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Navigating the Murky Waters of ADA Compliance in the Internet Age

By
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In recent years, many companies have been swept up in a wave of lawsuits claiming that certain private commercial websites are inaccessible to users with disabilities and thus violate Title III of the Americans with Disabilities Act (ADA). For example, blind individuals, who use screen-reader software to access the Internet, have alleged that they are unable to visit certain websites that have not been properly coded to convert visual information to audio translations. Complicating matters is the lack of clear guidance from the government and courts concerning whether websites are considered places of public accommodation under the ADA and, if so, what steps businesses must take to ensure website compliance with the ADA. This has left well-intentioned companies scratching their heads while exposed to the threat of costly litigation.

Because the ADA predates the Internet as it exists today, the statute does not specifically address websites. What is more, no formal government standards for website accessibility exist, and the Department of Justice (DOJ) has not issued long-promised regulations. In addition, most of the recent lawsuits on this issue have been settled before courts can weigh in. As for the courts who have issued opinions, there has been no clear consensus. A trend among recent decisions has emerged, however, finding that websites are places of public accommodation subject to ADA accessibility requirements, especially if there is a sufficient "nexus" between the website and the company's physical location. Therefore, it behooves companies to ensure that their websites are accessible to users with disabilities by taking such measures as coding content so that screen-reader software can convert text and images to audio descriptions for blind users and including descriptive text of videos for deaf users.

Conflicting Decisions

Title III of the ADA provides that "[n]o individual shall be discriminated against based on 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." 42 U.S.C. §12182(a). "To state a claim under Title III, [the plaintiff] must allege (1) that she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against her by denying her a full and equal opportunity to enjoy the services defendants provide." *Camarillo v. Carrols*, 518 F.3d 153, 156 (2d Cir. 2008). Under Title III of the ADA, a

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"place of public accommodation" is a facility open to the public whose operations affect commerce and that falls within at least one of 12 categories, which include lodging, restaurants, sales establishments, public transportation stations, and places of education, among others. See 42 U.S.C. §12181(7); 28 C.F.R. §36.104. None of the enumerated categories expressly refer to websites.

Courts are divided regarding whether places of public accommodation are limited to actual physical locations or whether websites qualify under Title III. Some courts have held that Title III does not apply to websites that "are not connected to any 'actual, physical place.'" See *Cullen v. Netflix*, 600 Fed. Appx. 508, 509 (9th Cir. 2015) (internal citation omitted); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) ("To interpret [the ADA] 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."); see also *Gil v. Winn-Dixie Stores*, 257 F. Supp. 3d 1340, 1348 (S.D. Fla. 2017) ("where a website is wholly unconnected to a physical location, courts within the Eleventh Circuit have held that the website is not covered by the ADA") (collecting cases). Other courts have found that Title III applies to all consumer oriented websites whether or not associated with a physical location. See *Nat'l Fed'n of the Blind v. Scribd*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (Title III of the ADA covers the website of a company without any physical locations); *Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994); see also *Doe v. Mut. of Omaha Ins. Co.,* 179 F.3d 557, 559 (7th Cir. 1999) (Title III "plainly enough" applies to a facility "whether in physical space or in electronic space" "that is open to the public").

Many courts have adopted the position that, at minimum, Title III applies to websites with a nexus to a physical place of public accommodation. See, e.g., *Earll v. eBay*, 599 Fed. Appx. 695, 696 (9th Cir. 2015). Some factors courts consider in determining whether such a nexus exists include whether the website provides the ability to purchase or preorder products, whether the website provides more than just information about the physical store, and whether the website facilitates use of the physical store. See *Gomez v. Gen. Nutrition*, 323 F. Supp. 3d 1368, 1376 (S.D. Fla. 2018). The Ninth Circuit in *Robles v. Domino's Pizza*, 913 F.3d 898, 905 (9th Cir. 2019), recently held that the use of Domino's website and app to locate a nearby restaurant and order pizzas for at-home delivery or in-store pickup was "critical" to showing a nexus between physical Domino's locations and its website. In the first of these cases to reach a verdict at trial, a federal district court held that a grocery store's website was a "service of a public accommodation" because it was "heavily integrated with [the] physical store locations and operates as a gateway to the physical store locations" and was, therefore, subject to Title III's accessibility requirement. *Gil*, 257 F.Supp.3d at 1348-49.

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In finding that places of public accommodation are not limited to physical structures, many courts have relied on the legislative history of the ADA, explaining that the "broad mandate" of Title III is to ensure that people with disabilities have equal access to the same goods and services as those without disabilities, regardless of location. See *Andrews v. Blick Art Materials*, 268 F. Supp. 3d 381, 395 (E.D.N.Y. 2017); *Del-Orden v. Bonobos*, No. 17 CIV. 2744 (PAE), 2017 WL 6547902, at *9 (S.D.N.Y. Dec. 20, 2017) ("Congress's purposes in adopting the ADA would be frustrated were the term 'public accommodation' given a narrow application, under which access to the vast world of Internet commerce would fall outside the statute's protection."); *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. and Am. Fed. of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001) ("The site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and

services. What matters is that the good or service be offered to the public."); *Carparts Distribution Ctr.*, 37 F.3d at 19-20. As the court stated in *Nat'l Fed'n of the Blind v. Target*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006): "The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute." (emphasis in original) (internal citation omitted).

Accessibility Guidelines And DOJ Flexibility

Although courts have not provided a precise roadmap for what constitutes an accessible website, more and more courts have used the Web Content Accessibility Guidelines (WCAG) as a remedy for Title III violations. See *Gil*, 257 F. Supp. 3d at 1350 (holding that plaintiff was "entitled to injunctive relief," and that "[r]emediation measures in conformity with the WCAG 2.0 Guidelines" would provide access); *Robles*, 913 F.3d at 907 ("[T]he district court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA."). The WCAG is produced by a consortium of private organizations known as the World Wide Web Consortium (W3C) with a goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments. The WCAG 2.0 was published on Dec. 11, 2008, and on June 5, 2018, the W3C released the WCAG 2.1, which are intended to supplement, rather than replace, the WCAG 2.0. The W3C website contains helpful reference materials for conforming to the WCAG 2.0 and 2.1. Companies may also test their site's accessibility by visiting sites like http://wave.webaim.org/ and https://www.w3.org/WAI/test-evaluate/.

While the DOJ has "repeatedly affirmed the application of [T]itle III to Web sites of public accommodations," see 75 FR 43460-01, 43464, it has provided little guidance to companies attempting to comply with the law. Despite its previously stated intent to promulgate regulations addressing this issue, the DOJ officially withdrew its proposed "rulemaking process" pertaining to website accessibility on Dec. 26, 2017. See 82 FR 60932. In June 2018, Congress responded with a letter requesting that the DOJ "provide guidance and clarity with regard to website accessibility under the … ADA." The DOJ released a statement on Sept. 25, 2018 confirming its view that the ADA "applies to public accommodations' websites" but granting companies "flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication." The DOJ added that "noncompliance with a voluntary technical standard for website accessibility doesn't necessarily indicate noncompliance with the ADA." In other words, as long as the end goal of accessibility is achieved, companies need not comply strictly with the WCAG 2.0 or 2.1. Exactly what steps businesses must take remains a mystery, but the flexibility provided by the DOJ may come in handy when defending Title III lawsuits where companies have acted in good faith to achieve compliance.

Conclusion

In the absence of clear directives from the government and courts, companies would be well-served by taking a hard look at the accessibility of their websites to users with disabilities. While the safest course of action is to implement the WCAG due to its frequent use by courts as a remedial measure, earnest efforts to improve accessibility may insulate companies from liability, particularly in light of the DOJ's recent statement. Moreover, not only will ADA compliance reduce the risk of litigation, but it's also the right thing to do and has the added benefit of expanding a business's consumer base.

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