

## MOVIES AND MORE

**John Waldo**

*What the courts (and the lawyers) have done for and to people with hearing loss*

- I. Movies – making real progress, with some issues unresolved.
  - A. Federal and state courts have required movie theaters to display closed captions to the extent they can afford to do so; ten largest national chains have all agreed.
  - B. Display devices differ – most theaters using Captiview device that displays captions on a portable reader, some – notably Regal – are using glasses that display captions on the inside of the lens.
  - C. Question now is what smaller theaters that cannot afford the caption devices will do – whether they will be exempt from any captioning requirement, or whether they might have to provide open captions.
  - D. Additional rules may be in the offing both from Congress and from the Department of Justice. Though well-intentioned, those proposals might actually be steps backward rather than forward.
  
- II. Internet – different courts, different outcomes
  - A. Americans with Disabilities Act passed before Internet became major medium of communication. ADA requires “places of public accommodation” to be accessible to people with hearing loss. Question is whether an Internet site is a “place.”
  - B. Some courts, notably the normally friendly Ninth Circuit, have ruled that Internet sites are not “places” for ADA purposes unless they are portals to brick-and-mortar businesses.
  - C. Cases seeking to require Netflix to caption online content have had different outcomes. Case filed in California dismissed because Netflix not a place. But in case filed in Massachusetts court said it would make no sense not to treat Internet sites as covered “places.” After that ruling, Netflix agreed to caption online content by the end of 2014.

- D. While it is conceptually possible to provide different Internet content for different parts of the country, it makes no economic sense to caption content for only one area. So Netflix case may provide a method for making Internet content broadly accessible. But cases must be filed in certain areas of the country and not others, and there is not assurance that an effort to reconcile the two different results would work in our favor.

### III. Athletic facilities – a new frontier, and favorable outcomes

- A. In case brought against Washington Redskins by National Association of the Deaf, court ruled that all aural content made available to hearing patrons must be made available to people with hearing loss. The remaining issue has been how to make that content available.
- B. A number of venues have offered hand-held caption-display devices, or are making captions available on personal smart phones. But experience has shown that hand-held viewing devices are unsatisfactory.
- C. The University of Oregon has taken the lead in providing scoreboard captions at its football and basketball facilities, and is working on providing captions for the so-called minor sports. The Portland Trailblazers professional basketball team has agreed that hand-helds will not suffice, and is exploring scoreboard captioning. Discussions with the Seattle teams are ongoing.

### IV. Two important new cases that offer huge gains

- A. While the ADA requires public accommodations to offer “effective” communication to people with hearing loss, the regulations allow the business to select from among the possible accommodations. The unresolved question is, who decides whether the offered accommodation is truly effective.
- B. Creighton University medical school offered a hard-of-hearing student note-takers and amplification devices, but refused captioning. The trial court agreed with the school, and dismissed the statements of the student as being “self-serving.” The court of appeals reversed, however, and ruled that the hard-of-hearing student was in the best position to determine what was effective. That case is going to trial this summer.
- C. In another case, a patron at Disneyland with mobility issues wanted to use a Segway to visit the park. Disney refused, saying that a powered wheelchair was

sufficient, and that a Segway was not necessary. The court agreed that a Segway was not necessary, but said that was not the appropriate criterion. Rather, the court said that businesses must take any reasonable step to make the experience of people with disabilities more akin to that enjoyed by individuals without disabilities.

- D. Together, these cases give us much greater power to ask for and receive accommodations that will really work for us, rather than simply an accommodation that the business regards as being sufficient.
- V. The black cloud – a business claims that it has a constitutional right not to provide captions.
- A. Greater Los Angeles Agency on Deafness (GLAD) sued CNN under California state law, asking CNN to caption its Internet videos.
  - B. Instead of simply arguing that California state law does not apply, CNN invoked California’s so-called anti-SLAPP law. That law, designed to prevent bullying of ordinary citizens by corporations that file lawsuits to deter citizen protests, says essentially that if a lawsuit involves the exercise of First Amendment rights, the plaintiff must demonstrate a probability of succeeding at the outset, and that if the plaintiff cannot do so, then it must pay the legal fees of the party initially sued.
  - C. CNN claims that its refusal to provide captions for its Internet videos is an exercise of its free-speech rights under the First Amendment to the U.S. Constitution. Trial court said no, that literal transcription of speech has nothing to do with content. But case is on appeal.
  - D. If CNN succeeds, that ruling would dramatically curtail the ability of private individuals and advocacy groups to seek accommodations for people with hearing loss because of the possibility of paying attorneys’ fees.

John Waldo is an attorney who focuses his practice on the legal issues arising out of hearing loss. He is counsel to non-profit advocacy organizations in Washington and Oregon that have worked to institute captioning at major live theaters and sports venues in those states. He represented ALDA in a lawsuit against Cinemark and in negotiations with AMC that helped prompt the corporate movie-theater owners to provide closed-caption viewing devices in all of their theaters nationwide.

