Rapid Research Report: Social Media Implications for Title II and Title III Entities

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Question Presented:

Is social media an extension of a website? If so, how does this impact Title II and Title III entities under the ADA?

1. Rehabilitation Act of 1973, Section 508 Amendment – Federal Rules

Congress amended the Rehabilitation Act of 1973 in 1998 to include Section 508. Section 508 requires all Federal agencies to "make their electronic and information technology (EIT) accessible to people with disabilities." Section 508(a)(1)(A) states:

> Development, procurement, maintenance, or use of electronic and information technology [w]hen developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology.[1]

Federal employees who have disabilities and members of the public who have disabilities must have access to any information and data that any individual without disabilities has access to. If making the electronic and information technology accessible would impose an undue burden, then the Federal department or agency must provide individuals with disabilities the information by "an alternative means of access that allows the individual to use the information and data."[2]

If information on any platform is not made accessible, then an individual with a disability can file a complaint with the Federal department or agency "alleged to be in noncompliance."[3] The statutes 29 U.S.C. §794a(a)(2) and 794a(b), provide information regarding remedies and resolutions if a suit is brought.[4] Additionally, there is an online complaint form found on ADA.gov.[5] According to the federal register, electronic "content" covered by the American with Disabilities Act of 1990 (ADA) is "all types of public-facing content, as well as . . . non-public-

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[1] https://www.dol.gov/agencies/oasam/regulatory/statutes/section-508-rehabilitation-act-of-1973.

[2] 29 U.S.C. § 794d(a)(1)(B), https://www.law.cornell.edu/uscode/text/29/794d (note that this is the statute for Section 508).

[3] 29 U.S.C. § 794d(f)(2), https://www.law.cornell.edu/uscode/text/29/794d.

[4] https://www.law.cornell.edu/uscode/text/29/794a#a_2.

[5] https://www.ada.gov/complaint/index.php.

facing content that communicate agency official business."[6] This content, meaning "'content' encompassing all forms of electronic information and data," has to be accessible with ADA standards.[7]

The Section 508 amendment applies to both Federal employees with disabilities and members of the public who have disabilities.[8] Technology must be made accessible and useable "absent a showing of undue burden."[9] In Congress' 2015 Notice of Proposed Rulemaking (NPRM) for Section 508, it wanted to separate content into two groups: public-facing electronic content and non-public-facing electronic content. Public-facing content is defined as "electronic information and data that a Federal agency makes available directly to the general public."[10] Non-public facing content has eight categories, applying to official agency communications: (1) emergency notifications; (2) initial or final decisions adjudicating an administrative claim or proceeding; (3) internal or external program or policy announcements; (4) notices of benefits, program eligibility, employment opportunity, or personnel action; (5) formal acknowledgements of receipt; (6) survey questionnaires; (7) templates and forms; and (8) educational and training materials.[11]

Of public facing and non-public-facing content, social media is expressly addressed in the definition of "public facing." According to the Federal Register, the definition of "public facing" is as follows:

> *Public Facing.* Content made available by an agency to members of the general public. **Examples include**, but are not limited to, an agency Web site, blog post, or **social media pages.**[12]

Agencies "have responsibility for all content that they develop, procure, maintain, or use."[13] Thus, agencies need to ensure that all content, including social media, is made accessible for people with disabilities. An example of a federal agency that has addressed social media accessibility can be found on the U.S. Department of Health & Human Services website, where it states, "Use of social media technologies must follow the current laws and standards that govern

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[6] https://www.federalregister.gov/d/2017-00395/p-19.

[7] *Id.*

[8] https://www.federalregister.gov/d/2017-00395/p-30.

[9] *Id*; see also 36 CFR part 1194.

[10] https://www.federalregister.gov/d/2017-00395/p-58; see also 80 FR at 10893.

[11] https://www.federalregister.gov/d/2017-00395/p-58.

[12] https://www.federalregister.gov/d/2017-00395/p-384.

[13] https://www.federalregister.gov/d/2017-00395/p-124, codified in 29 U.S.C. § 794d – Electronic and information technology.

[information] technology."[14] Additionally, federal agencies are responsible for any third-party content that is "added to and maintained on their sites" and need to make it accessible.[15] Lastly, although social media is an extension of a website, a federal agency is not prohibited from "using an inaccessible social media platform . . . as long as the agency provides individuals with disabilities an alternative means of accessing the same information and data."[16]

2. Title II – State and Local Governments

Title II of the ADA expressly addresses state and local governments and prohibits them from "discriminating on the basis of disability for all public services and programs."[17] Since websites and social media are available to the public, they must be made accessible in order to be in compliance with the ADA and the Rehabilitation Act of 1973. According to the Bureau of Internet Accessibility, if a local or state government Title II agency receives federal funds, Section 508 mandates that the website be accessible to people with disabilities.[18] Additionally, any publicly available videos must be made accessible under Title II, thus including any videos incorporated into social media.[19]

Although there is not exact language specifying that social media, as an extension of a website, must be made accessible for Title II entities, the ADA did address website accessibility. The ADA has stated:

> The [ADA] and, if the government entities receive Federal funding, the Rehabilitation Act of 1973, generally **require that State and local governments provide qualified individuals with disabilities equal access to their programs, services, or activities** unless doing so would fundamentally alter the nature of their programs, services, or activities or would impose an undue burden.[20]

Interpreted broadly and in light of Section 508, social media should be made accessible to comply with the ADA and the Rehabilitation Act of 1973.

3. Title III – Public Accommodations and Commercial Facilities

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14 https://www.hhs.gov/web/social-media/policies/index.html.

15 https://www.federalregister.gov/d/2017-00395/p-124, codified in 29 U.S.C. § 794d – Electronic and information technology.

16 *Id.*

17 https://www.boia.org/blog/web-accessibility-and-local-governments-what-you-need-to-know; https://www.ada.gov/ada_title_II.htm.

18 https://www.boia.org/blog/web-accessibility-and-local-governments-what-you-need-to-know.

19 https://www.3playmedia.com/2019/02/26/ada-video-requirements/.

20 https://www.ada.gov/websites2.htm.

Under Title III, all individuals have access to "the full and equal enjoyment of the goods and services at any place of public accommodation."[21] According to 28 C.F.R. § 36.101(a), the ADA anti-discrimination statutes (42 U.S.C. § 12181–12189) prohibit discrimination from public accommodations and commercial facilities. The ADA requires "places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards. . . ."[22] 28 C.F.R. § 36.101(b) explains that there is supposed to be "broad coverage" to ensure people with disabilities obtain protection under the ADA.[23] In determining this, the rule states the following:

> The primary object of attention in cases brought under the ADA **should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred**, not whether the individual meets the definition of "disability."[24]

As discrimination is to be interpreted broadly, this leans in favor that social media should be made accessible to those with disabilities. Additionally, if a Title III entity were receiving federal financial assistance, then it would have to comply with Section 508.[25]

However, in order to determine whether Title III entities need to make social media webpages accessible, social media must fit within the definition of "public accommodation." There are three main criteria for a places of public accommodation and commercial entities: 1) its operations will affect commerce; 2) it must not be intended for nonresidential use by a private entity; and 3) it must fall within one of twelve categories, as it cannot be an entity covered by the Fair Housing Act of 1968, a railroad locomotive, or an aircraft.[26] The twelve categories of public accommodation include places of lodging, places of public display or collection, places of recreation, places of education, service establishments, etc.[27]

4. Title III Litigation Re: "Public Accommodation" and the Circuit Court Split

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[21] *Id.*

[22] https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=2ab2aab2d3d2fd0f544a5ce7aad8f04c&rgn=div5&view=text&node=28:1.0.1.1.37&idno=28#se28.1.36_1101.

[23] *Id.*

[24] 28 C.F.R. § 26.101(b), *Id.*

[25] 28 C.F.R. § 36.103, https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=2ab2aab2d3d2fd0f544a5ce7aad8f04c&rgn=div5&view=text&node=28:1.0.1.1.37&idno=28#se28.1.36_1101.

[26] 28 C.F.R. § 36.104, https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=2ab2aab2d3d2fd0f544a5ce7aad8f04c&rgn=div5&view=text&node=28:1.0.1.1.37&idno=28#se28.1.36_1101; https://www.3playmedia.com/2019/02/26/ada-video-requirements/.

[27] Codified in 42 U.S.C. § 12181(7), https://www.law.cornell.edu/uscode/text/42/12181.

There have been a few cases litigated regarding places of accommodation. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*,[28] the National Association of the Deaf (NAD) brought suit against Netflix under Title III for "failure to provide equal access to its video streaming web site . . . ." In order to state a valid claim under the ADA, a plaintiff needs to show that "the alleged discrimination involves the services of a 'place of public accommodation.'"[29] In this case, the NAD argued that Netflix's "Watch Instantly" web site fit into several categories of places of public accommodation, including "place of exhibition and entertainment," "place of recreation," "sales or rental establishment," and "service establishment."[30] NAD also argued that places of public accommodation are not limited to "actual physical structures."[31]

The District Court agreed with the NAD, stating that Congress did not intend to limit the ADA with the examples listed in the twelve categories. The court quoted the House of Representatives Committee notes in explaining the ADA, which stated, "[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The Committee intends that the 'other similar' terminology should be construed literally consistent with the intent of the legislation . . . ."[32] Thus, the entity being charged does not have to specifically fit one of the twelve categories, but must fit within the overall category.[33] In ruling in favor of the NAD, the court stated:

> In a society in which business is increasingly conducted online, excluding businesses that sell services through the internet from the ADA would run afoul of the purpose of the ADA. It would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public.[34]

Although Netflix is not a social media website, it still had to fall under one of the twelve categories of places of accommodation in order to be required to be ADA compliant. Even though the District Court of Massachusetts ruled in favor of the NAD, the judge in *Cullen v Netflix* ruled the opposite way, stating that Netflix was "not subject to the ADA because it is not a physical place."[35]

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[28] 869 F. Supp. 2d 196, 198 (D. Mass. 2012) (hereinafter "*Netflix*").

[29] *Id.*; see also 42 U.S.C. § 12182(a), https://www.law.cornell.edu/uscode/text/42/12182.

[30] *Netflix* at 198.

[31] *Id.*

[32] *Id.*, quoting H.R. Rep. No. 485 (III), at 54.

[33] *Id.*

[34] *Id.* at 200.

[35] https://www.3playmedia.com/2015/07/23/nad-v-netflix-ada-lawsuit-requires-closed-captioning-on-streaming-video/.

In *Weyer v. Twentieth Century Fox Film Corp.*,[36] the court specified that a place of public accommodation must have a connection to an actual physical place.[37] In this case, the plaintiff, Weyer, worked for Twentieth Century Fox Film Corporation ("Fox"). Fox offered Weyer, as an employee, a long-term disability insurance policy administered by UNUM Life Insurance Company of America ("UNUM"), which Weyer bought. Under this policy, those who were disabled because of "mental illness, alcoholism, or drug abuse could only get benefits for twenty-four months."[38] Weyer was unable to work due to severe depression, and thus quit working at Fox.[39] After the twenty-four-month period passed, she no longer received benefits for her disability from depression. Individuals with physical disabilities, on the other hand, were not subject to the twenty-four-month limitation and could receive benefits until the age of sixty-five.[40] Weyer brought suit against Fox and UNUM under Titles I and III, claiming that there was "discrimination against those with mental disabilities in favor of those with physical disabilities."[41] Weyer also claimed that UNUM was a public accommodation under Title III, and thus she was denied goods and services on the basis of her disability.

In analyzing the "public accommodation" issue, the court reasoned that the places listed on the Title III list of public accommodations were "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services."[42] The court held that, in order to have a place of public accommodation, there must be "some connection between the good or service complained of and an actual place is required."[43] The court referenced two other circuits when making its decision, the Sixth Circuit and the Third Circuit, which both took similar stances in regard to there needing to be a connection to a physical place.[44] The circuit courts that require places of public accommodation to have a nexus to an actual, physical place are: the Third, Fifth, Sixth, and Ninth Circuit Courts.[45]

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36 198 F.3d 1104, 1114 (9th Cir. 2000) (accessible at https://scholar.google.com/scholar_case?case=16043862805835728767&hl=en&as_sdt=6&as_vis=1&oi=scholarr).

37 *Weyer,* 198 F.3d at 1114.

38 *Id.* at 1107.

39 *Id.* at 1108.

40 *Id.*

41 *Id.*

42 *Id.* at 1114.

43 *Id.*

44 *Id.*

45 *Access Now, Inc. v. Blue Apron, LLC*, 2017 DNH 236 (available at http://www.nhd.uscourts.gov/sites/default/files/opinions/17/17NH236.pdf).

In comparison, the First Circuit Court of Appeals considers "websites, standing alone, as public accommodations" under certain circumstances.[46] In *Carparts Distrib. Ctr. v. Auto Wholesaler's Ass'n*,[47] the plaintiff, Senter, who was the owner of Carparts, was a man diagnosed as HIV positive and suffered from AIDS.[48] Senter and Carparts (the plaintiffs) were enrolled in a health benefit plan offered by the defendants of the case since 1997. In 1990, the defendants alerted the plaintiffs "of its intention to amend the [p]lan in order to limit benefits for AIDS-related illnesses to $25,000."[49] The plaintiffs brought suit, claiming that the defendants breached their contract and needed to provide minimum medical coverage to Senter for non-AIDS related treatments. Additionally, the plaintiffs argued that the "lifetime cap on health benefits for individuals with AIDS instituted by defendants, represented illegal discrimination on the basis of a disability."[50]

The First Circuit Court reasoned, in *Carparts*, that the "public accommodation" definition was ambiguous. The court held,

> The plain meaning of the terms does not require 'public accommodations' to have physical structures for persons to enter. Even if the meaning of 'public accommodation' is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.[51]

Considering the plain meaning of the statute, the court further found that Title III covers service providers "which do not require a person to physically enter an actual physical structure," as travel services do not require a customer to physically enter a business in order to obtain services.[52]

The court in *Carparts* also considered Congressional intent, stating that "the purpose of the ADA is to 'invoke the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[53] This court believed that limiting

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[46] *Id.* at *6.

[47] 37 F.3d 12, 19 (1st Cir. 1994) (available at https://law.justia.com/cases/federal/appellate-courts/F3/37/12/509454/).

[48] *Id.* at 14.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 19.

[52] *Id*.

[53] *Id.*, quoting 42 U.S.C. § 12101(b) (available at https://www.law.cornell.edu/uscode/text/42/12101).

the application of Title III to physical structures, or having a nexus to a physical structure, would frustrate Congress' intent and would "run afoul of the purposes of the ADA."[54]

The Seventh Circuit Court of Appeals also does not require there to be a physical nexus for places of public accommodation. An example of this can be seen in *Doe v. Mut of Omaha Ins. Co.*[55], where the court stated that Title III applied to public accommodations "whether in physical space or in electronic space."

As there is a split in circuits regarding whether places of public accommodation include websites, it is difficult to say whether social media is required to be accessible under Title III of the ADA. For retail businesses who have a social media account or website associated with their physical businesses, they need to make it accessible to those with disabilities.[56] The Department of Justice (DOJ) has issued orders regarding the scope of accessible electronics and information technology, specifying that websites should be accessible under ADA standards.[57] In a recent DOJ order, the DOJ defined electronics and information technology as:

> Any equipment or interconnected system or subsystem of equipment that is used to create, convert, or duplicate data or information. Also, any equipment or interconnected system or subsystem of equipment that is used to automatically acquire, store, manipulate, manage, move, control, display, switch, interchange, transmit, or receive data or information. It includes computer hardware, software, networks and peripheral equipment; telephones; copiers; fax machines; and video and multimedia products, as well as many other electronic and communications devices commonly used in offices.[58]

The DOJ's definition of electronics and information technology is broad and would likely cover social media. However, it is also important to note that, because of the broad language and need for flexibility in this area, not all websites or social media pages will need to be made accessible, depending on whether there is an undue burden or alternative routes are made for accessibility purposes.[59]

5. Potential Implications for Non-Compliance with ADA Standards

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[54] *Id.* at 20.

[55]179 F.3d 557, 559 (7th Cir. 1999) (available at https://caselaw.findlaw.com/us-7th-circuit/1142322.html).

[56] https://www.boia.org/blog/why-does-web-accessibility-matter-for-retail-businesses.

[57] *Id*.

[58] DOJ 2015 Order: https://www.justice.gov/jmd/page/file/1018261/download.

[59] This article discusses Title III, failure to comply with accessibility guidelines not always being a violation of the ADA: https://www.adatitleiii.com/2018/10/doj-says-failure-to-comply-with-web-accessibility-guidelines-is-not-necessarily-a-violation-of-the-ada/.

In order for a website to be compliant with the ADA, it must conform to the Web Content Accessibility Guidelines (WCAG).[60] There are three standard conformance levels: A (being the weakest), AA, and AAA (the strongest).[61] Having a website or social media page meet one of these WCAG levels will help avoid ADA complaints or lawsuits. There has been a significant number of lawsuits against websites for not being ADA compliant (for example, Beyoncé, Kylie Jenner, Fordham University, etc. were all sued recently for not being ADA compliant).[62] There were over 2,250 web accessibility lawsuits filed in 2018 alone.[63] It appears that some social media platforms, such as Facebook, have started to make their platforms more accessible. As social media seems to fall within the broad definition of electronic and information technology, becoming ADA compliant would appear to be the logical next step for social media to take, even if this is not explicitly addressed.

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[60] https://www.zaginteractive.com/insights/march-2018/comparing-website-ada-levels.

[61] *Id.*

[62] https://blog.cws.net/5-reasons-your-website-should-be-ada-compliant; https://www.boia.org/blog/over-2250-web-accessibility-lawsuits-filed-in-2018-could-they-triple-in-2019.

[63] https://www.boia.org/blog/over-2250-web-accessibility-lawsuits-filed-in-2018-could-they-triple-in-2019.