



ADA WEBSITE ACCESSIBILITY FOR ECOMMERCE:

Legally Required or Best Practice?

A white paper analyzing the legal requirements for implementing an accessible ecommerce website.

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ADA WEBSITE ACCESSIBILITY: LEGALLY REQUIRED OR BEST PRACTICE?

Website accessibility seems to be the Wild, Wild, West of the World Wide Web, and it is not going to get reined in anytime soon. Over the past two years alone, more than 300 lawsuits have been filed in or removed to federal court relating to website accessibility, and that number continues to steadily grow. These lawsuits primarily target retailers with ecommerce websites, restaurants where patrons can make reservations or place online orders, and other types of companies, such as hospitality providers, movie theaters, movie and game rental chains, dating services, insurance providers, casinos, and even performing arts centers.

SINCE JANUARY 2015, MORE THAN 300 LAWSUITS HAVE BEEN FILED ALLEGING INACCESSIBLE WEBSITES THAT VIOLATE TITLE III OF THE ADA – MOST OF WHICH INVOLVE RETAILERS.

The complaints generally allege that the websites contain access barriers that make it difficult – if not impossible – for blind or visually impaired customers to use the sites, including locating stores, viewing and purchasing products or services, reading product or service descriptions and prices, signing up for email lists, watching videos, reading articles or blogs, or performing a variety of other functions. On several occasions, the complaints also allege that the retailer’s mobile application is inaccessible.

Although these types of cases have been on the rise in recent years, they still may come as a surprise to people who typically think of the Americans with Disabilities Act (“ADA”) only in terms of physical

LEGAL ADA COMPLAINTS ARE THAT RETAIL WEBSITES MAKE IT DIFFICULT FOR VISUALLY IMPAIRED USERS TO USE AND NAVIGATE THE SITES, INCLUDING VIEWING AND PURCHASING PRODUCTS, IMAGE DESCRIPTIONS, WATCHING VIDEOS, AND MORE.

barriers, such as wheel chair ramps and handicapped parking spaces. As the U.S. Department of Justice (“DOJ”) continues to delay the release of a proposed rule concerning the accessibility of public websites under the ADA, plaintiffs are resorting to filing lawsuits, sending demand letters, or entering into settlements with companies whose websites and/or mobile apps may not be readily accessible to, or usable by, blind individuals. The steady shift in our economy from traditional brick-and-mortar stores to online commerce has brought increased attention to website accessibility for ecommerce

sites in recent years. Nonetheless, there is still some debate as to how broadly the ADA applies. Given the increasing trend in private lawsuits and enforcement actions, businesses with ecommerce websites should understand the breadth of the ADA and ensure their websites are accessible.

I. OVERVIEW OF THE 1990 AMERICANS WITH DISABILITIES ACT

Title III of the ADA makes it unlawful to discriminate against the disabled “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.”¹ Title III identifies 12 specific categories of public accommodation, including:

- A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; and
- A restaurant, bar, or other establishment serving food or drink.²

It is unlawful both to deny the disabled the opportunity to participate in programs or services and to provide the disabled with separate, but unequal, goods and services. To ensure the disabled have full and equal enjoyment of the goods and services of places of public accommodation, the ADA also requires companies to make certain “reasonable modifications,” such as auxiliary aids, to ensure effective access.

The ADA permits any person who is subject to discrimination on the basis of disability in violation of Title III to file a civil action for a permanent or temporary injunction, restraining order, or other order.³ The prevailing party in such action is entitled to recover a “reasonable” attorney’s fee, including litigation expenses and costs.⁴ However, statutory or other monetary damages generally are not recoverable by plaintiffs for Title III violations.⁵ To state a claim under Title III, a plaintiff must allege that: (1) he or she is disabled within the meaning of the ADA; (2) the defendant owns, leases, or operates a place of public accommodation; and (3) the defendant discriminated against the plaintiff by denying him or her a full and equal opportunity to enjoy the services the defendant provides.⁶

All 50 states and the District of Columbia have also enacted statutes designed, in some form, to protect disabled persons (including the blind) against unlawful discriminatory practices. Certain state laws specify that any violation of the ADA is considered a civil rights violation and violators are subject to a minimum statutory penalty per access violation, plus attorneys’ fees.⁷ In other states, though, plaintiffs are only entitled to injunctive relief and attorney’s fees.

1 42 U.S.C. § 12182.

2 See 42 U.S.C. § 12181(7).

3 See 42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a). Statutory damages are generally not recoverable by plaintiffs under the ADA. Note, however, that such damages may be available under state law. See, e.g., *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004) (upholding award of damages to California theater patron who was excluded from a performance because she used a service animal); *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1065 (5th Cir. 1997) (Texas state law provides a damage remedy).

4 42 U.S.C. § 12205.

5 42 U.S.C. § 12188(a)(1); see also *Powell v. National Bd. of Medical Examiners*, 364 F.3d 79, 86 (2d Cir. 2004). Note, however, that such damages may be awarded to persons aggrieved when requested by the Attorney General (see 42 U.S.C. §12188(b)(2)(B)), and may be available under state law (see e.g., *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004) (upholding award of damages to California theater patron who was excluded from a performance because she used a service animal); *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1065 (5th Cir. 1997) (Texas state law provides a damage remedy); *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286 (6th Cir. 1999) (plaintiff had claim under Georgia statute creating cause of action for damages based on a breach of statutory duty, and Title III imposed such a duty)).

A. What it Means for an Ecommerce Website to be Accessible

Many disabled individuals commonly use assistive technology that enables them to navigate websites or access information contained on those sites. For example, the blind can navigate the web with the help of a “screen reader,” a program that can read the text of a webpage and convert it into audio format. Screen readers can also identify links and graphics to help users navigate using a keyboard, instead of a mouse. In order for a screen reader to work on a website, the site must generally use proper headers, alternate text embedded behind images, and code that is comprehensible to screen readers.

B. Common Ecommerce Barriers to Website Accessibility

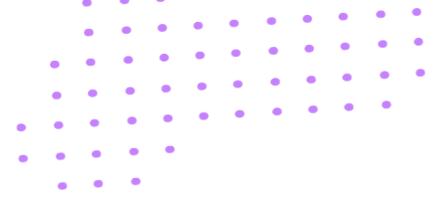
Many websites fail to incorporate or activate the features that can enable users with disabilities to access all of a site’s information. Common barriers to website accessibility include images or photographs that do not contain corresponding text describing the image, or websites that are simply not coded correctly. In these cases, the screen reader or similar assistive technology cannot “read” the image or text, leaving individuals who are blind with no way of independently knowing what information is being conveyed (e.g., a simple graphic or a link to another page). In many cases, the screen reader will get stuck and simply read “image” or “blank” aloud, without continuing across the page.

Similarly, complex websites can often lack navigational headings or links that would facilitate navigation using a screen reader or may contain tables with header and row identifiers that display data, but fail to provide associated cells for each header and row so that the table information can be interpreted by a screen reader. In a similar fashion, individuals who are deaf are unable to access information in web videos that do not have captions.

MANY ECOMMERCE SITES FEATURE STATIC CONTENT BLOCKS, WHERE TEXT AND IMAGES HAVE BEEN COMBINED INTO A SINGLE IMAGE THAT LINKS OUT TO ANOTHER URL. OFTEN TIMES THE TEXT CAN’T BE READ BY A SCREEN READER AND THEY RELY ON THE ALT-TEXT, WHICH IS NOT GUARANTEED TO PROVIDE ENOUGH INFORMATION.

6 See e.g., *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).
7 See Cal. Civ. Code §§ 51 et seq.

II. DEVELOPMENT OF WEBSITE ACCESSIBILITY LITIGATION



When the ADA was enacted in 1990, the Internet was only in its nascent stage. Traditionally, the ADA was thought to apply only to brick-and-mortar stores, and courts historically were not receptive to the idea that the Internet constitutes a place of public accommodation subject to the requirements of Title III. Nevertheless, since at least the late 1990s, the National Federation for the Blind (“NFB”) and other consumer groups have pushed various companies to ensure their websites and other streaming media are accessible to those with disabilities.

A. History of Litigation Addressing Whether the ADA Applies Only to Physical Places

The debate over whether a “place of public accommodation” requires an actual “place” began soon after the ADA was enacted.⁸ As early as 1994, the First Circuit determined that “the plain meaning” of the 12 categories of public accommodations in Title III “does not require ‘public accommodations’ to have physical structures for persons to enter.”⁹ The court added that “[e]ven if the meaning of ‘public accommodation’ is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.”¹⁰

In 1999, the Seventh Circuit further commented on this point, stating in dicta that an “owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space), that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.”¹¹ That same year, the Second Circuit agreed, finding that Title III applies to a business engaging in the kind of activity that would make it a public accommodation, regardless of whether that business also has a brick-and-mortar location that patrons can visit.¹²

B. Websites as a “Place of Public Accommodation”

The first court to squarely address whether the Internet qualifies as a place of public accommodation was the U.S. District Court for the Southern District of Florida in *Access Now v. Southwest Airlines Co.*¹³ In *Access Now*, plaintiffs filed a lawsuit alleging that the functionality of Southwest.com, which allowed customers to purchase airline tickets, check fares and schedules, and receive up-to-date sales promotions, violated Title III because the offerings at Southwest.com’s “virtual ticket counters” were inaccessible to blind individuals. The court dismissed the Title III claim for failure to state a claim based on the plaintiff’s allegation that the website was itself a place of public accommodation.

⁸ See e.g., *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (whether defendant’s insurance plan actually was a “place” of public accommodation).

⁹ *Carparts*, 37 F.3d at 19. The court first looked to the language of the statute and noted that, by including “travel service” among the twelve categories of public accommodation, “Congress clearly contemplated that ‘service establishments’ include providers of services which do not require a person to physically enter an actual physical structure,” because “many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services.” The court added that “one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services.”

¹⁰ *Id.*

¹¹ *Doe v. Mutual Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (emphasis added).

¹² *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32-33 (2d Cir. 1999) (holding that the ADA, which should be read broadly, “was meant to guarantee [the plaintiffs] more than mere physical access” and therefore, covered the sale of insurance even if the transaction was entirely concluded by phone and mail).

¹³ *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), appeal dismissed, 385 F.3d 1324 (11th Cir. 2004).

The court explained that it need look no further than the language of Title III, opining that “the plain and unambiguous language of the statute and relevant regulations does not include websites among the definitions of ‘places of public accommodation.’”¹⁴ The court concluded that to fall within the ADA, a public accommodation must be a “physical, concrete structure.”¹⁵ In a footnote, the court identified that this determination aligned with the Third, Sixth, and Ninth Circuits’ conclusions that a place of public accommodation is a physical space.¹⁶ Notably, however, the plaintiffs never argued that a nexus existed between Southwest.com and a qualifying place of public accommodation (i.e., the physical Southwest ticket counters), choosing instead to limit their argument to the contention that Southwest’s website should qualify as a “place.”¹⁷

THERE IS STILL A GRAY AREA FOR ECOMMERCE SITES AS TO WHETHER THEY FALL UNDER ADA. IF THEY HAVE A PHYSICAL RETAIL PRESENCE, IT’S FAIRLY UNANIMOUS NOW THAT THEY DO FALL UNDER ADA. IF THEY ARE ONLINE ONLY, THE COURTS ARE DIVIDED – AS A RESULT, MOST RETAILERS DECREASE THEIR RISKS BY ENSURING ALL THEIR CONTENT IS ADA COMPLIANT.

The onslaught of litigation relating to website accessibility began soon after 2006, following the NFB’s lawsuit against Target over the inaccessibility of its website. NFB’s legal theory was that unequal access to Target.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation.¹⁸ Target moved to dismiss the complaint for failure to state a claim, alleging that the ADA covers access to only physical spaces and not websites, and plaintiffs failed to assert they were denied access to Target stores.

In denying Target’s motion to dismiss, the district court in the Northern District of California found that the ADA could apply where there was a “nexus” between the use of the website and enjoyment of the goods and services offered at the retailer’s physical store.¹⁹ Moreover, the court found that the services on the Target.com website were “heavily integrated with the brick and mortar stores and operate[d] in many ways as a gateway to the store.”²⁰ The Target decision marked the first time a federal district judge ruled that Title III applies to websites when they act as a gateway to a brick-and-mortar store.

14 *Id.* at 1318.

15 *Id.* at 1318 (“to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards”).

16 *Id.* at 1320 n.10.

17 The district court considered, *sua sponte*, whether Title III might apply to Southwest.com by establishing “a nexus between the challenged service and the premises of the public accommodation.” The court, however, determined that no nexus existed because “southwest.com did not exist in any particular geographical location,” making it impossible for the plaintiffs to “demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space.” *Id.* at 1321. Subsequent courts, however, have explained the Access Now court’s application of the nexus approach as being a direct result of the pleadings before the court alleging only that Southwest.com was itself a place of public accommodation. See, e.g., *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (“Since there was no physical place of public accommodation alleged in *Access Now*, the court did not reach the precise issue [of]...whether there is a nexus between a challenged service and an actual, physical place of public accommodation”).

18 *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006).

19 *Id.* at 953-954 (“...defendant argues that the nexus theory applies only to the denial of physical access to a place of public accommodation, and thus plaintiffs’ claim that Target.com (rather than Target stores) is inaccessible is not legally cognizable. However, consistent with the plain language of the statute, no court has held that under the nexus theory a plaintiff has a cognizable claim only if the challenged service prevents physical access to a public accommodation. Further, it is clear that the purpose of the statute is broader than mere physical access—seeking to bar actions or omissions which impair a disabled person’s ‘full enjoyment’ of services or goods of a covered accommodation. Indeed, the statute expressly states that the denial of equal ‘participation’ or the provision of ‘separate benefit[s]’ are actionable under Title III”).

20 *Id.* at 955.

The suit settled in 2008, with Target agreeing to pay over \$6 million to the class and \$20,000 to a nonprofit corporation dedicated to helping the blind. In addition, Target agreed to make various changes to its website to ensure that “blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use.”

IN 2008, RETAIL GIANT TARGET PAID OUT OVER \$6 MILLION, AND AGREED TO MAKE CHANGES TO THE WEBSITE TO ENABLE BLIND USERS TO HAVE EQUIVALENT EASE OF USE THROUGH SCREEN READERS.

Similar to the *Target* case, a handful of others have applied the ADA to websites, when finding that a “nexus” exists between the ecommerce website and the physical space of public accommodation. A growing number of companies have settled these actions, even when their websites are not connected to physical stores. For example, both Priceline.com Inc. and Monster Worldwide, Inc. agreed in settlements with state attorneys general to make their websites ADA-accessible. This push for designating websites as places of public accommodations is also reaching other courts.

In 2015, a federal court in Vermont held that Scribd, Inc. – an online-only publishing platform hosting digital books and documents supplied by third parties (and which sells no physical products) – violated Title III of the ADA because its website and mobile apps use “an exclusively visual interface that is inaccessible to the blind because they use an exclusively visual interface and lack any non visual means of operation.”²¹ Specifically, the court found that Scribd violated the ADA because its website and apps were not programmed to be accessible through screen reader software. The court reasoned that Title III’s reference to a “place of public accommodation” is ambiguous and that, as “a remedial statute,” the ADA ought to be reviewed liberally in the plaintiff’s favor.

More recently, in March 2016, a California state court granted summary judgment in a case alleging that the Colorado Bag N’ Baggage website violated the ADA because it contained numerous access barriers preventing blind and other visually-impaired individuals from gaining equal access to the website.²² In its order, the court noted that the plaintiff had “presented sufficient evidence and legal argument to conclude Title III of the ADA applies to plaintiff’s use of a website where plaintiff has demonstrated he sought goods and services from a place of public accommodation because he demonstrated a sufficient nexus exists between defendant’s retail store and its website that directly affects plaintiff’s ability to access goods and services.” Further, the plaintiff had “presented sufficient evidence that he was denied full and equal enjoyment of the goods, services, privileges, and accommodations offered by [the retailer] because of his disability.”

Not all courts have been unanimous in this area, however. For example, cases stemming from courts in the Ninth Circuit have decided that an online-only business is not considered a place of public accommodation under the ADA, and is therefore not required to have an accessible website.²³ In

21 *National Federation of the Blind v. Scribd, Inc.*, 97 F.Supp.3d 565, 571 (D. Vt. Mar. 19, 2015).

22 Minute Order re Motion re Summary Judgement or Summary Adjudication, *Davis v. BMI/BNB Travelware Co.*, No. CIVDS1504682 (Cal. Sup. Ct., San Bernardino, Mar. 24, 2016); see also Complaint, *Davis v. BMI/BNB*, No. CIVDS1504682 (Cal. Sup. Ct., San Bernardino, Apr. 3, 2015)

23 See e.g., *Cullen v. Netflix, Inc.*, 600 F. App’x 508, 509 (9th Cir. 2015) (Netflix not subject to ADA because Netflix’s services not connected to any physical place); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (ADA claim fails because Facebook’s internet services do not have a nexus to a physical place of public accommodation); *Earll v. eBay, Inc.*, No. 5:11-cv-00262-JF (HRL), 2011 U.S. Dist. LEXIS 100360 (N.D. Cal. Sept. 6, 2011).

addition, a federal district court in Florida recently found that “[t]he Internet is a unique medium – known to its users as ‘cyberspace’ – located in no particular geographical location but available to anyone, anywhere in the world, with access to the internet, and determined that the plaintiff was unable to bring an action for website accessibility, because he was unable to demonstrate that the defendant’s “online website prevents his access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.”²⁴ Although there may still be some gray areas about the application of the ADA to certain websites, the findings in Target, Scribd and other cases have caused most businesses to lose their appetite for fighting these claims in court.

C. Recent Growth of Website Accessibility Litigation for Ecommerce Sites

Between January 1, 2015 and January 31, 2017, more than 300 lawsuits were filed in or removed to federal court alleging that a defendant’s inaccessible website violates Title III of the ADA. The majority of those suits involve retailers with brick-and-mortar stores selling their goods or service online,²⁵ although some involve online-only sites or services.²⁶ Lawsuits in this area, however, are not limited solely to inaccessible websites. For example, the fast-casual restaurant chain Sweetgreen was recently the subject of litigation alleging that the online ordering portion of its website and the Sweetgreen mobile application are inaccessible to the blind.²⁷

In recent complaints filed involving ecommerce websites, the plaintiffs generally allege that the sites contain digital barriers that limit the ability of, or completely prohibit altogether, blind and visually impaired consumers from accessing the sites, completing a transaction, locating stores, viewing and purchasing products, signing up for email newsletters, and performing a variety of other functions.²⁸ These access barriers include, but are not limited to, failing to provide a text equivalent for every non-text element (i.e., images), failing to provide labels or instructions when content requires users to input information in fillable forms, and failing to provide web page titles that describe the topic or purpose.²⁹ Plaintiffs generally seek a declaratory judgement that the website violates Title III of the ADA, a permanent injunction directing the company to make its website fully accessible to blind customers, and compensation for costs of the suit and reasonable attorneys’ fees.

There are also a handful of plaintiffs’ firms sending demand letters or entering into settlements with companies whose websites and/or mobile applications may not be readily accessible to, or usable by, blind individuals. Although five firms have primarily dominated this space, other players are getting involved in the hopes of forcing quick settlements. Most demands or lawsuits settle quickly for under \$100,000 (although others have settled for significantly higher amounts) with the money typically going toward plaintiffs’ attorneys’ fees and expenses.³⁰ These amounts, however, generally do not include the associated cost of remediation required to make the website accessible, which is generally imposed by the settlement agreements.

²⁴ See *Order, Kidwell v. Florida Commission on Human Relations and SeaWorld Entertainment, Inc.*, Case No. 2:16-cv-403-FTM- 99CM (M.D. Fla. Jan. 2017). We note, however, that this was a pro se plaintiff, and it does not appear the plaintiff put forth a nexus argument.

²⁵ See e.g., Complaint, *West et al. v. Jo-Ann Stores LLC*, No. 1:16-cv-09386 (S.D.N.Y., Dec. 5, 2016).

²⁶ See e.g., Complaint, *Depina v. Houzz, Inc.*, Civ. No. 1:16-cv-12054 (D. Mass, Oct. 2016); Complaint, *Jahoda v. National Basketball Association*, No. 2:15-cv-1462 (W.D. Penn., Nov. 6, 2015).

²⁷ See Complaint, *Farmer et al., SweetGreen, Inc.*, Civ. No. 1:16-cv-02103 (S.D.N.Y., Mar. 2016). In December 2016, Sweetgreen settled the lawsuit, agreeing to pay an undisclosed amount and agreeing to make its website and mobile app comply with the WCAG 2.0 AA guidelines. See Settlement Agreement, *Farmer et al., SweetGreen, Inc.*, Civ. No. 1:16-cv-02103 (S.D.N.Y., Dec. 2016), available at: http://www.washlaw.org/pdf/sweetgreen_settlement.PDF.

²⁸ See e.g., Complaint, *West et al. v. Jo-Ann Stores LLC*, No. 1:16-cv-09386 (S.D.N.Y., Dec. 5, 2016) (alleging that the Jo-Ann Stores website is inaccessible); Complaint, *Gniewkowski et al v. Lettuce Entertain You Enterprises, Inc.*, No. 2:2016-cv-01898 (W.D. Penn., Dec. 21, 2016) (alleging that websites for restaurants such as Maggianos, Big Bowl, Hub 51, Wildfire, Mon Ami Gabi, and others are inaccessible).

²⁹ *Id.*

³⁰ See Randazzo, S. (2016, Nov. 1) Companies Face Lawsuits Over Website Accessibility For Blind Users, *The Wall Street Journal*. Retrieved from <http://www.wsj.com/articles/companies-face-lawsuits-over-website-accessibility-for-blind-users-1478005201> (last accessed Dec. 28, 2016).

III. DEPARTMENT OF JUSTICE REGULATION OF WEBSITE ACCESSIBILITY

Although the statutory language of the ADA does not expressly mention the Internet, the DOJ – the primary enforcer of the ADA – has taken the position that Title III covers access to websites of public accommodations, as evidenced through rulemaking efforts, public statements, and recent settlements.

A. Rulemaking Efforts for Ecommerce Websites

For nearly a decade, the DOJ has contemplated promulgating a rule to address the applicability of the ADA to private retailers offering goods and services to the public online.³¹ In July 2010, the agency first issued an Advance Notice of Proposed Rulemaking (“ANPR”) seeking public comments on a variety of questions posed by the DOJ concerning the scope, applicability, and feasibility of website accessibility for public accommodations under Title III. The 2010 ANPR explained that the DOJ was “exploring what regulatory guidance it can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible,” and that any proposed regulation would address “whether entities doing business exclusively on the Internet are covered by the ADA.”³² Despite the comment period on the 2010 ANPR closing in January 2011, the rulemaking has been delayed several times and it is doubtful companies will get additional guidance from the DOJ anytime soon.

OFFICIAL FEDERAL CHANGES TO ADA GUIDELINES WILL NOT COME BEFORE JULY 2017, WITH FURTHER CLARITY IN 2018 OR 2019. THIS MEANS RETAILERS WILL NOT HAVE A FULL, LEGAL UNDERSTANDING OF THEIR VULNERABILITY UNTIL THEN.

Specifically, in November 2015, the DOJ placed the Title III rulemaking on its “long term action” list and concurrently announced that it expected to first publish a proposed rule for website accessibility applicable to State and local governments under Title II in January 2016.³³ The DOJ explained that it believed the Title II rulemaking would “facilitate the creation of an important infrastructure for web accessibility” and inform the agency of how it should move forward with its Title III website accessibility rule.³⁴ In April 2016, however, the DOJ took another step back when it withdrew the Notice of Proposed Rulemaking under Title II, and followed up with a Supplemental Advance Notice of Proposed Rulemaking (“SANPR”) soliciting additional public comment on various website

³¹ See DOJ, *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations; Advance Notice of Proposed Rulemaking*, 75 Fed. Reg. 43460 (July 26, 2010) (“On June 17, 2008, the [DOJ] issued a notice of proposed rulemaking (NPRM) to adopt the revised 2004 ADA Standards and revise the title II and title III regulations... Although the [DOJ] did not propose to include Web accessibility provisions [at the time] the [DOJ] received numerous comments urging the [DOJ] to issue Web accessibility regulations under the ADA. Based on these comments ... the [DOJ] has decided to begin the process of soliciting comments and suggestions with respect to what an NPRM regarding Web access should contain.”).

³² 75 Fed. Reg. at 43464.

³³ The Title II rulemaking had been sitting with Office of Management and Budget (OMB) since July 2014.

³⁴ See Unified Agenda and Regulatory Plan, DOJ, *Statement of Regulatory Priorities* (Fall 2015); DOJ, *Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Governments*, RIN No. 1190-AA65 (Fall 2015).

accessibility issues and asking for related cost information for preparing a regulatory impact analysis.³⁵ The SANPR posed more than 120 questions for public comment. Thus, it seems that the DOJ has more questions than answers at this point in the rulemaking process, with no proposed rule on the table.

In November 2016, the Federal government released its Fall 2016 Semiannual Unified Agenda and Regulatory Plan, which confirmed that the DOJ will not release a proposed rule on the Title II rulemaking until at least July 2017.³⁶ Needless to say, this likely means that companies will not be seeing a rulemaking for website accessibility applicable to public accommodations under Title III until at least 2018 or 2019, if at all. With the recent change in Administration, President Trump's Executive Order on Reducing Regulation and Controlling Regulatory Costs requires agencies to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. To that end, agencies are required to identify for elimination at least two prior regulations for every one new regulation issued. Thus, the DOJ will need to take this into consideration when determining if, and when, to issue Title III regulations.

DESPITE THE AMBIGUITY WITH ADA, THE DOJ ITSELF IS ENFORCING WEBSITE ACCESSIBILITY, RESULTING IN SETTLEMENTS WITH H&R BLOCK, PEAPOD, CARNIVAL CRUISE LINE, AND OTHERS.

B. Enforcement and Other Actions

Despite the significant delays in rulemaking, the DOJ has remained active with its enforcement of website accessibility under Title III of the ADA. In the various settlement agreements and consent decrees entered on this topic, the DOJ has generally required businesses and government entities to make their websites and mobile applications conform the Website Content Accessibility Guidelines 2.0 Level AA ("WCAG 2.0 AA"),³⁷ in addition to designating a "Responsibility Officer" for accessibility, implementing complaint procedures, and/or training employees in accessible features.

For example, in March 2014, the DOJ entered a consent decree with H&R Block, Inc., one of the largest tax return preparers in the U.S., requiring the company to ensure that its website, tax filing utility, and mobile apps conform to the WCAG 2.0 AA guidelines.³⁸ H&R Block was required to pay a \$55,000 civil penalty, and also agreed to pay \$45,000 to two individual plaintiffs who had also sued the company.

In November 2014, the DOJ announced a settlement with Peapod, LLC, an exclusively online business offering a website and mobile app for online grocery shopping and delivery services.³⁹ The DOJ alleged that individuals who are blind or have low vision and use screen reader software may not

³⁵ See DOJ, *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities; Proposed Rule*, 81 Fed. Reg. 28658 (May 9, 2016).

³⁶ Unified Agenda and Regulatory Plan, DOJ, *Statement of Regulatory Priorities* (Fall 2016); see also *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Governments*, RIN No. 1190-AA65 (Fall 2016).

³⁷ See Section IV(A), *supra*.

³⁸ See DOJ, *Justice Department Enters Consent Decree with National Tax Preparer H&R Block Requiring Accessibility of Websites and Mobile Apps Under Americans with Disabilities Act* (Mar. 6, 2014).

be able to properly use the website or app. The DOJ also alleged that individuals who are deaf or hard of hearing could not understand videos presented on the website because the captioning was inaccurate. The settlement required Peapod to ensure that its website and mobile app conform to the WCAG 2.0 AA guidelines.

Similarly, in July 2015, the DOJ announced a settlement with Carnival Corporation, owner and operator of the Carnival Cruise Line, Princess Cruises, and the Holland America Line.⁴⁰ Although the DOJ primarily alleged violations of Title III for physical access barriers on the Defendant's cruise ships, the settlement agreement required the company to make its websites and mobile app conform to WCAG 2.0 AA.

The DOJ also has the ability to intervene in pending civil litigation involving website accessibility. For example, the DOJ recently filed a Statement of Interest in an action against Winn Dixie pending in the Southern District of Florida.⁴¹ In its Statement of Interest, the DOJ reiterated that "goods and services of a public accommodation provided via website are covered by the ADA" and that the DOJ "has long affirmed the application of Title III of the ADA to websites of public accommodations."⁴²

THE WORLD WIDE WEB CONSORTIUM RELEASED THE WCAG 2.0 GUIDELINES
IN ORDER TO PROVIDE A SINGLE SHARED STANDARD FOR WEB CONTENT
ACCESSIBILITY. THIS INCLUDES CONFORMANCE LEVELS WCAG A (LOWEST), AA,
OR AAA (HIGHEST).

39 See DOJ, *Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities* (Nov. 17, 2014).
40 See DOJ, *Justice Department Reaches Agreement with Carnival Corp. Over ADA Violations by Carnival Cruise Line, Holland America Line and Princess Cruises* (Jul. 23, 2015).
41 Statement of Interest by United States of America, *Gil v. Winn Dixie*, No. 1:2016-cv-23020 (S.D. Fla. Dec. 12, 2016).
42 *Id.*, at 6-7.

IV. CURRENTLY AVAILABLE STANDARDS FOR IMPLEMENTING AN ACCESSIBLE WEBSITE

In the United States, there is currently no mandatory standard for ecommerce companies to adhere to for website accessibility. Nonetheless, most private settlements and DOJ consent orders require companies to ensure that their websites meet the WCAG 2.0 AA standards. The U.S. Federal government also has promulgated website accessibility standards applicable to Federal government agencies. On an international level, several countries have also adopted mandatory website accessibility standards for ecommerce websites.

A. W3C's Website Content Accessibility Guidelines

The World Wide Web Consortium (“W3C”), an international website standards organization, developed the WCAG 2.0 guidelines in cooperation with individuals and organizations around the world, with a goal of providing a single shared standard for web content accessibility.⁴³ The WCAG 2.0 is a set of technical standards containing 12 guidelines that are organized under these four principles.

Principles	Guidelines
1. Perceivable	<ul style="list-style-type: none">• Provide text alternatives for non-text content.• Provide captions and other alternatives for multimedia.• Create content that can be presented in different ways, including by assistive technologies, without losing meaning.• Make it easier for users to see and hear content.
2. Operable	<ul style="list-style-type: none">• Make all functionality available from a keyboard.• Give users enough time to read and use content.• Do not use content that causes seizures.• Help users navigate and find content.
3. Understandable	<ul style="list-style-type: none">• Make text readable and understandable.• Make content appear and operate in predictable ways.• Help users avoid and correct mistakes.
4. Robust	<ul style="list-style-type: none">• Maximize compatibility with current and future user tools.

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W3C, Web Content Accessibility Guidelines 2.0 (last updated Dec. 11, 2008).

For each guideline, there are testable set of success criteria, which are designated according to three conformance levels – A (lowest), AA, or AAA (highest) – that indicate a measure of accessibility and feasibility. As discussed above, Level AA, which is the intermediate level for access, contains the widely-accepted set of enhanced criteria for implementing website accessibility.

For each of the guidelines and success criteria, the WCAG also documents a wide variety of informative techniques according to those that are sufficient for meeting the success criteria and those that are advisory. The advisory techniques go beyond what is required by the individual success criteria and allow authors to better address the guidelines. Notably, in October 2016, the WCAG Working Group announced a plan to develop WCAG 2.1, which is intended to build upon, but would not supersede, WCAG 2.0.⁴⁴

B. International Accessibility Standards

Countries around the globe have implemented various website accessibility standards for public and/or private entities. WCAG 2.0 AA serves as the minimum compliance standard in many of these jurisdictions and, so far, has generated 17 formal, authorized translations.⁴⁵ Ecommerce sites selling goods and services internationally should be aware of a number of accessibility standards, including, but not limited to, the following:

- Australia: Australia’s Disability Discrimination Act (“DDA”) generally prohibits direct and indirect disability discrimination. The DDA has been held to apply to website accessibility by a Ruling in 2000 by the Australian Human Rights Commission.⁴⁶ In 2014, the Commission issued a revised advisory note on the DDA further recommending that non-government websites and web resources comply with WCAG 2.0 AA at a minimum.⁴⁷
- Canada (Ontario): In the Canadian province of Ontario, the Accessibility for Ontarians with Disabilities Act (“AODA”) requires public sector organizations and large private sector and non-profit organizations with more than 50 employees to make their websites accessible to people with disabilities. AODA required such entities to meet Level A compliance in 2014 and, by 2021, they must comply with Level AA.

In addition, countries such as Argentina,⁴⁸ Brazil,⁴⁹ Canada,⁵⁰ European Commission,⁵¹ France,⁵² Germany,⁵³ Italy,⁵⁴ Japan,⁵⁵ New Zealand,⁵⁶ and others currently require the Federal government,

44 W3C, WCAG 2.1 Under Exploration, Comments Requested by 1 November (Oct. 12, 2016), available at: <https://www.w3.org/blog/2016/10/wcag-2-1-under-exploration/>.

45 See W3C, WCAG 2.0 Translations (last accessed Dec. 27, 2016), available at: <https://www.w3.org/WAI/WCAG20/translations>. Authorized translations have been completed in Arabic, Catalan, Chinese, Danish, Dutch, Estonian, Finnish, French, German, Italian, Norwegian, Polish, Portuguese (European and Brazilian), Russian, Spanish, and Swedish languages.

46 See Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games, No. H 99/115 (Aug. 24, 2000), available at <http://www.humanrights.gov.au/bruce-lindsay-maguire-v-sydney-organising-committee-olympic-games>.

47 Australian Human Rights Commission, *World Wide Web Access: Disability Discrimination Act Advisory Notes*, V4.1 (2014), available at <http://www.humanrights.gov.au/world-wide-web-access-disability-discrimination-act-advisory-notes-ver-41-2014>.

48 Argentina; National Act No 26.653 (2010). *Ley de Accesibilidad de la Informacion en las Paginas Web Para Gente Con Discapacidades*, available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/175000-179999/175694/norma.htm>

49 *Modelo de Acessibilidade em Governo Eletrônico – e-MAG*, Portaria nº 03 (Abril de 2014), available at <http://emag.governoeletronico.gov.br/>.

50 Government of Canada, Standard on Web Accessibility, available at <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=23601>.

51 ETSI-Cen-Cenelec (February 2014). *European Standard: Accessibility requirements suitable for public procurement of ICT products and services in Europe*. EN 301 549. Vol. 1.1.1, available at http://www.etsi.org/deliver/etsi_en/301500_301599/301549/01.01.01_60/en_301549v010101p.pdf. The European standard EN 301 549 was adopted under mandate M/376 from the European Commission.

52 Référentiel Général d’Accessibilité pour les Administrations (RGAA) 2.2.1, available at <https://references.modernisation.gouv.fr/rgaa-accessibilite/>.

53 Verordnung zur Schaffung barrierefreier Informationstechnik nach dem Behindertengleichstellungsgesetz (BarrierefreieInformationstechnik-Verordnung – BITV 2.0), available at http://www.gesetze-im-internet.de/bitv_2_0/index.html.

54 Law 4/2004, “Disposizioni per favorire l’accesso dei soggetti disabili agli strumenti informatici,” available at <http://www.camera.it/parlam/leggi/04004.htm>.

government contractors, or equivalent public-sector websites to be accessible, many of which require compliance with all or part of WCAG 2.0 AA. Although these requirements are not directly applicable to ecommerce sites, it indicates that website accessibility has been at the forefront of discussions in these countries.

WHILE ADA STANDARDS ARE BEING SORTED OUT, THE TREND HAS SHIFTED TOWARDS COMPLIANCE. ECOMMERCE SITES SHOULD CREATE THEIR WEBSITES AND CONTENT IN A MANNER THAT IS COMPLIANT TO AVOID LITIGATION, AND TO BE ABLE TO BETTER SERVE THEIR DISABLED CUSTOMERS.

⁵⁵ Japanese Industrial Standard (JIS) X 8341, "Guidelines for older persons and persons with disabilities—Information and communications equipment, software and services"; see also "Web Accessibility in Japan," available at <http://www.evengrounds.com/blog/web-accessibility-in-japan>.

⁵⁶ New Zealand Government, Web Accessibility Standard, available at <https://webtoolkit.govt.nz/standards/web-accessibility-standard-1-0/>.

V. THE BUSINESS CASE FOR ECOMMERCE WEBSITE ACCESSIBILITY

Over the past decade, website accessibility has grown to be one of the more prominent issues under Title III, as both regulatory agencies and advocacy groups have challenged the inaccessibility of websites. Although the ADA does not explicitly address the Internet, plaintiffs continue to push for website accessibility and the DOJ has supported this position. In most instances in the U.S. involving settlement agreements or DOJ consent orders, the companies have been required to ensure their website and/or mobile app is accessible in accordance with WCAG 2.0 AA.

Ecommerce companies that are unsure whether their websites are accessible to the blind should take steps to determine whether their website can be read by a screen reader. Yet, avoiding the website accessibility controversy altogether may be the more prudent step. Having to re-code an entire website to make it accessible can seem like a daunting task; but tools and services are widely available to website developers to help efficiently create an accessible website, without coding. Building in accessibility in a website's design not only helps to avoid subjecting the company to litigation, receiving a demand letter, or being the target of DOJ enforcement action, but can also increase brand awareness, goodwill, and recognition for those consumers who may not have had the ability to previously engage with the company online.

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