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Making Music Accessible: Closed Captions in Light of California Court Ruling on The Duties of Film Studios

BY [ARIELLE VISHNY](#) / ON OCTOBER 20, 2016

Is it unreasonable for deaf moviegoers to expect that song lyrics might be included in film captions and subtitles? On Wednesday, September 28, 2016, a California District court found that it was, when it granted summary judgment to a group of movie studios named in a class action lawsuit filed by the Alexander Graham Bell Association (“the Association”) for the Deaf and Hard of Hearing.^[1] The Association filed the claim on the grounds that the studios’ distribution of their works with less-than-complete captions amounted to false advertising and a civil rights violation against the hard of hearing. The court found that a “reasonable consumer” would have no reason to believe that there was full captioning of a given film, and that the Association cannot prove the intentional discrimination required to mount a civil rights claim.^[2]

The court acknowledged that whether the film should include these lyrics and whether they must are two distinct issues, but the determination of what to include in a caption is part of the movie making process, and is up to the studio. The court described how the examples provided by the Association show that, in circumstances where music with lyrics played, important dialogue was spoken, such that the dialogue and not the lyrics ought to be captioned, and, thus, captions on a film are a matter of creative choice for the studio.^[3] Studios have also made arguments that there are certain technical challenges that come with including captions on their programming,^[4] though given that the technology is always being improved, this argument strikes as fairly weak. For the purpose of practicality, it may be that this is indeed an accurate summation of the obligations in the creation of film captions. In setting up a form of disability accommodation as something subject to first amendment protection and creative license, however, it leaves open the possibility of failing to provide adequate accommodation where otherwise required because it somehow infringes on the aesthetics of someone’s vision.

The court adopts a “reasonable person” standard with regard to caption expectation and thus minimizes the role of disability on reliance on the accuracy of the captions. Unclear in the decision is the extent to which a “reasonable person” suggests a “reasonable person who is deaf/hard of hearing,” but the implication is that it is the more general standard. This language could potentially invite future insufficient disability accommodations, because the reasonable person who is *not* hard of hearing has few, if any expectations with regard to captions, because they simply do not need them to understand the movie. The court rejects the characterization of the deaf community as a vulnerable population because the case from

which the Association cites, *Lavie v. Proctor & Gamble Co.* (2003), refers to vulnerable populations as those that are easily persuaded by false advertising, like small children. If vulnerability hinges on inability to perceive a piece of media for its message, then one would think the definition would encapsulate individuals who cannot hear the musical accompaniment to a film, which in many circumstances could communicate important information. This narrow reading of what constitutes "vulnerability" will likely bar other individuals with varying disabilities from lodging a successful claim on these grounds.

The court found that the Association's argument that they relied on the studio's captions of the movies because there is no alternative did not prove reliance, but rather the opposite, that the hard of hearing would purchase the DVDs regardless of the quality of the captions and thus do not rely on their quality when making their purchase at all. This argument then suggests that reliance would be predicated on choice, that a consumer in this case would have had to have chosen only to buy films where they believed the captions to be superior. This argument fails to imagine circumstances in which an individual would purchase entertainment media that he or she could not fully enjoy, namely that film and television are hugely important elements of modern human culture, where failure to participate can leave one isolated.

The court presents accommodation as something subject to creative license. While this ruling permits the studios to continue leaving out song lyrics from captioning, it should not be read as giving license for minimal accommodation. The recent growth in prominence of the Deaf West Theatre Company both in the revival of the musical *Spring Awakening* on Broadway,^[5] and their featuring in Ingrid Michaelson's music video for the song "Hell No,"^[6] suggests that music can be presented to the deaf and hard of hearing in ways that can be appreciated by any "reasonable person" as creative and engaging entertainment. Given the prevalence of online streaming, computerized glasses,^[7] handheld devices, and others, it simply does not follow that there is no way in which the lyrics of background music might somehow be incorporated for the benefit of deaf audiences. If the takeaway from this ruling is that the studios have creative license when it comes to accommodation, then moving forward one may hope that this creativity is employed to implement new and more effective ways of enhancing the film-watching experience for the deaf and hard of hearing, rather than to make a "creative decision" to do only the bare minimum.

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^[1] Gardner, Eriq, "Studios Beat Lawsuit Over Non-Captioning of Song Lyrics in Movies and Television," *The Hollywood Reporter Esq.* (Sept. 29, 2016, 12:36 PM),

<http://www.hollywoodreporter.com/thr-esq/hollywood-studios-beat-lawsuit-captioning-933845>

^[2] Christie Anthony et. al. v. Buena Vista Entertainment Inc. et.al, 2:15-cv-09593-SVW-JPR (C. D. Cal. Sept. 28, 2016). <https://www.scribd.com/document/325831259/Hollywood-Captioning>

^[3] *Id.*

^[4] Lawler, Frank, "Netflix sued for lack of captions on streaming videos," Gigaom (June 17, 2011, 8:41 AM) <https://gigaom.com/2011/06/17/netflix-captions-lawsuit/>

^[5] Spring Awakening The Musical, <http://www.springawakeningthemusical.com>

^[6] Michaelson, Ingrid, "Hell No," (2016) <https://www.youtube.com/watch?v=79N7Tn2fDjM>

^[7] Herbert, Geoff "Regal's new closed caption glasses finally make movies enjoyable for deaf and hard-of-hearing," *Syracuse.com* (June 23, 2013, 4:51 PM)

http://www.syracuse.com/entertainment/index.ssf/2013/06/closed_caption_glasses_movies_regal_theaters_deaf.html