



THE HARMONIE GROUP[®]

Can You Be Sued If A Blind Person Cannot Access Your Website? Plaintiffs Seek to Expand ADA Liability to the Internet

By Adam Besagno
Manning & Kass Ellrod, Ramirez, Trester LLP

The Americans with Disabilities Act has been a source of liability for businesses since its enactment in 1990. For every meritorious suit, other Plaintiffs have taken advantage of the civil enforcement provisions by entering storefronts and leaving with causes of action. Now, certain individuals are making efforts to expand this liability beyond the physical world and into cyberspace.

Several of our corporate clients have received letters threatening lawsuits and alleging that they are in violation of Title III of the ADA for lack of website accessibility. This development affects every business, big or small, with a presence on the world wide web. It is important that every content provider is aware of the requirements, or lack thereof, for website compliance under the ADA. Do these allegations have merit? And how can a business protect itself from this new form of ADA troll?

How Visually Impaired Persons Use the Internet

Screen reading and voice recognition software allow persons with visual impairments to navigate the internet with surprising ease, so long as each site is “readable” by the software. The reading software analyzes and indexes each page as it is loaded, allowing the user to search, navigate, and playback text, links and even descriptions of photographs on the site. The crux of any ADA complaint about website accessibility is whether or not the web page is coded to be sufficiently “readable” by the software. If not, it is alleged, that the user suffers discrimination in the full and equal enjoyment of the site. A common example is that a description of every photograph on a web page should be described in language embedded in the code. This is especially critical where a link does not contain words, but rather is coded to an image. If the screen reader cannot identify that image as a link, the disabled user will not be able to access the linked portion of the site without difficulty.

The Standards for Readability

The two most common website accessibility standards are the U.S. Accessibility Board Section 508 Standards and the World Wide Web Consortium (“W3C”) Web Content Accessibility Guidelines 2.0 (“WCAG-2”). These two standards include specific coding requirements to reach a level of compatibility with screen reading software sufficient to enable visually impaired users to use a site. Under federal legislation, all government-run websites are required to be in compliance with the Section 508 guidelines. The WCAG-2 guidelines were developed by the non-profit W3C to give web content providers a blueprint for ensuring uniform accessibility across the internet.

What Does the Law Say?

The fishing letters recently received by our office allege discrimination under the general requirement of Title III, “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . .” To date, Courts have been reluctant to extend the definition of a “public accommodation” to include websites, however, this reluctance is beginning to wane.

In fact, the ninth circuit has already ruled that a cause of action may stand for violation of Title III of the ADA for lack of accessibility to a store website. The prevailing case is Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006). Plaintiff claimed that Target.com was a "public accommodation" under the ADA and that due to design flaws in the web site it denied disabled persons (specifically persons with blindness/low vision) equal access. Target filed a motion to dismiss arguing that the web site was not a "public accommodation" because it was not a physical place and that even if it was, the ADA did not extend to web sites. The Court denied the motion and held that Target.com could violate Title III, but only to the extent that its inaccessibility "impede[d] the full and equal enjoyment of goods and services offered in Target stores." The court also indicated, however, that "to the extent that Target.com offers information and services unconnected to Target stores, which do not affect enjoyment of goods and services offered in Target stores, the plaintiffs fail[ed] to state a claim under Title III of the ADA." This ruling is narrow, requiring a nexus between a website and physical store in order to show a violation. It is noteworthy that the plaintiffs in this case ultimately failed to show the required connection to the physical store and the matter was dismissed.

The Department of Justice, on the other hand, has stated on a number of occasions that it considers internet sites to be "public accommodations" under title III regardless of whether the site denies equal access to a physical store. See http://www.ada.gov/briefs/netflix_SOI.pdf. The DOJ has issued several briefs, maintaining that the ADA requires website accessibility, but refuses to identify or adopt any specific standards. Formal rule making steps were initiated in 2010, but the DOJ has indicated that no rule is imminent.

What Now?

If the fix were easy, all websites would already be compliant with the Section 508 and WCAG-2. However, retrofitting the coding for websites is time-consuming, and the specific coding requirements can slow websites to a crawl. This forces e-commerce into a choice whether or not to invest in accessibility. Even more concerning, every web content provider, from bloggers to multi-national online stores may be subject to these claims if "public accommodation" is expanded to include websites. The potential for liability is astronomical, but we are not there yet.

The Target ruling illustrated that successful litigation against websites under the ADA is difficult. Under current case law, a website is not a "public accommodation" under the ADA and neither of the existing standards have been adopted by the Courts or the DOJ. However, the survival of the Target plaintiff's claim beyond a motion to dismiss required the company to incur additional litigation costs. So long as the standards remain vague and the threat of high litigation costs looms, more and more ADA fishing expeditions are to be expected.

As these internet ADA claims begin to multiply, we have developed strategies to defend against these claims.

Adam Besagno
Manning & Kass Ellrod, Ramirez, Trester LLP
801 South Figueroa Street, 15th Floor
Los Angeles, CA 90017
(213) 624-6900 x2578
amb@manningllp.com
www.manningllp.com

Tim Violet, Executive Director
The Harmonie Group
4248 Park Glen Road
Minneapolis, MN 55416
(612) 875-7744
tviolet@harmonie.org
www.harmonie.org