Propelling Aviation to New Heights: Accessibility to In-Flight Entertainment for Deaf and Hard of Hearing Passengers

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ACCESSIBILITY TO IN-FLIGHT ENTERTAINMENT FOR
DEAF AND HARD OF HEARING PASSENGERS

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ABSTRACT

In-flight entertainment has been available for over forty-five years but to this day remains without captions or subtitles, thus depriving deaf and hard of hearing passengers of access to this service. The Air Carrier Access Act of 1986 (ACAA) and implementing regulations do not require captioning of in-flight entertainment, and Congress, the airline industry, and the U.S. Department of Transportation (DOT) have yet to remedy the problem. The courts do not allow deaf and hard of hearing passengers a private right of action and punitive damages under the ACAA. The DOT recently indicated it will issue a Notice of Pro-

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posed Rule Making on the subject, and what follows is an argument for a new regulation that interprets the ACAA to require captioning of in-flight entertainment on U.S. transcontinental and international flights.

“The airplane has unveiled for us the true face of the earth.”

I. INTRODUCTION

I FIRST SAW the true face of the earth when, at age thirteen, I flew between New York and Los Angeles on an American Airlines Boeing 707 jet. Dancing on “laughter-silvered wings” and witnessing the majesty of “from sea to shining sea,” I was hooked on flight. At fourteen, I took my first international

1 Antoine de Saint-Exupéry, Wind, Sand and Stars, in Airman’s Odyssey 1, 58 (1967). The airplane can also be conceptualized as a prelude to the World Wide Web, accelerating the circulation of people, ideas, and information that marked a break between the 19th and the 20th centuries. In-flight entertainment assisted in that acceleration, linking people and cultures around the world.

2 John Gillespie Magee, Jr., High Flight, Poetry X (May 15, 2005), http://poetry.poetryx.com/poems/11205 (Oh, I have slipped the surly bonds of Earth and Danced the skies on laughter-silvered wings; Sunward I’ve climbed, and joined the tumbling mirth of sun-split clouds . . . .). In response to the tragedy of the Challenger explosion in 1986, President Reagan quoted from Magee’s famous poem (the astronauts “waved goodbye and ‘slipped the surly bonds of earth’ to ‘touch the face of God’”). President Ronald Reagan, Speech to the Nation About the Challenger Explosion (Jan. 28, 1986), available at http://www.historyplace.com/speeches/reagan-challenger.htm. Reading the full poem for the first time, I imagined Magee was referencing an airplane like the F-14 fighter jet of the late 20th century, only to discover he was flying a Supermarine Spitfire over the skies of Britain in 1941. For an image of the Spitfire, a World War II-era British fighter jet, see Supermarine Spitfire/Seafire, Warbird Alley, http://www.warbirdalley.com/spit.htm (last visited Feb. 7, 2012). A few days after the United States entered World War II, Magee, a nineteen-year-old American military pilot, was killed in a midair collision over England. Linda Granfield, High Flight: A Story of World War II 24 (1999).


4 My love of flying led me to obtain my private pilot’s license. I trained in a Cessna 172, a four-seat, single-engine propeller airplane flying out of Lincoln Park, New Jersey. I made many flights down the Hudson River, tracking Manhattan’s West Side Highway and passing the George Washington Bridge, the Empire State Building, the twin towers of the World Trade Center, and the Statue of Liberty. Because I am deaf, I flew beneath the ceiling of 1,100 feet over the Hudson River established for mandatory radio communication with the tower at New York’s La Guardia Airport. After takeoff from Lincoln Park, I’d climb to a thousand feet, head east for the Hudson River, and turn right over the Hudson at the Palisades side of New Jersey. Settling in at 800 feet, I’d fly down the river to the Verrazano Narrows Bridge spanning Staten Island and Brooklyn, cross over the bridge, turn left and drop down to 300 feet over the Atlantic Ocean to fly past
flight, an Eastern Airlines Whisperjet,\(^5\) between New York and Montreal. I was fifteen when I flew El Al Airlines between New York and Tel Aviv, and sixteen when I flew British Overseas Airways Corporation (now British Airways)\(^6\) between New York and Nairobi, Kenya. In that day and age, before hijackings to Cuba and global terrorism transformed aviation, flying was a glamorous pleasure. There were no security checkpoints, and family and friends could accompany me to my gate. Airplane seats were spacious, providing ample knee room, and often there were no passengers in my row. I remember quite a few overnight flights to Europe where I could stretch out and sleep. I remember one Eastern Airlines flight from Logan Airport in Boston to New York’s La Guardia Airport, a DC-type aircraft, where my brother and I sat, face to face, in comfortable armchairs. It was right out of *Casablanca*.\(^7\)

However, something was missing—movies.

The movies—or “in-flight entertainment” (IFE), the term used by the airline industry\(^8\)—had no captioning or subtitling

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enabling me to access the entertainment screened during long overseas or transcontinental flights.\(^9\) I recall that the American Airlines jet I flew between New York and Los Angeles in 1966 screened a movie, but I could not watch it because it lacked captions.\(^10\) That was the way it was on all my transcontinental and transoceanic flights during my youth.

Fast forward forty-five years.

The state of affairs I faced in the 1960s continues today.\(^11\) On flights aboard Pan American, TWA, American, United, Delta, US Air, and Icelandair, flown between New York and the West Coast, including New York and Europe, I have not seen in-flight movies with captions.\(^12\) My fellow passengers could wile away the long hours in the air being entertained while I had to actively entertain myself by reading and writing.\(^13\)

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\(^9\) Captioning refers to adding text to the bottom of the screen enabling hearing impaired viewers to access the dialogue in English, whereas subtitling generally refers to captions added in foreign language movies enabling English speaking viewers to access the dialogue. See Captions vs. Subtitles, ALASTAIRC, http://alastairc.ac/2006/09/captions-vs-subtitles/ (last visited Feb. 7, 2012). For purposes of this article, I use the term captioning to refer to accessible movies for hearing impaired airline passengers.

\(^10\) The first movie to be screened in flight was aboard an Aeromarine Airways flight in 1921, although it was not until the 1960s that in-flight entertainment was regularly offered in aircraft cabins. See In-Flight Entertainment, WIKIPEDIA, http://en.wikipedia.org/wiki/In-flight_entertainment#History (last visited Feb. 7, 2012).

\(^11\) See Larry Goldberg & Brad Botkin, Seeing Sound & Hearing Images at 30,000 Feet, AVION, Second Quarter 2006, at 46-47 ("[F]or passengers ... who are deaf, hard of hearing, blind or visually impaired. IFE systems are another frustrating ‘not-for-me’ technology. This continuing problem has followed them from the ground into the air.").


\(^13\) Certainly the advent of mobile technology now enables me to bring onboard captioned DVDs so I can watch first run movies on my laptop computer. This
Analogizing this case to a case brought under public accommodation law, the airlines’ failure to offer captioning of in-flight entertainment constitutes a classic example of both denial of participation and participation in an unequal benefit.  

Reflecting on the problem while flying back home from Europe recently, I puzzled over why over two decades after the passage of the landmark Americans with Disabilities Act and the Air Carrier Access Act, both domestic and foreign airlines are still operating long flights without providing access to in-flight entertainment for deaf and hard of hearing passengers. After all, 

article is based on the assumption that as a full fare-paying passenger with a disability, I should be able to access whatever programming the airline offers its passengers on the aircraft’s IFE system. My ability to mitigate the experience of inaccessibility should have no bearing on the discussion about the accessibility of in-flight entertainment. Cf. 29 C.F.R. § 1630.2(j)(1)(vi) (2011). “The determination of whether or not an individual’s impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures...the use or non-use of mitigating measures...may be relevant in determining [only] whether the individual is qualified or poses a direct threat to safety.” RUTH COLKER & ADAM A. MILANI, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK 109 (7th ed. 2011). Since I’m qualified to fly (I bought the ticket!) and do not pose a threat, direct or otherwise, to safety, why should passengers with hearing have a choice of in-flight entertainment while I do not? 

14 Under public accommodation law, people with disabilities are protected from discrimination on the basis of disability by a place of public accommodation, e.g., (a) denial of participation (“A public accommodation shall not subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation”); and (b) participation in unequal benefit (“A public accommodation shall not afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals”). See 42 U.S.C. § 12186(b) (2006); 28 C.F.R. § 36.202(a)–(b) (2011) (Department of Justice’s implementing regulations). Unfortunately, a commercial aircraft is not included in the twelve categories of a place of public accommodation. See 42 U.S.C. § 12181(7)(A)–(L).

15 “In the best of situations, air travel can be arduous, stressful and even frightening for the . . . 54 million Americans with disabilities.” Jane Engle, Disabled Passengers Are Finding Flying an Improved Experience: Fines Are Up and Complaints Are Down, But Advocates Say Some Barriers to Access Remain, L.A. TIMES (Jan. 18, 2004), http://articles.latimes.com/2004/jan/18/travel/tr-insider18. In a letter responding to Engle’s article, Eric Lipp, executive director of the Open Doors Organization in Chicago, stated that the organization’s 2002 Market Study on Travelers With Disabilities showed that travelers with disabilities spent at least $13 billion a year on travel. Eric Lipp, Letters, Providing Help for Disabled Travelers,
the technology for providing in-flight captioning in 2011 is available and affordable. Yet, American law’s only pronouncement about effective communication access in airplanes operating in the United States is strictly limited to preflight safety announcements related to seat belt usage, oxygen masks, and emergency egress. Although the airline industry and the DOT are well aware of the problem, flights continue to operate with an inaccessible IFE system for deaf and hard of hearing passengers, notwithstanding the fact that affordable captioning technology exists. Indeed, the federal government has declined to require airlines to provide captioned in-flight entertainment.

What do members of the deaf and hard of hearing communities who fly have to do to achieve “meaningful access” to in-flight entertainment? This article argues that if the airlines cannot act now on a voluntary basis to provide accessible in-flight entertainment on all U.S. transcontinental and international flights to and from the United States, the DOT should move immediately to enact a regulation requiring access to movies and programming offered to passengers, to be phased in over a short time frame, and to fully enforce the regulation. Should the DOT fail to act, Congress should amend the Air Carrier Access Act (the Act or the ACAA) to require airlines to provide accessible in-flight entertainment and to allow aggrieved airline passengers a private right of action and punitive damages under the Act.

L.A. TIMES (Mar. 7, 2004), http://articles.latimes.com/2004/mar/07/travel/tr-letters7.3. According to Lipp, “[a]bout 30% of adults with disabilities have traveled by air in the past two years (or 9.4 million air travelers total). They said they would take two or more flights a year if airlines were to accommodate their needs as a person with a disability. This translates into 18.8 million more flights—and means that air spending by the disabled community could double if airlines made the necessary accommodations.” Id.


A carrier “must ensure that all new videos, DVDs, and other audio-visual displays played on aircraft for safety purposes, and all such new audio-visual displays played on aircraft for informational purposes that were created under [the carrier’s] control” are captioned. 14 C.F.R. § 382.69(a) (2011). In-flight entertainment, including television and movie programming, is not covered.

Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27,614, 27,639–40 (May 13, 2008) (codified at 14 C.F.R. pt. 382). The DOT, in publishing its Final Rule, amended its ACAA rules to apply to foreign carriers and reorganized and updated the rules. Id. at 27,614. It also addressed the issue of accommodating deaf and hard of hearing passengers but would not go so far as to require IFE access. Id. at 27,614, 27,639–40.
II. AIR CARRIER ACCESS ACT OF 1986

Regarding disabilities, the airline industry is exclusively regulated by the ACAA, which endows the DOT with sole regulatory power to enforce the Act.\(^{19}\) Deriving its contents from the Federal Aviation Act of 1958,\(^{20}\) the Airline Deregulation Act, and section 504 of the Rehabilitation Act,\(^{21}\) the ACAA polices air travel for people with disabilities.\(^{22}\) Reaching both domestic and foreign air carriers, subsection (a) of § 41705 of the ACAA forbids discrimination against airline passengers who have a physical or mental impairment limiting one or more major life

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\(^{19}\) Air Carrier Access Act, 49 U.S.C. § 41705 (2006). In passing the ACAA, Congress was overturning U.S. Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), where the Supreme Court ruled that U.S. air carriers do not receive federal financial assistance for purposes of Section 504 of the Rehabilitation Act and are under no obligation to provide access to passengers with disabilities. See Carol J. Toland, Cong. Research Serv., Overview of the Air Carrier Access Act 1 (2009). See also Erin M. Kinahan, Despite the ACAA, Turbulence Is Not Just in the Sky for Disabled Travelers, 4 DePaul J. Health Care L. 397, 398-400 (2001). With the passage of the ACAA, Congress sought to address the “unique difficulties” faced by the flying public with disabilities, overrule the Paralyzed Veterans of America case, and strike a balance between accommodation and general passenger safety. Toland, supra.

\(^{20}\) Section 404(a) of the Act required air carriers to provide “safe and adequate” service. Federal Aviation Act, Pub. L. No. 85-726, § 404(a), 72 Stat. 731, 760 (1958). Section 404(b) prohibited “undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic.” Id. § 404(b). This law did little to protect airline passengers with disabilities. See Lex Frieden, Position Paper on Amending the Air Carrier Access Act to Allow for Private Right of Action, Nat’l Council on Disability (July 8, 2004), http://www.ncd.gov/publications/2004/July82004.


\(^{22}\) The policies and procedures authorized under the ACAA are created to aid passengers with disabilities in traveling without hindrance. See Air Carrier Access Act, Accessible Journeys, http://www.disabilitytravel.com/airlines/air_carrier_act.htm (last visited Feb. 7, 2012).
activities, have a record of such impairment, or are regarded as having such impairment. Each act of discrimination prohibited by subsection (a) of § 41705 constitutes a separate offense under the ACAA.

The ACAA requires the Secretary of Transportation to “investigate each complaint of a violation of subsection (a).” In addition to investigating these complaints, “[t]he Secretary shall publish disability-related complaint data in a manner comparable to other consumer complaint data,” “regularly review all complaints received by air carriers alleging discrimination on the basis of disability and shall report annually to Congress on the results of such review,” and provide technical assistance to air carriers and individuals with disabilities in consultation with the Department of Justice (DOJ), the Architectural and Transportation Barriers Compliance Board, and the National Council on Disability.

The statutory language is brief, leaving the task of implementation to the DOT. According to the DOT’s regulations, airlines violate the ACAA’s nondiscrimination provision if they discriminate against a person “with a disability, by reason of such disability, in the provision of air transportation.” There are two

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23 49 U.S.C. § 41705(a). Under DOT regulations, individuals are “qualified” individuals with a disability if they make a good faith effort to purchase or possess, or actually purchase or possess, valid air tickets. See 14 C.F.R. § 382.3 (2009). Originally the ACAA applied only to U.S. airlines operating in this country, but in 2000, Congress amended the Act to include foreign carriers flying to and from the United States. See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century § 707(a) (2). On May 13, 2008, the DOT revised its regulations to include foreign airlines. See Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27,614, 27,645 (May 13, 2008) (codified at 14 C.F.R pt. 382). The new provisions became law on May 13, 2009. See id.

24 See 49 U.S.C.A. § 41705(b) (“For purposes of [49 U.S.C.A. §] 46301, a separate violation occurs under this section for each individual act of discrimination prohibited by subsection (a).”).

25 Id. § 41705(c)(1).

26 Id. § 41705(c)(2).

27 Id. § 41705(c)(3).

28 Id. § 41705(c)(4). The Secretary will also “ensure the availability and provision of appropriate technical assistance manuals to individuals and entities with rights or responsibilities under this section.” Id. § 41705(c)(4)(B). The ACAA provides various remedies and enforcement methods, e.g., civil penalties, enforcement actions brought by the DOT upon receipt of a complaint, and in certain instances, the opportunity for review in the District of Columbia Circuit Court of Appeals regarding DOT orders promulgated under the ACAA. See id. § 41705; Love v. Delta Airlines, 310 F.3d 1347, 1354–58 (11th Cir. 2002).

exceptions to the general nondiscrimination requirement: airlines may discriminate “on the basis of safety” and may refuse to serve an individual with a disability on the basis that such service would violate a requirement by the Federal Aviation Administration, the Transportation Security Administration, or a foreign government.\textsuperscript{30} Exercising either exception requires the airline to specify its reason in writing.\textsuperscript{31}

The DOT regulations addressing communication access in the aircraft refer only to safety and informational videos.\textsuperscript{32} Under 14 C.F.R. § 382.69, a carrier

must ensure that all new videos, DVDs, and other audio-visual displays played on aircraft for safety purposes, and all such new audio-visual displays played on aircraft for informational purposes that were created under [the carrier’s] control, are high-contrasted captioned. The captioning must be in the predominant language or languages in which [the carrier] communicates with passengers on the flight.\textsuperscript{33}

Carriers must caption audiovisual displays used for safety purposes on or after November 10, 2009,\textsuperscript{34} and do the same for informational displays on or after January 8, 2010.\textsuperscript{35}

The ACAA requires all airlines to (i) establish a procedure for resolving disability-related complaints raised by passengers with a disability and (ii) designate at least one complaint resolution

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\textsuperscript{30} 14 C.F.R. § 382.19(c) (2011); see Newman v. Am. Airlines, 176 F.3d 1128, 1131 (9th Cir. 1999) (an airline may refuse boarding to an individual with a disability if the person’s condition raises a reasonable doubt whether the person can fly safely without extraordinary medical assistance during the flight. A decision to refuse passage must be assessed in light of the facts and circumstances known to the airline at the time, and the decision cannot be unreasonable or irrational).

\textsuperscript{31} See 14 C.F.R. § 382.19(d).

\textsuperscript{32} 14 C.F.R. § 382.69(a).

\textsuperscript{33} Id. The DOT changed its layout to a question-answer format “with language specifically directing particular parties to take particular actions (e.g., ‘As a carrier, you must ***’).” Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. at 27,614. “High contrast captioning” is defined as “captioning that is at least as easy to read as white letters on a consistent black background.” 14 C.F.R. § 382.3 (2011).

\textsuperscript{34} See 14 C.F.R. § 382.69(b). “Between May 13, 2009 and November 9, 2009, [carriers had to] ensure that all videos, DVDs, and other audio-visual displays played on aircraft for safety purposes [had] open captioning or an inset for a sign language interpreter, unless such captioning or inset either would interfere with the video presentation as to render it ineffective or would not be large enough [for transmitting the briefing to passengers with hearing impairments], in which case these carriers must use an equivalent non-video alternative for transmitting the briefing.” Id. § 382.69(c).

\textsuperscript{35} See id. § 382.69(d).
official (CRO) to handle disability-related complaints at each airport the airline serves. Each CRO must be trained and thoroughly proficient with respect to the rights of passengers with disabilities under the ACAA and accompanying regulations. The airline must make a CRO available to any person who makes a disability-related complaint during all times the airline is operating at an airport and should make that person aware of the existence of the DOT’s aviation consumer disability hotline for resolving issues related to disability accommodations.

The CRO may be made available in person or by telephone. If the CRO is made available by telephone, it must be at no cost to the passenger. The CRO must be accessible via a text telephone (TTY) for passengers who are deaf or hard of hearing. If a passenger with a disability, or someone on behalf of a passenger with a disability, complains about an alleged violation of the law, the airline must enable the passenger to contact a CRO on duty. A CRO has the authority to resolve these complaints on behalf of the airline.

When a passenger with a disability makes a complaint to a CRO during the course of the passenger’s trip (e.g., over the telephone or in person at an airport), the CRO “must promptly take dispositive action” to resolve the problem. Where the law has not yet been violated, the CRO must take action or direct other employees to take action to ensure compliance. Where a passenger’s complaint concerns a violation of the law that has already occurred and the CRO agrees that a violation has occurred, the CRO must provide the complaining passenger with a written statement summarizing the facts at issue and the steps, if any, the airline proposes to take in response to the violation. And, if the CRO determines that no violation has occurred, the CRO must provide a written statement including a summary of

37 See id. § 382.151(d).
38 See id. § 382.151(b).
39 Id.
40 Id.
41 Id.
42 See id.
43 See id. § 382.151(c).
45 See id. § 382.153(a). Only the pilot in command of an aircraft has final authority to make decisions regarding safety, and the CRO cannot countermand a pilot’s decisions regarding safety.
46 See id. § 382.153(b).
the facts and the reasons for the determination. Either way, this statement must be provided in person to the passenger at the airport, if possible; otherwise, it must be forwarded to the passenger within thirty calendar days of the complaint. The statement also must include information about the right to pursue DOT enforcement action under the law.

An aggrieved passenger has up to forty-five days to file a complaint with the airline, after which the airline is under no obligation to respond. For timely written complaints describing an incident that constitutes a violation of law, the airline must provide a dispositive written response within thirty days of receipt of the complaint. If the airline agrees that a violation occurred, its response must summarize the facts and state what steps, if any, the airline proposes to take in response to the violation. If the airline denies that it violated the ACAA, its written response must include the airline’s summary of the facts and its reasons under the law for making its determination. Also required is information about the aggrieved passenger’s right to pursue DOT enforcement.

The above-detailed enforcement scheme is useless for deaf passengers because the regulations do not require captioned in-flight entertainment aboard airplanes. A deaf or hard of hearing passenger has no grounds on which to file a complaint about inaccessible in-flight entertainment with the CRO, the airline, or the DOT. Deprived of the recognition of access as a legal right, deaf and hard of hearing passengers can draw no sustenance from the enforcement scheme. We now turn to the three major barriers confronting deaf and hard of hearing fliers: the lack of a private right of action, congressional inability to enact corrective legislation, and DOT inaction.

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47 See id. § 382.153(e).
48 See id. § 382.153(d).
49 See id.
50 See 14 C.F.R. § 382.155(c) (2011).
51 See id. § 382.155(d).
52 See id. § 382.155(d)(1).
53 See id. § 382.155(d)(2).
54 See id. § 382.155(d)(3).
III. COURTS DO NOT ACKNOWLEDGE A PRIVATE RIGHT OF ACTION

Prior to 2001, a number of courts entertained a private right of action under the ACA.

All that changed when the Supreme Court ruled in Alexander v. Sandoval:

[P]rivate rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative.

The Supreme Court held that a private right of action under federal legislation exists only when created by Congress, asserting that Title VI of the Civil Rights Act did not authorize a private right of action.

In Sandoval, Alabama amended its constitution by declaring English the official state language. Accordingly, the Alabama Department of Public Safety administered the state’s driver’s license test in English. The plaintiff brought suit arguing that the Alabama Department of Public Safety’s actions violated the DOJ’s regulations because it “had the effect of subjecting non-English speakers to discrimination based on their national origin.” On appeal to the Supreme

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55 See, e.g., Shinault v. Am. Airlines, 936 F.2d 796, 803 (5th Cir. 1991) (although the ACA was silent on a private right of action, the court will imply one based on the uncertain remedial scheme in the statute); Tallarico v. Trans World Airlines, 881 F.2d 566, 570 (8th Cir. 1989) (allowing a private right of action is consistent with the underlying purpose of the ACA); Bower v. Fed. Express Corp., 156 F. Supp. 2d 678, 689 (W.D. Tenn. 2001); Price v. Delta Airlines, 5 F. Supp. 2d 226, 234 (D. Vt. 1998) (denying airline summary dismissal because genuine issues of fact remained concerning the need to remove disabled passenger); Rivera v. City of Philadelphia, No. CIV. A. 97-CV-1130, 1998 WL 376097, at *3 (E.D. Pa. July 4, 1998) (recognizing a private right of action under the ACA even though the statute did not expressly provide for one); Adiutori v. Sky Harbor Int’l Airport, 880 F. Supp. 696, 700 (D. Ariz. 1995), aff’d without opinion, 103 F.3d 137 (9th Cir. 1996) (although the ACA did not explicitly provide a private right of action, the fact that other courts allowed it persuaded the court).


57 See id. at 279.

58 Id. at 278.

59 See id.

60 Id. at 275. Because the Alabama Department of Public Safety accepted federal funds, it subjected itself to Title VI of the Civil Rights Act. Section 601 of that title mandates that no persons, among other things, be subjected to discrimination on the basis of race. See id. at 278. Section 602 authorizes federal agencies to enforce the provisions of § 601 by issuing regulations. See id. Accordingly, the
Court, the question was "whether there is a private right of action to enforce the regulation [promulgated by the DOJ]."61

The Sandoval Court began its analysis by assuming three aspects of Title VI. "First, private individuals may sue to enforce § 601" of Title VI and obtain both injunctive relief and damages.62 Second, § 601 only prohibits intentional discrimination.63 Finally, "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."64

Given these three assumptions, the Court concluded that there was no precedent favoring Sandoval's claims that a private right of action exists to enforce disparate-impact regulation.65 The Court additionally noted that these three assumptions did not suggest "Congress must have intended a private right of action to enforce disparate-impact regulations."66 Central to understanding the Court's analysis is knowledge of the "genesis of private causes of action."67 So, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."68 But in Cort v. Ash, that understanding of private causes of actions was jettisoned in favor of not "venturing beyond Congress's intent."69

The Court could not find that a private cause of action existed to enforce disparate impact discrimination because § 601 prohibits only intentional discrimination.70 Section 602, which was meant to give agencies the authority to enforce §601, did not

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61 Id. at 279.
62 Id. at 275.
63 See id.
64 Id.
65 See id.
66 Id. at 284.
67 Id. at 286.
68 Id. At one time, under J.I. Case Co. v. Borak, "it [was] the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." Id. at 314 (citing 377 U.S. 426, 433 (1964)).
69 Id. at 317.
70 See id. at 285.
contain the requisite rights-creating language. Therefore, according to the Court, no private right of action existed to enforce disparate impact discrimination.

To assess statutory intent in light of Sandoval, courts must examine the text and structure of the statute. Thus, in Love v. Delta Airlines, the plaintiff, a survivor of polio who used a wheelchair, alleged that Delta failed to provide an accessible call button, an aisle chair for accessing the bathroom, and an accessible bathroom. The district court found an implied right of action under the ACAA but determined the law permitted only injunctive and declaratory relief. The Court of Appeals for the Eleventh Circuit reversed, finding no implied right of action because Congress "created an elaborate administrative enforcement regime with subsequent, limited judicial review of the DOT's actions." Under this regime, the court ruled that the DOT is required to investigate ACAA claims and has broad powers to sanction airlines for violations, airlines must establish ACAA dispute resolution mechanisms, and individuals "with a substantial interest" may pursue appellate review in a circuit court of appeals. For the Love court, this regime strongly suggested that Congress did not intend a private right of action under the ACAA. Other courts followed this reasoning: Shotz v. American Airlines, Wright ex rel. D.W. v. American Airlines, Ruta v. Delta Airlines, Boswell v. Skywest Airlines, Inc., Shqeirat v. US Airways Group, Perez-Ramos v. Spirit Airlines.

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71 Id. at 276.
72 Id. at 275.
73 Id. at 288.
74 Love v. Delta Airlines, 310 F.3d 1347, 1350 (11th Cir. 2002).
75 See id. at 1351.
76 Id. at 1360 (holding that "Congress did not intend to create a private right of action in a federal district court to vindicate the ACAA's prohibition against disability-based discrimination on the part of air carriers").
77 Id. at 1354–57.
78 See id. at 1357–58.
79 Shotz v. Am. Airlines, 420 F.3d 1332, 1337 (11th Cir. 2005) (ACAA's comprehensive remedies and enforcement mechanisms nullify the argument for finding a private right of action against the airlines).
Judges interpret the ACAA to constitute an "elaborate and comprehensive enforcement scheme," thus invalidating the need for a private attorney general. Under this "elaborate enforcement scheme," however, the DOT is not an attorney for the aggrieved party and cannot collect restitution for private plaintiffs. While the DOT is commanded by the law to investigate a claim of discrimination, it is not required to adjudicate the claim. Thus, a deaf or hard of hearing passenger who wishes to complain about the lack of access to in-flight entertainment has no way to bring a claim under the ACAA or to complain to the DOT.

IV. THE LACK OF CONGRESSIONAL ACTION

A call on Congress to amend the law is not a novel idea. On February 26, 1999, the National Council on Disability issued a paper, recommending, *inter alia*, that Congress amend the Air Carrier Access Act to establish both an express statutory private right of action and punitive damages. Subsequently, the Civil Rights Act of 2008 was introduced in the 110th Congress, proposing to amend the ACAA to provide for a private right of action. The Senate and House bills voiced congressional

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First Circuit district court disagree, holding that the ACAA does provide a private right of action. See, e.g., Bynum v. Am. Airlines, 166 F. App’x 730, 733 (5th Cir. 2006) (noting that “the Department of Transportation has primary jurisdiction over claims for injunctive relief’); Shinault v. Am. Airlines, 936 F.2d 796, 800 (5th Cir. 1991); Tallarico v. Trans World Airlines, 881 F.2d 566, 570 (8th Cir. 1989); Deterra v. Am. W. Airlines, 226 F. Supp. 2d 298, 311 (D. Mass. 2002). To this date, the Supreme Court has not intervened to resolve this split.

85 See Love v. Delta Airlines, 310 F.3d 1347, 1352 (11th Cir. 2002) (“[T]aken together, the text of the ACAA itself ... and the surrounding statutory and regulatory structure create an elaborate and comprehensive enforcement scheme that belies any congressional intent to create a private remedy.”). “The explicit provision of these elaborate enforcement mechanisms strongly undermines the suggestion that Congress also intended to create by implication a private right of action in a federal district court but declined to say so expressly,” Id. at 1357.

86 For a detailed argument supporting amendment of the Air Carrier Access Act to allow for a private right of action, see Frieden, supra note 20.

87 Id. Even if the DOT decides to adjudicate, by no means is an outcome favorable to the passenger with a disability assured.


89 See Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2008); see also TOLAND, supra note 19.
rejection of the courts' interpretation of the private right of action, noting

the absence of a private right of action leaves enforcement of the ACAAs solely in the hands of the Department of Transportation, which is overburdened and lacks the resources to investigate, prosecute violators for, and remEDIATE all of the violations of the rights of travelers who are individuals with disabilities. 90

Although both Senate Bill 2554 and House Bill 5129 were referred to committee, the 110th Congress did not take action, and as of today, "Congress has not introduced any similar legislation." 91

V. THE DOT'S INACTION REGARDING IFE CAPTIONING

On May 13, 2008, the DOT issued a Final Rule amending its ACAAs. 92 The DOT had proposed a new rule requiring "U.S. and foreign carriers to provide high-contrast captioning on entertainment videos, DVDs, and other audio-visual displays on new aircraft, or aircraft ordered after the rule's effective date or delivered more than two years after that date." 93 Although the DOT did not propose to require "the captioning of entertainment videos on existing aircraft, believing that the costs of such a requirement would exceed the benefits that would follow," 94 it "solicited comment on the costs and feasibility of both modifying and replacing equipment on existing aircraft and complying with the proposed rule with new aircraft." 95

The airlines opposed the proposals. Submitting comments on the proposed rule through its representative, the World Airline Entertainment Association (WAEA), 96 the airlines argued, "[S]ome of the captioning requirements and implementation

90 H.R. 5129 § 401.
91 See Toland, supra note 19.
93 Id. at 27,638. "Aircraft on which the audio-visual machinery is replaced after that date would also be considered new for purposes of § 382.69." Id.
94 Id.
95 Id.
96 "Founded in 1979, the WAEA is a not-for-profit international organization representing nearly 100 passenger airlines and over 250 suppliers to the airline in-flight entertainment (IFE) industry (including aircraft manufacturers, major electronics manufacturers, motion picture studios, audio/video post-production labs, broadcast networks, licensing bodies, communication providers, etc. worldwide." WAEA Comments, supra note 8. Over a year ago the WAEA renamed itself APEX – Airline Passenger Experience Association. See APEX Yearly Recap &
timelines proposed in this [Notice of Proposed Rule Making (NPRM)] (and specifically § 382.69) would impose undue and unacceptable financial burdens on an already beleaguered airline industry." The airlines insisted some of the requirements were simply not technically or operationally feasible given the:

- technical limitations of both legacy and new IFE systems,
- variations among proprietary IFE systems currently in service and being installed,
- limited space for and readability of captioning on both small "personal" in-flight screens and on more distant "communal" inflight screens,
- intrusion factor of open captions for non-impaired passengers,
- limited cabin-server storage for additional captioned video files to complement up to eight languages offered on board, and
- lengthy aircraft retrofit/fleet order cycles and IFE system design/certification time periods.

To implement closed captioning for new IFE systems, the WAEA recommended the following steps be taken:

- all IFE systems and equipment be "grandfathered" that have been or will be FAA-certified during the period prior to the availability for purchase by airlines of closed-captioned-compliant next-generation IFE systems that can comply with this Rule,
- after such next-generation equipment is available for purchase, require that all new aircraft and all retrofitted aircraft that are changing out all of their "seat boxes" to next generation IFES seat boxes install only compliant equipment, and
- while the next-generation systems should support closed captioning, use of open captioned product on that system should also be compliant, thus providing greater choice in available content and passenger viewing options, the captioning to be either in the form of subtitles or descriptive captions.


97 WAEA Comments, supra note 8, at 1.

98 Id. at 1–2; see also Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. at 27,639.

99 WAEA Comments, supra note 8, at 6. According to the WAEA, previously "grandfathered" equipment installed on an aircraft should remain grandfathered if installed in another aircraft within the airline’s fleet. See id.
Finally, but not least, the WAEA offered a financial exigency argument for staying the hand of the government in requiring the airlines to provide accessible IFE systems:

As the DOT surely knows, airlines are currently facing record-high fuel costs at a time when many carriers are still struggling to recover from the financial losses resulting from 9-11 and the SARS-scares. The DOT’s Rules, as proposed, would impose undue and unacceptable financial burdens on the airline industry. While the IFE industry is eager to address the needs of hearing-impaired passengers, airlines must be allowed to do this by means that are technically and financially feasible and within time-frames that accommodate the product-cycles that are unique to our industry.100

Supporters of accessible in-flight entertainment weighed in. The WGBH Educational Foundation’s National Center for Accessible Media filed its comments on the same day as the WAEA.101 The WGBH Educational Foundation (Foundation) is “one of the country’s leading public broadcasters and has long considered one of its central missions to be increasing access to media for people with disabilities.”102 The Foundation’s National Center for Accessible Media was awarded a three-year grant from the Department of Education’s National Institute on Disability and Rehabilitation Research “to study ways of making airline travel more accessible to passengers with sensory disabilities.”103 The project, Making In-Flight Communications and Entertainment Accessible, looked at “the technical barriers and potential solutions” for rendering in-flight entertainment accessible to passengers who are deaf, hard of hearing, or deaf-
According to the WGBH, its “preliminary investigations into in-flight entertainment systems indicates that the next generation of in-flight systems can be designed to accommodate captioning in a variety of ways (open-captioning, English subtitling, or user-selectable closed captioning similar to what is available on in-home TV sets today).” However, the advances in “these systems, not the roll-out of new aircraft, will trigger ready availability of captions.” Inasmuch as new planes may utilize older IFE systems and older aircraft may have their IFE systems upgraded, the WGBH urged the DOT to predicate its rules “on changes to IFE systems and not on purchases of or changes in aircraft.”

The WGBH went on to note, “[d]isplay of captions on next-generation IFE systems is a work in progress based on new means of distributing video signals throughout the aircraft cabin,” and while “it is highly likely . . . the transformation of existing caption data for use on in-flight systems can be developed, it is not yet an automatic or trivial process.” Work would need to be done to ensure existing captions on videos were transferrable to the new IFE system. Responding to the airlines’ argument that captions may be too small for some video displays, the WGBH stated, “[C]aptions and other forms of text are commonly used in similar environments or situations such as on lap-top computers, PDAs, and cell phones. If properly rendered, captions can be as usable in these environments as they are on home TV sets.”

The use of portable IFE units

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104 WGBH Comments, supra note 101. Project activities included researching technical solutions, procedures, and practices required to infuse access considerations into in-flight hardware, digital content management systems, interactive and display systems, connectivity, and content; developing a demonstration model using a state-of-the-art IFE system that offers a prototype of an in-flight system supporting user-selectable captions, audio description, and talking menus; participating in WAEA technical committees and working groups and promoting the adoption/inclusion of standard accessibility metadata models into new and existing standards developed by those groups; and publishing a White Paper outlining the functional requirements of an accessible IFE system. See Making Inflight Communication and Entertainment Accessible, supra note 103.

105 Solutions and resulting recommendations included the integration of captioning for video and audio, descriptive narration for visual images, and audio navigation for system menus and interface design. See id.

106 WGBH Comments, supra note 101, at 1.

107 Id.

108 Id.

109 Id. at 5.

110 Id.
as an alternative to installed systems, the WGBH indicated, may be a "readily achievable solution . . . if the variety of programming available on a portable IFE unit matches the variety available on a seat-back display."\textsuperscript{111} In conclusion, the WGBH argued, emerging digital IFE technology will readily support a variety of means for displaying text for a range of entertainment and communication products and services. While further development is required, we believe the airline and IFE industries are both motivated and interested in serving the needs of people who require captions to understand and enjoy in-flight entertainment and communications.\textsuperscript{112}

Basing its response on the comments from the airline industry and WGBH, the DOT "reluctantly concluded . . . that [it] cannot adopt a regulation governing entertainment displays at this time."\textsuperscript{113} Although the DOT asserted the ACAA's scope encompassed in-flight entertainment and granted the DOT authority to regulate such entertainment, it found that "the record in this proceeding does not provide a basis for adopting a captioning requirement for IFE at present."\textsuperscript{114} The DOT stated, "We cannot conclude on the basis of the comments that providing high-contrast captioning for entertainment displays is technically and economically feasible now, nor can we ascertain a date by which it most likely will be."\textsuperscript{115} Accordingly, in its section-by-section analysis, the DOT referenced captioned videos only in terms of those created for safety and instructional purposes and required they be captioned within certain time frames.\textsuperscript{116}

The DOT called for "more current and more complete information":

Therefore, we will shortly be issuing a [Supplemental Notice of Proposed Rule Making (SNPRM)] to call for more current and more complete information on the cost and feasibility of providing high-contrast captioning for entertainment displays, information not only on current technology but also on the nature and

\textsuperscript{111} Id. at 6.
\textsuperscript{112} Id. at 7.
\textsuperscript{114} Id. at 27,640.
\textsuperscript{115} Id. Of the commenters who spoke in support of captioning in-flight entertainment, the DOT noted, "[n]one . . . addressed the costs or difficulties of achieving compliance." Id. This is interesting—the DOT faults commenters in favor of captioning for not addressing the issue of cost, but the airlines did not address the issue of cost either, and they were not called out for this omission.
\textsuperscript{116} Id. at 27,653.
pace of technological developments. Regarding the latter, we are aware that on March 6, 2007, after the conclusion of the period for commenting on the DHH NPRM[,] WAEA’s Board of Directors adopted a new specification as part of an ongoing effort to establish a standard digital content delivery system for IFE. This new specification reflects progress toward development of a common methodology for delivering digital content and greater interoperability for in-flight entertainment systems.\footnote{Id. at 27,640 (emphasis added).}

That call was issued in May 2008, over three years ago, and as of this writing in November 2011, no SNPRM has been issued. Domestic and international flights continue to operate with inaccessible in-flight entertainment systems. On September 28, 2011, I posted an inquiry to Bill Mosley of the DOT, and he indicated that the Department would be issuing a SNPRM by the end of 2011.\footnote{E-mail from Bill Mosley, Department of Transportation (Sept. 28, 2011) (on file with author).}

\section{VI. THE IRONY: ACCESSIBLE IN-FLIGHT ENTERTAINMENT IS AVAILABLE NOW}

Undeniably, the issue of rendering an in-flight entertainment system is a complex technological challenge that has not been easy to solve.\footnote{Linke-Ellis, \textit{supra} note 12.} But technology clearly exists to make it happen.\footnote{In a news release on November 30, 2011, LiveTV, a wholly-owned subsidiary of JetBlue Airways, announced “that, for the first time in the history of in-flight entertainment, closed captioning is now available for live television content onboard an aircraft.” \textit{Closed Captioning Now Available for Live Television Onboard Continental Airlines}, PRNewswire (Nov. 30, 2011), http://www.prnewswire.com/news-releases/closed-captioning-now-available-for-live-television-onboard-continental-airlines-134753338.html. According to the news release, “LiveTV is the world’s leading provider of live in-flight entertainment and connectivity systems for commercial airlines,” serving not only JetBlue and Continental, but also AirTran, Alitalia, and Virgin Blue. \textit{Id.}} In-flight entertainment has undoubtedly transformed the way airlines outfit the interior cabin of their planes due to demand for improved video and audio and better choices; most long-haul flights now have Personal TVs (PTVs) for every passenger, located in the backs of aircraft seats or tucked away in the armrests of front row seats.\footnote{Hunter-Zaworski, \textit{supra} note 16. Prior to this time period, passengers were expected to focus their attention to a large projection screen located at the front of the cabin and plug headphones into their arm console that enabled them to hear the film being played. \textit{Id.}} The problem is, there is no uniform practice or standard governing PTVs:
Many different systems are used, from just a few channels, AVOD (Audio Visual On Demand), or direct broadcast satellite television which shows the TV channels live as they are transmitted from the ground. In addition, some carriers offer video games using the PTV equipment. There are a range of options on availability of PTVs. Some airlines offer PTVs across the whole fleet, but others offer PTVs only in First and Business Class, while a few airlines offer PTVs on short duration flights, and several airlines do not offer PTVs at all.\footnote{122}

Personal TVs rely on an In-flight Management System, which stores pre-recorded channels on a central server and streams them to PTVs during flight, and AVOD systems store individual programs separately, streaming a specific program to a passenger who can control its playback. Some airlines use the In-Flight Management System to broadcast satellite TV.\footnote{123} A few airlines provide a portable IFE system known as a “digiPlayer, and some offer a DVD player even for short-haul routes.”\footnote{124}

Forms of in-flight entertainment vary: cabin music; audio entertainment consisting of various genres of music, as well as news and comedy; and video entertainment.\footnote{125} Different channels provide a selection of films, comedies, documentaries, children’s shows, and drama series; “[s]ome airlines also present news and current affairs programming that are often pre-recorded and delivered in the early morning before flights commence.”\footnote{126} As Hunter-Zaworski notes, “A British aviation research firm has shown that ‘choice [on IFE] is paramount,’ and in the past couple of years it has become more focused on giving the customer control.”\footnote{127} Given the long hours on flights between the United States and Asia (up to seventeen hours) and given the cramped seats of coach as opposed to business and first class seats, “it is the Economy cabin passenger [who] has the highest level of appreciation and satisfaction from IFE enhancements.”\footnote{128} Sitting up for these long hours, coach passengers are “most likely to spend a much longer portion of a long

\footnote{122}{Id. AVOD systems allow the passenger to select music from a music server aboard the aircraft, and the passenger uses headphones to listen. Id.}
\footnote{123}{Id.}
\footnote{124}{Id.}
\footnote{125}{Id.}
\footnote{126}{Id.}
\footnote{127}{Id.}
\footnote{128}{Id.}
haul flight making use of the different in-flight entertainment options.”

As Hunter-Zaworski acknowledges, “Display of captions on next-generation IFE systems is a ‘work in progress’ based on a new way of distributing video signals throughout the aircraft cabin.” Current closed caption displays are analog, and the Line 21 caption data used for broadcast and cable TV “is not immediately compatible with the digital signals being routed to seat-backs in the newest IFE systems.” Transforming this data for IFE systems aboard planes “is not yet an automatic or trivial process.” Moreover, the type of video signal varies, with some entertainment (movies, videos, and other prepackaged TV programs) already captioned, requiring re-encoding; the same problem inheres with live signals from satellite TV, also requiring re-encoding. There are even variations in the terminology: subtitles vs. captions, open vs. closed captions. In sum, IFE technology is rapidly evolving, and “it is important that the system architecture be open to accommodate future technological advances” According to Hunter-Zaworski, the airline and IFE industries “are both motivated and interested in serving the needs of people who require captions to understand and enjoy in-flight entertainment and communications.”

In late 2007, Emirates Airlines “introduced a new movie subtitling and Closed Caption technology to its latest In-Flight entertainment—Ice Digital Widescreen.” This new technology gives Emirates passengers the ability to turn on or off closed captions or subtitles in various languages for the selected film, which had previously been impossible due to technical limitations. Initially closed captions and subtitles could be displayed only when they were embedded within the picture; now

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129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
135 Id. The human factor is important: sensory impairment ranges widely, and captioning must take into account numerous characteristics: font type, size, contrast levels and scroll rates. Id.
136 Id.
138 Id.
these words are separated from the image, enabling passengers to opt for or against captioning. Providing passengers with the option to turn on or switch off the closed captions or subtitles—just as they do on their DVD player at home—offers a new level of flexibility and, for those wishing to watch films without subtitles, it further improves their enjoyment. Emirates' Vice President for Passenger Communications and Visual Services Patrick Brannelly stated that the airline "endeavor[s] to make these offerings accessible to the diverse group of travelers flying."

VII. A CALL TO ACTION

Clearly accessible in-flight entertainment is available here and now. Not being able to watch a movie you’ve been dying to see and to watch other passengers enjoy themselves is not an enjoyable experience. It isn’t dancing “the skies on laughter-silvered wings.” What does the deaf community have to do to get airlines flying to, from, or within the United States to provide accessible IFE? This segment of our flying public faces a unique problem—without a private right of action and punitive damages, deaf and hard of hearing passengers have no leverage to force airlines to provide accessible in-flight entertainment. Despite an elaborate enforcement scheme in the DOT regulations, which purposefully omit in-flight entertainment, deaf and hard of hearing passengers have no recourse to the DOT. Clearly this is an untenable situation, patently unfair and discriminatory toward a class of passengers based on their disability. Thus, the DOT should issue a Notice of Proposed Rule Making that proposes a phased-in timetable for implementing captioning of all in-flight entertainment on transcontinental flights within the United States and international flights to and from the United States.

139 Id.
140 Id.
141 Id.
142 See Magee, supra note 2.
143 The National Association of the Deaf, self-described as “the nation’s premier civil rights organization of, by and for deaf and hard of hearing individuals in the United States of America” (http://www.nad.org) has discussed captioning of in-flight entertainment with the DOT and correctly notes, “[t]he current rules require only captioning of in-flight safety information, not captioning of in-flight entertainment.” See Air Travel, NAT’L ASS’N OF THE DEAF, http://www.nad.org/issues/transportation-and-travel/air-travel (last visited Mar. 3, 2012). The NAD has urged the DOT to establish rules requiring airlines to caption in-flight entertainment. Id.
States. The DOT has stated the scope of the ACAA covers in-flight entertainment, and that it has the power to regulate the issue. So, given its enforcement power and the availability of the technology, what is holding the DOT back?
Case Notes