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# Do the Washington Redskins Hate Deaf People? ADA Claims for the Captioning of Football Stadiums

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# DO THE WASHINGTON REDSKINS HATE DEAF PEOPLE? ADA CLAIMS FOR THE CAPTIONING OF FOOTBALL STADIUMS

RUSSELL LANDY\*

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*Like two teams in a crucial late season football game, the opposing sides of Americans with Disabilities Act<sup>1</sup> (ADA) litigation are fierce rivals. On one goal line stands the offense, disabled fans seeking the same life experiences as their non-disabled counterparts. On the other goal line stands the defense, American businesses who likely wish to accommodate all their fans, but not at what they believe to be an unreasonable expense. The stripe painted at the 50 yard line represents the reasonable middle ground these two teams should reach. It is unavoidable that the two teams will clash, each side testing the other with its strongest blows and best efforts. When the clock expires, the ball will come*

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<sup>1</sup> Americans with Disabilities Act, 42 U.S.C.A. §§12101-12213 (2007).

*to a resting point somewhere between the goal lines, providing some new level of accommodation for disabled individuals. Where that ball should rest, however, becomes a difficult question that the referees—the judges and juries of America—must answer.*

In August 2006, the National Association of the Deaf<sup>2</sup> (NAD) filed a class action lawsuit against FedEx Field and the Washington Redskins.<sup>3</sup> The NAD brought its claim under the ADA, and is asking the court to order the Washington Redskins and FedEx Field to provide and display captioning on the stadium's scoreboards and video monitors for all announcements made over the public address system, including plays and penalties called, safety and emergency information, and any other announcements.<sup>4</sup>

The Washington Redskins, one of the National Football League's (NFL) oldest and most storied franchises, has been in existence since 1933,<sup>5</sup> and was designated as the NFL's most profitable team in 2006.<sup>6</sup> The Redskins play their home games at FedEx Field, a team-owned stadium located in Landover, Maryland. It is this stadium that will serve as the arena for this litigation.

<sup>2</sup> Established in 1880 in Cincinnati, Ohio, the National Association of the Deaf has a long history of defending the rights of deaf and hard of hearing people. Its mission is to "promote, protect, and preserve the rights and quality of life of deaf and hard of hearing individuals in the United States of America." See National Association of the Deaf Homepage, <http://www.nad.org> (last visited Oct. 23, 2007).

<sup>3</sup> Complaint, *Feldman v. Pro Football, Inc.*, No. 8:06CV02266 (D. Md. August 31, 2006). See Posting of Julie Feldman to DeafDC.com Blog, <http://www.deafdc.com/blog/julie-feldman/2006-08-31/for-frustrated-deaf-redskins-fans-out-there/> (Aug. 31, 2006, 18:26 EST), for a brief explanation of the origins of this lawsuit. FedEx Field is owned by Pro-Football, Inc., doing business as The Washington Redskins. The stadium was named Jack Kent Cooke Stadium when it opened in 1997. The first act of Redskin's owner Dan Snyder was to remove the Cooke name from the stadium in order to search for a corporate sponsor. JOHN FEINSTEIN, *NEXT MAN UP: A YEAR BEHIND THE LINES IN TODAY'S NFL* 298 (2005). Soon after, Snyder sold the stadium's naming rights to Federal Express for \$200 million over twenty-seven years. Thomas Heath, *Redskins' Revenue Reaches \$300 Million*, WASH. POST, Aug 20, 2005, at A01, available at <http://www.msnbc.msn.com/id/9015600/>.

<sup>4</sup> Feldman, *supra* note 3. The Redskins contend that all emergency information is already posted on the large screens and on TV monitors throughout the stadium. Hamil R. Harris, *Hearing-Impaired Fans Sue for Access to Closed-Captioning*, WASH. POST, Sept. 20, 2006, at B06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/19/AR2006091901403.html>.

<sup>5</sup> See Washington Redskins History, [http://www.profootballhof.com/history/team.jsp?FRANCHISE\\_ID=32](http://www.profootballhof.com/history/team.jsp?FRANCHISE_ID=32) (last visited Oct. 23, 2007). The Redskins franchise began in 1932 in Boston, Massachusetts, where the team used the nickname "Braves." The team became known as the "Redskins" in 1933 and moved to Washington, D.C. in 1937. They have won three Super Bowl Championships and, at the beginning of the 2006 season, have an all time record of 538-484-27. *Id.*

<sup>6</sup> Forbes.com, *NFL Team Valuations: #1 Washington Redskins* (Aug. 31, 2006), [http://www.forbes.com/lists/2006/30/06nfl\\_Washington-Redskins\\_300925.html](http://www.forbes.com/lists/2006/30/06nfl_Washington-Redskins_300925.html). The Redskins franchise was valued at \$ 1.4 billion. *Id.*

Title III of the ADA roughly requires that the benefit and opportunities available to disabled individuals be equal to that afforded to non-disabled individuals.<sup>7</sup> What constitutes an equal benefit, however, is a question not easily answered, as Title III's requirement is assuredly meant to be read in a relative sense, providing equal benefit to the extent that it is reasonably achievable. It would be difficult, at best, to precisely equate the benefit each person receives from any given experience. The NAD filed suit in part because they "are tired of being left out of the game."<sup>8</sup> But is this really the case? Can it really be said that the inability to hear the stadium announcer means that deaf fans are not receiving a benefit equal to their non-deaf counterparts? How much of the information broadcast over the stadium's sound system significantly adds to the experience? The wireless microphones worn by NFL referees often malfunction resulting in the entire stadium being unable to hear the announcements. At the height of excitement during a football game, crowd noise reaches a level so loud that even non-deaf fans may be unable to hear stadium announcements. In addition, some stadiums are equipped with sound systems that are so obsolete and dilapidated that non-deaf people cannot hear or understand what is being communicated. Would this mean that the stadium would only have to provide half of the captioning if the average non-disabled fan could only be expected to hear half of the messages coming from the speakers?

This Comment will explore the validity of NAD's claim. Specifically, it focuses on the burden that captioning would place upon the Redskins for providing deaf fans equal enjoyment of the football fan experience through a service of limited value. Part I of this Comment will document, through statutory analysis, the ADA's purpose, its history, and limitations on claims that can be made under it. Part II will look at NAD's claim in light of the case law interpreting the ADA, in order to determine what accommodations the Redskins are required to provide for their deaf fans. Part III analyzes the viability and costs of various solutions utilizing current captioning technology. Part IV attempts to predict the long term effects that a complete captioning requirement would represent for the sports industry. Finally, this Comment concludes that, while the Redskins may choose to provide some reasonable accommodation for their deaf fans, complete captioning on FedEx Field's video boards would constitute an undue burden on the Redskins, as well as a fundamental alteration of their product.

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<sup>7</sup> 42 U.S.C.A. § 12182(b)(1)(A)(ii) (2007).

<sup>8</sup> Feldman, *supra* note 3.

## I. STATUTORY ANALYSIS

In 1990 Congress passed the ADA to put an end to discrimination against individuals with disabilities.<sup>9</sup> Title III of the ADA passed based on Congress' determination that discrimination against individuals with disabilities was a serious and pervasive social problem.<sup>10</sup> Congress acted on reports that "an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation."<sup>11</sup> The overall goal of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>12</sup>

Individuals with disabilities may seek relief under the ADA if the source of the discrimination falls within one of the Act's three titles.<sup>13</sup> Specifically, the ADA was designed to protect individuals with a mental or physical disability that "substantially limits one or more . . . major life activities."<sup>14</sup> These major life activities include, among others, the ability to walk, see, speak, work, and hear.<sup>15</sup> "Individuals who are deaf or hard of hearing to an extent that substantially limits their ability to hear, have [a disability] within the meaning of the ADA and merit protection under the [Act]."<sup>16</sup>

Central to this Comment, the ADA provides that "[n]o 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."<sup>17</sup>

The issue of ADA claims against sports stadiums, however, is not a novel one<sup>18</sup> In fact, Title III actually distinguishes between newly constructed and

<sup>9</sup> 42 U.S.C.A. § 12101(b)(1).

<sup>10</sup> *Id.* § 12101(a)(2).

<sup>11</sup> H.R. REP. NO. 101-485, pt. 2, at 34 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 316.

<sup>12</sup> 42 U.S.C.A. § 12101(b)(1)-(2).

<sup>13</sup> See *id.* § 12101. Title I of the Act concerns employment; Title II, public services; and Title III, public accommodations and services provided by private entities.

<sup>14</sup> See *id.* § 12102(2)(A).

<sup>15</sup> H.R. REP. NO. 101-485, pt. 3 at 28 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 451.

<sup>16</sup> Faye Kuo, Comment, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUTER & INFO. L. 159, 165 (2004).

<sup>17</sup> 42 U.S.C.A. § 12182(a). In order to set forth a prima facie case under Title III, a plaintiff must prove that: (1) he has a disability; (2) the defendant's business is a place of public accommodation; and (3) the plaintiff was denied full and equal treatment because of his disability. *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1166 (E.D. Mich. 1994).

<sup>18</sup> There has been a number of cases arising from Title III claims brought by wheelchair-bound individuals. See generally James Kurack, *Standing In Front of the Disabled: Judicial Uncertainty Over Enhanced Sightlines in Sports Arenas*, 8 VILL. SPORTS & ENT. L.J. 161 (2001). These cases have led to a marked

existing facilities.<sup>19</sup> Specifically, § 12183(a)(1) declares that new facilities are those that are designated and completed for “first occupancy” later than 30 months after July 26, 1990.<sup>20</sup> For newly constructed facilities, Title III requires that the stadium design be “readily accessible to and usable by individuals with disabilities.”<sup>21</sup>

The courts, however, have distinguished cases in which defendants have constructed non-compliant facilities, and cases in which defendants have purchased existing non-compliant facilities. For example, in *Rodriguez v. Investco, L.L.C.*<sup>22</sup> a Florida District Court found that the defendant who purchased a hotel constructed for first occupancy after January 26, 1993 did not violate § 12183(a)(1).<sup>23</sup> While a failure to abide by ADA accessibility guidelines evidences intentional discrimination against disabled persons, the liability is limited to the person who designs and constructs the place of public accommodation.<sup>24</sup> The individual who purchases a facility built in violation of § 12183(a)(1) must bring the facility under ADA compliance only if it is “readily achievable.”<sup>25</sup>

#### A. Full and Equal Enjoyment by Disabled Individuals

As part of the general rule on the prohibition of discrimination in public accommodations, a House of Representatives Report explains that “[f]ull and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others.”<sup>26</sup> However, the Report also

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increase in the accessibility of stadiums for wheelchair-bound individuals. In 2000, the Green Bay Packers renovated Lambeau Field—one of the NFL’s most famous stadiums—increasing the number of ADA compliant wheelchair positions from 26 to 571. Likewise, when the Philadelphia Eagles demolished Veterans Stadium and moved into the newly constructed Lincoln Financial Field, the number of ADA wheelchair positions increased by over 250% from 256 to 685, while stadium capacity only increased by 3,000 seats. Martin J. Greenberg, *International Sports Law and Business in the 21st Century: Sports Facility Financing and Development Trends in the United States*, 15 MARQ. SPORTS L. REV. 93, 108-109 (2004).

<sup>19</sup> See 42 U.S.C.A. § 12183(a)(1). See also Kurack, *supra* note 18.

<sup>20</sup> *Id.* § 12183(a)(1).

<sup>21</sup> *Id.*; Kurack, *supra* note 18, at 163. When alterations to an existing facility are made, the altered portion must, to the maximum extent feasible, comply with the Department of Justice’s architectural regulations. *Id.* at n.20.

<sup>22</sup> 305 F. Supp. 2d 1278 (M.D. Fla. 2004).

<sup>23</sup> *Id.* at 1283.

<sup>24</sup> *Id.* But see *Access 4 All, Inc. v. Trump Int’l Hotel and Tower Condo.*, 458 F. Supp. 2d 160, 176 (S.D.N.Y. 2006) (“[T]he *Rodriguez* court merely held that defendant had not discriminated against the plaintiff by failing to remove architectural barriers, as it was in the process of doing so.”).

<sup>25</sup> *Rodriguez*, 305 F. Supp. 2d at 1283 n.16. “Readily achievable,” as defined in the ADA, means “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C.A. § 12181(9).

<sup>26</sup> H.R. REP. NO. 101-485, pt. 3, at 55 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 478.

made clear that its intent was not that disabled individuals must experience or accomplish the exact same things as those who are not disabled.<sup>27</sup>

The ADA provides for the use of “auxiliary aids and services” to help comply with the Act.<sup>28</sup> Auxiliary aids and services are those devices and services that a person with a disability requires in order to offset the challenges of their disability.<sup>29</sup> They include, among others, “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments,” as well as the “acquisition or modification of equipment or devices,” and “other similar services and actions.”<sup>30</sup> The regulations promulgated under Title III of the ADA elaborate on the statutory definition of “auxiliary aids and services.”<sup>31</sup> These regulations specifically include open and closed captioning devices as auxiliary aids, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.<sup>32</sup>

### B. *The ADA is Not Just a Porous Defense: Limitations of Claims*

The extent of services that places of public accommodation are required to provide in order to comply with the ADA is not without limit.<sup>33</sup> Section 12182 requires modifications to be made only when they are reasonable. It is the plaintiff’s ultimate burden to persuade the finder of fact of the

<sup>27</sup> Kuo, *supra* note 16, at 166 (“[I]t does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability.”). For more regarding the equities of experiences, see *infra* text accompanying notes 63-78.

<sup>28</sup> See 42 U.S.C.A. § 12102(1).

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* §12102(1)(A), (C). In *Bunjer v. Edwards*, 985 F. Supp. 165, 167 (D.D.C. 1997), the court held that a fast-food restaurant’s drive-through facility violated the ADA because it discriminated against patrons who were deaf or suffered from hearing impairments. The court forced the restaurant to adopt policies and provide training to accommodate the deaf and hearing impaired.

<sup>31</sup> 28 C.F.R. § 36.303(b) (2007).

<sup>32</sup> *Id.* § 36.303(b)(1).

<sup>33</sup> The plaintiff must demonstrate his standing to successfully bring an ADA discrimination claim. *Access Now, Inc. v. S. Fla. Stadium Corp.*, 161 F. Supp. 2d 1357, 1364 (S.D. Fla. 2001). In *Access Now*, a wheelchair-bound fan brought a suit alleging that Pro Player Stadium violated Title III. The fan alleged that the stadium failed, *inter alia*, to provide unobstructed lines of sight for wheelchair seating and the required number of wheelchair-accessible seating locations. In order to establish standing, a plaintiff seeking injunctive relief must additionally allege “a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury.” *Id.* at 1364 (citing *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001)). Absent an allegation of intent to return to the public accommodation, an ADA plaintiff fails to demonstrate this irreducible minimum, and thus lacks standing to sue for injunctive relief. *Access Now*, 161 F. Supp. 2d at 1364 (citing *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001)).

reasonableness of a modification.<sup>34</sup> “If, and only if, the plaintiff meets this burden, [does the defendant bear] the burden of proving that, under the particular circumstances, the requested modification would fundamentally alter the nature of the goods or services being offered.”<sup>35</sup> However, Title III does not limit the reasonable modification requirement only to requests that are easy to evaluate.<sup>36</sup> Instead, determining whether a modification required by the ADA is “reasonable” is a fact-specific, case-by-case inquiry that looks at, among other things, effectiveness of the modification in light of the nature of the disability in question and the cost to the organization implementing it.<sup>37</sup>

A place of public accommodation may be exempt from providing a particular accommodation for disabled individuals if it demonstrates that doing so would constitute a fundamental alteration of the nature of the benefits being offered or if doing so would subject it to an undue burden.<sup>38</sup> The Title III Technical Assistance Manual<sup>39</sup> defines a fundamental alteration as “a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.”<sup>40</sup>

Alternatively, § 12182(b)(2)(A)(iii) allows a place of public accommodation to prevail if it can show that it would incur “significant difficulty or expense”<sup>41</sup> if it was required to offer an auxiliary aid. To determine if an auxiliary aid or service can be provided without great difficulty or expense the court examines the estimated logistics or financial expense for providing a specific auxiliary aid or service, asks whether the expenses should be compared against the parent corporation or the individual facilities, and compares that estimated expense against the budget of the corporation or its individual facilities.<sup>42</sup> This is a case by case inquiry.<sup>43</sup> “In practice, however, the questions of whether an accommodation is reasonable and whether it creates an undue burden are almost identical.”<sup>44</sup> This does not mean that simply because a public accommodation can demonstrate that *one* type of auxiliary aid is cost-prohibitive, that the public accommodation is exempt

<sup>34</sup> See *Larsen v. Carnival Corp.*, 242 F. Supp. 2d 1333, 1342-43 (S.D. Fla. 2003).

<sup>35</sup> *Id.* at 1343.

<sup>36</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001).

<sup>37</sup> *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995). *Accord Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1083 (9th Cir. 2004).

<sup>38</sup> 42 U.S.C.A. § 12182(b)(2)(A)(iii) (2007).

<sup>39</sup> ADA TECHNICAL ASSISTANCE PROGRAM, U.S. DEP'T OF JUSTICE, THE ADA TITLE III TECHNICAL ASSISTANCE MANUAL (1993), available at <http://www.ada.gov/taman3.html>.

<sup>40</sup> *Id.* at III-4.3600, available at <http://www.ada.gov/taman3.html#III-4.3600>.

<sup>41</sup> 28 C.F.R. § 36.303(f) (2007).

<sup>42</sup> *Id.* § 36.104; see also *supra* note 40.

<sup>43</sup> H.R. REP. NO. 101-485, pt. 2, at 107 (1990).

<sup>44</sup> *Bennett v. Calabrian Chems. Corp.*, 324 F. Supp. 2d 815, 836 (E.D. Tex. 2004).



from ADA compliance as a whole.<sup>45</sup> Thus, an undue burden claim is not a blanket defense in response to any aid requested by a plaintiff.

Courts have noted that an accommodation is reasonable only if its costs are not “clearly disproportionate to the benefits that it will produce.”<sup>46</sup> However, there is little case law prescribing any meaningful standard for determining whether a modification is an undue burden, and this is especially apparent in the context of entertainment venues. In *Pascuiti v. New York Yankees*,<sup>47</sup> an ADA claim calling for the removal of architectural barriers in Yankee Stadium, the court looked at the budget of the city Parks Department instead of just Yankee Stadium. Under this case the court would look at the operating budget of the Redskins as a whole and not that of FedEx Field. Although this is helpful with the analysis of the Redskins’ case, it only provides one half of the undue burden analysis. *Pascuiti* fails to provide a framework to determine what portion of the budget would constitute an undue burden.

## II. APPLICATION OF THE ADA TO FEDEX FIELD AND THE WASHINGTON REDSKINS

Passage of Title III of the ADA was based on data showing that “an overwhelming majority of individuals with disabilities [led] isolated lives and [did] not frequent places of public accommodation.”<sup>48</sup> Based on the plain text of Title III FedEx Field is a public accommodation, and therefore, discrimination against individuals with disabilities by its owners and operators is prohibited.<sup>49</sup> The ADA describes a public accommodation, in part, as “a motion picture house, theatre, concert hall, stadium, or other place of exhibition entertainment.”<sup>50</sup>

The entity sued, however, is critical to the analysis of liability for violations of the ADA. Title III’s prohibitions are restricted to “places” of public accommodation; therefore Title III should be read to disqualify entities that do not own the public accommodation. In the instant case, the ownership issue is moot because the Redskins own FedEx Field,<sup>51</sup> yet

<sup>45</sup> Kuo, *supra* note 16, at 203.

<sup>46</sup> Young v. Cent. Square Cent. School Dist., 213 F. Supp. 2d 202, 213 (N.D.N.Y. 2002) (citing Borkowski v. Valley Cent. School Dist., 63 F.3d 131, 138 (2d Cir. 1995)).

<sup>47</sup> Pascuiti v. N.Y. Yankees, 87 F. Supp. 2d 221 (S.D.N.Y. 1999).

<sup>48</sup> H.R. REP. NO. 101-485, pt. 2, at 34 (1990), as reprinted in 1990 U.S.C.A.N. 303, 316.

<sup>49</sup> 42 U.S.C.A. § 12182(a) (2007).

<sup>50</sup> *Id.* § 12181(7)(c).

<sup>51</sup> Forbes.com, NFL Team Valuations: #1 Washington Redskins (Aug. 31, 2006), [http://www.forbes.com/lists/2006/30/06nfl\\_Washington-Redskins\\_300925.html](http://www.forbes.com/lists/2006/30/06nfl_Washington-Redskins_300925.html). Only four NFL stadiums are privately owned: Carolina, Miami, New England and Washington. More commonly, a city, a county

stadium ownership is so crucial to an ADA liability analysis that it requires further exploration for its precedential effect on the remaining NFL teams. This limitation was first explored in the sports context in *Stoutenborough v. National Football League, Inc.*<sup>52</sup> In this case, an individual with a hearing impairment claimed that he, along with other hearing-impaired individuals, was effectively prevented from listening to blacked-out<sup>53</sup> football games over the radio denying him access to the game.<sup>54</sup> The Sixth Circuit determined that the ADA did not apply to the NFL.<sup>55</sup> Although televised game broadcasts were offered through the NFL they were not deemed services of public accommodation.<sup>56</sup> Finally, the court posited that the applicable regulations provide that a “place” is a “facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve ‘public accommodation’ categories.”<sup>57</sup> Therefore, *Stoutenborough* stands for the notion that although football games are played in a place of public accommodation and can be viewed on television in other places of public accommodation, these circumstances do not support a Title III claim.<sup>58</sup>

The rationale in *Stoutenborough* indicates that individuals with disabilities must bring their claim against the stadium and its owners. In the event that the stadium is not owned by the occupant team, a *Stoutenborough* analysis leaves that team with no liability—and a disabled individual no claim against the team—under the ADA.<sup>59</sup> Furthermore, *Stoutenborough* places the NFL in an interesting position, where it may assume a neutral stance on the captioning issue if it so chooses.<sup>60</sup> The NFL may decide, nonetheless, that

or some sort of special governmental authority owns the facility. Mike Swift, *Bright Lights, Small City: Santa Clara's NFL Foray*, MERCURY NEWS (San Jose), Jan. 14, 2007.

<sup>52</sup> 59 F.3d 580 (6th Cir. 1995). For a general background and discussion on some of the problems that arise when the ADA is applied to professional sports, see Jeffrey Michael Cromer, Note, *Creating an Uncomfortable Fit in Applying the ADA to Professional Sports*, 36 IND. L. REV. 149, 158 (2003).

<sup>53</sup> NFL rules decree that a regular-season, Sunday afternoon home team game will be blacked out in a home team's territory if the game fails to sell out at least seventy-two hours before the game. Each stadium's local blackout area is defined by the broadcast signal of the local affiliate carrying the game, not by the mileage surrounding the stadium. See *Blackout Rules for Local Team Home Games*, <http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=900046> (last visited Oct. 23, 2007).

<sup>54</sup> See *Stoutenborough*, 59 F.3d at 582; cf. *Louie v. Nat'l Football League*, 185 F. Supp. 2d 1306, 1308-09 (S.D. Fla. 2002) (extending the holding in *Stoutenborough* to cover the NFL's ticket lotteries).

<sup>55</sup> *Stoutenborough*, 59 F.3d at 582.

<sup>56</sup> *Id.* at 583.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *Forbes.com, NFL Team Valuations: #1 Washington Redskins* (Aug. 31, 2006), [http://www.forbes.com/lists/2006/30/06nfl\\_Washington-Redskins\\_300925.html](http://www.forbes.com/lists/2006/30/06nfl_Washington-Redskins_300925.html).

<sup>60</sup> Congruently, courts have consistently determined that sport governing bodies and leagues are not places of public accommodation under the ADA. In *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp.

it may benefit from a public relations standpoint if it chooses to pressure its member teams into providing captioning under the ADA.<sup>61</sup>

### A. *What's Missing in the Stadium?*

Title III provides that it is discriminatory for an individual to be denied an opportunity to participate due to his disability.<sup>62</sup> It cannot be said under the ADA, and the NAD does not claim, that the Redskins are denying deaf fans participation in watching Redskins games.<sup>63</sup> Unlike others with disabilities, deaf individuals can still access the stadium and participate as spectators, they are simply not able to hear the sounds of the game. Title III's requirement is that the disabled fans' benefit be equal to that afforded to other individuals.<sup>64</sup> Therefore, for NAD's Title III claim to succeed they must prove the Redskins are preventing deaf fans from the same benefits as non-disabled fans.

In an attempt to classify and regulate equal benefits for disabled individuals, the Department of Justice authored a technical assistance manual entitled *Accessible Stadiums*, highlighting features that must be accessible in new stadiums.<sup>65</sup> The manual requires assistive listening devices that amplify

2d 460, 483 (D.N.J. 1998), the court ruled that the NCAA was not a place of public accommodation. See Robert J. Adelman, *Has Time Run Out For The NCAA? An Analysis of the NCAA as A Place of Public Accommodation*, 8 DEPAUL-LCAJ. ART & ENT. L. 79 (1997); cf., *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217 (E.D. Mo. 1996) (neither the local youth hockey organization nor the national amateur hockey organization were places of "public accommodation" within meaning of Title III). But cf. *Shultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222 (C.D. Cal. 1996) (national nonprofit corporation and its affiliates serving as administrative body for amateur sports league were collectively considered a "public accommodation" regardless of their connection with physical facilities). Also interesting is *Schaaf v. Ass'n of Educ. Therapists*, No. C 94-03315 CW, 1995 WL 381979 (N.D. Cal. June 13, 1995), where an association holding a conference at local hotel was not a "public accommodation" because plaintiff failed to allege a connection with a physical facility. The *Schaaf* decision is curiously inconsistent with the Department of Justice's comments that "[a]n entity that is not in and of itself a public accommodation, such as a trade association . . . may become a public accommodation when it leases space for a conference. . . at a hotel, convention center, or stadium." 28 C.F.R. § 36.201 cmts. (2007), available at <http://www.usdoj.gov/crt/ada/reg3a.html#Anchor-3800>. See also 1 GARY S. MARX & DEBORAH ROSS, *DISABILITY LAW COMPLIANCE MANUAL* § 9:5 (1998).

<sup>61</sup> *Stoutenborough*, however, appears only to be exculpatory to the NFL in a broadcast context as courts have not explored whether the NFL, or a tenant-team, could be held liable under the ADA's Title II employment provisions. This, however, is beyond the scope of this article. Furthermore, NAD is bringing its ADA claim in the context of the stadium as an accommodation and not the broadcast. It is worth further exploration to determine whether the NFL could be liable to individual team employees for violation of the Title II employment provisions.

<sup>62</sup> 42 U.S.C.A. § 12182(b)(1)(A)(i) (2007).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 12182(b)(1)(A)(ii).

<sup>65</sup> DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, *ACCESSIBLE STADIUMS* <http://www.usdoj.gov/crt/ada/stadium.pdf> (last visited Oct. 21, 2007).

sound and deliver it to a receiver worn by the spectator when “audible communications are integral to the use of the stadium.”<sup>66</sup>

However, whether audible communications are integral to the use of FedEx Field during a Redskins game is a difficult question to answer. In *Independent Living Resources v. Oregon Arena Corp.*,<sup>67</sup> the court examined whether sports arenas are places where audible communications are integral to the use of the facility. There, a Department of Justice Accessibility Standard required that assembly areas in which audible communications are integral to the use of the space provide assistive listening devices for four percent of the arena’s seating capacity.<sup>68</sup> The court, however, held that the arena in question, the Rose Garden, did not violate the regulation.<sup>69</sup> Because it is used “primarily for sporting events,”<sup>70</sup> the Rose Garden is not an assembly area where audible communications are integral to the use of the space.<sup>71</sup> Consequently, the court only required the Rose Garden to provide enough assistive listening devices to meet the reasonably foreseeable demand for the events booked at the stadium.<sup>72</sup> Based upon this precedent, it is likely that FedEx Field is not a place where audible communications are integral to the use of the space. This determination should not be discounted when evaluating NAD’s claim.

Furthermore, it is not clear what information the hearing impaired fans would like to have captioned. Television programs caption all the information conveyed by the broadcast, including music. Would there have to be captioning of lyrics to the music played by the stadium throughout the game? NAD requests that all plays and penalties be captioned; however, football referees already use hand signals, to indicate to spectators what penalties they are calling, when teams gain first downs, and certain clock regulation.<sup>73</sup> It would be duplicative to caption this information. Must the

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<sup>66</sup> *Id.* at 3. Additionally, the stadium must provide signs that notify spectators of the availability of the assistive listening systems. *Id.*

<sup>67</sup> 1 F. Supp. 2d 1124 (D. Or. 1998).

<sup>68</sup> *Id.* at 1138. The court cited concert and lecture halls, playhouses and movie theaters and meeting rooms as examples of places where audible communications were integral to the use of the space. *Id.* at 1139.

<sup>69</sup> *Id.* at 1138-39.

<sup>70</sup> *Id.* at 1139.

<sup>71</sup> *Id.* at 1139 (positing that the Rose Garden could be utilized for events where audible communications are integral to the use of space, like a national political convention.) However, the court so as far as to exclude rock concerts, monster truck exhibitions, ice shows, and the circus from events requiring assistive listening devices. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> It is admitted, however, that the yardage value of some penalties is not indicated by the referee’s hand signals. This, however, could be viewed and deduced by the Plaintiffs as the referee paces off the penalized yardage.

Redskins caption the entire stadium environment to make the experience equal for their deaf fans?

*B. What Type of Accommodation is Required?*

It is essential to undertake the correct inquiry when deciding on an accommodation. In *Todd v. American Multi-Cinema, Inc.*,<sup>74</sup> the court, in reference to hearing impaired movie theatre customers, stated that “[e]qual access does not mean equal enjoyment.”<sup>75</sup> This statement, however, seems to be at odds with the general rule of the ADA, which states that “[n]o individual shall be discriminated against on the basis of disability in the full and *equal enjoyment* of a . . . public accommodation.”<sup>76</sup> The analysis therefore, should be one tailored to determine whether deaf fans are receiving equal enjoyment of the game without captioning of the audible information available to the non-impaired fan.

It is difficult to determine what portion of the football watching experience hearing-impaired fans lose as a result of their disability. They are still able to see the entire game, players, coaches, fans, cheerleaders, and replays on the video boards. They are still able to sense the temperature inside the stadium, as well as any of the weather elements in which the game is played. Their ability to order and consume the stadium’s food or smell the beer spilled around them is not impaired. The only part of the experience that the hearing-impaired fan seems to be without is the ability to hear the crowd noise, the sounds of the game, and the stadium announcer; however, those elements do not appear crucial to the experience. What is the value of these sounds to the fan?

A further challenge is that stadiums must provide accommodations in the most integrated setting appropriate to the needs of the individual.<sup>77</sup> This requirement, however, would likely not be an issue in the case of FedEx Field, because any attempt to provide captioning to fans would likely be in their seats.

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<sup>74</sup> *Todd v. Am. Multi-Cinema*, No. Civ.A. H-02-1944, 2004 WL 1764686 (S.D. Tex. Aug. 5, 2004).

<sup>75</sup> *Id.* at 4.

<sup>76</sup> 42 U.S.C.A. § 12182(a) (2007) (emphasis added).

<sup>77</sup> *Id.* § 12182(b)(1)(B) (“Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”).

### III. CAPTIONING

The solution that has been addressed by the courts and is most analogous to a football stadium, is the analysis of ADA required captioning at movie theatres. While not as extensive as ADA wheelchair litigation, there is an identifiable body of precedent applying the ADA to captioning in the theatre setting.

There are two predominant technologies that exist for captioning – open captioning and Rear Window Captioning (RWC).<sup>78</sup> The Redskins could employ these technologies in four distinct methods to accommodate hearing-impaired Redskins fans: open captioning on the stadium's video board, closed captioning through the use of a RWC system, personal captioning devices, and special captioning sections at FedEx Field.

Open captions consist of words burned onto the actual film of the television program or movie.<sup>79</sup> These captions cannot be turned off and are visible to everyone who views the programming.<sup>80</sup> Alternatively, closed captioning exists as a means of discreet captioning in order to lessen the impact on non-impaired viewers.

Rear Window Captioning is an example of a specific type of closed captioning.<sup>81</sup> An RWC system displays reversed captions on a light-emitting diode (LED) text display mounted at the rear of a theatre. Individuals use a transparent acrylic panel that attaches to their seat to reflect these captions in a manner such that captions appear superimposed on the screen.<sup>82</sup> RWC systems provide the benefit of open-style captioning for those who need it, with the added benefit of low intrusion on the experience of the non-impaired individuals.<sup>83</sup>

The FCC requires closed captioning for all television programming, but has propounded standards for exemptions when closed captioning would impose an undue burden on the programmer.<sup>84</sup> Factors to be considered

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<sup>78</sup> Kuo, *supra* note 16, at 171.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* Closed captioning was developed in the 1970s. These captions must be activated and interpreted by a caption decoder. They are not a permanent part of the film. There are newer systems where the captions are not permanent on the film; however, for the purposes of this article open captions will refer captions visible to everyone, not just those using some sort of captioning decoder or system.

<sup>81</sup> Visual Alarms Technical Bulletin: Theatrical Movie Captioning Systems, <http://www.access-board.gov/adaag/about/bulletins/captioning.htm> (last visited Oct. 4, 2007).

<sup>82</sup> *Id.*

<sup>83</sup> This is, of course, in a theater-style setting. In the setting of a sports stadium, a rear window captioning system loses many of its characteristics that allow for its minimal intrusion to non-impaired fans. See *infra* text accompanying notes 123-124.

<sup>84</sup> Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960 (1990).

when determining whether undue burden exists include the nature and cost of the closed captioning for the programming, the impact on the operation of the provider or program owner, the financial resources of the provider or program owner, the type of operations of the provider or program owner, and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements, including, but not limited to text or graphic display of the content of the audio portion of the programming.<sup>85</sup> While these factors have been propounded for television, the reasoning behind them can be used with the stadium context.

The following section will explore the viability and costs, both economic and social, of the four types of captioning systems that the Redskins would reasonably be able to employ.

### A. Open Captioning

Utilization of open captioning would change the experience of attending a football game for all fans in the stadium regardless of disability. Open captioning reduces the viewable area of the stadium's video boards, as well as curtails the presentation of other information that football fans have come to expect during their game experience. This likely makes an open captioning system a fundamental alteration of the nature of the good provided by the Redskins. Section 12182 requires reasonable modifications to be made "unless the entity can demonstrate that making such modifications would fundamentally alter the nature" of the good or service.<sup>86</sup> This "fundamental alteration of the service provided" standard has been defined by the Department of Justice as "a modification that is so significant that it alters the essential nature of goods, services, facilities, privileges, advantages, or accommodations offered."<sup>87</sup>

To date, no judge or jury has determined specifically whether visible captions on a movie screen constitute a fundamental alteration of the movie.<sup>88</sup> The issue of captioning as a fundamental alteration has, however, been generally explored in *Cornilles v. Regal Cinemas, Inc.*<sup>89</sup> and *Ball v. AMC Entertainment, Inc.*<sup>90</sup> Regal Cinemas was able to convince the court that captioning was a fundamental alteration in *Cornilles*.<sup>91</sup> However, this was not

<sup>85</sup> 47 C.F.R. § 79.1(f) (2007).

<sup>86</sup> 42 U.S.C.A. § 12182(b)(2)(A) (2007).

<sup>87</sup> ADA TECHNICAL ASSISTANCE PROGRAM, U.S. DEP'T OF JUSTICE, THE ADA TITLE III TECHNICAL ASSISTANCE MANUAL (1993), available at <http://www.ada.gov/taman3.html>.

<sup>88</sup> Kuo, *supra* note 16, at 198.

<sup>89</sup> *Cornilles v. Regal Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885 (D. Or. 2002).

<sup>90</sup> *Ball v. AMC Entm't, Inc.*, 246 F. Supp. 2d 17 (D.D.C. 2003).

<sup>91</sup> *Cornilles*, 2002 WL 31440885, at 6.

achieved through the § 12182(b)(2)(A) exemption. The *Cornilles* court explored the fundamental alteration issue from the standpoint of 28 C.F.R. § 36.307, which focuses on providing stores that sell goods the option of not having to provide accessible or special goods that would only be purchased by persons with disabilities.<sup>92</sup> Unfortunately, for that reason, there has been no determination whether captioning would modify the essential nature of the goods or services theatres provide.<sup>93</sup>

Subsequently, the court in *Ball* disagreed with *Cornilles*, and determined that showing a movie is not a good but a service, therefore § 36.307 was inapplicable. Alternatively, the court points out that no other court or settlement has ever required a theatre to provide open captioning under the ADA.<sup>94</sup> The court supports this point by indicating that the Department of Justice had not required companies in the entertainment industry to provide open captioning to their movies.<sup>95</sup> However, in *Ball*, AMC failed to prove that installing captioning equipment would fundamentally alter the nature or mix of the services it provides, therefore it was not entitled to use the defense under the ADA.<sup>96</sup> Consequently, *Ball* stresses the importance that, under the ADA, the Redskins, or any other place of public accommodation, must meet their burden to prove that compliance with the ADA would fundamentally alter the service they provide. The visibility of open captioning to everyone in a theater may be construed by a court to be a significant modification that alters the nature of the service that movie theaters provide.<sup>97</sup>

Commentators argue that theatres' willingness to show foreign films, or domestic films with subtitled portions, contradicts any defense by the theatres that providing open captioning in movies would constitute a fundamental alteration of their product.<sup>98</sup> However, this argument is without merit. A theatre or production company provides foreign subtitles in order to translate a film to English and open it to a wider audience. Furthermore, domestic films with subtitled portions contain those subtitles as an aspect of the artistic and cinematic design chosen by the filmmakers. In both events, the subtitles are a part of the film product and not an

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<sup>92</sup> 28 C.F.R. § 36.307(a) (2007) ("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."). See also Kuo, *supra* note 16, at 195.

<sup>93</sup> Kuo, *supra* note 16, at 195.

<sup>94</sup> *Ball*, 246 F. Supp. 2d at 130.

<sup>95</sup> *Id.*

<sup>96</sup> *Ball* involved rear window captioning, yet its importance in the open captioning context, through its dicta and analysis, warrants its mention here.

<sup>97</sup> Kuo, *supra* note 16, at 197.

<sup>98</sup> *Id.* at 198.



alteration added by the theatre. If a theatre or third party subsequently adds open captioning to accommodate hearing impaired viewers, it likely would be a fundamental alteration of the viewing experience.

Open captioning could prove to be a fundamental alteration for FedEx Field as well. Deaf football fans must recognize the tension created by their claim. If the availability of open captioning is so crucial that it denies deaf fans participation in the game, then they cannot say that it does not fundamentally alter the nature of the service provided to fans. It would be incongruous for deaf fans to argue that placing open captions on stadium screens are inconsequential and would not fundamentally alter the experience for non-disabled fans, while at the same time claiming that, without them, they cannot watch the game and are denied participation. Placing words over video on a scoreboard, or over other information a non-disabled fan has grown to expect when attending a game, fundamentally alters his viewing of the game.

## 1. FINDING A POSITION FOR OPEN CAPTIONING TO PLAY

Any type of open captioning would likely come at a great social and financial expense to stadium owners. There are only two logical places to locate open captioning. The first would be on the stadium video board. The second would be on the video displays that wrap around the interior of a stadium.<sup>99</sup> In either location the captioning will take the place of advertising space, video programming, or other information displayed by the stadium.

The most likely location for a stadium to provide open captioning would be on the stadium's video boards where the team usually displays actual real time game footage, replays, statistics, commercials, and print advertising. This appears to be the ideal location, as NAD demands that captioning be located there in their complaint. These massive video screens are astronomically expensive, both to construct and operate, and screen time is precious. The new \$8 million digital scoreboard at the University of Texas' stadium, nicknamed "Godzillatron," is the nation's largest high-definition video board at 55 feet high by 134 feet wide.<sup>100</sup> Open captioning, large enough for fans to see, would likely take up, at minimum, fifteen percent of the screen. This would reduce the viewable portion of the screen to the non-impaired fan by the same amount.

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<sup>99</sup> Many stadiums have installed ribbon boards. They are LCD screens that cover the stadiums' advertising façade. They allow stadiums to change advertisers at any moment, as well as display other messages to fans. *Ads are in Motion on Stadium's New Board*, S. FLA. BUS. J., July 21, 2006, available at <http://southflorida.bizjournals.com/southflorida/stories/2006/07/24/tidbits1.html>.

<sup>100</sup> Andrea Ahles, *A New Light on Signs*, FT. WORTH STAR-TELEGRAM, Oct. 29, 2006, at F1.

Open captioning, however, is likely the most cost effective method of captioning for a stadium. In order to implement open captioning on the main video boards, stadium operators would have relatively low out-of-pocket expenses.<sup>101</sup> The FCC estimates that the cost of real-time captioning for live programming is estimated to be between \$120 and \$1200 an hour.<sup>102</sup> This low out-of-pocket expense, however, comes with high opportunity costs to the stadium.

The stadium's video board, while likely the ideal location for the disabled fans making this ADA claim, is not the only feasible location for open captioning. If the open captions are placed on a location on the scoreboard adjacent to the video board, the stadium would not lose video space, but would have to sacrifice other information customarily displayed on the scoreboard. NFL teams use scoreboards to display real time game information, scores of other games, statistics, messages, advertisements, and information of interest to fans. If the stadium replaces scores or statistics with open captioning, they are effectively reducing the level of their product to all fans in the stadium, including the plaintiffs. It is not clear whether the deaf fans are willing to trade information they already enjoy from the scoreboard—like statistics—for open captioning of the stadium public address announcer's messages. Further exacerbating this uncertainty is the fact that NAD does not represent all deaf Redskins fans. It is not clear whether all deaf fans wish for the Redskins to provide captioning at all.

If the disabled fans are not willing to make this trade, and the stadium is forced to use advertising space on the scoreboard, then the Redskins would incur losses in advertising revenue. As professional athlete salaries escalate, stadium advertising has become an increasingly important revenue component for professional sports teams, generating millions of dollars each year, and allowing teams to stay profitable.<sup>103</sup>

The Redskins 2005 sponsorship revenue was approximately \$48 million.<sup>104</sup> In 1997, it was estimated that the stadium would lease the six

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<sup>101</sup> Assuming the existing video boards are capable of displaying open captioning, or are easily modifiable to accommodate captioning.

<sup>102</sup> In the Matter of Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176 at No. 115, (FCC Jan. 17, 1997), available at <http://www.fcc.gov/Bureaus/Cable/Notices/1997/fcc97004.txt>.

<sup>103</sup> Thomas Heath, *Clear and Visible Signs of the Times*, WASH. POST, Aug. 24, 1997, at D01, available at <http://football.ballparks.com/NFL/WashingtonRedskins/Articles/082497.htm>.

<sup>104</sup> Thomas Heath, *Redskins' Revenue Reaches \$300 Million*, WASH. POST, Aug. 20, 2005, at A01, available at <http://www.msnbc.msn.com/id/9015600/>. Cf. Tony Allison, *Marketing the Q*, SAN DIEGO METRO. MAG., July 1997, available at <http://www.sandiegometro.com/1997/jul/q.html> (Revenues from advertising at Qualcomm Stadium in San Diego are approximately 4.2 million annually). In the Redskins' case, team owner Daniel Snyder has gone to great lengths to generate additional revenue from FedEx Field. He has added seats described as "dangerously close to the field," seats with obstructed views of the

4-by-16-foot backlit advertising panels on each sideline at a cost of \$100,000 each per season. If one of these advertising panels on each sideline<sup>105</sup> was appropriated for open captioning use, the Redskins would lose \$200,000 in ad revenue for the space alone.<sup>106</sup> This figure does not take into account the expense of providing the open captioning, nor the intrusion on the ever-expanding and innovative methods teams invent for selling advertising. Would die-hard, but hearing impaired, Redskins fans like to read the public address announcer in exchange for a possibly detrimental effect on the team's ability to acquire a star free-agent wide receiver?

If the stadium chooses to display open captioning on a ribbon board,<sup>107</sup> they incur the expense of the ribbon board at the cost of the benefit conferred from advertising revenue. Nevertheless, this may be partially offset by the benefit received from the captioning not being displayed over the video board's video content. Conversely, a ribbon board, located apart from the video board, and in a different sight line, may not be an easy and convenient method for impaired fans to read the audio content they desire. This, however, would not be the death-knell for ribbon board-based captioning, as the public accommodation does not have to provide individuals their preferred accommodation, just a reasonable accommodation.<sup>108</sup>

### B. Rear Window Captioning

The implementation of RWC could constitute an undue burden on the stadium. However, due to the relative ease of implementing an RWC system in a movie theatre it has been held not to be a burden.<sup>109</sup> It does not appear to be as simple, or as effective, in the stadium context. Each individual theatre requires a single LED panel, one set of acrylic reflector screens, and one computer system. Federal regulations recommend reflectors for four percent of the seating capacity.<sup>110</sup> The 2003 costs of the system include

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field, and has even tried to prevent fans from parking across the expressway adjacent to the stadium in order to generate greater parking revenue. FEINSTEIN, *supra* note 3, at 304-05.

<sup>105</sup> So people of both sides could see. This solution still raises issues for fans seated in the end-zone and upper deck. Furthermore, the size of captioning and the speed at which it scrolls may be an issue.

<sup>106</sup> This figure is reflected in 1997 dollar values. Assuming a 2.4% rate of inflation, this equals approximately \$255,425 in 2007.

<sup>107</sup> See discussion *supra* note 99.

<sup>108</sup> See *Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir. 1998) ("Similarly, we conclude that the desk job offered to Keever was a reasonable accommodation, although it did not provide him with his preferred accommodation.").

<sup>109</sup> E.g., *Ball v. AMC Entm't Inc.*, 246 F. Supp. 2d 17 (D.D.C. 2003).

<sup>110</sup> 28 C.F.R. § 36, app. A, Standard 4.1.3(19)(b) (2007); see also Visual Alarms Technical Bulletin, *supra* note 82.

\$8,000 for the LED datawall,<sup>111</sup> \$6,000 for each DTS 6D player and \$80 for each reflector.<sup>112</sup> Assuming the average theater seats 300 people,<sup>113</sup> the cost would be approximately \$14,960.00 per theatre. With a capacity of 91,665,<sup>114</sup> it would cost \$293,328.00 simply to outfit FedEx Field with acrylic reflectors for a RWC system designed to accommodate four percent of the spectators.<sup>115</sup> FedEx Field boasts 180 seating sections, excluding luxury boxes and club level seating.<sup>116</sup> It would cost the Redskins \$14,000.00 per section, for a total of \$2,520,000.00 for all 180 sections, to provide the hardware required to project the captioning onto the RWC reflectors. This adds up to a grand total of \$2,813,328.00 to provide RWC captioning to four percent of Redskins fans.<sup>117</sup> This expense would constitute 2.6 percent of the Redskins 2005 pre-tax operating income of \$108.4 million.<sup>118</sup> While it is unlikely that the Redskins would be required to go to the extreme measure of installing RWC systems for use in every section of the stadium, the cost of doing so may not be deemed to be an undue burden on the Redskins.

A stadium setting, however, poses many challenges that an RWC system may not be able to overcome; this would ultimately render cost irrelevant. These challenges, which include the feasibility and safety of an RWC system, could create an undue burden on the Redskins. The main problem is that there is little or no indication that an RWC system would be feasible in an outdoor stadium setting under bright light. In fact, it appears that RWC systems do not even work optimally in dark theatre environments.<sup>119</sup> Few stadium sections have rear walls on which to mount LED displays, and the slope of the seats in any given section at a stadium is different from that of a theatre. The angles of the sections' boundaries may make it impossible for a single RWC system to work effectively. Moreover, unlike theatres,

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<sup>111</sup> See Visual Alarms Technical Bulletin, *supra* note 81.

<sup>112</sup> *Id.*

<sup>113</sup> Anne Gilbert, *Secrets of Size*, IN FOCUS, Dec. 2006, <http://www.natoonline.org/infocus/06december/auditoria.htm> (the average theatre seats between 250 and 400 people).

<sup>114</sup> Stadiums of the NFL, <http://www.stadiumsofnfl.com/nfc/FedExField.htm> (last visited Oct. 21, 2007).

<sup>115</sup> In *Cornilles*, the theatre contended that the cost of a rear window caption system would be \$14,206 per auditorium. *Cornilles v. Regal Cinemas, Inc.*, 2002 WL 31440885 at \*6 n.5 (D. Or. Jan. 3, 2002); cf. *Ball v. AMC Entm't Inc.*, 246 F. Supp. 2d 17, 26 (D.D.C. 2003) (theatre estimated costs of approximately \$15,000-16,000 per screen to install rear window captioning).

<sup>116</sup> Seating Diagram, <http://www.redskins.com/fedexfield/seating.jsp>, (last visited Oct. 21, 2007).

<sup>117</sup> This does not take into account the cost to install, maintain, and operate the rear window captioning systems.

<sup>118</sup> Forbes.com, NFL Team Valuations: #1 Washington Redskins (Aug. 31, 2006), [http://www.forbes.com/lists/2006/30/06nfl\\_Washington-Redskins\\_300925.html](http://www.forbes.com/lists/2006/30/06nfl_Washington-Redskins_300925.html).

<sup>119</sup> Daniel de Vise, *For Deaf Patrons, New View Of Moviegoing Experience*, WASH. POST, Jan. 2, 2005, at C03, available at <http://www.washingtonpost.com/wp-dyn/articles/A41441-2005Jan1.html>.

stadiums are places of constant fan motion where people are entering and exiting their seats frequently, and an exciting play often brings fans to their feet—effectively blocking the RWC system.<sup>120</sup>

Fan motion is a phenomenon that does not pose a question of first impression for courts. In *Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C.*,<sup>121</sup> the district court examined the ability of a place of public accommodation to accommodate wheelchair bound individuals with the implementation of a “no-stand” policy. The MCI Center, which was the stadium in question, planned to comply with the ADA by implementing a “no-stand” policy,<sup>122</sup> which would have supposedly prevented persons from standing up in front of patrons in wheelchairs; thus providing a clear line of sight for those wheelchair bound patrons. The court found two problems with the proposed policy.

First, the court differentiated the “no-stand” solution as an operational measure and not a design solution.<sup>123</sup> Because the MCI Center was a new facility at the time of the suit (as opposed to an existing one), the ADA required stricter standards for compliance.<sup>124</sup> For new structures, the ADA requires that the design and construction provide ready access to individuals with disabilities.<sup>125</sup> Therefore, the court found, a purely operational solution was insufficient to secure compliance for a new facility such as the MCI Center.<sup>126</sup>

The second problem the court identified was that the policy would impermissibly single out wheelchair patrons.<sup>127</sup> Because the plan would only be in effect where wheelchair-bound fans were located, all non-disabled fans in the arena would have been permitted to stand during play, except those seated in front of patrons in wheelchairs. The court made it quite clear that such a policy would present a “very real danger” of subjecting wheelchair users to resentment or hostility.<sup>128</sup> The ADA prohibits measures that “screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations.”<sup>129</sup>

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<sup>120</sup> This does not take into account stadiums where fans stand most of the time. For a discussion of the problems arising from this situation, see *infra* text accompanying note 142.

<sup>121</sup> 950 F. Supp. 393 (D.D.C. 1996).

<sup>122</sup> *Id.* at 402.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (referencing 42 U.S.C.A. § 12182(b)(2)(A)(iv)).

<sup>125</sup> *Id.* (referencing 42 U.S.C.A. § 12183(a)(1)).

<sup>126</sup> *Id.* at 402, 403.

<sup>127</sup> *Id.* at 403.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (quoting 42 U.S.C.A. § 12182(b)(2)(A)(i)).

FedEx Field would likely fail the *Ellerbe Becket* test. Since FedEx Field is an existing structure, a purely operational measure, instead of a design change, may bring the stadium into compliance with the ADA. However, in order to accommodate an RWC system, the fans seated behind a RWC user, like those seated in front of a wheelchair bound fan in *Ellerbe Becket*, would likely be required to have their motion curtailed by some sort of stadium policy in order to accommodate an RWC system. As in *Ellerbe Becket Architects & Engineers*, this would likely subject deaf fans to ridicule or hostility. Furthermore, as deaf fans utilizing the RWC system would not be seated in special sections, it would be difficult to locate the patrons seated behind the deaf fans and inform them of their new behavior restrictions.

Finally, a no-stand policy would render the RWC system a fundamental alteration of the service under the ADA. Non-disabled fans, seated behind RWC users, would have their experience fundamentally altered if they were not able to stand to cheer for their team, as many fans are accustomed to doing throughout the game.

It is estimated that anywhere from 9 to 22 out of every 1,000 people, or 0.9% to 2.2% of the population, have a severe hearing impairment or are deaf.<sup>130</sup> In order to accommodate the average percentage of disabled fans at FedEx Field's full capacity of 91,665 people, the Redskins would be required to have between 825 and 2,016 acrylic RWC reflectors on hand for each game.<sup>131</sup> At an approximate price of \$80 each, these reflectors would cost the Redskins between \$66,000 and \$161,280. Furthermore, as the stadium setting is exponentially more rowdy and kinetic than a theatre, the likelihood is high that the Redskins would have to replace these reflectors more frequently than a movie theatre would have to replace its own reflectors. Therefore, an RCW system would likely be an undue burden because of its cost and feasibility.

### C. *Seeing the Whole Field—Other Options*

#### 1. INDIVIDUAL CAPTIONING DEVICES

A third option that can be used to provide captioning to Redskins fans includes individual captioning devices. The NFL and the Washington Redskins have introduced a portable, hand-held device that allows fans to

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<sup>130</sup> How Many Deaf People are there in the U.S., <http://gri.gallaudet.edu/Demographics/deaf-US.php> (last visited Oct. 21, 2007).

<sup>131</sup> The Washington Redskins have sold out every game since 1968. Washington Redskins, [http://www.profootballhof.com/history/team.jsp?FRANCHISE\\_ID=32](http://www.profootballhof.com/history/team.jsp?FRANCHISE_ID=32) (last visited Oct. 21, 2007).

watch any NFL game directly from the stands.<sup>132</sup> This technology may be utilized to provide captioning to deaf fans at a lower cost than open captioning or RWC; however, it would still constitute an undue burden on the Redskins. With these personal devices the Redskins may offer captioning to those who need it without disturbing non-impaired fans and without fundamentally altering the service provided to fans. A major drawback to this option is the relatively small size of the device.<sup>133</sup> The device's small size would likely make it difficult for fans to read the captioning formatted to fit on its even smaller screen.

Despite the relatively low cost of this option, compared to open captioning or closed captioning, there remains a significant financial expense to the Redskins associated with its implementation. Federal regulations provide that the Redskins may not charge disabled fans a fee to recoup some or all of the costs of the implementation of a hand-held captioning aid. C.F.R. § 36.301(c) prohibits charging a fee for providing auxiliary aids and services, barrier removal, alternatives to barrier removal, reasonable modifications in policies, practices, and procedures, or any other measures necessary to ensure compliance with the ADA.<sup>134</sup> The rental fee for a hand-held TV device at 2006 Redskins games was \$39.95.<sup>135</sup> Assuming full retail price, and stadium capacity, it would cost the Redskins approximately \$80,564 to provide hand-held devices to 2.2% of fans for one game. This would likely be an undue burden on the Redskins.

## 2. SPECIAL TEAMS—DESIGNATED SPECIAL SECTIONS

Perhaps the most feasible, and least intrusive, method for the accommodation of the Plaintiffs is the creation of special sections in which deaf fans may sit. In these sections, much like those created for the accommodation of wheelchair-bound fans, there is a reasonable compromise between NAD's demands and the Redskins' statutory obligation to provide reasonable accommodations. Here, the Redskins can provide a small screen in front of each seat which would display captioning.<sup>136</sup> RWC may be

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<sup>132</sup> Kangaroo TV is a brand-name example of an electronic device that weighs approximately one pound, is the size of a fist, and allows fans to watch programming from their seats. Thomas Heath, *A Little Bundle of Games, Stats*, WASH. POST, Nov. 21, 2006, at E07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/20/AR2006112001074.html>. The Redskins and the Miami Dolphins were the first NFL teams to implement this technology at the beginning of the 2006 NFL season. <http://www.redskins.com/tickets/article.jsp?id=21438>.

<sup>133</sup> *Id.* The Kangaroo TV screen is only three inches by four inches.

<sup>134</sup> 28 C.F.R. § 36.301(c) (2007).

<sup>135</sup> See Heath, *supra* note 133.

<sup>136</sup> See Visual Alarms Technical Bulletin, *supra* note 81.

utilized in these sections as well; however, the small size of the section would only alleviate some of the problems that arise from the use of an RWC system outside, in bright light, and constant fan motion. However, the cost of creating special captioning sections is not as clear as that for special wheelchair sections. The implementation of a wheelchair section is a one time fixed cost, priced solely at the expense of construction of the section. For a captioning section, however, the stadium is still required to provide the service of real-time captioning, as well as the captioning technology. For the Redskins, this solution causes concern, because of both the high initial construction costs, as well as the ongoing operations costs for the real-time captioning.

The easiest method, and a fair compromise, would be to provide captioning in these special sections through televisions mounted within view of the impaired fans. The stadium could mount a small number of large televisions, or multiple smaller televisions, in order for the hearing impaired fans to watch the television broadcast of the game, utilizing the television's captioning. This plan is not without its own drawbacks. While the expense to the team would only be the cost of construction of the section and the installation of the televisions, it would nevertheless limit the captioned content to that provided by the game's television broadcast. While the hearing impaired fans would then be provided some measure of captioning, they would not, in fact, be provided with captioning of all the messages of the stadium that they seek from the Redskins.

However, the Redskins could successfully argue that the required construction would be cost prohibitive, and that there would be no room for such sections at FedEx Field.<sup>137</sup> The Redskins would likely have to move existing seating in order to construct the new sections. Moving existing seats and retrofitting FedEx Field would not only cause the Redskins to shoulder heavy financial costs, but it would also inconvenience the non-disabled fans who would be forced to leave their current seats for another location. Adding to the effect on non-disabled fans is the likelihood that televisions mounted for disabled fans may obscure the views of non-disabled fans. Many of the deaf fans would require at least one companion seat in these sections as well, doubling the size required for these special sections. Finally, deaf fans may find these sections stigmatizing, or be disinclined to give up their seats in order to move to the hearing impaired section. If this solution indeed has a stigmatizing effect, then it would be found insufficient under the standard set forth in *Ellerbe Becket*.

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<sup>137</sup> The Redskins would have to remove other seats. For a discussion of new wheelchair positions at NFL stadiums, see *supra* note 18.



#### IV. LONG TERM EFFECTS: THE ALWAYS DANGEROUS “SLIPPERY SLOPE” ARGUMENT

Requiring stadiums to provide captioning to deaf fans would have serious and lasting effects on the sports industry. Many colleges will not be able to afford the added costs of implementing captioning technologies.<sup>138</sup> Recent increased spending on athletics has led to the growth of a rift between athletic and academic interests on college campuses.<sup>139</sup> In actuality, only about forty schools claim their athletic departments are self-sufficient.<sup>140</sup> Some colleges have gone so far as to forego historic and meaningful names for their stadiums in favor of selling the naming rights to corporate sponsors.<sup>141</sup> After making substantial renovations to their stadiums, universities may not be able to afford further expenditures to add captioning systems to them. Furthermore, not every college stadium has a video scoreboard on which to display captioning.

The effect of court-mandated captioning would not be confined to one or two individual sports. Professional baseball stadiums routinely have large video boards, and they would face the same challenges as FedEx Field in implementing captioning systems. In other major sports, such as basketball and hockey, the announcements made are usually even less informative about the contests' proceedings than those made at a football or baseball stadium. At many professional and semi-professional stadiums across the country, teams cannot afford modern scoreboards, much less those capable of real time open captioning. A court requiring FedEx Field and the Redskins to provide open captioning on their video board could result in firm precedent that would compel other stadiums to make alterations to their product that would cripple them financially.

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<sup>138</sup> See NCAA analysis, *supra* note 60.

<sup>139</sup> See MaryJo Sylwester & Tom Witosky, *Athletic Spending Grows as Academic Funds Dry Up*, USA TODAY, Feb. 18, 2004, available at [http://www.usatoday.com/sports/college/2004-02-18-athletic-spending-cover\\_x.htm](http://www.usatoday.com/sports/college/2004-02-18-athletic-spending-cover_x.htm); see also MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 11, Aspen Publishers (2005) (noting that an “athletic arms race” causes a majority of university athletic departments to operate at a loss). In 2003 the cost of college sports facility renovation across the country totaled \$4 billion. This construction boom has resulted in debt that should affect universities for years to come. *Id.* at 12 (citing KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, *A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION* 17 (June 2001)).

<sup>140</sup> Sylwester & Witosky, *supra* note 140.

<sup>141</sup> Marc Carig, *Friedgen: Naming-Rights Deal a Major Step*, WASH. POST, Aug. 25, 2006, at E03 available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/24/AR2006082401881.html?nav=emailpage>. This practice has been going on for years at the professional level; however, is fairly new to the arena of college athletics.

What other places of public accommodation may have to provide captioning? Would airports be required to caption announcements regarding unattended baggage? Would the local diner with a long wait for a table on Saturday night be required to caption the host or hostesses announcements? Requiring the Redskins to caption stadium announcements at FedEx Field could theoretically lead to extensive litigation calling for the captioning of every product or service in America.

## V. CONCLUSION

While it is safe to assume that the Redskins do not hate deaf people, the absurdity of this article's title is intended to illuminate the complexity of the issue that faces the Redskins. The complication lies in the fact that no matter what accommodation the Redskins choose, they will still be viewed by some as discriminating against deaf fans. Although the Redskins, like all professional sports teams, have an interest in accommodating and maintaining a positive relationship with disabled fans, they should not be required to provide captioning to accommodate the NAD, unless they are able to do so in a cost-effective manner that does not disturb the enjoyment of the experience for their non-deaf fans. None of the available captioning options are required under the ADA. Open captioning constitutes a fundamental alteration of the Redskins' product, while RWC and individual captioning devices would impose an undue burden on the team.

In the end, there is no indication that deaf fans are not receiving full and equal enjoyment of the football fan experience in the absence of captioning of stadium announcements. Congress has determined that, while disabled individuals must have an equal opportunity to obtain the same result as non-disabled individuals, they do not have to be provided with the exact same experience as people without a disability. Without captioning, hearing impaired Redskins fans are able to view every play of the game, see the officials' hand signals, participate in cheering for their team, view statistical information and equally enjoy the fan experience. The absence of captioning does not preclude hearing impaired fans from enjoying the opportunity to experience the game as their non-disabled counterparts do. It would be incongruous with the congressional intent and goals of the ADA for a court to decide otherwise.

As the analysis is one that should be performed on a case-by-case basis, open captioning should be viewed as a fundamental alteration of the goods and services that FedEx Field provides to its fans. Open captioning would substantially reduce the viewable area of the stadium's video boards, as well as curtail the presentation of other information that football fans have come to expect during their experience. Furthermore, while less expensive than

closed captioning, open captioning presented at a location in the stadium other than the video boards would be apt to come at a considerable expense to the Redskins—both in out-of-pocket expenses as well as lost opportunity costs. The Redskins may legitimately take the position that open captioning could hinder their ability to put a winning team on the field.

Alternatively, closed captioning would come at a considerably greater financial expense to the Redskins. An RWC system's substantial expense could become an undue burden to the Redskins. Putting an RWC system into service would not be easily achievable because it would include purchasing the necessary equipment, installing it, maintaining it, and creating an environment for its successful implementation. This would cause the Redskins to spend millions of dollars in order to have a system that would service approximately four percent of Redskins fans. Moreover, it is probable that such an RWC system is not mechanically feasible in the stadium environment at FedEx Field.

The middle ground for the Redskins would be to offer a small number of personal captioning devices, or to create a limited number of special captioning sections in the stadium. Both of these options would carry a high expense, but would still be more financially efficient than an RWC system. Furthermore, these two solutions are less likely to fundamentally alter the nature of the Redskins product to non-impaired fans. The number of portable personal captioning devices, or the number of seats available in a special captioning section, as well as the location of the section within FedEx Field, must be a fact specific analysis, taking into account the cost, utility and accessibility of the respective services. Nevertheless, because it is possible that a court may deem FedEx Field a location where audio communication is not integral to its use, the Redskins would not have to supply a great number of personal captioning devices.<sup>142</sup> Based upon the *Oregon Arena* "reasonably foreseeable" standard, the Redskins would only be required to provide captioning devices for the number of fans reasonably expected to require a device—and to request one.

One of the questions at hand is what *should* be captioned? The Redskins should continue to provide all fans with security and safety information on the scoreboards. The noises of the game, such as grunts, player yelling and the noise of collisions on the field should not be captioned. While these sounds are part of the game, their absence does not deny access to hearing-

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<sup>142</sup> See *supra* text accompanying note 68. In *Oregon Arena*, the stadium reported it had never received more than 18 requests for assistive listening devices for a single event. The Rose Garden has a seating capacity of 21,538. National Basketball Association Home Courts, [http://encarta.msn.com/media\\_701500786/National\\_Basketball\\_Association\\_Home\\_Courts.html](http://encarta.msn.com/media_701500786/National_Basketball_Association_Home_Courts.html) (last visited Oct. 21, 2007).

impaired fans, or prevent them from equal enjoyment of the game. Even non-impaired fans do not hear all, or sometimes any, of these sounds. They can even be equated to ambient noise one hears when walking down a street. While this noise provides a background to the experience, a lack of this ambient noise does not hinder an individual's ability to navigate life.

However, the announcements made by the game's referee are in a grey area of what should or should not be captioned. While the referee makes hand signals to indicate the penalty called, he will also often explain a close or confusing call to both the players and the fans. Similar to the game's other sounds, an absence of these sounds should not deny hearing-impaired fans access, or provide for their unequal enjoyment due to the absence of captioning for this information.

Through the efforts of its employees, the NFL has made professional football one of America's most-watched sports. The NFL itself has also taken socially responsible stances when faced with a range of controversial situations. As the outcome of this contest between the Redskins and FedEx Field and NAD will have repercussions that ripple throughout the league, it would behoove the NFL to take a proactive role in helping individual teams make their facilities more accessible to hearing-impaired fans. The form of aid the NFL supplies to its teams should be both consulting and financial to insure compliance with the ADA.

Stadiums that have a technologically sufficient video board of ample size may be able to offer a limited captioning option to fans. Simply placing penalty information, such as the infraction called and the offending player, on the video board for a few short moments after each occurrence may be enough to satisfy hearing-impaired fans (or non-impaired fans that just missed the play). This may be relatively easy. One individual may simply input the information into a pre-set computer program. This may be a sensible, and socially responsible, method of compromise for teams that already have the technological ability to do so.

When the dust settles on the field, the level of accommodation that the Redskins provide for deaf fans should be determined by the Redskins themselves. The accommodation demanded by NAD is not warranted under the ADA. The Redskins operate a public accommodation that offers hearing-impaired fans the same opportunity for the full and equal enjoyment of the fan experience as they do for non-disabled fans. Numerous factors suggest that it would behoove the Redskins to offer as much accommodation as reasonably attainable; however, they should make this determination themselves, and should neither alter their product, nor incur substantial expense to reach this end.

