PRACTICE FOCUS / INTERNET LAW

Avoiding Litigation: Is Your Website Accessible to Visually, Hearing Impaired?

Commentary by Steven Solomon and Anastasia Protopapadakis

Many unwitting businesses operate websites and mobile applications that are not specially coded and structured to accommodate the assistive technology that vision-impaired and hearing-impaired individuals need to access online content.

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Consequently, affected persons across the country are suing private businesses alleging that the inaccessibility of their websites violates Title III of the Americans with Disabilities Act.

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Historically, violations of the ADA have been limited to physical barriers like the absence of a wheelchair ramp at brick-and-mortar locations; however, federal courts have broadened the scope of a place of public accommodation under Title III to include websites that offer their goods and services online.

Title III of the ADA prohibits discrimination by private entities that are open to the public, referred to as "public accommodations," and includes a list of 12 categories of businesses subject to the provisions of the ADA — including but not limited to hotels, restaurants, retail stores, private schools, law offices and hospitals. Arguably, a retail store's lack of a ramp excludes wheelchair-bound individuals from access in the same way that an improperly coded website excludes visually or hearing-impaired individuals from the full enjoyment of the services or goods offered through a retailer's website .

While the Department of Justice has not yet issued any controlling regulations on Title III website compliance, its July 2010 Advanced Notice Of Proposed Rulemaking, or ANPRM, on Title III clarified its intention to promulgate such regulations in the future. The DOJ explained that the prohibition against discrimination by a place of public accommodation extended to its offering of all goods and services, including those offered through the internet. The provisions of the ADA will only extend to websites of businesses that provide goods or services that fall within the 12 categories of places of public accommodation as set out in 42 U.S.C. § 12181(7).

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The absence of controlling regulatory standards has not stopped the DOJ and private plaintiffs from demanding that websites be accessible to individuals with vision or hearing loss; a well-known tax preparation service and a South Florida-headquartered cruise line have each reached settlements with the DOJ requiring modification of their websites in order to enable equal access.

The DOJ continues to maintain aggressive enforcement actions, even reaching settlement agreements with web-only businesses like online grocery service Peapod.com and online education portal edX Inc. As a settlement provision, these businesses are required to modify their websites to meet the standards set forth in the World Wide Web Consortium's Web Content Accessibility Guidelines, or WCAG 2.0, Level AA, which are consistently referenced in the ANPRM and are likely to be adopted by the DOJ as the ADA's guidelines for website compliance.

CIRCUIT SPLIT

The 1990 Senate report on Title III provides that the ADA should be "construed liberally" to ensure equal access for all individuals, but federal circuit courts are split on how liberally the scope of a place of public accommodation should be interpreted.

The Third, Sixth, Ninth and Eleventh circuits do not interpret web-only businesses as places of public accommodation subject to the ADA. Instead, a website must have a sufficient nexus to the services of the actual brick-and-mortar location before such a website will be subject to the ADA. One court adopting the nexus approach held that plaintiffs sufficiently stated a claim under Title III when the inaccessibility of the Target.com website impeded their enjoyment of the goods and services of Target stores. There was enough of a connection between the website and the physical stores to bring the website within the definition of "a place of public accommodation."

Those adopting the nexus approach — including the Eleventh Circuit — have declined to define web-only services, like Facebook or eBay, as public accommodations subject to the ADA because they lack a connection to a physical location. However, in the First, Second and Seventh circuits, a web-only business like Netflix would be considered a place of public accommodation despite lacking a nexus to an actual physical location. These circuits' broadened definition of public accommodation means web-only businesses will face conflicting liability based on plaintiffs' jurisdictions.

With Florida ranking second in the country for the most ADA website compliance suits, litigation of these claims seems unlikely to slow soon. Given the growing number of plaintiffs, the lack of clear statutory guidance and the DOJ's aggressive enforcement actions, businesses with an online presence — including those exclusively online — should consider modifying their websites and mobile applications to comport with WCAG, which is available at https://www.w3.org/TR/WCAG20/.

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