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Websites, Mobile Apps Targeted by DOJ and Private Litigants for Alleged Inaccessibility

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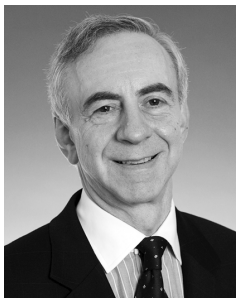

Technology does exist to modify websites and mobile apps to enhance accessibility for the visually impaired; however, it may be a challenging and costly task. But based on the current enforcement and litigation environment, it is a task that should be considered when designing or significantly refreshing a website or app.

Background

The internet seeks to promote instant gratification: a quick search on a web browser and a few clicks will lead to information about almost anything. It also provides tools for making purchases, scheduling appointments and various other activities. But according to the U.S. Department of Justice and various advocacy groups, that may not always be the case for some visually impaired individuals who, in certain circumstances, may be able to access information on the internet only with the aid of software designed to "read" websites and convert visual information into speech.

DOJ enforces Titles II and III of the Americans with Disabilities Act and Section 508 of the Rehabilitation Act of 1973. Titles II and III of the ADA require state and local governmental agencies and private businesses, respectively, to make their goods and services as accessible to individuals with disabilities as they are to those without disabilities. Section 504 of the Rehab Act prohibits disability-based discrimination and requires accommodations by any entity that receives federal financial assistance and by federal agencies. Section 508 of the Rehab Act bars the federal government from procuring electronic and information goods and services that are not fully accessible to those with disabilities. Regulations promulgated under the Rehab Act in 2000 (found at 36 C.F.R. Part 1194) created the first-ever U.S. federal accessibility standards for the internet.

Inaccessible Websites and Mobile Apps Are Enforcement Targets

Allegedly inaccessible websites and mobile apps currently are the subject of aggressive enforcement efforts and litigation by the DOJ, advocacy organizations for individuals with disabilities and private litigants. This is despite a glaring absence of any regulations setting standards for website accessibility, and despite the fact that federal appeal courts are currently split on whether websites are "public accommodations" within the meaning of Title III of the ADA.

Conflicts in the Courts

The 9th U.S. Circuit Court of Appeals has held that a "place of public accommodation" under the ADA is limited to "an actual physical place."[i] Constrained by this precedent, the federal district courts within the 9th Circuit have dismissed numerous lawsuits challenging inaccessible websites as ADA violations. For instance, an ADA claim against Facebook was dismissed, in part, because "Facebook operates only in cyberspace, and thus is not a 'place of public accommodation' as construed by the 9th Circuit."[ii] A federal district court in Florida reached the same conclusion some years ago regarding Southwest Airlines' website, holding that "the plain and

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unambiguous language of the ADA" does not include websites as places of public accommodations.[iii]

The 1st, 2nd and 7th Circuits, on the other hand, have construed the phrase "place of public accommodation" more expansively, to encompass both physical and electronic spaces. In the 1st Circuit case of *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Assoc. of New England, Inc.*,[iv] for instance, the defendant's self-funded medical plan placed a lifetime cap on medical benefits for individuals with HIV/AIDS. The 1st Circuit reversed a lower court decision that a medical plan was not a public accommodation, noting:

> [n]either Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity.[v]

The U.S. District Court for the District of Massachusetts applied this reasoning to Netflix's business in a case challenging the company's online streaming practices. In direct contrast to *Cullen v. Netflix*.[vi] it found that Netflix was a place of public accommodation within the meaning of the ADA, noting that "the legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology."[vii]

Taking a different tack, one California district court sought to find a way around the 9th Circuit's narrow interpretation. In *National Federation for the Blind v. Target, Inc.*,[viii] a class action, the visually impaired plaintiffs alleged that they could not access Target's website to purchase products, redeem gift cards or find Target stores. In the court's view, there was enough of a nexus between the use of the website services and those provided at the actual bricks-and-mortar stores to bring the website within the definition of a "place of public accommodation." The parties eventually settled the lawsuit, with a payment of more than $6 million to the class and $20,000 to a nonprofit advocacy organization for the blind. The company also agreed to modify its website to facilitate website transactions for customers with vision impairments.

State Laws Involved

In light of these threshold challenges to stating claims under Title III of the ADA, some plaintiffs have sought to gain traction under state anti-discrimination laws, such as California's Unruh Civil Rights Act or the California Disabled Persons Act.[ix] The interplay between the ADA and these and other similar state statutes is unresolved. Recently, the 9th Circuit certified to the California Supreme Court the question of whether the Disabled Persons Act includes websites, saying that the question has significant ramifications for California disability law.[x]

Rehabilitation Act Distinctions

In contrast, cases brought under the Rehabilitation Act do not face the same type of initial hurdle in light of the statute's specific prohibition against procuring non-accessible electronic goods and information. Illustrative of this point, the American Council of the Blind recently filed a class action against the federal government itself, specifically the U.S. General Services Administration, on behalf of blind individuals who are government contractors.[xi] The GSA administers the federal government's non-defense contracts. One of its responsibilities is to monitor federal contractors' compliance with the non-discrimination provisions of Section 504 of the Rehab Act.

Rather ironically, this lawsuit alleges that *the GSA website itself* is inaccessible to blind or visually impaired individuals; allegedly, the website has a number of features that are not "viewable" by the standard screen reader software that many visually impaired individuals use. For instance, "talking screen readers" allegedly can't interpret and convert to text undetectable features such as buttons, checkboxes, search parameters, "mouseovers" (which hide buttons or links beneath a label on the screen) and dropdown menus, all of which are part of the GSA website. Because federal contractors must register on the GSA website annually to be eligible to do business with the federal government, the suit alleges that visually impaired contractors are placed at a disadvantage in keeping their registrations current. The lawsuit asks for an injunction requiring the GSA to re-

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move or redesign these barriers to the use of its website by individuals with vision impairments.

Where Are the Rules?

Information about the analytical processes and the technology required to make websites accessible to individuals with disabilities is available through the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C). The Web Content Accessibility Guidelines (WCAG) issued by this group, intended primarily for Web content developers, Web authoring tool developers and Web accessibility evaluation tool developers, contain an international standard for Web accessibility. Portions of the earliest version of the WCAG standards were included in the Rehab Act regulations mentioned above. WCAG standards are widely expected to be incorporated at some point into proposed ADA regulations, as evidenced by an Advanced Notice of Proposed Rulemaking issued by DOJ in 2010 (75 Fed. Reg. 43460), which sought comments on whether DOJ should adopt the most recent version of WCAG standards (WCAG 2.0).

DOJ recently indicated that after three delays, it now expects the NPRM to be issued in March 2015. The ANPRM comments, at length, on potential barriers to Web access faced by visually impaired individuals, noting that many features that others take for granted may not be "read" by screen reader software: images or photographs without corresponding text, poorly labeled field elements in online forms and the annoying CAPTCHAs (distorted text designed to tell computers and humans apart). The ANPRM asserts that, in most instances, "removing these and other website barriers is neither difficult nor especially costly." The correctness of that assertion is far from free of doubt.

In fact, a WAI publication, *Introduction to Web Accessibility*,http://www.w3.org/WAI/intro/accessibility/php, effectively calls into question the assertion that removal of any existing website barriers "is neither difficult nor especially costly":

Making a Web site accessible can be simple or complex, depending on many factors such as the type of content, the size and complexity of the site, and the development tools and environment. Many accessibility features are easily implemented if they are planned from the beginning of Web site development or redesign. Fixing inaccessible Web sites can require significant effort, especially sites that were not originally "coded" properly with standard XHTML markup, and sites with certain types of content such as multimedia.

Depending on costs and other factors, the question of whether modifications to existing websites are "readily achievable" under the ADA may be presented in particular situations.

DOJ Is Pressuring Companies

Costly or not, and the lack of website regulations notwithstanding, DOJ is pressuring companies to modify websites and mobile apps to meet WCAG 2.0 technical standards. Although the DOJ has, as noted, thrice delayed the issuance of a NPRM on website accessibility, it is proceeding as if those technical standards already have been adopted. For example:

- DOJ recently intervened in a class action against H&R Block brought by the National Federation for the Blind, which alleged that the company violated Title III of the ADA by failing to code its website and mobile apps to allow its features and services (such as instructional videos and professional and do-it-yourself tax preparation) to be accessible to blind individuals. The case was resolved in March 2014 with a five-year consent decree, under which H&R Block is required, among other things, to modify its website and mobile apps to certain standards in WCAG 2.0, to make a $45,000 payment to two plaintiffs and to pay a $55,000 civil penalty. The consent decree can be found on DOJ's website at http://www.ada.gov/hrb-cd.htm.
- DOJ demanded similar relief in a Title II action against the Clerk of Courts in Orange County, Florida, which it brought on behalf of a blind individual who alleged that he was denied full and equal access to court documents filed and maintained in the court's electronic filing system (DOJ Complaint # 204-17M-440). That settlement, announced July 15, 2014, and posted online at http://www.ada.gov/occ.htm, also requires the Clerk of Courts to modify the Orange County Courts' websites to comply with the WCAG 2.0 AA.

DOJ has pushed the issue of website and mobile apps accessibility even in cases arising under Title I of the ADA, which prohibits disability-based discrimination in employment. In a recent settlement between Florida State University and DOJ, a provision requiring compliance with WCAG 2.0 technical standards was incorporated into the settlement of an employee's Title I claim. This was true even though FSU's website had nothing to do with the employee's complaints about hiring-related medical inquiries. The university agreed not only to make changes to its procedures for conducting medical examinations and making disability-related inquiries to

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job applicants, but to ensure that its "FSU Police Department website, including its employment opportunities website and its mobile applications, conform to, at a minimum, the Web Content Accessibility Guidelines 2.0 Level AA Success Criteria and other Conformance Requirements."[xii]

Next Steps

The bottom line is that the DOJ has made clear that it now deems accessibility of websites and mobile apps an integral part of ADA and Rehab Act compliance, even without regulations or standards for accessible websites and apps and without regard to the fairness of that approach.[xiii] Between this rigorous regulatory environment and the plethora of private litigants pursuing this issue, some businesses (among them, Major League Baseball, National Credit Reporting Agencies, Safeway, CVS, Staples and Bank of America) have decided to reap the benefits of positive publicity by collaborating with private litigants. These businesses have agreed to satisfy WCAG 2.0 A or AA Success Criteria and some continue to publicize accessibility upgrades. Major League Baseball, for instance, has released accessible versions of its AtBat iPhone and iPad applications. DOJ enforcement actions will surely continue to target accessibility criteria for mobile applications.

Achieving website and app accessibility is a highly technical endeavor, which may "require significant effort" and also must be tailored to the particular business model and needs, consistent with the evolving requirements of the ADA and the Rehab Act. Now may be the time to consider retaining technical consultants and experienced counsel to evaluate the accessibility of your website and apps and a potential plan for modifications, especially if a significant refresh of an existing website is planned. The benefits of reaching a wider audience or customer base will hopefully offset the costs of website modification and avoid litigation risk and adverse publicity.

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[i] *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

[ii] *Young v. Facebook, Inc.*, 790 F.Supp.2d 1110, 1115 (N.D.Cal. 2011); *See also, Jancik v. Redbox Automated Retail, LLC,* No. SACV 13-1387-DOC, 2014 U.S. Dist. LEXIS 67223 (C.D.Cal. May 14, 2014) (Redbox Digital is not required to caption library of web-based videos for hearing-impaired customers because website is not place of public accommodation); *Cullen v. Netflix, Inc.*, 880 F. Supp.2d 1017, 1023-24 (N.D.Cal. 2012) (Netflix Internet services not public accommodation within meaning of ADA).

[iii] *Access Now v. Southwest Airlines Co.*, 227 F. Supp.2d 1312, 1317 (S.D. Fla. 2002).

[iv] 37 F.3d 12, 19-20 (1st Cir. 1994).

[v] *See also, Pallozzi v. Allstate Life Ins. Co.,* 198 F.3d 28 (2d Cir. 2000) (ADA Title III applies to insurance offerings); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (plain language of ADA includes as public accommodations owners and operators of all facilities, whether in physical or electronic space).

[vi] *See* n ii.

[vii] *National Ass'n of the Deaf v. Netflix*, 869 F. Supp.2d 196, 200-201 (D. Mass. 2012).

[viii] 452 F.Supp.2d 946, 953-54 (N.D.Cal. 2006).

[ix] *See, e.g., Young v. Facebook, Inc.*, 790 F. Supp.2d at 1116-17 (no liability under Unruh Act, which requires proof of intentional discrimination, or under Disabled Persons Act, which incorporates ADA standards and definitions); compare *National Federation of the Blind v. Target, Inc.*, No. C06-1802 MHP, 2007 U.S. Dist. LEXIS 73547 (N.D. Cal. Oct. 2, 2007) (certifying class and holding California Unruh Act and Disabled Persons Act apply to websites and virtual businesses).

[x] *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, No. 112-15807 (9th Cir., February 10, 2014).

[xi] *American Council of the Blind, et al. v. Tangherlini and U.S. General Services Administration* (Civil No. 14-671, DCDC, April 22, 2014).

[xii] *Settlement Agreement Between the United States and Florida State University*, DOJ No. 205-17-13 (June 5, 2014), available at http://www.ada.gov/floridastate-tl-sa.htm.

[xiii] In *National Ass'n of the Deaf v. Netflix*, 869 F. Supp.2d at 200-201, the Department of Justice filed a Statement of Interest arguing that the "fact that the regulatory process is not yet complete does not support any inference whatsoever that web based services are not already covered by the ADA, or should not be covered by the ADA." Statement of Interest at p. 12. ❖

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