



# **DISABILITY AND COMMUNICATION ACCESS BOARD**

**Movie Captioning in Theaters in Hawaii  
An Abbreviated Legislative History**

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# **Movie Captioning in Theaters in Hawaii**

## **An Abbreviated Legislative History**

The following document is intended as a brief summary of movie captioning in theaters in Hawaii. It includes a brief discussion of the federal law to place our state laws in context and to provide a historical perspective of Hawaii's groundbreaking effort in providing open movie captioning viewings in theaters. It is not intended as a legal document with annotated footnotes, (although the Disability and Communication Access Board (DCAB) office has all appropriate documents noted as reference), but rather a lay guide for historical reference.

It should also be noted that most of the legislation that covers the topic of captioning, whether open or closed, in movie theaters, includes the topic of audio-description for persons who are blind or visually impaired. However, this document does not discuss audio-description in movie showings.

This document also does not discuss the background or history on the production side of captioning movies by movie studios, nor does it discuss requirements under the Federal Communications Commission or the Federal Emergency Management Agency for captioning movies only shown on television and streaming venues or news broadcasts on television.

### **Definitions**

“Open movie captioning” means the written, on-screen display of a movie's dialogue and non-speech information, such as music, the identity of the character speaking, and other sounds and sound effects. Open movie captioning shows the text on the screen with the information visible to all patrons.

“Closed movie captioning” means the written display of a movie's dialogue and non-speech information, such as music, the identity of the character speaking, and other sounds and sound effects. Closed movie captioning is only visible to a patron with the use of assistive technology captioning device, not to all patrons. When requested, the captions are delivered via individual captioning devices used by patrons at their seats. The captioning devices are owned by the movie theaters.

NOTE: The Department of Justice (DOJ) intentionally used the terms “Open movie captioning” and “Closed movie captioning” instead of “closed captioning” so as not to confuse viewers and readers with the “CC” or term that is used in the context of television captioning, whereby a viewer at home is able to activate the “hidden” captions with the selection on a remote control, thereby making the captions visible to all by choice. Captioning on television cannot be viewed with the same assistive technology as used in a movie theater.

## **Federal Legislation – The Americans with Disabilities Act (ADA)**

### Enactment of the ADA

Congress enacted the Americans with Disabilities Act (ADA) in July 1990 as a broad and comprehensive civil rights law that prohibits discrimination on the basis of disability in employment, and programs/services in state and local government as well as privately-owned places of public accommodation.

While the ADA's final language does not specifically refer to captioning in movies, there is reference to captioning in the legislative history where Congress noted that open captioning was not a requirement under the ADA. The House and Senate Committees supported the showing of captioned movies, although they chose not to require such showings, stating that "filmmakers are, however, encouraged to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films." Subtitles were already well established for foreign language films, but closed captioning and audio description did not exist when the ADA was enacted. Even at that time, open captioning was a laborious process with analog films.

### Department of Justice ADA Rules on Movie Captioning

The evolution and technological advances in movie production since the inception of the ADA resulted in a shift from analog to digital film. This shift made it significantly easier to embed the captioning in movies and to use voice recognition software to minimize labor costs for captioning. Furthermore, with the proliferation of streaming services on television where many individuals preferred to watch movies at home, production companies increased the number of films with embedded captioning so that the films could be viewed on television after the initial run in the cinema houses.

On July 26, 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (ANPRM) relating to Nondiscrimination on the Basis of Disability for Movie Captioning and Video Description. On the same day, the anniversary of the ADA, it also issued its revised ADA Rules for Titles II and III of the ADA. The ANPRM specifically asked for public input on the provision of closed movie captioning and audio description, noting that open movie captioning was still not required under the ADA.

On August 1, 2014, four years later, the DOJ issued a Notice of Proposed Rulemaking (NPRM) on the same topic of movie captioning and audio description in movie theaters. The rule proposed that movie theaters provide a specified number of assistive technology captioning devices to view closed captioned movies. Furthermore, theaters would be required to offer the closed caption version of a movie at all screenings, provided that the movie is produced and otherwise distributed with such features.

On December 2, 2016, two years later, the DOJ issued a Final Rule regarding movie captioning and audio description in movie theaters. The rule became effective January 17, 2017. However, the timeframe for compliance varied depending upon whether the theater had to convert from analog to digital viewing systems. The Final Rule requires that a public accommodation that owns, operates, or leases a movie theater is required to provide closed movie captioning and audio description whenever showing a digital movie that is produced, distributed or otherwise made available with these features. It does not require movie theaters to caption movies that are not otherwise produced and distributed with captions, nor to switch from analog to digital systems. The rule requires the provision and maintenance of a specified number of captioning devices based upon the number of movie theater auditoriums exhibiting digital movies.

#### Summary of Federal Law

As of the date of this summary, movie theaters must abide by the requirements of the December 2, 2016 Final Rule issued by the DOJ. The type of captioning devices (glasses, rear view mirror, etc.) used is left to the discretion of the movie theater. From a practical perspective for large theaters, this applies to all showings. Open captioned movies are not required, but may be provided as an alternative.

## State Legislation

### Act 39 (2015)

The Hawaii State Legislature passed Act 39 Relating to Movie Theaters, a groundbreaking statute, the first of its kind in the nation, to require a selected number of showings in movie theaters to be open captioned rather than closed captioned. Hawaii Revised Statutes (HRS) §489-9 was amended to require a public accommodation that owns, leases, leases to, or operates a motion picture theater in more than two locations in the state to provide open movie captioning during at least two showings per week of each motion picture that is produced and offered with open movie captioning.

For the purposes of this Act and HRS §489-9, a motion picture theater was defined as “a movie theater, screening room, or other venue in use primarily for the exhibition of a motion picture.” Functionally, the narrowness of the definition meant that the law impacted only two movie theater companies in Hawaii (Regal and Consolidated Theaters).

Act 39 was clear to state that motion picture theaters were not required to create movies in captioned media if not already done so by the production company. Furthermore, the Act would not prohibit the showing of a movie without an open movie captioned version if it is produced and distributed without captioning or audio description. Act 39 also did not specify which movie showings were to be open captioned, as this decision was left to the discretion of the movie theaters.

Act 39 was an amendment to HRS §489, the State’s nondiscrimination statute for public accommodations under the jurisdiction of the Hawaii Civil Rights Commission.

As a concession to those who opposed the bill (House Bill 1272) when introduced, the Act was set as a two-year demonstration project with an effective date of January 1, 2016 and a sunset date of January 1, 2018. Key legislators in the passage of Act 39 were Representative James Tokioka, Representative Derek Kawakami, Senator Suzanne Chun Oakland, and Senator Rosalyn Baker.

It should be noted that 2015 was not the first time that an open movie captioning bill had been suggested or introduced. At least one iteration had been introduced earlier. However, because the DOJ, did not issue a NPRM until 2014 (see prior history of federal legislation), the issue at the state level was always put on the back burner until the federal government decided what it would require, so as not to have a state law that was duplicative or inconsistent with federal law. Opponents of a state law, the movie theaters, indicated that it was premature to have a state law without knowing the parameters of the federal law. However, once the 2014 NPRM was issued, the direction of the federal government was basically charted, leaving open the option for the State to enact a law that would not be inconsistent, but would complement and exceed the federal provisions.

## Act 211 (2017)

Recognizing that Act 39 had a sunset date of January 1, 2018, advocacy groups mounted an effort to amend the law to make the provisions of Act 39 permanent by removing the sunset date. A bill was introduced as House Bill 475 in a simple form with the only intended amendment to repeal the sunset date, but otherwise leaving all other provisions of the Act unchanged.

The bill had multiple hearings, with limited, but all positive support from the advocacy groups, including DCAB and the deaf community, in support of the benefits of open captioning and the desire to make the provisions permanent. It would be fair to say that the deaf community did not realize that the bill was in jeopardy or that there were efforts by others in the community to oppose the repeal, particularly behind the scenes.

As a result, when House Bill 475 finally emerged from the Conference Committee after many hearings of all positive testimony there were changes that were unanticipated and, frankly, a complete surprise to the advocacy community. Although the community sought a repeal of the sunset date, the final version only extended the sunset date for two more years from January 1, 2018 to January 1, 2020. In addition, the following last minute changes emerged from the Conference Committee:

- Reducing the required number of open captioned viewings from two per week to one per week; and
- Allowing a motion picture theater to substitute a “personal closed captioning system by means of lightweight eyewear” in lieu of providing open movie captioned showings.

In addition, the final version of House Bill 475 required the Department of Business, and Economic Development, and Tourism (DBEDT) to conduct a survey of motion picture theaters that are covered by Act 39 to determine the operational and financial impact that it has had on the theaters.

Although advocacy groups within the state, notably DCAB and the Hawaii Civil Rights Commission, had grave reservations about the weakening of the law with the reduction of viewings and the ability to substitute lightweight eyewear for open captioned showings, there was concern that a veto of the bill would leave no statutory requirement at all, essentially “throwing out the baby with the bathwater.” Also of concern was the inappropriateness of specifying a particular type of technology, lightweight eyewear. As a result, the Governor allowed the bill to become law as Act 211 without his signature, noting the concern, but with his desire to retain some provision on the books for potential amendment in the future.

As a result of Act 211, one motion picture theater company in Hawaii provided lightweight eyewear and ceased offering open captioned movies while the second

motion picture theater company in Hawaii continued to provide open captioned movies at the reduced number of one showing per week. It should be noted that some smaller theater venues voluntarily show open captioned movies.

#### Department of Business, Economic Development, and Tourism Study (2017)

Pursuant to Section 3 of Act 211, DBEDT undertook an effort to study the impact of Act 211 on the two motion picture theater companies in Hawaii. The reasoning for the study was an assertion by the movie theater industry that the provision of open captioned movies would have a negative financial impact on the industry. In essence, the claim was that movie patrons who objected to seeing the captions, ostensibly hearing patrons, would not patronize the theater, resulting in a loss of revenue. In the face of shrinking attendance due to a shift of viewers to home streaming services, any possibility of reducing the number of patrons would be alarming to brick-and-mortar motion picture theaters.

The study was conducted by DBEDT with findings released in December 2017, "Impact of Act 039 Relating to Movie Theaters." The only means of gathering information from the two motion picture theaters was via aggregate, self-reported data that compared the overall attendance at all showings that were open captioned with the overall average attendance at all showings that did not have captions. The result showed an overall average difference in attendance (lower for those movies with open captioning) but, due to resource limitations, did not test for causation for the difference in attendance. DCAB prepared a response to the report and noted that the study: (1) did not (and could not, given the methodology limitations imposed by the theaters) compare attendance per showing (i.e., to compare the same show shown at the same time on different days in open versus closed viewings); (2) could not determine if attendance shifted away from open to closed captioned viewings, resulting in no net loss to the motion picture theater; or (3) did not analyze the increase in attendance from those individuals who would not have otherwise attended were it not for the presence of open captioning.

#### House Bill 2370, Senate Bill 2797 and Senate Bill 2650 (2018)

DCAB introduced legislation in 2018 through the Governor's administrative package in the form of House Bill 2370, Senate Bill 2797, in addition, a separate House Bill was introduced. The purpose of the bills was to restore the statutory requirement in HRS §489-9 that had been enacted in Act 39-2015 prior to its amendment by Act 211-2017.

These bills made significant progress in the 2018 Legislature, but ultimately failed to pass a final committee hearing. On the open public record there was much support from advocacy groups and little objection except from those who represented the interests of motion picture theaters who cited the DBEDT study of December 2017 as evidence that the legislative requirement was harming the industry from a financial perspective. Those groups and lobbyists proved to have persuasive impact with



legislators sufficient to hold the bill. Given the fact that the sunset date of the statute was January 1, 2020, there was no urgency to correct the situation for the legislators.

#### Act 154 (2019)

Because efforts to pass legislation in 2018 failed, and with the imminent potential sunset and repeal of HRS §489-9 on January 1, 2020, House Bill 1009 was introduced by the Administration again at the request of DCAB. House Bill 1009 was essentially identical to House Bill 2370 and Senate Bill 2797 from the prior 2018 session. Several other versions of the bill were also introduced but House Bill 1009 was the only version that survived. One other version required one of the two showings with open captioning to be in the evening or on weekends (i.e., prime time), but strategically the decision of key legislators was to be less prescriptive in order to minimize opposition.

The advocacy and supportive efforts of DCAB, Hawaii Civil Rights Commission, Hawaii Disability Rights Center, the Aloha State Association of the Deaf and members of the Deaf Blind Task Force were augmented in 2019 with the addition of the Office of Language Access to stress the importance of captioning for people with Limited English Proficiency (LEP). Opposing testimony from the National Association of Theater Operators was counterbalanced with national testimony from the National Association of the Deaf, Association of Late Deafened Adults, Hearing Loss Association of America, and Telecommunications for the Deaf, Inc. In addition, more consumers were rallied through social media (vlogs) in American Sign Language for the deaf community through DCAB, resulting in many more testimonies by individuals who are deaf or hard of hearing. House Bill 1009 was enacted into law as Act 154 on June 26, 2019.

Key legislators in the passage of Act 154 were Senator Karl Rhoades, Senator Rosalyn Baker, Senator Donovan Dela Cruz, Representative Aaron Ling Johanson, Representative Chris Lee, and Representative Sylvia Luke.

#### Summary of State Law

As of the date of this summary, motion picture theaters (i.e., movie theaters) in Hawaii with two or more locations must provide open movie captioning during at least two showings per week of any movie that is produced and offered with open captioning. The law neither specifies the times those showings must occur, nor does it require captioning of movies that are produced without captioning.

The law is enforced by the Hawaii Civil Rights Commission.

## REFERENCE DOCUMENTS IN DCAB OFFICE

### Tab

- 1 DOJ ANPRM: Nondiscrimination on the Basis of Disability by Places of Public Accommodations - Movie Theaters: Movie Captioning and Video Description (July 26, 2010)
- 2 DOJ NPRM: Nondiscrimination on the Basis of Disability by Places of Public Accommodations - Movie Theaters: Movie Captioning and Audio Description (August 1, 2014)
- 3 DOJ Final Rule: Nondiscrimination on the Basis of Disability by Places of Public Accommodations - Movie Theaters: Movie Captioning and Audio Description (December 2, 2016)
- 4 Act 39 (2015)
- 5 Act 211 (2017)
- 6 DBEDT Study: Impact of Act 039 Relating to Movie Theaters (December 2017)
- 7 House Bill 2370, Senate Bill 2797, and Senate Bill 2650 (2018)
- 8 Testimonies from the following entities on Senate Bill 331 or House Bill 1009 (2019): Disability and Communication Access Board, Hawaii Civil Rights Commission, National Association of the Deaf, National Association of Theater Operators, and a Joint Statement of Position by the National Association of the Deaf, Association of Late Deafened Adults, Hearing Loss Association of America, and Telecommunications for the Deaf, Inc.
- 9 Act 154 (2019) and Governor's Bill Signing
- 10 Miscellaneous Articles or Information