LJN LAW JOURNAL NEWSLETTERS e-commerce LAW & STRATEGY®

Website Accessibility Rules Are Still on Target

August 2012
By Stanley P. Jaskiewicz

Netflix Ruling Expands Landmark Decision Allowing the Disabled to Shop Online

In 2008, the National Federation for the Blind (NFB) and Target Corporation settled a landmark case requiring that the retailer's website be made accessible to the blind. The settlement occurred after a groundbreaking 2006 ruling that California's state disability rights laws applied to the website because of its close link to Target's real-world stores that were already clearly covered by those laws (*see*, "Targeting new e-Commerce Customers," in the Dec. 2006 edition of *e-Commerce Law & Strategy*, at http://bit.ly/MsteA2).

A New Vision

However, a recent federal court ruling, *National Association of the Deaf v. Netflix, Inc.*, No. 11-CV-30168 (U.S.D.C. MA June 19, 2012) (http://bit.ly/LmeKFa) reached the same result, despite the absence of a Target-like bricks-and-mortar store nexus. Instead, the National Association for the Deaf (NAD) pursued the accessibility under the Americans with Disabilities Act (ADA) of a "website only" firm with no real-world presence — Netflix (for a news account of the ruling, *see*, "Judge: Disabilities Act Applies Online Too," *Disability Scoop*, http://bit.ly/MoCUx4).

The summary of the ruling from a disabilities-rights website simply captures the breadth of the ruling, far beyond *Target*'s narrow holding and link to real-world stores. It states:

> In a major victory for the [NAD], the nation's premier civil rights organization for deaf and hard of hearing individuals, the District Court of Massachusetts held that the ADA applies to website-only businesses. In *National Association of the Deaf, et al. v. Netflix*, Judge Ponsor denied Netflix's motion for judgment on the pleadings and is allowing this disability civil rights case to move forward. The underlying lawsuit alleges that Netflix violates the ADA by failing to provide closed captioning on most of its "Watch Instantly" programming streamed on the Internet, thereby denying equal access to the deaf and hard of hearing community.

(www.dredf.org.)

And the summary by one of the firms that represented the NAD in the *Netflix* case simply but breathtakingly captures the sweep of the ruling:

> Netflix's Watch Instantly website is a place of public accommodation subject to the requirements of the Americans with Disabilities Act.

(www.lewisfeinberg.com/news.html.)

Consider just the highlights mentioned in these brief texts:

- The ruling applies to "website only" businesses, severing the link to real-world stores underlying the *Target* decision that had made it (legally, at least) much less controversial. In other words, firms that exist only online must comply with rules created for the tangible, "pre-www" world.

- The court made a factual finding, that a website is a place of "public accommodation," which allows websites to be treated the same way as the many places where our society now routinely expects accommodation of the disabled, from department stores to sports arenas to courthouses.
- By reaching this result in a case brought under the ADA, the landmark 1990 civil rights law that recognized the rights of the disabled, all of that law's procedural rights — allowing recovery of legal fees, for example — can now be applied in cases against website operators that do not "reasonably accommodate" the disabled.

One well-known online commentator immediately warned website operators of the practical financial implications for their legal expense budgets. "(I)f this ruling sticks, there may be buckets of money to be made in ADA litigation against Internet companies" (*see*, "Will the Floodgates Open Up for Americans with Disabilities Act (ADA) Claims Against Websites?," *Technology & Marketing Law Blog*, http://bit.ly/Or9D7O).

So how did Judge Ponsor create such judicial havoc — in the eyes of some website operators — or strike such a strong blow for the rights of the disabled to participate in what has become a critical part of life today, in the eyes of the ruling's supporters?

The Court's Reasoning

In *Netflix*, the court considered how that firm's "Watch Instantly" streaming video fit into the listing of 12 "places of public accommodation" in the ADA. Without much discussion — surprising in light of prior cases that had refused to reach this result (for examples, *see*, "Nondiscrimination on the Basis of Disability," Advance Notice of Proposed Rulemaking, 28 CFR Parts 35 and 36, Section III(B)(ii), http://1.usa.gov/f2lNad) — the court analogized the streaming video site to several of the ADA's listed physical locations: a "place of exhibition and entertainment," a "place of recreation," a "sales or rental establishment" and a "service establishment." The court ruled that Netflix' streaming video business instead "is analogous to a brick and mortar store or other venue that provides similar services, such as a video store."

The court relied on a 1994 federal appellate decision, *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc*, 37 F.3d 12, 19 (1st Cir. 1994). The court in that case had ruled that "places of public accommodation are not limited to actual physical structures," because "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. Congress could not have intended such an absurd result." *Id.*

Moreover, the *Netflix* court specifically rejected Netflix' defense that because Congress did not list streaming video in the ADA statute's 12-part definition of a "place of public accommodation" — written before the mid-1990s' explosion in popular use of online services — it could not be considered such a place. The court responded:

> (T)he fact that the ADA does not include web-based services as a specific example of a public accommodation is irrelevant. First, while such web-based services did not exist when the ADA was passed in 1990 and, thus, could not have been explicitly included in the Act, *the legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology.* ... Second, and more importantly, Congress did not intend to limit the ADA to the specific examples listed in each category of public accommodations. *Plaintiffs must show only that the web site falls within a general category listed under the ADA.*

(*Netflix*, at 8.) (Emphasis added.)

Referring to the ADA's legislative history (*see*, *e.g.*, S. Rep. No. 116, at 59 (1990)), the court read its coverage more broadly — and provided rules for applying the ADA to new technologies in the future:

> [W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation ...; H.R. Rep. No. 485 (III), at 54 (1990); A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category.

(*Netflix*, at 9.)

'Redefining' Public Accommodation

Turning the concept of "public accommodation" on its head, the *Netflix* court next transformed *any* home or apartment with an Internet connection into such a regulated location:

> The ADA covers the services "of" a public accommodation, not services "at" or "in" a public accommodation. This distinction is crucial. (Citing the *Carparts* decision), the statute 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 language of the statute. Consequently, while the home is not itself a place of public accommodation, entities that provide services in the home may qualify as places of public accommodation. ... Under the *Carparts* decision, the Watch Instantly web site is a place of public accommodation and Defendant may not discriminate in the provision of the services of that public accommodation — streaming video — *even if those services are accessed exclusively in the home.*

(*Netflix*, at 11.) (Emphasis added.)

As a result of Judge Ponsor's reasoning, the *Netflix* opinion provides a roadmap to applying disabilities-discrimination laws to new technologies. Using a very traditional tool of legal reasoning, taught in the first year of every law school in America, the court generalized and analogized from the exact statutory language, to find a way to expand the law's explicit coverage to services that did not even exist at the time the ADA was written.

Imagining About What May Come

As new technologies develop, therefore, anyone involved in a dispute about them (not just advocates for the disabled under civil rights laws) can argue by analogy to existing laws desired to be applied to the new technology. For example, to use a relatively recently introduced technology, persons litigating issues related to Twitter might argue from precedent applied to such "old" methods of communication as telegraph, phone service or instant messaging.

But even before the *Netflix* decision, cases concerning online accessibility had flourished in the years since the original *Target* decision. Today, those developments are just as relevant to e-commerce firms (if less publicized than the *Netflix* decision). For example, another case against Netflix relies solely on the California discrimination laws used in Target, as well as more traditional false-advertising claims (*see*, www.doncullen.net/?p=713 and www.doncullen.net/?p=699).

More broadly, I have been pleased to see that a prediction I made in my 2006 article on the original *Target* ruling has been proven correct, through the advocacy efforts of civil rights lawyers. At that time, I wrote:

> Rather than focus on what is required, and how to get around legal requirements, consider instead the potential benefits of accessible e-commerce website design. After all, no one needs the benefits of e-commerce more than those who cannot shop in a traditional manner, whether due to physical or mental limitations. If online and bricks-and-mortar firms see that making websites more accessible can improve business, by attracting customers they might never have had otherwise, the issues presented by the case will fade away — firms will make websites accessible because it is good business, not just because of a legal requirement.

("Targeting New e-Commerce Customers," *e-Commerce Law & Strategy*, Dec. 2006, at http://bit.ly/MsteA2.)

Negotiation, Not Litigation

As a continuing example of this approach, the Law Office of Lainey Feingold (http://lflegal.com) has negotiated a series of settlement agreements concerning website accessibility for the blind. Ms. Feingold relies on "the collaborative advocacy and dispute resolution method known as Structured Negotiations," "a collaborative and solution-driven advocacy and dispute resolution method conducted without litigation."

According to the description on her website: "Structured Negotiations begin with a letter describing the accessibility problem and explaining the legal reasons why accessibility is required, the importance of accessibility to the disability community and potential solutions to the identified issue. If the entity to which the letter is sent is willing to engage in the process, a 'Structured Negotiations Agreement' is signed to protect the interests of all parties during the negotiations." (http://lflegal.com/faqs/#structured-negotiations.)

As simple and as common-sense as this approach sounds, it has achieved impressive results, validating my prediction that

businesses (for profit and non-profit alike) would see that making websites accessible was in their own best interests.

In fact, the 2012 Addendum to the Major League Baseball settlement showed how to extend the ADA coverage mandate described in the *Netflix* opinion to a new technology. That addendum added mobile devices, such as the iPad and iPhone, to an earlier 2010 access agreement. A similar expansion of such accessibility rules to new technologies has occurred in the series of cases involving educational institutions, and e-readers described below.

Other Victories

But others besides Ms. Feingold have achieved similar settlements. For example, Amazon.com and the NFB agreed on accessibility goals as early as 2007 (*see*, http://bit.ly/MIAPYT). (The website of the International Center for Disability Resources (www.icdri.org) also has links to news and settlements with many diverse businesses.) Expedia Inc., operator of Expedia.com and Hotels.com, reached its own settlement in 2009 (*see*, http://bit.ly/MIBl9f). Similar settlements have been made with Newegg (*see*, http://bit.ly/OXTJwx) and Charles Schwab (*see*, http://bit.ly/IXKFrD).

Even Disney settled a case against it over accessibility. The full agreement is online at http://bit.ly/OGkIvj, including a separate section describing many aspects of website changes to improve accessibility.

Many Venues

The Ivory Tower

The challenges of new technologies have also arisen in cases involving colleges, as e-readers (used in lieu of expensive textbooks) and online course-management software have replaced the traditional paper course catalog and registrar's forms. In a recent case, Penn State University reached a settlement with the NFB over the online course-management system, library catalog and other technologies on campus. The university said: "Penn State has agreed to continue implementing a strategy to make all electronic and information technology systems used on its campuses fully accessible to blind students, faculty, and staff. The information technology systems covered include course management systems, [websites], classroom technology, library resources, banking services, and more."

Similar settlements have been reached at other schools, as the challenges of shrinking budgets and accelerating book prices have made e-readers omnipresent (*i.e.*, Case Western Reserve University in Cleveland, Pace University in New York City, and Reed College in Portland, OR, (*see*, http://cnet.co/7SBJI0); Arizona State (*see*, http://bit.ly/LrQVGr); and Florida State (*see*, http://nfb.org/node/931).)

Google and the Government Lacking

Even the "don't be evil" culture of Google has been challenged with claims against the lack of accessibility for Google Apps (*see*, "Colleges Discriminate Against the Blind with Google Apps, Advocates Say," *The Chronicle of Higher Education*, http://bit.ly/fnXZfd).

Governmental entities, too, have been targeted for failing to make websites accessible. Indeed, given the amount of critical information now available only online due to budget cuts, and simply the fact that governmental benefits and services can often be provided more efficiently online, an inaccessible website could block citizens from obtaining government benefits and, possibly, exercising their rights. It is not surprising, then, that disabilities-rights organizations have brought — and settled — similar claims against government units. (A survey, with links to accessibility standards for government units, may be found at http://bit.ly/mBJ6Wc. Even the Small Business Administration has been accused of having an inaccessible website (*see*, http://bit.ly/25yctE).

The Department of Justice makes available an "ADA Best Practices Tool Kit for State and Local Governments" on website accessibility under Title II of the ADA (www.ada.gov/pcatoolkit/toolkitmain.htm), which eloquently makes the case for why government websites *must* be accessible — in terms that apply equally well to all e-commerce sites; replace "your e-commerce business" with "government" in the following quote from the Toolkit:

> The Internet has dramatically changed the way state and local governments do business. Today, government agencies routinely make much more information about their programs, activities, and services available to the public by posting it on their websites. As a result, many people can easily access this information seven days a week, 24 hours a day.

> Many government services and activities are also provided on websites because the public is able to participate in them at any time of day and without the assistance of government personnel. Many government websites offer a low-cost, quick and convenient way of filing tax returns, paying bills, renewing licenses, signing up for programs, applying for permits or funding, submitting job applications and performing a wide variety of other activities. ...
>
> An agency with an inaccessible website may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line. These alternatives, however, are unlikely to provide an equal degree of access in terms of hours of operation and the range of options and programs available.

For example, the Department of Justice's settlement with The City of Port St. Lucie, FL, includes detailed rules concerning St. Lucie's website, and how the city provides services to the disabled through that website. (*See*, www.ada.gov/websites2.htm.) Similarly, guidelines for government testing of website accessibility are available from the Department of Commerce at http://1.usa.gov/Ni07D6. Also see a site collecting information on ADA compliance by governmental entities (www.ada.gov/websites2.htm), and a three-part series from Disability.gov on "best practices" in accessible website design (http://bit.ly/HBvbJV). A resource on standards under a different anti-discrimination law, Section 508 of the Rehabilitation Act, began publication this year (*see*, http://section508.gov).

e-Commerce 'Buys' Accessibility

Clearly, in the years since the original *Target* decision opened the Web to the disabled, the e-commerce community has embraced the concept of accessibility as evidenced by the sheer number of settlements (and the many more examples of voluntary changes to make sites accessible), and by the scope of the changes. The highly detailed website redesign work required by the settlements discussed above is more than mere lip service to the cause of the disabled. As a result, I seriously doubt whether any attorney today would make as snarky a comment as that reportedly made by Netflix' counsel just months ago, in the *Cullen* case mentioned above:

> What happens when an online merchant, with no obligation to do so, voluntarily changes its product content to address customer suggestions? A lawsuit—for not making the changes fast enough.

"Updates on the Netflix Cases," *Deaf Politics*, http://bit.ly/rrampN.

Fine-tuning Regulations

Instead, perhaps the greatest sign of how website accessibility has gone "mainstream" was the issuance of the advance notice of proposed rulemaking mentioned above by the Department of Justice in July 2010 (*see*, "The Department of Justice's Consideration of Regulations Requiring Entities Covered by the ADA To Make Their Websites Accessible to Individuals with Disabilities," http://1.usa.gov/f2lNad). That document requested comments on rules to codify what so many firms have found to be in their best interest, making websites, generally, accessible to the disabled.

As the notice stated, businesses, governments and the regulated community alike need the certainty of "a clear requirement that provides the disability community consistent access to websites and ... clear guidance on what is required under the ADA and what is not." In other words, a clear rule would apply to all rather than the practice since *Target* of dragging firms that apparently do not see the benefit to themselves of a fully accessible website, online on a lawsuit-by-lawsuit basis, into the world where the disabled have full access to the resources available online.

The same notice also discussed access to state and local governmental websites, for which "there is no doubt" about coverage by the ADA. *Id.*

While that ANPRM is too long to quote extensively in this article, it is important to note the limited goals of the proposal:

> It is the Department's intention to regulate only governmental entities and public accommodations covered by the ADA that provide goods, services, programs, or activities to the public via websites on the Internet. Although some litigants have asserted that "the Internet" itself should be considered a place of public accommodation, the Department does not address this issue here. The Department believes that title III reaches the websites of entities that provide goods or services that fall within the 12 categories of "public accommodations," as defined by the statute and regulations. Because the Department is focused on the goods and services of public accommodations that operate exclusively or through some type of presence on the Web — whether hosting their own website or participating in a

host's website — the Department wishes to make clear the limited scope of its regulations.

Best to Be Prepared

While the scope of the proposed regulation would make clear what has, to now, taken many lawsuits to establish, that is, the right of the disabled to use websites of many firms that provide goods or services online, the Department of Justice is not claiming — yet, at least — that the Internet itself is no different than a public park or a road. (The full text of the notice is well worth reading, for an analysis of the legal basis for mandating accessible websites, and for its discussion of the technical solutions that make such a mandate possible.)

Nonetheless, e-commerce designers and owners must note the progression that this notice represents. Beginning with a case, *Target*, that had to show a strained link to a bricks-and-mortar store to establish a right of access, many more businesses, even those that exist only online, will clearly be required to make their websites accessible. As a practical matter, therefore, Web designers must take such planning into account in building websites, and think about other types of disabilities they may have to accommodate during the expected lifespan of their site — intellectual disabilities, for example, or various types of physical disabilities.

Therefore, the fact that the Department of Justice has delayed action on its proposal until December 2013, at least, should not change how e-commerce Web designers build their sites today, to include compliant accessibility features, to accommodate the changes that inevitably will occur in the future, as plaintiffs follow the path laid out by the *Netflix* court for adjusting the law to changes in technology.

Oh, Yes, and ...

Let me close with an ADA critic's commentary on the question of we-bsite accessibility that ironically proves why it is needed. In decrying a recent ADA accessibility settlement involving Charles Schwab, blog author Jim Butler, an attorney, commented (disapprovingly) that the same attorneys had "persuaded the nation's leading banks to install 'talking ATMs,'" with the result that: "Today, nearly every ATM in the country provides voice activated communications elements to assist blind and low vision bank customers to navigate the machines" (*see*, http://bit.ly/LZTK4r).

Yet, what more could disability advocates ask for than just the ability to use a convenience we have all come to rely on? The universal acceptance of the talking ATM is simply a realization of the promise of the Americans with Disabilities Act. Universal Web access for the disabled, regardless of one's particular disability, should be no different than what we as a society have come to expect from something as complex as an ATM.

Stanley P. Jaskiewicz, a business lawyer, helps clients solve e-commerce, corporate, contract and technology-law problems, and is a member of *e-Commerce Law & Strategy*'s Board of Editors. Reach him at the Philadelphia law firm of Spector Gadon & Rosen P.C., at sjaskiewicz@lawsgr.com, or 215-241-8866.