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ADA UPDATE: Is Your Hotel's Online Reservation System a Golden Marketing Opportunity or an ADA Lawsuit Waiting to Happen?

by Martin H. Orlick
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When the Americans with Disabilities Act (ADA) was enacted by Congress in July 1990, the Internet was in its infancy and few, if any, considered its applicability to cyberspace. But a San Francisco Federal judge's recent decision not to dismiss a discrimination case against retailer Target Corporation has brought the issue to the forefront. Believed to be the first court ruling determining that the ADA's architectural barrier requirements can apply to the Website of a private business, the stage is now set for increased ADA litigation involving Web accessibility. Target intends to defend the lawsuit and is confident its Website and stores comply with all applicable laws. But some plaintiffs' ADA lawyers argue that the Website for an online retail operation is an extension of the store, and because the retail operation is clearly defined in the ADA as a "place of public accommodation," the Website is similarly required to be accessible to the public. Until now, courts have not seen it that way.

WHAT IS AN "ACCESSIBLE" WEBSITE?

Many consumers with visual impairments rely on the Internet as the most efficient method of making reservations and conducting personal business, such as retail purchases and financial transactions. Thus, accessible websites are more likely to drive sales to visually disabled customers. This could be a golden marketing opportunity for hoteliers that rely on the Internet as a source for guest reservations.

It is estimated that of the nearly 10 million visually impaired people in the United States, 1.5 million use assisted technologies such as

screen reader technology to access Websites and communicate over the Internet. Screen reader technology converts Website text to an audio format by reading the displayed screens. Accessible Websites provide computer codes that are compatible with screen reader software. Although the Web Accessibility Initiative and other groups have been advocating for Internet standardization for some time – the Web Accessibility Initiative of the World Wide Web Consortium (W3C) has developed design and functional standards – no written guidelines for Website accessibility have been adopted for the private sector. The Americans with Disabilities Act Accessibility Guidelines ("ADAAG") are currently under revision and comment, but Website "construction" is not included in the revisions.

WHAT HAS CHANGED?

Until this time, the leading case on Internet accessibility was *Access Now, Inc. v. Southwest Airlines Co.*, decided in 2002. In that case, the plaintiffs – an advocacy group and a blind individual – sued Southwest Airlines alleging that its Website was inaccessible to visually impaired consumers using screen readers. The plaintiffs argued that Southwest's Website violated the ADA, as the Website was a "place of public accommodation," as defined in the ADA, which was not useable by visually impaired customers. (The ADA generally requires that all "places of public accommodation" and all "goods, services, facilities, privileges, advantages or accommodations" of places of public accommodation must be made accessible to

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disabled persons, absent undue hardship.) Many state laws mirror the ADA's mandate.

The Court rejected the plaintiffs' argument, holding that the defined categories of "public accommodations" in the ADA all relate to "brick and mortar" facilities. The Court also pointed out that the plaintiffs were able to access the services provided by Southwest's Website through other sources – the telephone, ticket counters and travel agents.

The *Southwest Airlines* Court did, however, recognize the rapidly changing technological landscape and the explosive growth in the use of the Internet by millions of people, including those with disabilities, and acknowledged that not all courts might feel so constrained by the statutory language of the ADA to limit its application to brick and mortar accommodations. In fact, not long after the *Southwest Airlines* decision, a Georgia court decided that Atlanta's public transit district was required to make its Website accessible to the blind under Title II (applicable to government programs and services). Further, the Federal Government requires that under Section 508 of the Rehabilitation Act, all federal Websites be accessible. The Federal standards and guidelines were the catalyst for disability rights groups to demand the private sector also provide Internet accommodations.

In 2004, New York State Attorney General Eliot Spitzer settled a case with two major travel Websites, Priceline.com and Ramada.com, to make their sites more accessible to blind and visually impaired users. The argument in this case was the same: that Websites are an extension of a hotel's status as a "place of public accommodation" under the ADA. The Attorney General noted that accessible Websites are the wave of the future.

FROM "DRIVE-BYS" TO "SURF-BYS"

For years, our law firm has defended hotels and other businesses against "drive-by" lawsuits where disability advocacy groups send a disabled "customer" to an establishment to check for a host of often very technical ADA violations. If any barriers to access arguably exist, the "customer" files a lawsuit against the

establishment under the ADA and related state laws. In some cases, a single plaintiff may visit a number of hotels or restaurants in a given area on the same day, and file lawsuits against all of them claiming similar physical, psychological and emotional injuries in each instance. Consider now, the number of Websites one potential plaintiff could visit in a day while surfing the Internet! It is no wonder there is intense concern about a potential flood of lawsuits resulting from Internet "surf-bys".

WHAT ABOUT THIRD-PARTY VENDORS?

It is a common practice for hotels to outsource their reservation system to third party service providers. But as far as the general public is concerned, reservations are being taken by the hotel itself. Can your hotel become the target of ADA cyberspace lawsuits for the practices of third party vendors? While no one knows how a court will answer this question, it is likely that sooner rather than later, plaintiffs groups will test the waters by filing additional lawsuits in these circumstances.

It is wise for hotels to confirm that the Websites of their third-party providers are accessible to those with visual impairments and the blind. Currently, Department of Justice Consent Decrees and Voluntary Compliance Agreements involving the hotel industry uniformly require hotel reservation systems to provide up-to-date information on the accessible features of their hotels. It would not be surprising to see an additional requirement for Websites to be accessible to the visually impaired and blind.

ACT NOW TO AVOID LIABILITY

While many hotel brands and individual properties are aware of the needs of visually impaired consumers and already provide codes within their Websites that make it possible for screenreading software to "read" their text, others have been unaware of the issue, or have been slow to act. They cannot afford to wait any longer.

The plaintiff in the Target case, the National Federation of the Blind, estimates that Target would need to spend between \$20,000 and

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\$40,000 to make its Website accessible to the visually impaired. Some think would cost less and others believe the figure to be substantially higher. Because the technology is far from universal, the actual cost is difficult to estimate. The cost of "retrofitting" Websites will be a factor when courts consider what "reasonable accommodations" should be made to a company's Website, if any.

But now is the time for hoteliers to review their Websites for accessibility to the visually

impaired. They will also want to review the Websites of third party providers that accept reservations for their hotels. The outcome of the Target case could determine if more lawsuits regarding Website accessibility become a reality sooner rather than later. There are technological barriers to be overcome, for sure. But the end result could be a golden marketing opportunity for hoteliers to market their services to a sizeable market segment of visually impaired consumers, or the new source of accessibility litigation.



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