



Is Your Website the Subject of an ADA Lawsuit Yet?

December 2, 2015



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Agenda

1. Setting the Stage: How Can A Website Be Subject to the ADA, Let Alone A Lawsuit?
2. What Is An Accessible Website?
 - Digital Accessibility
 - Electronic Information Technology
 - Assistive Technologies
 - Accessibility Guidelines
3. The Legal Landscape
4. Enforcement Trends
 - DOJ Actions
 - Private Actions
5. Mitigating Risk



Setting the Stage

ADA Title III requires public accommodations provide:

- **Equal access** to goods and services
- **Auxiliary aids and services** to ensure “**effective communication**” unless undue burden/ fundamental alteration
 - Public accommodation generally gets to choose which auxiliary aid or service to provide, provided communication is “effective” and privacy and independence are assured
 - Regulations do not specifically mention websites/mobile apps
 - Definition of “auxiliary aids and services” was amended in 2010 to include “accessible electronic information technology” (28 CFR Sec. 36.303(b).)



Setting the Stage

Neither Title III nor its implementing regulations require businesses' websites meet any certain standard to comply with the law.

Plaintiffs, the DOJ, and advocacy groups don't care.

They claim the above provisions require websites & mobile apps conform to a certain standard for accessibility called WCAG 2.0 AA.



What Is An Accessible Website?



First, A Little Terminology

Digital Accessibility

- The practice of making websites, mobile applications, and other online systems (called Electronic Information Technology, or “EIT”) usable by people with disabilities.
- When sites are correctly designed and developed to be accessible, all users can have equal access to information and functionality.



What types of EIT are implicated?

IT Systems

- Websites, Web Applications and Mobile Web Assets
- Software Applications
- Mobile Apps for IOS & Android
- Kiosks, directories, and e-readers
- Both public and employee facing systems pose risk for an organization

Electronic Documents

- Adobe Acrobat (PDF) Documents
- Microsoft Office Documents
- ebooks

A Little More Terminology

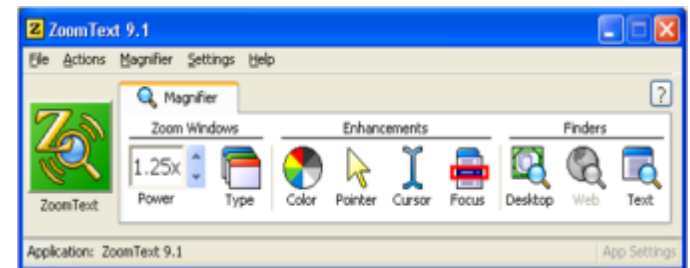
Assistive Technologies:

Devices, software, or techniques used to assist individuals with disabilities in using or accessing information.



Types of Assistive Technologies

- Screen readers
- Refreshable Braille displays
- Screen magnifiers
- Onscreen or other special keyboards
- Text-to-speech software
- Word prediction software





How Assistive Technologies Help

- **Blind:** Screen reader compatibility; keyboard-only access
- **Low Vision:** Color contrast; text resizing
- **Deaf or Hard of Hearing:** Captions for audio content
- **Manual dexterity challenges:** Keyboard-only access; ability to slow down or turn off time outs
- **Epilepsy:** No flashing content
- **Color Blind:** Color not used to convey information



Accessibility Guidelines

Web Content Accessibility Guidelines

- Published by WC3 private standards-setting consortium
- Three levels of conformance (A, AA, AAA)
- Proposed as new Section 508 standard
- Legal standard for airline websites
- Gold standard used by private sector experts for accessibility
- Standard for all DOJ settlement agreements
- Very likely to become standard for public accommodations and state and local government websites when regulations issued (more on this later)



Accessibility Guidelines

WCAG 2.0 Level AA Concepts - Examples

- Ensure that a page is designed so it can be read in assistive technology
- Provide alternative text for images
- Ensure the page can be used with the keyboard
- Provide sufficient color contrast for text
- Provide captions for any video and presentations containing audio



The Legal Landscape

The Legal Landscape: Key Statutes

Law	Coverage	Relief Available
ADA Title III	Public Accommodations	<u>Private action</u> : Injunctive relief; attorneys' fees; costs <u>DOJ action</u> : Injunctive relief, civil penalties, damages for aggrieved persons
Section 504 Rehab Act	Recipients of Federal Funding	Injunctive relief, attorneys' fees, costs, damages DOJ 2010 ANPRM Statement: "[t]here seems to be little debate that the websites of recipients of federal financial assistance are covered by Section 504 of the Rehabilitation Act."
State Non-discrimination Laws	Public Accommodations	Injunctive relief; attorneys' fees; costs; damages (CA: statutory damages)



ADA Title III

- DOJ has not issued a regulation adopting the legal standard for what constitutes an “accessible” website.
- Proposed regulation now expected in 2018, but DOJ has moved forward with enforcement based on WCAG 2.0 Level AA as the technical standard for accessibility.
- Contrast 2010 DOJ Advanced Notice of Proposal Rulemaking:
- “Equivalent” alternative means of accessing goods & services on website (e.g. 24 hour phone service for all information and services available on web) is acceptable;
- Public comment requested about:
 - How much time businesses should have to comply;
 - Impact of requirement to caption all videos;
 - What standard should be adopted as definition of accessibility;



ADA Title III

- Courts have held that the website of a business with a brick & mortar presence is covered under the ADA.
- First Circuit & DOJ position: No brick & mortar presence required for coverage.
- Ninth Circuit position: Website must have a nexus to brick and mortar location to be covered under the ADA.
- No court decision on whether WCAG 2.0 AA is the appropriate standard for accessibility because the cases settle as soon as the courts determine that the website is covered under the ADA.
- No decision on ADA coverage of mobile applications.



ADA Title II

Applies to state and local governments

- Equal access to programs, services, or activities required unless doing so would fundamentally alter the nature of the programs, services, or activities or would impose an undue burden.
- 2003 DOJ technical guidance says websites should be accessible or there must be an alternative means of access that provides an “equal degree of access.”
- DOJ proposed rule for state and local government websites was due out at the end of 2013.
- Now pushed to 2016.



ADA Title I

Applies to all employers with more than 15 employees

- No formal EEOC position about whether online application websites must be accessible.
 - 2/17/03 EEOC informal letter: Accessibility of online application systems was an “emerging issue” but stressed that employers must make reasonable accommodations upon request.
- PEAT Report (Fall 2015)
- Lawsuits in 2015 regarding accessibility of online applications.



Section 503 Rehabilitation Act

Applies to Federal Government Contractors & Subcontractors

- Contractors “encouraged” to make information and communications technologies accessible, even absent a specific request for accommodation.
- If technology not accessible, contractor must provide “alternate means” for accessing job information and applying that is “timely.”

Air Carrier Access Act (ACAA)

- 2013 Final DOT Rule: Airlines that operate at least one aircraft having a seating capacity of more than 60 passengers must make the core functions of their website accessible by **12/12/15; remainder by 12/12/16.**
- 25% of kiosks must be accessible by **12/22/22.**
- Mobile applications not covered by rule.





“Enforcement” Trends



DOJ Actions

- Peapod (settlement agreement)
- H&R Block (lawsuit/consent decree)
- Hilton Worldwide (lawsuit/consent decree)
- Quick Trip (settlement agreement)
- Museum of Crime & Punishment (settlement agreement)
- edX (settlement agreement)
- Louisiana Tech University (settlement agreement)
- Harvard & MIT (statement of interest)
- Florida State (settlement agreement)
- Law School Admissions Council (settlement agreement)
- Carnival Cruise Lines (settlement agreement)



DOJ's Statement of Interest: *Harvard and MIT*

- National Ass'n of the Deaf originally brought lawsuit
- Demand that all videos on Harvard/MIT websites be captioned
- DOJ filed Statement of Interest opposing motion to dismiss:
 - Accessible website is an existing requirement(!)
 - Schools' obligation is to the public at large, not just to students
 - University "online programming" (including free online videos and audio files that are not only courses or educational lectures but also "topics of general interest") must be accessible
 - Website regulations may not come out for years



Private Actions

In the past few years, settlements publically announced with:

- Safeway
- Charles Schwab
- Weight Watchers
- Bank of America
- Major League Baseball
- American Cancer Society
- CVS
- Scribd
- U.S. General Services Administration



New Private Actions in 2015

- Hundreds of demand letters to businesses from 3-4 law firms
- Lawsuits filed against various businesses, including:
 - *NCAA*
 - *NBA*
 - *Huntington Nat'l Bank*
 - *Home Depot*
 - *Foot Locker*
 - *Brooks Brothers*
 - *Hard Rock Café*
 - *Red Roof Inns Inc.*
 - *eHarmony Inc.*
 - *DSW Shoe Warehouse*
 - *Harley-Davidson*
 - *Select Cinemas Services Inc.*
 - *Westside Sober Living Centers Inc.*
 - *Fareportal Inc.*



Common Settlement Terms

- Bring websites and mobile apps into conformance with WCAG 2.0 Level AA within a certain time
- Retain third party website accessibility consultant
- Develop and adopt digital accessibility policies
- Train employees with website/mobile app responsibilities
- Make PDFs accessible on ecommerce & mobile web pages
- Accessibility feedback method for customers
- Civil penalty, damages, attorneys and expert fees



Mitigating Risk

- Start building in accessibility proactively
- Contact your legal counsel to discuss your risks
- Audit and test your website to determine the baseline level of compliance
- Secure third party technical expertise to help guide you through the process
- Develop policies and train employees
- Choose your digital accessibility consultant carefully.



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