

DISABILITY LAW—AMERICANS WITH DISABILITIES ACT OF 1990—  
TITLE II AND TITLE III AND THE EXPANSION OF CAPTIONING FOR THE DEAF:  
FROM TELEVISIONS AND MOVIE THEATERS TO STADIUMS AND ARENAS?

I. INTRODUCTION

Picture a stadium full of thousands of spectators watching a college football game on a clear, cool, fall Saturday. Imagine the sounds of the bands as they play their respective fight songs or the sounds of shoulder pads smashing against one another; imagine the sounds of the crowd as they shout, yell, and cheer all in the name of school spirit. Now imagine what it would be like not to be able to hear any of this. These are all sounds that nearly eleven million deaf and hard-of-hearing individuals cannot fully experience;<sup>1</sup> they are also sounds that technology cannot yet recreate to accommodate the deaf and hard of hearing.<sup>2</sup>

There are, however, some aspects of this football atmosphere that the deaf can experience through the assistance of captioning such as reading the lyrics to songs played during intermissions, calls by an umpire, or even commentary from the announcers. Many football teams and stadiums (or any other live entertainment venue for that matter), however, do not provide such captioning or similar accommodations to these deaf fans and spectators. This isolating atmosphere should not be a scenario that deaf individuals should find themselves in when they wish to enjoy any form of live entertainment. With the advancing technologies in communications that are constantly emerging and the regulations that the Americans with Disabilities Act (ADA)<sup>3</sup> contains, live entertainment venues should not deny the deaf equal enjoyment of any entertainment that the venue can reasonably make accessible.

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1. See Ross E. Mitchell, Endnotes, *How Many Deaf People Are There in the United States?: Estimates from the Survey of Income and Program Participation*, 11 J. DEAF STUD. & DEAF EDUC. 112, 117 (2006) (citing a 2002 survey performed by the Survey of Income and Program Participation (SIPP) noting the number of deaf individuals in the United States).

2. Although the National Association of the Deaf (NAD) distinguishes hearing loss between deaf and hard of hearing, this note will refer to both the deaf and the hard of hearing as “deaf” or “deaf individuals.” Faye Kuo, Comment, *Open and Closed: Captioning Technology As a Means to Equality*, 23 J. MARSHALL J. COMPUTER & INFO. L. 159, 159 nn.4–5 (2004) (explaining that the deaf are individuals “with little to no residual hearing and do not depend on their hearing in order to communicate,” while the hard of hearing are individuals with “mild to moderate hearing loss” that may “use their hearing to communicate”).

3. 42 U.S.C. §§ 12101-12213 (West 2009).

Recently, with the help of the ADA's Title II, which "prohibits discrimination on the basis of disability by public entities,"<sup>4</sup> and Title III, which "prohibits discrimination on the basis of disability by public accommodations,"<sup>5</sup> the deaf have seen some progress as they have begun to demand equal enjoyment at more live entertainment events. In 2006, a group of deaf individuals brought a suit against the Washington Redskins for not providing captioning at Redskin football games.<sup>6</sup> In that case, the United States District Court for the District of Maryland decided that "Title III of the ADA requires Defendants to provide deaf and hard of hearing fans equal access to the aural information broadcast over the stadium bowl public address system at FedExField, which includes music with lyrics, play information, advertisements, referee calls, safety/emergency information, and other announcements."<sup>7</sup> Similarly, in the early summer of 2009, Vincent Sabino, with the help of the National Association of the Deaf (NAD), filed a suit against the Ohio State University (OSU) claiming the university violated Title II of the ADA and Section 504 of the Rehabilitation Act because it did not provide captioning at sporting events such as football and basketball games.<sup>8</sup> Although the NAD brought Sabino's complaint in federal court, OSU dissolved Sabino's complaint by captioning public announcements, play descriptions, and calls by game officials on its scoreboards and stadium televisions at OSU's September 26, 2009, home game against the University of Illinois.<sup>9</sup>

Although the deaf have succeeded some in using the legal system to expand captioning to more live entertainment venues, the expansion has not been widespread and the legal instructions regarding this expansion have been limited. One reason for this may be the lack of complaints by the deaf community in years past. Another reason may be that *Feldman v. Pro Football, Inc.*<sup>10</sup> applied to the Washington Redskins' FedExField only; the court did not instruct any other stadium or arena to implement captioning programs. It is apparent, at least in the last four years, that more deaf individuals have begun demanding equal access at more live entertainment venues. As more deaf individuals demand this equal access, more cases will certainly appear before our courts.

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4. 28 C.F.R. § 35.101 (2009).

5. 28 C.F.R. § 36.101 (2009).

6. *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697 (D. Md. 2008).

7. *Id.* at 709.

8. *See Deaf Sports Fan Files Complaint Against Ohio State University*, Nat'l Ass'n of the Deaf (July 2, 2009), <http://www.nad.org/news/2009/7/deaf-sports-fan-files-complaint-against-ohio-state-university>.

9. *See OSU Adds Captioning for Hearing-Impaired*, COLUMBUS DISPATCH (Ohio), Sept. 26, 2009, at C2.

10. 579 F. Supp. 2d 697.

This note will explore the likely arguments that the deaf may bring through Title II and Title III of the ADA to acquire captioning at live entertainment events, as well as the outcomes these arguments will likely produce. Part II of this note will chart the history and functions of captioning,<sup>11</sup> the struggles and progress the deaf have had in obtaining captioning for areas of entertainment including television and movies,<sup>12</sup> the history and functions of Title II and Title III of the ADA,<sup>13</sup> and the recent struggles deaf individuals have incurred in requesting captioning at live entertainment.<sup>14</sup> Part III will discuss the available technologies that stadiums, arenas, and other venues may use to provide the deaf with equal access to their entertainment;<sup>15</sup> the deaf community's rights under Title II and Title III of the ADA;<sup>16</sup> the arguments they provide in favor of the deaf community's access to captioning;<sup>17</sup> and the arguments they may provide state and private entities as to why they may not be required to provide captioning for the deaf.<sup>18</sup> Part IV will conclude that through Title II and Title III of the ADA, and through current technology, captioning should expand to provide the deaf with equal access to stadiums, arenas, and other entertainment venues.

## II. BACKGROUND

In order to understand why the deaf are in the situation they presently find themselves with regard to having access to captioning at live events, it is important to understand the origins of captioning, its functions,<sup>19</sup> and its struggles.<sup>20</sup> It is also important to understand the protections the deaf enjoy and the relationship these protections have with captioning.<sup>21</sup> With this background, it is clear that the most recent incidents involving deaf individuals requesting captioning at live entertainment venues are quite novel and are without much legal guidance from the courts as to how to accommodate such requests.<sup>22</sup>

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11. *See infra* Part II.A.
  12. *See infra* Part II.A.2.
  13. *See infra* Part II.B.
  14. *See infra* Part II.C.
  15. *See infra* Part III.A.
  16. *See infra* Part III.B.
  17. *See infra* Part III.B.1.
  18. *See infra* Part III.B.2.
  19. *See infra* Part II.A.
  20. *See infra* Part II.A.2.
  21. *See infra* Part II.B.
  22. *See infra* Part II.C.

## A. Captioning

Captioning involves the on-screen display of the text of conversations or other audible sounds in, namely, television and movies.<sup>23</sup> There are two forms of captioning: open captioning and closed captioning.<sup>24</sup> These two forms differ in that open captioning is permanently affixed to the visual output so that every viewer sees the captioning whereas closed captioning is coded onto the visual output so that viewers have the option of either displaying or hiding the captioning.<sup>25</sup> As this note explores the history of captioning, it will further explain the development and the differences between the two forms.

### 1. *History of Captioning*

Beginning with captioning in movies, this section will discuss the development of open captioning, the efforts to caption television programs, and the development of closed captioning for television.<sup>26</sup>

#### a. Movies

When the movie industry was in its earliest stages, around the turn of the twentieth century, most films were silent.<sup>27</sup> Although some films in-

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23. See Kuo, *supra* note 2, at 170.

24. *Id.* at 171.

25. *What Is the Difference Between Open and Closed Captioning?*, U. WASH., <http://www.washington.edu/accessit/articles?50> (last updated July 12, 2002).

26. Although captioning in movies moved from open captioning to closed captioning, this note will not explore the development of that transformation. The movie sector experienced a brief succession of cases involving closed captioning at movie theaters during the early 2000s. However, this note will not discuss these cases in detail but will acknowledge their role in the progression of captioning to the live entertainment sector. *Compare* *Cornilles v. Regal Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885, at \*6 (D. Or. Jan. 3, 2002) (holding that movie theaters “have no obligation to comply with Plaintiffs’ demand to purchase specially-altered movies to accommodate Plaintiffs’ disability” because doing so would fundamentally alter the movie theaters’ services), *with* *Ball v. AMC Entm’t, Inc.*, 246 F. Supp. 2d 17, 26 (D. D.C. 2003) (rejecting the *Cornilles* court’s ruling and holding, instead, that movie theaters could allow deaf individuals “to enjoy the first run movies normally shown by Defendants without fundamentally altering the nature or mix of the service they provide.” However, the court did not rule whether providing closed captioning at the movie theaters would place an undue burden on them.), *and* *Todd v. Am. Multi-Cinema, Inc.*, No. Civ. H-02-1944, 2004 WL 1764686, at \*4 (S.D. Tex. Aug. 5, 2004) (holding that movie theaters provided adequate evidence showing that providing closed captioning in their theaters would pose an undue burden financially on the theaters and that plaintiffs “failed to refute the defendants’ evidence that the remedies sought here would not constitute an undue burden under the ADA”).

27. See Kuo, *supra* note 2, at 174.

cluded minimal sounds, such as music or certain sound effects, they were considered “silent” because they had no audible dialogue.<sup>28</sup> In order for audiences to follow the dialogue, plot, and other important details of the film, producers provided the audience with printed programs briefly explaining the plot and the characters involved.<sup>29</sup> Intertitles—printed words photographed and incorporated into films in between scenes and visible to all viewers<sup>30</sup>—soon took the place of these printed programs and became the “first method of captioning ever used in the movie theaters.”<sup>31</sup>

Because intertitles, and later subtitles, which were visible during film scenes as opposed to being visible in between scenes, were open to all viewers, they appealed to both the hearing audiences that had to rely on the captioning due to the lack of sound incorporated into the films of the early twentieth century and to the deaf community.<sup>32</sup> These open captions gave the deaf community the same access to films as hearing audiences had which was something they did not have in other venues, such as the live theater, where sound was available for hearing audiences to follow and understand the entertainment provided.<sup>33</sup> This open captioning of films for deaf and hearing audiences lasted for some time. However, in the late 1920s, when the film industry introduced films with sound that included dialogue (known then as “talkies”), the need for open captioning dwindled for hearing audience members, and the deaf community found itself without equal access to many of the newer films.<sup>34</sup>

Talking films became common after the 1920s, rapidly evolving and advancing to include more sounds but leaving the deaf community behind; however, there was a movement in the late 1940s attempting to make these talking films accessible to the deaf.<sup>35</sup> This movement, headed by an all volunteer group called “Captioned Films for the Deaf,” strove to continue captioning films for the deaf, and by 1958, they had captioned at least thirty films.<sup>36</sup> The process was time consuming, requiring volunteers to condense scripts—some that were at least two inches thick—into captions and into a

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28. See GREGORY J. DOWNEY, CLOSED CAPTIONING: SUBTITLING, STENOGRAPHY, AND THE DIGITAL CONVERGENCE OF TEXT WITH TELEVISION 19 (2008).

29. *Id.*

30. *Id.*

31. See Kuo, *supra* note 2, at 172.

32. See DOWNEY, *supra* note 28, at 20.

33. *Id.*

34. See Greg Downey, *Constructing Closed-Captioning in the Public Interest: From Minority Media Accessibility to Mainstream Educational Technology*, INFO: J. POL’Y REG. & STRATEGY FOR TELECOMM. INFO. & MEDIA, Spring 2007, at 69.

35. *Id.*

36. *Id.*

language<sup>37</sup> that the deaf were sure to understand,<sup>38</sup> but the deaf did have access to certain feature films, albeit severely limited access. However, the deaf did not have access to television, which had become more popular, accessible, and affordable, and by the 1960s, had become a staple piece of furniture in almost every American household.<sup>39</sup>

Television began to “radically alter the way . . . hearing Americans acquired . . . information.”<sup>40</sup> Unfortunately, the deaf community could not access this “extraordinary innovation” because neither televisions nor broadcasters provided any type of captioning.<sup>41</sup> Having had some success in obtaining captioning for films, the deaf and advocates for the deaf focused their attention on acquiring captioning for television programs.<sup>42</sup>

#### b. Television

It was not until the 1970s that captioning began to appear on televisions around the country.<sup>43</sup> The first captioned television programs were open-captioned, with the captioning burnt directly on the film.<sup>44</sup> Later, however, closed captioning, “a new technology that enabled only viewers who *wanted* to see captions on their television screens to be able to do so” took the place of open captioning on television.<sup>45</sup>

Captioning made its way onto television screens across the nation due largely to the efforts of the Public Broadcasting System (PBS) and Dr. Malcolm J. Norwood, chief of the Captioned Films project.<sup>46</sup> In 1971, Norwood worked out an agreement between the United States Department of Health, Education and Welfare (HEW) and WGBH-TV, a public television station

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37. American Sign Language (ASL) is one of the primary languages deaf individuals use to communicate. It has its own grammatical rules and sentence structures, and is “an autonomous linguistic system . . . independent of English.” However, deaf individuals must rely on English in its written form, although the deaf better understand ASL grammatical structuring than English grammatical structure. CLAYTON VALLI & CEIL LUCAS, LINGUISTICS OF AMERICAN SIGN LANGUAGE: AN INTRODUCTION 15 (Gallaudet Univ. Press 2002) (3d ed. 2000).

38. See DOWNEY, *supra* note 28, at 41.

39. See Downey, *supra* note 34, at 70 (citing JAMES L. BAUGHMAN, THE REPUBLIC OF MASS CULTURE: JOURNALISM, FILMMAKING, AND BROADCASTING IN AMERICA SINCE 1941 (1992)).

40. KAREN PELTZ STRAUSS, A NEW CIVIL RIGHT: TELECOMMUNICATIONS EQUALITY FOR DEAF AND HARD OF HEARING AMERICANS 206 (2006).

41. *Id.*

42. See DOWNEY, *supra* note 28, at 53.

43. See STRAUSS, *supra* note 40, at 206.

44. See Sy DuBow, *The Television Decoder Circuitry Act—TV For All*, 64 TEMP. L. REV. 609, 610 (1991).

45. See STRAUSS, *supra* note 40, at 206.

46. See Downey, *supra* note 34, at 71.

in Boston, to air one of the nation's first captioned television programs, Julia Child's cooking show, *The French Chef*.<sup>47</sup> These episodes of *The French Chef* were open captioned reruns.<sup>48</sup> Captioning live television was not yet possible,<sup>49</sup> so broadcasters could only buy the videos of televised events and rebroadcast them with open captions.<sup>50</sup> While broadcasters sought to experiment with captioning in many ways, including how to possibly caption live events, they were more interested in finding ways to "hide" or "close" captions.<sup>51</sup>

Broadcasters were interested in closed captioning because they were concerned "that hearing viewers would object to widespread open captioning."<sup>52</sup> Because television was transmitted electronically, unlike films at movie theaters, hiding captions was a very real possibility.<sup>53</sup> With federal funding, PBS began exploring ways to "close" captioning.<sup>54</sup> It was the National Bureau of Standards (NBS) that finally discovered the most effective way to provide closed captioning—using the analog television signal itself.<sup>55</sup>

NBS discovered that out of the 525 lines of the National Television System Committee (NTSC) television signal, a series of lines, ending in line 21, did not contain any picture information.<sup>56</sup> With this series of lines, known as either the Vertical Blanking Interval (VBI) or simply Line 21, captioners could transcribe a television program's dialogue and transmit that transcription over the television's analog signal.<sup>57</sup> In order to give the viewer the option to show or hide captioning, captioners coded these transmissions, and viewers in the 1970s had to equip their televisions with special decoders to receive the coded transmissions.<sup>58</sup>

After discovering a way to hide captioning, proponents for closed captioning had to sell their innovative concept to television networks, as well as to the Federal Communications Commission (FCC).<sup>59</sup> This was no easy task, as the equipment and labor involved in captioning were costly,<sup>60</sup> and

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47. See STRAUSS, *supra* note 40, at 207.

48. *Id.*

49. See DOWNEY, *supra* note 28, at 62.

50. See STRAUSS, *supra* note 40, at 206–07.

51. *Id.* at 206.

52. See DuBow, *supra* note 44, at 610.

53. See DOWNEY, *supra* note 28, at 69.

54. See DuBow, *supra* note 44, at 610. Early proposals for closed captioning included using digital impulses of audible notes to transmit captions to special receivers and using the telephone to transmit captions to televisions. See DOWNEY, *supra* note 28, at 69–70.

55. See DOWNEY, *supra* note 28, at 70.

56. *Id.* at 71.

57. See DuBow, *supra* note 44, at 611.

58. *Id.* at 611.

59. See DOWNEY, *supra* note 28, at 70–71.

60. *Id.* at 76.

the size of the deaf community in America at that time was arguably small.<sup>61</sup> Throughout the 1970s and even into the early 1980s, PBS and NBS toiled to convince reluctant television broadcasters and networks to use closed captioning technology to provide captioned programs that the deaf could enjoy.<sup>62</sup> However, this was not the only struggle PBS, NBS, or any other advocate for captioning encountered in working to implement closed captioning.

## 2. *Struggles Captioning Faced*

The discovery of closed captioning, as well as the actual process to provide both open and closed captioning, slowly served to grant the deaf community adequate access to television. However, there were other external forces that slowed this movement. Such forces included financial difficulties that captioning faced,<sup>63</sup> opposition from some members of the television industry,<sup>64</sup> and little governmental guidance.<sup>65</sup> All of these struggles, of course, occurred before Congress passed the ADA in 1990.

### a. Financial difficulties

The costs involved in captioning certainly contributed to slowing the development of captioning. These burdensome costs included the studies reflecting the effects of captioning, the encoding and transmitting equipment, the labor involved in captioning, and the production and the retail costs of the separate decoders that the deaf needed in order to benefit from the closed captioning.<sup>66</sup>

One of the earliest financial burdens that captioning encountered occurred while open captioning was the only option for providing equal access to televisions to the deaf. PBS, through its affiliate in Boston, WGBH, wanted to conduct “a study to determine the success or failure of their [captioning] efforts” and how these efforts affected the deaf and hearing com-

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61. There was some debate as to who would benefit from captioning. HEW had estimated that “at least 13.4 million” people who were deaf, hard of hearing, those with limited hearing in only one ear, not both, would benefit from captioning. However, opponents of captioning estimated that there were only 335,000 deaf individuals that would actually benefit from captioning, and those that were hard of hearing or had limited hearing simply needed sound amplification, not captioning. *Id.* at 77.

62. *Id.* at 94.

63. *Id.* at 76–77; see also DuBow, *supra* note 44, at 612.

64. See Downey, *supra* note 34, at 72.

65. *Id.* at 75.

66. *Id.* at 71; see also DOWNEY, *supra* note 28, at 76–77; DuBow, *supra* note 44, at 612.



munities alike.<sup>67</sup> PBS hoped these studies would reveal how hearing individuals reacted to open captioning and also “reveal the size of the [deaf and hard-of-hearing] audience for captioning.”<sup>68</sup> However, before PBS could complete these studies and obtain this crucial information to combat the television industry’s claims that captioning “would drive away the vast and lucrative hearing majority,” it ran out of money.<sup>69</sup> At that time, the only funding PBS had received for captioning came from HEW.<sup>70</sup>

After losing their chance to record how deaf and hearing audiences reacted to open captioning, PBS and the others involved in providing captioning faced further financial difficulties as they struggled to develop closed captioning.<sup>71</sup> The three main areas that affected the cost of closed captioning were the following: (1) the equipment used to actually caption television shows and transmit those captions; (2) the labor necessary to provide captioning; and (3) the television decoders that television owners needed in order to view the closed captions.<sup>72</sup> Although PBS did receive some funding through grants from HEW to conduct the research and to develop closed captioning,<sup>73</sup> these grants were not meant to cover the costs of actually implementing closed captioning.

The equipment used for closed captioning in the 1970s was anything but simple. It included microcomputers, special keyboards, and “time code reader[s]” which determined when lines of captioning would appear and how many lines would appear at a time.<sup>74</sup> Therefore, the cost of the equipment used to code and transmit captions was expensive, and the parties involved in the captioning process of the 1970s could not agree on a price for this equipment.<sup>75</sup>

NBS, the agency that first discovered how to make closed captioning possible, believed “a complete network installation to generate, transmit, and decode captions [would] cost approximately \$3000.”<sup>76</sup> PBS, however, believed that the cost for such equipment would range “between \$30,000 and \$50,000.”<sup>77</sup> PBS increased its estimation for captioning, “citing the capital cost to each network” that undertook the task to make captioning

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67. Downey, *supra* note 34, at 69 (citing Sandra L. Danielson & David A. Howe, *Use of the Television Vertical Interval to Broadcast Time for Everyone and Program Captions for the Deaf*, COMM. SOC’Y, Nov. 1973, at 3–4).

68. *Id.* at 71.

69. *Id.*

70. See Danielson & Howe, *supra* note 67, at 3–4.

71. See DOWNEY, *supra* note 28, at 76–77.

72. *Id.* See also DuBow, *supra* note 44, at 612.

73. See DOWNEY, *supra* note 28, at 73, 75, 79.

74. *Id.* at 80–81.

75. *Id.* at 76.

76. *Id.* (citing Danielson & Howe, *supra* note 67 at 3–4).

77. *Id.*

commercially operable.<sup>78</sup> Still, television networks like NBC and CBS had their own estimation as to how much closed captioning would cost them.<sup>79</sup> NBC estimated that it would cost “\$500,000 per station just to carry captioning,”<sup>80</sup> and CBS claimed that it would cost \$250,000 to do the same.<sup>81</sup>

Unfortunately, whereas PBS seemed to have increased the estimated cost of captioning to include capital costs, other television networks seemed to have increased their estimated costs due to their opposition to “reserving Line 21 for closed captioning.”<sup>82</sup> Because of the vast range in equipment costs to provide captioning—from \$3000 to \$500,000—it is hard to pinpoint what the most realistic equipment cost would have been. However, it is certain that television broadcasters that were not interested in providing captioning cited finances as the reason for not providing captioning.<sup>83</sup>

The labor involved in captioning television programs was another cost matter. The process itself, much like the captioning of movies involved “transcription, spotting, writing, proofing, and production” which could take hours to complete.<sup>84</sup> The estimated costs in labor for captioning were similar to the estimated costs of captioning equipment in that the parties involved strongly disagreed on the exact costs. In 1975, a captioner for PBS estimated that the labor cost involved in captioning a one hour program was nearly \$1000.<sup>85</sup> In a trial captioning of one of its one-hour programs, CBS claimed to have spent \$3800, more than tripling PBS’s estimate; NBC’s estimate was double even that of CBS.<sup>86</sup> Finally, in 1979, the National Captioning Institute (NCI)<sup>87</sup> determined that it would charge networks between \$2000 and \$2500 to caption a one-hour program.<sup>88</sup>

The labor costs that the NCI estimated did not seem too extreme given that the average one hour prime time television program, without captions, cost networks approximately \$270,000.<sup>89</sup> However, networks were opposed

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78. *Id.*

79. *See* DOWNEY, *supra* note 28, at 76.

80. *Id.*

81. *Id.* *See also* STRAUSS, *supra* note 40, at 209–10.

82. *See* DOWNEY, *supra* note 28, at 76; *see also* STRAUSS, *supra* note 40, at 211–12.

83. *See* DOWNEY, *supra* note 28, at 76; *see also* STRAUSS, *supra* note 40, at 211–12.

84. *See* DOWNEY, *supra* note 28, at 80.

85. *Id.* at 76. The estimate was based on the time it took to caption a one-hour program and the costs involved. These costs included “a qualified caption-editing team at a medium salary of \$15,000 + 22% for fringe benefits” who, at a wage of \$8.80/hour, earned \$352 per one hour program, and “engineering labor and production supplies” that totaled another \$490. *Id.*

86. *Id.* at 76–77.

87. In 1979, HEW established NCI “to jumpstart the provision of television captioning with federal funding . . . ,” which over a period of time would be phased out so that captioning could become “a self-sustaining operation.” *See* STRAUSS, *supra* note 40, at 210.

88. *See* DuBow, *supra* note 44, at 613; *see also* Downey, *supra* note 34, at 73.

89. *See* DOWNEY, *supra* note 28, at 77.

to these costs because they were spending money on what they believed to be a “limited viewing audience.”<sup>90</sup> The deaf community was too small an audience for television networks to finance the equipment and labor to provide captioning.

Although broadcasters bore most of the financial costs, viewers had to bear one cost themselves—the decoder. NBS engineers had optimistically estimated that they could develop a “five dollar decoding chip” in 1972; however, at that date, decoders were selling for just under \$300.<sup>91</sup> In the 1980s and 1990s, decoders continued to cost \$200 to \$300.<sup>92</sup> These costs proved to be “an economic hardship for many deaf and hard-of-hearing people,” due to the fact that many of these individuals did not hold jobs, or if they did, held low-paying jobs.<sup>93</sup> Consequently, the cost of the decoder may have been one of the “more difficult challenge[s]” that closed captioning faced at that time.<sup>94</sup>

Although captioning faced financial difficulties, PBS, NBS, and others who were determined to provide captioning to the deaf continued their efforts to further the future of captioning. These difficulties did not stop captioning; however, they demonstrated that many were opposed to the idea of captioning when it was in its earliest stages.

*b. Opposition by the television industry*

Fear of financial hardship was not the only reason the television networks opposed captioning. Television networks believed Line 21, which at the time was the VBI reserved for captioning, “would be of worth” for purposes other than captioning.<sup>95</sup>

Many broadcasters and networks believed they could use Line 21 to transmit “news, weather or financial information,” something that could benefit many Americans, both hearing and deaf.<sup>96</sup> One system that a few networks hoped to promote was “Teletext.”<sup>97</sup> Teletext was a system that worked much like captioning except it also “allowed text to appear in differ-

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90. See DuBow, *supra* note 44, at 613.

91. See DOWNEY, *supra* note 28, at 205–06.

92. *Id.* See also DuBow, *supra* note 44, at 612.

93. See DuBow, *supra* note 44, at 612; see also DOWNEY, *supra* note 28, at 82 (explaining that “Government demographic data from 1971” revealed “more hearing-impaired persons [had] family incomes under \$5000 and fewer ... [had] family incomes over \$15,000 than the general population as a whole.” *Id.* (quoting AUGUSTINE GENTILE, PERSONS WITH IMPAIRED HEARING: UNITED STATES 1971 16 (U.S. Dep’t of Health, Educ., & Welfare 1975))).

94. See DOWNEY, *supra* note 28, at 81.

95. See Downey, *supra* note 34, at 71.

96. *Id.*

97. See STRAUSS, *supra* note 40, at 209.

ent colors, speeds, and sizes . . . to convey other kinds of information.” It was a system that many countries, including France, England, Japan, and Australia, were using.<sup>98</sup> Even though Teletext was essentially a form of captioning,<sup>99</sup> “networks were more than willing to invest” in Teletext because they believed it could “reach a larger, more affluent, and more evenly distributed mainstream audience” than closed captioning.<sup>100</sup>

Some broadcasters felt the best strategy to secure Line 21 for transmitting news instead of closed captions was to lobby the federal government.<sup>101</sup> One lobbying group, the National Association of Broadcasters (NAB), attempted to persuade the FCC not to reserve Line 21 solely for captioning. Instead, it hoped the FCC would “only allow closed captioning on a three-year temporary basis” until captioners could further test captioning technologies.<sup>102</sup> Fortunately for captioning, the NAB, as well as many other groups lobbying against captioning did not fully succeed in taking Line 21 away from captioners.

Line 21 was an opportunity for networks and broadcasters to make money. Perhaps this is one of the main reasons why networks and broadcasters were reluctant, or were opposed to supporting captioning when groups like PBS asked for assistance. This may also explain why these same networks and broadcasters thought captioning would be a bigger financial burden than it actually was. Still, network opposition is only part of the reason why captioning faced the challenges it did. A lack of government guidance also contributed, perhaps equally, to these challenges.

c. Lack of guidance by the federal government

As stated earlier, the struggles that captioning faced all occurred prior to the passing of the ADA in 1990. However, during the time captioning was still struggling to stay on televisions, Congress enacted a new law known as the Rehabilitation Act of 1973.<sup>103</sup> Unfortunately, because the Rehabilitation Act was very recent, courts were unsure as to how the Act affected captioning. Even the federal government was unsure as to which agency would enforce the Act. Therefore, the federal government’s involvement during captioning’s trying times was minimal.

Advocates for captioning believed that the federal government needed to mandate captioning.<sup>104</sup> By mandating captioning, the government could

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98. *Id.*

99. *See* DOWNEY, *supra* note 28, at 217.

100. *Id.* at 200–01.

101. *See* Downey, *supra* note 34, at 71.

102. *Id.* at 72.

103. 29 U.S.C.A. §§ 791–794 (West 2009).

104. *See* Downey, *supra* note 34, at 74.

have eased the trials captioning was facing.<sup>105</sup> However, networks opposed the idea of government mandated captioning. They claimed that these mandates were “unnecessary,” would “infringe upon First Amendment rights of broadcasters,” and would place “an economic burden upon” them.<sup>106</sup> Because the FCC was a federal government entity that regulated what the television industry did, many captioning advocates targeted the FCC in hopes that that entity would regulate closed captioning. Nonetheless, it took years before captioning advocates were successful.<sup>107</sup>

The federal government did help some in the development of closed captioning. HEW approved a series of grants that helped fund the development of closed captioning.<sup>108</sup> Similarly, the FCC “authorize[d] broadcasters to voluntarily use Line 21 technology for closed captions.”<sup>109</sup> The federal government also established the NCI, which, as mentioned earlier, helped in the initial implementation of providing television captioning.<sup>110</sup> However, captioning advocates truly wanted the government to *mandate* captioning and require television broadcasters and networks to comply with these mandates.

During the 1970s and 1980s, proponents of captioning tried to use the recently enacted Rehabilitation Act as a way to require television stations to provide captioning, asserting that it was a mandate from the federal government.<sup>111</sup> Unfortunately, these proponents could not convince the FCC to enforce the provisions of the Act.<sup>112</sup> To make matters worse, after advocates for captioning took legal actions to demand captioning, the Supreme Court of the United States ruled that the FCC was not required to enforce the Rehabilitation Act.<sup>113</sup> It would not be until Congress passed the ADA that the federal government finally took measures to begin regulating captioning, passing such acts as the Television Decoder Circuitry Act<sup>114</sup> and taking other measures to “forever change the landscape of television captioning.”<sup>115</sup>

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105. *Id.*

106. *Id.*

107. *See* STRAUSS, *supra* note 40, at 209.

108. *See* DOWNEY, *supra* note 28, at 73, 75, 79.

109. *See* STRAUSS, *supra* note 40, at 209.

110. *Id.* at 210.

111. *See* DOWNEY, *supra* note 28, at 202.

112. *Id.* at 202–03.

113. *Id.* at 203 (referring to *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983)).

114. 47 U.S.C.A. § 303 (West 2009).

115. *See* STRAUSS, *supra* note 40, at 235–36.

## B. The ADA and Other Legislation Benefiting Deaf Individuals

In 1990, Congress passed the ADA to protect and provide legal redress to millions of Americans who for years experienced discrimination.<sup>116</sup> Among the millions who received protection were the deaf.<sup>117</sup> This note will focus primarily on two titles within the ADA that relate to captioning and to protecting the deaf: Title II, which pertains to public or state entities,<sup>118</sup> and Title III, which pertains to private entities that provide public accommodations.<sup>119</sup>

### 1. *Title II of the ADA*

Title II of the ADA regulates state and local governments as well as “any department, agency, special purpose district, or other instrumentality of a State or States or local government,”<sup>120</sup> and ensures that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.”<sup>121</sup> Title II also refers to the Code of Federal Regulations to further explain how the ADA protects these services, programs, and activities. Title 28 of the Code of Federal Regulations is of particular importance in that it explains the protections of communications.<sup>122</sup> Many deaf individuals and advocates for the deaf have turned to this regulation in their recent demand for the captioning of live entertainment at state or local government-owned venues.

According to the Code of Federal Regulations, in relation to communication, state or local governments “shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.”<sup>123</sup> In deciding what auxiliary aids to provide deaf individuals, state and local governments must rely on section 35.160(b)(2), which states that “a public entity shall give primary consideration to the requests of the individual with disabilities.”<sup>124</sup> Therefore, according to the regulation, when deaf individuals are in need of some

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116. 42 U.S.C.A. § 12101(a)(4) (West 2009).

117. *See* 42 U.S.C.A. § 12102(1)(A) (West 2009); 42 U.S.C.A. § 12102(2)(A) (West 2009).

118. 42 U.S.C.A. §§ 12131–12165 (West 2009).

119. 42 U.S.C.A. §§ 12181–12189 (West 2009).

120. 42 U.S.C.A. § 12131(1)(A) (West 2009).

121. 42 U.S.C.A. § 12132 (West 2009).

122. 42 U.S.C.A. § 12134(b) (West 2009).

123. 28 C.F.R. § 35.160(b)(1) (2009).

124. 28 C.F.R. § 35.160(b)(2) (2009).

form of auxiliary aid, they may request the specific form of auxiliary aid they prefer, and the public entity must consider this request.

Although the ADA gives a deaf individual the right to demand his or her preferred accommodations from state and local government entities, the ADA does not require state and local governments to provide the requested auxiliary aids if the state or local government can show that doing so would “result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.”<sup>125</sup> The ADA requires that a public entity bear the responsibility of proving any alteration or financial burden should it make such claims.<sup>126</sup> The ADA further requires that a public entity use all available resources “in the funding and operation of the service, program, or activity” before claiming that complying with the communications regulation would result in an alteration or burden.<sup>127</sup>

With provisions such as these, Title II provides a reasonable balance for both deaf individuals and state or local government owned venues. Title II recognizes the need to provide deaf individuals with some form of auxiliary aid, and even compels state entities to consider the deaf community’s preferred aid, yet it also acknowledges the burdens that providing such aids can place on some entities. To the deaf and to those advocating on their behalf, Title II appears to be one possible solution to obtaining captioning at live entertainment venues that are state owned.

## 2. *Title III of the ADA*

Much like Title II of the ADA, Title III ensures that “[n]o individual shall be discriminated against on the basis of disability . . . .”<sup>128</sup> However, whereas Title II applies to public entities like state and local governments, Title III applies to places of public accommodations<sup>129</sup> including “motion picture house[s], theater[s], concert hall[s], stadium[s], or other place[s] of exhibition or entertainment.”<sup>130</sup> Title III does have implementation regulations codified in the CFR;<sup>131</sup> however, these regulations do not contain a “communications” section for the deaf to turn to. Instead, Title III’s regulations contain an “auxiliary aids and services” regulation on which the deaf may rely.<sup>132</sup>

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125. 28 C.F.R. § 35.164 (2009).

126. *Id.*

127. *Id.*

128. 42 U.S.C.A. § 12182(a) (West 2009).

129. *Id.* Places providing public accommodations are also known as private entities. This note will refer to places providing public accommodations as private entities.

130. 42 U.S.C.A. § 12181(7)(c) (West 2009); 28 C.F.R. § 36.104 (2009).

131. 28 C.F.R. § 36.101 (2009).

132. 28 C.F.R. § 36.303 (2009).

Turning to the auxiliary aid regulation, the ADA requires that private entities “furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”<sup>133</sup> Among the auxiliary aids that Title III recognizes are “[q]ualified interpreters . . . closed caption decoders, [and] open and closed captioning . . . .”<sup>134</sup> Yet, unlike the Title II regulations regarding auxiliary aids, Title III’s regulations do not require private entities to give “primary consideration” to a request for a certain auxiliary aid.<sup>135</sup> This difference, though, is one that the United States Department of Justice, the entity involved in interpreting the regulations of the ADA,<sup>136</sup> cannot explain.<sup>137</sup>

Title III of the ADA gives private entities the same provisions as it gives public entities as to when a private entity is not required to provide auxiliary aids and services to deaf individuals. Therefore, if a private entity can show that providing an auxiliary aid or service would “fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense,” it does not have to provide the service.<sup>138</sup> The language of Title III’s regulations does not actually require that a private entity exhaust every available resource before claiming that an auxiliary aid or service creates an undue burden or alters the services the entity provides. However, if possible, the private entity must “provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or . . . burden . . . .”<sup>139</sup>

Like Title II, Title III offers a fairly balanced proposition to deaf individuals and public accommodations. Both Title II and Title III support the ADA’s primary purpose, which is to ensure that individuals with disabilities receive equal access to services provided by both public and private entities as is reasonably possible. Both titles respect the deaf community’s request for equal access through auxiliary aids as well as consider the burdens that some entities might face in providing such services. Therefore, these two titles play an important part in the deaf community’s goal of obtaining captioning at live entertainment venues.

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133. 28 C.F.R. § 36.303(c).

134. 28 C.F.R. § 36.303(b)(1).

135. See Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling a Conversation About Communications*, 35 FLA. ST. U. L. REV. 947, 995 (2008).

136. *Id.* at 949.

137. *Id.* at 997.

138. 28 C.F.R. § 36.303(a).

139. 28 C.F.R. § 36.303(f).



### C. Recent Events in the Demand for Captioning at Stadiums and Arenas

Although movies and television now provide captions, there are still other venues that the deaf would like to see provide captioning, particularly live entertainment venues. In the last decade, deaf individuals have begun bringing lawsuits against entities that provide live entertainment because these entities do not provide captioning. The following two instances are both recent and well-publicized examples of the deaf community's demands to broaden the reach of captioning.

#### 1. *Feldman v. Pro Football, Inc.*

In the early 2000s, a group of Washington Redskins' fans who were also deaf requested that "the Redskins caption the stadium's public address system announcements on the Sony JumboTrons ('JumboTron') located in each end zone at FedExField."<sup>140</sup> These fans wanted the stadium to caption "referee calls, plays during the game, and emergency announcements"<sup>141</sup> so that they could better understand what was occurring around them.<sup>142</sup> Fans, including Paul Singleton and Shane Feldman, initially made their requests by writing to officials and representatives of the Redskins.<sup>143</sup> In August 2006, after two or three years of corresponding with the officials and representatives, deaf fans took their requests to the NAD who, in turn, "filed a class action lawsuit against FedEx Field [sic] and the Washington Redskins."<sup>144</sup>

The NAD claimed that by not providing captioning on the JumboTrons at FedExField the Washington Redskins' franchise was not complying with Title III auxiliary aid requirements of the ADA.<sup>145</sup> The Redskins claimed that they did provide some captioning. However these captions appeared on "two light-emitting diode ribbon boards ('LED ribbon boards') located midway between the upper and lower seating decks on each side of the stadium at the 50 yard line" instead of appearing on the JumboTrons.<sup>146</sup> In response, the NAD claimed that there were still many aspects of the game that the Redskins and FedExField failed to caption and that the LED ribbon

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140. *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 699 (D. Md. 2008).

141. One such emergency announcement that would have benefitted deaf fans had it been captioned occurred in 2002 when the stadium experienced a "pepper spray incident." *Id.* at 699-700.

142. *Id.*

143. *Id.*

144. Russell Landy, *Do the Washington Redskins Hate Deaf People? ADA Claims for the Captioning of Football Stadiums*, 16 U. MIAMI BUS. L. REV. 47, 48 (2007).

145. *Id.*

146. *Feldman v. Pro Football Inc.*, 579 F. Supp. 2d 697, 700 (D. Md. 2008).

boards “[did] not communicate effectively because they [were] not in the line of sight of the JumboTrons . . . .”<sup>147</sup>

The United States District Court for the Southern Division of Maryland heard the NAD’s case and concluded that “Title III of the ADA requires [The Washington Redskins and FedEx- Field] to provide deaf and hard of hearing fans equal access to the aural information broadcast over the stadium bowl public address system . . .” including “music with lyrics, play information, advertisements, referee calls, safety/emergency information, and other announcements.”<sup>148</sup> This decision was undoubtedly a breakthrough for many deaf fans of the Washington Redskins. However, this decision also involved a novel issue that not many, if any, other courts had encountered.<sup>149</sup>

The outcome of the *Feldman* case affected the deaf fans of the Washington Redskins only, and it did not provide or set any real precedent for other courts to follow. It required only that the Washington Redskins and FedExField provide captioning, not that all other National Football League (NFL) teams provide captioning at their respective stadiums. Perhaps the outcome can persuade other courts in the future to require a public accommodation to provide captioning, but it has yet to create such a movement toward captioning uniformity.

## 2. *Sabino and the Ohio State University*

In the summer of 2009, a year after the *Feldman* decision, Vincent Sabino, a deaf individual and long time fan of OSU’s football team, filed a complaint against the university for failing to provide “captioning on the scoreboards and stadium televisions.”<sup>150</sup> Like the deaf Washington Redskins’ fans, Sabino felt as though he was entitled to have access to the “game experience” through captioning.<sup>151</sup> Unlike the *Feldman* case, Sabino’s case dealt with a different Title of the ADA; his complaint fell under Title II of the ADA because OSU is a state university and, therefore, a state entity, whereas FedEx-Field is a private entity made into public accommodation.<sup>152</sup>

Although Sabino and the NAD filed their complaint in federal court in Columbus, Ohio, the federal court never had a chance to rule on the legal issues in Sabino’s complaint. Instead, OSU worked with Sabino and the

147. *Id.* at 703.

148. *Id.* at 709.

149. *Id.* at 708. The court noted that the issue was so novel that, aside from Title III of the ADA, Plaintiffs could not “cite any law or cases to support their position.” *Id.*

150. Rick Armon, *Hearing-Impaired Fan Sues OSU: Man Wants Captioning on Football Scoreboards*, AKRON BEACON JOURNAL, July 17, 2009, at A1.

151. *Id.*

152. *See Deaf Sports Fan Files Complaint Against Ohio State University*, *supra* note 8.

NAD and began providing captioning at OSU home football games on September 26, 2009.<sup>153</sup> This action seemed to benefit deaf fans by providing them equal access to the feel of collegiate football games, but again, this applied only to OSU and its deaf fans. There have been other collegiate football teams that have followed in OSU's footsteps in providing captioning to deaf fans, but it has not been wide spread.<sup>154</sup>

Both Feldman's Title III claim and Sabino's Title II claim have very recently presented the continuing struggle that many deaf individuals face trying to obtain captioning and equal access at live entertainment venues. Although Feldman and Sabino were successful in obtaining captioning at the venues they attended regularly, their successes were limited in that only a few deaf individuals benefited and only a few venues provided captioning. There are still many live entertainment venues that do not provide captioning for deaf patrons, despite the recent outcomes of the *Feldman* decision and the Sabino and OSU situation.

### III. DISCUSSION

#### A. Available Technologies for Live Entertainment Venues

Captioning technology has come a long way since its inception in the early twentieth century. Whereas in the 1970s captioning live television or live events seemed almost impossible, today it is now possible through technologies such as Real-time Captioning (RTC) and smartphones.<sup>155</sup> Because live entertainment is unscripted, for the most part, RTC seems like one of the best options for stadiums and arenas to consider for providing captioning to deaf audiences.

##### 1. *How RTC Works*

RTC "converts . . . spoken word[s] into [a] printed format using computer-aided translation[s], which appear[] on a large screen for anyone to

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153. *OSU Adds Captioning for Hearing-Impaired*, *supra* note 9.

154. Other collegiate football teams that have implemented captioning at their games include the University of Michigan, Notre Dame, and "eight of the Big XII Conference schools." *Closed Captioning Added at Michigan Stadium*, CONNECTMIDMICHIGAN.COM, <http://www.connectmidmichigan.com/sports/story.aspx?id=363016> (last visited Nov. 28, 2009).

155. A "smartphone" is a device that acts both as a phone and as a computing device. *Smartphone*, TOPBITS.COM, <http://www.tech-faq.com/smartphone.shtml> (last visited Nov. 28, 2009). With a smartphone, one may use several different applications including calendars, address books, and even the internet. *Id.*

view.”<sup>156</sup> This system of captioning originated from the courtroom technology that helped stenographers produce courtroom transcripts.<sup>157</sup> With this technology, captioners have already been able to caption live evening news for the deaf,<sup>158</sup> classroom lectures for deaf students mainstreamed in hearing classrooms,<sup>159</sup> and even aid deaf litigators, judges, clients, and witnesses within the courtroom.<sup>160</sup> However, this same technology has not yet been implemented in many live entertainment venues.

There are some negative aspects of RTC that opponents of live captioning identify. One of the most obvious points is the accuracy of live captions. With captioners typing at speeds as fast as “225 words per minute” and relying on how they hear the speech or program which they are captioning, mistakes “are inevitable even with the required accuracy rate as set by the captioning company, which is typically 98% or better.”<sup>161</sup> However, RTC captioners point out that they understand that errors occur, but as long as the translation is “at least phonetically readable to the caption viewer, and never offensive[,]” the errors will not greatly harm the viewer.<sup>162</sup> Another point of contention by opponents was that it “undermined all of the skill and artistry that previous rounds of captioners and subtitlers had developed ever since the end of silent film” by replacing the “timing, editing, and proofreading in the video production” with “dictionary-building, ‘just-in-time’ performance.”<sup>163</sup> However, this “just-in-time performance” seems to expand the programs that captioners can provide captioning for, and it seems to save costs in certain situations.<sup>164</sup>

If accuracy is the greatest concern that opponents of live captioning and RTC highlight, then the good that live captioning provides—providing more captioned programs and cutting captioning costs—should easily outweigh such a concern. At the moment, even if it is not perfect, RTC seems to be one of the best options for providing captioning of live entertainment. Perhaps if more live entertainment venues implemented RTC or similar aids, better live captioning systems might emerge more quickly.

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156. *Real-Time Captioning, DESCRIBED AND CAPTIONED MEDIA PROGRAM*, <http://www.dcmp.org/caai/nadh28.pdf> (last visited Nov. 28, 2009).

157. *See* DOWNEY, *supra* note 28, at 155–57.

158. *Id.* at 161.

159. *Id.* at 167.

160. *Id.* at 181.

161. *Real-Time Captioning, supra* note 156, at 1.

162. *See* DOWNEY, *supra* note 28, at 197–98. (quoting AMY BOWLEN & KATHY DiLORENZO, *REALTIME CAPTIONING THE VITAC WAY* (VITAC 2003)).

163. *Id.* at 197.

164. *See id.*

## 2. *Why Would Stadiums and Arenas Want RTC?*

Because stadiums and arenas tend to provide live entertainment, RTC would be a convenient technology that these live entertainment venues could implement to ensure that deaf patrons could have equal access to the programs provided. Also, because many of these venues are polluted with excessive noises that emanate from fans, poor quality PA systems, or other similar sources,<sup>165</sup> RTC could prove to be convenient for some hearing patrons who may not be able to hear above the noises of the stadium or arena. Stadiums could easily project the captions from the RTC system onto large screens or JumboTrons located in the stadium for fans to see. However, this would, in essence, be a form of open captioning, something that opponents of RTC could use against live captioning.

At the moment it appears as though open captioning is the easiest and most effective way to broadcast captions of live entertainment to numerous deaf patrons. As unpleasant as this may seem to some hearing people, this will probably be temporary. As technology advances, so too do the options for providing stadiums and arenas with a closed captioning system. There has been some progress toward such a system already.

## 3. *Other Technologies That Stadiums and Arenas Could Implement*

Aside from RTC, there are other technologies that have emerged in recent years, and there are new possibilities and options that stadiums and arenas may consider to provide captioning to the deaf who attend the live entertainment. One of these newer options may be made possible with the help of smartphones. In the summer of 2009, the San Francisco Giants announced that their stadium, AT&T Park, was a smartphone friendly park.<sup>166</sup> Among the features that the Giants' baseball park now provides is "closed captioning of PA announcements for the hearing impaired."<sup>167</sup>

As promising as this may be for paving a way for stadiums and arenas to provide a closed captioning system, this possibility depends on whether a deaf individual owns a smartphone. This poses a problem because stadiums and arenas cannot rely on deaf individuals to go out and buy smartphones so

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165. See Landy, *supra* note 144, at 49.

At the height of excitement during a football game, crowd noise reaches a level so loud that even non-deaf fans may be unable to hear stadium announcements. In addition, some stadiums are equipped with sound systems that are so obsolete and dilapidated that non-deaf people cannot hear or understand what is being communicated.

*Id.*

166. See John Boudreau, *AT&T Park Leading the Way in Digitally Enhanced Baseball*, ALAMEDA TIMES-STAR (Cal.), July 17, 2009.

167. *Id.*

that they can have access to closed captioning. Yet, the feature that the San Francisco Giants are now offering at their stadium is a step in the direction toward obtaining a closed captioning system for stadiums and arenas.

Currently, there are technologies that would enable stadiums and arenas to provide captioning of any live entertainment they might offer. However, many stadiums and arenas do not provide such a service despite the technology. The next section of this note will explore the requirements of the ADA, the technologies that are now available, and whether these components, together, would require more stadiums and arenas to provide captioning for live entertainment.

## B. Arguments for Implementing Captioning at Live Entertainment Venues

As the background section indicated, implementing captioning into movies and television was not an easy task. At that time, the ADA was many years away from being enacted, and the technology that enabled captioning was still being developed. Today, however, ADA regulations require certain mediums to caption programs that they provide deaf individuals, and many captioning technologies are past the developmental stages and processes. However, live entertainment at stadiums and arenas is still an area to which many deaf people do not have equal access. Relying on Titles II and III of the ADA, the available captioning technologies, and the arguments that opponents of live captioning may raise, this section will argue that more stadiums and arenas should be required to provide captioning for live entertainment.

### 1. *The ADA As It Applies to Live Entertainment Venues and Captioning*

It is undisputed that both Title II and Title III apply to deaf individuals because deaf individuals are considered individuals with disabilities under the ADA.<sup>168</sup> However, it is not as clear whether the ADA applies to live entertainment venues or captioning. It seems as though both Title II and Title III contain language that would encompass stadiums, arenas, and other live entertainment venues that public and private may entities own. The language also suggests that captioning is an auxiliary aid that these venues can provide for their deaf patrons. This note will cite language within the ADA that suggests that more stadiums and arenas should include captioning of some kind at their venues.

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168. See 42 U.S.C.A. § 12102(1)(A) (West 2009); 42 U.S.C.A. § 12102 (2)(A)(1) (West 2009).

a. ADA and stadiums and arenas

Both Title II and Title III include language that encompasses stadiums and arenas. In Title II, the language states that any public entity that conducts "...the benefits of a service, program, or activity . . ." is responsible and "shall furnish appropriate auxiliary aids and services . . ." so that an individual with a disability can enjoy the entertainment and services of a program or activity.<sup>169</sup> Therefore, if a state or local governmental entity were to conduct, or manage, a "service, program, or activity," in a stadium or arena that it owned and a deaf individual attended, Title II's regulation clearly states that the state "shall furnish" an auxiliary aid should the deaf individual ask for such an aid. Similarly, Title III notes that a private entity includes "stadium[s], or other places of exhibition or entertainment."<sup>170</sup> Unlike Title II, Title III actually contains the word "stadium"; however, the language in Title II is broad, and it is easy to infer that the language implies stadiums as a possibility.

b. The ADA and captioning

Title II and Title III do include language that pertains to captioning. Title II does not expressly mention captioning as an auxiliary aid to assist the deaf. However, it does contain language that would imply that captioning is a possible auxiliary aid. The Title II regulation states that "[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities."<sup>171</sup> As the two most recent demands for equal access at football games have demonstrated, deaf individuals seem to prefer captioning as their requested choice of auxiliary aid at a live entertainment event. Therefore, Title II does implicitly include captioning as an auxiliary aid.

Title III, on the other hand, expressly mentions captioning as a possible auxiliary service. It lists, among other examples of auxiliary aids and services, "open and closed captioning, . . . videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments."<sup>172</sup>

It seems clear that both Title II and Title III require entities to provide captioning to deaf patrons unless providing captioning would cause an undue burden or would fundamentally alter the service originally provided.<sup>173</sup> These titles also most certainly apply to stadiums and arenas whether publi-

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169. 28 C.F.R. § 35.160(b)(1) (2009).

170. 28 C.F.R. § 36.104 (2009).

171. 28 C.F.R. § 35.160(b)(2).

172. 28 C.F.R. § 36.303(b)(1) (2009).

173. See 28 C.F.R. § 35.164 (2009); 28 C.F.R. § 36.303(a), (f).

cally or privately owned. Now that this section has established how Title II and III apply to live entertainment venues as well as to captioning, it will further examine the equal access that deaf individuals are requesting.

c. The ADA and equal access

The ADA states that a public entity must furnish auxiliary aids or services “to afford an individual with a disability an equal opportunity to participate” in entertainment it provides.<sup>174</sup> It also states that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, [or] services, . . . of any place of public accommodation . . . .”<sup>175</sup> However, the ADA does not adequately define what this equal opportunity, enjoyment, or access is. The following section addresses the question of what it is that the deaf want equal access to at live entertainment venues.

Live entertainment offers many different features, including visual and audible aspects. The atmosphere of being at a live-entertainment event is also something that is easy to feel but hard to describe. Of the aspects previously mentioned, it is the audible aspect to which deaf individuals request access. As the *Feldman*<sup>176</sup> and *Sabino* facts demonstrated, deaf individuals want anything spoken or stated at a live entertainment venue captioned, like calls and commentary by announcers or referees, or lyrics to a specific song.<sup>177</sup> Hearing individuals already have access to these words; deaf individuals now want the same access to them, even if it must be through a different medium.

It is clear that the deaf want access to the words spoken or sung at a live-entertainment event, but how can this access be considered equal when it would require a different medium to convey the words spoken or sung to the deaf? It is true that hearing individuals rely on hearing, something that the deaf cannot. However, both hearing and deaf individuals can communicate, one through talking and the other through sign language. It is the act of communication and understanding that both hearing and deaf individuals have access to; therefore, their communicating is essentially equal. The same can be true about the access to the words spoken or sung at a live-entertainment event. The hearing rely on their ears while the deaf rely on their eyes, yet both could understand the words spoken or sung when put in their respective mediums. Therefore, if the hearing can hear an announcer’s words, the deaf should be able to see the announcer’s words in order for the access to be equal.

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174. 28 C.F.R. § 35.160(b)(1).

175. 42 U.S.C.A. § 12182 (West 2009).

176. *Feldman v. Pro Football Inc.*, 579 F. Supp. 2d 697, 700 (D. Md. 2008).

177. *Id.*; see *Deaf Sports Fan Files Complaint Against Ohio State University*, *supra* note 8.



The ADA requires entities, such as publically and privately owned stadiums or arenas, to provide auxiliary aids, such as captioning or videotext, to individuals with disabilities, such as deaf individuals, to ensure that these individuals have equal access to the services or programs provided by these entities. One would think that this language is convincing enough to compel more stadiums and arenas to provide captioning. However, that is not yet the case. Many stadiums turn to the ADA's exceptions to providing auxiliary aids and services in order to avoid providing captioning at their venues often claiming that the technology to provide captioning would either alter the service provided or would pose an undue burden on the venue. The following section will discuss the technologies stadiums and arenas can use to provide captions and explore whether these technologies do indeed pose a burden or alter the service provided.

## 2. *Captioning Technologies for Stadiums*

As mentioned earlier, RTC appears to be a convenient way for stadiums and arenas to caption their live events. However, there are some drawbacks to RTC, including the quality and accuracy of captions. This discussion and the following paragraphs differ from the discussion in section III in that this discussion focuses on how stadiums and arenas can implement RTC and why stadiums and arenas may be opposed to installing such a technology.

### a. Implementation

After the *Feldman* case and Sabino's action against OSU, it appears as though deaf individuals want stadiums and arenas to provide open captioning on the scoreboards and JumboTrons. To achieve this, stadiums would need to hire captioners or stenographers to type what was being said or sung at the venue; they would need equipment such as "a stenographic keyboard, computer, modem, captioning software, . . . televisions, headphones, encoder, and the video source," all of which could cost as much as \$25,000,<sup>178</sup> and they would need to yield a portion of their scoreboard for the captions to appear. At the moment, open captioning with RTC seems to be one of the most effective, and perhaps cost efficient,<sup>179</sup> ways to provide captioning to many deaf individuals at the same time. However, many stadiums and arenas object to this method of implementing captioning because they claim it fundamentally alters the service they provide and it places an undue burden on them.

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178. See *Real-Time Captioning*, *supra* note 156.

179. See Landy, *supra* note 144, at 63.

- b. RTC does not fundamentally alter the service that stadiums and arenas provide

One of the arguments that many live entertainment venues propose is that providing RTC on the venue's big screen, scoreboard, or JumboTron would fundamentally alter the service of providing viewers and patrons with images, messages, game information, advertisements, and other information that can be displayed through video.<sup>180</sup> However, the fundamental service that stadiums and arenas provide when there is live entertainment is the live entertainment itself; the video information is a service, but it is not the fundamental service that these stadiums and arenas are providing. Stadiums and arenas can argue that captioning would alter the video content displayed on the big screens and JumboTrons. However, they cannot argue that providing captioning would fundamentally alter the live entertainment they are providing.

The "fundamentally altering" argument appears vulnerable, especially considering that stadiums will project advertisements and messages on a big screen and claim those messages to be part of the "fundamental service," but will not project captioning which is similar to these messages and advertisements. The ADA states that an entity is not obligated to provide an auxiliary aid if it would fundamentally alter the service provided.<sup>181</sup> It seems as though, for now, stadiums and arenas may fail to truly show such a fundamental alteration.

- c. RTC does not present many stadiums and arenas with an undue burden

Another argument that many stadiums and arenas raise is that implementing RTC would pose an undue burden, primarily a financial burden upon them. This may be true for some stadiums and arenas; however, there are many live entertainment venues that can afford to implement RTC without placing a financial burden upon themselves yet choose not to implement it.

It is true that captioning equipment is not inexpensive. As mentioned earlier, captioning equipment can cost as much as \$25,000,<sup>182</sup> and stenographers add to that cost, depending on the experience of the stenographer, somewhere between \$120 and \$1200 an hour.<sup>183</sup> Yet, the cost of the equipment is more than likely a one-time investment, so once stadiums and arenas purchase the captioning equipment, they are left with the cost of paying a stenographer to caption the event which does not appear to be a financial burden.

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180. *Id.*

181. *See* 28 C.F.R. § 35.164 (2009); 28 C.F.R. § 36.303(a), (f).

182. *See Real-Time Captioning, supra* note 156.

183. *See* Landy, *supra* note 144, at 63.

There are some stadiums and arenas that truly may not be able to purchase the captioning equipment. These venues may be small state college stadiums or arenas, or perhaps a venue that does not seat thousands of spectators. However, major stadiums and arenas that bring in thousands of fans and spectators may not be able to claim a financial undue burden, especially given that the entities that own these stadiums have millions of dollars that they can spend for other venue features.<sup>184</sup>

It is hard for many major stadiums and arenas to claim the exceptions found in the ADA for providing auxiliary aids. This note does not argue that all stadiums and arenas should provide captioning at live events, but there is a concern that not enough stadiums and arenas that can provide such a service without alterations or burdens are providing captioning. These exceptions should not be loosely interpreted so as to let many of the multi-million dollar stadiums off the hook in providing deaf patrons equal access to their services.

#### IV. CONCLUSION

This note began by demonstrating in the history of captioning, that captioning had a hard time expanding before the ADA. Now, with the support of Titles II and III, and with the advancements in captioning technology, captioning appears to be a service that should expand into the realm of live entertainment offered in stadiums and arenas. Although there is little precedent given by courts in this area of captioning, one court found the ADA was clear enough to have ruled that stadiums are required to provide captioning. Hopefully, with the help of more court interpretations of the ADA regarding live captioning, the deaf will eventually have equal access at more live venues.

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184. In 2008 and 2009, the New York Yankees spent \$1.5 billion to construct a new baseball stadium, and the Dallas Cowboys' owner Jerry Jones spent \$40 million on a video board. Mike Lupica, *New Dallas Cowboys' Stadium Is As Big As Team Owner Jerry Jones's Ego*, NEW YORK DAILY NEWS, Sept. 19, 2009.

\* J.D. expected May 2011; B.A. in English and Political Science, Lyon College. I wish to thank Professor Ranko Shiraki Oliver and Brian Vandiver for their guidance in the early stages of writing and development of this note's topic; Dr. Terrell L. Tebbetts, whose mentoring and instruction at Lyon College has and will forever stay with me; Christopher Flint Fears, James Tropp, Donald Roy, and the many other friends who gave me insight and advice from the perspective of a deaf individual; and the staff of the UALR Law Review for their dedication and efforts to producing a quality publication, especially the Editorial Board, with whom I have had a pleasure serving. Finally, and most importantly, I wish to thank my Heavenly Father, my family and my friends for their love and support during this journey that is law school.