Shopping Center Law Report

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# ELECTRONIC COMMERCE

## 'E-Tailers,' Are Your Web Sites Accessible? Consider Some Design Accommodations

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By now, most people associated with the shopping center industry are generally aware that shopping centers and individual retail establishments are so-called "places of public accommodation"[1] covered by Title III ("Title III") of the Americans with Disabilities Act ("ADA") and, to varying degrees, must be accessible to persons with disabilities. Thus, it has become common knowledge that new shopping centers must be designed and constructed in accordance with the ADA's "building code," i.e., the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), and that alterations to existing shopping centers must also be undertaken in accordance with ADAAG. Additionally, most people in the shopping center business are aware that the ADA imposes an obligation on shopping center landlords and tenants to remove from places of public accommodation architectural barriers existing as of the effective date of the ADA.

Yet, as sensitive as we have become since the enactment of the ADA nearly 10 years ago to the needs and rights of people with disabilities, most people think of the ADA as a statute that governs only what our physical, built environment must look like. When we think of the ADA, we tend to think of things such as whether we have the correct number of parking spaces in our parking lots and whether those parking spaces are where they should be. We focus on our floor surfaces, aisle widths, counter heights, bathrooms and ATM machines. But now that retailing is becoming "e-tailing," are we also focusing on our web sites?

This article presents a brief overview of why the ADA may require the website of a public accommodation[2] to be accessible to people with disabilities. It then describes some of the more common ways in which a website can be inaccessible to people who have disabilities affecting their vision, and sets forth some solutions for remedying those inaccessible features.

While the ADA does not *expressly* refer to the Internet and while its statutory scheme does not include a counterpart to ADAAG that details how to construct an accessible web site, it may be incorrect to conclude that the ADA does not govern the accessibility of a public accommodation's web site. In fact, there are substantial reasons to believe that the opposite is true. A thorough discussion of this point is beyond the scope of this article, but a few compelling points on the issue should be noted.

First, the ADA is civil rights legislation and, as such, is subject to liberal construction by the courts. Second, the ADA's legislative history reflects that Congress intended for the interpretation and application of various Title III requirements to evolve as technological advances that affect those protected by the act are made. Third, various express mandates under Title III can be read to contain an implied requirement that the website of a public accommodation must be accessible to people with disabilities. For example, Title III states that a public accommodation may not afford a person with a disability an opportunity to participate in or benefit from a place of public accommodation's goods and services that is unequal to the opportunity afforded to other individuals. Title III also requires a public accommodation to take those steps that are necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services unless taking such steps would fundamentally alter the goods and services or result in an undue burden, i.e., a significant difficulty or expense.[3a]

Various interpretative sources on the ADA make clear that the purpose underlying this latter requirement concerning the provision of auxiliary aids and services is to ensure that public accommodations *effectively communicate* with persons who have disabilities affecting hearing, speech or vision. Accordingly, the U.S. Department of Justice (DOJ), the federal agency charged with the responsibility of enforcing Title III, maintains that a public accommodation's obligation to provide auxiliary aids and services—such as sign language interpreters, assistive listening devices, brailled materials, and large-print materials—requires a public accommodation to ensure that its web site, too, is accessible to people with disabilities, subject, however, to the undue-burden and fundamental-alteration limitations noted above. For example, on the topic of the applicability of the ADA to the Internet, the DOJ has written in a nonbinding advisory letter to Sen. Tom Harkin, D-Iowa, that "[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well."

In short, it is the authors' view that, although the ADA does not expressly mention the Internet by name, and although, as this article goes to press, no court has yet decided the issue of the ADA's applicability to the Internet,[4] there are, nevertheless, compelling reasons for concluding that Title III does require all public accommodations with web sites to ensure that those web sites are accessible to people with disabilities. Perhaps more important, however, is the fact that regardless of whether the ADA mandates that a public accommodation's web site be accessible, an inaccessible web site may result in significant lost business to a merchant as substantial numbers of customers may not be able to use the web site effectively. Therefore, the remainder of this article describes some of the more frequently encountered design features that prevent a web site from being accessible to people with vision impairments, and outlines a variety of things that can be done to make a web site more accessible to those individuals.

### Evolving Question

Answering the question of whether a particular web site is accessible poses a question that is as continually evolving as the Internet itself. Given such a challenge, the example of a hypothetical web site can help to illustrate some of the issues at hand. Suppose, for example, that a clothing retailer wishes to use the Internet to promote its new flagship store and to sell its products to the public. The retailer directs its web site design team to make its new web site colorful and exciting, to use moving images, and to list the clothing labels that the retailer will carry for each clothing line. The retailer also tells the designers that it wants a strip for banner advertising that managers of its various store locations can use to advertise in-store specials.

When the work is done, the retailer launches an exciting web site. But, is the site accessible to people with vision impairments? This is a particularly important question when one considers that as many as 20 percent of American computer users are "non-traditional" users who rely on screen magnification devices and screen reader software to use their computers, including for surfing the Internet.

The screen reader software allows the non-traditional user to use a computer by "translating" the text on the computer screen into audible words. However, if this software were to visit the retailer's web site described above, it would face several obstacles. For example, when it encounters the site's moving images, it would find no text to translate. Instead, absent corrective measures such as using so-called "Alt tags" for the moving images, the reader would state that "this is the web home page of ... [image]. Link, Link, [image]." Additionally, the site's vertically designed chart displaying the retailer's clothing lines would trip up the screen reader because the reader processes tables by scanning from left to right rather than from top to bottom. And, when the reader scans the site's advertising banner, the reader's user would hear only words such as "image" or "link," rather than words that inform the user about the in-store special that the advertising banner is promoting.

Those are just a few examples of the hurdles that people with vision impairments face when surfing the Internet. Worse yet, new hurdles of varying sorts appear with each technological advance that is made. Listing all of the design considerations that should be considered in order to create an accessible web site is beyond the scope of this article. However, the following are some of the more fundamental things that one can do to eliminate from a web site the obstacles most frequently encountered by sight-impaired individuals:

◆ Avoid constructing the web site using "frame" technology. Frames pose severe navigational difficulties for the blind user.

◆ Place the most important information, including navigational links, at the top of each page.

◆ Include a link on the home page to a site map. A site map is a table of contents for the whole site. The link to the site map should be placed so that it will be one of the first items read by the screen reading device.

◆ Use highly descriptive image alternative tags ( so-called "Alt tags") for graphical navigational elements and substantive images.

◆ Moving text and imagery (e.g., Flash, animated imagery, and Java) can inhibit accessibility. Depending on the technology, it may be necessary to provide a static text alternative to the moving text.

◆ Provide for keyboard shortcut (in addition to mouse pointer) navigation.

In addition, the City of San Jose, Calif., a recognized leader in the area of accessible web site design, offers the following suggestions for creating a more accessible web site: (1) Have an access instruction page for visitors (San Jose's instruction page includes an email hyperlink for visitors to communicate problems with web page accessibility); (2) provide support for text browsers; (3) attach "Alt" tags to graphic images so that screen readers can identify the graphics; (4) hyperlink photographs with descriptive text "D"; (5) caption all audio and video clips by using "CC" hyperlinks; (6) provide alternative mechanisms for online forms (such as email or voice/TTY phone numbers); and (7) avoid access barriers such as posting documents in PDF, table, newspaper, or frame format or requiring visitors to download software; if posting in PDF, however, the City of San Jose recommends that the HTML text or ASCII file also be posted.

Design Resources

Finally, set forth below is a list of some additional resources and organizations that can be contacted for further information on accessible web site design:

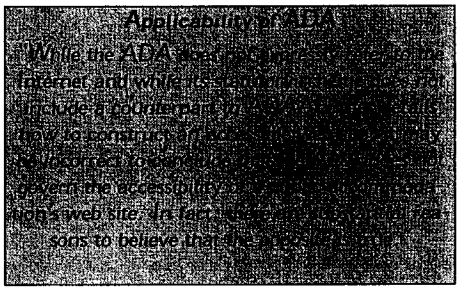
◆ CAST and Bobby. CAST is the Center for Applied Special Technology, which is a not-for-profit organization that uses technology to expand opportunities for people. CAST has developed "Bobby," a computer program that can be used to identify and correct a variety of inaccessible web site features. Bobby can be accessed at CAST's web site location, www.cast.org.

◆ The World Wide Web Consortium. This group, also known as "W3C," is an international industry consortium, partially hosted by the Massachusetts Institute of Technology Laboratory for Computer Science, intent on leading the World Wide Web to its full potential by developing protocols to promote its evolution and ensure its operability. W3C maintains its web site at www.w3.org.

◆ Trace Research and Development Center at the University of Wisconsin. This center, which is found on the Web at www.trace.wisc.edu, focuses on making computers, the Internet, and information kiosks more accessible through the process known as universal or accessible design.

◆ Disabilities Information Resources. This entity is a not-for-profit corporation that collects information on disabilities-related subjects and makes available, at www.dinf.org/software/software.htm, a non-visual browser designed for use by the visually impaired.

One thing that should be kept in mind is that accessibility detection software such as Bobby has certain inherent limitations and, therefore, is not a fail-safe way of evaluating the accessibility of a web site. One is best served in this regard by having an expert in accessible web site design do an accessibility evaluation of the web site. As alluded to above, given the significant numbers of "non-traditional" computer users who are surfing the Internet today, this evaluation is something that all public accommodations with web sites should probably do sooner rather than later.




(1) A "place of public accommodation" is defined in the ADA as a facility, operated by a private entity, whose operations affect commerce and that falls within at least one of 12 exclusive categories of business establishments, one of which is shopping centers and other sales and rental establishments. A "public accommodation," on the other hand, is the entity who owns, operates, leases, or leases to the place of public accommodation.

(2) An interesting and more difficult question is whether a web site that is not associated with any physical place of public accommodation, such as a virtual bookstore or private museum that exists only in cyberspace, is required by the ADA to be accessible to people with disabilities. (See the reference to the lawsuit recently filed against America Online Inc. at footnote 4 below.) On the one hand, such a web site is not a "place" like all of the other places of public accommodation in the ADA's 12 exclusive categories of such places because it is not comprised of bricks and mortar and it is not physically located somewhere on the face of the earth. So, perhaps the ADA's umbrella would not cover it. On the other hand, such web sites can and do function as the cyberspace equivalent of their brick-and-mortar counterparts. Therefore, perhaps the ADA does apply to such web sites, especially when one considers the civil rights aspects, and intended remedial nature, of the statute. Unfortunately, a thorough discussion of this issue is beyond the scope of this article.

(3) It should be noted that the foregoing mandates apply only to public accommodations. Title III also has limited application to "commercial facilities," which are any privately owned and operated nonresidential facilities, whose operations affect commerce, and that do not fall within one of the 12 categories of places of public accommodation. Thus, factories, warehouses, steel mills, and all or some parts of office buildings are examples of commercial facilities for purposes of Title III. While the ADA's requirements concerning the design and construction of new facilities and concerning the alteration of existing facilities apply equally to places of public accommodation and commercial facilities, the mandates noted above apply only to public accommodations. Accordingly, commercial facilities are not required by the ADA to ensure that their web sites are accessible to people with disabilities.

(4) On Nov. 4, the National Federation of the Blind and others sued America Online Inc. in federal district court in Boston alleging that AOL's proprietary software is inaccessible to blind persons in violation of the ADA. To the authors' knowledge, this is the first lawsuit of its kind under the ADA.

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