COMPETITIVE ENTERPRISE INSTITUTE

Tech Briefing 2001

A Free-Market Guide to Navigating Tech Issues in the 107th Congress

Internet Access for the Disabled

by
JESSICA P. MELUGIN

INTERNET ACCESS FOR THE DISABLED

Introduction. Some advocates believe increased use of graphics, video clips, color-contrasted links, and pages that require high levels of motor control exclude the disabled from utilizing the Internet. These groups want to improve access by expanding to private sites rules already imposed on federal web pages.

This proposed expansion should be rejected. The costs of applying these rules to privately owned and operated websites would stifle the Internet. Ironically, it would harm disabled Americans by inhibiting the market-driven development of technologies that benefit them. The market, not regulations, should react to users' special needs in cyberspace.

Practicalities aside, rules requiring private websites to communicate with everyone in the world if they want to communicate with anyone, regardless of cost, would be an egregious violation of the First Amendment to the United States Constitution.

Background. Two recent developments raise the issue of regulating private websites to make them more accessible for the disabled. First, the National Federation of the Blind (NFB) filed a lawsuit against America Online (AOL) that alleged the ISP leader was violating the Americans with Disabilities Act. Passed in 1990, ADA is a complex statute designed to make public accommodations accessible to disabled Americans.[1] The NFB claimed that text-reading software enabling blind users to access information on websites is not compatible with AOL's site. The case was settled in July 2000. AOL agreed to make the next version of its software compatible with screen-reader technology. No ruling confirming or denying the applicability of ADA to the Internet was made in the case, and no other court has ruled on this matter. Nevertheless, in a September 9, 1996, communication, Assistant Attorney General Deval L. Patrick wrote, "Covered entities [under ADA] that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well."[2]

Second, in 1998 the federal government undertook to ensure the "electronic and information technology developed, procured, maintained, or used by the Federal government be accessible to people with disabilities."[3] In December 2000, the US Access Board published standards to require agencies to provide technology that is fully usable by employees and citizens with disabilities. Agencies have until June 21, 2001, to comply. The standards dictate that, among other things, agency websites provide a text alternative to any video components, animated media, and all tables and charts. They also limit the frequency with which pages may flicker (flickering text may induce seizures in persons with photosensitive epilepsy), set standards for levels of color contrast, and mandate that when a timed response is required, users be able to indicate more time is needed.[4] The Access Board explains the rules this way: "In general, an information technology system is accessible to people with disabilities if it can be used in a variety of ways that do not depend on a single sense of ability."[5]

Requirements. The practical results of the parameters laid out in the government provisions are that streaming audio or audio files must be accompanied by simultaneous text; that streaming video be captioned; that the use of color to convey information be restricted in some ways; and that webmasters provide at least one mode that does not require user vision formatting all information so that it is compatible with Braille and speech synthesis devices. A second mode of conveying information would have to accompany everything posted to the Web. The provisions may mean a ban on touch screens, moving text, or animation (unless the user can go to a static display with the same information), and require all websites to provide at least one mode that minimizes the cognitive and memory skills required of the user.[6]

Any requirements imposed on private sites could well mirror these federal guidelines, and the field of disabilities law is so expansive and open-ended that a number of arguments could be used to support including the private world. For example, websites might be classified as public accommodations. Or the government might impose on its contractors the requirements it imposes on itself; this would sweep in almost every large business in the nation.

Effect on the disabled. Proponents of regulation argue there are 54 million Americans with disabilities in danger of missing out on the Internet

revolution. But this suggests that the market will have plenty of incentives (54 million of them, to be exact) to cater to those with special needs. The unregulated marketplace has already produced new technologies and countless opportunities on-line for people with disabilities.[7] For example, "Internet access for the blind has become possible due to the availability of screen access software," and this technology was not developed to comply with regulations, but rather came about in the marketplace.[8]

But if sites are regulated now, the incentives to create and distribute new technologies may be reduced. Federal law will "lock in" a minimum accessibility standard that may soon be well below what new technologies or innovations are capable of providing for disabled users. Who knows what software engineers and programmers will invent to aid disabled users? We will never find out, if the market incentives for them to create are taken away. Better to let market incentives bring everyone along (although maybe not everyone at the same time), than to stifle progress across the board.

Absent any regulatory obligations, many web page creators are being motivated to make their sites more accessible by various private organizations. For example, the World Wide Web Consortium (W3C) publishes technical guidelines for accessibility for content developers, authors of pages and sites, and developers of authoring tools. There are various other groups reaching out to the technology community in the interests of accessibility.[9]

The practical realities of the trade-off for accessibility. The possible benefits of enforcing ADA on privately owned websites are much touted, but what about the costs? In testimony to Congress, Walter Olson, editor of www.overlawyered.com and Manhattan Institute senior fellow, said "it would be hard to find a better way to curb the explosive upsurge of this new publishing and commercial medium than to menace private actors with liability if they publish pages that fail to live up to some expert body's idea of accessibility in site design."[10] Mr. Olson offers a picture of what would happen if "every technically literate American woke up tomorrow determined to publish on the Web in compliance with expert accessibility guidelines, or not at all." His predictions include:

- Hundreds of millions of websites would be torn down. Some of these would eventually be put back up after being made compliant. Countless others would never resurface.

- The posting of new pages, by the tens of millions, would screech to a near halt. A relative few, mostly larger organizations that have made it up the accessibility learning curve would continue to publish, but everyone else (except for entities exempt from ADA) would put publishing plans on hold while they trooped off to remedial tutorials, or at least sent their techies there.
- Amateur publishing, as by the owner of a small business or a community group that relies on volunteers, would become more of a legal hazard. The tendency would be for more entities to turn their web-publishing function over to paid professionals.
- Many widely used and highly useful features on websites would be compromised in functionality or simply dispensed with for reasons of cost, delay, or cumbersomeness. To take but one example, a small-town newspaper or civic organization might feel itself at legal risk if it put audio or video clips of the city council meeting on-line without providing text translation and description. Such text translation and description are expensive and time consuming to provide. The alternative of not running the audio and video clips at all remains feasible, however, and that is the alternative some will adopt.[11]

Free speech implications of applying ADA to private websites. The First Amendment to the United States Constitution provides: "Congress shall make no law…abridging the freedom of speech or of the press…" Whether this language permits Congress to impose an accessibility mandate on the Internet is a complicated question under Supreme Court case law.

Common sense would indicate it is extremely unlikely such a requirement could survive constitutional attack. Could it be seriously argued, for example, that Congress could enact a law providing that people could say anything they desire over the airwaves, but only if they also provide a written text to anyone who wants one? Or provide a written text in Japanese? Could all publishers of books, magazines, newspapers, pamphlets, brochures, or anything else, be forced to publish in Braille in addition to a regular printing? Could Congress require that all movies release a book version of their story so those who (for whatever reason) couldn't make it to the theater could be entertained by blockbusters or educated by documentaries? ADA regulations on the Internet are analogous to regulating the everyday decisions newspapers make about the layout of their paper.

To phrase the issue in terms of the formalities of First Amendment jurisprudence, those who argue for the constitutionality of broad access requirements claim they are "content neutral," and thus would be reviewed by the courts under a deferential standard. However, broad access rules would flunk even under this test. In explicating it, the Supreme Court has said, "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[12] The practical reality that millions of sites will be torn down if ADA standards are enforced on the Internet causes the proposal to fail this test. Reducing the amount of content on the Web through burdensome rules cannot possibly serve the goal of enhancing access.

In any event, a strong argument exists that the content-suppressing nature of the rules would be so great that they must be judged under a standard called "strict scrutiny."[13] Under this, the goal of the government—access for the disabled to information on the Internet—must be accomplished by the least restrictive means. Forcing all private websites to become accessible does not qualify as the least restrictive means for accomplishing increased accessibility. Less restrictive options might include targeted aid for the disabled, assistance through public libraries, a needs-based program for the disabled in their homes, or government grants.

Policy recommendation. Rather than risk violating free speech and imposing the harmful unintended consequences of regulation, Congress should not allow ADA to be applied to private websites. Instead, it should simply allow the market to continue to respond to the special needs of disabled Americans.

~ Jessica P. Melugin

[1] Edward L. Hudgins, "Handicapping Freedom: the Americans with Disabilities Act," *Regulation Magazine*, vol. 18, no. 2 (1995); available at www.cato.org//pubs/regulation/reg18n2e.html.

[2] Correspondence to Sen. Tom Harkin (D-Iowa) from Deval L. Patrick, assistant attorney general, Civil Rights Division, 9 September 1996; available at www.usdoj.gov/crt/foia/cltr204.txt.

[3] P.L. 105-220, Workforce Investment Act of 1998, was signed into law on 7 August 1998.

[4] "Electronic and Information Technology Accessibility Standards; Final Rule," Architectural and Transportation Barriers Compliance Board, Federal Register, vol. 65, no. 246, pp. 80500-80527.

[5] Taken from "Questions and Answers about Section 508 of the Rehabilitation Act Amendments of 1998"; available at www.access-board.gov/eitaac/section-508-q&a.htm.

[6] Statement of Chairman Charles T. Canady, House of Representatives Judiciary Committee, Subcommittee on the Constitution, Hearing on the Applicability of the Americans with Disabilities Act to Private Internet Sites, 9 February 2000; available at www.house.gov/judiciary/cana0209.htm.

[7] Testimony of Dr. Steven Lucas, Hearing on the Applicability of the Americans with Disabilities Act to Private Internet Sites; available at www.house.gov/judiciary/luca0209.htm. The section titled, "What Is Available Today?" lists and explains technologies currently available to aid individuals with various disabilities in the use of the Internet.

[8] Testimony of Charles J. Cooper, Hearing on the Applicability of the Americans with Disabilities Act to Private Internet Sites; available at www.house.gov./judiciary/coop0209.htm.

[9] Some examples include Equal Access to Software and Information (EASI; www.rit.edu/~easi/) and the Center for Rehabilitative Technology (CRT; www.arch.gatech.edu/crt/crthome.htm).

[10] Statement of Walter Olson, Hearing on the Applicability of the Americans with Disabilities Act to Private Internet Sites; available at www.house.gov./judiciary/olso0209.htm.

[11] Ibid.

[12] *Ward et al. v. Rock Against Racism*, 491 U.S. 781; 109 S.Ct. 2746 (1989).

[13] *Reno v. ACLU*, 117 S.Ct. 2329 (1997).