Attachment A

Before the
U.S. DEPARTMENT OF JUSTICE
Civil Rights Division
Disability Rights Section

In the Matter of	**)**	
	)	
Department of Justice, Civil Rights Division	**)**	**CRT Docket No. 106**
	)	
Notice of Proposed Rulemaking	**)**	**AG Order No. 2968-2008**

COMMENTS OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS

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August 18, 2008

minutes before show time, theaters should be permitted to sell companion seats to patrons who are not accompanying persons with disabilities. In any event, unoccupied "companion" seats should be available to any patron starting 10 minutes before the posted show time.

Question 23: Is the proposed rule regarding the number of tickets that a public accommodation must permit individuals who use wheelchairs to purchase sufficient to effectuate the integration of wheelchair users with others? If not, please provide suggestions for achieving the same result with regard to individual and group ticket sales.

Answer 23: Motion picture theaters usually do not restrict the number of tickets that an individual can buy to any performance. In the rare case of a premier or the opening of an extremely popular movie, a patron may only have the opportunity to buy a limited number of tickets. However, as a general rule, if an individual comes to the box office and asks to purchase all the available seats in any auditorium in the theater, the box office attendant would happily comply with this request.

Question 24: Should the Department require that, one year after the effective date of this regulation, public accommodations exhibit all new movies in captioned format at every showing? Is it more appropriate to require captioning less frequently? Should the requirement for captioning be tied to the conversion of movies from film to the use of a digital format? Please include specifics regarding how frequently captioning should be provided.

Answer 24: For several reasons, NATO strongly urges restraint with respect to any rulemaking in the area of captioning. The legislative history of the ADA makes unambiguously clear that captioning is not a required accommodation. While movie theaters have nevertheless made significant strides in accommodating deaf and hearing-impaired patrons, captioning technology is very dynamic and subject to salutary market forces that rulemaking could easily distort or altogether thwart. In the emerging digital arena, NATO members are very active in development of both standards for interoperability and the captioning technologies themselves. The digital transition holds great promise for captioning, but it is at an early and vulnerable stage and premature government involvement could abort significant strides. Both open and closed captioning currently entail significant costs—the former primarily as a function of demonstrable rejection of captioned movies by patrons without a hearing disability, and the latter primarily as a

function of the substantial cost of the technology itself. We ask that the DOJ observe these developments and resist any temptation to impose early mandates. We develop these positions further below.

A. The Department Cannot Require Movie Captioning Because the ADA Does Not Impose or Permit Such a Requirement.

Title III of the ADA prohibits operators of public accommodations from discriminating against disabled persons "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(a). In particular, the ADA prohibits a public accommodation from discriminating against disabled persons by: (1) denying the disabled the opportunity to participate in or benefit from the goods or services provided, 42 U.S.C. § 12182(b)(1)(A)(i); (2) providing goods and services to the disabled that are not equal to those afforded other individuals, 42 U.S.C. § 12182(b)(1)(A)(ii); or (3) providing goods or services that are different or separate from those provided to others, unless doing so is necessary to meet the needs of the disabled, 42 U.S.C. § 12182(b)(1)(A)(iii).

A public accommodation may be required to make reasonable modifications in its policies, practices, or procedures when necessary to provide its goods and services to the disabled. *See* 42 U.S.C. § 12182(b)(2)(A). In addition, a public accommodation may be required to provide auxiliary aids in connection with its goods and services to meet the needs of the disabled. *Id.*

Congress directed the DOJ to promulgate specific regulations to implement the ADA and to provide more specific guidance regarding the obligations imposed on public accommodations. 42 U.S.C. § 12186(b). These regulations require a public accommodation to make reasonable modifications to its policies, practices, or procedures when necessary to provide its goods and services to the disabled, unless doing so would fundamentally alter the nature of the goods and services provided. *See* 28 C.F.R. § 36.302.[2] Section 36.307 makes clear that the "reasonable modifications of policies, practices and procedures" and "auxiliary aids and services"

[2] 28 C.F.R. § 36.303 further requires that a public accommodation make available necessary auxiliary aids or services, unless doing so would fundamentally alter the nature of the goods or services provided or result in an undue burden to the operator of the public accommodation.

requirements are only intended to ensure the nondiscriminatory availability of the goods or services already offered by a public accommodation. A public accommodation is not required by Title III of the ADA to provide different or modified goods or services to meet the special needs of the disabled. Section 36.307 provides that:

> (a) This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.
>
> (b) A public accommodation shall order accessible or special goods at the request of an individual with disabilities if, in a normal course of its operation, it makes special orders on request for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business.
>
> (c) Example of accessible or special goods include items such as Braille versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

28 C.F.R. § 36.307. Thus, the plain language of the Regulations implementing the ADA demonstrates that a public accommodation is not required by Title III to change the nature of the goods or services it offers in order to meet the special needs of disabled persons.

In conjunction with the promulgation of the Regulations, DOJ prepared a section-by-section analysis of its Regulations under Title III. *See* Preamble to Regulation of Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, July 26, 1991, published as Appendix B to the DOJ's ADA Regulations at 28 C.F.R. Part 36 (hereinafter "Appendix B"). In Appendix B, DOJ analyzed each provision of the ADA Regulations in depth and gave illustrations intended to clarify the application of each provision.

DOJ's analysis of section 36.307 leaves no doubt that a public accommodation is not required to change the nature or mix of the products or services it offers to meet the special requirements of the disabled:

> Section 36.307 establishes that the rule does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility

> features that are designed for, or facilitate use by, individuals with disabilities. As specified in Section 36.307(c), accessible or special goods include such items as Braille versions of books, books on audio-cassettes, close-captioned video tapes, special sizes or lines of clothing and special foods to meet particular dietary needs.
>
> The purpose of the ADA's public accommodation requirements is to insure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a book store, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Braille or large print books. Similarly, a video store must make its facilities and rental operations accessible, but it is not required to stock close-captioned video tapes. The Department has been made aware, however, that the most recent titles in video tape rental establishments are, in fact, closed caption.

28 C.F.R. Part 36, Appendix B, Subpart C, discussion of § 36.307. Accordingly, just as a bookstore is not required to sell Braille books, and a video store is not required to sell captioned video tapes, theater owners are not required by the ADA to exhibit captioned films to meet the special needs of hearing impaired individuals. Indeed, this principle applies with even greater force to movie theaters because in the retail store examples, Braille books and captioned video tapes would simply constitute additional inventory, whereas a captioned movie is the only "inventory"—in its auditorium—for all patrons.

In its analysis of the "reasonable modification" requirement under § 36.302, DOJ also made clear that the "reasonable modification" and "auxiliary aid" requirements are subject to the limitations contained in Section 36.307.

> The rule enunciated in Section 36.307 is consistent with the "fundamental alteration" defense to the reasonable modification requirement of Section 36.302. Therefore, 36.302 would not require the inventory of goods provided by a public accommodation to be altered to include goods with accessibility features. For example, Section 36.302 would not require a book store to stock Braille books or order Braille books, if it does not do so in the normal course of its business.

28 C.F.R. Part 36, Appendix B, Subpart C, discussion of Section 36.302.

Finally, the Appendix to section 36.303 states unequivocally that "Movie theatres are not required by § 36.303 to present open-captioned films." 28 C.F.R. Pt. 36, App. B(C) (1992).

DOJ's interpretation of Title III of the ADA to *not* require a public accommodation to change the nature or mix of the products or services it offers is shared by the United States Architectural and Transportation Barriers Compliance Board (the "Access Board"). Congress mandated that the Attorney General's regulations be consistent with the minimum guidelines established by the Access Board. 42 U.S.C. § 12186(c).

The Access Board has addressed the issue of captioning for motion pictures on two occasions. In April 2001, the Access Board issued a technical bulletin addressing available and developing technologies for exhibiting closed caption motion pictures. *See* Technical Bulletin #8: Theatrical Movie Captioning Systems, April 20, 2001. While indicating that the voluntary adoption of closed captioning for motion pictures would be beneficial to severely hearing-impaired persons who cannot be helped by ALDs, the Access Board made clear in the accompanying April 20, 2001 Press Release that "[c]aptioning [is] ... not required by the Board's ADA Accessibility Guidelines."

In connection with its efforts to comprehensively revise and update the ADAAG, the Access Board again addressed the issue of movie captioning in its draft final guidelines published on April 2, 2002. The Access Board confirmed that the "ADAAG, and the DOJ's Regulations, do not require captioning of movies for persons who are deaf." *See* Draft Final ADA and ABA accessibility Guidelines, April 2, 2002, at 125. Moreover, the Access Board determined not to include such captioning requirements in its revised and updated guidelines.

B. Courts Have Repeatedly Held That the ADA Does Not Require a Public Accommodation to Change the Nature, Content or Mix of the Products or Services It Offers.

In interpreting Title III of the ADA, courts have recognized that the purpose of the ADA is to "regulate the *availability* of the goods and services that a place of public accommodation offers as opposed to the *contents* of goods and services offered by the public accommodation." *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997) (emphasis added).

Accordingly, the courts have repeatedly found that, while a public accommodation must ensure that the disabled have reasonable access to its products or services, it is not required to alter the nature or mix of goods that it generally provides. *See, e.g., McNeil v. Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000) ("In sum, we read Title III to prohibit an owner, etc., of a place of public accommodation from denying the disabled access to the good or service.... But the owner, etc., need not modify or alter the goods and services that it offers in order to avoid violating Title III"); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 1999) (finding that Title III "does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided"); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) ("We conclude that section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled"); *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457-58 (6th Cir. 1998) (rejecting construction of ADA which would "compel a video store to stock closed caption video tapes because ordinary tapes are worth less to a deaf person than to one with normal hearing").

In *Doe*, the Seventh Circuit succinctly described why the distinction between access and content is fundamental to a reasonable construction of the ADA:

> The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress proposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intentions clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide whether shoe stores should sell single shoes to one-legged persons and if so at what price, and how many Braille books the Borders or Barnes and Noble bookstore chains should stock in each of their stores.

179 F.3d at 560. Among the examples the court invoked to support its holding that the ADA does not require an owner of a public accommodation to alter the product which he makes available on a nondiscriminatory basis was "a movie theatre's refusal to provide a running translation into sign language of the movie's soundtrack." *Id*.

The Fifth Circuit applied similar reasoning in holding that the ADA does not require a business to alter or modify the goods or services it offers in order to satisfy the ADA:

> We acknowledge that it is literally possible, though strained, to construe "full and equal enjoyment" to suggest that the disabled must be able to enjoy every good and service offered to the same and identical extent as those who are not disabled. Construed in this manner, the statute would regulate the content and type of goods and services. That would be necessary to ensure that the disabled's enjoyment of goods and services offered by the place of public accommodation would be no less than, or different from, that of the non-disabled. But such a reading is plainly unrealistic, and surely unintended, because it makes an unattainable demand.
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> * * *
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> Furthermore, were we to try to construe the statute in this manner, its application would force impracticable results. If the blind must be able to enjoy all goods and services to the same extent as the sighted, bookstores would be forced to limit the selection of books they carried because they would need to stock braille versions of every book. Shoe stores would reduce the styles available to their general customers, because they would need to offer special shoes for people with foot deformities in every style sold to the non-disabled. Sporting goods stores might have to close altogether. Restaurants would have to limit their menus to avoid discriminating against diabetics. After all, to offer food to the public that a diabetic could not eat would, in the literal words of the statute, deny the diabetic the full and equal enjoyment of the goods of the restaurant compared to those with no limitations on their diets.
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> By citing such examples, we do not mean to make the statute sound ridiculous. We do this to illustrate that the language of the statute can only reasonably be interpreted to have some practical, common sense boundaries. Based on the language of the statute, we simply see no non-arbitrary way to distinguish regulating the content of some goods from regulating the content of all goods.

McNeil, 205 F.3d at 187.

Although the DOJ's NPRM briefly addresses some of the cases that have construed the ADA in regards to theater owners' alleged obligations to provide captioned movies, it does not address the most recent and the most compelling decision on the subject. In *Arizona v. Harkins Amusement Enterprises, Inc.*, 2008 WL 19222979 (D. Ariz. 2008), the court addressed a suit by the state asserting that theater operators were obligated to provide captioned movies. The defendant moved to dismiss the complaint on the grounds that the requested captions would alter

the content of its services and therefore fall outside the scope of the ADA. *Id*. at *2. After engaging in an exhaustive review of the Act, the regulations, and the case law construing the Act, the court held that captioning was not required.

In reaching its decision, the *Harkins* court expressly considered and rejected plaintiffs' arguments that the provision of captions would not alter the contents of the films because: 1) Harkins would not be required to show any movies that it would not otherwise show at its theater; 2) the auxiliary aids requested would only require Harkins to provide a "functionally equivalent service for people with sensory disabilities;" and 3) film studios provide captions with select movies at no additional costs on a separate CD-ROM disk. *Id*. at *4. In rejecting the plaintiffs' first argument, the court held that

> merely because Harkins would not be required to show movies it would not otherwise offer does not mean that providing captions and descriptions would not change the contents of its services. Movie theatres offer motion pictures to the public in specific formats which combine audio and visual elements. However, Plaintiffs' request would require Harkins to alter the form in which it normally provides its services . . . Captioning changes audio elements into a visual format . . . . Persons with sensory disabilities are not 'excluded, denied services, segregated or otherwise treated differently than other individuals' because they are offered the same form of services as other members of the public. *See* 42 U.S.C. § 1218(b)(2)(A).

Id. at *4 (citations omitted).

The court similarly rejected the plaintiffs' argument that the auxiliary aids would only require Harkins to provide a "functionally equivalent service for people with sensory disabilities." The court recognized that while the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment" of services, this language must "be interpreted to have some practical, common sense, boundaries." *Id.*, *quoting McNeil v. Times Ins. Co.*, 205 F.3d at 187.

> The unvarnished and sober truth is that in many, if not most, cases, the disabled simply will not have the capacity or ability to enjoy the goods or services of an establishment "fully" and "equally" compared to the non-disabled. There would seem to be no statutory boundary if the ADA regulates the content of services.

Id. (citations omitted).[3]

Finally, the court held that a movie theater is not required to change the content of the services it offers merely because additional content is offered to theaters free of charge. "The expense a public accommodation incurs to provide auxiliary aids and service goes to the undue burden limitation in § 12182(b)(2)(A)(iii), not the scope of the ADA's prohibition against discrimination in § 12182(a)." *Id*.

In reaching its conclusion, the *Harkins* court noted that its holding was consistent with the legislative history of the ADA. "The House Committee Report states: 'Open-captioning, for example, of feature films playing in movie theatres, is not required by this legislation.'" *Id*. at *5, *citing* H.R. Rep. No. 101-486(II) at 108 (1990), as *reprinted* in 1990 U.S.C.C.A.N. 303, 391. The holding is also consistent with the ADA's regulations and guidelines. "Movie theatres are not required by § 1 36.303 to present open-captioned films." *Id*. at *6. Finally, the court recognized that its decision was consistent with the overwhelming weight of authority in cases construing the Act. Accordingly, the court held that:

> Given the language of § 12182(b)(2)(A)(iii), the reasoning in *Weyer, McNeil, and Doe*, the legislative history, and the ADA regulations and guidelines, the Court concludes that the ADA does not require Harkins to provide captions nor descriptions. Section 12182(b)(2)(A)(iii) requires public accommodations to ensure that persons with disabilities have access to the services they provide (utilizing auxiliary aids and services if necessary), but does not require public accommodations to alter or modify the content of the services.

Id.; *see also Cornilles v. Regal Cinemas, Inc.*, 2002 WL 31440885 (D.Or.), *aff'd in relevant part*, 2002 WL 31460787 (D.Or. 2002) (denying plaintiffs' suit to require close captioned movies); *Todd v. America Multi-Cinema, Inc*., 2004 WL 174686 at *4 (S.D. Tex. 2004) (rejecting

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[3] The court also recognized that nothing in the ADA's § 12182(b)(2)(A)(iii) governing auxiliary aids was intended to extend the scope of the ADA. *Id*. at *3. Quoting the Fifth Circuit in *McNei*l, the court held that:

> The provisions in §§ 12182(b)(1)(A)(i)-(iii) concerning the opportunity to benefit from or to participate in a good or service do not imply that the goods or services must be modified to ensure that opportunity or benefit. Rather, this section only refers to impediments that stand in the way of a persons' ability to enjoy the goods or services in the form that the establishment normally provides it. *Id.*

plaintiff's argument that defendants must provide captioning in all movies and at all movie theatres on undue burden grounds and because "[e]qual access does not mean equal enjoyment… [T]he plaintiff has not offered any or significant rebuttal evidence that precludes summary disposition of the case on the basis that access has been granted as a matter of law.").

In the NPRM (73 F.R. 34531), the DOJ states: "While the Department has not required that the movie theatre industry caption its presentations, during the mid-1990's, as closed captioning became available, the Department began requiring in certain settlement agreements that presentations be closed captioned. See Agreement Between Walt Disney World Co. and the United States (January 17, 1997)."

It is unclear what point the DOJ wishes to advance by citation to the Disney settlement. But if it is to call into question the history of *not* requiring captioning of movies, then the citation is misdirected for several reasons. The Disney settlement is not a motion picture industry settlement. The settlement covered theme parks owned and operated by Disney. These theme parks have attractions that display the same event or film, over and over 365 days a year. The event or film is produced and/or owned by Disney. The entertainment displays at a theme park cannot be equated to the exhibition of a motion picture in a movie theater. Movie theaters show films that are owned by distributors and licensed to the theaters pursuant to a film licensing agreement. Theater operators are expressly forbidden to change the nature of the presentation and cannot provide any type of captioning without written permission from the distributors. Further, a Disney attraction shows the same event or film for a lengthy period of time, often several years. Movie theaters change pictures, often every two weeks. There is no comparison. Moreover, despite substantial ADA litigation with several NATO members, the DOJ has never even raised the issue of mandatory captioning with NATO or its members, much less included a mandatory captioning provision in any settlement.

The NPRM cites the *Ball* case (*Ball v. AMC Entertainment*, 246 F. Supp.2d 17, DDC 2003) as supporting a requirement that motion picture theaters make closed captioned films available. The case supports no such requirement. The *Ball* case was decided on a motion for summary judgment. Plaintiffs argued that the ADA required motion picture theaters to show open

captioned and closed captioned films. The Court rejected plaintiffs' claims regarding open captioning, noting, "Since the installation of RWC [rear window captioning] has become the key concern in this case, Plaintiffs' request for open captioning will not be considered." 246 F. Supp.2d at 21 n.13.

The Court then ruled that from a summary judgment standpoint, the Court could not conclude that the ADA or the DOJ regulations "explicitly forbid" requiring theaters to show closed caption films. The Court never ruled whether the ADA required theaters to show closed captioned films and, if so, under what conditions. The case settled before trial so these issues were never addressed or decided.

The ADA's distinction between providing equal access to products or services offered by a public accommodation, as opposed to altering or tailoring the products or services that are offered to meet the special needs of the disabled, is directly applicable here. Imposing the requirement that theaters show captioned movies would not constitute equal access to the product or service that NATO members currently provide in their theaters—non-captioned first run movies. Instead, it would compel theater operators to provide a different type of product more suitable for deaf patrons—precisely the type of relief the above-cited cases found beyond the scope of the ADA's requirements.[4]

C. Although the ADA Does Not Require Motion Picture Theaters to Exhibit Captioned Movies, NATO and Its Members Have Long Supported Efforts to Make Cinemas More Accessible to Deaf and Hard of Hearing Patrons.

For nearly two decades, NATO and its members have actively supported movie access for deaf and hard-of-hearing patrons. NATO helped develop the first open caption film program with our partners in the movie studios and at InSight Cinema (formerly "Tripod"). In this program, film prints with open captions have been distributed and circulated among volunteer motion picture exhibition companies for advertised screenings. After closed captions for film were introduced

[4] Because the ADA does not require movie theatres to otherwise change the nature, content, or mix of the products and services provided, NATO has not addressed the undue burden issue. It is worth noting, however, that in instances where NATO members voluntarily show captioned and non-captioned films at the same time in the same theatres, the attendance at the non-captioned movies always far exceeds the attendance at the captioned film. Even when the availability of captioned films is widely publicized, deaf patrons rarely attend captioned showings.

with the WGBH Rear Window® Captioning System, many NATO members installed closed caption systems in select auditoriums for the exhibition of those movies distributed with captions, and publicly advertised the availability of closed caption first run films.

D. Despite the Efforts of the Movie Distributors, Exhibitors, and Technology Providers, Wide-Scale Implementation of Captioning in the Film Era Has Been Difficult.

Open and closed captioned screenings in the film era have encountered limited success for several reasons. The production of open captioned prints is expensive. Movie studios have only been able to distribute a limited number of prints for a limited number of movie titles. Even more problematic, open captioned screenings draw few deaf and hard-of-hearing patrons to the cinema and drive hearing patrons away. When NATO members offer first-run versions of the same film in two auditoriums, one with open captions and one without, very few patrons attend the open captioned screening even if the other auditorium is crowded.

Closed captioned screenings do not produce the same disincentive for attendance by hearing patrons, but there is some indication that even the use of the Rear Window device has a negative impact on attendance in the auditoriums equipped therewith. Moreover, despite advertising by theater companies and by WGBH of the availability of closed captioned movies in designated cinemas, usage surveys by exhibitors that have installed these systems show that they are rarely used. Closed captioning in the film era, moreover, imposes significant cost burdens on the exhibitors, as the cost of the equipment enormously exceeds the negligible additional revenues generated.

E. With the Advent of Digital Cinema, the Industry Is Making Great Progress Toward the Goal of Greater Access, and NATO and Its Members Are at the Forefront of These Developments.

Digital cinema constitutes the greatest technological transition in the cinema industry since the advent of the “talkies.” For the past one hundred years, movies have been distributed and projected on celluloid film prints. Today, the industry has begun the transition to digital distribution and projection. Approximately 5,000 of the 38,600 movie auditoriums in the United States have digital projection systems. Installation rates will accelerate in the near future as

technical standards are completed and as the various parties agree to business models for further implementation. At some point after digital implementation, film prints will cease to exist and all movies will be distributed and exhibited in digital format.

At the same time, the industry is developing specific technology standards and equipment vendors are creating viable options for increasing access in the digital cinema world. Digital cinema cannot solve the problem of open caption movies—as hearing patrons will not accept open captioned screenings regardless of the projection technology used. But digital cinema may reduce the cost burden of closed captioning and audio description compared to the film world. Thus, digital cinema may greatly facilitate disabled patrons' access to movies.

Digital Cinema Initiatives, a joint venture of the six major Hollywood studios, released version 1.0 of its Digital Cinema System Specification in July 2005. NATO released version 1.0 of our Digital Cinema System Requirements in February 2006, and version 2.0 in February 2008. (See www.natoonline.org/Digital.htm.) Section 3 of NATO's requirements specifically call for disability access by requiring that digital cinema servers be capable of playing narrative audio tracks and closed caption tracks when included in content distribution.

The publication of user requirements informs system providers, product developers, and formal standards committees of what exhibitors will want from vendors. The Society of Motion Picture and Television Engineers (SMPTE) constitutes the main standards body for digital cinema. In late 2006 NATO petitioned SMPTE to conduct a study effort of closed caption systems for theatrical use. NATO's technology consultant, Michael Karagosian, chaired that committee. By March of 2007 the study effort was completed and a full-fledged standards effort for closed captions began. The primary goal of the standards effort is to produce the minimum uniformity required among diverse equipment manufacturers that will allow a competitive closed caption market to thrive. With standards in place, new innovations in personal display technologies can be introduced in the future without changing the closed caption distribution method or changing the digital cinema servers. This goal of interoperability is critical to optimizing the development of competitive technologies and ensuring their smooth implementation.

The SMPTE 21 DC Ad Hoc Group for Closed Captions continues its activity today. Committee participants include multiple providers of closed caption systems, multiple providers of closed caption content (e.g., movies), and multiple providers of digital cinema servers. (Digital cinema servers must receive the closed caption content and synchronize it with sound and picture.) The committee's first step was to produce mastering and distribution standards for closed captions. Draft documents are in their first ballot cycle at this time. The group's next step is to produce a standard for connecting third party closed caption systems to digital cinema servers. To better understand how the standards will apply, the block diagram below illustrates the workflow for closed caption distribution and display.

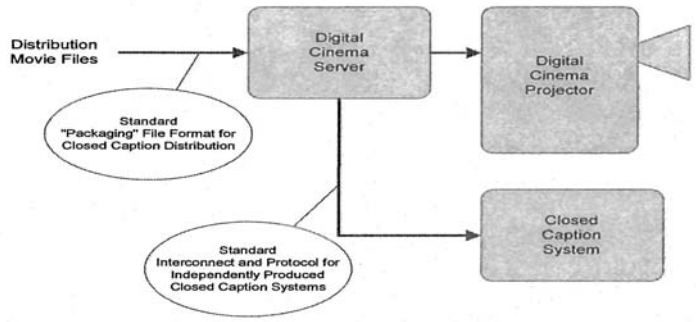

Figure 1. Closed Caption Workflow in Digital Cinema
(Note: Closed Caption System can be that of WGBH, PCS, or other vendor.)

To date, the only closed caption system in full production is WGBH's Rear Window® captioning system. Competitive closed captioning systems are also emerging. One such system to be installed in theaters on an experimental basis is from Personal Captioning Systems (PCS). PCS wirelessly transmits captions into the theater auditorium, which are displayed on cup-holder-mounted personal digital assistants (PDAs). Other technologies in development include head-worn optics that display wirelessly-transmitted text in one's field of view while watching the movie. USL/Emagin and Sightline are developing variations on this approach. The illustrations below show how two possible closed caption systems work in digital cinema.

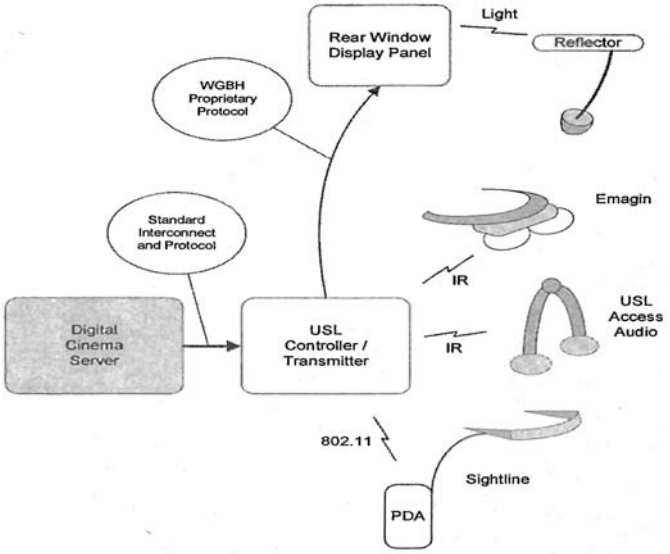

Figure 2. USL Proposed Controller/Transmitter Product for Closed Captions & Access Audio in Digital Cinema

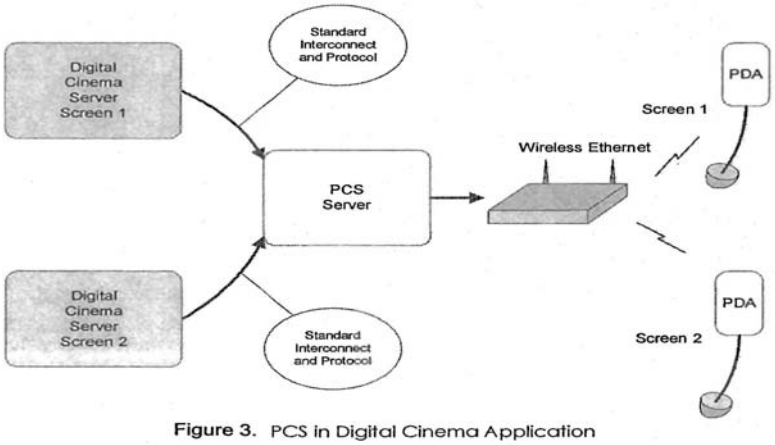

Figure 3. PCS in Digital Cinema Application

Leading NATO members are working very closely with access equipment companies by providing technical guidance, cinema testing locations, design requirements, and other collaborative efforts. One leading member is working with USL and Emagin, and another with PCS. NATO members have also organized hands-on demonstrations of prototype equipment to representatives of the disabled community and to industry participants at large.

At the same time, NATO has taken the lead public advocacy position within the broader movie and equipment industry. Most recently in May 2008, for example, before the Department's NPRM was published, NATO distributed an open letter (also available at

www.natoonline.org/Digital.htm) to movie distributors and equipment vendors calling for support of greater access in digital cinema to motion pictures for deaf and hard-of-hearing patrons, as well as the blind and visually impaired. The letter described developing technologies and ongoing standards efforts, and suggested steps to be taken by the collective industry.

NATO and our members seek wider access to cinemas in the evolving digital cinema world. We stand ready to provide any additional information or technical briefings that the Department may desire.

F. DOJ Regulation at This Juncture Would Distort or Altogether Thwart Meaningful Progress.

Any requirement of captioning or audio description at this juncture would require significant expenditures for film-based equipment adaptations that will become obsolete in the near future. Regulations now would also divert attention and resources from new technologies that hold the best promise of wide-scale access, and instead return the industry's focus to technologies that have proven to be overly costly and unacceptable to the industry's hearing-impaired patrons. We strongly recommend that the Department refrain from regulation, and instead monitor these developments in new access technologies. NATO looks forward to assisting the Department in that regard.

Question 25: Should the Department require that, one year after the effective date of this revised regulation, a public accommodation will exhibit all new movies with narrative description? Would it be more appropriate to require narrative description less frequently? Should the requirement for narrative description of movies be tied to the use of a digital format? If so, why? Please include specifics regarding how frequently narrative description should be provided.

Answer 25: The same analysis provided in response to Question 24 relating to captioning applies to Question 25 involving "narrative description."

Additionally, narrative description requires writing a new script. Narrative description is not part of a motion picture. It is a separate product and indeed must have a separate copyright. As other