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# Analysis

## Disability Discrimination

### Disabled Access Laws and Internet Websites—An Unsettled Area

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Federal law requires that public accommodations be accessible to persons with disabilities. Does this apply to websites? And, if so, what standards do businesses have to meet? In one area—sales of Internet-based products to the federal government—there are some answers under Section 508 of the Federal Rehabilitation Act and guidance issued under that section. In other public procurements and the commercial world, similar answers are likely to arrive soon.

The U.S. Court of Appeals for the Seventh Circuit (in *dicta*) and the U.S. Department of Justice (“the DOJ”) have taken the position that the Americans with Disabilities Act (“the ADA”) applies to commercial websites. Analogous case law from the First Circuit agrees.<sup>1</sup> On the other hand, at least one district court has expressly rejected a plaintiff's attempt to sue a commercial website for alleged ADA violations. Analogous case law in the Third, Sixth, and Ninth circuits and other district courts indicates that those courts would take a similar view.

In this author's opinion, the ADA is very likely to be applied to at least some types of websites. If and when courts apply the ADA to those websites, businesses can use Section 508 as a model to predict what specific requirements will then apply.

<sup>1</sup> For a comprehensive discussion of this issue, and an argument in favor of application of Title III of the ADA to websites, see *When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web*, National Council on Disability, July 10, 2003, at <http://www.ncd.gov/newsroom/publications/adainternet.html>.

Whether disabled access laws apply to a website depends on who owns and operates the site and may also depend on the types of services the site provides.

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#### Who Owns the Site?

**Public Sector.** Websites owned or operated by the federal government are subject to Section 508 of the Federal Rehabilitation Act (29 U.S.C. § 794d), which requires that those sites be accessible to persons with disabilities. An increasing number of state and local governments are adopting Section 508 or similar standards as well. In addition, websites for other public facilities, such as public transportation systems, are subject to requirements under Title II of the ADA, and its implementing regulations, that public entities make “adequate communications available, through accessible formats and technology, to enable users to obtain information and schedule service.” [*Martin v. Metropolitan Atlanta Rapid Transit Authority (MARTA)*, 225 F. Supp. 2d 1362, 1377 (N.D. Ga. 2002) (holding that MARTA's website violated Title II of the ADA because it was not accessible to persons with visual impairments).]

**Private Sector.** The private, commercial sector is generally subject to Title III of the ADA (42 U.S.C. § 12101, *et seq.*). The ADA requires that “public accommodations” be made accessible to persons with disabilities unless doing so would fundamentally alter the goods or services provided or would be an undue burden. A place of public accommoda-

tion is covered by the act if it “affects commerce” (i.e., provides goods or services to the public) and falls within one of 12 enumerated categories listed at 42 U.S.C. § 12181(7)(C). The listed categories include places of exhibition or entertainment, sales or rental establishments, service establishments, places of public display or collection, places of recreation, and places of education. Specific ADA access requirements and guidance on how a public accommodation can meet these requirements are provided in regulations created by the Architectural & Transportation Barriers Compliance Board (“the Access Board”) and promulgated at 28 C.F.R. § 36.101, *et seq.*

It is unclear whether Title III of the ADA would apply to commercial websites. Whether those laws apply will likely depend on the types of services the site provides.<sup>2</sup> To date, no court has held that commercial websites must be accessible to persons with disabilities.

#### What Types of Services Does the Site Provide?

**Sites Providing Access to Physical Public Accommodations.** A site that provides access to a physical place that itself qualifies as a public accommodation probably should be subject to disabled access law requirements. For example, a theater's website,

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<sup>2</sup> If a website includes job postings, it would be subject to Title I of the ADA, which prohibits disability discrimination in employment. If a disabled job applicant found such a website to be inaccessible, the website owner might be obligated, at the applicant's request, to modify the website as a reasonable accommodation.

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which allows patrons to purchase tickets online, should be covered by the ADA. The reasoning is that, even if the websites themselves are not public accommodations (an unsettled question discussed below), to the extent they are inaccessible to persons with disabilities, they are barriers to access to places that clearly are public accommodations, e.g., theaters, sports arenas, museums, etc.

The Tenth Circuit recently applied this reasoning in an analogous situation. In *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (10th Cir. 2002), plaintiffs with visual and upper torso mobility impairments sued the production company for the game show, "Who Wants to Be a Millionaire?," alleging that the show's "fast finger" telephone dial-in system for selecting contestants was inaccessible to them. The district court dismissed the claims, agreeing with the defendants' argument that the dial-in system was not covered by the ADA. The appeals court reversed, holding that the dial-in system was a barrier to access to participation in the game show, which took place in a public accommodation, i.e., a TV studio.

The DOJ, the agency charged with enforcing the ADA's access provisions, has taken a similar position regarding websites. [Policy Ruling, Sept. 9, 1996: *ADA Accessibility Requirements Apply to Internet Web Pages*, 10 NDLR 240 (also available at <http://www.usdoj.gov/crt/foia/tal712.txt>).]

**Sites Without a Connection to a Physical Place of Public Accommodation.** Every website has a connection to a physical place in the sense that it is located on a server or servers in real space, but what if that is the site's only connection to a physical space? Does the ADA apply, for example, to amazon.com, the same way it applies to a bricks and mortar book store? What if the site is connected to a physical place that does not qualify as a public accommodation?

*Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002), is directly on point. In that case, the district court granted defendant Southwest Airlines' motion to dismiss plaintiffs' claims that Southwest's website violated Title III. Significantly, the court noted that the plaintiffs could not argue that the website denied them access to aircraft because aircraft are explicitly exempt from Title III (42 U.S.C. § 12181(10)). The court concluded

that Title III does not apply to websites based primarily on the plain language in the title (42 U.S.C. § 12181(7)) and the implementing regulations (28 C.F.R. §§ 36.101, 36.104), which both define "places of public accommodation" in terms of "physical, concrete places."

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**The applicability of disabled access laws to commercial websites is unsettled, but legal challenges are sure to come.**

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At least one court has taken the position that the ADA does apply to websites. In *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), a case involving an ADA challenge to an insurance policy, the court states:

The core meaning of [Title III 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, . . . [citation omitted, emphasis added]) 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.

The DOJ has taken the same position. In *Hooks v. OKBridge*, 232 F.3d 208 (5th Cir. 2000) (decision without published opin.), the plaintiff sued a commercial website on which customers can play bridge for a fee, alleging that his membership at the site was terminated because he has bipolar disorder. In an unpublished opinion, the U.S. District Court for the Western District of Texas dismissed the case, ruling that a company providing services over the Internet is not a physical place of public accommodation under the ADA and that the defendant was exempt from the ADA as a "private club." On appeal, the DOJ filed an amicus brief with the Fifth Circuit arguing that public accommodations under Title III are not limited to companies providing services to customers at a physical location and that the entertainment or recreation services provided by OKBridge make it a place of public accommodation. [See DOJ Amicus Brief at <http://www.usdoj.gov/crt/briefs/hooks.htm>.]

Several circuits have looked at the broader issue of whether the ADA's definition of public accommodation requires that it be a physical place in the context of employee health insurance plans. The courts are split, with the Third, Sixth, and, most recently, the Ninth circuits holding that a physical place is required, such that the challenged plans are not covered. The First Circuit, on the other hand, has held that a physical place is not required.

**Subscriber-Only Websites.** A website that is accessible to subscribers only is analogous to a private club and probably would not be covered. The district court dismissed the plaintiff in *OKBridge* in part because it considered the challenged website, a members-only gaming site, to be the equivalent of a private club. Subscriber-only sites are also very similar to the digital cable service that the district court found not to be a "public accommodation" in *Torres v. AT&T Broadband, LLC*, 158 F. Supp. 2d 1035 (N.D. Cal. 2001).

**Some Courts Are Likely to Find That Websites Must Be Accessible.** In sum, it is unclear whether websites are themselves public accommodations under the ADA. The DOJ believes they are, and it is likely that the First and Seventh circuits would agree. On the other hand, decisions by the Third, Sixth, and Ninth circuits indicate those courts would be more likely to reject application of the ADA to websites without a meaningful connection to a physical place.

It is clear that Congress did not have websites in mind when the ADA was enacted in 1990. However, applying the ADA to websites would serve the general purposes of that statute of making public commerce accessible to persons with disabilities.

### **If Disabled Access Laws Apply to Websites, What Do They Require?**

**Parties Liable Under Disabled Access Laws.** The ADA requirements apply to entities that own or operate public accommodations. Thus, if a website is a public accommodation, the party or parties that own and operate the site will be liable for any access violations of that site. While some cases also hold design professionals, such as architects, liable under the ADA, the majority view is that they are not *directly* liable under the Act. Regardless, such professionals still need to be concerned about access require-

ments due to indemnity obligations they may have to site owners.

**ADA Regulations.** The DOJ, as the federal agency responsible for implementing the ADA, has promulgated detailed regulations on how a public accommodation must make architectural features accessible, but it has created no such regulations for websites or similar technologies. However, courts can look to detailed regulations applicable to federal government websites under Section 508 for guidance on what website features are or are not accessible (36 C.F.R. § 1194.1, *et seq.*). Commercial guidelines, though not legally binding, are also available. [See, e.g., Web Content Accessibility Guidelines 1.0, at <http://www.w3.org/TR/WCAG10/>.]

### Section 508—Rehabilitation Act

Section 508 provides a model for the future if and when other laws, like the ADA, are applied to commercial websites. It provides that agencies can only purchase electronic and information technology (“EIT”) that provides access to government employees and members of the public with disabilities “comparable” to that provided to persons without disabilities. EIT must meet applicable accessibility standards of the Access Board at 36 C.F.R. Pt. 1194. [See also <http://www.access-board.gov/sec508/508standards.htm>.]

Subpart A of the regulations defines the types of technology covered. The application section (Section 1194.2) outlines the scope and coverage of the standards, providing that they apply to EIT which is defined as “any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, or duplication of data or information.” If no product meets all of the regulations’ accessibility standards, then the agency may procure one that *best* meets standards (not necessarily the one that meets the *most* standards). The regulations incorporate the concept of “equivalent facilitation,” which permits vendors to use designs or technologies that differ from those prescribed in the standards so long as they result in substantially equivalent or greater access (Section 1194.5); this effectively converts the accessibility standards into performance criteria.

Subpart B provides “technical standards” regarding various categories of EIT, including Web-based intra- and Internet information and applications (Section 1194.22). Many

of the criteria provided ensure access for persons with visual impairments who rely on assistive technology such as screen readers and refreshable Braille displays. The standards require certain conventions such as verbal tags or identification of graphics and format devices, like frames, which are necessary so assistive devices can read them for the user in a sensible way. The standards do not prohibit graphics or animation but, where used, require that the same information be available in accessible format, which generally means the use of text labels or descriptors for graphics and certain format elements.

Subpart C of the regulations provides functional performance criteria for technologies or components for which there are no specific requirements under technical standards in Subpart B. For example, one provision requires that at least one mode allow operation by individuals with low vision (between 20/70 and 20/200) without relying on audio input (since those individuals may also have a hearing loss).

Subpart D regulates information, documentation, and support, including user guides, installation guides, customer support, and tech support communications. Such items must be made available in alternative formats upon request at no additional charge. Alternative formats include Braille, cassette recordings, large print, electronic text, Internet postings, TTY access, and captioning and audio description for video materials.

In addition to the formal regulations, the Section 508 interagency steering committee has issued detailed, informal guidance in the form of a “frequently asked questions” document.<sup>3</sup>

### How Can Websites Be Made More Accessible to Disabled Persons?

If disabled access law requirements do apply to websites, then how can site owners and operators make their sites more accessible?

Persons with disabilities commonly encounter the following barriers to access in websites:

- visual features (e.g., photos, graphics) with no text equivalents or special coding, including graphics essential to navigating site or imparting

<sup>3</sup> Available at <http://www.section508.gov/index.cfm?FuseAction=Content&ID=75>.

vital information (such as a table or image map);

- color cues (e.g., links that change from red to green once they have been used);<sup>4</sup>

- text that is too small, has too little contrast, etc.;

- audio or video features with no text equivalents, e.g., sounds to indicate the user has made a mistake;

- features only accessible by typing in text;

- features only accessible by mouse clicking on a target.

Disabled persons can use many technologies effectively, including websites, through the use of adaptive equipment or software, also known as “assistive technology.” Examples of assistive technology include:

- screen reader technology—allows persons with visual impairments to use websites by converting text to speech or refreshable Braille display,

- voice recognition technology—allows persons with certain physical or dexterity impairments to input commands,

- closed-captioning—allows persons with hearing impairments to follow audio content.

Finally, websites can be made more accessible by providing accessible information about how to access website features (e.g., including an access instruction page for site visitors and providing help desk assistance knowledgeable about assistive technology and accessibility features of the site).

### Conclusion

Every day, websites are becoming a more significant part of how we do business. This means that access barriers in sites are increasingly depriving disabled persons of this means of doing business. Businesses should consider the accessibility of their sites to the disabled, whether they are legally obligated to do so or not. The applicability of disabled access laws to commercial websites is unsettled, but legal challenges are sure to come. And it is likely that when they do, at least some courts will find the laws do apply to at least some sites.

<sup>4</sup> To check websites for readability by persons with some forms of color-blindness, visit <http://www.vischeck.com>.