Lathrop GPM

ADA Litigation Over Website Accessibility Is Exploding

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Today, it is nearly unthinkable to run a successful business without a website. While companies focus on the appearance, functionality and usability of their sites, they often inadvertently overlook how well the website interfaces with screen reader and hearing assistive technologies used by those with visual and hearing disabilities. This innocent oversight can invite expensive litigation. For example, the National Federation of the Blind successfully certified a class of disabled individuals who could not access the Target website. The result was a $6 million settlement and the retailer's commitment to make its website accessible to individuals using assistive technologies.

Recently aggressive demands have been made on companies of all sizes and types. All companies with websites used to sell services or products are at risk. Indeed, a handful of law firms have sent hundreds, if not thousands, of letters to private businesses alleging that their websites are not accessible to disabled individuals and, therefore, in violation of Title III of the Americans with Disabilities Act (ADA). Burdensome demands have been made and dozens of lawsuits have been filed, and many more are expected. Often, the demands and lawsuits also include breach of privacy claims.

What does this mean?
Title III of the Americans with Disabilities Act provides "[n]o individual shall be discriminated against on the basis of disability 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*(emphasis added)." Historically, a "place of public accommodation" was interpreted to refer to a physical location (*i.e.,* a brick and mortar building or park). However, what this means for non-governmental agency websites is unsettled.

Given that the ADA was passed in 1990, a year before the first website went live, one can argue - and many have argued - that websites do not fall within the scope of the ADA. Indeed, the ADA makes no mention of websites or online services of any type. Nevertheless, several courts have held that websites are considered places of public accommodation and fall within the scope of the ADA. The courts that hold this position differ on whether a website must be tied to a physical location before it falls under the ADA. The Ninth Circuit held that the ADA does *not* apply to website-only businesses, such as eBay and Netflix.[1] However, other district courts, such as the District of Vermont[2] and the District of Massachusetts[3] have come to the opposite

conclusion. The Sixth Circuit, on the other hand, has held that a "place of public accommodation" must be an actual place.[4]

The Department of Justice (DOJ), which is tasked with enforcing the ADA, has taken the position that all websites must be accessible to consumers with disabilities even if it is not tied to a physical place of business that is open to the public. In 2010, the DOJ initiated rulemaking in this area by issuing an Advanced Notice of Proposed Rulemaking. However, the DOJ has repeatedly set and then canceled release dates for the Final Notice of Proposed Rulemaking concerning website accessibility. In December 2015, the DOJ announced that it will not issue private sector website accessibility regulations under Title III until sometime during the fiscal year 2018.

In short, the ADA is silent in relation to websites, there are no DOJ regulations in this area, circuits are split on whether a website falls under the scope of the ADA and even those courts that have held that a website is a place of public accommodation under the ADA have provided no guidance as to the accessibility requirements. As such, businesses are left to try and figure out how to avoid the onslaught of future DOJ enforcement litigation and private sector litigation in this quickly evolving area.

Hints for an answer exist. In the absence of DOJ regulations, many settlements approved by the DOJ and in civil litigation have implemented the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0 (WCAG) on how to make a website more accessible. These Guidelines involve varying levels of accessibility, but the DOJ and counsel in civil litigation have signed off on settlements where a company agrees to make their website compliant with the WCAG 2.0 Level AA Guidelines. A customizable reference to the WCAG Guidelines can be found when you click here.

Access to the appropriate guidelines, unfortunately, does not end the analysis. The WCAG Guidelines provide, among other things, information on how to use alternative text (code embedded beneath graphics). Screen reader software that vocalizes that alternative text can be used to provide a description of the website content to the user. Due to the differing functionalities of websites based on computer and browser type, however, it is extremely difficult to make a website completely error free.

Next Steps.

Because of burgeoning website accessibility litigation and the desire of most companies to provide a pleasant website experience for their users, businesses with eCommerce websites would be well-served to begin investigating compliance efforts and accessibility issues now. Lathrop Gage has a team of individuals who can help provide guidance and answers, whether it is in the context of litigation or as part of a risk management plan for compliance.

If you have any questions, please contact your Lathrop Gage attorney or one of the attorneys listed above.

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1. *Earll v. eBay Inc.*, No. 13-15134 (9th Circ. April 1, 2015) and *Cullen v. Netflix Inc,.*No. 13-15092 (9th Circ. April 1, 2015).

2. *Nat'l Fed'n of the Blind v. Scribd Inc.,* No. 2:14-cv-162 at *7-10 (D. Vt. March 19, 2015).

3. *Nat'l Ass'n of the Deaf v. Netflix Inc.*, 869 F. Supp. 2d 196, 201-02 (D. Mass. 2012).

4. *See, e.g., Parker v. Metropolitan Life Insurance Co.,* 121 F.3d 1006 (6th Cir.1997) (en banc) (reversing an earlier panel decision and holding that "[t]he clear connotation of the words in § 12181(7) is that a public accommodation is a physical place .... To interpret these terms as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute and the principle of noscitur a sociis").