Disabled Access and the Internet: Legal Issues

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Both California and Federal law require 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 to 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 Seventh Circuit (in dicta) and the Department of Justice have taken the position that the ADA applies to commercial websites. Analogous case law from the First Circuit agrees. On the other hand, at least one district court (in an unreported decision) has expressly rejected a plaintiff's attempt to sue a commercial website for alleged ADA violations. And analogous case law in the Third, Sixth, and Ninth Circuits 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. And, 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.

Do Disabled Access Laws Apply to Websites?

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

Who owns the site?

Governments

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. For example, on August 2, 2001, California's Department of Information Technology issued a directive that all state IT procurements comply with section 508 standards. In addition, at least twelve states (California is not one of them) have adopted access technology laws requiring that state-owned or operated information technology, including websites, be accessible.[1]

Private Sector

The private, commercial sector is generally subject to Title III of the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*) and, in California, the Unruh Act (Civ. Code § 54, *et seq.*).

The ADA generally 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 accommodation is covered by the Act if it "affects commerce" (*i.e.*, provides goods or services to the public) and falls within one of twelve enumerated categories listed at 42 U.S.C. § 12181(7)(C). *See also* 28 CFR § 36.104 (defines public accommodation as a "place" or a "facility" affecting commerce and falling in one of the twelve categories). 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. Private clubs are not public accommodations. 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*.

The California Unruh Act similarly requires that persons with disabilities be given equal access to "places of public accommodation" and "other places to which the general public is invited." Civ. Code § 54.1(a). Specific access requirements and guidance are provided in the California Building Code, Title 24, Part 2.

It is unclear whether the ADA and the Unruh Act would apply to commercial websites. Whether those laws apply will likely depend on the types of services the site provides.

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 is probably subject to disabled access law requirements. For example, a theatre's website, which allows patrons to purchase tickets on-line, is probably covered. Likewise, airline websites are probably covered. The reasoning is that, even if the websites themselves are not public accommodations (an unsettled question discussed below), they are communications providing access to places that clearly are public accommodations, *e.g.*, theatres, commercial airline flights, etc. The ADA requirement that public accommodations "ensure effective communication with individuals with disabilities" (28 C.F.R. § 36.303(c)) likely requires that such websites be made accessible.

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 plaintiffs' claims, agreeing with the defendants' argument that the dial-in system was not covered by the ADA. The Circuit 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 U.S. Department of Justice, the agency charged with enforcing the ADA's access provisions, has taken a similar position regarding websites. Policy Ruling, 9/9/96: "ADA Accessibility Requirements Apply to Internet Web Pages," 10 NDLR 240 (also available at www.usdoj.gov/crt/foia/tal712.txt).

Sites Without a Connection to a Physical Place

Of course, every website has a connection to a physical place in the sense that it is located on a server 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?

In dictum, the Seventh Circuit has taken the position that it does. In *Doe v. Mutual of Omaha Insurance Company*, 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, *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)) 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." 179 F.3d at 559 (emphasis added).

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 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 www.usdoj.gov/crt/briefs/hooks.htm. The Fifth Circuit did not reach the issue of ADA Internet coverage, ruling that OKBridge did not violate the ADA because it was not aware of the plaintiff's alleged disability when it terminated his membership. For a description of that case, *see* www.usdoj.gov/crt/ada/aprsep00.htm.

In addition to *Hooks*, a disabled plaintiff also challenged the accessibility of a website in *National Federation of the Blind (NFB) v. America Online, Inc.*, 99CV12303EFH (D. Mass. 1999). In that case, the NFB sued AOL, claiming that AOL's then-current version 5.0 software was not accessible to visually-impaired persons. That case settled, with AOL agreeing to make its version 6.0 accessible. The settlement agreement in that case is available at www.nfb.org/Tech/accessibility.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. *Ford v. Schering-Plough Corp.*, 145 F. 3d 601 (3rd Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-16 (9th Cir. 2000). The First Circuit, on the other hand, has held that a physical place is not required. *Carparts*, 37 F.3d at 18-19 (1st Cir. 1994); *see also Doe v. Mutual of Omaha Insurance Company*, 179 F.3d 557 (7th Cir. 1999).

While there are no reported decisions ruling on whether the ADA or Unruh Act apply to commercial websites, the District Court for the Northern District of California dealt with a very similar issue in *Torres v. AT&T Broadband, LLC,* 158 F. Supp. 2d 1035 (N.D. Cal. 2001). In that case, a visually-impaired subscriber to AT&T's digital cable service sued under the ADA and Unruh Act, alleging that the service's channel listing program is not accessible to him. The court granted AT&T's motion to dismiss on the ground that its cable system was not a "public accommodation" under either act. The court reached its conclusion based on the plain meaning of the statutes and their implementing regulations, which it found to define public accommodations as being limited to physical places. It found that a digital cable system is not analogous to any of the categories of accommodations listed in the ADA, and, since the cable service only provides entertainment in a subscriber's home, the subscriber's TV is not a place of public entertainment. It also found support in *Weyer*, 198 F.3d at 1114-16.

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 *Hooks v. 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" under either the ADA or Unruh Act in *Torres v. AT&T Broadband, LLC,* 158 F. Supp. 2d 1035 (N.D. Cal. 2001).

In sum, it is unclear whether sites are themselves public accommodations under disabled access laws. The Department of Justice 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.

On the one hand, it is clear that Congress did not have websites in mind when the ADA was enacted in the early 1990's. On the other hand, applying the ADA to websites would serve the general purposes of that statute of making public commerce accessible to persons with disabilities. For recent testimony for both sides of this argument, see "Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites, Hearings Before the Subcommittee on the Constitution of the House Judiciary Committee" (2/9/00), available at www.house.gov/judiciary/2. In the opinion of this author, as courts see more and more ADA challenges to inaccessible websites, at least some of those courts will find ways to read website accessibility requirements into the ADA.

To the Extent Disabled Access Laws Apply to Websites, What Do They Require?

Parties Liable Under Disabled Access Laws

The ADA and Unruh Act 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. Such professionals still need to be concerned about access requirements due to indemnity obligations they may have to site owners.

ADA and Unruh Act Regulations

The agencies responsible for implementing the ADA and Unruh Act have promulgated detailed regulations on how a public accommodation must make architectural features accessible, but they have created no such regulations for websites or similar technologies. However, courts can look to detailed regulations applicable to Federal government websites under Section 508. 36 C.F.R. § 1194.1, *et seq.*

Section 508 of the Rehabilitation Act

Section 508 applies only to Federal agencies. It does not apply to States, even for programs that receive Federal funds (except States receiving assistance under Assistive Technology Act State Grant program through the U.S. Department of Education). But, while Section 508 does not apply to private sector directly, it has an indirect impact because Federal agencies pass on its requirements to their vendors for Federal procurements. It also provides a model for the future, if and when other laws, like the ADA, are applied to commercial websites.

The statute – 29 USC § 794d – provides that agencies can only purchase electronic and information technology ("EIT") that provides access to government employees and members of public with disabilities "comparable" to that provided to persons without disabilities. EIT must meet applicable accessibility standards of the Access Board at 36 CFR Pt. 1194 (issued 12/21/00).

There are some exceptions to Section 508 requirements. The EIT need not be accessible where compliance would result in "undue burden" to the agency, but the agency then must make information and data available by an alternative means, *e.g.*, through non-Web-based communications. 29 U.S.C. § 794d(a)(1)(B). Compliance also is not required if it would fundamentally alter the nature of the product. There is also an exception for commercial purchases (as opposed to development contracts) where no accessible products are commercially available.

While Section 508 has required that Government agencies make their EIT accessible since the 1980's, it was only given "teeth" when it was revised by the Workforce Investment Act of 1998. A Government-wide rule implementing the revised Section 508 took effect in June 2001. The revisions provide that persons with disabilities may sue for noncompliant purchases occurring on or after June 2001. Injunctive relief and attorneys' fees are available, but damages are not. The revisions were also important because they mandated the creation of enforcement regulations.

The Access Board regulations are at 36 CFR Pt. 1194. *See also* www.access-board.gov/sec508/508standards.htm. Subpart A of the regulations defines the types of technology covered. The application 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 (§ 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 (§ 1194.22).[2] 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 ID of graphics and format devices, like frames, which are necessary so assistive devices can read them for user in 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 ("FAQs") document at www.section508.gov/docs/508QandA.html. That document is updated. It provides, for example, that:

- EIT meeting the "technical standards" in Subpart B of the regulations must still meet the broader "functional criteria" in Subpart C (FAQs § B.2.ii.)
- compliance does not require the agency to alter its requirements to the point where the procured EIT would not meet its needs (FAQs § E.2.)
- if no product meets all of the applicable accessibility standards, then the agency may procure one that *best* meets standards (not necessarily the one that meets the *most* standards) (FAQs § E.2; *see also* 36 CFR § 1194.2)

- absent an undue burden determination, the agency cannot make a best value or cost/technical tradeoff between a product that meets all of the standards and one that does not (FAQs § E.2)
- agencies should draft solicitations such that products offering equivalent facilitation will be considered along with those that strictly adhere to standards (FAQs § B.3.i.) and products that strictly adhere to accessibility standards will not take precedence over those that support agency requirements through equivalent facilitation (FAQs § B.3.ii.)
- agencies may (but are not required to) give evaluation credit to products that offer greater access than required by Access Board (FAQs § B.3.ii.)

Section 508 requirements are also regulated in the Federal Acquisition Regulations ("FAR"), which were amended by final rule on April 25, 2001. The FAR establishes what agencies must do to comply with Section 508 when procuring EIT. It defines EIT as having same meaning as IT, as broadly defined by FAR 2.101, which includes Web-based intra- and Internet information and applications. The FAR provides that, as a first step, the agency must determine during acquisition-planning phase which accessibility standards apply (FAR 7.103). For example, for a website procurement, the agency would apply the standards at 36 C.F.R. § 1194.22. As a second step, applicable to commercial items acquisitions only, the agency must conduct market research to determine extent to which commercially available products meet applicable standards (FAR 10.001(a)(3)(vii)). The agency is excused from procuring fully conforming items if none are commercially available (FAR 39.203(c)(1)) or if it would be an undue burden to do so (defined consistently with ADA and Section 504 of the Federal Rehabilitation Act as "significant difficulty or expense" – FAR 39.202). It is still an open question whether the agency can require its vendors to conduct their own market research.[3] If step 1 shows that a standard applies and step 2 does not excuse that standard's requirements, then the agency must incorporate the standard as minimum requirements in its contract (FAR 39.203(a)).

How Can Websites Be Made More Accessible to Persons with Disabilities?

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

Barriers to access disabled persons face when using the Internet include:

- Visual features (*e.g.,* photos, graphics) with no text equivalents or special coding, including graphics essential to navigating site or imparting vital information (such as table or image map)

- Color cues (*e.g.,* links that change from red to green once they have been used)
    - For a guide to good and bad color combinations, visit www.lighthouse.org/colr_contrast.htm
    - To check websites for readability by persons with some forms color-blindness, visit www.vischeck.com
- Text that is too small, too little contrast, etc.
- Audio or video features with no text equivalents, *e.g.,* sounds to indicate user has made a mistake
- Features only accessible by typing in text
- Features only accessible by mouse clicking on a target

Ways websites can be made more accessible to disabled persons:

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

Websites can be made more accessible by making their features interoperable with assistive technology. For example, sites can include embedded features (*e.g.,* inclusion of site licenses for adaptive software) or it can use software that is compatible with assistive technology (*e.g.,* attaching "Alt" tags to graphics so screenreaders can identify graphics, hyperlinking photos with descriptive text "D", and captioning all audio and video clips by using "CC" hyperlinks).

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).

Resources

- Accessibility guidelines developed by WWWW Consortium:
  - Web content accessibility guidelines at www.w3.org/TR/WCAG10-TECHS/
    - 34 states have conformed their websites to these guidelines
  - Prioritized checklist of accessibility goals compiled by Web Accessibility Initiative Web Content Guidelines Working Group at www.w3.org/TR/WAI-WEBCONTENT/full-checklist.html
- Primer on ADA accessibility developed by Dr. Kathryn Hawes at University of Memphis at www.people.memphis.edu/-profweb/ADA/
- Auburn University's web page on site accessibility issues at www.lib.auburn.edu
- Clearinghouse of accessibility-related design guidelines at www.websitetips.com/accessibility/index.shmtl
- Guidelines for Section 508 of the Federal Rehabilitation Act at www.access-board.gov/sec508/50standards.htm
- Section 508 web accessibility checklist at www.webaim.org/standards/508/checklist
- Online testing website at www.cast.org/bobby

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 to 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.

1. States to adopt such laws to date are Arkansas, Colorado, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nebraska, South Carolina, Texas, Virginia, and West Virginia.

2. The other categories of EIT covered in the regulations are software applications and operating systems (§ 1194.21); telecommunications products (§ 1194.23); video or multimedia products (§ 1194.24); self-contained, closed products, such as information kiosks (§ 1194.25); and desktop and portable computers (§ 1194.26).

3. The United States General Services Administration ("GSA") and the Information Technology Industry Council ("ITIC") have produced a voluntary market research template that vendors may use to provide product accessibility information about their websites. This template is available at www.itic.org/policy/access_0106.htm.