

The United States Law Week

INSIGHT: Website Accessibility and the ADA— Is Your Business Ready?

By Karen S. Elliott

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The U.S. Supreme Court let stand a Ninth Circuit opinion requiring Domino Pizza's website and mobile app to be accessible to the visually impaired under the Americans with Disabilities Act. Karen S. Elliott, with Eckert Seamans, says with no nationwide standard, companies need to ask their web and content developers questions about accessibility.

The U.S. Supreme Court's decision not to review the website accessibility case involving Domino's Pizza impacts businesses in states within the Ninth Circuit, but also potentially throughout the rest of the United States.

The U.S. Court of Appeals for the Ninth Circuit held that Title III of the Americans with Disabilities Act requires Domino's website and mobile app to be accessible to the visually impaired because they "connect [its] customers to the goods and services of Domino's physical restaurants." The ADA applies to "places of public accommodation" as defined by the statute, which includes a broad range of businesses open to the public.

Because of the certiorari denial, the Ninth Circuit's ruling stands as the law for its citizens. Therefore, a visually impaired customer in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington could (absent long-arm jurisdiction issues) sue in their state claiming web or app inaccessibility.

It is left now to a future U.S. Supreme Court decision or congressional legislation to provide national consistency and answers to the following:

- Does the accessibility requirement apply to all businesses with a website/app or only those websites/apps linked to a physical establishment? Must all of the websites linked to from within a website also be accessible?
- How does a business measure legal compliance with accessibility standards in a world of constantly changing technology?

Does the ADA Definitively Require Website Accessibility?

Reasonable minds can disagree. The 1990 law predates the web's growth and it references only "places of" accommodation which some argue means application of the statute to a physical establishment only.

The Ninth Circuit is the first federal appeals court to definitively find that a website or app that provides a connective experience to a physical establishment requires accessibility of the website, app, and physical establishment.

What Does Website Accessibility Mean?

The visually impaired often use screen reading software to access the internet. Screen reading software reads the computer screen and then "speaks" the information that appears on the website. Whether the screen reading software can read the site's information depends on the coding behind the website. If using an iPhone, users might employ Apple's Voice Over screen reading program for mobile application.

The ADA provides that "[n]o 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...." The statute finds discrimination where a business "fails to take steps" for equal treatment and mandates certain reasonable modifications and possibly auxiliary aids and services to ensure effective communication with individuals with disabilities.

Courts and advocates look to the guidelines developed by The World Wide Web Consortium. The WWC currently recommends use of its "Web Content Accessibility Guidelines" (WCAG) when developing accessible content for websites.

However, the WWC continually processes and updates new recommendations. Without a nationwide legal standard, a business could arguably bring its website into compliance with WCAG 2.0 today, and be sued in the future by advocates of a later version.

How to Respond Now

Without having legal clarity, businesses settle the demands and cases at a very high rate. Until Congress or the Supreme Court can provide clarity and unity, businesses may want to keep in mind the following:

- The ADA provides for injunctive relief and attorneys' fees but not damages to the individual. Therefore, businesses should be mindful of the line of cases that may allow them to "moot" the case early through making immediate accessible changes to their website to eliminate or decrease the relief.
- It remains an open question of "how accessible" a website must be to qualify as compliant. The Department of Justice tried to implement regulations, but the speed of technological advances and the variety of ways to make a site accessible made codifying a legal standard difficult. For example, a site may "test" as 98 percent accessible, but fail in the total experience (i.e., the consumer made it all the way through the site to select the desired pair of shoes, but was not able to execute the final sale due to a design flaw on the "submit for purchase" page). Some courts opine that the regulations were withdrawn to give businesses maximum flexibility in meeting accessibility requirements. Therefore, at a minimum, businesses should provide a telephone number that customers using screen-reading software can access to receive assistance. The website should also contain a screen-readable accessibility policy.
- Determine whether the plaintiff stated that he/she actually uses or plans to use the business' services. Is it plausible that the plaintiff would use the services? Professional "testers" bring many of the ADA accessibility cases in which status alone does not generally strip them of standing, but it also does not insulate them from having to allege "injury-in-fact." To have suffered an injury-in-fact, the plaintiff must have suffered an injury that is (1) concrete and particularized and actual or imminent, (2) fairly traceable to the defendant's conduct, and (3) likely, as opposed to merely speculative, to be redressed by a favorable decision. Further, some courts require in the ADA context a "real and immediate threat" that the plaintiff will be injured again.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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