CONTINUING LEGAL EDUCATION

Electronic Accessibility Post-*Domino’s*: Detangling Employers’ and Business Owners’ Web and Mobile Accessibility Obligations

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Speakers

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Objectives

• List between 3 and 5 program learning objectives
• The objectives are what the learners will be able to accomplish by the end of the program
• Course objectives focus the audience and make the program relevant to them
• Well constructed course objectives include:
  • Performance – what a learner is expected to be able to do
  • Condition – context or area of law
  • Criterion – how well the learner must perform in order to be considered acceptable
What does the ADA have to do with the Internet?

• Americans with Disabilities Act of 1990
  • Guidelines for businesses, governments, and employers on how to improve accessibility for persons with disabilities

• 28 C.F.R. § 36.101(a): “The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 . . . , which prohibits discrimination on the basis of disability by covered public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.”

• 28 C.F.R. § 36.101(b): “The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act’s purpose of reinstating a broad scope of protection under the ADA ...
Places of Public Accommodation and Commercial Facilities

- Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories –

  1. Place of lodging.
  2. A restaurant, bar, or other establishment serving food or drink;
  3. A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
  4. An auditorium, convention center, lecture hall, or other place of public gathering;
  5. A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
  6. 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;
  7. A terminal, depot, or other station used for specified public transportation;
  8. A museum, library, gallery, or other place of public display or collection;
  9. A park, zoo, amusement park, or other place of recreation;
  10. A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
  11. A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
  12. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

- No websites!?
Places of Public Accommodation and Commercial Facilities

• *Facility* means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

• *Commercial facilities* means facilities –
  (1) Whose operations will affect commerce;
  (2) That are intended for nonresidential use by a private entity; and
  (3) That are not –
    (i) Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601 - 3631);
    (ii) Aircraft; or
    (iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars ..., any other railroad cars ..., or railroad rights-of-way...

• Still no websites?!
Nat’l Fed’n of the Blind v. Target Corp.,
452 F. Supp. 2d 946 (N.D. Cal. 2006)

• Class action lawsuit alleging that Title III of the ADA prohibited discrimination against the disabled including on websites and in the internet, and was not restricted to physical places.

• Target argued the ADA was intended to apply exclusively to physical accommodations instead of cyberspace.

• District Court ruled a retailer may be sued if its website is inaccessible to the blind because it discriminated against the disabled in the enjoyment of goods, services, facilities, or privileges.

• A nationwide class of legally blind individuals was later certified.

• In September 2008, the parties reached a settlement to modify the website and company policies; established a $6 million settlement fund for California class members; paid $3.7 million in attorneys’ fees and costs to plaintiffs’ counsel.
Inconsistency in what constitutes a place of public accommodation

- *National Association of the Deaf v. Netflix*: Plaintiff successfully sued alleging lack of closed captioning for streaming video is a violation of the ADA. Judge ruled it would be “irrational to conclude” that “places of public accommodation are limited to actual physical structures.”

  “In a society in which business is increasingly conducted online, excluding businesses that sell services through the internet from the ADA would run afoul of the purpose of the ADA. It would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public.”

- *Cullen v. Netflix*: deaf Netflix viewer alleged Netflix did not provide sufficient closed captioning on its online streaming videos. Judge in unpublished decision ruled Netflix is not subject to the ADA and not required to caption its streaming library.
Floodgates opened (USCourts.gov Data)

Figure 2. ADA Civil Rights Cases, by Type, 2005 – 2017

- Employment
- Other
Floodgates Opened (2017-2018)

ADA Title III Website Accessibility Lawsuits in Federal Court (2017-2018)

- 814* suits in 2017
- 2258* suits in 2018

177% increase over 2017
What do these lawsuits look like?

- Digital accessibility is the ability of a website, mobile app, or electronic document to be easily navigated and understood by a wide range of users, including those with visual, auditory, motor, or cognitive disabilities.

- Analogize accessibility of a website to a ramp or Braille; a necessary modification to allow a disabled person to enjoy goods and services in an increasingly e-commerce based world.

- Recommend adopting the Web Content Accessibility Guidelines, best practices adopted by the World Wide Web Consortium (W3C), an international community of member organizations, full-time staff, and public input on maximizing the usability of the internet. Most suits encourage adoption of Version 2.0 or 2.1, AA (standard) or AAA (exceptional) compliance.

- Goal is to make website use seamless: alt-text for images, captioning for videos, no accessible drop-down menus, no keyboard access to navigate, empty links making navigation frustrating.

- Screen readers are a start, but may also include mouth-controlled devices and adaptive controllers.
Surprising “targets” of website accessibility lawsuits

Beyoncé: Visually impaired would-be concertgoer could not navigate website by keyboard and lacked alt-text on images.

Fox News: Visually impaired user sued network because its website did not meet WCAG 2.0 standards so he could not find out about live broadcasts and tapings audience members could attend.

Burger King: Class action that visually impaired individuals could not navigate website without alt-text tags for the images on the site.

Harvard University/Massachusetts Institute of Technology: Sued over failure to provide captions for online content in MOOCs (massive open online courses).
Gil v. Winn-Dixie (S.D. Fla.)

- Plaintiff Juan Carlos Gil, who is legally blind and has cerebral palsy, alleged the Winn-Dixie grocery store website violated Title III. Prior to Winn-Dixie, there was a split among the Circuit courts as to whether a website must bear a nexus to a physical location to be a place of public accommodation or not.
- First ADA/Title III case to go to verdict.
- Court found the site was “heavily integrated” with physical store locations and “operates as a gateway to the physical store locations.” Examples: searching for locations, getting store coupons, refilling prescriptions online, learning about brand items, and receiving information about product recalls.
- Court not only found Winn-Dixie liable but suggested “[r]emediation measures in conformity with the WCAG 2.0 Guidelines.”
- Testimony was that website was overhauled for $9 million but added cost of adding accessibility would have been $37,000-$250,000.
- Appeal currently pending in Eleventh Circuit.
Domino’s v. Robles (N.D. Cal.; Ninth Circuit)

• Plaintiff was a visually impaired California resident who used a screen reader to order online or through the mobile app.

• District court dismissed Robles’ suit, but Ninth Circuit Court held that the app and website should be accessible to the disabled:
  The alleged inaccessibility of Domino’s website and app impedes access to the goods and services of its physical pizza franchise—which are places of public accommodation. This nexus between Domino’s website and app and physical restaurants—which Domino’s does not contest—is critical to our analysis.

• Ninth Circuit rejected argument that parties needed to wait for specific regulatory direction stating interpretation of the ADA was within the court’s competence.

• In Domino’s petition for review with the Supreme Court, the question was whether “Title III of the ADA require[s] a website or mobile phone application that offers goods or services to the public to satisfy discrete accessibility requirements with respect to individuals with disabilities?”
Current Circuit Split

- Courts in the Third, Sixth, Ninth and Eleventh Circuits generally limit ADA-website accessibility claims to defendants whose websites are connected with, or bear a nexus to, physical retail locations.
  - *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place.");
  - *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997) (*en banc*) ("[A] public accommodation is a physical place and this Court has previously so held.");
  - *Weyer v. Twentieth Century Fox Film Corp.*, 198 (9th Cir. 2000) ("Title III . . . 'public accommodations' . . . actual, physical places where goods or services are open to the public, and places where the public gets those goods or services. . . . [thus a connection with] an actual physical place is required.");
  - *Rendon v. Valley Crest Prods., Ltd.*, 294 F.3d 1279, 1282 (11th Cir. 2002) ("Title III encompasses a claim involving telephonic procedures that, in this case, tend to screen out disabled persons from participation in a competition held in a tangible public accommodation.").
Current Circuit Split

- First, Second, and Seventh Circuits remain more welcoming forums for plaintiffs because they have opined a physical nexus is not required.
  - *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (suit alleging that insurance policy violated Title III of the ADA not barred because public accommodations are "not so limited" as "to actual physical structures");
  - *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017) (finding plaintiff stated a facial claim under the ADA when he was unable to as easily use a website, because of its design inaccessibility, to purchase art supplies);
  - *Doe v. Mut. Of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999) (holding that the "core meaning of" the ADA, "plainly enough, is that the 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").
Current Circuit Split and Trend

• *Del-Orden v. Bonobos*, 2017 U.S. Dist. LEXIS 209251 (S.D.N.Y. Dec. 20, 2017): Reflects thinking of the Southern District of New York courts, that the term public accommodation extends to private commercial websites that affect interstate commerce and a connection to a physical location is unnecessary.

• Focus defense away from arguing: mootness through prior remediation, violation of Due Process rights through compelled compliance with private WCAG guidelines, or lack of nexus and more toward practical approach of minimizing risk of being sued in the first instance.
Problems with Unresolved Circuit Split

• Assumption that physical nexus not required due to SCOTUS refusal to hear Dominos appeal.
• Forum shopping will continue as websites are accessible from anywhere in the world.
• Don’t expect regulatory guidance to resolve open questions.
• Free online tools help detect noncompliant websites and reveal targets for next lawsuit.
• Public court filings often reveal companies willing to settle early.
Problems with Unresolved Circuit Split

• Continued flood of “surf by” website cases, reuse of boilerplate complaints, and rising demands for attorneys’ fees and costs.

• Risk of class action cases increasing, driving up settlement value.

• Inconsistent remedies available due to panoply of state law analogs with varying remedial schemes.

• Settlement without full remediation does not moot copycat litigation, *e.g.*, *Haynes v. Hooters of America* (11th Cir. 2018)
What should website owners do next?

• No indication of whether or when DOJ will issue clarifying regulations so website owners must assess risk and take appropriate remedial steps.

• Do nothing?
  • High risk of litigation targeting, particularly in retail and food services sector
  • Not serving the needs of the disabled community

• Address during next website revision?
  • Should certainly include in the overall budget and compare remediation to design element costs. E.g., Domino’s revision estimated at $37,000.
What should website owners do next?

• Address only when sued?
  • Add in cost of attorneys’ fees (yours and plaintiff’s) and court costs, publicity, negative attention.

• Routinely audit website with third-party vendors and voluntarily re-code/re-design.
  • Proactively monitor and address deficiencies in coding using WCAG 2.0 AA standard or better.
Best Practices

• Assume you/your client will be sued.
  • If you have a consumer facing website, you are a target.
  • When, not if.

• Proactively check your website.
  • Use the same free tools plaintiffs’ lawyers use to check for deficiencies.
  • Add accessibility statement.

• Retain outside vendors as part of your compliance review.
  • Hire users with disabilities to use your site and offer feedback.

• Begin remediation – include deficiencies in your IT monthly schedule and annual legal compliance budget.

• Once in compliance: maintain, test, and document.
Best Practices

• Respond early to demand letters, if you receive one. Private settlement avoids creating additional PR challenges.

• Understand the source of content (hosted, third-party, original, etc.). Be sure settlements address only content within the company’s control.

• Work with consultants before agreeing to a remediation time frame, accounting for standard website upgrades, other IT priorities, and realistic time for completion and budgeting.

• Consider waiving, or insisting on deleting, the confidentiality provision of the settlement agreement to share with future litigants.

• Work with counsel familiar with the plaintiff’s bar in this space, as they understand the usual settlement ranges and timeframes that are reasonable.
For More Information

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