

New Settlements Suggest Online Retailers Should Focus on Web Site Accessibility

By Gonzalo E. Mon

In the last few months, two major retailers — Target and Apple — have entered into settlements with the National Federation of the Blind (“NFB”) over allegations that the retailers’ Web sites violated the Americans with Disabilities Act (“ADA”) because they were not accessible to the blind.

Although the retailers disagreed with the NFB about what the ADA required, they agreed to make changes to improve the accessibility of their sites. By entering into these settlements, Target and Apple joined a growing list of companies that have entered into similar settlements and agreed to make similar changes to their own sites. Although the legal requirements in this area are still unclear, a close look at these settlements and the steps leading to them can teach online retailers a thing or two.

BACKGROUND: ADA AND SCREEN READER TECHNOLOGY

Title III of the ADA makes it unlawful to discriminate against the disabled “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation” 42 U.S.C. §12182(a) (2008). “Discrimination” includes denying the disabled the opportunity to participate in programs or services, and providing the disabled with separate, but unequal, goods and services. *Id.* §12182(b)(1)(A)(i-iii). To ensure that the disabled have full and equal enjoyment of the goods and services of places of public accommodation, the ADA also requires companies to make cer-

tain “reasonable modifications,” including providing auxiliary aids to ensure effective communication, and removing architectural and communications barriers to accessibility. *Id.* §12182(b)(2)(A)(ii-iv).

The blind can navigate the Web with the help of a “screen reader,” a program that can read the text of a Web page and convert it into a format that a blind user can understand, such as audio or Braille. Screen readers can also identify hyperlinks and graphics to help users navigate by using a keyboard instead of a mouse. But for a screen reader to work on a given site, the site must use a code that screen readers can decipher. To ensure accessibility, the NFB has urged Web site designers to comply with the Web Content Accessibility standards set forth by the World Wide Web Consortium (“W3C”). (*See*, <http://w3c.org/wai>.) These standards include:

- Adding invisible “alt-text” to graphics so that screen readers can recognize and vocalize them;
- Ensuring that all functions can be performed on a keyboard;
- Ensuring that image maps are accessible; and
- Adding headings that allow easier navigation.

NFB CHALLENGES TARGET

In Feb. 2006, the NFB filed a lawsuit against Target arguing that the company was in violation of the ADA because its Web site did not provide equal access to blind customers. For example, blind customers could not access the Web site to:

- Purchase products;
- Redeem gift cards;
- Find Target stores; or
- Perform other functions that customers who can see could perform.

Moreover, the NFB argued that the “reasonable modifications” required to make the Web site accessible were technologically simple and not economically prohibitive. Soon after the suit was filed, Target filed

a motion to dismiss, arguing that the ADA did not apply to its Web site. Target argued, in part, that its Web site was not a place of “public accommodation” within the meaning of the ADA and, therefore, that the NFB had failed to state a claim. Specifically, Target argued that the NFB did not allege that “individuals with vision impairments are denied access to one of Target’s brick and mortar stores or the goods they contain.”

In Sept. 2006, a California federal court allowed the case to proceed (*see, National Federation of the Blind v. Target*, 452 F. Supp. 2d 946 (N.D. Cal. 2006)). The court found that the ADA could apply where there was a “nexus” between the use of a Web site and enjoyment of the goods and services offered in a retailer’s physical store. The court reasoned that the ADA “applies to the services of a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain meaning of the statute.” *Id.* at 953. As a result, the court held “that to the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim, and the motion to dismiss is denied.” *Id.* at 956. On Oct. 2, 2007, the court certified a nationwide class of blind individuals that attempted to access Target.com and were denied access to the goods and services offered in Target stores.

Settlement with Target

Last August, Target and the NFB settled the suit. As part of the settlement, Target agreed to make various changes to its Web site to ensure “that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use.” For example, Target must ensure its Web site meets the Target Online Assis-

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tive Technology Guidelines — a detailed series of guidelines developed by Target with input from the NFB — as well as make various changes agreed on during meetings between each party's technical team. When the changes are complete, the NFB will certify that the Web site meets the requirements of the NFB Nonvisual Accessibility Certification program. Moreover, designated personnel from each party must confer twice a year for three years to see whether additional changes are warranted.

In addition to the changes Target must make to its Web site, the company must deposit \$6 million in an interest-bearing account to be paid to members of the California class who submit valid claims. Each claimant will receive \$3,500 or an equal pro-rata share of the damages fund, depending on the number of claimants and the availability of funds. Individuals may make up to two claims based on separate incidents for a total of \$7,000. Target must also pay \$20,000 to a non-profit corporation set up by the original named plaintiff for the purpose of establishing the California Center for the Blind, a rehabilitation and training center for blind people.

Settlement with Apple

As the ink was drying on the Target settlement, the NFB was busy negotiating a settlement agreement with Apple and the Massachusetts Attorney General over similar issues. The NFB argued that various parts of Apple's iTunes services were not fully accessible to blind consumers using screen readers. Again, the NFB argued that the ADA applied to the iTunes services and that Apple was legally required to make various reasonable accommodations to enable blind consumers to more easily use the services.

On Sept. 29, Apple agreed to settle the case. According to the settlement:

Apple, the Attorney General, and the NFB differ as to what applicable law requires in regard to iTunes and the iTunes Services, but whether legally required or not, Apple is committed to making iTunes Fully and Equally Accessible." For purposes of the settlement, the term "Fully and Equally Accessible" means that "blind customers using Screen Access Software may access or acquire the same information, engage in the same interactions, and enjoy the same iTunes products and services Apple offers its sighted customers with substantially equivalent ease of use.

The company must reach various milestones by June 30 and provide monthly re-

ports to the NFB and the Attorney General. Apple must also consult with disabled consumers and accessibility experts quarterly and train personnel to assist blind consumers. In addition, Apple agreed to contribute \$250,000 to the Massachusetts Commission for the Blind to purchase adaptive technology for blind Massachusetts residents.

Settlements with Other Retailers

The language of the ADA and the analysis in the California court's ruling on Target's motion to dismiss suggest that the ADA will apply only in cases where there is a "nexus" between the use of a Web site and enjoyment of the goods and services offered at the retailer's physical store. Accordingly, many companies assume that retailers without bricks-and-mortar stores should not have to comply with the ADA. It is important to note, however, that the NFB and other entities have been successful in pressuring online-only retailers to modify their Web sites to ensure accessibility.

In March 2007, for example, Amazon.com settled a suit with the NFB in which the retailer agreed to make its Web site fully accessible to the blind. As part of the settlement, the parties agreed "to work together to develop and promote technologies that improve [W]eb accessibility for the blind that are commercially reasonable and require minimal additional measures to support non-visual access by customers who utilize screen access software to access Web sites."

When the settlement with Target was announced this year, NFB spokesman Christopher S. Danielsen referred to the Amazon.com settlement and expressed concerns about the progress the company had made. "We are hopeful that we can resolve issues without litigation," he said.

In Aug. 2004, then-New York Attorney General Eliot Spitzer announced settlements with Ramada.com and Priceline.com over the inaccessibility of their sites. According to the press release, Spitzer had argued that the ADA requires that private Web sites be accessible to the blind. Notably, Spitzer did not state that the ADA's requirements apply only when a Web site has a nexus to a physical location; indeed, Priceline.com has no physical stores. As part of the settlements, both companies agreed to implement a range of accessibility standards authored by the W3C. The press release cited the following as examples of changes the companies had to make:

- Graphics and images must have comprehensible labels;
- Tables must have appropriately placed

row and column headers; and

- User input fields must be labeled to indicate which information is requested.

In what was perhaps the NFB's earliest effort to promote accessibility online, the Foundation filed a lawsuit against AOL in 1999 arguing that AOL's proprietary client software and content did not work with screen readers. The NFB claimed that AOL's services constituted a "virtual public accommodation" that was subject to the ADA. The suit was dropped after AOL agreed to make significant changes to its software. Since then, AOL has been at the forefront of ensuring that its services and content are accessible to the blind.

LEARNING FROM THE SETTLEMENTS

Because each of the challenges mentioned above resulted in a settlement, there are no decided cases that definitively explain what types of Web sites have to comply with the ADA, or specifically what Web-site operators must do to comply with the Act. This makes it difficult to draw the legal boundaries with any certainty. What is certain, though, is that the NFB and other entities have a history of successfully getting a variety of companies to enter into settlements in which they agree to make changes to their Web sites (and even pay large sums of money). Given this history, online retailers would be well advised to examine their Web sites to determine whether their sites are accessible to the blind.

If a retailer finds its Web site is not accessible to the blind, then it should take a close look at the W3C guidelines and at the guidelines detailed in recent settlements, such as the settlement with Target (which includes the most specific standards). These materials provide a good road map to ensuring that a Web site will be accessible to blind consumers using screen readers. The more a company can meet these requirements, the less likely it is that the company will find itself the target of a challenge by the NFB or a state attorney general. Of course, each company must assess the costs and risks for itself, but in many cases, it may be less expensive to ensure that a Web site is accessible before getting a complaint.