

## ADA UPDATE: IS YOUR RETAIL WEBSITE 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, as it is confident its Website and stores comply with all applicable laws. 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 HAS CHANGED?

Until now, the leading case on Internet accessibility was *Access Now, Inc., a Florida nonprofit corporation v. Southwest Airlines Co.*, 385 F.3d 1324, 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 Court rejected their 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 Websites permit users of assistive technology, including screen reader software, to make on-line reservations. The Attorney General noted that accessible Websites are the wave of the future. The argument is the ADA requires that Websites of private companies to be accessible to the blind and those with low vision. 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.

Many blind and visually impaired persons use screen reader software to navigate the Internet. Screen reader technology converts Website text to audio format by reading the displayed screens. Web access is accomplished by using computer codes that are compatible with screen reader software. The Website graphics and text require comprehensible formatting of text, edit fields, and tables. The companies agreed to implement design and functional standards developed by the Web Accessibility Initiative of the World Wide Web Consortium ("W3C").

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

For years, our law firm has defended retailers 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 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 shopping centers or stores 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. In a companion article, I discuss the very recent, important case, *Gunther v. Lin*, (2006 Cal. App. LEXIS 1670) decided October 26, 2006 by the California Court of Appeal, Fourth Appellate District, which may curb litigation over technical deviations from access guidelines.

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".

The fact is, many visually impaired consumers rely on the Internet as the most efficient method of shopping, making reservations, and conducting personal business, such as retail

purchases and financial transactions. It is estimated that of the nearly 10 million visually impaired people in the United States, 1.5 million use assisted technologies to access Websites and communicate over the Internet. Thus, Internet accessibility will likely drive sales to disabled customers. This could be a golden marketing opportunity for retailers engaged in e-commerce.

Many Internet retailers are aware of the needs of visually impaired consumers and already provide codes within their Websites that make it possible for screen-reading software to "read" text to the visually impaired. But other businesses have been unaware of the issue, or have been slow to act. They cannot afford to wait any longer.

### THE ISSUES

The plaintiff in the Target case, the National Federation of the Blind, estimates that Target would need to spend between \$20,000 and \$40,000 to make its Website accessible to the visually impaired. While others think it may be less costly, still others believe the figure is substantially higher, and the technology is far from universal. 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.

Another complicating issue is that there are no generally accepted standards for programming assistive software so as to make them uniformly compatible with Websites. Although the Web Accessibility Initiative and other groups have been advocating for Internet standardization for some time, 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" has not been included in the revisions.

Now is the time for retailers to review their Websites for accessibility to the visually

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impaired. They will also want to review the Websites of vendors that market the retailer on third-party Websites. Can your business become the target of ADA cyberspace lawsuits or for the practices of third party vendors? While no one knows how a court will answer these questions, it is likely that sooner rather than later, plaintiffs groups will test the waters by filing additional lawsuits in these circumstances.

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 can either be a golden marketing opportunity for retailers, or the new source of accessibility litigation.



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