Now that just about all business entities and institutions, public and private alike, rely increasingly on their virtual presence to conduct their affairs and reach customers, the question of where an entity conducts business gets complicated and important. Most owners and administrators understand that their brick-and-mortar locations must be handicap-accessible pursuant to the American with Disabilities Act (ADA). But in a world that operates as much online as it does on the ground, what does that mean for websites?

Many decision-makers are unaware that their websites are under increasing scrutiny for compliance with the ADA—scrutiny that could land them in court. From Harvard to Netflix, litigation over website accessibility is on the rise. Retailers, universities, hospitals, financial institutions, municipalities, and service providers that do not want to get caught in this wave of lawsuits need to move toward compliance now.

COMPLIANCE WITHOUT CLEAR GUIDANCE?

The extent to which the ADA applies to websites is unclear. Nonetheless, the lack of clarity has not stopped plaintiffs from issuing demand letters and filing lawsuits alleging that websites and mobile applications do not comply with the ADA.

Advocates argue that not being able to see words or images or to hear audio on websites significantly disadvantages disabled individuals. This is made worse if a disability decreases the ability to leave the home, because the internet may be that person’s only connection to the outside world. Without web accessibility, a person may not be able to access their medical records, educational resources, government services, or shop for goods.

Supporters of web accessibility argue that the ADA’s promise of providing equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life can only be achieved if it is clear to state and local governments, businesses, and educators that websites must be accessible.

The U.S. Department of Justice, the entity charged with enforcing the ADA, has dragged its feet on enacting guidelines for websites to be ADA compliant. Nonetheless, the DOJ continues to enforce the ADA if websites do not include features that allow hearing-impaired or visually impaired individuals access to content. For example, websites must be compatible with screen-reading technology or include closed captions or audio descriptions of visual content. Courts are not hesitating to chart new paths to punish non-compliance, given the lack of clarity or regulations provided by the federal government. This creates a legal minefield for companies and organizations attempting to ensure that their websites are compliant under the ADA.

Under the current landscape, Web Content Accessibility Guidelines (WCAG) 2.0 Level AA is the de facto standard applicable to public entities, including state and local governments and agencies under Title II of the ADA. WCAG 2.0 AA is also the de facto standard for private businesses under Title III. As technology continues to advance, however, mere compliance with WCAG 2.0 AA is insufficient without further guidance from the DOJ. In 2010, the DOJ announced that in early 2016 it would publish rules to address website accessibility. But in November 2015, it stated it would table the long-awaited Title III proposed rules until at least 2018. The DOJ was expected to release new Title II guidance early this year, but instead withdrew its proposed rule...
making and issued a Supplemental Advance Notice of Proposed Rulemaking on April 28.

**COURTS STEP IN**

In spite of the DOJ’s delays, courts have not shied away from deciding cases and setting new precendents, thus shaping and foreshadowing the future of website accessibility standards. Historically, private businesses typically relied on two primary defenses when faced with ADA website accessibility actions: (1) seeking a stays until the DOJ provides rules and regulations governing website accessibility and (2) arguing that the ADA does not apply to commercial websites based on a theory that their sites were not places of “public accommodation,” since the ADA traditionally applied only to brick-and-mortar stores. Recent court rulings and recommendations, though, have made it very unlikely that either defense will be successful going forward.

In February 2016, a Massachusetts federal magistrate issued a report and recommendation denying two universities’ requests for a stay until the DOJ issued proposed rules on website accessibility. The National Association of the Deaf brought suit on behalf of a class of deaf and hard-of-hearing individuals against Harvard University and MIT, alleging that the universities failed to provide closed captioning for thousands of videos on their websites. U.S. Magistrate Judge Robertson recommended denial of both universities’ requests for a stay, stating that the suit may proceed forward while the DOJ continues to develop its proposed rules, especially given that the proposed rules are just that – proposed – and therefore of little aid to the court. See *National Association of the Deaf, et al. v. Harvard University, et al.*, Case No.: 3:15-cv-0412-MGD, United States District Court, District of Massachusetts [Dkt. 50 and 51].

For a website to be subject to the ADA, a threshold requirement is that the website be considered a place of “public accommodation.” Title III states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by an person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. §12182. The statute defines “public accommodation” to include a list of 12 categories of establishments, all of which are traditionally brick-and-mortar.

So far, the circuits have been split as to whether Title III should apply to websites. In March 2015, the District Court in Vermont held that the site of the sale is irrelevant when faced with an action brought by the National Federation of the Blind against Scribd, Inc., a digital library offering subscriptions on its website and applications for e-readers. Rather, the only defense matters is whether the good or service is offered to the public. While no circuit court has addressed directly whether exclusively internet-based companies are subject to Title III of the ADA, we anticipate that the law will shift in this direction. The DOJ has even hinted to such a shift in this paradigm noting that “the Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of “public accommodations,” as defined by the statute and regulations.” 75 Fed. Reg. 43460-01 (July 6, 2010). In addition, in a hearing before the House Subcommittee on applicability of the ADA to private internet sites, it was the “opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services.” *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites; Hearing before the House Subcommittee on the Constitution on the Judiciary, 106th Cong., 2d Sess. 65-010 (2000).

State courts have followed suit in extending the reach of Title III to online retailers. In March 2016, Edward Davis, a blind man, sued Colorado Bag ‘n Baggage, claiming that he was unable to shop online at the retailer’s site because it failed to provide accessible features, such as screen-reading software. In a landmark decision in California, Judge Foster in San Bernardino Superior Court granted Davis’s motion for summary judgment, finding that he had presented sufficient evidence that he was denied full and equal enjoyment of the goods, services, privileges, and accommodations offered on the defendant’s website.

In April, Netflix entered into a benchmark settlement agreement to provide audio description for many popular titles that it streams. The technology provides visually impaired users with an audio description of what is happening in scenes without dialogue or in scenes with significant visual elements. Given that the DOJ has failed to implement a national standard for website accessibility, courts are forced to address the issue on a case-by-case basis. It is unlikely going forward that courts will be receptive to arguments that online retailers are exempt entirely from Title III ADA compliance.

**PROACTIVE STEPS**

Organizations with an online presence can take practical steps now, such as:

- Educate individuals responsible for creating and maintaining website;
- Determine to what extent the organization’s current website complies with WCAG 2.0 Level AA as we anticipate that the law will move in the direction of the proposed rule;
- As new websites and features are created and content is added, consider incorporating technical specifications to make them more accessible; and
- Conduct an audit with the help of experienced legal and technical counsel.

On April 22, the ADA posted on its website a new Technical Assistance section. While it provides links to the proposed rulemaking, guidance, and enforcement actions, clear guidance on private sector compliance remains unchanged. Therefore, assessment and proactive improvement of your company’s website accessibility is necessary to help avoid ADA enforcement and copyright private lawsuits in the future.