



## MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTER

---

NOVEMBER 2018



Pierre  
Grosdidier

### **Must Websites Comply With the ADA?**

**Pierre Grosdidier**

Website ADA compliance litigation is all the rage, manifesting itself as an epidemic of “website drive-by lawsuits.”<sup>1</sup> Beyond the litigation controversy, the issue is whether websites must be accessible to the visually-impaired via screen reader software to comply with the ADA. Circuit Courts are split.

Title III of the ADA requires that [n]o 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.<sup>2</sup>

The statute defines “public accommodation” through a laundry list of 12 characterizations whose common denominator is that they are all physical places that must affect commerce, *i.e.*, hotels, restaurants, retail stores, schools, stadiums, theaters, just to name a few.<sup>3</sup> When the ADA became law in 1990, the public conscience largely associated disabled Americans with individuals with mobility issues, hence the installation of reserved parking spaces and wheelchair-friendly access ramps. Fast-forward a few years and one of the hot-topic issue has become the visually-impaired’s ability to access Internet. The substantive legal question whittles down to whether a website is a “place of public accommodation” under 42 U.S.C. § 12181(7), an expression that the statute leaves undefined.

### **Some courts require a nexus between a website and a physical place to impose ADA compliance requirements.**

One line of cases has construed § 12181(7)’s laundry list narrowly and held that websites are generally not places of public accommodation because they are not physical places where the public acquires good or services.<sup>4</sup> This line of cases

holds that a website need not comply with the ADA unless a sufficient nexus can be established between the website and a corresponding physical space. For example, in *Earll v. eBay, Inc.*, the Ninth Circuit Court of Appeals held that eBay was not subject to the ADA because its services were “not connected to any ‘actual physical place[.]’”<sup>5</sup> Under this logic, streaming and social media sites are exempt from ADA compliance.<sup>6</sup> But websites that are tied to a physical store may have to comply. In *Nat’l Fed’n of the Blind v. Target Corp.*, the plaintiffs complained that Target’s website was inaccessible to the blind and that they were denied “full and equal” access to the company’s stores and the goods and services therein.<sup>7</sup> The court agreed and refused to dismiss the plaintiff’s complaint to the extent that the website’s inaccessibility impeded the visually-impaired’s access to the physical stores.<sup>8</sup> It reasoned that § 12182(a) “applie[d] to the services of a place of public accommodation, not services *in* a place of public accommodation,” and it concluded that, in this case, the website offered an access to the services of Target’s physical stores.<sup>9</sup> The court dismissed the plaintiffs’ claim to the extent that Target’s website offered information and services unconnected to its stores.

The above line of California cases cited to *Weyer v. Twentieth Century Fox Film Corp.* *Weyer*, in turn, cited approvingly to two Third and Sixth Circuit cases that have also construed website ADA compliance narrowly—unless a nexus to a physical store exists.<sup>10</sup> Two recent district court cases show that this nexus is not difficult to establish. In *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, one of the defendants, a bank, moved to dismiss plaintiffs’ complaint that its website was not ADA compliant because it was not a “place of public accommodation.”<sup>11</sup> The court disagreed because the bank “own[ed], operate[d], and control[led]” the property through which individuals accessed its services, namely its website, and it denied the bank’s motion to dismiss.<sup>12</sup> Likewise, in *Castillo v. Jo-Ann Stores, LLC*, the plaintiff alleged

that Jo-Ann Stores’ web site was not accessible through screen-reading software, in violation of the ADA.<sup>13</sup> Castillo alleged that the website could be used to locate brick-and-mortar stores, to browse for products, to find specials and discounts, and to purchases items. The court held that these claims sufficiently alleged a nexus between Jo-Ann’s website and its physical stores, and it denied Jo-Ann’s motion to dismiss. The court saw no need to decide whether the website qualified as a place of public accommodation.<sup>14</sup>

**Some courts hold that the ADA applies to all websites.**

Another line of cases has held that websites must comply with Title III of the ADA regardless of whether the website is tied into a physical store. In *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, the First Circuit of Appeals rejected the defendants’ attempt to narrow ADA Title III’s scope to physical locations.<sup>15</sup> It held that Congress necessarily contemplated that Title III applied to more than services in physical places when it included “travel services” in § 12181(7)’s laundry list. Travel services are often conducted over the phone and do not require the client’s in-store presence. Per the court, it would defy logic to conclude that the ADA protected in-store clients but not those who transacted over the phone. “Congress could not have intended such an absurd result.”<sup>16</sup> Citing *Carparts*, the New Hampshire District Court refused to dismiss a defendant’s claim that it did not have to make its website ADA compliant.<sup>17</sup>

The Second and Seventh Circuit Courts have followed *Carparts*.<sup>18</sup> In a detailed opinion, the district court in *Andrews v. Blick Art Materials, LLC* denied a motion to dismiss an ADA Title III claim against a company whose website the blind plaintiff could not use.<sup>19</sup> The court noted that Title III’s title (see footnote 2)

and the laundry list’s heading both excluded the word “places,” which indicated Congress’s intent not to limit the statute’s reach by this term.<sup>20</sup> A broad interpretation of Title III’s scope was consistent with “the ADA’s broad remedial purpose” of fighting discrimination against disabled persons. The court specifically rejected as plainly unworkable the *Target* court’s holding that ADA compliance could be compartmentalized between information about a website and information related to the goods and services available through the website. It implied that some parts of a website would have to comply with the ADA and others not.<sup>21</sup>

**Others courts have not fully addressed the issue, or not at all.**

The Eleventh Circuit recently issued its first decision on the issue of website ADA compliance, holding that a plaintiff alleged a viable ADA Title III claim where the website offered services that facilitated access to physical shops, like a store locator and the ability to purchase gift cards online.<sup>22</sup> The appellate court did not address the question of whether compliance was required even in the absence of a physical store nexus. Echoing the holding in *Target*, Florida district courts have distinguished between websites that provide information about a physical location, and websites that provide access to enjoy a physical location.<sup>23</sup> These courts have held that only the latter are subject to the ADA. In *Price v. Everglades Coll., Inc.*, the plaintiff was allegedly unable to obtain admissions information from the college’s website, which was not compatible with screen-reader software. The court held that his complaint failed to state a claim.<sup>24</sup>

The Fifth Circuit has not addressed the issue of website compliance with the ADA. But it held in *Magee v. Coca-Cola Refreshments USA, Inc.*, that Title III did not apply to the owner of glass-front beverage vending machines.<sup>25</sup> The court reasoned that based

on the plain meaning of the term, a vending machine did not qualify as a “sales establishment” under § 12181(7)(E). The court joined the Third, Sixth, and Ninth Circuit Courts in noting that § 12181(7) lists physical places open to the public, and acknowledged the contrarian view espoused by the First, Second, and Seventh Circuits.<sup>26</sup> At the very least, *Magee* suggests that the Fifth Circuit will look closely at the nexus between a website and a physical store in deciding whether to require ADA Title III compliance.

---

<sup>1</sup> Drive-by lawsuit: a suit filed by someone who drove-by a business and spotted something (anything) not in compliance with the Americans with Disability Act (ADA, 42 U.S.C. § 12101 et seq.). A quick Internet search will reveal the scope of the problem and the engine that allegedly drives the litigation: enterprising attorneys and their clients who file ADA-based lawsuits against businesses that are quickly settled for a payment that is less than the cost of defending the suit. See, e.g., Mark Pulliam, *In Austin, the ADA Lawsuit Mill Grinds On*, SE TexasRecord, Mar. 5, 2018. A prevailing ADA plaintiff can expect equitable remedy and attorney fees; not so the defendant. 42 U.S.C. §§ 12188(a)(1), 12205. This article side-steps the lawsuit abuse controversy to focus on the substantive ADA compliance issue.

<sup>2</sup> 42 U.S.C. § 12181 et seq. (Subchapter III, Public Accommodations and Services Operated by Private Entities); *id.* § 12182(a).

<sup>3</sup> *Id.* § 12181(7).

<sup>4</sup> See, e.g., *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

<sup>5</sup> 599 Fed. Appx. 695, 696 (9th Cir. 2015) (mem. op.) (not appropriate for publication and not precedent) (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)).

<sup>6</sup> See *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012); *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at \*4–5 (D. Mont. Mar. 31, 2011); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1114–16 (N.D. Cal. 2011).

<sup>7</sup> 425 F. Supp. 2d 946, 949–50, 952 (N.D. Cal. 2006)

<sup>8</sup> *Id.* at 956.

<sup>9</sup> *Id.* at 953–55 (emphases in original); see also *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012) (noting that Title III “covers the services ‘of’ a public accommodation, not services ‘at’ or ‘in’ a public accommodation” in a case that holds that the ADA applies to website regardless of a nexus to a physical place).

<sup>10</sup> *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997). *Weyer, Ford, and Parker* are insurance cases but are cited to support the proposition that websites need a nexus to a physical place to require compliance with the ADA.

<sup>11</sup> 251 F. Supp. 3d 908, 911–12 (W.D. Penn. 2017).

- <sup>12</sup> *Id.* at 918.
- <sup>13</sup> 286 F. Supp. 3d 870, 872 (N.D. Ohio 2018).
- <sup>14</sup> *Id.* at 880–81.
- <sup>15</sup> 37 F.3d 12, 19 (1st Cir. 1994) (insurance case).
- <sup>16</sup> *Id.*
- <sup>17</sup> *Access now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354, at \* (D.N.H. Nov. 8 2017).
- <sup>18</sup> *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. and Am. Fed'n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001); *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32–33 (2d Cir. 1999).
- <sup>19</sup> 268 F. Supp. 3d 381, 385 (E.D.N.Y 2017).
- <sup>20</sup> *Id.* at 393–94.
- <sup>21</sup> *Id.* at 396.
- <sup>22</sup> *Haynes v. Dunkin' Donuts, LLC*, No. 18-10373, 2018 WL 3634720, --- Fed. Appx. ---, at \*2 (11th Cir. July 31, 2018) (per curiam) (citing *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2001) (insurance case)).
- <sup>23</sup> *Price v. Everglades Coll., Inc.*, No. 6:18-cv-492, 2018 WL 3428156, at \*2 (M.D. Fla. July 16, 2018) (slip op.).
- <sup>24</sup> *Id.*; compare with *Fuller v. Smoking Anytime Two, LLC*, No. 18-cv-60996, 2018 WL 3387692 (S.D. Fla. July 7, 2018) (blind plaintiff sufficiently alleged a claim where website incompatible with screen-reader software offered information about physical store locations, products, gift cards, discounts, and orders for in-store pick-ups).
- <sup>25</sup> 833 F.3d 530, 535 (5th Cir. 2016).
- <sup>26</sup> *Id.* at 534 and n.23.

## Music Modernization Act Brings Mechanical Licensing into 21st Century

Wesley Lewis



Wesley Lewis

The widespread availability of fast and reliable broadband Internet access has had a profound impact on the recorded music industry, necessitating a fundamental reevaluation of how copyright law compensates songwriters and musicians in digital age. Once the industry's primary source of revenue, physical sales of music (through CDs, vinyl records, and cassettes) plummeted with the advent of digital music downloads and online streaming services. In the span of just a few years, revenue from music streaming services has grown exponentially, now easily surpassing revenue from physical sales. In the first half of 2018 alone, streaming

services accounted for \$3.4 billion dollars in revenue, a figure that represents approximately 75 percent of all industry revenue during that six-month period.

Copyright law has been slow to adapt to the rapidly changing economic realities of music consumption in the Internet age. Mechanical licensing, which governs the right to reproduce and distribute copyrighted musical works through physical formats, digital downloads, and interactive streaming, is, at its core, an antiquated system. In fact, these licenses were originally established to provide copyright owners the ability to control the distribution of player piano rolls at a time when sound recordings were themselves cutting-edge technology (and nearly a century before the advent of digital streaming). This licensing regime had not been significantly overhauled since its inception in 1909; the result was an outdated system that was ill-suited to govern royalty payments for Internet streaming and unable to equitably and efficiently distribute royalties in the current digital marketplace.

In response to the growing need for legislative intervention, Congress recently enacted the Music Modernization Act (MMA), which President Trump signed into law on October 11, 2018. The Act has been celebrated as a truly bipartisan legislative achievement, and it received broad-based support from stakeholders across the music industry, including songwriters, musicians, record labels, and streaming music services—groups whose respective interests often place them at odds on proposed copyright reform measures.

The MMA consists of three constituent pieces of legislation that were ultimately consolidated into a single omnibus bill: the original Music Modernization Act (later renamed the Musical Works Modernization Act to avoid confusion with the omnibus bill); the Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society (CLASSICS) Act; and the Allocation for Music Producers (AMP) Act. Each addresses different issues with music royalty payments in an effort to improve fairness and efficiency in music licensing.

First and foremost, the MMA provides for the creation of a new government body, the Mechanical Licensing Collective (MLC), which will streamline royalty payments by acting as an intermediary between digital music services and rights holders. Like traditional performing rights organizations (PROs), the MLC will issue blanket mechanical licenses to digital music services and, in turn, collect and distribute mechanical royalties to rights holders. The MLC will also create a public database containing song ownership information and serve as a royalty clearinghouse, holding unclaimed royalties for at least 3 years before distributing them to songwriters on a market-share basis. Each of these reforms is designed to enhance the efficiency of the licensing market and ensure that songwriters actually receive the royalties to which they are entitled.

The Act also establishes a “willing buyer/willing seller” standard for the Copyright Royalty Board when setting the rates for mechanical licenses. This standard is designed to more closely approximate licensing rates that otherwise would have been negotiated in the free market in an effort to increase licensing rates for songwriters in the long run.

In addition, the MMA adjusts the rate-setting process for public performance licenses of musical works, changing the way judges are assigned to oversee rate-setting proceedings and permitting those judges to take into consideration royalty rates for sound recordings when setting rates. Like the adoption of the willing buyer/willing seller standard, these reforms are intended to promote greater parity between royalty rates for musical compositions and those for sound recordings.

Next, the CLASSICS Act will require digital services like Pandora and SiriusXM to pay royalties for the use of sound recordings fixed before February 15, 1972. Because these recordings do not enjoy federal copyright protection, some services are currently not required to pay royalties for the use of those recordings. The CLASSICS Act changes this, making noninteractive digital audio transmissions of these recordings subject

to the same copyright protection as post-1972 recordings, preempting a patchwork of state and common-law protections.

Finally, the AMP Act makes it easier for producers and engineers to receive royalty payments for their contributions to sound recordings. It does so by formalizing the process by which recording artists can send “letters of direction,” which instruct SoundExchange to pay producers and sound engineers a portion of the royalties for a recorded work directly.

The Music Modernization Act promises to be one the most significant reforms to copyright law in decades. In light of streaming’s newfound role as a key revenue center for the music industry, the MMA will serve as a much-needed revamp of a previously outdated music licensing regime, bringing copyright law into the digital age and making licensing fairer, simpler, and more efficient.

---

Haynes and Boone’s Media and Entertainment Practice Group has extensive experience representing major media clients across all platforms – including newspapers, magazines, broadcast and cable networks, production companies, and online content providers – in high profile disputes. Our team brings deep knowledge to a broad range of matters, including libel, intellectual property, and access to information. Our lawyers present frequently on issues facing the industry and have been leaders in drafting legislation to address cutting-edge issues affecting free speech and transparency.

FEATURED SPEAKING ENGAGEMENTS

**Laura Prather**

**ABA Forum on  
Communications Law  
24th Annual Conference**

Moderator: "The Right  
to Privacy v. The First  
Amendment: A Current Look  
at Online Legal Protections"  
January 31 - February 3, 2019  
Miami, Florida



**Texas State Bar's Advanced  
Trial Strategies CLE**

Panelist: "Anti-SLAPP and Rule 91a"  
February 14-15, 2019  
New Orleans, Louisiana

**Tom Williams**

**Freedom of Information  
Foundation of Texas, Open  
Government Seminar**

Speaker: "Texas Open  
Meetings Act"  
November 15, 2018  
Brownsville, Texas



**Wesley Lewis**

**The Honorable Lee Yeakel  
Intellectual Property  
American Inn of Court**

Speaker: Music Licensing  
and the Music Modernization  
Act  
January 17, 2019  
Austin, Texas



FOR MORE INFORMATION CONTACT:



**LAURA LEE PRATHER**

PARTNER

[laura.prather@haynesboone.com](mailto:laura.prather@haynesboone.com)  
+1 512.867.8476



**TOM WILLIAMS**

PARTNER

[thomas.williams@haynesboone.com](mailto:thomas.williams@haynesboone.com)  
+1 817.347.6625