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6-1-2011

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Erica N. Lucero
Loyola Law School Los Angeles

Recommended Citation
Erica N. Lucero, *Life, Liberty, and the Pursuit of Entertainment?*, 31 Loy. L.A. Ent. L. Rev. 209 (2011).
Available at: http://digitalcommons.lmu.edu/elr/vol31/iss3/1

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LIFE, LIBERTY, AND THE PURSUIT OF ENTERTAINMENT?

This comment focuses on the case *Arizona ex rel Goddard v. Harkins Amusement Enterprises* and uses it to explore whether the Americans with Disabilities Act ("ADA") is being distorted and misused if theater owners are required to install and provide equipment so as to fully accommodate hearing- and vision impaired customers. The comment begins by outlining the ADA using case examples and detailing the analytical framework courts use to evaluate claims asserted under the Act. It then discusses the accommodations the motion picture industry currently provides disabled patrons, and, after evaluating these existing accommodations, outlines the financial and technical effect full compliance under the ADA would have on the motion picture industry. Lastly, the article suggests possible action for courts and the public to take in order to balance the interests of disabled Americans and the motion picture industry, ultimately concluding that full compliance under the ADA would place an undue burden on the motion picture industry.

I. INTRODUCTION

In 2000, famed actor and director Clint Eastwood made headlines when he took a politically incorrect stance: he litigated a case against a disabled woman who claimed that under the Americans with Disabilities Act ("ADA") his Mission Ranch resort was not wheelchair-accessible.[1] "'If you're right, you've got to hold your ground,' Eastwood said. 'I also fought for the businessmen and businesswomen who own small businesses who are trying to get by and they get worked over by those people.'"[2]

The plaintiffs in the case were Diane and Michael zum Brunnen, visitors of Mr. Eastwood's resort in Carmel, California.[3] At that time, the resort had two wheelchair-accessible bathrooms, a wheelchair-accessible

1. Alan Gathright & Maria Alicia Gaura, *Eastwood Wins Suit Over ADA*, S.F. CHRON., Sept. 30, 2000, at A15 [hereinafter Gathright & Gaura].

2. *Id.*

3. *Id.*

suite, and a handicap-accessible parking space.[4] The plaintiffs claimed that the bathrooms were 240 feet from the Mission Ranch Restaurant without signs directing the way, the suite was too expensive, the hotel office was not wheelchair accessible, and the parking space was not properly marked.[5] To make up for these inadequacies, the zum Brunnens' attorneys demanded a $577,000 settlement from Eastwood.[6] Rather than pay up, though, Eastwood fought the claim.[7] Besides showing up daily in federal court, he testified before a Congressional committee in May 2000, urging lawmakers to stop frivolous lawsuits by amending the ADA to require that plaintiffs notify business owners of access problems and give them ninety days to make improvements before filing suit.[8]

Criticism against Eastwood was scathing.[9] The vast majority of ADA cases are settled out of court where business owners often pay cash to plaintiffs while quietly making the disabled access improvements to their businesses.[10] Sid Wolinsky, the director of litigation services for Disability Rights Advocates in Oakland, scoffed, "'[H]e's being Mr. Clint Eastwood "make my day" Mr. Tough Guy . . . . It's ridiculous for him to say he didn't know what needed to be done' to eliminate physical barriers for the disabled . . . . 'I can't think of an area that is more clear-cut.'"[11] Unintentionally, however, Mr. Wolinsky hit upon the crux of the problem with the ADA. There is nothing clear-cut about ADA requirements, as evidenced by the current debate rocking the motion picture industry: movie theater access for vision- and hearing-impaired patrons.[12]

In 2005, two disabled Arizonans filed complaints that would dramatically change the movie theater industry.[13] Frederick Lindstrom and Larry Wanger lodged their complaints against Harkins Amusement Enterprises ("Harkins"), a movie theater chain with over eighty percent of its theaters located in Arizona.[14] Each plaintiff separately attempted to attend a movie at a Harkins movie theater location.[15] However, Harkins was unable to ac-

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4. *Id.*
5. *Id.*
6. *Id.*
7. Gathright & Gaura, *supra* note 1.
8. *Id.*
9. *See id.*
10. *Id.*
11. *Id.*
12. *See infra* Part II.
13. *See infra* Part II.C.
14. *See* HARKINS THEATERS, http://www.harkinstheatres.com/theatres.aspx (last visited Aug. 12, 2011).
15. Arizona *ex rel.* Goddard v. Harkins Amusement Enters., 603 F.3d 666, 669 (9th Cir.

commodate them because of their disabilities, leading each patron to file a complaint of public accommodation discrimination with Arizona's Civil Rights Division.[16]

The State of Arizona sued Harkins in 2008, and theater patrons Lindstrom and Wanger intervened as plaintiffs.[17] Harkins removed the case to federal court, which granted its motion to dismiss.[18] The State and the two patrons then appealed to the Ninth Circuit Court of Appeals.[19] That court reversed the motion to dismiss, holding that as a matter of law, the suit fell under the purview of the ADA.[20] In addressing the issue of what specific technology theaters might be required to have, the Ninth Circuit ruled "open captioning is not mandated by the ADA as a matter of law."[21] However, the Court left open whether theaters are required by law to provide closed captioning and descriptive narration.[22]

In a press release posted to his website, Arizona Attorney General Terry Goddard announced the Ninth Circuit's "[g]roundbreaking [r]eversal in [the] [m]ovie [t]heater [d]isability [c]ase."[23] In the release, he stated, "[t]his is a groundbreaking legal decision because it is the first time that a Circuit Court of Appeals has ruled on whether the Americans with Disabilities Act requires captions or descriptions in movie theaters."[24] Goddard then expressed his appreciation, stating,

> We are gratified that the Ninth Circuit rejected Harkins' argument that the ADA . . . require[s] only that individuals with dis-

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2010) [hereinafter *Goddard*].

16. *Id.*

17. *Id.*; *see also* Arizona v. Harkins Amusement Enters., 548 F. Supp. 2d 723 (D. Ariz. 2008).

18. *Goddard*, 603 F.3d at 669.

19. *Id.*

20. *Id.* at 671, 675.

21. *Id.* at 673, 668 (defining open captioning as a system that displays every spoken word of a movie in text that appears at the bottom of a movie theater screen).

22. *See id.* at 675, 668 (explaining closed captioning displays that transmit captions to viewers through personal devices on an individual basis, so that the only patrons seeing the captions are those who request them); *Frequently Asked Questions*, MOPIX MOTION PICTURE ACCESS, http://ncam.wgbh.org/mopix/faq.html (last visited Aug. 14, 2011) ("Narrated descriptions provide information about key visual elements . . . . The descriptions are inserted into pauses in the soundtrack and do not interfere with the dialogue.").

23. Press Release, Ariz. Att'y Gen. Terry Goddard, Terry Goddard Announces Groundbreaking Reversal in Movie Theater Disability Case (Apr. 30, 2010), *available at* http://www.azag.gov/press_releases/april/2010/Press%20Release%20-%20Terry%20Goddard%20Announces%20Groundbreaking%20Reversal%20in%20Movie%20Theater%20Disability%20Case.html.

24. *Id.*

> abilities gain entrance to the theater, but not access to the soundtrack or key visual features of the films shown . . . . This decision makes it clear that the ADA is about more than physical access to a public accommodation—it is also about ensuring access to the services that the public accommodation provides.[25]

Due in large part to *Arizona ex rel. Goddard v. Harkins Amusement Enterprises*, movie theater access for the disabled is currently garnering a great deal of attention. The Department of Justice ("DOJ") recently announced that it

> is considering revising its regulation implementing Title III of the Americans with Disabilities Act in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by movie theater owners or operators at movie theaters accessible to individuals who are deaf . . . or who are blind . . . by screening movies with closed captioning or video description.[26]

In a notice handed down to the motion picture industry, the DOJ provided "advance notice" and sought comments on the issue.[27] A variety of blogs discuss the need for closed captioning and descriptive narration.[28] Some even dispense tax advice, informing small businesses of tax cuts available to them should they decide to embrace closed captioning.[29] In Alameda County, California, a class action lawsuit has been filed against movie theater giant Cinemark, alleging the theater chain discriminates against the deaf by not providing captioned movies.[30] The issue is officially ripe, and the time has come to reach a consensus that takes into account the interest of the motion picture industry and its disabled patrons.

American theaters are now facing a complicated issue: should theater owners be required to install and provide equipment in order to fully ac-

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25. *Id.*

26. Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. 43467, 43467–43476 (July 26, 2010) (to be codified at 28 C.F.R. pt. 36).

27. *Fact Sheet: Advance Notice of Proposed Rulemaking on Movie Captioning and Video Description*, U.S. DEP'T OF JUSTICE (Aug. 3, 2010), http://www.ada.gov/anprm2010/factshtcrt_movie_captions_anprm_2010.htm.

28. *E.g.*, CLOSEDCAPTIONING.NET, http://www.closedcaptioning.net (last visited Aug. 14, 2011); CLOSED CAPTIONING BLOG, http://abercap.com/blog/ (last visited Aug. 14, 2011).

29. *E.g.*, *Ask Your Tax Man*, CLOSEDCAPTIONING.NET (Jan. 19, 2010), http://www.closedcaptioning.net/techtips/ask-your-tax-man.

30. Vic Lee, *Hearing Impaired File Class Action Against Cinemark*, KGO BAY AREA NEWS (Nov. 30, 2010), http://abclocal.go.com/kgo/story?section=news/local/east_bay&id=7817681.

commodate their hearing and visually impaired customers under the ADA? Regulations promulgated under the ADA are failing to balance the competing interests of disabled Americans with those who provide entertainment facilities to the public. At some point a line must be drawn. As the First Circuit pointed out in *United States v. Hoyt Cinemas Corp.*, "[t]he ADA places substantial emphasis on equality of access. As a matter of common sense, this cannot be absolute equality; a tilt-back chair for ordinary patrons does not therefore entail a tilt-back platform for a wheelchair."[31] Recent trends tilting the balance in favor of the disabled are imposing prohibitive burdens on private enterprise,[32] and *Arizona ex rel. Goddard v. Harkins Amusement Enterprises* presents the Ninth Circuit with the perfect opportunity to bring equity back to regulations under the ADA.[33]

The purpose of this paper is to discuss whether the ADA is being distorted and misused. Part II of this article outlines the ADA and, using case examples, discusses the analytical framework courts use to evaluate claims asserted under the Act. The paper also provides specific examples of the ways in which the motion picture industry has made allowances for its disabled patrons. Part III of this article discusses the current implications of the ADA and its effect on the motion picture industry, specifically focusing on the financial impact ADA compliance would have on the industry. Lastly, Part IV suggests possible action for courts and the public to take in attempting to balance the interests of disabled Americans and the motion picture industry.

II. LEGAL BACKGROUND

A. The Americans with Disabilities Act

In 1990 Congress passed the Americans with Disabilities Act ("ADA") based on congressional findings about the status of disabled Americans.[34] Congress declared that, "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination."[35] Finding that discrimination against disabled individuals exists in a wide variety of

31. United States v. Hoyt Cinemas Corp., 380 F.3d 558, 567 (1st Cir. 2004).
32. *See infra* Part III.
33. *See generally Goddard*, 603 F.3d 666.
34. *See generally* 42 U.S.C. § 12101 (2010).
35. *Id.* at § 12101(a)(1).

"critical areas,"[36] Congress stated, "individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural . . . [and] communication barriers . . . [and] failure to make modifications to existing facilities and practices."[37] Thus, the Act placed the federal government in the role of enforcer by invoking the "sweep of congressional authority" in an effort "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and sought "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[38]

Title III of the ADA outlaws discrimination by public accommodations, stating 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, *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*.[39]

To prevail on a discrimination claim under Title III, the plaintiff must establish a prima facie case that: "(1) [the plaintiff is] disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his [or her] disability."[40]

There is an analytical framework for any party making a claim of discrimination under the ADA. First, the plaintiff must prove that a modification was requested, and that such modification is reasonable.[41] To meet this burden, the plaintiff must introduce "evidence that the requested modification is reasonable in the general sense."[42] The burden then shifts to the

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36. *Id.* at § 12101(a)(3).

37. *Id.* at § 12101(a)(5).

38. *Id.* at § 12101(b).

39. 42 U.S.C § 12182(b)(2)(A)(iii) (2010) (emphasis added).

40. Arizona *ex rel.* Goddard v. Harkins Amusement Enters., 603 F.3d 666, 670 (9th Cir. 2010) [hereinafter *Goddard*].

41. Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001).

42. *Id*. (quoting Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052 (5th Cir.

defendant who will be expected to produce evidence that the requested modification is unreasonable.[43] If the court finds that the plaintiff has met his or her burden, the defendant must then make the requested modification, unless the defendant can meet the additional burden of proving that the modification would either constitute an undue burden or that it would fundamentally alter the nature of the public accommodation.[44] Although the term "undue burden" is not specifically defined in the statute, the Department of Justice ("DOJ") suggests that the term be interpreted in the same way as the "undue hardship" standard.[45] Used in the employment provisions of the ADA, "undue hardship" is defined as a "significant difficulty or expense."[46]

The case *Coleman v. Zatechka* illustrates the protections of the ADA.[47] In *Coleman*, a handicapped student with cerebral palsy was admitted to the University of Nebraska, Lincoln, in 1991.[48] Due to the paresis in both her legs, she required the services of a personal attendant to assist her with such tasks as dressing, showering, and toileting.[49] The summer before Coleman began her schooling, she submitted a housing contract application to secure dormitory housing.[50] However, rather than submit her name to the general lottery to be randomly assigned a roommate, the University automatically assigned her to a room without a roommate.[51] Coleman later learned that the University's policy was not to assign roommates to students who required a personal attendant.[52] In the ensuing lawsuit, the University repeatedly stated that it would "not require another student to be [Coleman's] roommate."[53]

First, Coleman successfully established a prima facie case: 1) she, the plaintiff, was disabled within the meaning of the ADA because cerebral palsy is recognized as a disability under the Act;[54] 2) the University of Nebraska, the defendant, is a private entity operating a place of public ac-

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1997)).

43. *Id.*

44. *Id.*; *see also Goddard*, 603 F.3d at 675.

45. 1–3 ADA: PUBLIC ACCOMMODATIONS § 3.02 (Matthew Bender & Co., LEXIS 2010).

46. *Id.*

47. Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993).

48. *Id.* at 1362.

49. *Id.*

50. *Id.*

51. *Id.* at 1363.

52. *Id.*

53. *Coleman*, 824 F. Supp. at 1365.

54. *Id.* at 1367.

commodation, as the Nebraska Legislature established the school as a state institution;[55] and 3) she was denied public accommodations when the school prevented her from living in a residence hall with a roommate because she had cerebral palsy.[56]

The court ruled that the school's conduct was unacceptable, stating that "[t]he ADA's Findings and Purposes illustrate that Congress, in enacting the statute, aimed to bring people with disabilities into society's mainstream, to cause the kinds of interaction which might facilitate recognition of the true equality of human worth as between individuals—regardless of disabilities."[57] As implemented, the University's policy unnecessarily separated students with disabilities from those without disabilities, striking at the essence of the ADA by specifically violating the statute's stated purpose: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[58] In essence, the court used the Act to ensure that Coleman had the same opportunity as her peers—that is, to live in her university's dormitory housing with a roommate.[59] This case perfectly illustrates how the findings and purposes of the ADA are applied.

In *Tennessee v. Lane*, the Supreme Court upheld a more controversial application of the ADA.[60] In an opinion authored by Justice Stevens, the Court staunchly supported the goals of the ADA by upholding it in the face of an Eleventh Amendment challenge.[61] George Lane and Beverly Jones, two paraplegics, filed suit in 1998 against the state of Tennessee, alleging that they were denied access to the state court system by reason of their disabilities.[62] Lane alleged that he was compelled to appear in court to answer to criminal charges, but upon attempting to access the second floor of the courthouse, he found that there was no elevator and was forced to crawl up two flights of stairs to enter the courtroom.[63] On a second visit to the courthouse, he refused to crawl or be carried and was consequently arrested and jailed for failure to appear.[64] Jones, a certified court reporter, alleged that she had been unable to gain access to a number of Tennessee state

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55. *Id.* at 1367–68.
56. *Id.* at 1362–63.
57. *Id.* at 1373.
58. *Id.* (citing 42 U.S.C. § 12101(b)(1)).
59. *Coleman*, 824 F. Supp. at 1372–73.
60. Tennessee v. Lane, 541 U.S. 509 (2004).
61. *See id.* at 533–34.
62. *Id.* at 513.
63. *Id.* at 513–14.
64. *Id.* at 514.

courthouses, and had therefore lost work and the opportunity to participate in the judicial process.[65] Tennessee moved to dismiss the suit on the ground that the Eleventh Amendment barred the claims.[66]

The Court began by stating,

> Congress may abrogate the State's Eleventh Amendment immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority."[67]

According to the Court, the first question was "easily answered" because the ADA specifically states that no state shall be immune under the Eleventh Amendment.[68]

The Court continued, "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment."[69] This, as "[it] ha[s] often [been] acknowledged, is a broad power indeed."[70] The Court then commented on the nature of Title II, saying it "seeks to enforce . . . [a] prohibition on irrational disability discrimination . . . [and] a variety of other basic constitutional guarantees . . . like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment."[71]

In evaluating the constitutionality of Title II, the Court stated that Title II's validity must be judged against the backdrop of the historical experience it reflects.[72] One of the numerous examples the Court provided addressed voting: "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, '[a]s of 1979, most States . . . categorically disqualified "idiots" from voting,

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65. *Id.*

66. *Lane*, 541 U.S. at 514; *see also* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

67. *Lane*, 541 U.S. at 517 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)).

68. *Id.* at 518.

69. *Id.*

70. *Id.* (citation omitted).

71. *Id.* at 522–23.

72. *Id.* at 523.

without regard to individual capacity.'"[73]

The Court ultimately held that Title II of the ADA constitutes a valid exercise of Congressional authority.[74]

Tennessee v. Lane continues to be a powerful opinion, not only for the majority's endorsement of the ADA in the face of an Eleventh Amendment challenge, but also for the dissent's powerful denunciation of the majority.[75] In an opinion authored by Chief Justice Rehnquist, the dissent attacked Congress' ADA findings.[76] Calling the majority's examples of wrongs dealt to the disabled a "digression," Rehnquist critically states that the majority's recounting of "historical discrimination against the disabled through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services" is "outdated" and "generalized."[77] The dissent then goes on to state that this "unexamined, anecdotal evidence does not suffice,"[78] and that "[t]he Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II."[79]

In conclusion, the dissent explicates that Title II of the ADA suffers from "massive overbreadth,"[80] and that

> [e]ven if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse . . . does not state a constitutional violation. . . . We have never held that a person has a *constitutional* right to makes his way into a courtroom without any external assistance.[81]

B. Motion Picture Industry Allowances

Nationwide, theaters have already made allowances for disabled pa-

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73. *Lane*, 541 U.S. at 524 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 464 (1985)).

74. *Id.* at 533–34.

75. *See id.* at 538–54.

76. *See id.* at 541, 545–46.

77. *Id.* at 541.

78. *Id.* at 542 (citation omitted); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001).

79. *Lane*, 541 U.S. at 543.

80. *Id.* at 551.

81. *Id.* at 546–47.

trons under the ADA.[82] The alteration of theater architecture is especially demonstrative of this.[83] The Architectural and Transportation Barriers Compliance Board (the "Access Board") is a congressionally appointed board under the ADA tasked with drafting regulations relating to architectural and transportation barriers for the disabled for the DOJ.[84] The regulations are then either adopted or modified by the DOJ, and must at least be "consistent with the minimum guidelines and requirements" that have been drafted by the Access Board.[85] In 1991, the Access Board provided the DOJ with accessibility guidelines "that required wheelchair seating to be located to provide lines of sight comparable to those for all viewing areas."[86] The Access Board solicited comments on sightlines at entertainment venues where patrons might frequently stand, such as at sporting events, but did not propose any regulations.[87] Ultimately, however, when the DOJ thereafter promulgated Standard 4.33.3, it omitted any reference to the issue of standing spectators.[88]

The issue of standing spectators did not arise again until 1993 during the DOJ's investigations into the facilities for the 1996 Olympic Games, to be held in Atlanta, Georgia.[89] At that time, the DOJ made the concrete statement that "'lines of sight comparable to those for members of the general public' meant 'line[s] of sight over standing spectators.'"[90]

As a result of this statement, the Paralyzed Veterans of America filed suit in 1996 against the owners of the MCI Center,[91] a venue being constructed in downtown Washington D.C. designed to host football games,

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82. *See, e.g.*, *Accessibility*, AMC THEATRES, http://www.amctheatres.com/AMCInfo/Accessibility/?WT.mc_id=nh_about (last visited Aug. 14, 2011).

83. *See* United States v. AMC Entm't, Inc., 549 F.3d 760, 763 (9th Cir. 2008).

84. David McArdle, *Using the Americans with Disabilities Act to Inform "Access to Sporting Venues" Under the Disabilities Convention*, 27 B.U. INT'L L.J. 317, 320 (2009); *see also* Adam A. Milani, *"Oh, Say, Can I See—and Who Do I Sue if I Can't?": Wheelchair Users, Sightlines over Standing Spectators, and Architect Liability Under the Americans with Disabilities Act*, 52 FLA. L. REV. 523, 529 (2000).

85. McArdle, *supra* note 84; *see also* Milani, *supra* note 84 (citing 42 U.S.C. § 12186(c)).

86. McArdle, *supra* note 84, at 321 (citation omitted); *see also* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 2296, 2314 (proposed Jan. 22, 1991) (codified at 36 C.F.R. pt. 1191).

87. McArdle, *supra* note 84, at 321–22; *see also* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 2296, 2314 (proposed Jan. 22, 1991) (codified at 36 C.F.R. pt. 1191).

88. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 581 (D.C. Cir. 1997).

89. *Id.*

90. *Id.*

91. *Id.* at 582.

basketball games, concerts, and other special events.[92] As the Court of Appeals for the District of Columbia stated,

> Because the games and events will be exciting affairs and the patrons are expected, even encouraged at times, to stand and cheer for the home teams, wheelchair users are understandably concerned about whether the seats available to them will allow them to see the action during the most dramatic moments.[93]

Before suit was filed, D.C. Arena ensured, on their own initiative, that sixty percent of the wheelchair seating had sightlines over standing spectators.[94] Despite these efforts, the District Court found the plan deficient, stating that the owners needed to provide sightlines over standing areas in seventy-five to eighty-eight percent of the areas where there was disabled seating.[95] These numbers, the court deemed, would qualify as "substantial compliance."[96]

Both parties appealed. D.C. Arena argued that Standard 4.33.3 did not require any of the wheelchair areas to have such sightlines, and the Paralyzed Veterans of America took the stance that one hundred percent compliance was the only way the owners could avoid violating the ADA.[97] The Court of Appeals affirmed the lower court's ruling, reasoning that one hundred percent compliance could only be achieved by having all wheelchair seating areas separate from the rest of the spectators.[98] This result would also violate the ADA, as the Act requires wheelchair seating to be integrated with the seating for the other spectators.[99] Therefore, separating disabled seating from the seats of non-disabled patrons "would merely exacerbate wheelchair users' physical and social isolation from the rest of the audience."[100]

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92. *Id.* at 580.
93. *Id.*
94. McArdle, *supra* note 84, at 323.
95. *Paralyzed Veterans of Am.*, 117 F.3d at 588.
96. *Id.*
97. McArdle, *supra* note 84, at 324; *see also Paralyzed Veterans of Am.*, 117 F.3d at 582.
98. *Paralyzed Veterans of Am.*, 117 F.3d at 588.
99. *Id.* at 589.
100. McArdle, *supra* note 84, at 325; *see also Paralyzed Veterans of Am.*, 117 F.3d at 582.

The issue of architecture and disabled seating eventually affected the motion picture industry. In 1999, the government filed suit against AMC Entertainment, a nationwide theater chain,[101] alleging that AMC violated the ADA by restricting handicapped seating to only the front sections of its stadium-style movie theaters.[102] The court found that AMC discriminated against handicapped patrons by not placing accessible seating in areas where lines of sight were comparable to those for members of the general public.[103] AMC Entertainment was given five years, beginning January 10, 2006, to implement changes to all future and existing theaters.[104] The opinion contained a lengthy list of retrofitting that AMC was required to undertake, listing specific changes for each and every auditorium.[105] For example, the Order for Lakes Square 12 in Leesburg, Florida stated "Auditoriums 3, 4, 5, and 6: AMC shall remove two Wheelchair Spaces from the front row of the Traditional Section and relocate them to the last row of this Section adjacent to the two existing Wheelchair and Companion Spaces."[106]

However, what the court only implicitly acknowledged was that AMC had already made allowances for the disabled.[107] In the subsequent appeal, the court stated that "theaters built in 1995 require the most significant retrofitting, including installing ramps, removing mini-risers and constructing new seats, whereas other newer theaters, having been altered to respond to customer complaints, require less retrofitting."[108] This statement indicates that AMC made efforts to accommodate its disabled patrons without the threat of legal action. As a direct result of theaters making increasing allowances throughout the years, less retrofitting was needed in newer than in older theaters.

After the district court ordered AMC to retrofit all of its theaters, AMC appealed on the ground that it was "not told the rules of building stadium-seating theaters until, at the earliest, the government published its view of Section 4.33.3."[109] Section 4.33.3 of the Code of Federal Regulations states, "[w]heelchair areas shall be an integral part of any fixed seat-

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101. AMC THEATRES, http://www.amctheatres.com (last visited July 26, 2011).

102. United States v. AMC Entm't, Inc., No. CV-99-01034-FMC(SHx), 2006 U.S. Dist. LEXIS 6119, at *4 (C.D. Cal. Jan. 10, 2006).

103. *Id.* at *4, *13.

104. *Id.* at *6.

105. *Id.* at *15–60.

106. *Id.* at *26.

107. *See id.*

108. *AMC Entm't, Inc.,* 549 F.3d at 767–68.

109. *Id.* at 768.

ing plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public."[110] Because this regulation pre-dated the construction and subsequent popularity of stadium-style movie theaters by several years, it was unclear whether stadium-style theaters were required to comport to the same regulation.[111] What resulted was inaction by the DOJ, with the Ninth Circuit stating, "the Access Board and the DOJ failed to provide clear direction as to the precise meaning of Section 4.33.3."[112] The Ninth Circuit held that the lower court had abused its discretion and, in doing so, violated AMC's due process rights by requiring the retrofitting of theaters regardless of their date of construction.[113]

What is evident from both *Paralyzed Veterans of America v. D.C. Arena* and *United States v. AMC Entertainment, Inc.* is that the owners of the entertainment venues *did* take their disabled patrons into account prior to being subjected to legal action.[114] What the patrons found unsatisfactory was that the owners refused to fully comply with their wishes. Accordingly, the patrons proceeded to file suit to force the companies to make greater accommodations than they had originally proposed.[115]

Theater owners now face the next frontier of disabled accommodations in closed captioning and descriptive narration. In the past several years, courts have handed down conflicting rulings.[116] For example, in *Ball v. AMC Entertainment, Inc.*, a Washington, D.C. District Court held that, although the ADA did not explicitly require movie theaters to provide its patrons with closed captioning,[117] congressional intent clearly indicated that "the ADA might require new technology be used, as it is developed, to further accommodate disabled individuals."[118] In stark contrast, the court

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110. 28 C.F.R. pt. 36, app. A, § 4.33.3 (2010).

111. *AMC Entm't, Inc.*, 549 F.3d at 764.

112. *Id.*

113. *Id.* at 768.

114. *See id.* at 763 (modifying designs for future theaters to accommodate the disabled); *see also Paralyzed Veterans of Am.*, 117 F.3d at 582 ("[S]ome, but not all, of the wheelchair seating in the chosen designs would have lines of sight over standing spectators.").

115. *See AMC Entm't, Inc.*, 549 F.3d at 763 (modifying designs for future theaters to accommodate the disabled); *see also Paralyzed Veterans of Am.*, 117 F.3d at 582 ("[S]ome, but not all, of the wheelchair seating in the chosen designs would have lines of sight over standing spectators.").

116. *See* Ball v. AMC Entm't, Inc., 246 F. Supp. 2d 17, 22 (2003). *But see* Cornilles v. Regal Cinemas, Inc., 14 Am. Disabilities Cas. (BNA) 563, 563 No. 00-173-AS, (D. Or. Mar. 12, 2002).

117. *Ball*, 246 F. Supp. 2d at 22; *see also* 1–3 ADA: PUBLIC ACCOMMODATIONS § 3.02, *supra* note 45.

118. *Ball*, 246 F. Supp. 2d at 23; *see also* 1–3 ADA: PUBLIC ACCOMMODATIONS § 3.02,

in *Cornilles v. Regal Cinemas, Inc.* held that Regal Cinemas was not required to accommodate its disabled patrons with closed captioning because "requiring Defendants to expend thousands of dollars per auditorium to install new technology [would be] unduly burdensome."[119] To prevent costly future battles faced by both sides in reaching a consensus about the allowances the motion picture industry must make for its disabled patrons, it is important for the DOJ to act now and make an educated and realistic choice about what its stance on the issue will be.

C. Current Application

After the Ninth Circuit's holding in *Arizona ex rel. Goddard v. Harkins Amusement Enterprises*, the Law Office of Lainey Feingold announced that its clients, Fredrick Lindstrom and Larry Wanger, would soon be refiling their case.[120] Lindstrom is a nearly deaf patron who alleges that three specific technologies would aid him in his movie-going experience.[121] The first option is open captioning, a system that displays every spoken word of a movie in text that appears at the bottom of the screen.[122] This occurs either by engraving text onto each individual frame of a film[123] or by using a separate projection system to project captions onto the movie screen.[124] Secondly, Lindstrom added that closed captioning, a relatively new technology, would also aid him in his movie-going experience.[125] Closed captioning displays captions to viewers through personal devices on an individual basis, so that the only patrons seeing the captions are those who request them.[126]

Wanger is a nearly blind patron and alleges that only one type of technology, descriptive narration combined with headphones, would allow him to enjoy movies:

> Descriptive narration is a way of making visual media more meaningful to people with vision loss. Narrated descriptions

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supra note 45.

119. *Cornilles*, 14 Am. Disabilities Cas. (BNA) at 569; *see also* 1–3 ADA: PUBLIC ACCOMMODATIONS § 3.02, *supra* note 45.

120. *Federal Appeals Victory for Blind Movie Goers*, LAW OFFICE OF LAINEY FEINGOLD: DISABILITY RIGHTS LEGAL ADVOCACY (May 9, 2010), http://lflegal.com/2010/05/harkins-opinion#excerpt.

121. *Goddard*, 603 F.3d at 668.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 669.

126. *Id.* at 668.

> provide information about key visual elements such as actions, settings, facial expressions, costumes, on-screen text and scene changes. The descriptions are inserted into pauses in the soundtrack and do not interfere with the dialogue.[127]

The *Harkins* court held that movie captioning and audio descriptions are "clearly" auxiliary aides and services that therefore fall under the purview of the ADA.[128] However, the DOJ's Code of Regulations specifically states that theaters are not required to provide open captioning as a matter of law.[129] The court, however, left the issue of closed captioning requirements open.[130] In arguing against having to provide closed captioning, Harkins relied on interpretations of the ADA contained in the Federal Register, in which the DOJ only showed that the matter was still being debated.[131] The court did not find this argument dispositive, declining "to give deference to Access Board guidelines that have not yet been adopted by the DOJ."[132]

In holding that the plaintiffs' claim fell under the purview of the ADA, the Ninth Circuit enabled the plaintiffs to re-file their suit, alleging discrimination under the ADA for Harkins' failure to provide closed captioning and descriptive narration.[133] However, the court did make one very important statement for the defense:

> Our holding does not necessarily mean that Plaintiffs will be entitled to closed captioning and descriptive narration in Harkins's theaters. Harkins may still be able to avail itself of several defenses, such as the contention that the devices would fundamentally alter the nature of its services or constitute an undue burden.[134]

III. IMPLICATIONS

The Department of Justice ("DOJ") recently issued a notice of proposed rulemaking in which it seeks to institute regulations that would require all theaters in the United States to accommodate disabled movie thea-

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127. MOPIX MOTION PICTURE ACCESS, *supra* note 22 (describing descriptive narration).
128. *Goddard*, 603 F.3d at 670.
129. *Id.* at 673; *see also* 28 C.F.R. § 36.303 (2010).
130. *See Goddard*, 603 F.3d at 675.
131. *Id.* at 674.
132. *Id.*; *see also* Miller v. Cal. Speedway Corp., 536 F.3d 1020, 1027 n.1 (9th Cir. 2008).
133. *See Federal Appeals Victory for Blind Movie Goers*, *supra* note 120.
134. *Goddard,* 603 F.3d at 675 (citations omitted).

ter patrons by providing both closed captioning and descriptive narration.[135] As a follow up, the DOJ recently included the topic in the appendix of the proposed rulemaking, stating that the Department "was considering the possibility of requiring public accommodations to exhibit all new movies in captioned format and with video description at every showing."[136] It then asked for public comment, concluding that

> rather than issue specific regulatory text at this time, the Department has determined that it should obtain additional information regarding issues raised by commenters . . . supplemental technical information, and updated information regarding the current and future status of the conversion to digital cinema by movie theater owners and operators.[137]

To this end, the DOJ is planning to engage in rulemaking relating specifically to movie captioning under the Americans with Disabilities Act ("ADA").[138]

In analyzing the prima facie case for a discrimination claim under Title III of the ADA, it is clear that the third requirement, in which the defendant denies the plaintiff public accommodations because of his or her disability, is at issue in *Arizona ex rel. Goddard v. Harkins Amusement Enterprises*.[139] Harkins' best defense would be that the devices would constitute an undue burden.[140] Harkins, as well as any theater confronted with such a lawsuit, will be able to show undue burden by demonstrating to the court the exact costs incurred in making their screens compliant.[141] Arts Access, an organization whose fundamental goal is to "encourage [individuals with disabilities] to participate fully in the rich cultural and artistic life throughout the state,"[142] offers training services to theaters on ADA

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135. Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. 43467, 43467 (July 26, 2010) (to be codified at 28 C.F.R. pt. 36).

136. *Id.* at 43469.

137. 28 C.F.R. pt. 36 app. A (2010).

138. Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. at 43467.

139. Arizona *ex rel.* Goddard v. Harkins Amusement Enters., 603 F.3d 666, 670 (9th Cir. 2010).

140. *See id.* at 675.

141. *See generally id.* (stating that Harkins may still be able to avail itself of several defenses, such as the contention that the devices would fundamentally alter the nature of the services or constitute an undue burden).

142. *About Arts Access*, ARTS ACCESS, INC., http://www.artsaccessinc.org/about.html (last visited Aug. 12, 2011).

compliance.[143] However, what the website fails to acknowledge is that the costs would be prohibitive.[144]

A. Digital v. Film Screens

Standardized technology that operates closed captioning and descriptive narration in conjunction with film screens does not exist.[145] Therefore, before a theater can accommodate the disabled, it must make the initial step of converting its film screens to digital screens.[146] Currently, estimates of the number of cinema screens in the United States that are equipped with digital projectors vary.[147] Industry experts state that the number of digital screens is approaching approximately one third of all screens in the U.S.,[148] whereas the DOJ claims that approximately 5,000 of 38,794 screens have been converted.[149] Regardless of the source of statistics, digital screens are the minority, meaning that most cinema screens in the United States are still equipped with film projectors.[150] Further, estimates vary as to how long it will take most theaters, excluding specialty theaters, to be equipped with digital screens.[151] For example, according to one commenter who presented findings to the DOJ, it will be approximately ten or more years before all of the screens in the United States are digital.[152] On the other hand, industry experts predict that in three to five years, over ninety percent of screens will have converted to digital.[153] However, this conversion depends on a variety of factors, including the financial situation of movie

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143. *ADA Compliance Training*, ARTS ACCESS, http://www.artsaccessinc.org/training.shtml (last visited Aug. 12, 2011).

144. *See infra* Part III.A–C.

145. Interview with Bryce Alden, Eng'r, Jim Whittlesey, Senior Vice President of Tech. & Operations, & John Wolski, Vice President of Exhibitor Servs., Deluxe Digital Cinema, in Burbank, Cal. (Sept. 29, 2010) [hereinafter Interview with Alden].

146. *Id.*

147. *Compare id. with* Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. at 43473.

148. Interview with Alden, *supra* note 145.

149. Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. at 43473.

150. *See also id.* (stating the DOJ's understanding that the vast majority of U.S. movie theaters currently exhibit film-based movies). *See generally* Interview with Alden, *supra* note 145 (stating digital screens are only one third of all screens in the U.S. and growing).

151. *See* Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. at 43473.

152. *Id.*

153. Interview with Alden, *supra* note 145.

theater owners and operators, the state of the economy, and incentives being offered to promote the digital change.[154]

What is not disputed is the high cost to convert a film screen to a digital screen.[155] Conversion estimates, provided by commenters to the DOJ, range from $70,000 to $100,000, which is the cost per screen, not per cinema complex.[156] Therefore, a theater complex owner looking to convert his entire complex into one with digital screens would only be able to do so at great expense. The additional costs do not end there; maintenance costs for digital projectors are much higher than those of film projectors, costing $5,000 to $10,000 more per year to maintain, which is approximately five times more than the annual maintenance cost for film projectors.[157] Therefore, theaters are not only looking at higher short term costs, they are also looking at permanently higher operating costs.

B. Closed Captioning

Unlike open captioning, which is visible to the entire audience,[158] closed captioning makes it possible for exhibitors to provide captions to its patrons on an individual basis.[159] There are three main types of closed captioning systems currently being produced.[160] The first is called rear window display.[161] The rear window captioning system produces a digital, lighted display that is mounted on the back wall of a movie theater.[162] Patrons are then given a transparent acrylic panel that can be mounted in the cup holder of a theater seat.[163] The panel reflects the captions from the rear window display on the back wall of the theater so that the captions are superimposed either below or on the movie screen, in the typical place one might see subtitles.[164] There is no need for special prints or special screen-

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154. *See generally* Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. at 43467–43476.

155. *See id.* at 43473.

156. *Id.*

157. *Id.*

158. MOPIX MOTION PICTURE ACCESS, *supra* note 22 (discussing how rear window captions differ from open captions).

159. *Id.*

160. *See infra* Part III.B.

161. *See* MOPIX MOTION PICTURE ACCESS, *supra* note 22 (describing how rear window captioning systems work).

162. *Id.*

163. *Id.*

164. *Id.*

ings, as the rear window display is its own functioning machine that works in tandem with a digital projector.[165]

Ultra Stereo Labs is a manufacturer of the second type of closed captioning system, the Infrared Emitter System ("IR Emitter System").[166] The IR Emitter System is composed of two pieces.[167] The first piece is an infrared emitter device, which transmits closed caption text over infrared wavelengths.[168] The list price is $1,450 per device.[169] The second piece of the system is the infrared receiver, which can come in several forms.[170] Two of the most popular forms are a personal infrared receiver display and infrared receiving glasses.[171] The personal display is a small box with a light-emitting diode ("LED") light text display that clips to the armrest of a patron's seat.[172] The cost is $430 per personal display.[173] The infrared receiving glasses, which are worn by the patron, also use an LED light display and angled glass to overlay closed caption text on top of the movie image.[174]

A third type of closed captioning system is produced by Doremi Cinema and is called the CaptiView Closed Captioning System.[175] As a preliminary requirement for the system, a theater must employ the Doremi Digital Cinema Server, which has a list price of $18,400.[176] Once this preliminary hurdle has been passed, the system has two separate components.[177] The first component is a software application that is loaded onto the digital cinema server at a price of $950 per server.[178] The software then enables the server to wirelessly transmit closed captions via a WiFi net-

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165. *Id.*

166. *See Infrared Closed Caption System*, USL, INC., http://www.uslinc.com/images/products/download/CCS-OneSheet.pdf (last visited July 26, 2011) (describing and displaying the features of the company's closed captioning device).

167. *See id.*

168. *Id.*

169. E-mail from Clint Koch, Sales Director, Ultra Stereo Labs, to Erica N. Lucero (Oct. 22, 2010, 10:33 PST) (on file with author) [hereinafter *Koch E-mail*].

170. *See* USL, INC., *supra* note 166 (describing and picturing the features of the company's closed captioning device).

171. *Id.*

172. *Id.*

173. *Koch E-mail*, *supra* note 169.

174. Interview with Alden, *supra* note 145.

175. James Gardiner, *Showest 2010 – 08 – Doremi CaptiView Closed Captioning System*, CINE TECH GEEK (Apr. 22, 2010, 12:50AM), http://www.cinetechgeek.com/2010/04/22/showest-2010-—-08-—-dorami-captiview-closed-caption-system/.

176. E-mail from Michael Archer, Vice President of Digital Cinema, Doremi Labs, Inc., to Erica N. Lucero (Oct. 27, 2010, 16:21 PST) (on file with author) [hereinafter *Archer E-mail*].

177. *Id.*

178. *Id.*

work to individual CaptiView display devices which retail at $525 each.[179] The device "consists of a small, OLED display on a bendable support arm" that can be mounted into the cup holder of a theater seat.[180] The display is equipped with a privacy visor so that it can be positioned in front of the patron and cause minimal distraction to those seated near that patron.[181] A theater with ten screens would first need to purchase ten Doremi digital cinema servers, costing a total of $184,000. Once these servers are purchased, the theater would need to purchase a software package for each of the ten servers at a total cost of $9,500. Lastly, the theater would need to buy enough personal display devices to meet demand at a cost of $525 each. Assuming each theater demands one such device, a single theater complex would be spending a total of $198,750 to outfit its complex with the CaptiView Closed Captioning System.

Moreover, beyond the prohibitive cost, there are major logistical issues that must be addressed before theaters should be required to provide disabled patrons with closed captioning. Currently, there are no standards in place that regulate or make uniform the interaction of closed captioning equipment and digital theater equipment.[182] When a digital movie is delivered to a theater, it is loaded onto a playback server.[183] Because there are multiple manufacturers of both playback servers and closed captioning systems, standards are necessary to dictate how a playback server communicates with a closed captioning device.[184] Additionally, movie distributors have not been provided with delivery standards.[185] On its website, Ultra Stereo Lab describes its IR Emitter System as a system that "complies with DCI and SMPTE *draft* standards."[186] As illuminated by the use of the word "draft," there are currently no official standards, and as a result, distributors are currently limping along by using subtitling standards.[187] Therefore, the multitude of logistical issues resulting from a lack of concrete standards makes it highly impractical for theaters to provide closed captioning.

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179. Gardiner, *supra* note 175; *see also Archer E-mail*, *supra* note 176.

180. Gardiner, *supra* note 175.

181. *Id.*

182. Interview with Alden, *supra* note 145.

183. *Id.*

184. *Id.*

185. *Id.*

186. *See Infrared Closed Caption System*, *supra* note 166 (describing and displaying the features of the company's closed captioning device) (emphasis added).

187. Interview with Alden, *supra* note 145.

C. Descriptive Narration

Disabled rights advocates claim that unlike closed captioning, descriptive narration does not require a digital theater system.[188] However, what these advocates fail to note is that there is currently no technology that could enable descriptive narration to run with a film projection system.[189] It is, therefore, more costly for a theater with a film projector to broadcast descriptive narration than it is for a digital theater.[190] Like closed captioning systems, the cost of descriptive narration systems for digital theater owners is often high. Descriptive narration can be achieved in one of two ways.[191] The first way would be to install chairs equipped with audio jacks in theaters.[192] This solution would enable a patron to plug a headset into the outlet and listen to the descriptive narration of the movie. However, this solution would likely be extremely costly.[193] If disabled patrons could sit anywhere in the theater, theater owners would be required to wire every single seat and purchase more expensive seats equipped with audio jacks for the entire theater.[194]

The second alternative is much more cost-effective. This method provides wireless headphones to each patron upon request and allows patrons to tune into the descriptive narration using a variety of possible methods.[195] One method would be for the patron to tune in to a specific FM channel through which the descriptive narration soundtrack is broadcast.[196] Another method could be utilized via a WiFi or Bluetooth network provided by the theater for the specific purpose of transmitting the narration.[197] Lastly, headphones are available through Ultra Stereo Systems for $80, which work with the same infrared emitter device that transmits closed caption text over infrared wavelengths (list price $1,450 per device).[198] The cost to equip a one hundred-seat movie theater with the system made by Ultra Stereo Systems would be $9,450. Equipping a ten-screen movie thea-

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188. *Frequently Asked Questions*, *supra* note 22 (describing how the descriptive narration is synchronized to a film).

189. Interview with Alden, *supra* note 145.

190. *Frequently Asked Questions*, *supra* note 22 (discussing the cost to install descriptive narration equipment).

191. Interview with Alden, *supra* note 145.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Interview with Alden, *supra* note 145.

198. *Koch E-mail*, *supra* note 169; *see also Infrared Closed Caption System*, *supra* note 166 (describing and displaying the features of the company's closed captioning device).

ter complex with the system would therefore cost $94,500.

Although descriptive narration is less costly than closed captioning, it is potentially fraught with regulatory problems, since wirelessly transmitting descriptive narration will likely raise a variety of piracy issues. For example, an individual outside of a theater could tune into the radio channel broadcasting the descriptive narration and obtain a high quality soundtrack of a recently released movie.[199] In addition, the FCC would have to monitor what channels theaters could use; these channels are in-demand commodities with a limited supply.[200] Accordingly, like its counterpart closed captioning, descriptive narration is plagued with logistical issues, making it difficult to implement in theaters.

IV. SUGGESTED ACTION

The question remains: should theater owners be required to install and provide equipment to fully accommodate its hearing and visually impaired customers under the Americans with Disabilities Act ("ADA")? Theater owners should *not* have to *fully* accommodate their hearing and visually impaired customers under the ADA. Full compliance, as previously demonstrated, would come at a prohibitive cost.[201] It would result in a misuse of the ADA because it would fail to balance both the interests of disabled Americans and the interests of those providing entertainment facilities to the public. It is time for courts to end the recent trend tilting the balance in favor of the disabled by imposing prohibitive burdens on private enterprise. To that end, there are three paths of action that would serve to strike a compromise between both interests: limited compliance, postponement, and shared obligation.

A. Limited Compliance

The website for the National Association of the Deaf lists a variety of issues that disabled Americans face today, one of which is technology.[202] Movie captioning is one such issue, about which the Association states,

> People who are deaf or hard of hearing want to be able to attend

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199. Interview with Alden, *supra* note 145.

200. Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1697 (1997).

201. *See supra* Part III.A–C.

202. *Movie Captioning*, NATIONAL ASSOCIATION OF THE DEAF, http://www.nad.org/issues/technology/movie-captioning (last visited Aug. 12, 2011) (describing the Association's commitment to achieving captioned movies in every theater in America).

> any showing of any movie in any theater at any time, to sit anywhere in the movie theater with their family and friends, and to have equal access to the movie soundtrack through high quality captioning that is consistently reliable.[203]

Although ideal, this statement is highly impractical because, as demonstrated, this would come at an incredible cost to theater owners.[204] Courts should not force this unrealistic expectation on theater owners. A limited number of showings and a limited amount of equipment should be sufficient to serve a limited population. Theater owners should not have to purchase an excessive amount of equipment to avoid a lawsuit alleging a violation of the ADA whenever the theater cannot serve a single disabled patron. As the Court in *Cornilles v. Regal Entertainment, Inc.* elucidated, "there is no evidence that . . . non-disabled customers have the ability to request that certain movies be played in the theaters."[205] Consequently, disabled customers should not be able to dictate the terms of their movie watching.

Theaters should be able to implement a system that efficiently exploits a limited amount of equipment while making movie theater visits as convenient as possible for their disabled patrons. For example, this could be achieved by calling in or purchasing a ticket that indicates a closed captioning or descriptive narration device will be required for the disabled patron's use. If the limited amount of ADA-compliant equipment runs out, the disabled patron will be informed and can then pick a future showing. Ultimately, theaters should not be in relentless fear of a lawsuit solely because they are unable to guarantee the constant accessibility of equipment for its disabled patrons. A limited, but standard amount of equipment should be decided upon, and theaters should be confident that by meeting that number, they are fully compliant.

Theaters should also have less stringent compliance requirements based on their geographic locations. For instance, rural areas are less populous than urban areas and the smaller population has a corresponding decrease in the number of disabled individuals. Therefore, it would be unfair for courts to place the same standards for accommodation on rural theater locations as they do on urban theater locations. Requiring theater owners to make costly improvements for very few people would be an unfair burden to place on private enterprise. Additionally, placing a lighter burden on rural theater locations would enable theater owners to

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203. *Id.*

204. *See supra* Part III.A–C.

205. Cornilles v. Regal Cinemas, Inc., No. 00-173-AS, 2002 U.S. Dist. LEXIS 7025, at *19, (D. Or. Jan. 3, 2002).

funnel their money to their urban locations, where their equipment for disabled individuals will have a greater impact by serving a greater portion of the disabled population.

B. Postponement

Regardless of compromises and agreements reached by theaters and their disabled customers, providing equipment to accommodate hearing and visually impaired customers should be postponed for three particular reasons. First, as previously mentioned, the majority of screens in the United States are not digital.[206] Predictions for when all screens in the United States will become digital range anywhere from three to ten years.[207] Since the technology to run closed captioning and descriptive narration on film screens does not exist,[208] and it is very expensive to convert a film screen to a digital screen,[209] postponement seems sensible. Because it would be less burdensome for theater owners to provide auxiliary aids to their disabled customers without first having to pay for an expensive digital conversion, a better balancing under the ADA would take place once the huge financial hurdle of conversion has taken place.

Secondly, standards for assistive devices have not yet been promulgated for the industry,[210] and devices are still unreliable and in development.[211] Ultra Stereo Labs, a producer of IR emitter devices, states on its website that standards have not yet been developed.[212] The website uses the term "draft" standards, indicating that while the Society of Motion Picture and Television Engineers is currently working on standards, they are not yet complete.[213] Until such standards are developed, theater owners should not be required to invest in technology that may become outdated or even unusable should the devices not comply with the particular industry standards that are ultimately set.

Lastly, it is unrealistic to burden theater owners at this time with a re-

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206. Interview with Alden, *supra* note 145.

207. *Id.*; *see also* Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. 43467, 43473 (July 26, 2010) (to be codified at 28 C.F.R. pt. 36).

208. Interview with Alden, *supra* note 145.

209. Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. at 43473.

210. *See* Interview with Alden, *supra* note 145.

211. *Id.*

212. *Infrared Closed Caption System*, *supra* note 166 (stating that the closed captioning system complies with DCI and SMPTE draft standards and operates with any compliant digital cinema server).

213. *Id.*

quirement to make their theaters compliant with imperfect and still developing technology.[214] As the *Cornilles* court posited, "is something better just around the corner?"[215] Closed captioning systems are relatively new products—Doremi Cinema's CaptiView system was only introduced in April 2010.[216] Until technology catches up with the goals of disabled advocacy groups, theater owners should be given a respite from these unrealistic demands.

C. Shared Obligation

There are limits on a public accommodation's obligations to provide auxiliary aids and services.[217] Even though the ADA requires public accommodations to provide auxiliary aids and services, "it does not require a public accommodation to supply individually prescribed devices for persons with disabilities."[218] For example, a public accommodation would not be required to provide a disabled individual with a wheelchair.[219] However, ramps to allow a disabled individual to access the public accommodation with ease would be required.

While theater owners may be required to provide access to the movie theaters, in applying the concept of limited obligation to closed captioning and narrative description in movie theaters, they should not be required to provide personal devices by which to view movies. For example, with regard to closed captioning, a theater may be required to provide either a Rear Window device on the back wall of its theater or an IR emitter device. However, it would be the responsibility of the patron to take advantage of this access by providing his or her own acrylic panel or infrared receiver. Likewise, regarding descriptive narration, patrons would be responsible for providing their own headphones, while the theater would be obligated to broadcast descriptive narration for the patrons to access. Another solution might be for theaters to offer such devices for a small fee, one that would essentially only cover the purchase of new devices and their upkeep.

It is also possible that the government would be willing to share this obligation. In the recent Twenty-First Century Communications and Video Accessibility Act of 2010, President Obama signed a bill into law that, in his words,

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214. Interview with Alden, *supra* note 145.
215. *Cornilles*, 2002 U.S. Dist. LEXIS 7025, at *22.
216. Gardiner, *supra* note 175.
217. 1–3 ADA: PUBLIC ACCOMMODATIONS § 3.02, *supra* note 45.
218. *Id.*
219. *Id.*

> make[s] it easier for people who are deaf, blind, or live with visual impairment to do what many of us take for granted—from navigating a TV or DVD menu to sending an email on a smart phone. It sets new standards so that Americans with disabilities can take advantage of the technology our economy depends on.[220]

A provision of the Act grants authority to the FCC to set up programs that "distribute specialized equipment used to make telecommunications and Internet-enabled communication services accessible to individuals who are deaf-blind. . . ."[221] This support is capped at $10 million per year.[222] However, this government program has a huge potential impact on the issue of closed captioning and descriptive narration in theaters. It shows that the United States government is amenable to subsidizing equipment for the disabled, and that consequently, similar programs could perhaps be set up to enable low-income disabled theater patrons to acquire their own auxiliary aids for viewing movies or to help theaters purchase equipment. Although contingent upon standards being developed for closed captioning and descriptive narration, disabled theater patrons could easily purchase equipment that would work in any theater across the United States. In this way, the costs of providing greater disabled theater access would be balanced between both parties.

V. CONCLUSION

The Americans with Disabilities Act's ("ADA") purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[223] has unquestioned validity. However, in seeking to end discrimination against individuals, it is important not to merely redirect that discrimination elsewhere. Theater owners cannot be made to bear the undue burden of complete accommodation without greatly distorting and misusing the ADA.

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220. Press Release, The White House, Remarks by the President at the Signing of the 21st Century Communications and Video Accessibility Act of 2010 (Oct. 8, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/10/08/remarks-president-signing-21st-century-communications-and-video-accessib.

221. *21st Century Communications and Video Accessibility Act*, NATIONAL ASSOCIATION OF THE DEAF, http://www.nad.org/issues/civil-rights/communications-act/21st-century-act (last visited July 26, 2011) (describing the 21st Century Communications and Video Accessibility Act).

222. *Id.*

223. 42 U.S.C. § 12101(b)(1) (2010).

*Erica N. Lucero**

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* J.D. Candidate, Loyola Law School, 2012; B.A., University of Southern California, 2008. The author would like to thank Wendy Aylsworth and Bryce Alden for not just participating in the entertainment industry, but being scholars of it as well, and generously sharing their knowledge. The author would also like to thank Jim Whittlesey and John Wolski for kindly sharing their expertise. This article would not have been possible without the tireless work of Professor Sarah Bensinger and the editors and staff of the Loyola of Los Angeles Entertainment Law Review; their continuous efforts are greatly appreciated. Finally, a special thank you to Ed, Wendy, and Jackie Lucero, without which nothing would be possible.