

Accessibility-Related Factors in Current Litigation

By Hiram Kuykendall

This article reprinted from the April 2016 issue of Mealey's™ Litigation Report: Cyber Tech & E-Commerce. Mealey's is a subscription-based information provider and a division of Lexis Nexis.

The Internet has become a significant access point for government and private companies to offer goods, services, and access to vital information. As this reliance on web-based services has increased, so have actions against companies that provide websites and web applications that are either not usable by, or have significantly diminished utility for, people with disabilities. The majority of actions against organizations with web presences have been filed on behalf of people who meet the legal definition of blind with some notable actions on behalf of the Deaf community.¹

Many cases involving website accessibility for the visually impaired have been settled before being fully adjudicated. Many consider the seminal lawsuit on the topic to be *National Federation of the Blind v. Target Corp.*² This lawsuit was removed from the California Superior Court to the Federal District Court, certified as a class, and withstood Target's motions to dismiss. The dismissal attempt was based, in part, on the argument that the Americans with Disabilities Act (ADA) of 1990 was intended to apply exclusively to physical accommodations. The matter was settled by the parties agreeing on changes to the website, Target Policies, and the payment by Target of the plaintiffs' court-determined litigation costs and fees, as well as providing a \$6-million-dollar fund for California plaintiffs.

Since the 2009 settlement, a number of similar actions have been brought against retailers and other businesses claiming violations of the ADA as well as other federal and state laws regarding vision-related disabilities. In addition to actions brought by advocacy organizations a number of demands have been made by individual plaintiffs and putative classes. Many of these have resulted in negotiated settlements.

In a recent California State Court case, *Davis v. BMI/BND Travelware*,³ a California Superior Court granted the blind plaintiff's motion for a summary judgment finding that the defendant, which operates Colorado Bag'n Baggage, violated the ADA and the California Unruh Civil Rights Act. The judgment ordered statutory damages for violation of the Unruh Act in the amount of \$4,000 plus legal fees. In addition, the plaintiff was granted injunctive relief ordering the defendant to either take the steps necessary to make the website readily accessible by visually impaired individuals or terminate the website. As of this writing, the website is listed as "under construction and coming soon." This is, to our knowledge, the first case in the country to definitively rule that a retailer was in violation of the ADA for maintaining a website that was not accessible for the visually impaired.

Many businesses were waiting for the U.S. Department of Justice (DOJ) to issue specific regulations with regard to the applicability and requirements for website accessibility under Title III, and thought that the lack of clear guidelines might constitute a defense against website access for visually impaired plaintiffs. Thus far, courts have not been receptive to that argument. The DOJ has indicated that while it first proposed that

it would provide rules addressing the applicability of the ADA to businesses under Title III in 2010, it has repeatedly delayed the release of these rules, and now has suggested that it will publish the rules in fiscal 2018.

Which brings us to the question of, “What is the goal and what is the standard in providing website accessibility for the visually impaired?”

While issues related to the other non-vision related categories of accessibility (hearing, mobility, and cognitive) are intrinsically important, accessibility for the vision impaired is clearly an area of regulatory and legal focus. A few of the actionable challenges presented are:

- **Is the content perceivable?** — A website or web application must be coded in a manner that facilitates rendering by assistive technologies (AT) such as screen readers. As the name implies, a screen reader reads content on the desktop, tablet, or mobile device and provides additional functionality to assist with tasks such as navigation. A simple example of a perception failure is omitting the text descriptions of content-rich graphics. Members of the blind community rely upon developers to make all aspects of a website or application perceivable by AT. Failure to do so creates an inaccessible experience.
- **Is the site operable?** — Complex web components such as shopping carts, video players, information carousels, and forms are frequently unusable by people who rely upon AT. The issues vary from a screen reader’s inability to submit the contents of a shopping cart to more subtle failures such as the user being unaware of dynamic changes to a form. The end result is that non-visual users are unable to operate the site without the assistance of a sighted user and a mouse. While other disability categories can be equally inaccessible, operable issues related to vision tend to be solid accessibility failures.

Once an accessibility challenge has been made against a website or web application, the next logical questions are:

- By what standard is accessibility judged?
- How is accessibility compliance determined?
- What are the barriers to compliance?

By what standard is accessibility judged?

To understand how web-based product is evaluated for accessibility, it’s important to know that there are both legal and technical standards. They are:

1. Laws
 - a. Section 508 of the Rehabilitation Act of 1973, as amended in 1990 (29 U.S.C. § 794 (d))
 - b. State Laws

These are being applied to litigation based on accessibility. We will go into more depth in each area in a future article.

2. Technical Standards
 - a. **Section 508 of the Rehabilitation Act.** Section 508 is a law, but it also serves as a federal purchasing standard and a technical standard. Any private company selling to federal, state, or local government or selling to a private entity that has accepted federal funds must create web-based products that are compliant with Section 508.
-

- b. **Web Content Accessibility Guidelines (WCAG) 2.0⁴ – Word Wide Web Consortium (W3C).** While there are other standards, the WCAG is the most frequently cited standard. It provides three levels of compliance principles.
- i. **Level A** – contains the most basic accessibility principles. Level A failures are unquestionable accessibility failure.
 - ii. **Level AA** – is more restrictive and is widely believed to be the minimum level of accessibility to comply with the various laws.
 - iii. **Level AAA** – is a highly specialized set of principles used for applications and devices beyond a website or web application. As such, it is generally not cited as a target compliance level for websites and web applications.

It is important to understand that WCAG is a set of principles for creating accessible experiences, not a how-to cookbook for accessibility. The WCAG does contain non-binding examples of how to create an accessible web experience. It is also noteworthy that there are other accessibility standards produced by the W3C, but they are not generally cited for websites and web application guidance.

How is accessibility compliance determined?

Web products can be tested for accessibility through automated and manual methods.

1. **Automated tools.** There are many automated tools that will review a web presence for syntactical accuracy. They work by reviewing the code and searching for profiles that indicate missing accessibility structures and/or known coding methods that produce inaccessible experiences. Using automated tools is not a failsafe method for three main reasons.
 - The presence of failures does not necessarily mean the website is inaccessible. Failures can range from annoyance to hard failures.
 - The errors will vary from tool to tool. Each automated checking tool strives to catch all errors, but the quality of each tool varies.
 - Automated testing tools are generally believed to only pick up 30% of accessibility failures. It is very possible to have a site that passes the automated tests yet is completely unusable by AT.
2. **Manual testing.** The only way to truly know if the web product is accessible is to have a knowledgeable company or individual test the site manually. Virtually no web products are free from an automated test failure in some form. As discussed, that does not mean the site is not perceivable and usable by a person using an AT. For AT users, the bottom line is whether they can independently access, perceive, and operate the site without the aid of a sighted user and in the same manner and timeframe as a sighted user.

What are the barriers to compliance?

There are many challenges to bringing a web product into compliance. This is especially true for those organizations that did not take accessibility requirements into account during product development. The following are a few of the key reasons companies cannot easily remediate their technology once development has been completed.

1. **Lack of training.** The staff who created the original code is unlikely to have training in creating accessible web presences. Good technical training is difficult to find and expensive.
 2. **Volume of work.** Once the organization is aware of the changes required, it may take days, months, or years to execute them, depending on the scope of work.
-

3. **Limited availability of accessibility consultants.** There are many good accessibility consulting firms, but their services are expensive and can be difficult to schedule due to the high market demand. In addition, many consulting firms can provide reports on what is wrong, but they do not have teams that can perform the recommended actions. This is because there are many languages, frameworks, and technologies involved, and having expertise in all these areas may not be a part of the firm's core focus.
4. **Variation of technologies.** While the WCAG represents principles for web accessibility, each development language has its own constructs designed for accessibility. For example, the HyperText Markup Language (HTML) has specific patterns and coding practices to facilitate accessibility. In addition, the W3C has created supplementary techniques such as Web Accessibility Initiative – Accessible Rich Internet Applications (WAI-ARIA)⁵ that fill in gaps in the HTML standard and can ensure very accessible experiences. In fact, there are very few accepted languages that do not have the means to create an accessible experience, but as stated above, not all developers are skilled in creating accessible experiences using these methods.

The problem of website accessibility for the visually impaired is becoming a real legal challenge, not just for the giants of industry, but for common businesses and services. And the targets are not limited to those that have been traditionally viewed as “public accommodations.” It is not uncommon for a demand letter from a law firm to be little more than a demand for relief with suggested settlement terms based on an automated check of the site. The problem is not going away, and taking action prior to receiving the lawsuit or demand letter is the most effective way to mitigate legal risk. It also has the decided advantage of avoiding or minimizing reputation risks for clients.

Hiram Kuykendall is chief technology officer for Microassist, an Austin, Texas-based learning, development, and accessibility consulting firm. He has more than 20 years of experience in custom application development and over 10 years of accessibility remediation for custom application development, eLearning, and instructor-led training. In addition, Hiram advocates through public speaking and volunteer work specifically focused on the technical aspects of web accessibility. Hiram can be reached at accessibility@microassist.com.

For 28 years Microassist has partnered with organizations to better educate their employees, constituents, and clients through the use of traditional classroom training, innovative elearning, mission-critical applications, and ever-changing technology, emphasizing online usability and accessibility. Please visit www.microassist.com.

*Any commentary or opinions do not reflect the opinions of Microassist or LexisNexis, Mealey's.
Copyright © 2016 Hiram Kuykendall. Responses welcome.*

Endnotes

¹ For example, National Association of the Deaf v. Netflix, C.A. NO. 11-CV-20168-MAP, United States District Court for the District of Massachusetts.

² National Federation of the Blind v. Target Corporation, 452 F. Supp. 2d 946 (2006)

³ Davis v. BMi/BND Travelware, CIVDS1504682 Minute Orders

⁴ WCAG – <https://www.w3.org/TR/WCAG20/>

⁵ WAI-ARIA – <https://www.w3.org/WAI/intro/aria>

