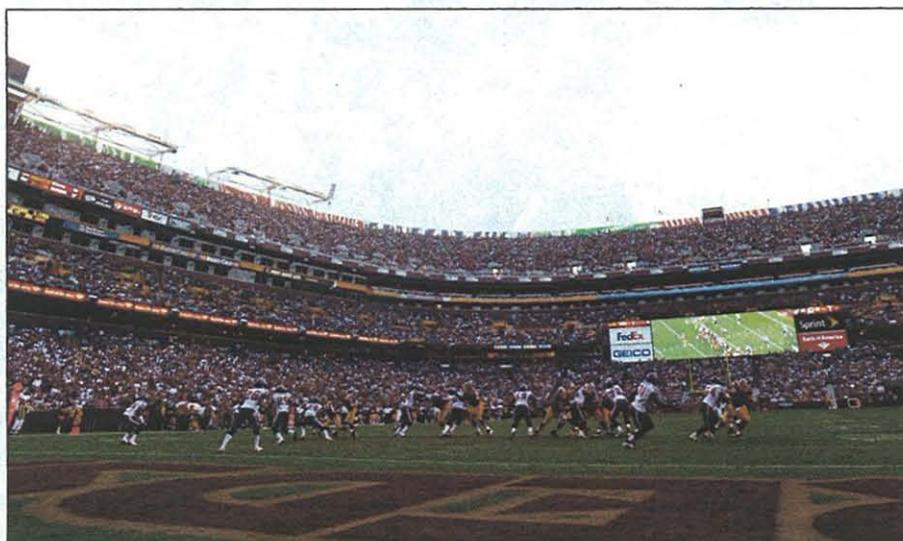


Decision does little to define 'effective communication'

"Y'all don't really want it but the young got time / With a flow so spec like . . . technologic / Shawty get loose, baby do what you do, let me see you let down your hair."

"Shawty Get Loose" by Lil' Mama

Those lyrics, broadcast over the public address system at a Washington Redskins game in 2006, are quoted by a federal appeals court as an example of "aural



Access to lyrics of music played at FedEx Field was the basis of federal lawsuit in Maryland.

content" that must be made available to deaf and hard of hearing fans at FedEx Field. In *Feldman v. Pro Football Inc.*, the 4th U.S. Circuit Court of Appeals held that the Americans with Disabilities Act requires "full and equal access to . . . music lyrics" as part of the football game experience "whatever the poetic merit of the lyrics and their relevance to the sport of football."

Anyone who's been to a sports event knows that tailgating, mascot races and halftime shows are part of the fan experience, in which the show can overshadow the game itself. (Wardrobe malfunction, anyone?) Little surprise then that sports events draw crowds from all walks of life, including disabled fans protected by a seemingly clear objective of the ADA against "discrimination on the basis of disability in the full and equal enjoyment" of, in this case, the sports event "experience." Nevertheless, the Feldman court struggles with the devil in the details and follows the letter of the law, but fails to reach a satisfactory decision.

Beginning in 2003, deaf and hard of hearing Redskins fans asked for greater access to information during home games, including the captioning of all content broadcast over the public address system at FedEx Field. Dissatisfied with alternative solutions, those fans filed a lawsuit to require the use of auxiliary aids, specifically captioning, at Redskins games. After the lawsuit was filed, an increasing amount of content was captioned at FedEx Field on two LED ribbon boards at the 50-yard line, including game information, public address announcements and nonmusical halftime entertainment. The notable exception was music lyrics, which ultimately became a focal point in the case. The U.S. District Court in Maryland ordered the use of an auxiliary aid to "effectively communicate" lyrics, finding that "the ADA requires defendants to provide auxiliary aids for the aural content broadcast" at FedEx Field, and access to lyrics could be provided without specific hardship or undue burden on the team. The district court did not specifically require captioning. To comply with the court's order, deaf and hard of hearing fans are sent copies of the lyrics by email before each game. The 4th Circuit affirmed the district court's order in its entirety. It agreed that effective communication under the ADA requires auxiliary aids for "full and equal access to the goods and services" at FedEx Field, i.e., the experience of a live football game. Although "[n]either the ADA nor the regulations implementing the ADA impart guidance on the specific content" that must be communicated, the court was clear about music and lyrics: Music played during a football game arouses enthusiasm and fosters a sense of shared participation. The lyrics may be nonsensical, as defendants

point out, but even nonsensical lyrics may enhance the collective excitement that defendants provide as part of their goods and services.

The 4th Circuit also emphasized it did not require the auxiliary aids to take a particular form, noting that "the type of aid necessary . . . will vary with context" and "the auxiliary aid requirement is a flexible one." The court specifically left open the possibility that lyrics should be captioned, and its analysis of proposed ADA regulations concluded that future rulemaking could require captioning of game-related information and "any other relevant announcements" including lyrics.

Requiring the reproduction of lyrics, however, creates a different problem overlooked by the court. A mechanical license is available for the performance of a recorded song like "Shawty Get Loose" over the stadium's public address system. However, a mechanical license would not ordinarily cover reproduction rights for lyrics, captioned or otherwise, which are copyrighted and licensed separately, and for which there is no defined statutory licensing scheme. Simply complying with the court's order to reproduce lyrics by any form of auxiliary aid risks potential copyright infringement absent separate negotiated licenses.

In effect, Feldman means that one federal statute (the ADA) requires the Redskins (or any other team) to comply

with an unrelated federal statute (the Copyright Act), but without a way to negotiate a proper license that is not an undue burden on the team.

In addition, the selection of songs to "arouse enthusiasm" is arguably influenced by many things: musical style, rhythm and tempo, current popularity, and familiarity to fans. The lyrics to music broadcast at the games is largely irrelevant, especially if they are nonsensical, a point the court gave insufficient weight.

Let's be honest: Even hearing fans aren't listening much of the time, and many lyrics are too rapid-fire, unintelligible or nonsensical, as the court admitted with "Shawty Get Loose." In addition, inappropriate content is always objectionable, and lyrics are far more impressionable when duplicated and repeated as captioned text. Hopefully, teams will take reasonable measures to screen such content because no parent wants inappropriate lyrics captioned and displayed for young fans.

The Feldman decision leaves everyone unsatisfied. The court recites the letter and spirit of the law but provides little real guidance about "effective communication." Captioning for disabled fans is better but still not comprehensive, and the Redskins must comply with a problematic order with no assurance its solution is legally adequate.

It should be noted that the Feldman decision is unpublished and not binding precedent in the 4th Circuit. However, considering Ohio State University's recent agreement to provide captioning to settle a 2010 lawsuit, and a deaf University of Kentucky fan suing to require captioning at Wildcats football games, Feldman is only one case addressing "effective communication" at sports events. Hopefully, reasonable decisions by other courts will spare us the treat of nonsensical lyrics streaming across JumboTrons nationwide.

Philip R. Hochberg (PHochberg@srgpe.com), a Washington lawyer who represents professional and collegiate sports interests, is the former stadium announcer for the Redskins. Karl Wm. Means (KMeans@shulmanrogers.com) chairs the intellectual property practice group at Shulman Rogers in Potomac, Md.



PHILIP R. HOCHBERG



KARL WM. MEANS

content" that must be made available to deaf and hard of hearing fans at FedEx Field.

In *Feldman v. Pro Football Inc.*, the 4th U.S. Circuit Court of Appeals held that the Americans with Disabilities Act requires "full and equal access to . . . music lyrics" as part of the football game experience "whatever the poetic merit of the lyrics and their relevance to the sport of football."

Anyone who's been to a sports event knows that tailgating, mascot races and halftime shows are part of the fan experience, in which the show can overshadow the game itself. (Wardrobe malfunction, anyone?) Little surprise then that sports events draw crowds from all walks of life, including disabled fans protected by a seemingly clear objective of the ADA against "discrimination on the basis of disability in the full and equal enjoyment" of, in this case, the sports event "experience." Nevertheless, the Feldman court struggles with the devil in the details and follows the letter of the law, but fails to reach a satisfactory decision.

Beginning in 2003, deaf and hard of hearing Redskins fans asked for greater access to information during home games, including the captioning of all content broadcast over the public address system at FedEx Field. Dissatisfied with alternative solutions, those fans filed a lawsuit to require the use of auxiliary aids, specifically captioning, at Redskins games. After the lawsuit was

Betty Gomes, Jake Kaylor Copy Editors
Tiffin Warnock Photo Coordinator
Wes Schueneman, Susanne Corrado Editorial Graphic Designers

REPORTERS:

CHARLOTTE (Phone 704-973-1400)
Bill King Senior Writer
Tripp Mickle, Don Muret,
Michael Smith Staff Writers
David Broughton Research Director
Brandon McClung Research Associate

NEW YORK (Phone 212-500-0700)

Daniel Kaplan Finance Editor
Terry Lefton Editor-at-Large
Eric Fisher Staff Writer
John O'Rand Staff Writer
Fred Dreier Staff Writer

CHICAGO (Phone 312-873-2217)
John Lombardo Staff Writer

LOS ANGELES (Phone 310-322-8711)
Liz Mullen Bureau Chief

CONTRIBUTING COLUMNISTS:

Rick Burton, John Genzale, Clark C. Griffith,
Richard Lapchick, Rich Luker, Norm O'Reilly,
Marc Pollick, Bill Sutton, Andrew Zimbalist
Joe Hoffercker Cartoonist

CONTRIBUTING REPORTERS:

Albany - Adam Sicho; Baltimore - Ryan Sharrow; Buffalo - Rick Maloney; Charlotte - Erik Spanberg; Cincinnati - Steve Watkins; Columbus - Jeff Bell; Dallas - Katherine Cromer Brock; Dayton - Jacob Dirr; Denver - Wayne Hicks; Honolulu - Jim George; Houston - Greg Barr; Jacksonville - Kimberly Morrison; Kansas City - James Dornbrook; Louisville - John Karman; Memphis - Michael Sheffield; Milwaukee - Mark Kass; Nashville - Scott Takac; Orlando - Richard Bilbao; Philadelphia - John George; Portland - Andy Giegerich; Raleigh - Chris Baysden; Sacramento - Kelly Johnson; San Antonio - W. Scott Bailey; San Francisco - Eric Young; Seattle - Greg Lamm;

South Florida - Kevin Gale; Wichita - Pat Sangimino

ADVERTISING

NEW YORK (N.Y. FAX 212-500-0701)

Julie Tuttle Director of Advertising Sales
(Phone 212-500-0711)

Burt Cobe Northeast Advertising Manager
(Phone 212-500-0702)

Hunter Millington Northeast Advertising
Manager (Phone 212-500-0725)

Heather Taylor Classified Sales Manager
(Phone 212-500-0707)

Maura Bruen Sales Assistant
(Phone 212-500-0705)

CHICAGO:

Judi Bowe Midwest Advertising Manager
(Phone 312-873-2216)

JACKSONVILLE:

Chris Hixenbaugh Southeast Advertising
Manager (Phone 904-265-2215)

LOS ANGELES:
Mark B. Schwartz Western Region Advertising
Sales Manager (Phone 310-322-8711, Ext. 11)

CIRCULATION/

ADMINISTRATION

Beverly Padgett Director of Circulation
Ted Hunt College & University
Program Manager

Ashley Swecker, T.J. McCullough Circulation
Sales Representatives

Manatha Young Circulation Marketing
Representative/Administrative Coordinator

Jay Lenihan Circulation Marketing
Representative

MARKETING

Misty Berry Creative Director

STREET & SMITH'S

CONFERENCE GROUP:

James Sullivan Managing Director
Donna Johnson Senior Conference Director
Laura Case Conference Director
Natalie Sharp Sales Director
Allison Brush Sales Director
Lorianne Lamonica Conference & Events
Coordinator

STREET & SMITH'S SPORTS GROUP:

Kirk Shaw Executive Vice President and
Chief Financial Officer
MaryLou Millhauser Director of Human
Resources, Martin Bounds V.P. Marketing,
Renee Maldonado Accounts Receivable
Administrator, Debbie Harley Accounts
Receivable Administrator

Email all SportsBusiness Journal staff and contributing columnists at:
first initial last name@sportsbusinessjournal.com
Please visit our website at sportsbusinessjournal.com for editorial staff telephone numbers