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COMMENT: EQUAL ACCESS REQUIRES FULL CAPTIONING OF MUSIC AND SONG LYRICS FOR THE DEAF AND HARD OF HEARING

*Frances Choi**

Captions make movies and television shows accessible to deaf or hard of hearing individuals. Through advocacy for deaf audiences and increased legal action, there have been great strides in getting more movies, shows, and other sources of entertainment captioned. Several pieces of federal legislation have contributed to the increased efforts to provide accessibility to disabled individuals, namely the Americans with Disabilities Act (“ADA”). State legislation, like California’s Unruh Act, has also contributed, however, despite advocacy and progressive legislation, the deaf and hard of hearing still face many hurdles when it comes to captioning.

This Comment focuses on the *Anthony v. Buena Vista Home Entertainment Inc.* case, a consumer class action lawsuit brought by nine deaf and hard of hearing plaintiffs against major movie and television show producers and distributors for not captioning music and song lyrics in their features. After examining the district court’s holding of each legal claim in *Anthony*, this Comment explains that although the *Anthony* court correctly applied and followed Ninth Circuit precedent, it should have incorporated public policy considerations into its opinion. To deny full captioning to the deaf and hard of hearing is to deny them equal and full enjoyment of movies and television shows, which violates the purpose of the ADA and other disability rights laws.

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I. INTRODUCTION

Captions provide access to movies and television shows to those who are deaf or hard of hearing.¹ Some believe that access to movies and television shows simply means that the deaf² community is able to watch the movies or television shows.³ This sort of access, however, is “meaningless when deaf people are unable to understand” what is going on in a movie or television show.⁴ “Without a visible way to understand verbal dialogue, informative sounds, and sound effects, deaf people enjoy watching movies as much as hearing people would if they had to watch movies with the volume off.”⁵

Although most movie and television producers⁶ were unwilling to caption their features in the past, advocacy for deaf audiences and increased legal action has resulted in the captioning of most movies and television shows today.⁷ Deaf audiences, however, still do not have full access to movies and television shows because producers are still not required to provide full captioning of music and song lyrics.⁸

This paper will discuss the legal analyses and the public policy considerations surrounding the issue of whether captioning for music—as well as dialogue—and song lyrics should be required. Part II will focus on

1. John F. Stanton, *[Song Ends]—Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157, 158 (2015) (“To make a movie or television show accessible to deaf viewers, the producer must provide captions that allow the deaf person to ‘hear’ the program’s spoken words by reading them.”).

2. For efficiency, this Comment will use “deaf” to refer to individuals who are “deaf and hard of hearing.”

3. Faye Kuo, Comment, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUT. & INFO. L. 159, 159–60 (2004).

4. *Id.* at 160.

5. *Id.*

6. For efficiency, this Comment will use “producers” to refer to “movie and television producers.”

7. John F. Stanton, *[Song Ends]—Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157, 163 (2015).

8. *See id.* at 158.

the legislative background that has contributed to the accessibility of captioning, analyze the copyright defense that producers have given for why they do not want to caption music and song lyrics, and lastly, discuss predictions of class action lawsuits raised under consumer laws. Part III will examine *Anthony v. Buena Vista Home Entertainment Inc.*, a consumer class action lawsuit brought by deaf and hard of hearing plaintiffs against major movie and television show producers and distributors. It will also examine the district court's holding of each individual claim and will provide a comparison of past precedent to each claim. Part IV will discuss the public policy that the court in *Anthony* should have considered in making its decision. Part V will provide recommendations for how Plaintiffs should argue in future similar lawsuits. Part VI will discuss what actions producers should take to prevent future lawsuits. Finally, Part VII will conclude and explain why the court should have incorporated public policy into their opinion in *Anthony*.

II. BACKGROUND

A. *Legislation That Has Contributed to the Accessibility of Captioning*

Several pieces of legislation have contributed to the expansion of captioning: the Captioned Films Act,⁹ the Individuals with Disabilities in Education Act ("IDEA"),¹⁰ section 504 of the 1973 Rehabilitation Act,¹¹ the Americans with Disabilities Act of 1990 ("ADA"),¹² the Television Decoder Circuitry Act ("TDCA"),¹³ the Telecommunications Act of 1996 ("1996 Act"),¹⁴ and the Communications and Video Accessibility Act of 2010 ("CVAA").¹⁵ According to the National Association of the Deaf,

9. *Id.* at 166.

10. *Id.* at 166 n.60.

11. *Id.* at 167.

12. John F. Stanton, *[Song Ends]—Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157, 167 (2015).

13. *Id.* at 168.

14. *Id.* at 169.

15. *Id.* at 166–69.

these laws require accommodations—such as captioning—to ensure equal access, to ensure an equal opportunity to participate, and to create effective communication with people who are deaf or hard of hearing.¹⁶

Through the Captioned Films Act, Congress used federal funds to provide captions for films and to distribute these films to state schools and other state agencies for the deaf.¹⁷ This was the first attempt to address the captioning issue.¹⁸ The Captioned Films Act was later incorporated into the IDEA.¹⁹ These statutes have been used to provide captioning for access to educational programs and services.²⁰

Section 504 of the Rehabilitation Act of 1973 was enacted to prohibit discrimination against the disabled “receiving federal financial assistance” under any federal program.²¹ Through litigation, advocates tried to use section 504 to argue that television broadcasting should be more accessible to the deaf.²² Unfortunately, courts were not willing to interpret section 504 broadly enough to require public broadcasters to caption their programs.²³ However, in *Community Television of Southern California v. Gottfried*, the United States Supreme Court acknowledged that public broadcasting stations may not “simply ignore the needs of the hearing impaired in discharging its responsibilities to the community which it serves.”²⁴

16. See *When is Captioning Required?*, NAT’L ASS’N OF THE DEAF, <http://www.nad.org/resources/technology/captioning-for-access/when-is-captioning-required> [<http://perma.cc/3ZK7-LR2Z>].

17. Stanton, *supra* note 12, at 166.

18. *Id.*

19. *Id.* at 166 n.60.

20. *When is Captioning Required?*, *supra* note 16.

21. 29 U.S.C. § 794 (2012) (effective Oct. 1, 2016).

22. Stanton, *supra* note 12, at 167 (citing *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983); *Greater L.A. Council on Deafness, Inc. v. Cnty. Television of S. Cal.*, 719 F.2d 1017 (9th Cir. 1983)).

23. *Id.*

24. *Gottfried*, 459 U.S. at 508.

Next came the ADA in 1990, which is much broader than section 504 of the 1973 Rehabilitation Act.²⁵ The ADA “is one of America’s most comprehensive pieces of civil rights legislation” and prohibits discrimination against the disabled from having the same opportunities or being able to “participate in the mainstream of American life.”²⁶ The passing of the ADA was a “groundbreaking victory” because those with disabilities were now entitled to public accommodations and no longer had to rely on “charitable accommodations from those who felt inclined to do so.”²⁷ Title III of the ADA specifically prohibits discrimination of the disabled in places of public accommodations (“PPAs”).²⁸ Although the ADA does not explicitly outline a captioning requirement, there have been several cases that have advocated for captioning in movie theaters under the ADA.²⁹ For the most part, the courts have resisted interpreting the ADA broadly enough to require captioning,³⁰ but there have also been successes when plaintiffs do not ask for a countrywide requirement of captioning.³¹

Congress passed the TDCA in 1990.³² This act required all televisions larger than thirteen inches and built after July 1993 to have a

25. Stanton, *supra* note 12, at 167–68 (citing 42 U.S.C. § 12101 (2012) (effective Jan. 1, 2009)).

26. *Introduction to the ADA*, U.S. DEP’T OF JUST. CIV. RTS. DIVISION, http://www.ada.gov/ada_intro.htm [<http://perma.cc/PG35-N232>].

27. Faye Kuo, Comment, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUT. & INFO. L. 159, 162–63 (2004).

28. 42 U.S.C. § 12182(a) (stating that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

29. See *Civil Rights—Americans with Disabilities Act—District Court Approves Settlement Requiring Movie Theaters to Provide Closed Captioning for Deaf and Hard-of-Hearing People*—Ball v. AMC Entertainment, Inc., 118 HARV. L. REV. 1777, 1777 (2005).

30. See *id.* (citing Todd v. Am. Multi-Cinema, Inc., No. Civ. A. H-02-1944, 2004 WL 1764686, at *4 (S.D. Tex. Aug. 5, 2004) and Cornilles v. Regal Cinemas, Inc., No. Civ.00-173-AS, 2002 WL 31469787, at *1 (D. Or. Mar. 19, 2002)).

31. See generally Ball v. AMC Entm’t, Inc., 246 F. Supp. 2d 17 (D.D.C. 2003).

32. 47 U.S.C. § 303 (2012) (effective Oct. 8, 2010).

caption decoder built-into the television.³³ Before the TDCA, viewers would have to buy their own separate decoder that would turn on captions on their television.³⁴ After the passing of the TDCA, televisions had a “captioning chip,” which allowed viewers to turn on captions as an option, thus making captioning more accessible.³⁵ Later, the 1996 Act required that broadcasters caption all new television programs by 2006.³⁶ In 2010, the CVAA further expanded captioning requirements by mandating that “modern communications,” including the Internet and mobile devices, be better accessible to the disabled.³⁷

Together, these laws communicate a clear message that the deaf should have the same accessibility to communications, entertainment, and places of public accommodations. The laws have worked toward addressing inaccessibility issues that many disabled people face and have given advocates a voice in their fight for equal access. However, while these laws have led to great strides, the deaf population still does not have the same access to movies and television shows as the rest of the population.

B. The Copyright Defense Against Captioning Music & Song Lyrics

Due to the aforementioned legislation and the advancement of technology, more movies and television shows now have captioning for the dialogue spoken in their features.³⁸ However, the deaf are still denied full and equal access because music and song lyrics are not captioned.³⁹ One of

33. Kuo, *supra* note 27, at 169 (citing *Closed Captioning on Television*, FED. COMM. COMMISSION, <http://www.fcc.gov/cgb/consumerfacts/closedcaption.html> [<http://perma.cc/MP5K-5ADD>]).

34. Stanton, *supra* note 12, at 168 n.72 (citing Sy DuBow, *The Television Decoder Circuitry Act—TV for All*, 64 TEMPLE L. REV. 609, 616–18 (1991)).

35. *Id.* at 168 (citing *DuBow*, at 616–18).

36. Kuo, *supra* note 27, at 169 (citing 47 U.S.C. § 613).

37. *21st Century Communications and Video Accessibility Act (CVAA)*, FED. COMM. COMM’N, <http://www.fcc.gov/consumers/guides/21st-century-communications-and-video-accessibility-act-cvaa> [<http://perma.cc/7VXP-N4FP>].

38. *Id.*

39. Stanton, *supra* note 12, at 158.

the main defenses that producers have given for why they do not caption music and song lyrics is the “copyright defense.”⁴⁰

Movie and television show makers often claim that the reason they do not include music and song lyrics on their DVD features is because they do not have the license to include the lyrics on the DVD.⁴¹ Yet before the advent of DVDs, there were very few producers who would refuse to caption music and song lyrics.⁴² John F. Stanton, chair of the Public Affairs Council of the Alexander Graham Bell Association of the Deaf and Hard of Hearing, believes that the copyright defense and the decision to cease music and song lyric captioning arose due to two cases: *Bourne Co. v. Walt Disney Co.* and *ABKCO Music, Inc. v. Stellar Records, Inc.*⁴³ In these cases, the courts found that having captioned song lyrics on “sing-along” VHS tapes⁴⁴ and karaoke machines⁴⁵ infringed upon the copyrights to the songs and required a license for producers to use them.⁴⁶ Since then, bringing music and song lyric captions back has been a struggle for advocates.

While the disappearance of music and song lyric captions has been attributed to the copyright defense, Stanton does not believe this is a valid legal excuse.⁴⁷ Stanton argues that applying the fair use defense will “lead to harmonization between the Copyright Act and accessibility mandates” in regards to the captioning of music and song lyrics.⁴⁸ The fair use doctrine allows one to use or copy copyrighted work for certain purposes such as

40. *Id.* at 158–59.

41. *Id.* at 158.

42. *Id.* at 160–61.

43. *Id.* at 180–81.

44. Stanton, *supra* note 12, at 180 (citing *Bourne Co. v. Walt Disney Co.*, No. 91 Civ. 0344, 1992 WL 204343, at *7 (S.D.N.Y. Aug. 7, 1992)).

45. *Id.* at 181 (citing *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 65–66 (2d Cir. 1996)).

46. *Id.* at 180–81.

47. *Id.* at 159.

48. *Id.* at 183.

“criticism, comment, news reporting, teaching, scholarship, or research.”⁴⁹ Stanton states that if the use or copying is considered “transformative,” then “it supports a finding of fair use.”⁵⁰ Stanton avers that there is a great public benefit or “transformative” use to captioning song lyrics because it provides accessibility for deaf viewers.⁵¹

Stanton further argues that it does not displace a potential market or represent a “lost sale” for copyright holders.⁵² Generally, the lower the harm from the use of the copyright on the copyright holder, the less proof is required to show there is a public benefit to captioning.⁵³ Because the use of song lyrics in captioning would not affect the marketplace for those songs, the copyright holders in those songs would not suffer significant harm⁵⁴ and consequently, movie and television show producers would not need to show extensive evidence of a public benefit from captioning. However, even if they were held to such a high standard, producers would be able to prove that there is “a great public benefit” in captioning music and song lyrics for the deaf.⁵⁵ Therefore, given the fair use defense, Stanton does not believe that copyright violation is a valid legal argument for producers to claim they cannot caption music and song lyrics.⁵⁶

C. Prediction of Class Action Lawsuits

Stanton believes that federal laws are not “extensive enough to correct every instance of disability inaccessibility” and believes that state laws could play a larger role in impacting the issue of captioning music and

49. 17 U.S.C. § 107 (2012).

50. Stanton, *supra* note 12, at 183 (citing Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 101 (2d Cir. 2014)).

51. *Id.* at 184.

52. *Id.* at 185.

53. *Id.* at 186 (citing *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1049 (S.D.N.Y. 1994)).

54. *Id.*

55. Stanton, *supra* note 12, at 186.

56. *Id.* at 183–86.

songs.⁵⁷ Because the ADA is not preemptive, it allows for action under state and local laws so long as these laws provide the same or greater protection as the ADA.⁵⁸

Stanton specifically discusses California's Unruh Act.⁵⁹ The Unruh Act states that those who are disabled are "entitled to full and equal accommodations . . . in all business establishments of every kind whatsoever."⁶⁰ Stanton points out that although the language of this law seems broad enough to also apply to DVD producers, California courts have found that DVD producers must intentionally discriminate against the disabled for there to be affirmative misconduct on their part.⁶¹

Stanton also believes it would be possible for plaintiffs to use state consumer law remedies to sue DVD producers for failing to provide full captioning of songs.⁶² He states that these consumer law cases would most likely be brought as class actions,⁶³ which is precisely what happened in *Anthony v. Buena Vista Home Entertainment Inc.*⁶⁴

III. ANTHONY V. BUENA VISTA HOME ENTERTAINMENT INC.

A. Parties

Plaintiffs in *Anthony v. Buena Vista Home Entertainment Inc.* consisted of nine deaf and hard of hearing individuals who shared the common experience of not having music and song lyrics captioned in the

57. *Id.* at 186.

58. *Id.* at 188.

59. *Id.* at 189.

60. Stanton, *supra* note 12, at 189 (citing CAL. CIV. CODE § 51(b) (West 2016) (effective Jan. 1, 2016)).

61. *Id.* (citing *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 428–31 (9th Cir. 2014)).

62. *Id.*

63. *Id.* at 190.

64. *See generally* *Anthony v. Buena Vista Home Entm't Inc.*, No. 2:15-cv-09593-SVW-JPR (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016).

features they purchased.⁶⁵ The defendants in this case were major producers and distributors of movies and television shows in the United States.⁶⁶ Plaintiffs brought this action against the following defendants: Buena Vista Home Entertainment Inc., Netflix, Paramount Pictures Corp., Sony Pictures Entertainment Inc., Sony Pictures Home Entertainment LLC, Walt Disney Co., Warner Bros. Entertainment Inc., and Warner Home Entertainment Inc.⁶⁷

B. Plaintiffs' Complaint

On October 19, 2015, plaintiffs brought a consumer class action on behalf of themselves and others with hearing loss or impairments who purchased a movie theater ticket and/or purchased, rented, or streamed a movie or television show with the expectation that it contained captions for the entire film, including the song lyrics.⁶⁸ Plaintiffs alleged that defendants falsely advertised their movies and television shows as fully captioned or subtitled for the deaf.⁶⁹ Defendants' captions did not provide song lyrics⁷⁰ and because of this, plaintiffs claimed that they were deprived of a complete viewing experience.⁷¹

C. The District Court's Decision

The district court granted the defendants' Motion to Dismiss.⁷² In analyzing the case, the court separated the plaintiffs' claims into: (1)

65. Complaint at 2–6, *Anthony v. Buena Vista Home Entm't Inc.*, No. 2:15-cv-09593-SVW-JPR (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016).

66. *Id.* at 6–7.

67. *Id.*

68. *Id.* at 10–11 (“Plaintiffs are deaf and hard of hearing individuals who have purchased tickets to movies, purchased or rented DVDs, or purchased or rented movies or shows via streaming services produced and/or distributed by Defendants which were marked with and advertised as having captions or subtitles, but the music and song lyrics were not captioned or subtitled.”).

69. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 2.

70. Complaint, *supra* note 65, at 12.

71. *Id.* at 13.

72. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 1.

misrepresentation claims; (2) warranty claims; and (3) Unruh Act claim.⁷³ The court held that all of the claims were insufficient and dismissed the case.⁷⁴

1. *Misrepresentation Claims*

Plaintiffs' misrepresentation claims stated that defendants violated the Unfair Competition Law ("UCL"), California's Consumers Legal Remedies Act ("CLRA"), and California's False Advertising Law ("FAL").⁷⁵ The UCL prohibits unfair competition, which includes "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising."⁷⁶ The CLRA states that it is unfair competition and deceptive practices to sell or lease goods to any consumer after "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have."⁷⁷ Additionally, the FAL prohibits companies from making false statements or advertisements that mislead consumers about the product.⁷⁸

Under the UCL, CLRA, and FAL, the court stated that the plaintiffs needed to show that defendants' misrepresentation would likely deceive a reasonable consumer.⁷⁹ The plaintiffs argued that movies and television shows advertised as captioned *should* include music and song lyrics.⁸⁰ However, the plaintiffs never argued that consumers *expected* the movies and television shows to include captioned songs.⁸¹ The court discussed that it was unclear whether the plaintiffs were even deceived by the "fully

73. *Id.* at 3–8.

74. *Id.* at 1.

75. *Id.* at 3.

76. CAL. BUS. & PROF. CODE § 17200 (West 2016).

77. CAL. CIV. CODE § 1770(a)(5) (West 2016).

78. BUS. & PROF. § 17500.

79. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 3.

80. *Id.* at 3–4.

81. *Id.* at 4.

captioned” advertising because their complaint stated that the exclusion of captioned music and song lyrics was widespread.⁸² Furthermore, in their complaint and opposition brief, the plaintiffs stated that they would buy and rent movies and television shows even without full captioning and subtitling because they did not have many alternatives.⁸³ Thus, the court concluded that the plaintiffs failed to show that they and other reasonable consumers were or would be deceived by defendants’ alleged misrepresentation.⁸⁴

2. *Warranty Claims*

Next, the court addressed plaintiffs’ warranty claims under California’s Song-Beverly Consumer Warranty Act (“Song-Beverly Act”).⁸⁵ The Song-Beverly Act establishes that a manufacturer, retailer, or distributor breaches the implied warranty of fitness when it knowingly sells consumer goods that fail to meet their required purpose, and where the buyer relies on the manufacturer, retailer, or distributor’s skill or judgment in providing goods that fit this purpose.⁸⁶ The Song-Beverly Act also states that there is a breach of the implied warranty of merchantability when the consumer good fails to “pass without objection in the trade under the contract description,” fails to fit “the ordinary purposes for which such goods are used,” fails to be “adequately contained, packaged, and labeled,” and fails to “conform to the promises or affirmations of fact made on the container or label.”⁸⁷

The court dismissed the plaintiffs’ claim that defendants breached an implied warranty of fitness because the court found that neither a sale nor a consumer good was involved as required by the Song-Beverly Act.⁸⁸ Plaintiffs tried to assert that purchasing DVDs was a sale, but the court

82. *Id.*

83. *Id.* at 5.

84. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 4.

85. *Id.* at 5–7 (citing CAL. CIV. CODE §§ 1791.1–1792.1 (West 2016)).

86. CIV. § 1791.1.

87. *Id.* § 1791.1(a).

88. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 6–7.

determined that the purchase of DVDs was evidence of a purchase of a license to view rather than a sale.⁸⁹ Furthermore, the court held that the video *content* of defendants' movies and television shows did not constitute a "consumer good."⁹⁰ The court explained that only physical products, not expressive content, fall under the product liability law.⁹¹ Because song and music lyrics are expressive content, the court held that the lyrics do not fall under the Song-Beverly Act.⁹²

While plaintiffs tried to argue that this was a consignment for sale, which is also covered under the Song-Beverly Act, the court held that a consignment is when a person issues goods to a merchant, without passing title, and the merchant merely takes possession of the goods until the merchant is ready to sell the goods.⁹³ In this case, plaintiffs purchased movies and television shows for personal use and not to sell at a later time.⁹⁴

3. *Unruh Act Claim*

Finally, the court analyzed plaintiffs' civil rights claim under the Unruh Civil Rights Act ("Unruh Act").⁹⁵ Under the Unruh Act, those with disabilities "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."⁹⁶ Plaintiffs claimed that defendants violated the Unruh Act because they were not providing equal access to music and song lyrics for the deaf.⁹⁷ However, the court ruled against the plaintiffs' Unruh Act claim

89. *Id.* at 6 (citing 17 U.S.C. § 202 (2012) ("Transfer of ownership of any material object" in which a copyrighted work is embodied "does not of itself convey any rights in the copyrighted work embodied in the object . . .")).

90. *Id.* at 7.

91. *Id.*

92. *Id.* at 6.

93. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 6.

94. *Id.*

95. *Id.* at 7–8.

96. CAL. CIV. CODE § 51(b) (West 2016) (effective Jan. 1, 2016).

97. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 7.

because they failed to show intentional discrimination.⁹⁸ The court noted that the movies and television shows provided captioning that was available to all audiences.⁹⁹

a. Legal Analysis of the District Court's Decision

1. *Misrepresentation Claims*

The court held that plaintiffs' misrepresentation claims failed because plaintiffs did not show that the defendants' alleged misrepresentation would deceive a reasonable consumer.¹⁰⁰ The court drew a reasonable inference based on the plaintiffs' statements that they continuously ran into this problem.¹⁰¹

Plaintiffs argued that part of their reliance was established under the impression that different studios could have different captioning procedures and that studios may decide to change the amount they caption.¹⁰² While this may be true, the court correctly inferred that if plaintiffs were still buying defendants' movies and television shows knowing that many were likely to not be fully captioned, there could not be reasonable reliance.¹⁰³ However, the court should have addressed plaintiffs' argument that if they wanted "to watch a movie or show, they are limited to those produced by these defendant studios—as there are no fully captioned alternatives."¹⁰⁴

Plaintiffs argued that instead of using the reasonable reliance test based on a reasonable consumer, the court should have analyzed the allegations by how it would impact plaintiffs as part of a vulnerable population.¹⁰⁵ Plaintiffs used *Lavie v. Proctor & Gamble Co.* in support of

98. *Id.* at 8.

99. *Id.*

100. *Id.* at 3–4.

101. *See id.* at 4.

102. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 4.

103. *Id.*

104. Pl.'s Opp'n to Def.'s Mot. to Dismiss at 7, *Anthony v. Buena Vista Home Entm't Inc.*, No. 2:15-cv-09593-SVW-JPR (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016).

105. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 4.

this argument.¹⁰⁶ The *Lavie* court held that advertisements should be analyzed through the eyes of vulnerable populations rather than through the eyes of a reasonable consumer.¹⁰⁷

However, the court stated that *Lavie* involved children who were considered a vulnerable population because they did not have the capacity and maturity to be compared with a reasonable consumer.¹⁰⁸ In this case, the deaf are not a vulnerable population under *Lavie* because their disability does not affect their capacity to know when it is reasonable to rely on an advertisement.¹⁰⁹ Plaintiffs ultimately failed to show how they might be more vulnerable to advertisements than others.¹¹⁰

2. *Warranty Claims*

Next, the court correctly held that plaintiffs failed to show there was a sale of consumer goods, as required by the Song-Beverly Act.¹¹¹ The court stated that the DVDs are themselves a consumer good because they are a physical and tangible product.¹¹² However, the court determined that the songs and music within the DVDs are not consumer goods but rather expressive content.¹¹³ This analysis is supported by *Winter v. G.P. Putnam's Sons*, which held that the purpose of products liability law is “focused on the tangible world and does not take into consideration the unique characteristics of ideas and expression.”¹¹⁴ The music and songs within movies and television shows are clearly within the realm of “ideas and expression” rather than the world of “tangible” products. Therefore,

106. *Id.*

107. *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 506–07 (Ct. App. 2003).

108. *Id.* at 494.

109. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 4.

110. *Id.*

111. *Id.* at 6.

112. *Id.* (citing *Atkinson v. Elk Corp.*, 135 Cal. Rptr. 2d 433, 443–47 (Ct. App. 2003)).

113. *Id.*

114. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991).

the court correctly held that the music and songs were not consumer goods.¹¹⁵

The court then discussed how there was no “sale” under the Song-Beverly Act.¹¹⁶ Section 202 of the Act states that “ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied.”¹¹⁷ Since the video content of the movies and television shows remain in the copyright owner’s title,¹¹⁸ the court was correct in determining there was no sale in this case under the Song-Beverly Act.

3. *Unruh Act Claim*

The court correctly followed Ninth Circuit precedent and held that the plaintiffs failed to provide evidence that defendants intentionally discriminated against the deaf.¹¹⁹ To support their Unruh Act claim, plaintiffs presented case law, which stated that evidence of disparate impact might be probative of intentional discrimination.¹²⁰ However, the court noted that this is not the controlling precedent in the Ninth Circuit.¹²¹

To assert an Unruh Act violation, plaintiffs must show evidence of intentional discrimination in public accommodations.¹²² For example, in *Greater Los Angeles Agency on Deafness v. Cable News Network, Inc.*, the Ninth Circuit held that the Greater Los Angeles Agency on Deafness, Inc. (“GLAAD”) did not meet its burden of showing that CNN intentionally discriminated against the deaf by not captioning their online videos.¹²³ The court reasoned that CNN’s practice of not captioning its online videos

115. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 6.

116. *Id.*

117. 17 U.S.C. § 202 (2012).

118. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 6.

119. *Id.* at 8.

120. *Id.*

121. *Id.*

122. *Id.* at 7 (citing *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 426–27 (9th Cir. 2014)).

123. *Greater L.A. Agency on Deafness, Inc.*, 742 F.3d at 423–26.

applied equally to all CNN.com visitors and was therefore not intentional discrimination against the deaf.¹²⁴ The *GLAAD* case, as well as other case law,¹²⁵ provides that when captioning is or is not available to *all* audience members, there is no “willful, affirmative misconduct” or intentional discrimination under the Unruh Act.¹²⁶ Since the captioning of movies and television shows in this case was equally available to all consumers, the court correctly held that there was no intentional discrimination against the deaf.¹²⁷

4. Agreement with District Court’s Legal Reasoning

Based on the above, the court’s legal reasoning for granting defendants’ Motion to Dismiss was sound. Plaintiffs failed to submit sufficient evidence to support their misrepresentation claims, warranty claims, and Unruh Act claim as required under the statutes and case law.¹²⁸ However, the court should have considered and incorporated in its opinion the following public policy concerns.

IV. PUBLIC POLICY CONSIDERATIONS

Although the *Anthony* court correctly followed Ninth Circuit precedent, it should have also considered the public interest when reviewing plaintiffs’ claims under the Unruh Act. Since captioning involves the rights of a minority group, the court should have considered public policy by discussing the purpose behind disability rights laws.

A. Denying Equal & Full Enjoyment of Movies & Television Shows

To deny deaf audiences full access and enjoyment of a movie while the hearing public has full access is against public policy. Most people would agree that without music, movies and television shows would not be

124. *Id.* at 426.

125. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1228–29 (Cal. 2005); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012).

126. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 8 (citing *Koebke*, 115 P.3d at 1228–29).

127. *Id.*

128. *Id.* at 5, 7–8.

as enjoyable or have the same impact on audiences.¹²⁹ Music plays an integral role in movies and television by introducing audiences to the scene and the characters, illustrating the character's state of mind, and inducing audiences to feel emotions.¹³⁰ Without captions for music and song lyrics, all deaf persons can do is sit in silence while the rest of the audience enjoys the sounds and effects of music in movies and television shows.¹³¹ All that appears on the screen for the deaf are words such as “[SONG PLAYING]” at the start of the song and “[SONG ENDS]” as the song concludes.¹³²

It is without a doubt that those who are deaf value and enjoy song lyrics just as much as those without any hearing disabilities.¹³³ The deaf and hard of hearing make up a significant portion of the United States population¹³⁴ and they deserve equal opportunities to enjoy movies and television. Given these facts, courts have an obligation to consider public policy when deciding whether full captions, including music and song lyrics, should be required for all film and television features.

129. Tony Woodcock, *Why Music is Important: The Experience*, HUFFINGTON POST (Sept. 13, 2012, 10:47 AM), http://www.huffingtonpost.com/tony-woodcock/music-movies-themes_b_1877492.html [<http://perma.cc/9LJ5-YCHG>].

130. *Id.*

131. *See id.*

132. John F. Stanton, *[Song Ends]—Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157, 161 n.21 (2015) (“Alternatively, the producers will just caption ‘[SINGING AIN’T NO MOUNTAIN HIGH ENOUGH]’ instead of the actual lyrics when the song is performed. This happens rather often.”).

133. Daniel Haney, Note, *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?*, 33 U. ARK. LITTLE ROCK L. REV. 465, 488 (2011) (“It is the act of communication and understanding that both hearing and deaf individuals have access to; therefore, their communication 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.”).

134. *Quick Statistics about Hearing*, NAT’L INST. ON DEAFNESS & OTHER COMM. DISORDERS (Dec. 15, 2016), <http://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing> [<http://perma.cc/TS5S-CGH8>].

B. Going Against Legislation Protecting Disability Rights

The purpose and policy behind the ADA and California's Unruh Act require that the deaf and hard of hearing be able to have full enjoyment of movies and television shows. The ADA was created in 1990 with the goal of providing people with disabilities "with the means to gain access to everyday occasions and activities that many people take for granted."¹³⁵ It was one of the most influential pieces of civil rights legislation.¹³⁶ When Congress passed the ADA, Congress "made it patently clear that American businesses and state/local governments were required to make efforts toward ending discrimination against individuals with disabilities."¹³⁷

Meanwhile, California's Unruh Act of 1959 established that those with disabilities were entitled to "full and equal accommodations" in business establishments.¹³⁸ While the statutory language of California's Unruh Act may seem broader than the ADA and therefore more protective of disability rights, courts have held that an Unruh Act claim is viable only when there is evidence of intentional discrimination.¹³⁹ The court in *Anthony* upheld this requirement.¹⁴⁰ Thus, the Unruh Act is actually not broader than the ADA.

It is important to note that the Unruh Act and all other state disability laws and regulations must provide the same or greater protection as that provided for by the ADA.¹⁴¹ In fact, the statutory definitions of the ADA and the Unruh Act dictate that a violation of the ADA is a violation of the Unruh Act.¹⁴²

135. Faye Kuo, Comment, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUT. & INFO. L. 159, 206 (2004).

136. *Introduction to the ADA*, U.S. DEP'T OF JUST. CIV. RTS. DIVISION, http://www.ada.gov/ada_intro.htm [<http://perma.cc/PG35-N232>].

137. Kuo, *supra* note 135, at 163.

138. CAL. CIV. CODE § 51(b) (West 2016) (effective Jan. 1, 2016).

139. Stanton, *supra* note 132, at 189 (citing Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc., 742 F.3d 414, 428–31 (9th Cir. 2014)).

140. *Anthony v. Buena Vista Home Entm't Inc.*, No. 2:15-cv-09593-SVW-JPR, at 14 (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016).

141. Stanton, *supra* note 132, at 186.

142. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023 (N.D. Cal. 2012).

The ADA gives those who suffer from a disability a voice and legal power.¹⁴³ It allows those with disabilities to seek legal remedy for discrimination if the type of discrimination falls under Titles I, II, or III of the ADA.¹⁴⁴ Titles II and III of the ADA have specifically been cited by the proponents of full captioning for the deaf.¹⁴⁵ Title II of the ADA ensures that no “qualified individual with a disability” will be excluded from participation in and benefits of a public entity.¹⁴⁶ Title II also regulates state and local governments.¹⁴⁷ Meanwhile, Title III of the ADA regulates places of public accommodations.¹⁴⁸

Looking at the language of the ADA and Unruh Act, courts should recognize that the purpose of both statutes is to provide equal access to those who are deaf. Even before the enactment of the ADA, the United States Supreme Court in *Gottfried* acknowledged that making things “more available and more understandable to the substantial portion of our population that is handicapped by impaired hearing” would serve the public interest.¹⁴⁹ Referring to the Rehabilitation Act of 1973, the Supreme Court stated that there was a federal interest in ensuring that individuals with handicaps had the opportunity to live “full and independent lives.”¹⁵⁰

C. *Not Affording the Same Rights As Those in Other Circuits*

The ADA, California’s Unruh Act, and the Supreme Court have made it clear that there is a strong public interest in ensuring that individuals with disabilities receive equal access to services provided by public and private entities.¹⁵¹ However, as demonstrated in *Anthony* and *GLAAD*, the Ninth

143. Kuo, *supra* note 135, at 163.

144. *Id.*

145. Haney, *supra* note 133, at 478.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 508 (1983).

150. *Id.*

151. 42 U.S.C. § 12101 (2012) (effective Jan. 1, 2009); CAL. CIV. CODE § 51(b) (West 2016) (effective Jan. 1, 2016); *see Gottfried*, 459 U.S. at 508.

Circuit has not provided the deaf with the necessary full access to captioning that should be granted based on the purpose of the ADA and California's Unruh Act.¹⁵²

Cullen v. Netflix is another example where the court limited the breadth of the ADA and California's Unruh Act.¹⁵³ The plaintiff in this case claimed that Netflix's streaming library did not provide adequate accessibility to hearing-impaired individuals because only a small amount of its streaming library was captioned.¹⁵⁴ Similar to *Anthony*, the *Cullen* court held that plaintiff's Unruh Act claim was invalid because the plaintiff failed to show how having limited caption features on Netflix's streaming library constituted "intentional discrimination."¹⁵⁵ The allegations against Netflix, according to the court, simply described "a policy with a disparate impact on hearing-impaired individuals, but do[es] not describe willful, affirmative misconduct."¹⁵⁶ Furthermore, the court held that Netflix's streaming library was not a place of public accommodation because, under Ninth Circuit precedent, websites are not places "of public accommodations under the ADA" because they are not physical spaces.¹⁵⁷

Yet the *Cullen* court also noted that other circuits have expanded the meaning of a "place of public accommodation."¹⁵⁸ For example, the First Circuit established that "places of public accommodation" are not restricted to only physical places.¹⁵⁹ Similarly, the Seventh Circuit stated that a "'place of public accommodation'" included public facilities in physical and electronic spaces.¹⁶⁰ In fact, a Massachusetts District Court following

152. See generally *Anthony v. Buena Vista Home Entm't Inc.*, No. 2:15-cv-09593-SVW-JPR (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016).

153. See generally *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

154. *Id.* at 1024.

155. *Id.*

156. *Id.*

157. *Id.* at 1023–24.

158. *Cullen*, 880 F. Supp. 2d at 1023–24.

159. *Id.* at 1023 (citing *Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12, 19–20 (1st Cir. 1994)).

160. *Id.* (citing *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999)).

First Circuit precedent recently held that Netflix's streaming library does fall under the ADA because the streaming library can fall under several of the enumerated ADA categories including a "service establishment," "a place of exhibition or entertainment," or a "rental establishment."¹⁶¹ However, despite examples of other circuits upholding the rights provided to the deaf by the ADA, the *Cullen* court held that it must follow Ninth Circuit precedent.¹⁶²

Other circuits have been more successful in upholding the ADA's purpose. For example, in *Feldman v. Pro Football, Inc.*, a Maryland District Court held that Title III of the ADA requires that deaf individuals be provided equal access to the aural information that is broadcast over a stadium public address system.¹⁶³ The plaintiffs in the *Feldman* case were deaf Washington Redskins's fans who wanted the Redskins and FedExField to caption the stadium's public address announcements and display them on the JumboTrons.¹⁶⁴ They had requested that the stadium caption "referee calls, plays during the game, and emergency announcements."¹⁶⁵

The defendants in *Feldman* argued that Title III of the ADA does not require them to provide auxiliary aids to ensure access to all the aural information at FedExField.¹⁶⁶ They argued that the only thing they were required to provide were assistive listening devices, which they claimed were always provided.¹⁶⁷ Furthermore, the defendants in *Feldman* insisted they were only required to provide captioning for "material that is integral to the use of the stadium" and "that all information that is integral to the use of the stadium can be gathered solely from watching the game."¹⁶⁸

161. *Id.* (citing Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012)).

162. *Id.* (citing *Ky Minh Pham v. Hickman*, No. 06-17172, 2007 WL 4553543, at *3 (9th Cir. Dec. 27, 2007) ("[I]n the absence of Supreme Court law, [a district court] is bound to follow Ninth Circuit precedent.")).

163. *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 709 (D. Md. 2008).

164. *Id.* at 699.

165. *Id.*

166. *Id.* at 707–08.

167. *Id.*

168. *Feldman*, 579 F. Supp. 2d at 708.

Lastly, the defendants asserted that the law does not require them to provide captioning so long as they provide some kind of auxiliary aid.¹⁶⁹

Despite their arguments, the *Feldman* court held that the ADA did require defendants to provide equal access to the aural information and announcements broadcast at FedExField.¹⁷⁰ This meant that FedExField must “effectively communicate[]” to deaf individuals.¹⁷¹ The court rejected defendants’ argument that they were only required to provide assistive listening devices, especially considering that the assistive listening devices seemed to be useless to plaintiffs.¹⁷² The court stated that it “cannot ignore the broader mandates of the ADA and its implementing regulations.”¹⁷³

Next, the *Feldman* court rejected defendants’ claim that by simply watching the game, one will be provided with the integral information at FedExField.¹⁷⁴ In addition to providing a football game, defendants “also provide public address announcements, advertisements, music, and other aural information.”¹⁷⁵ The court determined that all of these things constituted “a good, service, privilege, advantage, or accommodation” under the ADA and that defendants must provide access to them through “some form of auxiliary aid or service.”¹⁷⁶

Lastly, the court in *Feldman* specified that the music broadcast at FedExField was considered “information” or an “announcement” and that the music was part of a “program, service, or activity” which defendants were providing to their fans.¹⁷⁷ By failing to provide auxiliary aids, defendants were providing access to hearing fans but not to deaf fans,

169. *Id.*

170. *Id.* at 709.

171. *See id.* at 699.

172. *Id.* at 709.

173. *Feldman*, 579 F. Supp. 2d at 709.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 704.

which goes against the ADA.¹⁷⁸ The *Feldman* court, unlike the court in *Anthony*, recognized that music is covered under one of the ADA categories and should be accessible to the deaf.¹⁷⁹ The Ninth Circuit should have recognized, as the court in *Feldman* recognized, that “one of the purposes of the ADA was to ‘provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.’”¹⁸⁰

D. Not Overly Burdensome for Studios to Provide Music & Song Captions

The United States Supreme Court in *Gottfried* was very clear in stating that no party “may simply ignore the needs of the hearing impaired.”¹⁸¹ However, the court also stated that it was important to weigh “technological feasibility and economic viability” with public interest to determine whether accommodating the deaf was technologically and economically burdensome.¹⁸² This consideration can also be found within the statutory language of the ADA.¹⁸³

Title II of the ADA states that the deaf can demand their preferred auxiliary aid accommodations from a public entity and that the public entity must use all available resources “in the funding and operation of the service, program, or activity.”¹⁸⁴ However, the ADA provides an exception if the government can show it would “result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.”¹⁸⁵

While Title III does not force private entities to give “primary consideration” to a certain requested auxiliary aid, Title III requires that

178. *Feldman*, 579 F. Supp. 2d at 704.

179. *Id.*

180. *Id.* at 708.

181. *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 508 (1983).

182. *Id.* at 506.

183. *See Duties*, 28 C.F.R. § 35.164 (2016).

184. *Haney*, *supra* note 133, at 479 (citing 28 C.F.R. § 35.164).

185. 28 C.F.R. § 35.164.

private entities “furnish appropriate auxiliary aids and services . . . to ensure effective communication with individuals with disabilities.”¹⁸⁶ However, it does not require private entities to provide an auxiliary aid if doing so 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.”¹⁸⁷ This was shown in *Feldman*, where the court found that defendants failed to indicate any specific hardship or undue burden that would result if they had to provide access to music lyrics at FedExField.¹⁸⁸ The court did not find any “genuine disputes of material fact” to show that it was infeasible to provide access to music that was being broadcast at FedExField and that defendants’ counsel was simply using “broad and conclusory statements” without providing concrete evidence of why providing access to music would result in undue burden.¹⁸⁹

Defendants in *Anthony* did not even address whether fully captioning movies and television shows would be an undue burden on them.¹⁹⁰ While plaintiffs in *Anthony* did not rely on the ADA and instead used California’s Unruh Act, defendants should still have addressed whether captioning music and songs would be burdensome because the Supreme Court in *Gottfried* was clear in stating that technological feasibility and economic viability need to be considered when deciding whether to pursue the public interest of accommodating the deaf.¹⁹¹ Since defendants in *Anthony* never claimed there was an undue burden,¹⁹² it should be assumed, like it was in *Feldman*, that there was no undue burden on defendants to caption music and song lyrics. Therefore, it would not be unreasonable or against the ADA for courts to hold that studios and production companies should provide music and song lyric captions.

186. Haney, *supra* note 133, at 479 (citing Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling a Conversation about Communication*, 35 FLA. ST. U. L. REV. 947, 995 (2008) and 28 C.F.R. § 36.303(b)(1)).

187. *Id.* at 480 (citing 28 C.F.R. § 36.303(a)).

188. *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 709–10 (D. Md. 2008).

189. *Id.*

190. *See generally* *Anthony v. Buena Vista Home Entm’t Inc.*, No. 2:15-cv-09593-SVW-JPR (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016).

191. *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 506 (1983).

192. *See generally* *Anthony*, No. 2:15-cv-09593-SVW-JPR.

E. Deaf & Hard of Hearing Population Increasing

Lastly, it is important for the public and courts to recognize that there are a significant number of people in the United States that are deaf or hard of hearing. According to the National Institute on Deafness and Other Communication Disorders (“NIDCD”), around one in eight Americans twelve years or older has hearing loss in both ears.¹⁹³ This is around thirteen percent of the population and constitutes around 30 million Americans.¹⁹⁴ Furthermore, the NIDCD found that approximately 15% of American adults eighteen years or older report having trouble hearing.¹⁹⁵ This equates to about 37.5 million Americans.¹⁹⁶

In addition, according to the United States Census Bureau, as the baby boomer generation ages, a large portion of the United States population will be composed of the elderly.¹⁹⁷ The baby boomer population, as of 2015, “ranges from 74.9 million to 82.3 million, depending on whether the generation begins with the birth year of 1943 or 1946.”¹⁹⁸ By 2029, more than 20% of the U.S. population will be over the age of sixty-five.¹⁹⁹ According to the Bureau, “this shift toward an increasingly older population is expected to endure.”²⁰⁰ By 2056, it is expected that the number of people who are sixty-five and over will be a

193. *Quick Statistics about Hearing*, *supra* note 134.

194. *Id.*

195. *Id.*

196. *Id.*

197. Sandra L. Colby & Jennifer M. Ortman, *The Baby Boom Cohort in the United States: 2012 to 2060*, U.S. CENSUS BUREAU 1, 1 (2014), <http://www.census.gov/prod/2014pubs/p25-1141.pdf> [<http://perma.cc/6LGX-K75E>] (“The cohort born during the post-World War II baby boom in the United States, referred to as the baby boomers, has been driving change in the age structure of the U.S. population since their birth. This cohort is projected to continue to influence characteristics of the nation in the years to come. The baby boomers began turning 65 in 2011 and are now driving growth at the older ages of the population.”).

198. *American Generation Fast Facts*, CNN (Oct. 20, 2016, 2:35 PM), <http://www.cnn.com/2013/11/06/us/baby-boomer-generation-fast-facts> [<http://perma.cc/JWB3-JWQZ>].

199. Colby & Ortman, *supra* note 197, at 1.

200. *Id.*

larger population than those under eighteen.²⁰¹ These statistics indicate that a significant portion of our population will have hearing impairments.²⁰²

These numbers should further convince courts that there is a strong public policy argument in requiring studios to fully caption their movies and television shows. Knowing that an even larger portion of the U.S. population may suffer from hearing loss in the future, courts should recognize the impact their decisions will have on this vulnerable population. By allowing production companies to continue their practice of not fully captioning their features, courts will deprive many Americans from equal access and enjoyment of movies and television shows.

V. RECOMMENDATION TO PLAINTIFFS

Despite the public policy interests described above, the court in *Anthony* did not rule in favor of plaintiffs.²⁰³ Plaintiffs in *Anthony* could have had a stronger argument by relying on the ADA and by limiting the scope of relief they sought.

While the statutory language of the Unruh Act seems to be broader than the ADA,²⁰⁴ plaintiffs in California courts have generally been unsuccessful when trying to apply the Unruh Act to captioning cases because California courts require plaintiffs to show “intentional discrimination.”²⁰⁵ This is difficult for plaintiffs to demonstrate because courts have ruled that as long as *all* consumers and viewers, including those who do not have a hearing disability, are given access to the same captioning, then it cannot be intentional discrimination.²⁰⁶

201. *Id.*

202. See *Hearing Loss and Older Adults*, NAT’L INST. ON DEAFNESS & OTHER COMM. DISORDERS (Dec. 7, 2016), <http://www.nidcd.nih.gov/health/hearing-loss-older-adults> [<http://perma.cc/F6WL-YYTB>].

203. *Anthony v. Buena Vista Home Entm’t Inc.*, No. 2:15-cv-09593-SVW-JPR, at 1 (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016).

204. John F. Stanton, [*Song Ends*]—*Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157, 188–89 (2015) (citing *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 428–31 (9th Cir. 2014)).

205. See *id.* at 189 (citing *Greater L.A. Agency on Deafness, Inc.*, 742 F.3d at 428–31).

206. *Anthony*, No. 2:15-cv-09593-SVW-JPR, at 8; *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012); *Greater L.A. Agency on Deafness, Inc.*, 742 F.3d at 426.

Plaintiffs in *Anthony* might have been successful had they claimed an ADA violation. For one, courts have not established an intentional discrimination requirement for an ADA claim.²⁰⁷ Therefore, plaintiffs would not have faced the challenge of proving that defendants had intentionally discriminated against them when they refused to caption music and song lyrics. Plaintiffs would simply have needed to show that by denying full captioning, defendants were not providing equal access to the audio in the DVDs, streaming libraries, and movie theaters.²⁰⁸ If plaintiffs had brought an ADA claim, they could have cited to *Feldman*, which specifically held that the ADA covered music and that music must be accessible to the deaf.²⁰⁹

However, the *Feldman* court only required the Washington Redskins and FedExField to provide captioning of music.²¹⁰ The court did not require all National Football League teams to provide music captioning in their stadiums.²¹¹ Although *Feldman* has yet to create a “movement toward captioning uniformity,”²¹² the case is a step in the right direction and perhaps an indication of how plaintiffs should present their captioning claims.

The *Feldman* court was not the only court that limited the scope of its decision to apply only to certain parties.²¹³ The court in *Ball v. AMC Entertainment, Inc.* also limited its decision to particular movie theaters rather than broadening the decision to encompass all movie theaters.²¹⁴

207. See *Cullen*, 880 F. Supp. 2d at 1024.

208. See *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 704 (D. Md. 2008).

209. *Id.*

210. Daniel Haney, Note, *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?*, 33 U. ARK. LITTLE ROCK L. REV. 465, 482 (2011).

211. *Id.*

212. See *id.*

213. See *Civil Rights—Americans with Disabilities Act—District Court Approves Settlement Requiring Movie Theaters to Provide Closed Captioning for Deaf and Hard-of-Hearing People—Ball v. AMC Entertainment, Inc.*, 118 HARV. L. REV. 1777, 1777 (2005) [hereinafter *Civil Rights*] (citing *Ball v. AMC Entm't, Inc.*, 315 F. Supp. 2d 120 (D.D.C. 2004)).

214. *Id.*

Plaintiffs in *Ball* claimed that certain movie theaters within the Washington, D.C. area, operated by AMC Entertainment, Inc. and Loews Cineplex Entertainment Corporation, were violating the ADA by failing to implement captioning or provide other auxiliary aids.²¹⁵ The court denied defendants' motion for summary judgment and noted that the deaf were "tired of waiting" for movie theaters to voluntarily provide captions or other interpretive aids.²¹⁶

Michael S. Stein discussed how the court in *Ball* did not dismiss plaintiffs' claims on summary judgment because the plaintiffs were tactical in limiting the relief they sought to "select theaters within a narrow geographical area."²¹⁷ Since the ADA does not explicitly state a captioning requirement, there have been several cases before *Ball* that have argued for captioning in movie theaters under the ADA.²¹⁸ Stein reports that, for the most part, these cases are unsuccessful because courts are reluctant to interpret the ADA broadly to require captioning.²¹⁹

However, the *Ball* court was willing and less reluctant to "remain faithful to the text and purpose of the ADA" because, unlike plaintiffs in other unsuccessful cases, the plaintiffs in *Ball* were not asking for a nationwide recognition of captioning.²²⁰ According to Stein, this strategy made it easier for the *Ball* court to dismiss summary judgment because they did not have to "worry about the practical consequences of ordering nationwide relief."²²¹ By not reading the ADA narrowly, the *Ball* court pressured the movie theaters to eventually settle.²²²

215. *Id.* at 1777–78 (citing *Ball*, 315 F. Supp. 2d at 121–22).

216. *See Ball*, 315 F. Supp. 2d at 123, 128.

217. *Civil Rights*, *supra* note 213, at 1777 (citing *Ball*, 315 F. Supp. 2d at 123).

218. *Id.*; *Todd v. Am. Multi-Cinema, Inc.*, No. Civ. A. H-02-1944, 2004 WL 1764686, at *2 (S.D. Tex. Aug. 5, 2004); *see Cornilles v. Regal Cinemas, Inc.*, No. Civ.00-173-AS, 2002 WL 31469787, at *1 (D. Or. Mar. 19, 2002).

219. *See Civil Rights*, *supra* note 213, at 1777 (citing *Todd*, 2004 WL 1764686, at *4 and *Cornilles*, 2002 WL 31469787, at *1).

220. *Id.*

221. *Id.*

222. *Id.*

As *Ball* and *Feldman* demonstrate, courts are generally more willing to side with plaintiffs when they are not pressured with the responsibility of implementing uniform captioning. This fact is unfortunate because it seems to imply that it may take some time before captioning will become a nationwide requirement. Nevertheless, deaf plaintiffs should strongly consider Stein's analysis and use similar tactics as plaintiffs did in *Ball* and *Feldman* by limiting the relief they seek.

VI. RECOMMENDATION TO STUDIOS

Studios, production companies, streaming services, and movie theaters give several reasons to justify why they refuse to provide captioning. For example, they claim that captioning is too burdensome, that captioning alters the nature of the movie or television show, and that captioning involves copyright issues.²²³

When it comes to arguments about why they do not want to caption music and song lyrics, studios, production companies, streaming services, and movie theaters assert copyright issues.²²⁴ However, as stated in Part II of this Comment, the movie and television industry can use the fair use defense and assert that captioning music and song lyrics in movies and television shows serves a great public benefit.²²⁵ In addition, as Stanton stated, the "lost sale" for copyright holders is very low and therefore the movie and television industry does not have a high burden in justifying captioning the music and song lyrics.²²⁶ Furthermore, it probably would not be difficult for producers to obtain a license to use music and song lyrics for captions at the time they negotiate a license to use the songs in their movies and television shows. For these reasons, the copyright defense is not a valid legal excuse for studios, production companies, streaming services, and movie theaters to avoid captioning.

Studios, production companies, streaming services, and movie theaters also use the defense of undue burden. An example of this was seen in *Feldman*, where the defendants claimed that providing access to music

223. John F. Stanton, [*Song Ends*]—*Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157, 158 (2015).

224. *Id.*

225. *See id.* at 183.

226. *Id.* at 183–86.

would be overly burdensome without providing any evidence to support the claim.²²⁷ With the advancement of technology, the burden on defendants to provide auxiliary aids and captioning is not a high burden to meet. But the cost of captioning is by no means “inexpensive.”²²⁸ For example, the captioning equipment that is needed for real-time captioning in stadiums like the FedExField can cost up to \$25,000²²⁹ and paying for a stenographer can range from \$120 to \$1200 an hour, depending on the experience of the stenographer.²³⁰ However, “the cost of equipment is more than likely a one-time investment” and the costs thereafter will most likely be limited to paying a stenographer, which is not an undue financial burden.²³¹ Furthermore, with the continuing advancement of technology—the cost of captioning will likely decrease. Therefore, while providing full captioning will be somewhat costly, it is not overly burdensome for a billion dollar industry.

Lastly, studios, production companies, streaming services, and movie theaters have argued that captions alter the nature of the feature.²³² For example, the district court in *Arizona ex. rel. Goddard v. Harkins Amusement Enterprises, Inc.* stated that businesses were not required under the ADA to alter their products or services.²³³ The district court reasoned that adding captions to movies would alter the movie’s composition because it would change auditory elements into visual elements.²³⁴ Based on this assessment, the court held that the ADA did not require the

227. See *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 709–10 (D. Md. 2008).

228. Daniel Haney, Note, *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?*, 33 U. ARK. LITTLE ROCK L. REV. 465, 490 (2011).

229. *Id.* (citing *Real-Time Captioning*, DESCRIBED & CAPTIONED MEDIA PROGRAM 1, 1 (2008), <http://www.dcmp.org/caai/nadh28.pdf> [<http://perma.cc/TVX5-2GYY>]).

230. *Id.* (citing Russell Landy, Article, *Do the Washington Redskins Hate Deaf People? ADA Claims for the Captioning of Football Stadiums*, 16 U. MIAMI BUS. L. REV. 47, 63 (2007)).

231. *Id.*

232. See John F. Waldo, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*, 45 VAL. U. L. REV. 1033, 1046 (2011) (citing *Ariz. ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 548 F. Supp. 2d 723, 729 (D. Ariz. 2008)).

233. See *id.* (citing *Ariz. ex rel. Goddard*, 548 F. Supp. 2d at 728–29).

234. See *id.* (citing *Ariz. ex rel. Goddard*, 548 F. Supp. 2d at 729).

defendant movie theater to accommodate the deaf to the point of altering its products or services and that the defendant did not need to provide either closed-captioning or open-captioning.²³⁵

However, on appeal, the Ninth Circuit in *Harkins* reversed and stated that the ADA may require the altering of products and services when such a requirement is to provide auxiliary aids and services to the deaf.²³⁶ The Ninth Circuit explained that the ADA requires that captions be provided unless theaters can show that it would create a fundamental alteration or create an undue burden.²³⁷ The Ninth Circuit did note that open captioning may be distracting for hearing audiences and thus open captioning would not be required.²³⁸

Today, closed captions are “displayed by hundreds of movie theaters nationwide.”²³⁹ However, theaters like AMC are careful to note that while assistive listening devices and closed captioning are available, “not all titles are compliant with closed captions and/or audio descriptions.”²⁴⁰ AMC advises its audiences to “look for showtimes with audio description or closed captioning labels.”²⁴¹

If studios, streaming services, and movie theaters really look at the larger picture, it is to their benefit to provide full captioning because it will attract a larger audience. Statistics show that the aging population will contribute to a larger deaf and hard of hearing population.²⁴² This means

235. See *id.* (citing *Ariz. ex rel. Goddard*, 548 F. Supp. 2d at 731).

236. See *id.* at 1047 (citing *Ariz. ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 672 (9th Cir. 2010)).

237. See Waldo, *supra* note 232, at 1047 (citing *Harkins Amusement Enters., Inc.*, 603 F.3d at 675).

238. See *id.* (citing *Harkins Amusement Enters., Inc.*, 603 F.3d at 673).

239. *When is Captioning Required?*, NAT’L ASS’N OF THE DEAF, <http://www.nad.org/resources/technology/captioning-for-access/when-is-captioning-required> [<http://perma.cc/3ZK7-LR2Z>].

240. *Assistive Moviegoing*, AMC, <http://www.amctheatres.com/assistive-moviegoing> [<http://perma-archives.org/warc/6G35-MQMQ>].

241. *Id.*

242. See *Hearing Loss and Older Adults*, NAT’L INST. ON DEAFNESS & OTHER COMM. DISORDERS (Dec. 7, 2016), <http://www.nidcd.nih.gov/health/hearing-loss-older-adults> [<http://perma.cc/F6WL-YYTB>].

there will be an increase in the number of deaf and hard of hearing viewers that will buy DVDs, pay monthly for streaming libraries, and go to movies theaters. Given this possibility, it is baffling why the industry is reluctant to fully caption to reach a wider audience. One reason could be that the industry does not believe those who are deaf will stop purchasing movies and television shows simply because the song and music lyrics are not included. If that is the case, the industry would be taking advantage of this fact and its actions should be seen as discriminatory for purposely not accommodating a particular disabled audience.

As this type of litigation increases, courts may soon begin to side with deaf plaintiffs and recognize that failure to fully caption is discriminatory. Studios, production companies, streaming services, and movie theaters should be cognizant of this and should spend the minimal cost to fully caption their features to prevent expensive litigation.

If these practical arguments are not convincing enough, they should recognize that the industry practice of not fully captioning their features is against the public interest. They should recognize the purpose of disability rights laws, such as the ADA, and stop contributing to the prevention of equal access and enjoyment for those with disabilities.

VII. CONCLUSION

Even with the passage of federal and state disability rights laws, studios, movie theaters, and television networks continue to deny deaf individuals equal access. Historically, the hearing-impaired have been treated poorly and their needs have been largely disregarded because their disability is somewhat of an “invisible affliction.”²⁴³ So while some may deem it insignificant that the deaf cannot enjoy movies to the same extent as the hearing population, this issue actually symbolizes the larger issue of how the deaf have been “excluded and ostracized from the rest of society.”²⁴⁴ And while the Ninth Circuit recently dismissed *Anthony*,²⁴⁵ the case raised several significant issues. This Comment aimed to address

243. Julie Heldman, Comment, *Television and the Hearing Impaired*, 34 FED. COMM. L.J. 93, 95 (1982).

244. Faye Kuo, Comment, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUT. & INFO. L. 159, 206 (2004).

245. The Ninth Circuit granted the appellant’s motion to dismiss under Federal Rule of Appellate Procedure 42(b). *Anthony v. Buena Vista Home Entm’t Inc.*, No. 2:15-cv-09593-SVW-JPR (C.D. Cal. Sept. 28, 2016), *appeal docketed*, No. 16-56595 (9th Cir. Oct. 26, 2016), *dismissed* (9th Cir. May 15, 2017).

the best practical approaches to addressing those issues. Thus, moving forward, courts must consider the purpose of disability rights laws and hold producers accountable so that deaf and hard of hearing individuals can have equal access and enjoyment of movies and television shows.