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APPLICABILITY OF THE ADA TO PRIVATE WEB SITES

The applicability of the Americans with Disabilities Act ("ADA") to private, non-governmental web sites is an open question. Here are relevant citations and resources for your consideration.

The ADA. The ADA contains three titles: Title I (employment), Title II (governmental entities), and Title III (public accommodations). Of these, the only one that could apply to use of private, non-governmental web sites by disabled individuals is Title III.

Title III of the ADA prohibits discrimination by "public accommodations":

> No 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 any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (emphasis added).

"Public accommodations" are defined in the statute itself and in Department of Justice regulations as "places," "establishments," and "facilities," with "facilities" in turn defined as "buildings" or "structures." Appellate courts considering this language have split on whether Title III is properly limited to physical places (such as restaurants, doctor's offices, or golf courses) or applies more broadly.

Two of the four federal appellate courts that have undertaken to interpret "public accommodation" in the context of insurance policies have limited it to physical places.

The Sixth Circuit has spoken unequivocally: "The clear connotation . . . is that a public accommodation is a physical place." Parker v. Metropolitan Life Insurance Co., 121 F.3d 1006, 1014 (6th Cir. 1997) (en banc), cert. denied, 522 U.S. 1084 (1998). The Third Circuit agrees. See Ford v. Schering-Plough Corp., 145 F.3d 601, 612 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place.").

The First and Seventh Circuits have taken a more expansive view of the statutory language, refusing to rule that Title III cannot be applied to insurance policies and holding that the term "public accommodations" might include entities other than physical structures. See Carparts Dist. Center, Inc. v. Automotive Wholesalers Assn. of New England, Inc., 37 F.3d 12 (1st Cir. 1994). Although the reasoning in Carparts was expressly disavowed in the later Third and Sixth Circuit opinions, it has been followed by some district courts.

The Seventh Circuit expressly followed the First Circuit's Carparts decision and interpreted "public accommodation" as follows:

> The core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, *Web site*, or other facility (*whether in physical space or in electronic space*, Carparts []) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.

Doe v. Mutual of Omaha Insurance Co., 179 F.3d 557, 559 (1999) (J. Posner) (emphasis added).

The Seventh Circuit also stated that: "[S]ection 302 does not require a seller to alter his product to make it equally valuable to the disabled and the nondisabled." *Id.* at 563; *see also id.* at 564 ("[S]ection 302 does not regulate the content of the products or services sold in places of public accommodation . . .")

Courts have taken a restrictive view of what constitutes a "public accommodation" in areas such as television broadcasts and newspapers. For example, in Stoutenborough, the Sixth Circuit determined that television broadcasts could not be considered "public accommodations" within the meaning of the ADA. Stoutenborough, 59 F.3d at 582. Similarly, the United States District Court for the District of Columbia has held that newspaper columns are not public accommodations. See Treanor v. Washington Post Co., 826 F. Supp. 568 (D.D.C. 1993).

National Federation of the Blind v. America Online Services. Earlier this year, the National Federation for the Blind ("NFB") filed a complaint against AOL in a federal court in Massachusetts alleging that AOL's service violated the ADA. The complaint simply asserts that the "AOL service is a public accommodation . . . in that it is a place of exhibition and entertainment, a place of public gathering, a sales and rental establishment, a service establishment, a place of public display, a place of education, and a place of recreation." Although this assertion parallels the statutory definition of a public accommodation, it begs the question as to whether a web site constitutes a "place" within the meaning of the ADA.

In its complaint, NFB alleged that AOL violated various provisions of the ADA by its

1. failure to redesign its service to permit the blind to use it through screen access programs;
2. failure to remove existing communications barriers;
3. failure to take steps to ensure access via auxiliary aids and services or to provide auxiliary aids and services; and
4. failure to make reasonable modifications to policies, practices and procedures necessary to afford access.

NFB and AOL have settled this lawsuit on undisclosed terms.

An Open Question. The ADA has not been directly applied to private web sites (although it does apply to government sites). There are no judicial opinions, bills introduced in Congress, or government agency regulations directly on point. At a hearing in February 2000 before a congressional hearing on "The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites," several witnesses stated that the ADA does (or should) apply to private internet sites. The public accommodation doctrine most likely will be tested in the courts.

Resources. The World Wide Web Consortium has coordinated the Web Access Initiative through which accessibility guidelines and standards are being developed. Visit www.w3c.org for further information.

The WAI accessibility standards will likely be considered by the federal government as it assesses federal agency web sites for their compliance with the ADA. *See* Proposed Rule, Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 17345, 17355 (Mar. 31, 2000) (to be codified at 36 C.F.R. Pt. 1194) (noting that the proposed standards for web sites "include provisions which are based generally on priority level one checkpoints of the Web Content Accessibility Guidelines 1.0, as well as other agency documents on web accessibility and additional recommendations of the advisory committee").

For those who are interested, the Bobby tool at www.cast.org assesses web sites for compliance with ADA standards. Stay tuned for further developments in the courts.

MONTHLY UPDATE

COPA Commission Report. On October 20, a Congressional commission appointed to consider technologies and methods that might be used to prevent access by minors to "harmful to minors" material on the World Wide Web issued its report to Congress. See www.copacommission.org. The Commission did not recommend any legislation, and urged that additional resources be devoted to parental education and enforcement of existing obscenity laws.

Mandatory filtering. Attached to the Labor-Health and Human Services-Education spending bill is a measure that would require libraries and schools which receive federal funding to block child pornography and obscene material from being accessed on computers used by children.

Gambling. Legislation banning Internet gambling (H.R. 3125) is still stalled, but supporters have not given up. The bill's primary sponsor, Rep. Bob Goodlatte (R-VA), has been working to include this legislation in a must-pass spending bill to be enacted before the Congress adjourns for the year. The proposal currently provides exceptions to the ban for closed-circuit gambling networks for dog and horse races and jai alai in states where they are currently legal.

Mergers. A possible provision in the Commerce-Justice-State appropriations bill (HR 4690) is a measure that would amend the 1976 Hart-Scott-Rodino Act dealing with high-value mergers. The proposal would raise from $15 million to $50 million the threshold that requires the Federal Trade Commission and Department of Justice to review such mergers. The National Venture Capital Association strongly supports the provision.

Workforce Development: H1-B.
The President signed legislation (S. 2045 Sen. Hatch, R-UT) to increase the cap on the number of work visas, known as H1-B visas, to 195,000 through FY2003. The new law will enable high-tech companies and others to hire additional non-U.S. citizens.

Privacy: Legislation. The House of Representatives failed to pass a bill (H.R. 4049) to establish a Commission on the Comprehensive Study of Privacy Protection. In the closing days of the Congress, Rep. Gene Green (D-TX) filed legislation that would require Web site operators to post notice on their information collection practices, permit consumers to opt out, and forbid site operators from correlating personal data with Internet protocol addresses. The proposal requires the Federal Trade Commission to prescribe regulations implementing the legislation.

Privacy: Safe Harbor. As of November 1, 2000, U.S. companies will be able to certify under the Safe Harbor agreement reached between U.S. and European Union negotiators. (See April 2000 ECommerce News; see www.export.gov/safeharbor for relevant background materials).

Spam. Legislation (H.R. 3113, S. 2542) that would prohibit sending unsolicited commercial e-mail is dead for the year. The legislation would have empowered recipients and Internet Service Providers to sue bulk e-mailers under certain conditions.