Law360
Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Website-Only Businesses Must Be Aware Of ADA's Title III

Law360, New York (May 05, 2015, 11:45 AM ET) --

David B. Salmons

On April 1, 2015, in a decision of significance to all businesses with an Internet presence, the Ninth Circuit held a website-only business (i.e., unconnected to any physical place open to the public) is not a "place of public accommodation" subject to Title III of the Americans with Disabilities Act. This is the first time a federal appellate court has resolved this important issue. In reaching its decision, the Ninth Circuit relied on its prior cases, and those of the Third and Sixth Circuits, which generally hold that Title III applies only to businesses that operate real physical spaces open to the public.

The First Circuit, several district courts and U.S. Department of Justice in nonbinding statements appear to have a broader interpretation of Title III. While the Ninth Circuit was unambiguous in its ruling, the uncertainty in the law nationally, and the DOJ's apparent position, underscore the need for all businesses with an Internet presence to turn their attention to accessibility issues, whether legally or technologically. It is in businesses' interests to do so now, in order to get ahead of the DOJ's long-anticipated regulations for website accessibility, which likely will be announced in a notice of proposed rule-making this June.

Ninth Circuit's Decision and the Requirement of a "Nexus" to a Physical Place

Attorneys representing plaintiffs with disabilities and advocacy groups have been filing an increasing number of lawsuits under Title III and related state laws against companies big and small whose websites allegedly are difficult to navigate for individuals with hearing, vision and other impairments. An Internet user with a vision impairment, for example, may not comprehend moving text or images on a web page (even with assistive technologies like screen readers), and a user with a hearing impairment may not be able to understand audio components.

The Ninth Circuit recently decided two cases presenting the question whether Title III applies to website-only businesses — Earll v. eBay Inc.[1] and Cullen v. Netflix Inc.[2] In the former, an individual with a hearing impairment sued eBay under Title III, alleging a voice-based verification process on eBay.com prevented her from registering as an eBay seller in violation of the ADA. In the latter, another plaintiff alleged Netflix's online video content was inaccessible to individuals with hearing impairments

without closed-captioning, in violation of a state disability access law predicated on the ADA. After two years of litigation in the eBay case, the Ninth Circuit held eBay.com, a purely web-based marketplace unconnected to any physical place, is not a "place of public accommodation" under Title III. The Ninth Circuit reached a similar conclusion in Netflix on the same day.

The eBay and Netflix decisions build upon prior cases holding that Title III applies only when there is "some connection between the good or service complained of and an actual physical place."[3] Indeed, some district courts have held that Title III applies only to websites with a "nexus" to a physical place, such as a website hosted by a retailer that sells goods and services in a traditional, "brick and mortar" store and online.[4] Under this approach, purely web-based services like eBay and Netflix do not need to comply with the accessibility requirements of Title III.[5]

Efforts to Expand ADA Coverage to Stand-Alone Websites

Notwithstanding the Ninth Circuit's reasoning in eBay, the issue remains uncertain in other jurisdictions, where district courts have decided the question differently. A court in the District of Vermont, for example, recently held that Scribd Inc. — a web-only business that hosts a digital library subscription service — can be sued under Title III for its allegedly inaccessible website. Unlike the Ninth Circuit, the District of Vermont reasoned that Title III's reference to a "place of public accommodation" is ambiguous and that, as "a remedial statute," the ADA ought to reviewed liberally in the plaintiff's favor.[6]

Scribd is not the first stand-alone website to be held subject to Title III. The District of Massachusetts delivered a similar ruling against Netflix in 2012. In that case, the DOJ filed a statement of interest, in which it argued Netflix's web-only video-streaming service was a place of public accommodation subject to Title III.[7] The District of Massachusetts agreed and held that the ADA applies to Netflix's website.[8]

Since filing its statement of interest in that case, the DOJ has maintained its efforts to require companies to make their websites and mobile applications accessible. In November 2014, the DOJ entered into a settlement agreement requiring Peapod LLC to make peapod.com and Peapod's mobile applications compliant with Level AA of the leading industry web-accessibility standards, the Web Content Accessibility Guidelines 2.0.[9] This settlement is significant because Peapod is a purely web-based grocery delivery service, with no nexus to a "brick-and-mortar" place open to the public, yet the DOJ still initiated a "compliance review" that the department claimed was authorized by Title III.[10]

Web Accessibility Law Is Quickly Evolving

In addition to its advocacy in disability access litigation, the DOJ has taken steps toward promulgating specific regulations that would apply Title III to business websites. Consistent with the DOJ's position in the Peapod settlement, some speculate the department's eventual regulations may apply to websites, regardless of their nexus to a physical place open to the public. The DOJ has announced its plan to issue a notice of proposed rule-making on web accessibility in June.[11]

Based on the DOJ's recent consent decrees on websites and in its statements in the advance notice of proposed rule-making, it appears likely the department will endeavor to set regulations consistent with, or similar to WCAG 2.0, Level AA or the standards then-applicable under Section 508 of the Rehabilitation Act, which applies to federal government agencies and certain entities that receive federal funds.[12] The latter were based on WCAG 1.0, an older version of WCAG 2.0. In February 2015, the U.S. Access Board, the federal agency charged with developing accessibility standards under the

Rehabilitation Act (and other statutes) issued a notice of proposed rule-making outlining long-awaited updates to the Section 508 standards that adopt much of WCAG 2.0, Level AA.[13] It bears emphasizing that the standards in the WCAG 2.0 will likely apply not just to websites, but to mobile applications as well.[14]

Notably, documents like the Peapod settlement agreement account for the possibility of the DOJ promulgating other standards. Regardless of the standards, however, what now appears certain is that litigation risks in this area will continue to increase, with private plaintiffs and organizations, as well as the DOJ, testing websites and mobile applications for accessibility weaknesses. Claims under the ADA and state accessibility laws (which allow litigants to seek money damages) have and will continue to follow.

The increased attention web accessibility has garnered from the plaintiffs' bar, disability rights advocacy groups and the DOJ poses significant risks to businesses operating on the Internet. This is so notwithstanding the eBay decision, because other circuits have yet to address Title III's application to websites and at least one, the First Circuit, has adopted an interpretation of Title III at odds with the Ninth Circuit's reading.[15] For these reasons, all businesses with consumer-facing websites and mobile applications would be well-served to begin investigating accessibility issues and compliance efforts now.

—By Anne Marie Estevez, Douglas T. Schwarz, David B. Salmons and Stephanie Schuster, Morgan Lewis & Bockius LLP

DISCLAIMER: David Salmons, Bryan Killian and Stephanie Schuster represented eBay Inc. in Earll v. eBay.

Anne Marie Estevez is a partner in Morgan Lewis & Bockius' Miami office.

Douglas Schwarz is a partner in Morgan Lewis & Bockius' New York office. Schwarz served as commissioner of the Massachusetts Commission Against Discrimination and as an assistant attorney general in the Civil Rights Division of the Massachusetts Office of the Attorney General.

David Salmons is a partner and Stephanie Schuster is an associate in Morgan Lewis & Bockius' Washington, D.C., office. Salmons is co-chairman of the firm's appellate practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] No. 13-15134 (9th Circ. April 1, 2015).

[2] No. 13-15092 (9th Circ. April 1, 2015).

[3] eBay at *1 (quoting Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Circ. 2000)).

[4] See, e.g., Access Now Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

[5] See also Jancik v. Redbox Automated Retail LLC, No. SACV 13-1387 at *9–10 (C.D. Cal. May 14, 2014) (dismissing disability access claims because "there is not a sufficient nexus between the Redbox Instant

videos and the Redbox kiosks”).

[6] Nat’l Fed’n of the Blind v. Scribd Inc., No. 2:14-cv-162 at *7-10 (D. Vt. March 19, 2015).

[7] DOJ Statement of Interest, Nat’l Ass’n of the Deaf v. Netflix Inc., No. 3:11-cv-30168 (D. Mass. May 15, 2012).

[8] Nat’l Ass’n of the Deaf v. Netflix Inc., 869 F. Supp. 2d 196, 201-02 (D. Mass. 2012).

[9] Peapod Settlement Agreement (Nov. 17, 2014), available here. It should be noted that Peapod contested the DOJ’s conclusion that peapod.com and Peapod’s mobile applications were not ADA compliant, and the settlement agreement did not include damages or a civil penalty.

[10] Settlement agreement between U.S. of Am. & Ahold USA Inc. & Peapod LLC (Nov. 17, 2014), available here.

[11] See view rule, Office of Info. and Regulatory Affairs, see here (last visited April 24, 2015).

[12] Advance notice of proposed rule-making, 75 Fed. Reg. 43460 (July 26, 2010), available here.

[13] Notice of proposed rule-making, 80 Fed. Reg. 10880 (Feb. 27, 2015), available here.

[14] Mobile Accessibility, W3.org (Sept. 26, 2013), see here.

[15] See Carparts Distrib. Ctr. Inc. v. Automotive Wholesaler’s Ass’n, 37 F.3d 12, 20 (1st Circ. 1994).

All Content © 2003-2015, Portfolio Media, Inc.