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LIABILITY UNDER THE AMERICANS WITH DISABILITIES ACT FOR PRIVATE WEB SITE OPERATORS

By Evgenia Fkiaras¹

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Abstract

The Americans with Disabilities Act of 1990 (“ADA”) is silent on the specific question of whether privately owned websites fall within its provisions. There is a circuit split on the issue, although the only case directly on point makes mandatory website compliance the exception rather than the rule. Nevertheless, given the direction that the law will probably head and the relative ease of making websites accessible to the group most in need—those who require the use of assistive technologies—it behooves businesses to construct or alter their websites to accommodate these individuals.

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INTRODUCTION

<1> In August 2004, Ramada.com and Priceline.com settled with the State of New York to make their websites more accessible to the visually impaired, also agreeing to pay \$40,000 and \$37,000 respectively to cover investigation costs.² Ramada.com and Priceline.com are representative of a growing trend that will classify private websites as public accommodations under the Americans With Disabilities Act (“ADA”), requiring that such websites be designed to allow reasonable access by individuals who are disabled.

<2> While these settlements did not create precedent requiring accommodation,² and the only case directly on point holds that a privately owned website is not per se a "public accommodation" that must comply with the ADA, a growing body of law indicates that the ADA will soon require that websites accommodate users who are disabled.³ In predicting the direction and shape this law will take, the most nebulous area is the scope of what will be considered an "undue burden" in website development such that businesses may avoid complying with the ADA. Nevertheless, this scope will almost certainly include a requirement to accommodate those who require the use of assistive technologies, or technologies that help overcome some of the obstacles of computer operation. This is because the issue currently is focused on this group and because accommodating this group is relatively cost-effective. Businesses should thus design their websites so that individuals who use assistive technologies will be able to access and use their content.

THE AMERICANS WITH DISABILITIES ACT AND PRIVATE WEBSITES

<3> It is currently unclear whether the ADA equal access provisions will apply to websites. Nevertheless, given the existence of both the legal precedent and the trend towards accommodation, it is likely that the ADA stipulations on public accommodations will unequivocally be applied to private websites. Title III of the ADA requires that places of public accommodation guarantee equal access opportunity to individuals with disabilities unless such opportunities cause "undue burdens" on the owners of the public accommodation or fundamentally alter the accommodation.⁴ The legal battleground over whether the ADA applies to private websites centers on whether websites may be categorized as "public accommodations" within the meaning of the statute, as there is no mention of the internet in the law or its legislative history.⁵

<4> The only court decision directly on point held that the ADA directly covers only physical public accommodations, thereby excluding websites except under very limited circumstances. In *Access Now Inc., v. Southwest Airlines*⁶, a visually impaired customer was unable to purchase tickets via Southwest Airlines' website. The district court held that a "public accommodation" must be physical and does not include an internet website unless there is a nexus between it and a physical accommodation.⁷ In this case, there was no direct connection between the service (selling flight tickets) and a physical accommodation (a specific ticket counter).⁸

indications that the ADA will be interpreted by courts or amended by Congress to explicitly include virtual public accommodations. The appeal of *Access Now* was dismissed on technical grounds, but the Court of Appeals for the Eleventh Circuit mentioned in dicta the importance of resolving this issue.⁹ Even the original district court chastised Southwest Airlines for not being more accommodating.¹⁰ Several defenses of an expansive reading of the ADA argue that the legislative purpose of placing people with disabilities on an equal footing with the rest of the population indicates that Congress would have explicitly included private websites had that technology been prevalent when the statute was enacted.¹¹ Large companies have considered it more economically feasible to settle with disgruntled customers and make their websites accessible rather than defend the position that the ADA would not cover their websites.¹² New York Attorney General opined that the ADA requires that websites be made accessible to the visually impaired.¹³ Most significantly, a number of cases from other circuits support the interpretation that the ADA includes all public accommodations, be they physical or virtual: *Doe v. Mutual of Omaha Ins. Co.* stated that websites specifically are public accommodations as defined by the ADA¹⁴; *Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n* held that public accommodations pursuant to the ADA are not limited to physical accommodations, thus covering AIDS victims' health care plans.¹⁵ The Supreme Court has argued that the concept of public accommodation in the ADA "should be construed liberally."¹⁶ Lastly, Section 508 of the Rehabilitation Act ("Section 508") requires that federal websites be accessible to people with disabilities.¹⁷ Given this trend, it is only a matter of time before the ADA is extended to include websites as public accommodations.

THE COST

<6> At the heart of the contention is the question of whether the cost of compliance would be prohibitively expensive to businesses, a question that has no blanket answer. It is important to keep in mind that the ADA requires compliance only insofar as it does not create an "undue burden" on a business, an issue that has not been addressed by the courts with regard to its relevance to websites.¹⁸ Arguments for and against the extension of the ADA to websites thus revolve around the problem of whether compliance would constitute an undue burden on businesses. In the end, however, only a case-by-case analysis of a business' scope, size, audience, and resources would actually satisfy this query.¹⁹

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<7> Those who oppose applying the ADA to websites via court order argue that undefined standards would lead to excessive litigation and discourage web development, amounting to a significant long-term cost and an undue burden.²⁰

Complimenting this position is an argument for website compliance which implies that the lack of initial governmental subsidies would make website compliance unfeasible for businesses.²¹ It should also be noted that those who voluntarily make their websites accommodating tend to be large corporations whose business possibilities and economic resources are of a completely different scope than those of small businesses.²²

<8> To contrast such indications of prohibitive cost are arguments which emphasize the technical and economic feasibility of website compliance, as well as the business gains that will result from it. The World Wide Web Consortium ("W3C"), an internet standards developing organization, argues that "[d]esigning a new site to be accessible should not add significantly to development cost."²³ Altering existing sites could be absorbed by the cost of the occasional and inevitable re-design.²⁴ According to one assertion, a moderately-sized website could be converted within a relatively short period of time.²⁵ Such websites not only provide access to individuals who are disabled, but they also broaden a company's potential audience: Accessible sites are more user-friendly to those who are not disabled, are search engine friendly, are great for public relations,²⁶ and allow access by common alternative technologies such as cellular phones.²⁷ Research indicates that ADA accommodations not only may promote economic activity, but also might encourage technological innovation.²⁸ In many circumstances, the benefits of making websites accessible may well outweigh the costs.²⁹

REASONABLE ACCOMMODATIONS

<9> Identifying the outer parameters of what would constitute an undue burden on a business is difficult, but it is possible to predict at least the minimal website accommodations that the ADA will likely require of most operators. By focusing on the beneficiaries of accommodation as well as the legal trends towards accommodating these individuals, businesses can get a concrete picture of some of the standards which will be required in the future.

<10> To understand potential accommodation, one must first understand the beneficiaries. The issue as it stands today has revolved around those who are visually disabled: *Access Now*,

Priceline, and Ramada³⁰; the Attorney General of New York's Fkias: Liability under the Americans with Disabilities Act for Private W opinion;³¹ and testimony interpreting the ADA to the House of Representatives³² all centered around individuals with visual impairments. Nevertheless, it is important to note that those who are visually impaired are not the only individuals with disabilities who would benefit from accommodation. For example, those who are physically challenged may not be able to complete a website function quickly and may need more than the time often allotted.³³ Significantly, Section 508 standards and the W3C's Web Content Accessibility Guidelines are carefully drafted to be disability-neutral, implying a certain inclusiveness in their accommodation.³⁴

<11> People with disabilities tend to have "assistive technologies" of their own that allow them to access the web.³⁵ For example, those with visual impairments may possess alternative keyboards or switches with Braille elements that allow them to identify keys' functions by touch and are accompanied by screen readers that "read" text onscreen and translate it to refreshable Braille or synthesize a speech equivalent.³⁶ Private website operators would be required to have sites that are accessible by such technologies.

<12> Sites that are compatible with assistive technologies follow four basic guidelines:

1. Text or audio alternatives are associated with non-text content, e.g. graphics and visual media have brief textual or audio descriptions;
2. All functional content that is normally operable through a mouse is operable using the keyboard, i.e. an individual is able to efficiently tab his or her way through all elements of a webpage;
3. Screen flickering is reduced; and
4. Users are notified of time limits for responses and are given adequate opportunity to request extra time. ³⁷

In short, websites are accommodating when they do not depend on a single sense or ability for access.³⁸

<13> Since Section 508 already mandates these accommodations on certain websites, it is unlikely that these standards would constitute an "undue burden" under the ADA. They fulfill the four principles of accessibility as outlined by the W3C: perceivable content; operable interface elements;

understandable content and controls; and robust content that will be compatible with future technologies.³⁹ They accommodate multiple disabilities. For example, those who are visually impaired and those who are physically impaired could both benefit from extended time allocations.⁴⁰ Most importantly, these changes do not alter the visual presentation of a website and require very little effort to implement.⁴¹ Whether the ADA will extend beyond such standards is unknown, but it is safe to predict that the ADA will eventually include at least the above standards for private website compliance.

CONCLUSION

<14> Substantial legal opinions, dicta, and general trends indicate that the recent holding refusing to extend ADA coverage to private websites will eventually be superseded by other case law or legislative initiative that will mandate reasonable accommodation of individuals with disabilities. Business owners should be aware that those who are usually affected by inaccessible websites usually own assistive technologies. Thus, businesses should develop their websites with these technologies in mind: Content should be functionally navigable via the keyboard, sites should be flexible with time restraints, visual displays should flicker only minimally, and sites should provide alternatives to visual content. In this way, businesses will broaden their potential client base at minimal cost while likely assuring compliance with a probable future interpretation of the ADA. However, without a concrete legal precedent, it is next to impossible to predict exactly where the line will be drawn in the future; each company will have to make its own cost-benefit analysis on the extent to which it will create accommodations beyond the minimum.

PRACTICE POINTERS

- In developing websites, businesses should at a minimum:
 - provide text alternatives to non-text and non-audio content,
 - make all functional content operable by keyboard,
 - minimize screen flickering, and
 - warn users of time sensitive functions

with enough notice for users to extend
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their time.

- Be prepared for the possibility of having to provide more accommodations than those outlined here; design your websites flexibly.
- Refer to <http://www.access-board.gov> for Section 508 standards.
- Refer to Web Content Accessibility Guidelines 2.0 (July 30, 2004), at <http://www.w3.org/TR/2004/WD-WCAG20-20040730/> for detailed practice pointers on making websites accessible to individuals with disabilities.

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FOOTNOTES

1. Evgenia Fkiaras, University of Washington School of Law, Class of 2006.
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3. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).
4. Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(b)(2).
5. Jeffrey Scott Ranen, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. Third World L.J. 389 (2002).
6. 227 F. Supp. 2d 1312.
7. *Id.* at 1317-1318.
8. *Id.*
9. *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004).
10. 227 F. Supp. 2d at 1321.
11. Ranen, *supra* note 4, at 402; Adam M. Schloss, *Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?*, 35 Colum. J.L. & Soc. Probs. 35 (2001); Leah Poynter, *Setting the Standard: Section 508*

12. Schloss, *supra* note 11, at 36; *Priceline, Ramada Agree to Make Web Site More Accessible*, *supra* note 2.
13. Press Release, Office of New York State Attorney General Eliot Spitzer, *Spitzer Agreement to Make Web Sites Accessible to the Blind and Visually Impaired*, http://www.oag.state.ny.us/press/2004/aug/aug19a_04.html, (Aug. 19, 2004).
14. 179 F.3d 557, 559 (7th Cir. 1999).
15. 37 F.3d 12, 19 (1st Cir. 1994).
16. *PGA Tour, Inc., v. Martin*, 532 U.S. 661, 676 (U.S. 2001), *quoted in* Poynter, *supra* note 11, at 1222.
17. *See* 29 U.S.C.S. § 794(d) (2002); 36 C.F.R. § 1194.1 (2000).
18. 42 U.S.C. § 12182(b)(2).
19. Schloss, *supra* note 11, at 55.
20. Poynter, *supra* note 11, at 1219.
21. Schloss, *supra* note 11, at 57.
22. *See Priceline, Ramada Agree to Make Web Site More Accessible*, *supra* note 2.
23. *Fact Sheet for "Web Content Accessibility Guidelines 1.0"*, World Wide Web Consortium, <http://www.w3.org/1999/05/WCAG-REC-fact#cost>, (May 15, 1999). *See also* *Hearings Before the Subcomm. on The Constitution*, http://judiciary.house.gov/legacy/blan0209.htm#N_1, (Feb. 9, 2000) (testimony of Prof. Peter David Blanck).
24. Poynter, *supra* note 11, at 1219.
25. *ADA and the Internet: Why it should concern me*, SNP Technologies, Inc., <http://internet.snp.com/ada.htm>, (last visited Jan. 2, 2005).
26. *Id.*
27. Poynter, *supra* note 11, at 1219.

28. *Blanchi*, *supra* note 23.
29. *ADA and the Internet: Why it should concern me*, *supra* note 25.
30. 227 F. Supp. 2d 1312; *Priceline, Ramada Agree to Make Web Site More Accessible*, *supra* note 2.
31. Press Release, Office of New York State Attorney General Eliot Spitzer, Spitzer Agreement to Make Web Sites Accessible to the Blind and Visually Impaired, http://www.oag.state.ny.us/press/2004/aug/aug19a_04.html (Aug. 19, 2004).
32. Gary Wunder, *NFB Testifies on Internet Access and the ADA*, National Federation of the Blind (Feb. 9, 2000), <http://www.nfb.org/>.
33. *Web Content Accessibility Guidelines 2.0*, World Wide Web Consortium, <http://www.w3.org/TR/2004/WCAG20-20040730/>, (July 30, 2004).
34. See Electronic and Information Technology Accessibility Standards, § 1194.22 (Dec. 21, 2000), available at, <http://www.access-board.gov/sec508/508standards.htm#PART%201194>; *Web Content Accessibility Guidelines 2.0*, *supra* note 33.
35. *ADA and the Internet: Why it should concern me*, *supra* note 25.
36. *How People with Disabilities Use the Web*, World Wide Web Consortium, <http://www.w3.org/WAI/EO/Drafts/PWD-Use-Web/#tools>, (July 8, 2004).
37. Electronic and Information Technology Accessibility Standards, § 1194.22 (Dec. 21, 2000), <http://www.access-board.gov/sec508/508standards.htm#PART%201194>; Telephone Interview with George Fkiaras, Web Developer, Cybersearch (Dec. 9, 2004).
38. Poynter, *supra* note 11, at 1199.
39. *Web Content Accessibility Guidelines 2.0*, *supra* note 33.
40. See *Id.*
41. Gary Wunder, *supra* note 32.

