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Legal Updates

Website Accessibility – Once a Technical Advantage, Now a Point of Vulnerability for Retailers

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If your company has a website, you may receive a letter claiming that your site is not accessible to users who are visually impaired. Several advocacy groups are now actively searching for “noncompliant” websites, hoping to persuade companies to modify their sites so that they are easier for the blind to navigate. The advocacy groups may point to the recent settlement in the *National Federation of the Blind v. Target* case No. C 06-01802 MHP (N.D. Cal.), and ask your company to change the coding and structure of your website to improve its accessibility to users who are visually impaired. Here are answers to some questions about website accessibility and how your company can be affected.

What Is the Website Accessibility Issue? Many computer users who are visually impaired rely on a “screen reader” program that reads aloud the information displayed on the screen. For web pages, the screen reader analyzes the HTML source code to determine what is being displayed. Depending on how your website is coded, the screen reader may have trouble deciphering what is being displayed.

Potential legal claims are based on the Americans with Disabilities Act and similar state law statutes such as the California Unruh Civil Rights Act and the California Disabled Persons Act. The ADA requires companies to make “places of public accommodation” accessible to those with disabilities, including vision impairment. Under the ADA, a private plaintiff would not be entitled to damages, but potentially could obtain injunctive relief and attorneys’ fees. In California, the Unruh Act provides for \$4,000 in minimum damages per violation, and the Disabled Persons Act provides for \$1,000 per violation. In addition, under both California statutes, a violation of the ADA is also a violation of the state statutes, with the result that damages may be obtained for ADA violations that affect California consumers. A class action brought under the California statutes poses the risk of substantial potential liability.

The case law regarding whether a website is a “place of public accommodation” is unsettled. The Third, Sixth, and Ninth Circuits have interpreted “places of public accommodation” as limited to “actual physical places.”^[1] One court concluded that a website is therefore outside the reach of the ADA.^[2]

In the *Target* case, the court opened the door to claims for website accessibility. The court ruled that if problems with the website impeded a blind person’s ability to enjoy the goods and services at Target’s retail stores, plaintiffs could state an ADA claim. The court also ruled that the California Unruh and Disabled Persons acts independently required that websites be made available to the blind, even if there is no connection to a retail store.

The *Target* ruling does not spell out specific standards or safe harbors to define what does and does not make a website “accessible” under state law. In addition, the decision could expose companies to statutory minimum damages on each occasion that an individual with vision impairment visits an “inaccessible” website, or could demonstrate that he or she was “deterred” from doing so. Potential damages could be substantial, as they would be calculated on either a \$1,000-per-violation or a \$4,000-per-violation basis per class member.

How Does the Target Settlement Work? Under the settlement, Target will ensure, for a three-year period, that blind guests to its website using screen reader technology may acquire the same information and engage in the same transactions as sighted guests with substantially equivalent ease of use. Target also agreed to comply with its own Target Online Assistive Technology Guidelines, a detailed set of requirements for website development. Although the Target guidelines bear some similarity to the “Web Content Accessibility Guidelines” promulgated by the W3C Web Accessibility Initiative (<http://www.w3.org/>), they have been tailored to fit Target’s particular needs and software development framework.

How Can You Get Prepared? As an initial step, we suggest you take an inventory of your current website to see how easy it is for screen reader users to navigate it. The three biggest issues from an accessibility perspective are the use of (1) frames (2) forms/pull-down menus and (3) graphics without appropriate alt tags because a screen reader would not be able to “read” them effectively.

- **Frames:** Frames let websites present information in separate “windows” on the screen. A website that uses frames can create significant issues for a screen reader’s ability to help a user, who is visually impaired, navigate the website.
- **Forms/Pull-Down Menus:** Screen readers often have difficulty with pull-down menus, particularly if there are forms for users to fill out. One important consideration is whether the website is programmed that screen reader software can actually describe the “boxes” of information.
- **Alt Tags:** Images on websites cannot be interpreted by a screen reader. HTML allows a website to designate an alternative text description of the information conveyed by the image, a so-called “alt tag.” Many sites have images that lack meaningful alt tags. For example, on a retail website, an alt tag associated with a picture of an item for sale might be the item number or some other type of ID number. If a user that is visually impaired moved the mouse over the graphic, he/she would hear “Item xxx,” which does not provide any information about the product itself.

We have found that this first step helps clients determine the extent of any potential issues and puts them in a position to evaluate any programming updates or modifications.

Modifying a fully developed website to address accessibility issues is much more difficult than coding it for accessibility from the outset. If possible, take advantage of opportunities when you are updating your site or adding significant new functionality, to include as part of the project remedying the most important accessibility barriers. Raising awareness of these issues in your software development team, and in your vendors, is an important step in ensuring that new functionality is designed with accessibility issues in mind.

What Should You Do if You Receive a Complaint? Responding to a complaint from an advocacy group about your website can raise difficult legal and technical issues. Responding the right way after an initial inquiry is key to developing the most advantageous result. We advise clients to develop a strategy to demonstrate a good-faith effort to make their site accessible while taking into account the particular context and features of their website.

Contacts

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Footnotes

[1] *Weyer v. Twentieth Century Fox*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).

[2] *Access Now Inc. v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).