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Legal Sidebar

The Americans with Disabilities Act in Cyberspace: ADA Applicability to Websites

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In 1990, passage of the Americans with Disabilities Act (ADA) required businesses nationwide to accommodate people with disabilities. Under the statute's terms, for example, a "motion picture house" or other "place of exhibition or entertainment" may not turn someone away because she uses a wheelchair, must provide wheelchair seating with lines of sight comparable to standard seating, and must close-caption movies so deaf patrons can understand the dialogue. But one question courts have long struggled with is how the ADA applies, if at all, to cyberspace businesses. For instance, in 2022, is Netflix a "place of exhibition or entertainment" covered like a physical "motion picture house"? Some have claimed that courts' inconsistent conclusions about how to apply the ADA in this context have encouraged forum shopping (filing suit in the most favorable jurisdiction). Advocates for businesses and for people with disabilities alike have called for regulatory and legislative action. The Department of Justice (DOJ), charged with enforcing the relevant provisions of the ADA, recently attempted to clarify the agency's view, issuing guidance on cyberspace accessibility.

This Legal Sidebar discusses the ADA's text and history, then looks at judicial assessment of whether and when the ADA applies to websites and web applications. Next, it discusses DOJ's views and closes with considerations for Congress, including potential legislative measures to clarify if and when the ADA applies to websites and web applications. Another Sidebar addresses *how* the ADA's accessibility mandate may apply to websites—in particular, it describes potential standards to determine a website's ADA compliance.

What Is a "Public Accommodation"? Defining the ADA's Reach

Title III of the ADA applies to "public accommodations," that is, businesses and nonprofits open to the public that fall within the statute's specified categories. Those categories were targeted at historically brick-and-mortar businesses, which are then subject to accessibility and modification requirements. Many courts, commentators, and agencies have long argued that the statutory text, written in a different era as far as web commerce is concerned, leaves doubt about whether and how the statute applies in cyberspace.

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The ADA: Text and History

In passing the ADA, lawmakers took aim at the long-standing exclusion of people with disabilities from active participation in society. Congress found that "historically, society has tended to isolate and segregate individuals with disabilities." Disability discrimination, as Congress recognized in discussing the ADA's statutory predecessor, often comes from apathy and "neglect" rather than intentional exclusion. Thus, the ADA aimed to remedy, among other things, the "failure to make modifications to existing facilities and practices" and "communication barriers" that tend to exclude people with disabilities. One of the Committee reports accompanying the ADA noted, in particular, a concern with information access, indicating that "[i]nformation exchange is one of the areas where there are still substantial barriers." The ADA, the report suggested, should "keep pace with the rapidly changing technology of the times."

The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more major life activities." The statute covers three major areas of public life: employment (Title I), public services (state and local government) (Title II), and public accommodations (businesses and nonprofits open to the public) (Title III). The ADA bars discrimination against people with disabilities in these areas and requires reasonable modifications of rules, structures, and equipment to enable access. People denied access can bring private suit against covered entities.

For businesses and nonprofits, the ADA's definition of "public accommodation" lists 12 categories of establishments, providing examples for each. The categories can be summed up as places for lodging, food service, entertainment, public gathering, retail, health and personal care, transportation, exhibition, recreation, education, social services, and exercise. In describing the listed businesses, the ADA repeatedly calls them "place[s]," "office[s]," or "establishment[s]."

Title III's emphasis on physical places is even more apparent in comparison with Title II of the ADA, which covers public "services." Title II requires modifications to local government services—parks, licensing bureaus, education programs, police services, etc.—without reference to where they occur. It covers "any State or local government," including its departments, agencies, or instrumentalities. State and local governments may not exclude people with disabilities from, deny them participation in, or deny them the benefits of, any government "services, programs, or activities." Title II does not restrict covered government "services, programs or activities" by any reference to specific categories, facilities, or amenities.

Judicial Interpretations

Over the ADA's 30-year history, courts have split on whether Title III applies to nonphysical spaces like websites. The issue came up even before the rise of internet commerce, regarding businesses with no brick-and-mortar outlets. One circuit decided, for example, that an insurance plan is a public accommodation, and another decided that it is not.

In later cases considering websites, courts have fallen into three camps. First, some courts have applied the ADA to websites without restrictions. One such court, looking at the legislative history, reasoned that committee reports suggest "the important quality public accommodations share is that they offer goods or services to the public, not that they offer goods or services to the public at a physical location." According to these courts, a plaintiff "must show only that the web site falls within a general category listed under the ADA."

A second line of cases holds that the statute only applies to physical places and thus does not include websites. As one court held in dismissing claims against the social media site Facebook, "Facebook operates only in cyberspace, and . . . thus is not a 'place of public accommodation.'" In support, the court cited Title III's text barring discrimination "by any person who owns, leases (or leases to) or operates a

place of public accommodation." Even though Facebook had some physical products in physical stores (e.g., gift cards), it did not own or lease retail property.

A third line of cases has applied the ADA to *some* websites, depending on their connection to physical businesses. So if an inaccessible website restricts access to restaurants, hotel reservations, or in-store retail services, the website would fall under the ADA. As the Ninth Circuit put it, "[t]he statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation." In applying this rule to restaurant chain Domino's online pizza ordering, the court determined that "[t]he alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation." The Eleventh Circuit has, in an unpublished opinion and in a vacated opinion, endorsed a similar view. And in another published opinion the Eleventh Circuit has suggested, but not decided, that a website's "nexus" with a physical business could bring it under the ADA.

A number of district courts have also adopted this third approach, but many circuit courts have not addressed the question of whether or how the ADA applies to websites, prompting one commentator to note that case law on website accessibility is "still developing."

Agency Interpretation and Guidance

On March 18, 2022, the Department of Justice (DOJ), charged with enforcing the relevant provisions of the ADA, issued nonbinding web accessibility guidance. The guidance makes clear that, in DOJ's view, the ADA applies to at least some private websites, and it addresses how public accommodations can make accessible the goods and services they offer online. Nevertheless, the guidance does not explicitly say whether the ADA reaches all websites, including online-only businesses, nor does it say if the analysis looks to any sort of "nexus" to a physical business. The guidance does not contend with the divergent court precedent described above. Instead, the guidance lists several ADA categories of public accommodations, then points out that "a website with inaccessible features can limit the ability of people with disabilities to access a public accommodation's goods, services, and privileges available through that website." The guidance thus suggests, but does not explicitly state, that DOJ considers online entities offering goods and services under the categories of public accommodations listed in the guidance to be covered by the ADA. The guidance concludes that "the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web." Without defining "public accommodation" in the internet context, this language appears to leave open the possibility that DOJ sees web businesses as public accommodations even if they have no connection to a physical business.

Aside from commercial businesses, the DOJ guidance also addresses local and state government websites, covered under ADA's Title II. DOJ does not address the different scope of the titles and does not state whether government websites have different ADA responsibilities. In language much like its Title III guidance, DOJ notes that "[a] website with inaccessible features can limit the ability of people with disabilities to access a public entity's programs, services and activities." Thus, according to the guidance, "the ADA's requirements apply to all the services, programs, or activities of state and local governments, including those offered on the web." For state and local governments under Title II, however, DOJ has also announced that it will begin the process of writing regulations, aiming to issue a Notice of Proposed Rulemaking in April 2023.

The 2022 guidance is not DOJ's first effort to address web accessibility. In 2010, DOJ published an Advance Notice of Proposed Rulemaking for website accessibility. In its proposal, DOJ acknowledged potential differences in how the ADA might reach government websites and private websites. "There is no doubt that the websites of state and local government entities are covered by [T]itle II of the ADA," the notice stated. As DOJ recognized, existing regulations already provided that Title II "applies to all

services, programs, and activities provided or made available by public entities." For private websites, DOJ acknowledged a lack of consensus. "The Department believes that [T]itle III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations," DOJ affirmed, despite "remaining uncertainty" in judicial precedent.

In 2017, DOJ withdrew its regulatory proposals for websites, stating that it was "evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate." In 2018, however, Assistant Attorney General Stephen E. Boyd, responding to a congressional inquiry, wrote that the Department had long applied the ADA to private websites and assured that "the absence of a specific regulation does not serve as a basis for noncompliance."

Legislative Action and Considerations for Congress

Congress has periodically considered the issue of the ADA and website access, holding hearings in 2000 and 2010. In June 2018, more than 100 Members of Congress joined a letter to then-Attorney General Jeff Sessions urging DOJ to tackle "unresolved questions about the applicability of the ADA to websites."

Various bills in the 117th Congress have proposed changes to the ADA or have sought to establish separate accessibility requirements for particular online businesses. For instance, the Online Accessibility Act, H.R. 1100, introduced in 2021, would prohibit discrimination in "consumer facing websites," defined as "any website that is purposefully made accessible to the public for commercial purposes," as well as in "mobile applications" that are "consumer facing." Before suing under the proposed law, a plaintiff would need to provide the website owner with notice and an opportunity to correct accessibility problems. If the problems remained unresolved, the plaintiff could file a complaint with DOJ. An earlier version of the bill, H.R. 8478, appeared in 2020. The Websites and Software Applications Accessibility Act, S. 4998, introduced in September 2022, would specify that employers, private providers of public accommodations, and state and local governments, among others, must generally make their websites and applications accessible. The bill would also allow suit against website and software developers when their inaccessible products are used in employment, public accommodations, or local government settings. Other bills include H.R. 4686, introduced in the 116th Congress, which would have covered certain transportation-related websites.

Aside from these proposed measures, there are other considerations for potential legislation. Cyberspace presents particular legal challenges. For example, websites' ubiquity and decentralization raise unique questions of venue and extraterritoriality. Issues of standing to sue, appropriate remedies, and what constitutes denial of access differ in social media and online shopping contexts compared to traditional businesses such as restaurants or movie theaters.

Potential legislative considerations for defining covered businesses might include whether to broadly define included entities, specifically designate covered categories of businesses (as in the current Title III), or list excluded businesses. Other exclusions might identify certain goods or services that should not be covered or carve out businesses based on size, population served, or nonprofit status. Additional considerations might include whether a new statute should reach only consumer-facing websites, as does H.R. 1100, or cover wholesalers, underwriters, or similar companies if they serve only other businesses.

Alternatively, Congress could codify the nexus requirement that some courts have applied, requiring accessible websites only if existing sites impede access to physical businesses. Congress may also consider covering or exempting web logs or other sites that offer no goods or services. Along these lines, at least one scholar has proposed including only websites whose goods or services *could* be provided in a physical space. Separately, sites that rely on user-generated content may have difficulty meeting particular accessibility requirements, such as a captioning requirement for a site hosting users' video clips. Excluding user-generated content, as Congress has done in other internet measures, may be an option. Another option may be to offer case-by-case exemptions, as does the current ADA, which excuses compliance when it proves unduly burdensome or infeasible under the circumstances, or when compliance would fundamentally alter the goods or services provided.

An additional consideration is whether and how any legislation addressing ADA requirements for websites should apply retroactively. Requirements for physical architecture are not entirely retroactive under the current ADA. Businesses in pre-ADA buildings only need to make structural changes that are "readily achievable." Only new construction and substantial renovations must meet current standards. If imposing new requirements on cyberspace infrastructure, Congress may consider whether and how the rules should require rebuilding existing websites or applications. If imposing retroactive requirements, legislators may consider an appropriate implementation period. Congress could consider grant programs or other funding measures to bring entities into compliance.

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