

PRESENTED

December 15, 2022

Website Accessibility Litigation 2022

Richard M. Hunt

Richard M. Hunt
Hunt Huey PLLC
3010 Mountain Ash Court
Garland, Texas 75044

rhunt@hunthuey.com

214-641-9182

accessdefense.com

hunthuey.com

Website Accessibility Litigation 2022

Richard M. Hunt

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | Introduction..... | 3 |
| II. | What this paper covers..... | 4 |
| III. | The Gathering Storm – origins of ADA web litigation | 4 |
| A. | Understanding private lawsuits under the ADA – serial litigation..... | 5 |
| B. | Applying the ADA to the internet..... | 6 |
| IV. | The Hinge of Fate – Credit where credit is due..... | 12 |
| V. | Where we are today – law and procedure..... | 13 |
| A. | Whether and why the ADA applies to websites..... | 13 |
| B. | What “nexus” to a physical place of business is required..... | 16 |
| 1. | The website as a service of the physical place of business..... | 17 |
| 2. | The website prevents full use and enjoyment of the premises or impedes access to the physical premises..... | 18 |
| 3. | The website as a means of communication..... | 18 |
| 4. | The website as an auxiliary aid or service..... | 19 |
| 5. | Special rules for hotel and ticket sale websites..... | 20 |
| 6. | Where do mobile apps fit into this picture?..... | 20 |
| C. | What is an accessible website?..... | 21 |
| 1. | The technical approach – conformance to WCAG 2.x A, AA or AAA | 21 |
| 2. | The functional approach – meaningful access..... | 22 |
| D. | Defenses..... | 24 |
| 1. | Due process and the lack of regulations..... | 24 |
| 2. | Primary Jurisdiction..... | 25 |
| 3. | Lack of control..... | 26 |
| 4. | Mootness by remediation..... | 26 |
| 5. | Alternative means of access..... | 29 |
| E. | Standing issues..... | 29 |
| 1. | The myth of tester standing..... | 30 |

- 2. Initial injury – harm during the initial website visit 30
- 3. Intent to return – standing for injunctive relief..... 31
- 4. Municipal websites. 33
- 5. Standing limited to the plaintiff’s disability. 33
- F. Procedural maneuvers, jurisdiction and venue 34
 - 1. Litigation stays and other devices to minimize attorneys’ fees. 34
 - 2. Arguments about long-arm jurisdiction..... 35
 - 3. Offer of Judgment. 35
 - 4. Default..... 36
 - 5. The arbitration solution? 36
- G. Settlement – costs and pitfalls..... 37
 - 1. The cost of compliance with WCAG 2.x AA 37
 - 2. Consent decree v. confidential settlement. 38
- H. Indemnity and contribution..... 38
- I. Ethical issues..... 39
- VI. Conclusion 40

I. Introduction

I gave my first seminar on Website Accessibility Litigation in January of 2016 with the title “An ADA Storm is Brewing.” At the time the total number of website accessibility lawsuits filed by private plaintiffs was fewer than 30, and all but a few had been filed by a single law firm from Pennsylvania in a single federal court. In 2018 almost 2000 new website accessibility lawsuits were filed by a number of law firms from Florida, New York, California and elsewhere, up from only about 800 in all of 2017.¹ At the time of this 2022 update the annual federal court filing rate is around 2300 new cases each year with an additional 1700 a year in California state courts. After a brief decline during Covid the rate of filing has started to climb again and there is no reason it should not continue to rise.²

The broad outline of website accessibility issues and law was set in 2005, but the law remains uncertain because most cases settle and there is relatively little guidance from the Circuit Courts. Many of the details in this paper may soon be out-of-date.³ The best way to remain up to date on these issues will be to subscribe to my blog at accessdefense.com as well as William Goren’s blog at www.williamgoren.com/blog and (sigh) our competitor Seyfarth Shaw’s ADA blog at <https://www.adatitleiii.com>.

¹ These statistics come from accessibility.com, Unsablenet, and the ADA blog of Seyfarth Shaw at www.adatitleiii.com

² Efforts at legislation that would discourage new lawsuits are stalled, as I explain later in this paper.

³ For example, bi-partisan legislation to create a new ADA Title VII has been introduced in the last three sessions of Congress and may yet pass. See, <https://www.duckworth.senate.gov/news/press-releases/duckworth-sarbanes-introduce-bicameral-legislation-to-help-make-websites-and-software-applications-accessible-for-americans-with-disabilities>

II. What this paper covers.

The Americans with Disabilities Act has three major divisions. Title I covers employment. Title II covers state and local government entities. Title III covers “public accommodations,” a phrase that includes just about any non-governmental entity that is open to the public, including professional organizations like law firms and medical offices, hospitals, non-profits like the Red Cross, and almost anything else you can think of. This paper only deals with Title III. Governments and employers have their own website issues, but the recent increase in website accessibility lawsuits has come from Title III cases and Title III presents distinct legal and practical issues. Among the other things not covered are Section 508 of the Rehabilitation Act, which covers federal government entities, the Air Carrier Access Act, which covers airlines, and the 1996 Telecommunications Act, which covers broadcast and cable television. Again, these all have their own particular legal requirements and have not been the focus of widespread private lawsuits.

III. The Gathering Storm – origins of ADA web litigation

The Americans with Disabilities Act is among the most recent federal laws concerned with accessibility for the disabled. It was passed in 1990, with an effective date for most provisions in late 1991. At the time e-commerce was a tiny fraction of U.S. economic and social activity. Amazon was not started until 1994. Ebay arrived in 1995. Facebook did not arrive until 2004, and the other social media platforms like Twitter, Instagram, Snapchat and TikTok came even later. Wordpress, one of the first services that allowed relatively easy creation of personal or small business websites was founded in 2003. Back in 1991 the online world consisted almost exclusively of proprietary dial up services like Yahoo and AOL. Not surprisingly, there is no mention of the internet in the ADA and the list of “public accommodations” required to comply

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Website Accessibility Lawsuits

Also available as part of the eCourse

[Website Accessibility Lawsuits](#)

First appeared as part of the conference materials for the
2022 Website Accessibility Lawsuits session

"Website Accessibility Lawsuits"