

## Movie, Concert, and Performing Arts Theaters Beware of Possible ADA Lawsuit

*Should theaters provide personal hearing devices for the Deaf and Hard of Hearing?*  
by Martin H. Orlick

January 31, 2011

I was invited to be a co-panelist on KQED, San Francisco Bay Area's leading public radio station. The program commemorated the 20th anniversary of the Americans with Disabilities Act (ADA). On the segment, two prominent Disability Rights Advocates and I discussed what the ADA had accomplished since its inception in 1990 and where it was headed. When the subject turned to where the public-interest attorneys would seek change next, they cited, "the theater industry," namely, movie, concert, and performing arts theaters.

The advocates identified a closed captioned theater experience for deaf and hard of hearing Americans as their main area of concern, and in November, this same disability rights group launched class action litigation against Cinemark's theaters in California. In their complaint, they cited,

"Over two-thirds (2/3) of Americans attend movies each year. Yet without some form of captioning, countless seniors and those with hearing loss, cannot enjoy at trip to the movies because they are unable to hear or understand the dialogue."

The suit accuses the theater giant of discriminatory practices against deaf and hard of hearing patrons because of its "consistent refusal" to provide closed (and open) captioned films at its theaters in Alameda County, California. More specifically, the plaintiffs argue that Cinemark's discriminatory practices violate

the Unruh Civil Rights Act (California Civil Code sections 51 and 52), which prohibits discrimination on the basis of disability, the Disabled Persons Act (California Civil Code section 54.3), and the Americans with Disabilities Act.

### What are closed captions?

Closed captions can be best explained by understanding open captions. Open captions are on-screen text descriptions of dialogue and other sounds which are always in view and cannot be turned off. They can be subtitles you see at the bottom of the screen, or a sign language interpreter signing to the side of a stage. Closed captions, on the other hand, can be turned on and off by the viewer and may require a special device. Disability rights advocates insist that closed captioning such as rear window captioning (like the one seen below<sup>1</sup>) be provided to each disabled individual.



<sup>1</sup> Rear-Window Captioning system taken from Wikimedia Commons

## Movie, Concert, and Performing Art Theaters Beware of Possible ADA Lawsuit by Martin H. Orlick

### **Does this apply to me? The legal perspective.**

The 1990 Americans with Disabilities Act was created to ensure equal access to “public accommodations” for disabled Americans. Movie, concert, and performing arts theaters qualify under law as “public accommodations.”

To ensure equal access, public accommodations must ensure that no individual with a disability may be “treated differently than other individuals because of the absence of auxiliary aids and services.” Included in examples of “auxiliary aids and services” are closed caption, rear-window captioning and open captioning for individuals with hearing impairments. With the advances in technology, it is argued that at least one form of captioning is now required in virtually all hotel rooms, bars, restaurants, and other accommodations with televised services.

In short, the answer is yes. By law, theaters must provide auxiliary aids and services; however, public accommodations are not required to make every possible device available or to meet the specific, specialized needs of individual customers. As a safeguard for theaters, the ADA also maintains that if provision of a particular auxiliary aid or service would result in a fundamental alteration of goods, services, or in an undue burden, i.e., significant difficulty or expense, the ADA would allow an alternative auxiliary aid or service, if one exists, which would ensure equal facilitation to the maximum extent for disabled individuals. The type of auxiliary aid or service necessary to ensure effective communication will vary in

accordance with the method of communication used by the individual; the nature, length and complexity of the communication; and the context which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aids of services are needed to ensure effective communication, but the ultimate decision of what measure to take rests with the public accommodation, provided that the method chosen results in effective communication.

In the case of Cinemark, plaintiffs argue that closed captioning is available and affordable to theater owners and operators. They claim the cost to outfit each theater with captioning is less than \$10,000, a small amount for the motion picture distributor which has the highest growth in total revenues among the three largest distributors in the U.S. While the case against Cinemark is in the pleading stage, I believe there are viable defenses to the lawsuit which will undoubtedly be vigorously defended. I will update more on the litigation as the case moves toward class certification.

### **Questions you should leave with.**

Have you specifically investigated your theater’s needs to provide auxiliary aids and services? If you provide auxiliary aids and services, do you have policies in place for training staff on the need for and use of auxiliary aids and services for disabled guests? If not, now is the time to update these policies and procedures.

## Movie, Concert, and Performing Art Theaters Beware of Possible ADA Lawsuit by Martin H. Orlick

While your theaters are required by law to be outfitted with the necessary auxiliary aids and devices for your disabled guests, we can help you find economical options that will satisfy ADA requirements and ensure your patrons will be

able to enjoy your theater the way it was intended. As the battle for greater accessibility for deaf, hard of hearing, blind and low vision and other disabled Americans continues, more ADA litigation is inevitable.



Martin H. Orlick is a transactional and trial partner in the Real Estate Department of Jeffer Mangels Butler & Mitchell's San Francisco office. He is a member of the American College of Real Estate Lawyers (ACREL) and has been a member of the International Council of Shopping Centers (ICSC) for over 20 years. He has defended more than 400 ADA cases for shopping center developers, performing arts centers, theaters, banks, retailers, restaurants, hotel owners, wineries, public entities, parking companies, and other commercial businesses. He can be reached at 415.984.9667 or MORlick@jmbm.com.