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MOBILE APPLICATIONS

The Americans with Disabilities Act requires companies to ensure their brick-and-mortar stores are accessible to those in wheelchairs, but the law is not clear as to whether companies must also ensure their websites and mobile apps are accessible to the blind and deaf. The author discusses the current trend of courts finding that an ADA obligation does exist as well as ways in which companies can come into compliance with it.

Provide Access for the Disabled to Mobile Applications or Face the Consequences



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While most companies are cognizant of and comply with the requirements of the Americans with Disabilities Act in making their physical stores accessible to the disabled, many remain unaware of their obligation to make their websites and mobile applications accessible to the disabled. Perhaps that is an overstatement – ADA legal compliance is not perfectly, entirely, 100% clear for website and mobile app access to the blind and deaf. But given recent litigation by both the U.S. Department of Justice as well as advocates for the disabled, it makes sense for every company to ensure that their web properties are ADA compliant.

The key legal question is whether websites and mobile apps are “places of public accommodation” under Title III of the ADA, which requires, for example, brick and mortar stores to be accessible to people in wheelchairs. Now, however, advocates for the disabled, specifically the blind and deaf, are filing more and more lawsuits arguing for a reading of the ADA – written before the Internet existed – that finds that websites and mobile devices should be included within the definition of “places of public accommodation.”

Courts Consider ‘Nexus’ Requirement

Courts are generally split on the issue, although the trend recently has tilted towards finding an ADA compliance obligation. In 2006, a case in the Ninth Circuit found that an obligation existed because of a nexus between a retailer's physical place of public accommodation – its brick and mortar stores – and its website.¹ Many cases followed holding that because no nexus existed between the online and offline world, legally the ADA did not require accessibility for the disabled. More recently, though, a court in the First Circuit found that no nexus was needed to hold Netflix, the online only video streaming service without any physical locations, obligated to comply with Title III.² Furthermore, in early 2015, another court, this one within the Second Circuit, agreed in finding that the ADA compliance obligations applied to Scribd, another online only site.³ While this decision has been criticized by some commentators,⁴ it is an important data point for companies to consider when deciding whether it is worth the potential costs of implementing access for the disabled throughout their websites and mobile applications.

¹ *Nat'l Fed. of the Blind v. Target Corp.*, 452 F. Supp.2d 946 (N.D. Cal. 2006).

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

³ *National Fed. For the Blind v. Scribd*, 2015 WL 1263336 (D.Vt. Mar. 19, 2015).

⁴ See Goldman, Eric, “Scribd Must Comply with the Americans With Disabilities Act,” Technology and Marketing Law Blog, Mar. 31, 2015 (<http://blog.ericgoldman.org/archives/2015/03/scribd-must-comply-with-the-americans-with-disabilities-act-forbes-cross-post.htm>).

The U.S. Department of Justice has had on its "To Do" list for a number of years now the issuance of guidance for private companies for whether their web properties are required to be ADA compliant. The DOJ's litigation actions, however, speak louder than its silence on formal regulations. Notwithstanding their failure to issue formal guidance, the DOJ has sought and obtained settlements from companies requiring that websites must be compliant with the ADA. In early 2014, the DOJ entered into a consent decree with tax preparation company H&R Block, requiring the company to make accessible to those with disabilities its website, tax preparation tools, and mobile applications.

Similarly, in November, 2014, the DOJ secured a similar settlement with the owner of the grocery delivery service Peapod.com. Unlike prior settlements, however, the Peapod.com settlement requires a company running an online only e-commerce website and mobile apps service with arguably no nexus to a brick and mortar store be made accessible to the disabled. Conceivably it could be argued that the grocery delivery services constitute the nexus between the online and offline activities, but the same could be said for seemingly every online retailer which delivers merchandise purchased on a website or mobile app to a consumer.

The lack of clarity around whether a nexus between the online and offline world is required for ADA compliance to legally kick in is really the issue. Advocates for the disabled have commenced many actions over the years arguing that companies must make their websites, mobile apps, and other electronic services such as payment technologies, accessible to the disabled through assistive computer technology. They have argued in various forums that online only properties such as Netflix, eBay, and Scribd must be ADA compliant and that retail stores with e-commerce sites must be ADA compliant.⁵

⁵ A similar case in the Southern District of New York was recently filed against the online only dating site eHarmony. *West v. eHarmony, Inc.*, Case 1:15-cv-06080 (S.D.N.Y.), filed Aug. 3, 2015.

Currently, as of this writing, no case law, statute, or regulation is conclusive that a retailer's e-commerce website is definitively part of a physical "place of public accommodation" such that in all cases, a nexus exists requiring compliance with the ADA. Ultimately the answer may depend on the facts of the particular case, *e.g.*, whether the goods or services available on the website are available in some equivalent alternative manner. However, as with the Peapod.com settlement, the DOJ has been aggressive in arguing in favor of ADA compliance notwithstanding its failure to issue formal regulations.

Becoming ADA-Compliant

What would it mean for websites and mobile apps to be ADA compliant? Generally it means implementing software coding within all elements of a website (text, images, videos) ensuring that they can be audibly read and spoken by software machine readers for the blind, and that elements such as videos have closed captioning for the deaf. An organization called the World Wide Web Consortium (W3C) has issued "Web Content Accessibility Guidelines" that set forth technical standards for making Internet content accessible to the disabled, although they do not have the force of law and do not address whether, and to what extent, the Guidelines should apply to websites as places of public accommodation.

Companies considering implementing an ADA compliance program for their websites and mobile apps can also take some guidance from the DOJ's H&R Block settlement. There, H&R Block agreed to do a number of things to resolve the DOJ's claims, including appointing one person as a web accessibility coordinator, establishing a web accessibility committee to assist the web accessibility coordinator, requiring quarterly status reports for web accessibility, maintaining a disabled accessible mechanism for site visitors to provide comments, recommendations, and questions around accessibility, and a few others. It may well be that these kinds of onerous obligations are not applicable generally to all websites. However, it is useful guidance to understand the lengths to which companies may be pressed in order to ensure accessibility of electronic media to the disabled.

Given the complexities and costs of litigation, even in the absence of established law, many companies are committing to make their websites compliant with the ADA. Going forward, companies should not complacently assume that because they do not have a brick and mortar shop, their websites and mobile apps are insulated from compliance with the ADA. The trend is fast moving towards legal ADA compliance.

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