DYKEMA

Issue Brief

Does Your Website Comply With the ADA?

For more than 25 years, the Americans With Disabilities Act (ADA) has knocked down barriers that prevented disabled people from fully participating in society, and made physical locations from public parks and buildings to sports stadiums more accessible to everyone. The ADA was so effective in its mission that it's difficult to find a location today that hasn't been built or retrofitted for accessibility.

But the Internet Era introduced a new accessibility issue that any business with a website needs to address. The question is simple: Is a website a place of public accommodation to which the ADA applies? The answer is much more complicated. This Issue Brief will explain the issues at hand and what you can do about them.

The ADA and Websites

Does the ADA apply to websites? Opinions vary, in both courts and commentary. Courts have been dealing with the subject for the last five years or so, but few of the cases have crawled through the system far enough to develop much precedential case law.

Obviously, the considerations involved in internet accessibility are different than those involving a physical location. The issues in virtually all cases revolve around whether websites are accessible to the visual and hearing impaired. Earlier this decade, Netflix was sued in a Massachusetts federal court by the National Association for the Deaf (NAD), which alleged that videos on the service's then new streaming option were not captioned. After the court denied the company's motion for summary judgment, Netflix settled that dispute, by signing a consent decree to ensure its videos were captioned and paid a sizeable amount to the NAD's lawyer.

Most of the more modern cases involve accessibility for the visually impaired, who consume websites using screen readers, or accessibility software, that reads text to them. These suits usually allege that a website isn't compatible with the Web Content Accessibility Guidelines 2.0, and therefore, not compatible with accessibility software.

Web Content Accessibility Guidelines 2.0

The Department of Justice has not released any of its own guidance on the application of the ADA to websites. To date, it relies upon a set of recommendations from industry experts and developers called the Web Content Accessibility Guidelines 2.0 (WCAG).

The WCAG offer suggestions on how to improve accessibility for most website features. For example, for publishing nontext content like informational charts and graphics, the WCAG suggests providing a text alternative for the image so long as the text serves the same purpose and provides the same information. The guidelines offer several highly technical methods of creating this alternative. They also describe several methods that have been tried but fail to bring a website into compliance.

In these cases, the plaintiff has encountered content on a company's website that, he claims, does not comply with the WCAG. In response, the plaintiff will send a demand letter to the company.

The Demand Letter

A demand letter is usually the first notice a company gets that suggests there might be something wrong with the website. The letter comes from a plaintiff's law firm, claiming that a "customer" tried to use the targeted company's website but was frustrated by some noncompliant feature(s). The firm sending the letter will almost certainly offer to help the targeted company bring its website into compliance under the terms of consent decree (like in the *Netflix* case). The consent decree is an important part of the settlement because it will be used against the company in court like a battering ram should the cooperative effort fail to yield an amicable solution.

If you were to receive a demand letter, you should contact your ADA attorney to help you review the functionality of the website and any options you have before engaging with the plaintiff's lawyer.

Defenses

A company that has received a demand letter may have several defenses available.

The Website Does Comply with the WCAG

Yes, it's true, sometimes the plaintiff is wrong. Just because a company received a demand letter does not mean that its website does not comply with the WCAG or ADA. Your ADA attorney can help you review your website to determine if any of its features are not WCAG compliant.

ADA Is Inapplicable

As mentioned earlier, courts have been on each side of the issues of whether and how the ADA applies to websites. The ADA applies to a "place of public accommodation," which, plaintiffs argue, is not limited to a physical location. The Department of Justice has argued that Congress intended that application of the ADA would evolve over time as technology does.

Some courts have agreed with this argument. Notably, in the *Netflix* dispute mentioned above, a U.S. District Court judge denied Netflix's motion for summary judgment, stating that excluding internet businesses from the ADA would "severely frustrate Congress's intent" in enacting the law. Several other courts, including the 11th U.S. Circuit Court of Appeals, have issued opinions applying the ADA to digital or otherwise intangible barriers. It should be no surprise that many of the lawsuits being filed are in Florida, which is in the 11th Circuit.

But not all courts have applied the ADA this way, ruling that websites alone cannot be "places of public accommodation" because they aren't a physical place. The issue may never see any kind of interpretative consistency until more federal appeals courts weigh in on the issue and either come to a consensus, or a split develops among the circuits and the U.S. Supreme Court takes a case.

California state courts and the Ninth Circuit have taken an interesting middle ground approach. In a key case the National Federation of the Blind sued Target claiming Target's website was not accessible to the blind in violation of Title III of the ADA. The court held the ADA would apply to the Internet whenever it could be shown that the challenged services (the website) operated as a "gateway" to the company's brick-and-mortar stores as such stores come within the explicit definition of places of public accommodations under the ADA.

Plaintiff Doesn't Have Standing

Standing is an issue not well understood outside of a constitutional law classroom. It requires that a plaintiff have some personal stake in the litigation that he has filed, or that he has suffered some "concrete harm." It prevents a person from suing on behalf of others simply because he is a zealot on the issue, which is the crux of the standing defense. Many of the plaintiffs sending demand letters are not, in fact, regular customers, but "testers," often disability rights advocates who are randomly going to company websites looking for noncompliant features.

Under the federal standing doctrine (and the standing doctrines in many states), the plaintiff has to show some kind of "concrete harm" or injury in fact: that his use of the website was an earnest attempt to perform business through the website, that he was deterred from doing so because of the alleged noncompliance, and that he intends to try again and will likely suffer the same fate.

What Can You Do Now?

If you have not received a demand letter, it may only be a matter of time before it happens. In the meanwhile, companies that have a business website should contact their ADA lawyer to conduct a thorough review of their sites for features that do not fully comply with the WCAG.

Dykema regularly assists clients with all issues related to the Americans With Disabilities Act, including "digital barriers" cases and other matters. We can help you respond to any demand letter you receive or perform a WCAG compliance audit so that you are ready to defend yourself if one arrives.

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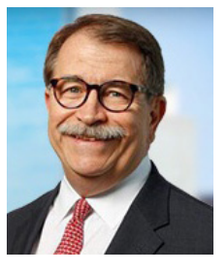

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