

MEALEY'S® LITIGATION REPORT

Cyber Tech & E-Commerce

Top Ten Digital Accessibility Legal Stories Of 2019

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**A commentary article
reprinted from the
January 2020 issue of
Mealeys Litigation Report:
Cyber Tech & E-Commerce**



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Commentary

Top Ten Digital Accessibility Legal Stories Of 2019

By
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Although final numbers are still unknown, 2019 continued the upward trend of recent years by surpassing the number of digital accessibility lawsuits in 2018 by about 7 percent.¹ What is the reason behind this continuing increase?

As technology and artificial intelligence become more embedded in the world around us, the need for inclusion in such technologies becomes more apparent. The Americans with Disabilities Act (ADA) was enacted long before the concern of web accessibility, in fact, 2020 marks the 30th anniversary of the law's signing. Although the ADA has requirements for public accommodations that enable people with visual, hearing, mobility, cognitive, and other disabilities to obtain access to services, it has been unclear to certain parties whether these legal requirements also pertain to the digital space. With the abundance of services provided online almost every part of daily life involves technology, therefore, providing equal access to online services remains a major concern.²

Courts have struggled with how to handle cases on website accessibility. Although guidelines do exist for companies to follow in regard to making their websites, apps, and all other online presence accessible,³ there are no federal mandates or guidance from the Department of Justice outlining clear cut accessibility rules. Local governments, universities, art galleries, restaurants, wineries, and grocery stores were among the industries hit hardest with litigation in 2019. Without a clear blueprint or uniform guidelines on how to abide by ADA regulations in a digital environment, companies and consumers will continue to encounter barriers. From small local businesses to large multinational corporations, no company, government entity, or educational institution is immune from digital accessibility litigation.

However, ADA litigation is always evolving and does not exclusively pertain to the digital space. As new technologies come forth, new problems with inclusion arise. Sometimes older analog technology becomes a target of ADA litigation, as was the case this year pertaining to gift cards. Although gift cards have been around for decades, challenges they pose for users with disabilities have failed to be recognized or addressed. While not directly related to online or digital accessibility, this shows the growing prominence of legal activity and its impact on the evolution of disability rights. A review of legal activity in 2019 encompasses businesses from big to small, marketplaces both online and physical, as well as corporations, universities and government entities. Whether driven by compliance, risk mitigation or broadening market reach and customer engagement, these legal cases making headlines in 2019 reinforce the importance for organizations to consider their digital accessibility strategy and obligations to the disabled community.

Supreme Court Weighs In on Domino's Denied Petition in First Digital Accessibility Lawsuit

In a lawsuit initiated in 2016, plaintiff Guillermo Robles claimed the website and app for Domino's Pizza were inaccessible to blind users trying to access the site via screen reading software. Over the course of the past three years, the case has made it through various courts before landing in the Ninth Circuit Court in California in early 2019.

Viewed as a significant victory for disability activists the Ninth Circuit Court ruled in favor of Robles claiming "the ADA applied to Domino's website and app because the Act mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind. Even though customers primarily accessed the website and app away from Domino's physical restaurants, the panel stated that the ADA applies to the services *of* a public accommodation, not services *in* a place of public accommodation. The panel stated that the website and app connected customers to the goods and services of Domino's physical restaurants. Regarding Domino's claim that they had not received enough information on how to make their web content accessible, the court stated that the panel held that the statute was not impermissibly vague, and Domino's had received fair notice that its website and app must comply with the ADA. Furthermore, the plaintiff did not seek to impose liability on Domino's for failure to comply with the Web Content Accessibility Guidelines 2.0, private industry standards for website accessibility. Rather, an order requiring compliance with WCAG 2.0 was a possible equitable remedy. Finally, the lack of specific regulations, not yet promulgated by the Department of Justice, did not eliminate Domino's statutory duty."⁴

With the outcome of this case having an impact on so many industries, the Retail Litigation Center and the National Retail Federation asked the Supreme Court to rule on the case back in July with no response. Domino's filed a petition for the case to be heard by the Supreme Court, with the hopes of gaining some clarity and possibly overturning the ruling of the Ninth Circuit. However, this plan did not come to fruition. On October 7th, the Supreme Court finally weighed in for the first time on digital accessibility by denying the request for the case to be heard. This left the ruling handed out by the Ninth Circuit in place, remanding

the case to proceed to trial in district court. In what has arguably become the biggest accessibility news story of 2019, a lawsuit that has dominated the accessibility news space for three years seemingly is coming to an end, with a final decision in the trial expected in 2020, unless both parties reach a settlement in the meantime. While the SCOTUS action stops short of defining a legal standard, leaving that to the Department of Justice or Congress, the decision reinforces the direction courts have been taking that ADA Title III does apply when examining website accessibility.

Website Accessibility Lawsuits on The Rise: Wineries, Art Galleries, and Restaurants Hit Hard

The number of website accessibility lawsuits has risen steadily over the past several years. In 2018 we saw an astonishing 2258 cases which was a huge increase over the 814 filed in 2017.⁵ Although final numbers are not in quite yet, early predictions show 2019 topping 2018 and setting the record for most website accessibility lawsuits in a year.¹ What is causing this exponential rise of ADA litigation? Although the simple answer is many companies fail to recognize their responsibility to make their content accessible, the topic is much more nuanced than that. As each year goes by, serial litigators are constantly changing target industries and each time seemingly catching them off guard. In 2018 credit unions throughout the US were targeted with litigation, leading to the Department of Justice issuing a statement⁶ in an attempt to address the issue. However, this did not prevent serial litigators from finding new targets in 2019.

In 2018 the state of New York accounted for 70 percent of all website accessibility lawsuits filed throughout the United States of America.⁵ This trend continued in 2019. Toward the end of 2018 and into early 2019 two new targets within the tourism and hospitality industry emerged: wineries and art galleries. Within the first two months of 2019 over 40 wineries had been hit with ADA litigation over their websites. Shortly following wineries were art gallery websites, of which over 75 were served with lawsuits within the first quarter. In both segments, the vast majority of lawsuits were filed in the state of New York.

Newest Frontier in ADA Litigation: Are Companies Required to Provide Gift Cards Printed In Braille?

In what appears to be a new frontier of ADA litigation, an eruption of Title III lawsuits regarding a lack of

Braille being printed on gift cards has come to light. Within the first few weeks of October 2019, lawsuits began to surface. Over 130 class action suits were filed in New York alone claiming ADA violations. Along the lines of other ADA cases, these gift card cases claim the plaintiffs are being denied equal access to public accommodation and services. In this situation, visually impaired individuals are being denied the ability to utilize gift cards, which therefore further limits access to purchase products and services. It is very unclear whether any of these cases will hold up, or what exactly the plaintiffs wish to accomplish. With the sheer abundance of suits filed within the last few months of 2019 this story is shaping up to be one to watch throughout 2020.⁷

Kroger Gives Hope to Other Companies by Avoiding Litigation Through Remediation

In June of 2019, a judge in the state of New York dismissed a lawsuit filed against the supermarket chain Kroger. The Judge dismissed the case under a mootness defense, a first for website accessibility litigation. The mootness ruling was in part due to the grocery store chain not operating in the state of New York therefore the court lacked personal jurisdiction over the case. However, Kroger's defense was that their website was up to WCAG 2.0, a set of standards that at the time of the lawsuit were slightly outdated but still the only standards available. In 2018 WCAG 2.1 was released, setting new standards for digital accessibility. However, Kroger was not bound to adhere to WCAG 2.1 rather by WCAG 2.0 which they were. Additionally, Kroger updated its entire website to be completely accessible and committed to maintaining its accessibility practices. This came as big news for any other retailers looking to fight an ADA case.⁸

Lawsuit Claims LSAT Discriminates Against Visually Impaired

In October of 2019 the Law School Admission Council (LSAC), the organization which administers the LSAT, settled a case that was eight years in the making. In 2011, Angelo Binno filed a case against LSAC claiming the LSAT was not inclusive of test-takers with visual impairments. In the lawsuit, the plaintiff claimed that the logic games section of the exam, which often requires test-takers to draw diagrams to answer questions, was impeding his ability to pass the exam. The test already had accommodations in place for blind test-takers such as screen readers, braille exam forms, and braille figures

and graphics. However, after settling the case LSAC has stated its goal is to improve exam accessibility to enable more test-takers to be fairly judged on their knowledge. After news of the settlement broke Kellye Testy, CEO of LSAC, stated "LSAC is committed to ensuring that disabled individuals can take our exam in an accessible place and manner, that the LSAT is fair for all test-takers, and that we support everyone interested in pursuing law school." They plan to achieve this goal by removing the logic games section entirely and finding other ways to test for analytical reasoning skills.⁹

Harvard Captioning Lawsuit Comes to A Close

In the fall of 2019, Harvard settled a case filed back in 2015 that alleged they had failed to provide closed captioning to free course material supplied online. The claim came about in a round of lawsuits attacking higher education institutions over their free materials. Other universities that received lawsuits were the Massachusetts Institute of Technology and the University of California Berkley. All of whom provide a large library of free educational materials to the public. In the case of UC Berkley, the school decided to reconcile their problem by pulling all materials from their website claiming they did not have the resources to make the content accessible. Harvard initially requested to have the case dismissed in 2016 which was denied. In 2018 the university filed a motion for judgment stating that their website was not a "place of public accommodation." This motion was denied in early 2019.¹⁰ Harvard later released a statement on their accessibility policy in April 2019¹¹ but did not settle the case until November. In their settlement, Harvard paid more than \$1.5 million, in addition to committing to keep their content accessible. The school committed to making all content posted from December 1, 2019 onward completely accessible. If any user would like to access older inaccessible content, after a request is filed Harvard will have 5 days to make the content accessible to the user.

Local Governments Within the State of Florida Become Major Target for Website Litigation

The state of Florida has been second only to New York in website litigation numbers in recent years.^{1&5} Not surprising then, is the fact that these lawsuits turned towards the local and municipal governments within Florida. Many towns and cities within the state have been served with lawsuits due to a lack of accessibility of documents which is a violation of Section 508 and

various state requirements. These documents can be anything from scanned copies of old paper documents which have been uploaded to the sites without any captioning, to modern day PDF forms that have not been properly made. The problem with small governmental bodies is they do not have the money to bring these cases to court to defend themselves and therefore almost all cases have been settled before going to court or certain documents were removed from the websites. In addition to the cost of settlements, the cost of website remediation and future staff training used to maintain web accessibility has become a major concern for many towns and municipalities.

2020 Presidential Campaigns Struggle with Website Accessibility

The release of a mid-year report by the Miami Lighthouse for the Blind and Visually Impaired showed that prospective executive policymakers faced their own set of challenges in terms of website accessibility. Upon finding none of the major presidential campaigns had accessible websites, the organization issued a challenge to campaigns to become fully ADA compliant.¹² By year's end, only four campaigns had what the group considered "mostly accessible" websites including Vice President Joe Biden, Senator Cory Booker, Andrew Yang and Former HUD Secretary Julian Castro, who recently exited the race.¹³ The website for late campaign entrant and former New York City Mayor Michael Bloomberg also contains an accessibility statement,¹⁴ however, since its release was after the review period for the Miami Lighthouse's last update, a ranking was not included.

Canada Acts Quickly by Passing "Accessible Canada Act" One Year After Bill Is Proposed

In June of 2018, the Canadian federal government tabled the first national accessibility legislation "Bill C-81" which would help create a "barrier-free Canada". Bill C-81, also known as the "Accessible Canada Act," was touted to be the first national legislation on accessibility. Although, provincial legislation already existed such, as the Accessibility for Ontarians with Disabilities Act (AODA), which was implemented in 2005. Similarly, the national bill aimed to create standards and regulations regarding accessibility for people with disabilities across the public and private sectors, including digital accessibility standards. This allows the government to seek out areas that need improved accessibility and adjust regulations based on the needs of the time.

The ability to make adjustments should prove especially beneficial to the ever-changing digital landscape.

Merely one year after the bill was tabled in parliament, it was passed into law. Bill C-81 seeks to improve accessibility in the workplace, physical environment, as well as the digital space.¹⁵ However, many disability rights activists have raised concerns that the act lacks the integrity needed to make a difference. Claiming that the language in the act is vague, the bill repeatedly uses words like "may" and "shall," offering no strength in the requirements. In contrast to provincial accessibility legislation like the AODA, there are no official deadlines as to when these changes need to take place, and without deadlines, there is no real clarity on when the policies would be implemented. Despite these concerns, the general attitude remains that the bill is a step in the right direction for people with disabilities and for Canada as a whole.

California Consumer Privacy Act Has Strict Accessibility Regulations: Will This Help Guide The Way For Future Accessibility Legislation?

The California Consumer Privacy Act (CCPA) is the first legislation to give United States citizens autonomy over their own data. The act which functions on the state level requires that any company intending to collect and sell user information must disclose their intentions. The company must provide accurate details on what information is being collected and sold and for what purpose as well as disclosing the intended buyer of the information. In addition to telling users if the data collected is intended to be monetized, they must offer a straightforward option to opt out of the collection and sale of information and must comply with users' requests to delete collected data. The companies can offer incentives to customers who do choose to share data however, they will be penalized for overcharging customers who refuse.¹⁶

A key takeaway of the CCPA is that the accessibility requirements placed on privacy policies will be strictly enforced. A fine of up to \$7,500 per penalty will be enforced on any company failing to make notices available to all users including users with disabilities. This combined with the ruling handed down by the Ninth Circuit Court in California this year, companies will have to abide by WCAG 2.0 standards to provide access via a screen reader, keyboard navigability, and straightforward easy to understand language. This is an

important win for disability rights activists who have been waiting for some form of legislative accessibility requirement and may prove as a catalyst for other governmental mandates on digital accessibility.¹⁷

Conclusion

Technology has become an inevitable part of everyday life for all of us, regardless of ability. As society advances it is important to keep inclusion and accessibility at the forefront of our technological advances, thereby improving the lives of everyone and not leaving anyone behind. Through the help of litigation, legislation, and education, great strides have been made in 2019 regarding disability rights and accessibility improvements. We can only hope to see this trend continue through 2020 and the coming decade.

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MEALEY'S LITIGATION REPORT: CYBER TECH & E-COMMERCE

edited by Mark C. Rogers

The Report is produced monthly by



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ISSN 1535-718X