

UNDERSTANDING WEBSITE ACCESSIBILITY LITIGATION

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Lawsuits and demand letters complaining that websites and mobile applications are not accessible to individuals with disabilities, especially those who are blind, have become an unfortunate fact of life for businesses across the United States. As many as 10,000 cases a year are filed in state and federal court, and while there have been positive legal developments, this trend seems unlikely to change any time soon. In last few years the number of plaintiffs' attorneys engaged in this activity has increased, with several different groups sending demand letters to small businesses instead of the original tactic of filing suit before trying settle. Businesses need to understand what these lawsuits and demands are all about, and how they can and should respond.

Unfortunately, there is more misinformation than useful information about these lawsuits on the internet. Much of what appears under the name of groups claiming to represent those with disabilities comes from organizations that are just a front for a law firm. Companies that sell services related to website accessibility also spread misinformation,

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sometimes out of a genuine but ignorant desire to help and sometimes for purely commercial reasons. Law firms that defend businesses involved in website litigation sometimes spread misinformation as well or provide truthful information that is misleading in context. This memo will explain what website accessibility means, the truth about the law concerning website accessibility, and how to tell real solutions for website accessibility from snake oil that has no value and can even make matters worse. If you want to keep up with developments in this area you will find more information at my blog, accessdefense.com.

SUMMARY

- *It isn't clear which business websites are covered by Title III of the ADA.* It may cover all websites that are available to the public or it may be limited to websites that have some connection to a physical place of business. Just what that connection must be is also uncertain.
- *What it takes for a website to meet the requirements of Title III of the ADA is not certain.* WCAG in its current version at success level AA is the best available technical standard, but it does not have the force of law. Conformance to its requirements may not be sufficient, and non-conformance may not mean the website violates the ADA.
- *Not all lawsuits and demands are the same with respect to the threat they pose.* Lawsuits and demand letters come from law firms that range from very sophisticated to incredibly ignorant. The only general advice that applies to all such lawsuits and demands is that before adopting any legal or business strategy you must know about the law firm and its history of website litigation.
- *Different judges can have very different views of what the ADA requires and how different defenses apply.* Just as you can't decide on legal strategy without knowing about the law firm that filed suit, you can't decide on a legal strategy without knowing what your specific judge has done in the past with similar ADA lawsuits.
- *Software testing is not adequate to find all the accessibility problems a website may have.* Only user testing by trained users can locate all the accessibility problems in a website.

- *No widget, plug-in or overlay can make a website fully accessible.* These products can, at best, improve a small subset of common problems but often do so at the expense of making other parts of the website inaccessible.
- *Accessibility and good design go hand in hand.* Making a website easy to use for non-disabled users will almost always solve common accessibility problems. Good design should be the primary consideration in website development.

I. The law concerning website accessibility.

A. Do websites really have to be accessible to people with disabilities?

The truth is that the law concerning website accessibility is very uncertain. Most website lawsuits are brought under Title III of the Americans with Disabilities Act, so it is a good place to start. The ADA was passed before websites were an important part of social and economic life in the U.S. It is not surprising that it never mentions websites or mobile applications. Under Title III of the ADA, which governs businesses that deal with the public, the Department of Justice can issue regulations that define just what Title III requires, but the only regulations that deal with websites are very narrowly limited to certain kinds of information on hotel reservation sites. This means that the law of website accessibility is being developed one case at a time by the 670 or so federal district judges, none of whom is obligated to agree with what the others think the law may be. The twelve Federal Courts of Appeal can make rulings that apply to all the district judges in their area, but very few of the lawsuits are appealed because almost all are settled early on. The courts of appeal do not have to agree with each other either, so there can be as many as twelve different ideas about what the law should be at the appellate level. The Supreme Court makes decisions that bind all the federal courts, but it has never ruled on website accessibility. This is why there is uncertainty. What the ADA requires of a website or mobile app depends on where the lawsuit is filed and often on which judge is assigned to the case.

Although the law is uncertain in many respects, there are a couple of very clear theories about the ADA and websites that most courts follow. One theory is that a website is a “public accommodation” that is directly subject to the ADA’s prohibition on disability discrimination. For courts that follow this theory there is no doubt that every website open to the public must be accessible to people with disabilities. The competing theory is that websites are not public accommodations but may be a service of a public accommodation. Since all the services of a public accommodation must be provided without discrimination these courts would say any website associated with a public accommodation has to be accessible. The “association with a public accommodation” part is important because these courts say that only physical businesses open to the public are public accommodations. According to these courts a company that only does business on the internet is not required to have an accessible website because Title III of the ADA just does not apply.

Title III of the ADA is not the only game in town for website accessibility. Every state has its own version of the ADA, and the California version (the Unruh Act) very clearly requires that every website be accessible. One of the courts of appeal that says the ADA only applies to businesses with physical stores covers California, and so the way it limits the ADA doesn’t really do businesses much good if they are sued in California. That’s the real rub – the web is everywhere, and that means every business website can be accessed by people someplace where the ADA applies to all websites. As a practical matter all this uncertainty about legal theories – and the little explanation above doesn’t even start to cover all the permutations and combinations – if you have a website, you might get sued. No website is immune.

B. OK, what is an accessible website then?

That's an easy question to answer unless you want details. A website is accessible if people with disabilities can use it. The problem is that no website can be used perfectly by everyone with a disability. For buildings and sidewalks and parking lots there are very specific requirements for accessibility. Doors must be a certain width, parking spaces can't have slopes of more than 2%, certain signs must be in braille at a certain height. For these physical places the rules are very clear because DOJ has issued almost complete regulations defining accessibility. If your building meets these requirements, then it is by definition "accessible." For websites there are no such regulations.

Who then decides what it means for a website to be accessible? Remember those 670 federal district judges? That's who. There have been a few decisions by individual judges that look to a private industry standard for website accessibility called WCAG 2.0 or 2.1 AA, but none of the Courts of Appeal have adopted that kind of standard, so the truth is that "accessible" means whatever a federal judge decides it means. Unless of course you are in state court in which case a state court judge decides what it means. When you read that some product or consultant will make your website comply with the ADA you can be certain it is not true because they don't know exactly what the ADA requires, and neither does anyone else.

C. This all sounds pretty hopeless.

Not really. The bad news is that things are uncertain if you want to know what the law is. The good news is that the law is much less important than practical considerations that don't require knowing "the law." I've started out with the law because most of the untrue things about website accessibility you'll read on the internet are about "the law."

Let's turn to the more important issues; mitigating litigation risk and taking care of your customers.

II. The truth about website accessibility lawsuits and demands.

Litigation over website accessibility is a new phenomenon. From the passage of the ADA through 2015 there were only a handful of cases. Since 2015 thousands have been filed and the number has increased almost every year. That sudden change was the result of the realization by a few law firms that ADA website accessibility litigation, like other forms of ADA litigation, could be highly profitable. The pattern for this new kind of ADA lawsuit was set in the summer of 2105 when one firm began filing a large number of lawsuits claiming websites violated the ADA. It was straightforward: Sue in a favorable jurisdiction, offer to settle for an amount that is high, but less than the cost of any possible defense, and dismiss the lawsuit based on settlement before having to invest any real time in the case. That basic pattern, with some variations depending on local legal conditions, has not changed in the last six years although many more firms are now involved in the website litigation industry.

Today almost all website lawsuits and demands can be broken down into different categories based on which law firm made the demand or filed suit. It is critical for a business that has been sued to know which category the lawsuit or demand falls into because this determines the cost of and strategy for settlement. The categories are:

- Lawsuits filed in Western Pennsylvania, New York, California and sometimes Maryland federal courts by sophisticated law firms with several years of experience with this kind of lawsuit. These firms are capable of and prepared to litigate a claim

all the way to trial if they must. Their settlement demands often start as high as \$75,000 but they will almost always settle at the outset of the case for between \$15,000 and \$20,000 plus an agreement to remediate the website.

- Lawsuits filed in New York, Florida and California by less sophisticated firms that typically demand and settle for between \$8,000 and \$10,000 and an agreement to remediate. These firms are capable of and have litigated these cases to trial but demand smaller settlements because they would rather not.
- Lawsuits filed, usually in California, by unsophisticated firms who are simply imitating other firms, often by copying pleadings filed by other firms. These firms do not have the capability of prosecuting a case to trial and will settle for a few thousand dollars.
- Demand letters sent by different groups of lawyers who are not sophisticated at all, often accompanied by a form of complaint that they say they will file if their demands are not met. The letters and complaints often appear to have been copied from materials taken off court filings by more sophisticated firms. Most of these law firms have never filed an ADA lawsuit of any kind and will settle for a small amount of money. If they are ignored, they will make repeated demands by email and phone, but eventually move on to other targets rather than filing suit.

There are some lawsuits that don't fall into these categories. Lawsuits filed by the National Federation of the Blind or National Association of the Deaf, for example, are filed against significant business targets with the goal of advancing disability access to the internet rather than making a quick buck. Handling these lawsuits requires much more attention than the

usual lawsuit filed by a private law firm on behalf of a pet client. There are also lawsuits filed outside of the usual venues. These may or may not be from firms that are sufficiently sophisticated to take the case to trial. The most important thing to know when you get a demand letter, or a lawsuit is which category the plaintiff's lawyers fall into because that will determine the negotiating strategy and likely cost of settlement.

You'll notice there isn't anything in this section about legal defenses to ADA lawsuits or demands. There are in fact good defenses that might apply in any ADA website lawsuit. These include challenges to personal jurisdiction, challenges to the plaintiff's standing to sue, arguments concerning application of the ADA to the specific website, the offer of alternative services, and arguments that the website is in fact accessible. Any one or combination of these defenses has the potential to result in a lawsuit being dismissed, but the cost of getting to a dismissal will almost always exceed the cost of a quick settlement. If you are determined to litigate, as some website owners are, these defenses become very important. If your goal is to spend money helping your customers instead of paying lawyers they probably don't matter.

III. Taking care of your customers and yourself.

The best reason to have an accessible website is so your customers with a disability can use it. This will become increasingly important as the average age of U.S. residents increases because age and disability go hand in hand. However, it is much easier to say "accessible website" than to say just what that means. For website developers it is usually taken to mean conformance to the current Web Content Accessibility Standards that I mentioned earlier. Developers like this definition of "accessible" because it gives them a

well-defined set of standards to meet. They don't need to worry about things like your business goals or what works for any particular person with a disability; if they meet the technical standards then they have done their job.² For business owners the meaning of accessible is more practical. An accessible website allows customers with a disability do what the website is intended to let them do, whether it is find a store, buy a product, read a blog, or contact customer service. A website that is technically perfect according to WCAG standards but fails to work for customers isn't accessible. Business owners also want their website to at least reduce the risk they will be sued. That risk cannot be eliminated because without a legal definition of "accessible" lawyers have a lot of room to make up a claim. It can, however, be reduced.

A. Reducing litigation risk.

It is easier to reduce litigation risk than to make a website accessible for customers who have a disability. This is because making a website accessible for customers with a disability requires taking into account a wide range of disabilities and the different ways customers with disabilities interact with a website. Reducing litigation risk, on the other hand, simply requires meeting a subset of the requirements of WCAG 2.1 AA.³ This is because of the way lawyers who file ADA website lawsuits work. You cannot file dozens or hundreds of lawsuits by sitting around waiting for clients to call with a website complaint. Instead, these firms use captive plaintiffs or even legal assistants who go from website to

² This is not to say it is easy to conform to the WCAG which includes a very long list of technical requirements that may not be easy to meet. WCAG itself has three success standards from A (basic) to AAA (almost impossible to achieve with current technology). The middle level, AA, is what most developers aim for.

³ The current version of WCAG.

website using software tools to scan the website for problems. If the software tool finds a problem a lawsuit is filed, or a demand letter sent.

The software tools used to scan websites range in price from free to fairly expensive and can be more or less sophisticated. However, they all have three things in common. First, they are designed to look for technical failures as defined by the WCAG standard, regardless of whether that failure is critical or trivial in terms of accessibility. Second, because of the limits on the AI used in these programs they can miss half or more of the technical failures, including some of the kinds of failure that make a website completely unusable for a person with a disability. Finally, they will report failures that are not real. This is because the WCAG standard depends in some cases on understanding the purpose of a website feature, and AI simply isn't good at teleological problems.⁴

The best way to avoid litigation risk is to simply use a software tool to scan your website and then fix whatever problems it says exist. This isn't necessarily easy. In general software tools detect the kinds of problems that are easiest to fix, but that doesn't mean they only detect easy to fix problems. However, if you fix the problems that software tools detect you can make your website look to potential plaintiffs as if it is accessible. This isn't perfect because different tools have different abilities, so the tool you use may not find a problem some other tool will find. You may also have to fix problems that aren't real just to make sure that the tools they use do not mistakenly report a WCAG failure. Remember that the lawyers do not care if the failure is real or not; they only care that they have enough to file a lawsuit.

⁴ Teleology is a fancy word for the study of purposes.

Using software tools and then fixing the problems they find may, depending on who developed your website, require hiring an outside consultant. I'll say more about those consultants in the next section. The point here is simply that any effort to make a website accessible should start with the problems found by software tools because if those problems are eliminated the plaintiffs may never notice that the website is not accessible.

B. Serving the needs of your customers.

Since software tools will not find all the accessibility problems in a website how do you go about making sure your website serves all of your customers? The consensus among accessibility professionals is that this requires two steps. First use the best available software tools to identify WCAG issues so they can be fixed. Then have your website tested by trained users who methodically follow all the user paths through your website to find out what kinds of problems still exist. Most businesses begin with a blind person using one of the more popular screen readers like JAWS or VoiceOver⁵ because almost all website litigation is brought on behalf of blind users and blind users are largest group of website users with a disability. This tester will note every problem they encounter so that the website developer or consultant can identify the underlying software problem and correct it.

Although the website development community is becoming increasingly aware of accessibility issues and the WCAG standard many developers are still not sufficiently

⁵ Screen readers are a kind of assistive technology that allows those who cannot see to use a computer, including websites. When most of what appeared on a screen was text these programs simply read the text out loud, hence the name. As computers and websites have become more sophisticated the abilities of screen readers have gone far beyond reading text, but the name stuck.

familiar with the necessary concepts to either find or fix problems that may exist. This is where consultants come in. Modern website accessibility litigation dates only to 2015, but federal law has required that federal government websites to be accessible for decades. That supported the growth of a consulting industry that understands accessibility. The original small number of consultants in this area has now grown tremendously as private businesses have become aware of their accessibility obligations and risks. The costs were originally keyed to the monster size budgets of federal agencies and the few very large businesses, like airlines, with clear regulatory obligations. Today, competition has brought down the cost, but accessibility consulting is still expensive, especially for complex websites. Most consultants will want a contract under which they find accessibility issues and then either fix the issues or train the business owner's IT department to fix the issues. These usually come with periodic reviews for accessibility problems that have come up as the website changes and sometimes with an ongoing support service. Many consultants will certify that as of a certain date the website met the relevant WCAG standard, but they generally do not guarantee compliance with Title III of the ADA because no one knows exactly what that means. They also will not guarantee continued compliance because modern websites are dynamic and all change gives rise the possibility of creating an accessibility error.

Businesses too small to have an IT staff or that cannot afford a consultant may have to rely on their third-party developer to make their website accessible. While developers are increasingly aware of accessibility as an issue many do not understand that software testing is inadequate and may not even know how to design an accessible website. Business owners who create their own websites using services like Word Press, Square Space or

others have the additional problem that in the process of making it easy to create a web page the services have concealed the code where accessibility problems originate. It is cheap and easy to build a website, but it may be expensive to make it accessible.

There is no good solution to this problem, which stems in part from the desire to make the internet available to all. Until the development and website services communities begin building accessibility into their designs users with disabilities will continue to find themselves locked out of some websites and owners of websites will find themselves owning an inaccessible website despite their best efforts. Website owners concerned with accessibility, and all website owners should be, can only insist on dealing with developers who at least appear to understand the requirements of WCAG and understand that conforming to those requirements is important.

C. What about widgets and plug-ins?

There are a number of products on the market that claim in their marketing materials to make any website conform to the WCAG standard. They can't, and if you read the fine print in the terms of service you will find so many exceptions and exclusions that the promise is almost meaningless. The problem with these products is the same as the problem with software tools to test for accessibility. Most websites are just too complicated for any form of artificial intelligence to succeed in identifying all the accessibility problems, and if AI can't find the problem, then AI can't fix it. Many of these products can do a few things that help some users, but they are also notorious for simultaneously creating problems for others, especially blind users using screen reading software. Website owners concerned

with accessibility will probably find their money is better spent on other forms of testing and remediation.⁶

D. The role of good design.

Many of the problems faced by disabled website users stem from poor website design, something that also affects users who are not disabled. A website whose structure is not logical will be hard to navigate by a user who relies on verbal descriptions from screen reading software but will also behave in unexpected ways for any user that relies primarily on a keyboard instead of a mouse. To a large extent good web design is the same thing as accessible web design. Website owners often focus on SEO instead of solid design; in fact, SEO optimization is central to the marketing pitch for most website design firms. Bringing potential customers to your website is pointless if those customers, whether or not disabled, find the website confusing or hard to use. Usability, not SEO optimization, should be the focus of website design because it is far easier to optimize a well-designed website than to fix a poorly designed website whose only virtue is SEO optimization.

CONCLUSION

The law of website accessibility is uncertain and misinformation about the law and about accessibility itself is pervasive. Businesses concerned only with litigation risk should look at website accessibility in terms of remediating the kinds of problems most likely to be found by automated scanning software. Businesses concerned with making their websites

⁶ For more information on this see Karl Grove's article at <https://overlayfalseclaims.com/downloads/Truth-in-advertising-does-not-exist-for-overlays.pdf> and <https://overlayfactsheet.com/>

usable by an increasing number of disabled users may begin with software testing but will include user testing and functionality rather than technical standards that may or may not provide meaningful accessibility.