Achieving the Promise of the Americans with Disabilities Act in the Digital Age: Current Issues, Challenges, and Opportunities

by Daniel F. Goldstein

From the Editor: Dan Goldstein, a longtime friend and attorney for the NFB with the firm of Brown, Goldstein, and Levy, LLP, delivered remarks on access to technology in the digital age and the Americans with Disabilities Act (ADA), to the U.S. House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, on Thursday, April 22, 2010. Mehgan Sidhu, an associate in Dan's firm who works closely with him on these issues is largely responsible for drafting the comments that he offered. The testimony provides an excellent survey of current matters in this arena, so it seems useful for *Monitor* readers to have this nicely organized presentation in one place. Inevitably details will change in this area of the law, but Dan's statement provides an effective snapshot of our advocacy and positions on matters as of today. Here is what he said:

Mr. Chairman, members of the Committee, thank you for inviting me here today. As a partner in the Baltimore, Maryland, law firm of Brown, Goldstein, & Levy, LLP, I have been engaged in disability-rights law, principally on behalf of the National Federation of the Blind (NFB) since 1986. In 1999 the NFB asked me to assist it in devising a strategy to promote the accessibility of digital information through education, negotiation, and litigation. I have devoted much of the last eleven years to that effort.

The ADA has played a valuable role in that undertaking as we have worked to make Websites, workplace software applications, ATMs, voting machines, cell phones, and eBook reading devices accessible to people with vision and print disabilities. The challenge is immense. Digital information is everywhere, from consumer electronics and home appliances to the Internet, from computer screens and mobile devices to ticket kiosks and ATMs. It is difficult to identify an activity in modern American life in which digital information does not play a role.

Because digital information is composed of zeros and ones, it is not inherently visual, aural, or tactile, but can be presented in any one or all of those modes with equivalent facility. Thus the ubiquitous use of digital information should be great news for those who cannot access print because of a disability—whether it's a vision disability, a learning disability, an intellectual disability, or a manual impairment or spinal cord injury. Similarly, digital information that was traditionally presented as speech can now produce mainstream accessibility for those with hearing impairments.

Sadly, however, the potential for the disability community to have mainstream and therefore equal access has not been realized. So much electronic information is presented so that it is accessible to only one sense, resulting in persons with disabilities having unequal access and therefore being denied the opportunity for equal participation in all spheres of life. Thus, to give you a homely example, something as simple as setting the thermostat in one's house, which a blind person could formerly do by adding tactile markings to the dial that controlled the thermostat, is now an inaccessible activity. Even though digital temperature controls could communicate both visually and audibly, most provide only visual information, leaving blind people worse off than before.

A.) The ADA and Public Accommodation Websites

The ADA is key to unlocking these doors. Title III of the ADA applies to public accommodations, defined as twelve categories of commercial entities that interact with the public. We believe both the intent and the language of the ADA cover Websites and other digital information and services provided by those covered entities, regardless of whether those entities also operate brick-and-mortar locations.

In 1999, on behalf of the NFB, I filed suit in federal court in Massachusetts against America Online for violating Title III of the ADA by failing to make its service accessible to the blind. The First Circuit had held in the context of insurance services that a public accommodation may be covered under Title III of the ADA without the activity being linked to a physical place of public accommodation. We were anxious to follow that case law to its logical conclusion, that Websites that offer the services of a public accommodation, as delineated in Title III, are likewise covered by the ADA. However, AOL quickly decided to make its Website fully accessible, so the matter was settled without creating any judicial precedent.

In 2006 we filed suit against the Target Corporation over the inaccessibility of its Website. After the federal court in San Francisco ruled that the portions of the Website that had a nexus to the physical stores were covered by the ADA, Target settled and has since made its Website fully accessible.

Opponents of the application of Title III to commercial and educational Websites might argue that some federal case law supports the proposition that e-commerce is outside the scope of the ADA. There is a line of reasoning adopted in some circuits that a place of public accommodation, within the meaning of Title III, must be an "actual, physical" place. These courts have held that, to state a claim under Title III, the plaintiff must allege either that there has been discrimination in a physical place or that there is a nexus between the challenged act of discrimination and a physical place of public accommodation. This approach stands in stark contrast to the more commonsense view adopted by several other circuits that the phrase "public accommodation" encompasses more than just physical structures.

Most cases addressing the place argument have been in the context of insurance, considering whether the ADA's nondiscrimination requirements govern the substance of insurance policies. None of the circuit courts adopting the physical-place line of reasoning have addressed the precise question of whether public accommodations that operate through the Internet or its Websites are places of public accommodation under Title III. So we do not currently know what conclusion these circuits would reach on that issue.
In today's increasingly online society, limiting the ADA (or any civil rights law) to only those businesses that operate in physical facilities would undermine the fundamental goals of civil rights. Given that one of the essential purposes of Title III is to eliminate discrimination against people with disabilities in the basic, day-to-day activities that are a fundamental part of living and functioning in a community, it is hard to imagine that coverage would depend on whether a covered entity offers its services and goods in a physical location, door-to-door, by phone, or online. In an age where hundreds of millions of Americans are increasingly using the Internet every day to shop for groceries, plan their travel, conduct business, do their banking, attend college classes, and socialize with friends and family, it is undeniable that these Websites are an indispensable part of basic, day-to-day life in the community.

Despite this obvious reality of life in the Internet era, one district court, in *Access Now v. Southwest Airlines Co.* has erroneously extended the physical-place line of reasoning to conclude that it would not apply Title III to prohibit discriminatory access to Southwest's Website, where the plaintiff had failed to allege a nexus between the site and a physical, brick-and-mortar place. I have no doubt that the district court's interpretation of Title III in the *Southwest* case was incorrect and that a federal court of appeals squarely presented with the issue should reach the conclusion that Title III applies to goods and services provided over the Internet. But the fact that the district court strayed so far from Title III's fundamental purpose was troubling and is one of the reasons that I applaud the Committee's decision to hold this hearing. In light of Assistant Attorney General Perez's affirmation last week that the Department of Justice continues to believe that public accommodations are covered by Title III, even when they reach the public only via Websites, it seems to me that the time has come to test this proposition in the courts as well as through the development of regulations by the Department of Justice.

Court cases aside, in the years since the Internet has become a mainstay of American life, some advocates and covered entities have reached agreements about accessibility of Internet sites. Among the Websites that have reached such agreements, variously with the NFB, the American Council of the Blind, and the New York and Massachusetts Offices of Attorney General are Amazon.com, Apple's iTunes, Major League Baseball, CVS, Radio Shack, Rite Aid, Staples, Ramada Hotels, and Priceline.com. Other companies with commercial Websites have reached out proactively to secure certification from the NFB that their Websites are accessible, including both large companies like G.E. and NewEgg and small businesses like my law firm.

These agreements and the Target case have had a positive impact in increasing Website accessibility across the commercial industry. A study of the top thirty-two online retailers' Websites that analyzed the Websites' accessibility one year before the Target decision and one year following the decision found a significant improvement in overall accessibility. Using the standards and tools provided by the ADA, we are seeing voice-guided ATMs and accessible point-of-sale machines. In the case of the former, with the recent announcement by Bank of America that all of its ATMs now have voice guidance and my settlement with the largest nonbank deployer of ATMs, Cardtronics, inaccessible ATMs are becoming the exception rather than the rule.

ATMs, however, provide an important lesson. The technology to make ATMs accessible is older than the technology to make ATMs, and the additional cost of accessibility in manufacturing and deploying ATMs is marginal. However, delay by banks and other deployers of ATMs to comply with the ADA until the national fleet of ATMs was mature led to a tremendous and unnecessary increase in costs in retrofitting or replacing functioning inaccessible ATMs. It also needlessly delayed the blind from having this convenience that so many rely on.

When new technologies find acceptance in the marketplace, their adoption and improvement often occur with dizzying speed. When accessibility is not built in from the outset, however, the disability community suffers significant competitive disadvantages, whose later correction may come only as that technology is being replaced by something newer or better. When a Microsoft offers first Windows Vista and then Windows 7 that were accessible from the day each went on the market, or Apple develops, as it has, a technology that allows the controls of its iPad to be accessible to the blind, this is cause for celebration.

The list of other technologies that have been accessible from their entry into the market, however, remains far too short. Gratuitous barriers to accessibility are still the rule and not the exception. Improved clarity about the application of the ADA to public accommodations operating over the Internet will help. As is demonstrated by the experience of educational institutions, once the purchasers of technology understand their obligations and insist on accessibility by their suppliers, accessibility becomes mainstreamed.

B.) Inaccessible Digital Information in Education

Nowhere is the impact of digital information felt more than in the field of education. The impact is pronounced here, perhaps more than in any other sphere, because digital information and electronic technology have the potential to change the game for students with print disabilities. However, educational institutions are not meeting that potential. For example, a 2008 study that examined the accessibility of postsecondary education Webpages found that 97 percent of the institutions in its sample contained significant accessibility barriers. The study examined only top or home pages of university Websites, suggesting that the significant barriers are even more deeply entrenched than indicated by the study.

That the vast majority of educational institutions fail to recognize their obligations under the ADA to make their Website information accessible is only the tip of the iceberg. Reliance on online education is steeply increasing, with online enrollments growing substantially faster than overall higher education enrollments in the past six years. Meanwhile, digital books, course management systems, and other educational technologies have become an integral part of postsecondary education. Many of these technologies are completely and gratuitously inaccessible to students and others with print disabilities. While universities and institutions have often failed to appreciate their obligations under the ADA and their commercial power as consumers of educational technology, some positive examples of success demonstrate the kind of impact institutions can have if their obligations under the ADA are made clear and enforceable.

i.) Universities and Amazon's Kindle DX

In February 2009 the Kindle 2 was introduced with a read-out-loud feature but with on-screen navigation that was not voiced and was therefore inaccessible to the blind. The Association of American Publishers and the Authors Guild sought to have Amazon terminate this feature. In response the Reading Rights Coalition was formed, thirty-two nonprofits representing the print-disability community—including, among others, the blind, people with dyslexia and other learning disabilities, those with cerebral palsy, and those with upper spinal cord injuries. The Coalition worked on one hand to protect the inclusion of Text-to-Speech while fighting to have Amazon allow its menus to talk and thus make the device accessible.

In May 2009 Amazon announced the launch of its Kindle DX eBook reader, which it had designed for educational use. Because Amazon failed to include accessible navigational controls, the device was inaccessible to the blind. Six colleges and universities simultaneously announced they would be deploying the Kindle DX during the 2009-2010 academic year. The National Federation of the Blind and the American Council of the Blind filed a complaint in federal court against Arizona State University and filed complaints with the Department of Justice and Department of Education against the remaining schools (Pace University, Case Western Reserve University, Reed College, Princeton University, and the

University of Virginia's Darden School of Business). These complaints alleged that, by deploying the inaccessible Kindle, the colleges and universities violated their obligations under Titles II and III of the ADA to provide equal access to their services. While sighted students would benefit from the instant access, note-taking, and other services of the Kindle, blind students would be left behind, forced to rely on separate methods of access that are significantly inferior to even the print textbook experience. The complaint against the University of Virginia is still pending with the Department of Education, but the NFB, the ACB, and the Department of Justice secured settlements with the other five schools under which those schools agreed, after the end of this semester, not to deploy inaccessible eBook readers.

While those complaints were pending, other universities stepped forward to pledge publically they would not adopt eBook technologies on their campuses—including the Kindle—unless and until they were accessible. Those universities included Syracuse University, the University of Wisconsin, and the University of Illinois. In response to this pressure Amazon announced that it would release a fully accessible Kindle in the summer of 2010. And on March 9, 2010, the Reading Rights Coalition, the Association of American Publishers, and the Authors Guild issued a joint statement, released on the White House blog, supporting mainstream accessibility when books are issued in formats other than print, such as eBooks and audio books.

ii.) Libraries and Adobe Digital Editions

Adobe Digital Editions is the leading commercial eBook format used by libraries and also the format that can be read on the inaccessible Sony eBook reader. Until March 2009 Adobe eBooks had been accessible to those who require speech to access text and who downloaded those books to a PC. In March 2009, however, Adobe stopped support of that accessible system and switched to a new, inaccessible eBook platform, called Adobe Digital Editions. As a result numerous public library patrons with disabilities could no longer access their libraries' digital collections.

Advocacy from the Burton Blatt Institute and the Reading Rights Coalition prompted the American Library Association to adopt a resolution strongly recommending that libraries ensure that all electronic resources they procure are accessible to people with disabilities. Shortly thereafter the Los Angeles Public Library, responding to a letter from the Reading Rights Coalition, agreed to suspend future procurement of Adobe Digital Editions books until they are fully accessible. In response Adobe announced that it would release an accessible Adobe Digital Editions in 2010. Thus, when institutional customers of technology like libraries act on their obligations under the ADA, the developers of those technologies find strong economic motivation to remove the barriers to accessibility.

iii.) California State University and BlackBoard

California State University succeeded in moving one of the leading course-management software systems, BlackBoard Learn, toward accessibility. In the late 1990s the Department of Education's Office of Civil Rights launched an investigation into California State University campuses' compliance with, among other statutes, Title II of the ADA. In response the Cal State system revamped its approach to providing access to students with disabilities and has become a leader and model for educational institutions to follow. Specifically, rather than delegating accessibility obligations to an isolated disability student services office, as most universities do, Cal State established a system-wide, coordinated approach to accessibility. Under this approach accessibility experts work closely with the university's information officers to ensure that the technology the university employs is accessible. Through this arrangement Cal State requires that new technologies it procures be accessible to its students. When Cal State put out a request for proposals for new course-management software, it turned down BlackBoard—the leading purveyor of course-management software—because it did not meet Cal State's accessibility requirements. Since that time BlackBoard has issued two new releases of its software that greatly enhance its accessibility.

C.) The Next Steps to Access to Technology

We are not even halfway there on making the Internet accessible and in making accessible the technologies used in the workplace and offered through public accommodations, like educational institutions. And, of course, new technologies continue to develop and flourish with astonishing speed. The barriers to accessibility, however, are not the result, for the most part, of intractable technological issues and need not (and as a practical matter, would not) slow down innovation. The biggest contributor to the growing accessibility gap continues to be a lack of commitment to making technology accessible.

The ADA was a tremendous normative statement of the importance we attach as a nation to equal opportunity without regard to disability. But, while the disability community has the responsibility to use the ADA and the other tools offered by federal and state laws, government must continue to make clear its commitment to that promise as well. The National Broadband Plan, for example, states as one of its goals that all Americans should have affordable access to robust broadband service and the means and skills to subscribe if they so choose. It envisions, among other things, improvements

in public education through e-learning and online content and improvements in healthcare through the expansion of e-care. Without concrete steps to build in accessibility at every stage and level, this promise to every American will not be realized. Recognizing this, the National Broadband Plan specifically states that hardware, software, services, and digital content must be accessible and assistive technologies must be affordable. The Plan calls on the federal government to be a model of accessibility; to specifically support innovation in accessibility; and to clarify and modernize its accessibility laws, enforcement efforts, and subsidy programs. In that respect the federal government has a long way to go since it has failed to monitor and enforce the provisions of Section 508 of the Rehabilitation Act.

The National Education Technology Plan, currently in draft form, addresses to some degree the need for education technology to be designed for mainstream accessibility for those with disabilities, and we hope the final draft will be more robust. However, recent draft rules regarding Health Information Technology fail to incorporate accessibility wholeheartedly. Again, the federal government must make sure that the execution follows the good intentions.

Our milestones under the ADA thus far have been significant, but we remain far behind where we ought to be in an era that relies so intrinsically upon digital information. The near future will only expedite the transition to digital information in critical sectors—including education, employment, healthcare, commerce, and social life. If we do not ensure that people with disabilities have equal access to digital information, they face exclusion from participation in our society.

The commitment we have already seen from the Department of Justice will take us nearer that goal. The Department of Education, Department of Health and Human Services, General Services Administration, Federal Communications Commission, and others have important opportunities to advance accessible technology as well. There are good reasons to believe that the disability community, acting for itself and with the support of governmental entities, can make great strides toward the day that it no longer must settle for separate and unequal access to technology but will have, instead, the same access to mainstream technology and thus an equal opportunity to participate in the educational, economic, and social life of this country.

Thank you.