

Flattening the (Inaccessible) Cyberworld for People With Disabilities

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NAGGING QUESTIONS

Almost 15 years ago, a White Paper for the Annenberg Washington Program titled "Communications Technology for Everyone" (Blanck, 1994) proposed five vital precepts that are still relevant today:

1. Accessibility must be designed in, not bolted on. Universal design benefits all users, not merely those with disabilities. The government's role has yet to be defined in encouraging (perhaps mandating) universal design and setting standards.
2. Technological accessibility is critical in today's society. The international information infrastructure must not be off limits to people with disabilities.
3. Technology enhances educational and workplace inclusivity through individualized curricula, supported communication, schools and jobs without walls, and other innovations.
4. Accessible technology offers opportunities for health care reform, and telemedicine brings doctors to geographically isolated people; for welfare reform, telecommuting helps reduce chronic unemployment and underemployment among people with severe disabilities.
5. Technological accessibility problems exist not only for people with disabilities but also for all underrepresented individuals in society: the poor, the isolated, and the vulnerable.

Dialogue, research, and law and policy reform are still needed to address and optimize solutions to these challenges (Blanck, Adya, Myhill, Samant, & Chen, 2007). This special policy and law issue of the *Assistive Technology Journal* recog-

nizes profound questions that continue to underlie these five precepts. Thus, among other contributors to this special issue, my colleagues and I (Myhill, Cogburn, Samant, Addom) argue that the movement to develop cyber-enabled knowledge communities may not fully benefit participants with disabilities unless attention is given to legal mandates and universal design principles. In a related vein, Seelman explores existing and emerging technology policy issues and the adequacy of current policy to address them. She proposes a participatory infusion model to generate dialogue about incorporating end-user involvement in engineering and design education, R&D practice, and longer-term policy development.

This closing article revisits the central question posed years ago: whether the inherent design of the Internet's (aka World Wide Web) information infrastructure acts as a barrier or bridge to helping people with disabilities and other underrepresented people move closer to full participation in society. But the world has changed dramatically since the above five precepts were suggested (see National Council on Disability, 2006).

In *The World Is Flat*, Thomas Friedman (2005) suggests that a globalization or flattening of the world has occurred in the past 15 years, due in large part to the deployment and adoption of new mass communications technologies, notably the Internet. The "new age of connectivity," as Friedman calls it, is driven by the World Wide Web, online commerce, and applications such as blogging (p. 59).

Equal access to the Internet by people with disabilities, as the gateway to the new global marketplace, to medical information, education, and to the world of work, has been at issue since the late 1990s. In 1999, the National Federation of the Blind (NFB) sued America Online (AOL), alleging AOL's Internet browser was inaccessible to the

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blind and did not comply with the accessibility requirements of Title III of the Americans With Disabilities Act (ADA; Blanck & Sandler, 2000). In 2000, the AOL lawsuit and the applicability of Title III's provisions to private Internet sites were the subject of congressional hearings, in which it was suggested that the Internet was a "place" of public accommodation appropriately covered by Title III ("Applicability of the Americans With Disabilities Act," 2000). Soon after, the AOL litigation settled, and AOL agreed to make its Internet browsing software compatible with screen reader assistive technology accessible to the blind.

A review of these hearings (Blanck & Sandler, 2000), and subsequent legal and policy challenges, identified the importance of Internet (Web) access for people with disabilities. NFB and other groups and individuals have examined the accessibility of Internet service providers, Web sites, and distance education services (Klein et al., 2003; Myhill, Coghurn, Samant, Addom, & Blanck, 2008 [this issue]; Myhill et al., 2007; Ritchie & Blanck, 2003). But the application of Titles III's access requirements to private Internet Web sites remains unsettled.

Title III prohibits discrimination against persons with disabilities by places of public accommodation, that is, by private entities offering goods and services to the general public. The law covers conduct affecting commerce directed at the public, including communication and trade within and among states and between a foreign country and a state. Places of public accommodation include sales and service establishments and places of entertainment, recreation, and education. However, at the time of the ADA's passage, cyberspace was not yet conceived of as a "place" of public accommodation.

Discrimination under Title III includes the failure of a private entity to ensure effective communication with individuals with disabilities, unless doing so fundamentally alters the nature of the services provided or results in an undue burden (Blanck, Hill, Siegel, & Waterstone, 2003, 2005). As an alternative to providing full accessibility through the Internet, Title III entities often suggest they offer their services in other formats because Web access is not readily achievable; 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 Title III requires the alternative help line to be staffed in a way equal to the services provided to nondisabled customers via their Web site, which may be costly relative to general Web site access. It re-

mains to be determined whether such alternatives are full and equal.

Beyond the shadow of the law, as Friedman and others argue, there are practical reasons for accessible private Internet sites and services. When accessibility is considered a component of a corporate e-business plan, the goods and services become available to millions more people with sensory, physical, cognitive, intellectual, and other impairments in the United States and around the world (Sandler & Blanck, 2005). Moreover, when universal design principles underlie online goods and service provision, they become available to the widest possible customer base with or without disabilities. By creating a universally designed e-commerce platform, not "separate but equal" Web sites as with text-only sites, e-businesses cultivate brand and consumer loyalty and reduce the costs of retrofitting sites.

Although accessibility has been shown to make technological and business sense, the marketplace has been slower than expected in prompting innovation (see Seelman in this issue). Elaborate site art (e.g., banners and sales lures) has been developed at the expense of accessibility. Implementation of Section 508 of the Rehabilitation Act was meant to help spur this innovation throughout the e-commerce industry. Enacted as part of the Workforce Investment Act of 1998, Section 508 requires that electronic and information technology (e.g., federal Web sites and telecommunications) be usable by persons with disabilities. U.S. federal agencies must procure and use technology accessible to persons with disabilities when this does not pose an undue burden. However, Section 508 does not require private companies who market technologies to the federal government to modify their products used by company employees or to make their Internet sites accessible to people with disabilities.

LOOKING FORWARD: ACCESS TO THE CYBER MARKETPLACE—*NFB V. TARGET CORPORATION*

In 2006, NFB and the NFB of California, and on behalf of their members, filed an action against Target Corporation seeking declaratory, injunctive, and monetary relief (*National Federation of the Blind [NFB] v. Target*, 2006).¹ The plaintiffs,

¹ Plaintiffs are represented by Disability Rights Advocates, a Berkeley-based nonprofit law firm; Brown, Goldstein & Levy, a civil rights law firm in Baltimore; and Schneider & Wallace, a civil rights law firm in San Francisco. I subsequently affiliated with plaintiffs as co-counsel pro bono in this litigation.

with more than 50,000 members, represent mostly blind individuals.² Many of NFB's members use screen-reading software to access the Internet.

Plaintiffs claim that target.com, a Web site owned and operated by Target, is not accessible to blind customers and thereby violates federal and California state laws prohibiting discrimination against persons with disabilities (*NFB v. Target*, 2006, 2007). Target operates approximately 1,400 retail stores nationwide and more than 200 stores in California. By visiting target.com, customers may purchase items available in Target stores—refill a prescription, order photos, enter a bridal or baby gift registry, and so forth.

Plaintiffs allege that target.com is not accessible to blind individuals because although designing an accessible Web site is technologically simple and cost-effective, the site does not appropriately use alternative text or navigation links for use by screen reader software.³ Target claims that ADA Title III, and California's disability antidiscrimination laws—the Unruh Civil Rights Act and the Disabled Persons Act (DPA)—cover access only to physical and not cyberspaces (*NFB v. Target*, 2006). In fact, the plaintiffs do not claim they are denied physical access to Target stores.

To date, the courts addressing this issue under ADA Title III conclude there must be a nexus between the challenged lack of service and the place of public accommodation. Target contends that Title III prohibits discrimination only at their places of business or store premises. The court disagreed with this position, concluding that ADA Title III “applies to the services of a place of public accommodation, not services in a place of public accommodation.” (*NFB v. Target*, 2006). In contrast to this decision, in *Access Now v. Southwest Airlines* (2002), the court held that the plaintiff's Title III claim failed because the inaccessibility of southwest.com prevented access to Southwest's virtual ticket counters, but these were not physical places and therefore not places covered as public accommodations under Title III.

The court in the Target case also found that the California state disability antidiscrimination laws do not contain a nexus requirement to the retail

stores. The state law claims are independent of and broader than the plaintiffs' ADA claims and, unlike the ADA, do not tie restrictions on access to places of public accommodation.⁴ Importantly, in language with potentially broad implications, the court concluded the following:

[The court] will now hold explicitly for the purposes of class certification: the Unruh Act and the DPA reach Target.com as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively. No nexus to the physical stores need be shown. (*NFB v. Target*, 2007, at 14).

In the Target case, the central question ultimately to be decided at trial is as follows: Do Target's Web-based merchandising strategies illegally discriminate against the plaintiff class in violation of ADA Title III and California law?⁵ If Target is liable and discrimination is found, the court will assess the damages for the class members. Despite the legal wrangling, however, the court aptly noted, “It is ironic that Target, through its merchandising efforts on the one hand, seeks to reach greater numbers of customers and enlarge its consumer-base, while on the other hand it seeks to escape the requirements of the ADA” (*NFB v. Target*, 2006, n. 4).

TOWARD A FLAT CYBERWORLD

There are at least two next-generation questions of the accessible cyberworld as affecting persons with disabilities:

1. Do the ADA's antidiscrimination provisions cover U.S. businesses as public accommodations operating only in cyberplaces (on the Web) and not with a physical store presence either in the United States or abroad? and,
2. Are foreign businesses—otherwise public accommodations—doing business in the U.S. “cy-

⁴ The Unruh Act regulates “all business establishments of every kind whatsoever.” The DPA addresses “an accommodation, advantage, facility, and privilege of a place of public accommodation” and “other places to which the general public is invited.” (*NFB v. Target*, 2007).

⁵ The plaintiff nationwide class is defined by the court as “all legally blind individuals in the United States who have attempted to access Target.com and as a result have been denied access to the enjoyment of goods and services offered in Target stores” (for ADA-applicable law). The definition for the California subclass is “all legally blind individuals in California who have attempted to access Target.com, for plaintiffs' claims arising under the California Unruh Civil Rights Act and the Disabled Persons Act” (*NFB v. Target*, 2007, at 6).

² The purpose of the NFB is to assist the blind to integrate into society and change social attitudes, stereotypes, and mistaken beliefs about blind persons (*NFB v. Target Corp.*, 2007).

³ The lack of access to target.com is alleged to result in diverted or deterred purchases and in-store barriers such as increased time and expense in shopping due to the inability to review products online in advance (*NFB v. Target*, 2007). Whether Target may reasonably accommodate plaintiffs in regard to the alleged access barriers is an affirmative defense to be proven at trial by Target.

berwaters” and without a physical presence in the United States covered by the ADA?

As evident from the Target ruling, with regard to the first question, the two U.S. lower courts addressing the issue have been reluctant to extend the ADA’s provisions to companies doing business with only virtual Web-based sites, although the issue nationally remains an open question. However, the court’s ruling in regard to California state law likely foreshadows the coming trend that nexus to the physical stores need not be shown when claiming Web-based access discrimination.

Regardless of the economic sense of making Web sites accessible to the widest group of consumers possible, it is likely a matter of time, perhaps less than another 15 years, before Web-based retailers selling their products only over the Internet are considered by courts to be covered by the ADA. This is because of a growing reliance on the Web for access to employment (hiring, training, education) and for goods and services embedded in the emergence of new information technologies (cell phone and wireless text messaging, television, and cable service) required for equal access to society for people with disabilities. The late Justin Dart, the father of the U.S. disability rights movement and the ADA, said civil rights and economics are two sides of the same coin; here, economics may drive Web access toward universal design in ways consistent with the ADA’s inclusion goals.

The second question—whether foreign businesses conducting trade in the United States are required to abide by ADA antidiscrimination law affecting Web accessibility—also ultimately may be overridden by market considerations but may have future legal and policy implications as well. Consider the U.S. Supreme Court decision in *Spector v. Norwegian Cruise Line Ltd.* (2005),⁶ in which the Court held that ADA Title III applies to foreign-flag cruise ships operating in U.S. waters. Although the *Spector* decision is a narrow reading of Title III, lower courts increasingly will address a range of factors to determine how Title III is applicable to foreign corporations doing business in the United States, whether physically present or through the Internet.

Does Title III cover foreign companies conduct-

⁶ In *Spector*, Norwegian Cruise Line, a Bermuda Corporation with a place of business in Florida, operated cruise ships from U.S. ports and provided passengers with cabins, restaurants, and recreation. Although most passengers were U.S. residents, many were not. The tickets specified disputes between passengers and the cruise line were governed by U.S. law (*Spector v. Norwegian Cruise Line Ltd.*, 2005).

ing business in U.S. cyberwaters? In *Spector*, the Court accepted the proposition that the cruise ships were covered by Title III: “This Court has long held that general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake” (*Spector v. Norwegian Cruise Line Ltd.*, 2005, p. 2177). As such, Title III’s access provisions may prohibit foreign e-businesses from discriminatory access practices toward persons with disabilities in U.S. cyberplaces, particularly when not posing an undue burden.

More broadly, is the question of possible inconsistencies between Title III and the Internet access laws of other nations, as well as with international trade agreements? In the era of universal design and design-for-all Web strategies, the practical effect may be moot. Countries such as the United Kingdom consider Web access to be covered under their disability antidiscrimination laws. Part III of the U.K. Disability Discrimination Act of 1995 (DDA) “makes it unlawful for service providers . . . and other persons to discriminate against disabled people in certain circumstances” (Disability Rights Commission, 2002, p. i). The DDA *Code of Practice* offers the following example: “An airline company provides a flight reservation and booking service to the public on its website. This is a provision of a service and is subject to the Act” (Disability Rights Commission § 19.3, at 2.17).

Likewise, the *Advisory Notes* to Australia’s Disability Discrimination Act of 1992 state that equal access to information and online services provided in Australia through the World Wide Web is covered by the DDA (Australian Human Rights & Equal Opportunity Commission, 2002). The United Nations and the European Union (EU) also are focused on e-accessibility as applied to persons with disabilities. Both the 2006 UN Disability Convention and the EU’s eAccessibility initiative (and related antidiscrimination directives) are aimed in part at enhancing access to Web-based information (Reina, Adya, & Blanck, 2006). The U.N. Department of Social and Economic Affairs commissioned a Web accessibility audit, which was performed by Nomensa, a United Kingdom company that specializes in inclusive and accessible Web technology (Nomensa, 2006). The study comprised 20 countries (including the United States, United Kingdom, and Australia) and examined 100 leading Web sites. Of the 100 Web sites, only 3 met minimum standards. Although strides have

been made in accessibility of physical places, cyberplaces lag behind.

CLOSING

The past almost 20 years has witnessed a sea of change in disability law and policy, anchored by the passage of the ADA (Blanck, 2004, 2005a, 2005c; Blanck & Millender, 2000). But today, the impact of the law still is mixed for those with disabilities. The ADA has helped to promote U.S. physical and policy environments and accommodations that enable people with disabilities to be included in society (Schartz, Hendricks, & Blanck, 2006). Yet ADA watchers could not have predicted the resistance by U.S. courts in approaching the rights and antidiscrimination principles at the core of the ADA (Logue & Blanck, 2008), for instance, on the question of whether the World Wide Web is a place of public accommodation. To begin to address these and other issues, ADA supporters have introduced a bill called the ADA Restoration Act.

Whether on cruise ships or surfing the Internet, full participation in the information society has the potential to benefit not only individuals with disabilities but also others: the elderly, children, persons who speak different languages. A broad approach to physical and cyberaccess, design, and technology embodies concepts of universal design and enables individuals across the globe to have full access to the services and programs of public accommodations (Blanck et al., 2003). Increasingly, companies with corporate cultures that understand the relation of universal design and market share growth generate value from accommodations and universally designed technologies to attract business and consumers around the globe (Schur, Kruse, & Blanck, 2005; Schur, Kruse, Blasi, & Blanck, in press). By enacting the ADA, the U.S. Congress anchored the government to the protection of the civil rights of individuals with disabilities. There now are related and fundamental laws and conventions that unite countries in their pursuit of policies to improve the equal status of persons with disabilities (Reina et al., 2006). A flat world understanding of e-access and universal design will help nations better effect disability anti-discrimination legislation and enhance global markets (Blanck, 2005a, 2005b, 2005c; Quinn, 2006).

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