ADA Title III and the Internet: Technology and Civil Rights

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Over the past two years, the issue of Internet accessibility has received national attention. In 1999, the National Federation of the Blind (NFB) filed a class action lawsuit against America Online, Inc. (AOL).1 NFB alleged that AOL's Internet browser and services were inaccessible to the blind and did not comply with the accessibility requirements of Title III of the Americans with Disabilities Act (ADA).2 Specifically, plaintiffs claimed that AOL's online service sign-up form, welcome screens, and chat rooms were not accessible because screen readers could not read text hidden within graphic displays.

In early 2000, the AOL lawsuit and the applicability of the ADA to private internet sites were the subject of congressional hearings.3 Testimony was presented by persons with disabilities, technology specialists, industry executives, and legal analysts. On July 26, 2000, the parties to the AOL litigation announced that they had reached a settlement. AOL agreed to make its Internet browsing software compatible with screen reader assistive technology, which makes AOL software accessible to blind users; to make the existing and future content of AOL services largely accessible to the blind; to publish an Accessibility Policy and post it on its web site; and to pursue other actions to implement accessibility features for blind users.4

NFB and other groups and individuals, working sometimes in concert with government enforcement agencies, continue to examine the accessibility of Internet service providers and web sites.5 In September 2000, President Clinton proposed a comprehensive initiative to "bridge the digital divide" by broadening access to the Internet and promoting online applications that will help all Americans use new computer technologies to their fullest potential.6 This article examines the particular application of Title III's accessibility requirements to private Internet web sites and services.

I. Title III and the Internet

One of the ADA's major goals is to remove architectural and communication barriers. Congress was careful in drafting the ADA's accessibility provisions to balance the needs of people with disabilities and the legitimate concerns of entities covered by the law, such as certain businesses, non-profit organizations, and state and local governments.

Public Accommodations

Title III prohibits discrimination against persons with disabilities in the full and equal enjoyment of public accommodations. A "public accommodation" generally is any private (non-governmental) entity, regardless of size, that offers goods and services to the general public. Title III covers only conduct affecting commerce that is directed at the public. The term "commerce" includes means of communication and trade within and among states, and between a foreign country and any state. Places of public accommodation include sales or rental establishments; service establishments; and places of exhibition or entertainment, public gatherings, recreation, and education. Many private enterprises, such as libraries and museums, are public accommodations even though they transact business without profit as a primary motive.

There are no reported court decisions as to whether Title III covers private web sites or Internet providers as public accommodations. It has been argued, however, that the Internet and private web sites are not public accommodations because they lack a "brick and mortar" facility or outlet.10 However, the First Circuit in Carparts Distribution Center, Inc. v.
Automotive Wholesaler's Association of New England, Inc.,11 ruled that the services of a health insurance provider were covered under Title III. The court reasoned that the term public accommodation is not limited to actual physical structures. By including travel service among the list of services considered public accommodations, Congress clearly contemplated that service establishments include providers of services that do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office. The court stated:

> [O]ne can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities to their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.12

Following the logic of the First Circuit, web-based activities of public accommodations that have an online presence (e.g., certain travel agents, insurance companies, online

catalogues, and retail stores) likely are subject to Title III provisions. This would be true to the extent that equivalent services offered online or in other accessible formats (e.g., Braille) were not available to people with disabilities. For the same reason, exclusively web-based service industries (e.g., e-commerce retail companies) would be considered Title III covered
entities affecting commerce offering goods and services to the public.

Nevertheless, other federal circuit courts have concluded that Title III does not cover the terms of an employer's insurance benefits program, finding that the definition of pubic accommodations only applies to places (e.g., the insurer's offices) and not to their goods and services.13 Thus, the key question to be resolved across the federal circuits will be whether private Internet sites and services are considered places, or goods and services for
purposes of analysis under Title III.

Effective Communication

Discrimination under Title III includes the failure of a covered entity to provide appropriate auxiliary aids or services (e.g., sign-language interpreters, assistive listening devices, Braille, or audiocassettes for individuals with sensory impairments) where necessary to ensure effective communication with individuals with disabilities, unless doing so would fundamentally alter the nature of the goods or services provided or result in an undue burden.14 In a policy ruling letter concerning web site accessibility, the U.S. Department of Justice (DOJ) concluded that, pursuant to Titles II and III, state and local governments and the business sector must provide "effective communication" whenever they convey information, through the Internet or otherwise, regarding their programs, goods, or services. Referring to persons with visual disabilities who use screen readers, DOJ suggests that providing an electronic text, rather than solely a graphical format, helps to ensure accessibility.15

The U.S. Department of Education, Office of Civil Rights (OCR), has defined the term effective communication in the context of Title II as the transfer of information with three basic components: (1) timeliness of delivery; (2) accuracy of the translation; and (3) provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability.16 Although not yet applied to Title III, this interpretation provides a framework for evaluating Internet activities as well. Thus, accessible web design typically reduces or eliminates the need for translation, thereby avoiding the introduction of inaccuracies. In addition, it often enables the "timeliness of

delivery" requirement to be satisfied in cost-effective and technologically efficient ways that do not require Internet service providers covered by Title III to engage in case-by-case
accommodations for individuals needing accessibility.17 Accessible web design also allows the communication to take place in a manner and medium appropriate for all individuals without case-by-case judgments of the significance of the message and the abilities of the individual.

As an alternative to providing full accessibility through the Internet, Title III entities may offer their services in other effective formats. For example, an e-commerce retail company may choose to make its services available through a telephone help-line or offer print catalogues in Braille format. Yet, the help-line-which Title III would require to be staffed in a fashion equal to the services provided to non-disabled customers via their web site (e.g., presumably 24 hours a day)-may be costly relative to general web site access. Likewise, producing an updated print catalogue in Braille may be costly relative to placing it on line and coding it for general access to screen readers and refreshable Braille.18

First Amendment

It is likely that the application of Title III to private Internet sites and services does not violate the First Amendment,19 which guarantees private parties' right to engage in expressive activities without governmental interference. Title III would not require a covered entity to make changes to the subject matter or content of web sites and services, but only to the manner by which information is presented. Its provisions would not restrict editorial discretion over material transmitted or displayed on web sites, nor would it require a site to display or otherwise engage in any speech "that is not their own."20 Lastly, Title III does not specifically target speech or any group of speakers, but applies equally to entities covered by the law.21

Given Title III's undue hardship provision, accommodations may not impose conditions that would stifle speech.22 Consequently, information technology has the potential to transform the limitations of print media by enabling the message to be communicated in multiple modes effectively and in ways that separate style from content in the creation of web pages and information on the Internet.23II. Social and Economic Benefits of Technology and Civil Rights

There is a strong practical and policy-oriented tie between the goals of the ADA and the development and provision of accessible private Internet sites and services. As the policy

and attitudinal shifts fostered by the ADA expand the market for goods that improve accessibility, inventors, employers, and entities affecting commerce are responding to the practical economic consequences of the law's implementation.24 Universal design and
accessibility, for instance, are being championed as fundamental components of e-business plans, so that goods, services, and information are posted and promoted to the widest possible customer base. E-commerce now involves innumerable Internet links to commercial, governmental, and public and private partners, whose web sites increasingly are made accessible to persons with sensory, physical, cognitive, mental, and other impairments.
By creating one platform-not "separate but equal" sites-e-businesses are beginning to cultivate brand and consumer loyalty and reduce the costs of retrofitting sites.

Although accessibility makes technological and business sense, the marketplace has been slower than expected in prompting innovation on its own. Elaborate site "art" (e.g. banners and sales lures) often has been developed at the expense of accessibility.25 In addition, e-businesses and web site developers often lack the skills or incentives to make their sites usable by persons with disabilities.

Catalysts for Accessibility

Despite these problems, the government has helped provide the catalyst for change. Earlier this year, the National Federation of the Blind and the Connecticut Attorney General's office reached an agreement with HDVest, Intuit, H & R Block, and Gilman and Ciocia to provide accessible on-line tax filing services by the 2000 tax season.26 The Internal Revenue Service had listed these companies on its site as partners for e-filing, but users
with screen readers could not file returns on those sites.

In addition, the impending implementation of Section 508 of the Rehabilitation Act27 likely will spur innovation throughout the e-commerce industry. Enacted as part of the Workforce Investment Act of 1998, Section 508 requires that electronic and information technology (EIT), such as federal web sites, telecommunications, software, and information kiosks, be usable by persons with disabilities. Federal agencies may not procure, maintain, or use EIT that is not accessible to persons with disabilities, to the extent that this requirement does not pose an undue burden. However, Section 508 does not require private companies who market technologies to the federal government to

modify the EIT products used by company employees, or to make their Internet sites accessible to people with disabilities.28

As originally written, Section 508 would have taken effect August 7, 2000. The Access Board published proposed standards on March 31, 2000, and comments were received from more than 100 individuals and organizations. However, to date, no final standards have been issued. Industry concerns about having time to study and implement new standards prompted President Clinton to sign an appropriations bill that postponed the effective date
of Section 508.29

Push-Pull of Civil Rights

Other shifts in law and policy may benefit technology innovation and induce market activity for accessible Internet sites, goods, and services.30 We are examining the ways in which the ADA and its civil rights protections function in such a "technology stimulating" manner by motivating entities covered by the law to be accessible or to reasonably accommodate individuals with disabilities.31 Preliminary research suggests that economically and socially beneficial implementation of the ADA is furthered by communicating information in accessible formats to persons with disabilities.32

Moreover, review of economic activity in the assistive technology market illustrates, but does not yet prove, that the ADA fosters technological innovation and economic activity in the private Internet-based service industry in many ways unanticipated at the time that the law was passed.33 The "push-pull" of disability policy is fostering research initiatives of individual and corporate inventors. The regulatory "push" introduced by the ADA and furthered by Section 508 expanded the market for accessible technology to include a range of consumer groups, including persons with disabilities; the elderly; employers; and public, municipal, and governmental entities.

At the same time, financial incentives and investment (the "pull") provide research and development opportunities to private Internet inventors and e-commerce companies.34 One strategy we have investigated recently involves ways to enhance the emerging e-commerce industry by increasing support for programs that encourage small business research, innovation, and entrepreneurship in the private sector.35 These and related programs may prove to be important, in light of studies showing that web accessibility solutions are generally inexpensive and reflect effective web design strategies.36

In addition, competition within the e-commerce market for new consumers with and without disabilities will continue to foster technological innovation and development. According to a 1992 survey, of the 2.5 million persons who had an unmet need for assistive technology (AT), about 1.2 million persons were of working age (25-64).37 Poor people were about twice as likely as non-poor people to say they needed an AT device,38 and non-whites were more likely than whites to have an unmet need for AT.39 Yet, recent studies still show that only 10 percent of people with disabilities use the Internet, as compared to 38 percent of people without disabilities.40 III.

Conclusion

A coordinated program of study is needed to examine the applicability of Title III to private Internet sites and services. Such research may include:

1. Dialogue about emerging technologies, e-commerce, and accessibility (e.g., through endeavors such as The World Wide Web Consortium, Web Accessibility Initiative);41

2. Awareness about persons with disabilities in terms of their capabilities and their value to employers and the American economy; and

3. Evaluation and Implementation of accessible Internet technologies and universal design concepts as applied to persons with and without disabilities, including initiatives in e-commerce, employment, health care, and education.42

Investigation is needed of the benefits and costs of web-based accessibility to large and small private Internet sites, services, and companies. This study might examine emerging markets and their increasing reliance on Internet technologies, such as by financial institutions, travel services, and e-commerce retail services. In addition, study is needed of the relationship among private Internet technologies and services and federal and state disability policies (e.g., the ADA, the Workforce Investment Act of 1998, and the Ticket to Work and Work Incentives Improvement Act of 1999).43 Using varying research methods and models, additional questions should be addressed about the relationships among federal and state policy, access to employment, health care, and services and supports available to the workforce of persons with disabilities.

Finally, dialogue and study are needed on the application of the ADA to private Internet services and sites, not only for people with disabilities, but for all underrepresented individuals in society-the poor and isolated, and the vulnerable. A far-reaching question

remains: Will the Internet help people with disabilities and other underrepresented persons participate equally in society, or, will the Internet further isolate them from the mainstream?

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Notes

1. National Federation of the Blind v. America Online, Inc., No. 99CV12303EFH (D. Mass. filed Nov. 4, 1999).

2. 42 U.S.C. §§12181-12189. See Cynthia D. Waddell, "The National Federation of the Blind Sues AOL," 27 Human Rts. 22-24 (Winter 2000).

3. See Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites, Hearings Before the Subcommittee on the Constitution of the House Judiciary Committee (Feb. 9, 2000). Available at <http://www.house.gov/judiciary/2.htm>.

4. The text of the Agreement can be obtained from the NFB web site at http://204.245.133.32.agreement.htm. The NFB AOL Press Release is available at http://204.245.133.32/nfbaolr.htm. See Todd R. Weiss, "AOL Promises Access for Blind," Computerworld, July 31, 2000, at 8. Available at 2000 WL 2176778, or http://www.pcworld.com.

5. See Judy Heim, "Locking Out the Disabled," PC World, Sept. 1, 2000, at 181. Also available at 2000 WL 9395458, or http://www.pcworld.com.

6. See <http://www.whitehouse.gov/WH/Accomplishments/technology.html.>

7. 42 U.S.C. §12182(a).

8. 42 U.S.C. §12181(1).

9. 42 U.S.C. §12181(7).

10. But see Hearings, supra note 3 (statement of Elizabeth K. Dorminey, lawyer at Wimberly, Lawson, Steckel Nelson & Schneider, P.C., concluding that the Internet and private web sites that affect commerce-e.g., web sites that offer merchandise or services-are not public accommodations because they are not physical places).

11. 37 F.3d 12 (1st Cir. 1994).

12. Id. at 18-19.

13. See Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998); Parker v. Metropolitan Life Insurance Co., 121 F.3d 1006 (6th Cir. 1997) (en banc).

14. 42 U.S.C. §12182(b)(2)(A)(ii); 28 C.F.R. §36.303.

15. Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division, U.S. Dep't Justice, to Tom Harkin, U.S. Senate (Sept. 9, 1996) (on file at 10 Nat'l Disability L. Rep. Para. 240 (1996)). See alsoCynthia D. Waddell, The Growing Digital Divide in Access
for People with Disabilities: Overcoming Barriers to Participation, Remarks at Understanding the Digital Economy Conference, Washington, D.C. (May 25, 1999) (available at http://www.digitaleconomy.gov.).

16. U.S. Dep't of Education, Office of Civil Rights, Letter of Resolution, Docket No. 09-97-2002 (Apr. 7, 1997) (cited in Waddell, supra note 15) (noting that entities covered under both ADA Title II and III must meet the "effective communication" requirement).

17. We thank Cynthia D. Waddell for developing this point. But see Hearings, supra note 3 (statement of Walter Olson, lawyer and author of books on the ADA, discussing "the ADA's application [to the Internet] as a serious threat to the freedom, spontaneity and continued growth of the Web.").

18. "Screen readers" use an artificial voice to read aloud text appearing on the computer monitor. People who are blind or deaf-blind may use "refreshable Braille" computer displays that move pins to form Braille letters, which a user can then read. Screen readers and Braille displays cannot be used with non-accessible web-based formats (e.g., with certain graphic images with descriptive text). People with significant impairments affecting their manual dexterity (e.g., cerebral palsy or quadriplegia) who cannot use a computer mouse also may benefit from accessible formats that allow the user to use other commands (e.g., arrows or tabs) for Internet navigation.

19. See Hearings, supra note 3 (statement of Charles J. Cooper, Counsel at the law firm of Cooper, Carvin & Rosenthal, PLLC). But see statement of Dorminey, supra note 10 (arguing that if all web sites were required to be written only in a text-based form, the freedom of expression of those who wished to present pictures or other non-text information would be impermissibly abridged).

20. Id. (statement of Cooper).

21. Id. (concluding that the mere fact that the cost of compliance with a statute will divert some of an organization's funds away from its speech activities or toward accessibility requirements does not implicate the First Amendment, citing Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Gottfried v. Federal Communications Commission, 655 F.2d 297 n. 54 (D.C. Cir. 1981), rev'd in part on other grounds, Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983)).

22. Id. (finding that heightened scrutiny test under First Amendment is not applicable where Title III applicability does not constitute a direct regulation of speech content, see Frisby v. Schultz, 487 U.S. 474, 481 (1988)).

23. We thank Cynthia D. Waddell for this point.

24. See Hearings, supra note 3 (statement of Cooper, supra note 19) (quoting the supreme Court's description of the Internet in Reno v. American Civil Liberties Union, 521 U.S. 844, 853 (1997), as "comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.").

25. Peter David Blanck, Leonard A. Sandler & David Klein, Corporate Culture, Disability, and Competitive Strategy: A Case Study of a Large Technology Company, Research in Progress at the Law, Health Policy & Disability Center, Iowa City, Iowa (forthcoming 2001).

26. See Connecticut Attorney General's Office Press Release, Attorney General, National Federation of Blind Applaud On-Line Tax Filing Services for Agreeing to Make Sites Blind-Accessible (Apr. 17, 2000).

27. Workforce Investment Act of 1998, Pub. L. 105-220, 112 Stat. 936 (1998).

28. Report from Attorney General Janet Reno to President Clinton, entitled "Information Technology and People With Disabilities: The Current State of Federal Accessibility, Executive Summary & Recommendations" (Apr. 2000) (available at <http://www.usdoj.gov/crt/508/report/content.htm>.

29. Enforcement of the law will not begin until six months after the date of publication of final standards by the Access Board. See Military Construction Appropriations Act for Fiscal Year 2001, amending §2405; §508(f)(1), 29 U.S.C. §794(f)(1) (HR. 4425; P.L. 106-246; July 13, 2000); Congress Amends Section 508 Enforcement Provisions at http://www.access-board.gov/news/508extension.htm.

30. Heidi M. Berven & Peter David Blanck, "The Economics of the Americans with Disabilities Act: Part II-Patents, Innovations and Assistive Technology," 12 Notre Dame J.L. Ethics & Pub. Pol'y 9-120 (1998).

31. Heidi M. Berven & Peter David Blanck, "Assistive Technology Patenting Trends and the Americans with Disabilities Act," 17 Behav. Sci. & L. 47-71 (1999) (discussing the "technology forcing" components of federal environmental laws that helped to create a market for pollution control technology where one had not previously existed). See also Susan Schwochau & Peter David Blanck, "The Economics of the Americans with Disabilities Act: Part III-Does the ADA Disable the Disabled?," 21 Berkeley J. Emp. & Lab. L. 271 (2000).

32. See, e.g., Peter David Blanck, The Americans with Disabilities Act and the Emerging Workforce (American Association on Mental Retardation, 1998); Employment, Disability, and the Americans with Disabilities Act (Peter David Blanck ed., Northwestern Univ. Press 2000).

33. See Berven & Blanck, supra notes 30-31 (discussing this line of research).

34. SeeBerven & Blanck, supra note 31 (examining the relation among corporate culture, technological innovation, and disability).

35. See Peter David Blanck, Leonard A. Sandler, James L. Schmeling & Helen A. Schartz, "The Emerging Workforce of Entrepreneurs with Disabilities: A Preliminary of Iowa's Entrepreneurs with Disabilities Program," 85 Iowa L. Rev. 1569 (2000) (discussing importance of technology to entrepreneurs with disabilities).

36. See Hearings, supra note 3 (statement of Judy Brewer, Director of Web Accessibility Initiative of the World Wide Web Consortium, discussing technological aspects of accessible web design). In addition, a tax credit is available to small businesses to offset expenses incurred in complying with the ADA and may be available for web site accessibility improvements.

37. Mitchell P. LaPlante, Gerry E. Hendershot & Abigail J. Moss, Assistive Technology Devices and Home Accessibility Features: Prevalence, Payment, Needs, and Trends, Advance Data from Vital and Health Statistics No. 217 (National Center for Health Statistics, 1992).

38. Id. 1.9 percent as opposed to 1 percent.

39. Id.

40. See <http://www.dralegal.org/>. See also Disability Watch 2001: The Status of People with Disabilities in the United States, Disability Rights Advocates, Oakland, Cal. (forthcoming 2001) (discussing these and related statistics from national Current Population Survey conducted in December 1998 and March 1999 by the Census Bureau for the Bureau of Labor Statistics); H. Stephen Kaye, "Computer and Internet Use Among
People with Disabilities," Disability Statistics Report No. 13; U.S. Department of Education, National Institute on Disability and Rehabilitation Research (Mar. 2000) (same, findings for persons with work-related disabilities).

41. See Hearings, supra note 3 (statement of Judy Brewer, Director of the Web Accessibility Initiative of the World Wide Web Consortium (W3C), discussing the W3C, Web Accessibility Initiative, and guidelines describing common approaches to Web accessibility).

42. See Hearings, supra note 3 (statement of Dennis C. Hayes, Chairman of the U.S. Internet Industry Association, discussing the Internet "as an evolving media," and stating that "the answer to the problem of accessibility is not regulation, but rather education and participation.").

43. See Peter David Blanck, "Researching the Work Environment: Disability, Employment policy, and the ADA," in The New Paradigm on Disability: Research Issues and Approaches (submitted, K. Seelman ed.) (discussing examples of research). Building the 21st Century Information Technology Work Force: Underrepresented Groups in the Information Technology Workforce (2000), at <http://www.itaa.org/workforce/studies/taks.htm> (examining underrepresented groups in the IT workforce, including persons with disabilities).