

The Web and the Disabled User: How to Move Forward?

Document Version: 1.1

Document Status: *Reviewed*

Contents

1	Introduction	3
2	History	4
3	Web Accessibility vs. Digital Inclusion	5
3.1	Web Accessibility Testing vs. Inclusion Monitoring	6
4	What's the Problem?	6
4.1	For Businesses	6
4.2	For Users	6
5	Big Challenges	7
5.1	Overlays	8
5.2	Technical Departments	8
5.3	Who do the current guidelines help?	8
6	Legal	8
6.1	Web Accessibility Legislation	9
6.1.1	Federal	9
6.1.2	State Legislation	11
6.2	Legal Theory	12
6.3	Holding/Precedent	13
7	Future Considerations/Solutions	13
7.1	Governmental Action	14
7.1.1	Judiciary	14
7.1.2	Legislative	15
8	Conclusion	15

1 Introduction

On August 6th, 1991, Tim Berners-Lee published the first website on the World Wide Web. In the years since, the world has globalized and digitized in ways that no one could have predicted. Three decades later, approximately 1.88 billion websites exist on the worldwide web.¹ This boom of the virtual space has precipitated the development of a hyper-digitized culture. Now, much of the population engage in daily activities that make use of the internet. Everyday activities such as food shopping, attending medical appointments, and engaging in social activity are conducted through the virtual spaces on the web. People, businesses, and governments alike engage in activities on the internet in ways that were only possible in the physical environment a few decades ago. Today, approximately 59.5% of the global population and 93% of adults in the United States use the internet.² Though 93% of the adults in the United States access the internet, there is an extreme divide in equity as to user capability of the internet.

Disability comprises the single largest minority group worldwide, with approximately 15% (or 1 billion individuals) of the global population identifying as disabled.³ According to the Center for Disease Control and Prevention (CDC), over a quarter of American adults are living with a disability.⁴ One's disability status is often accompanied by more frequent instances where physical and institutional barriers impose discriminatory effects on accessibility. Such areas where discriminatory behavior effects users' accessibility has been on the internet. Standardized web accessibility guidelines have universal implications on the usability of the internet. In disability, the principle of universal design – “the process of creating products that are accessible to people with a wide range of abilities, disabilities, and other characteristics”⁵ – serves the greater populace, generating a more inclusive environment for everyone, without discriminating against another group. In fact, universal design principles are applicable when discussing web accessibility and inclusivity, as those who the standards are designed for are not always those who are utilizing the functions the most. 80% of those who use the closed captioning function (as suggested with web inclusivity standards) are not auditorily disabled.⁶ Since a large majority of people benefit from accessible websites, why is it that most of them are inaccessible. 94% of the webpages are inaccessible to disabled users or fail testing of their inclusion scores (are noncompliant).

Exclusion from virtual platforms, either intentionally or unintentionally, remains among one of the most pressing issues in today's hyper globalized and hyper digitized world. The factors that contribute to the exclusion of individuals from equality in accessing virtual content remains entrenched in the vicious circle that exists at the corporate (entity) level. Commercially, in today's socially conscious environment, every company should desire to be the most inclusive version of themselves. Not only is equity in access to all facets of a business morally just, but it has a positive effect on consumer behavior as the social behaviors of a given corporate entity has been demonstrated to hold a marketable effect on their ability to capitalize within a given market.

Currently, legal discourse exists regarding the applicability of anti-discrimination legislation (namely the ADA) to instances where web inaccessibility may discriminate against disabled users' ability to interact on/with the web. While Section 508 provides that the government (and its respective agencies) must maintain web platforms that are accessible for disabled users, federal law doesn't explicitly impose

¹ Arooj Ahmed, “How Many Websites Are There in 2021? (Chart),” Digital Information World, August 10, 2021, <https://www.digitalinformationworld.com/2021/08/how-many-websites-are-there-in-2021.html>.

² “Demographics of Internet and Home Broadband Usage in the United States,” Pew Research Center: Internet, Science & Tech (Pew Research Center, April 26, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

³ “Disability and Health,” World Health Organization (World Health Organization, December 1, 2020), <https://www.who.int/en/news-room/fact-sheets/detail/disability-and-health>.

⁴ “Disability Impacts All of Us Infographic,” Centers for Disease Control and Prevention (Centers for Disease Control and Prevention, September 16, 2020), <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>.

⁵ “What Is Universal Design?,” What is universal design? | DO-IT, April 9, 2021, <https://www.washington.edu/doit/what-universal-design-0>.

⁶ “Accessibility and Online Video Statistics,” 3Play Media, November 11, 2020, <https://www.3playmedia.com/accessibility-online-video-stats/>.

the same provisions against privately held business. While not explicitly mentioned in the text of legislation, some in the legal field have pushed to apply the protections against discriminatory inaccessibility in Title III of the ADA to the virtual sphere. Herein lies the tension between two competing judicial interpretations of the law that have been brought before the Courts: a textualist approach would negate the idea that the web would be covered as a place for public accommodation, whilst a purposivism interpretation would likely find that the web's purpose is similar enough to that of those mentioned activities such that it would receive legal protections.

These competing interpretations have been at the root of several web accessibility lawsuits over the past half decade, and unfortunately, the jurists deciding these cases are just as divided in their interpretations as the lawyers arguing before them. With the United States Circuit Courts having failed to render uniform sets of decisions over web accessibility claims, the legislative branch has attempted to enact legislation that would bring clarity to this issue. Unfortunately, most legislative efforts have failed to pass their respective chambers, and those few that have been enacted aren't enough to effectively solve the problem. Current legislation is blind to the issues of inaccessibility on privately held business' websites. Section 508, when enforced, does hold government offices and agencies accountable for their web accessibility. As such, the legal implications of web accessibility (often framed under the auspices of discrimination), have been left to judicial interpretation. To date, there is no unified decision on the legal requirements over web accessibility. Judicial opinions, at the federal level, vary from jurisdiction to jurisdiction, and the Supreme Court has yet to take on a case to solve the discrepancy. As such, two government avenues present itself: comprehensive and effective legislative action, or Supreme Court adjudication.

This paper serves four purposes: first to provide a baseline of information about web accessibility; second, to review the current state of evaluating websites and digital assets for web accessibility; third, to explain how the current method of evaluating web accessibility is deficient and fails to adequately address the user's experience for true digital inclusivity; and fourth, to provide insight into potential actions taken by the government in order to remedy existing deficiencies in the law.

2 History

Thirty-one years ago, the United States passed the Americans with Disabilities Act of 1990 (ADA). The ADA, widely regarded as the cornerstone piece of legislation protecting disabled Americans from wrongful discrimination, established a national standard by which people, businesses, and the government are obliged to act in the pursuit of universal equity to access. Under the ADA, major life activities were defined where disabled individuals would be legally guaranteed equity in access. Those locations include parks, pharmacies, doctor's offices, grocery stores, and many other physical locations often frequented by disabled people. Though the ADA provides a critical step towards protecting disabled people from discrimination, the degree to which it protects disabled people in today's world is significantly less than it was in the world that existed 30 years ago.

COVID-19 has transformed the way people engage with their environment daily. Despite the enormity of these changes, they pale in comparison to how life has altered between 1990 and today. The biggest change to life has arguably been the introduction of digital spaces and the internet.

In 1990:

- The first public website had yet to go live on the internet. | Today there are over 1.8 billion websites worldwide.⁷
- Roughly 15% of American households had a computer.⁸ | As of 2018, that number has risen to 92%.⁹

⁷ Armstrong, Martin. "How Many Websites Are There?." Digital image. August 6, 2021. Accessed October 22, 2021. <https://www.statista.com/chart/19058/number-of-websites-online/>

⁸ Bureau of Labor Statistics, 99 Issues in Labor Statistics: Computer Ownership Up Sharply in the 1990s § (1999).

⁹ Computer and Internet Use in the United States: 2018, April 21, 2021. U.S. Census Bureau. <https://www.census.gov/newsroom/press-releases/2021/computer-internet-use.html>.

- The overwhelming majority of Americans did not have access to the internet.¹⁰ | Today 93% of the population of the U.S. uses the internet.¹¹
- According to the C.D.C., 13.2 million Americans identified as disabled.¹² | Today, that number hovers around 61 million (or roughly 1 in 5 Americans).¹³

While over a quarter of Americans identify as disabled, none of them receive the proper protections from discrimination in the online environment. The ADA's lack of adaptation to meet the needs of disabled individuals in today's environment has left it so that states, and people (through the courts system), are left to establish the legal precedent that the ADA was written to guarantee. As concern over the implications of disability rights in the virtual environment have become increasingly discussed over the last four years, two things have risen: litigation claims involving web accessibility and the amount spent on website development. Compliance, on the other hand, hasn't improved: today, it is demonstrated that there is a failure in 94% of web content.

3 Web Accessibility vs. Digital Inclusion

Web accessibility, by nature, is predominately technical. To date, courts and plaintiffs' counsel have concentrated on technical standards developed by the WC3 to determine whether a website or other digital media is deemed to be accessible to the disabled. These technical standards, however, often fail to reflect the goals of the ADA in providing equity to all people. While web accessibility is often defined based upon technical standards set by the World Wide Web Consortium (WC3), otherwise known as the Web Content Accessibility Guidelines (WCAG) standards, these technical standards don't always equate to inclusivity when considering the user's experience. According to the Web Accessibility Initiative (WAI), web accessibility can be defined as "websites, tools, and technologies [that] are designed and developed so that people with disabilities can use them. More specifically, people can: perceive, understand, navigate, and interact with the Web; [as well as] contribute to the Web."¹⁴ While universal standards aren't legally enforceable on much of the global private sector, WCAG exists and serves as the recommended norm to promote accessibility to web content.

Digital inclusion, as opposed to web accessibility, focuses on the material impact of web accessibility measure on user's ability to access their desired content. When adopting a metric for measuring inclusion, it is important to have a tool by which the user's own interface and interactions are measured. As such, the concept known as inclusivity scoring has been developed by AAAtraq to assess individuals' inclusion in the virtual environment. Inclusivity scoring is a more practical to assess the usability of a website for a disabled user, and measures its score on the user experience as opposed to the coding of the webpage.

¹⁰ Fox, Susannah, and Lee Rainie. "Part 1: How the Internet Has Woven Itself into American Life." Pew Research Center: Internet, Science & Tech. Pew Research Center, December 31, 2019.

<https://www.pewresearch.org/internet/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life/>.
¹¹ "Demographics of Internet and Home Broadband Usage in the United States." Pew Research Center: Internet, Science & Tech. Pew Research Center, April 26, 2021. <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

¹² "Prevalence of Mobility and Self-Care Disability -- United States, 1990." Centers for Disease Control and Prevention. Centers for Disease Control and Prevention, October 8, 1993.
<https://www.cdc.gov/mmwr/preview/mmwrhtml/00021988.htm>.

¹³ Fox, Susannah, and Lee Rainie. "Part 1: How the Internet Has Woven Itself into American Life." Pew Research Center: Internet, Science & Tech. Pew Research Center, December 31, 2019.
<https://www.pewresearch.org/internet/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life/>.

¹⁴ W3C Web Accessibility Initiative (WAI), "Introduction to Web Accessibility," Web Accessibility Initiative (WAI), n.d., <https://www.w3.org/WAI/fundamentals/accessibility-intro/#:~:text=Web%20accessibility%20means%20that%20websites.and%20interact%20with%20the%20Web.>

3.1 Web Accessibility Testing vs. Inclusion Monitoring

Web accessibility, in reference to the website monitoring of it, is known as web accessibility testing. As described by the WCAG standards, web accessibility testing is a subgroup of usability testing that is technically geared towards the consideration of users with disabilities. At a fundamental level, web accessibility testing serves to administer a technical evaluation of a given website's code to assess its accessibility capabilities. The testing process differs by jurisdiction and often by the preferences of a company. No universal standard for web accessibility testing exists, however the WCAG standards mentioned previously, guide testing standards by A, AA, and AAA. Without a technical background, most users and viewers would find these standards to be incomprehensible.

Inclusion monitoring, unlike web accessibility testing, does not just focus on the testing of a code, but evaluates a given website based on the user's interface with an inclusivity score. This inclusivity score focuses heavily on the material impact to the user, rather than the code of the given site. It evaluates the usability of the site for a disabled user and then scores it based on KPI. In developing standards for inclusivity monitoring, the user and the provider's capabilities are recognized.

4 What's the Problem?

For years, web accessibility and digital exclusivity have been predominately ignored by a large portion of today's society. This neglect has only exacerbated the isolation of the members within the disabled community as the internet has further integrated itself into the societal norms of today. In doing so, the shortcomings of inaccessible design of the websites on the internet has become increasingly prohibitive to disabled users attempting to access necessary components of everyday life (i.e., social media, medical care, food security, etc.). These shortcomings have significant negative effects on the entities providing the services, as well as the users themselves. So, what are the problems?

4.1 For Businesses

Your website is your digital front door – an extension of your business. For many, it's where all business takes place. However, with ever-changing ADA regulations, a lack of tools to monitor digital inclusion, and suppliers signing off their work, organizations are left exposed to litigation by opportunist lawyers. Systems currently available focus primarily on the complexities of Web Content Accessibility Guidelines (WCAG); with detailed technicalities designed for web developers and not for those in charge of an organizations digital inclusion (D&I).¹⁵ Instead, organizations need to take ownership of digital inclusion by putting in understandable processes, utilizing the correct tools, structure, policies, and reporting like you would with your cyber risks. Another problem is organizations allowing their inclusion efforts to be left with their web vendors to manage and sign off. You wouldn't let your child mark their own homework, so why are you letting your web vendors sign off your digital inclusion efforts? AAAtraq provides an independently verified digital inclusion score allowing those controlling risk to have a single measure to consider, removing any technical opinions or arguments out of the equation and, importantly, allowing you to have your independent metric that's immediate and simple to understand. Crucially the score removes the complexities and lack of independence in current reporting methods, while also allowing inclusion to be continually monitored and improved.

4.2 For Users

Disabled users experience the internet much differently than their able-bodied peers. One's disability status shouldn't mean that ability to engage on/with the internet is significantly restricted, however, most webpages aren't inclusive to all (don't allow for universal access). Many website developers exclude or significantly restrict disabled users access by constructing noncompliant websites

¹⁵ W3C Web Accessibility Initiative (WAI), "Web Content Accessibility Guidelines (WCAG) Overview," Web Accessibility Initiative (WAI), accessed November 22, 2021, <https://www.w3.org/WAI/standards-guidelines/wcag/>.

that don't offer many features needed by visually impaired, hard of hearing, or other disabled users. Properly coded and labeled form fields, closed captions, properly labeled images, and other tools are crucial to making a website accessible to the disabled user and ensuring equity in access to these everyday life functions.

Let's take a hypothetical scenario, grocery shopping online, and examine the potential ramifications inaccessible websites might have on the user. While the exactitudes of this situation are facially hypothetical, the general experience has been shared by countless disabled users whilst shopping online for groceries in the past years (with significant numbers experiencing it since the outbreak of the COVID-19 pandemic).

Imagine: You need groceries, but for whatever reason are unable to go to the grocery store. Also, you are blind. You use assistive technology (screen to text/screen reader) to navigate and utilize technological devices and virtual spaces. You log onto your desired grocery retailer's website. You try to use your screen reader, but unfortunately, the reader doesn't find any content on the page. You're upset, but you still need food and decide to check your next favorite retailer's website. You log onto their website, elated to find out that there is perceivable content for your device to read back to you. You go down your grocery list, and pick out your fruit, vegetables, dairy, frozen items, etc. Then, you go looking for your meat. It's Taco Tuesday at your house and tonight's featured item is a chicken taco (you have an allergy to MSG and shellfish, so other proteins for the tacos are out of the question). Using your screen reader, you navigate to an item and select 3 pounds of chicken (after it was read aloud to you by your screen reader). Next, you checkout and await your groceries. When the groceries arrive, you find most of the items you ordered, except one: the chicken. In addition, you find 4 pounds of chopped beef which, because of your allergy, you explicitly avoided ordering. Now you've spent all your budget on groceries, and you don't have a dinner that you can eat tonight or tomorrow.

Here is what happened: You logged onto the first website and reached the homepage. There's a plethora of options, information, and deals. Unfortunately for you, the page hasn't been properly coded to allow for screen readers to perceive the information, and thus you so must miss out. Next, you log onto a page that has been designed to allow screen-to-text functionality. The company offering this page has elected to operate with an overlay system that autonomously alters the page to be accessible. Unfortunately for you, this attempt at access equity backfires. Though the screen reader can read the information on the page, the overlay (widget) mislabels the beef as chicken, thus providing the screen reader technology with misinformation saying that the selection is chicken, which in turn leads you to accidentally purchase the beef. These errors, while potentially appearing small, have a real and sizable effect on the user experience. The improper web accessibility functions of these two websites have discriminated against you and have left you without food and without the means to purchase alternative options (as your budget has been expended on this order). This situation has caused harm to your person.

Proper accessibility and inclusivity features on a website are pivotal to the user experience and ensuring equity in access to virtual spaces. The user's experience heavily weighs on the individual's ability to engage in everyday life in today's world. The user experience in the hypothetical above is easily transferable to other aspects of life, such as trying to log onto a doctor's appointment or accessing news via a national media conglomerate.

5 Big Challenges

The truth of the matter is, virtually no person would intentionally desire to be noncompliant; so why is it that 94% of websites are not inclusive to disabled users? Inclusivity is often hindered by a lack of knowledge, incompetence, and/or the same assistive tools that have been constructed to help remedy noncompliance. There are several large obstacles in the pursuit of compliance, including the use of existing overlays, confirmation bias on the part of technology departments, and the misappropriation of disabled users' needs from one disabled group to that of another in the drafting of the technical standards. Many of these challenges are preventable in the construction/development of the website.

5.1 Overlays

Conceptually, overlays have the potential to be assets in the push for universal inclusivity on the web. Overlays are widgets that are utilities as assistive devices or corrective technology when addressing accessibility failures. While this section presents overlays as a potential obstacle towards universal compliance, it is only framed in such light as the existing overlays may be considered deficient. First, the vendors of such overlays falsely advertise a sense of security that is vastly overstated. Many users of overlays believe that the overlay is the end of their responsibility to ensuring accessibility and that their role from that point on would be passive. That shouldn't be the case, accessibility proves to be an ongoing process by which a vendor and users play active roles. Second, overlays that are on the market today have an over reliance on preliminary AI.¹⁶

5.2 Technical Departments

Informational Technology (IT)/Web departments pose one of the largest institutional barriers to accessibility and compliance. While not always the case, IT/Web departments are generally responsible for both the creation and maintenance of virtual platforms for the companies they are employed by. Under those auspices, the department is responsible for creating accessible web content and running checks (monitoring) their own content for failures that might lead to inaccessible content. As is the case with vendors, why would it seem appropriate or beneficial for the same people who create the web content to be responsible for checking the contents vulnerabilities at non-compliance? It's almost like one would be asking for confirmation bias issues. Technology related departments cannot, should not, and are incapable of objectively assessing their own content, as it often lends itself to compliance issues, and the executives would be none the wiser (an employee will most likely tell their supervisor the website is complying and doing their job effectively, even if they are not).

5.3 Who do the current guidelines help?

WCAG 1.0 – 2.1 standards generally focus on visually and auditorily impaired users. Newer standards, such as WCAG 3.0 (which came out in January of 2021), have just started to home in on the impacts of web design on cognitively impaired users by instilling new safeguards such as the “clear words” standard. Many, if not most, accessibility widgets and overlays are primarily concerned with the impact of digital inclusivity on visually and auditorily impaired users. Technical standards under WCAG provide predominately for those with historically accommodated disabilities, while not necessarily those whose disabilities might have been more recently recognized by the DSM5.

Here talk about what the accessibility standard means and new 3.0 developments

6 Legal

Litigation over web accessibility has steadily climbed in recent years. Over the past two years, web accessibility litigation has risen over 81%, with an estimated 4,200 cases to be filed in various jurisdictions by the end of 2021.¹⁷ Much of the litigation is found in federal jurisdiction, with caselaw predominately regarding legal questions related to Titles I and III of the ADA and Section 508; however, a sizable amount can be found from cases coming out of the state courts in New York (insert NYS Law), California (UNRUH), and Florida (insert Florida law) (all of whom have state legislation over the issue).¹⁸ The first

¹⁶ Karl Groves, “Truth in Advertising Does Not Exist for Overlay Vendors False Claims at the Expense of Customers and Persons with Disabilities.” Overlay False Claims, December 9, 2021, <https://overlayfalseclaims.com/index.html#false-advertising>.

¹⁷ “2021 Mid Year Report ADA Digital Accessibility Lawsuits” (UsableNet, July 2021), [https://f.hubspotusercontent30.net/hubfs/3280432/Remediated%20-%202021_MidYear_UsableNet_WebAccessibilityLawsuit_Report_FINAL_06292021%20\(5\).pdf](https://f.hubspotusercontent30.net/hubfs/3280432/Remediated%20-%202021_MidYear_UsableNet_WebAccessibilityLawsuit_Report_FINAL_06292021%20(5).pdf).

¹⁸ Ibid.

web accessibility lawsuit to go to trial in the United States appeared in District Court in 2017.¹⁹ Since then, federal district courts have heard thousands of cases, and none seem to agree on the answer to legal questions regarding web accessibility.

6.1 Web Accessibility Legislation

6.1.1 Federal

A large share of the web accessibility claims that reach the courts are decided in federal jurisdictions. The law that governs web accessibility for government agencies, Section 508 of the Rehabilitation Act, was passed in 1972. The Americans with Disabilities Act of 1990 is the main source of federal web accessibility litigation and contention, specifically regarding both Titles I and III of the ADA.

6.1.1.1.1 Americans With Disabilities Act of 1990

The Americans with Disabilities Act of 1990 (ADA) is the largest piece of anti-discrimination legislation that protects disabled people in the United States. The ADA became law on July 26th, 1990. The ADA is broken down into five sections, otherwise known as titles. Title I of the ADA provides for protections from discrimination in employment opportunities and benefits. Title II of the ADA prohibits discrimination by “public entities” in providing for public services.²⁰ Title III of the ADA prohibits places of public accommodation from discriminating against disabled individuals. Title IV of the ADA provides that telecommunications companies must provide for a national (interstate and intrastate) relay service that allows for individuals with speech and/or auditory disabilities to communicate over the telephone.²¹ Title V of the ADA, “Miscellaneous Provisions”, provides for various provisions relating more broadly to the ADA.

6.1.1.1.1.1 Title I

Title I of the ADA ensures equality in access to employment opportunities and benefits for disabled individuals. The Title’s provisions are applicable to employers with 15 or more employees and requires that they make reasonable accommodations to disabled applicants and employees. Reasonable accommodations, under this Title, is an accommodation to the disabled employee such that they can complete the task/job. Such accommodations shall not cause the employer “undue hardship” – the accommodation shall not pose too much difficulty or be prohibitive in expensive. The text of this Title provides for a legal definition for disability, however said definition has been rather fluid because of confliction judicial opinions on the matter. Title I falls under the purview of the U.S. Equal Employment Opportunity Commission (EEOC).

6.1.1.1.1.2 Title III

Title III of the ADA establishes 12 categories of public accommodations whereby it is prohibited to discriminate based on disability in the provision of goods and services. Though 12 categories have been named in the text of the ADA, different judicial jurisdictions have chosen other businesses to include. Such places named in Title III include:

- 1) Places of lodging;²²
- 2) Establishments serving food or drink (restaurants and bars);
- 3) Places of exhibition or entertainment;²³

¹⁹ Gil v. Winn-Dixie Stores, Inc. (United States District Court for the Southern District of Florida June 12, 2017).

²⁰ Public entities are entities such as state and local government agencies. Public services are services, programs, and activities provided by and/or subsidized by a public entity.

²¹ Recent litigation questions the applicability of Title IV to social media entities. *Cite Biden*

²² Places of lodging include inns, hotels, and motels. Owner occupied establishments renting fewer than six rooms are exempted.

²³ Places of exhibition or entertainment include motion picture houses, theaters, concert halls, and stadiums.

- 4) Places of public gathering;²⁴
- 5) Sales or rental establishments;²⁵
- 6) Service establishments;²⁶
- 7) Public transportation terminals, depots, or stations (not related to air transportation);
- 8) Places of public display or collection;²⁷
- 9) Places of recreation;²⁸
- 10) Places of education;²⁹
- 11) Social service center establishments;³⁰ and,
- 12) Places of exercise or recreation.³¹

Title III requires that these places of public accommodation not discriminate in providing goods and services based on disability status. The text of this Title also provides that entities named as public accommodations remove structural/architectural barriers that are “readily achievable” to ensure accessibility.³² Title III also forbids additional charges associated with making said accommodations available from being passed onto the disabled user by means of a surcharge. The underlying principle of Title III is to ensure equity in access for disabled individuals to businesses and entities that provide services/goods necessary to completing daily major life functions.³³ As businesses and entities have shifted some of the services named as public accommodations in Title III to the virtual realm, many in the legal community are debating whether the internet may be subject to Title III protections.

6.1.1.1.1.2 Section 508

Section 508 of the Rehabilitation Act of 1973 mandates that United States Federal Government agencies “develop, procure, or maintain, information and communication technology (ICT), that is accessible to persons with disabilities.”³⁴ Section 508 is applicable to technologies, acquired/procured, developed, and or licensed by government agencies, and is also applicable private entities under contract with federal agencies. Section 508 is applicable to all Electronic and Information Technology (EIT).³⁵ Section 508 is subject to the standards set by the U.S. Access Board, an independent agency of the federal government, is a board comprised of both members from the public (mainly people with disabilities), as well as members from the federal agencies.³⁶ Revised Section 508 guidelines require compliance with WCAG 2.0 standards.

²⁴ Places of public gathering include auditoriums, convention centers, and lecture halls.

²⁵ Sales or rental establishments include bakeries, grocery stores, hardware stores, and shopping centers.

²⁶ Service establishments include laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, and hospitals.

²⁷ Places of public display or collection include museums, libraries, and galleries.

²⁸ Places of recreation include parks, zoos, and amusement parks.

²⁹ Places of education include nursery schools, elementary, secondary, undergraduate, or postgraduate private schools.

³⁰ Social service center establishments include day care centers, senior citizen centers, homeless shelters, food banks, and adoption agencies.

³¹ Places of exercise or recreation include gymnasiums, health spas, bowling alleys, and golf courses.

³² Readily achievable is defined as “easily accomplishable without much difficulty or expense.”

³³ “Ada Overview,” ADA Overview | The Northeast ADA Center, n.d., <https://northeastada.org/resource/ada-overview>.

³⁴ 29 USC §794d

³⁵ EIT is defined as, “any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.” *NIST SP 800-12 Rev. 1 under Information Technology from 40 U.S.C., Sec. 11101.*

³⁶ “U.S. Access Board - about the U.S. Access Board,” U.S. Access Board, n.d., <https://www.access-board.gov/about/>.

6.1.2 State Legislation

While much of the litigation surrounding web accessibility claims concerns federal ADA and Section 508 legislation, individual states have developed/adopted web accessibility policies of their own. Their courts, like those of the federal, have entertained questions regarding web accessibility and the applicability of state anti-discrimination legislation to the virtual sphere. Three states in particular – California, Florida, and New York - account for a significant portion of web accessibility litigation outside of the federal jurisdiction. This section will focus on the legislative agenda/documents of the three aforementioned states, as well as the State of Colorado, who has just recently passed legislation on the issue that looks promising for a court battle.

6.1.2.1.1.1 UNRUH

The UNRUH Civil Rights Act is a California law by which discrimination is prohibited by any “business establishment” in the State of California.³⁷ The UNRUH Civil Rights Act says “all persons within the jurisdiction of this state are free and equal, and no matter their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”³⁸ Unlike in federal legislation such as the ADA, UNRUH is relatively clear in the scope of its reach. All businesses, regardless of the mechanism by which it conducts its affairs, that are considered public accommodations must be accessible to disabled users. Accordingly, the California Court System has upheld web accessibility protections when brought before them and have determined that a victorious plaintiff be entitled to 3 times any actual damages, with a minimum of \$4,000 in statutory damages.³⁹

6.1.2.1.1.2 Florida

Florida remains one of the top legal forums in which one might find web accessibility litigation. Florida requires all state agencies comply with Section 508 standards with direct references to WCAG 2.0 compliance in the Section 508 Refresh. Though some websites have been ruled to be public accommodations as they are sites universally available, Florida falls within the jurisdiction of the United States 11th Circuit Court of Appeals, and thus applies the legal precedent established in *Gil v. Winn-Dixie Stores, Inc.*.

6.1.2.1.1.3 New York State Web Accessibility Policy

New York State Information Technology Policy: Accessibility of Information Communication Technology is New York State’s governing document regarding web accessibility. The policy is heavily influenced by the Section 508 requirements and “mandates that State Entities ‘develop, procure, maintain, or use’ Information and Communication Technology (‘ICT’) in a manner that ensures State employees with disabilities have comparable access to, and use of, such information and data relative to other State employees, unless doing so would impose an undue burden on a State Entity.”⁴⁰ The policy

³⁷ Business establishments may include “governments and public entities”, as well as privately held businesses. The law specifically outlaws any discriminatory action/behavior in housing and any other public accommodation of a protected class. Cal. Civ. Code §§ 51

³⁸ Cal. Civ. Code §§ 51(b)

³⁹ “State Accessibility Laws : Latest Unruh Act Rulings Ensure Heavier Surge in California,” Accessibility Works, January 29, 2020, <https://www.accessibility.works/blog/unruh-act-website-compliance-california-website-accessibility/>.

⁴⁰ “New York State Information Technology Policy: Accessibility of Information Communication Technology,” New York State Information Technology Policy: Accessibility of Information Communication Technology § (2019), https://its.ny.gov/system/files?file=documents/2022/10/nys-p08-005_accessibility_of_information_communication_technology.pdf.

establishes minimum requirements on the accessibility of ICT in order to provide for equity in digital access.

6.1.2.1.1.4 Colorado

On June 30th, 2021, Colorado House Bill 21-1110 (“Colorado Laws for Persons with Disabilities”) was signed into law.⁴¹ The law, aimed at remedying existing legislative gaps in protections, includes new language that strengthens the existing Colorado law that protects disabled individuals from discrimination. This law includes provisions prohibiting the exclusion of disabled individuals from participation/access to state sponsored services, programs, and/or activities.⁴² The law goes on to provide a deadline for compliance of all public entities and agencies with a date of July 1st, 2024.⁴³

6.2 Legal Theory

In 2017, the United States District Court for the Southern District of Florida heard the first trial for a web accessibility case in the United States (*Gil v. Winn-Dixie Stores, Inc.*). Since then, most circuits have entertained cases regarding legal questions involving web accessibility claims. Though these courts have each issued their independent rulings, there is not a uniform consensus in how to interpret or adjudicate cases involving such claim. Thus, no generalized legal precedent governs courts who wish to provide answers to future legal questions over the matter. Much of the disconnect between the courts revolves around the benches’ interpretation of Title III of the Americans with Disabilities Act of 1990. In particular, the courts disagree about how best to approach legal interpretations relating to the public accommodations provisions of this section. In approaching the foundation of this question, courts have generally had to decide whether to apply a textualist approach in their decisions.

A textualist approach, as the name might convey, dictates that the essence of the legal question can only be resolved in the particulars of the text it is found in; as such, courts that have chosen to take this approach have resolved that web accessibility doesn’t exist under the scope of the ADA, as it is not explicitly mentioned in the text of the legislation. The textualist approach is a favorite among jurists who prefer to deal with caselaw as is, rather than give the bench subjective jurisdiction over inconsistent fact patterns. The 11th Circuit of Appeals applies the textualist approach in their 2021 decision of *Gil v. Winn-Dixie Stores, Inc.*⁴⁴ This approach is also the favorite of jurists such as Associate Supreme Court Justices Neil Gorsuch and Sonia Sotomayor.

The other approach, purposivism, is one that is more understanding of the fact that when the ADA was drafted, the internet had not yet been published. This approach allows the court to apply the principles that exist as the foundation of the ADA, and apply the intent of the drafters to a new technological developments over time (i.e., the internet). This approach has allowed the courts in the 1st, 2nd, and 7th Circuits (Courts of Appeals) to find that plaintiffs (here being disabled individuals) were discriminated against under Title III and were entitled to damages. The purposivism interpretation principles itself on the understanding that the legislative documents that serve as guidelines for activities often outlive the environmental conditions to which they were born into. As such, the jurists applying this interpretation see the documents as living, and their application to the environment as fluid; often being effective beyond a textual understanding of the time in which they were created. Such approach entertains the notion that jurists have latitude in interpreting the meaning behind the texts, and not just the text of legislation themselves.

⁴¹ CO HB 21-1100

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Juan Carlos Gil v. Winn-Dixie Stores, Inc.* (United States Court of Appeals for the Eleventh Circuit April 7, 2021).

6.3 Holding/Precedent

To date, U.S. Circuit Courts of Appeals have narrowed their interpretation on this legal question to three responses: the internet is a place of public accommodation similar to that of a physical location, the internet is not a place of public accommodation, and there is a nexus between the physical location and the virtual application of the business such that a website can be interpreted to be either a place for a public accommodation or not (i.e., receiving the protections granted under Title III of the ADA from discrimination).

The 1st, 2nd, and 7th U.S. Circuits prescribe to the latter of the legal theories when adjudicating cases on web accessibility and Title III ADA claims. Purposivism, the name for this type of interpretation, has made it so that these jurists have transplanted the intentions of the drafters of the ADA to the circumstances that exist in the modern world. The cases tried within the jurisdictions would likely be decided in favor of the plaintiff, as precedent suggests that the judges on these benches find websites to be places of public accommodation. It is important to note that this is just a generalization, and that there have been judges, particularly in the 2nd Circuit, who have expressed dissent towards this interpretation.⁴⁵

The 11th Circuit has ruled that websites are not places of public accommodation. Cases in jurisdictions who prescribe to similar beliefs will often be decided in favor of the defendant. Judges on these benches, in applying a strict textualist approach, believe that a website is not a place for public accommodation. The 11th Circuit affirmed this position in their decision of *Gil v. Winn-Dixie Stores, Inc.* in April of 2021. In *Gil v. Winn-Dixie, Inc.*, the Circuit Court avoided providing an answer to the “nexus approach” but does entertain the idea that one could exist by stating that the circumstances of this case did not provide evidence for a nexus-based argument. This decision affirms what is known as the intangible barrier standard.

The 3rd, 6th, and 9th Circuits apply a hybridized approach to the question of public accommodations. Cases tried in the below jurisdiction apply the “nexus approach”, meaning there must be a nexus between the website and physical location. Unlike the other jurisdictions, the jurists on these benches look mainly at the facts of the case rather than an evaluation of the law one is making a claim under. The “nexus” between the physical and virtual spheres must be such that the two act in tandem, and/or act in a manner that one would see them as achieving the same goal. Furthermore, arguments made dictate that the claimant must demonstrate that the inaccessibility of the website further impedes their access to the physical location. “[Including] websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress’s mandate that the ADA keep pace with changing technology to effectuate the intent of the statute.”⁴⁶

7 Future Considerations/Solutions

With so much uncertainty in how the courts may apply anti-discrimination provisions to web accessibility claims, it’s impossible to have a clear picture of the future of web accessibility and digital inclusivity. What is clear is that discrimination in the virtual environment is unlikely to be a phenomenon that disappears on its own, and any attempt to mitigate the effects of inaccessibility will require the intervention of both the government and private business. The lower courts do not appear inclined to reach a consensus on their own. What does that mean? There are two paths forward: the Supreme Court can take on a web accessibility claim, effectively overruling any lower court discrepancies in caselaw; or the United States Congress can write legislation to make it such that websites are considered places of public accommodation under the ADA (or some new piece of legislation). For private businesses, part of the solution is protecting themselves, while also ensuring their own pages are accessible to all users. The

⁴⁵ *Winegard v. Newsday LLC* (United States District Court Eastern District of New York August 16, 2021). and *Yaroslav Suris v. Gannett Co., Inc. and Gannett Satellite Information Network, Inc.*, (United States District Court Eastern District of New York July 14, 2021).

⁴⁶ 913 F.3d 898, 905–906 (9th Cir. 2019).

legal profession and businesses alike will have to adapt to the changes in technology and institutions that are bound to arise as time progresses.

7.1 Governmental Action

7.1.1 Judiciary

The Judiciary Branch remains the most effective mechanism by which the questions over web accessibility/digital inclusivity law may be answered. More specifically, because of the inconsistencies in the findings of lower courts, a decision on the issue must be rendered by the Supreme Court to quash conflicting legal precedents (thus settling the matter once and for all). The Court has chosen not to take on prior litigation posing the question on whether legal protections enacted for physical locations held for those same activities/services/companies in the virtual realm.⁴⁷ Associate Justice Clarence Thomas, in his concurring opinion in *Biden v. Knight First Amendment Institute at Columbia University*, has indicated that the Court believes that this issue will come up again, and requires an answer. So, what would happen if a case were to reach the highest court?

Nothing is known for sure, however all signs point to this not being a partisan issue. The essence of the legal question lies in the tension between judicial approaches, specifically whether the jurists on the bench apply a textualist approach or one that invokes purposivism. The approach typified in judicial opinions doesn't necessarily mean a particular jurist will side as would be assumed. Justices Gorsuch and Sotomayor are strict textualists. While Justice Gorsuch is believed to favor the judicial opinions of the 9th and 11th Circuit, not much is known on Justice Sotomayor's opinion on the matter. Three Justices have declared their opinions on the matter: Justice Thomas, Justice Barrett, and Justice Kavanaugh. In *Biden v. Knight First Amendment Institute at Columbia University*, first asserts his belief that the question of legal doctrines application to businesses operated in the virtual sphere is one that the Court will need to address. In his opinion Justice Thomas writes, "We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms."⁴⁸ He cites Justice O'Connor in *Turner Broadcasting System, Inc. v. FCC*, making the point it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies" and then applies it to the web.⁴⁹ Justice Thomas later goes on to write "That is especially true because the space constraints on digital platforms are practically nonexistent (unlike on cable companies), so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking" to declare agreement that the virtual realm, for all intense and purposes, is an extension of the physical environment and thus is entitled to the same protections under the ADA.⁵⁰ Justice Barrett, in *Carello v. Aurora Policemen Credit Union*, 930 D.3d 830 (2019), indicated her opinion being somewhat like that of Justice Thomas.⁵¹ Justice Kavanaugh has expressed his inclination for a textualist interpretation and thus would rule to exclude webpages from the protections under Title III of the ADA.

The direction of the decision of a case brought before the Court is mostly unknown. Most legal analysis have a pre-hearing consensus of three-two in favor of websites being a public accommodation,

⁴⁷ *Robles v. Domino's Pizza, LLC*, No. 17-55504 (9th Cir. 2019).

⁴⁸ Associate Justice Clarence Thomas, Concurring Opinion on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Joseph R. Biden, Jr., President of the United States, et al. v. Knight First Amendment Institute at Columbia University, et al.* (Supreme Court of the United States April 5, 2021).

⁴⁹ "Turner Broadcasting System, Inc. v. Federal Communications Commission." Oyez. Accessed December 6, 2021. <https://www.oyez.org/cases/1996/95-992>.

⁵⁰ *Joseph R. Biden, Jr., President of the United States, et al. v. Knight First Amendment Institute at Columbia University, et al.* (Supreme Court of the United States April 5, 2021).

⁵¹ *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830 (7th Cir. 2019)

with four justices being swing votes.⁵² That being said, the direction of the Court will be decided in the decision of those four members whose votes are not known.

7.1.2 Legislative

In early 2021 (February), Rep. Ted Budd (R-NC), Richard Hudson (R-NC), and Lou Correa (D-CA) re-introduced the Online Accessibility Act H.R. 1100 onto the House floor to solidify the legal precedent established in *Robles v. Dominos Pizza, LLC*. Like its predecessor bills, this legislative attempt failed to pass both chambers. The failure of H.R. 1100 is just another example of the failure of Congress to reach a meaningful consensus on the issue. Previous bills have failed to pass for pedagogical, ideological, and financial reasons. There have been small instances where progress has been made for a narrowly tailored group of individuals. In 2020, Senator Bob Casey [D-PA] and Senator Jerry Moran [R-KS], introduced S. 3587 “The Department of Veterans Affairs (VA) Website Accessibility Act”. S. 3587 passed the Senate and was enacted into law on December 4, 2020. The law ensures compliance under Section 508 on Veterans Affairs webpages, adding specific protections for blind individuals.

Though laws such as S. 3587 have proven to be successful for a narrow scope of people, legislative action should affect the largest quantity of people. While on paper it would appear to be a simple solution to providing protection for disabled individuals in the virtual sphere – include the internet in the codification of places of public accommodation under Title III – in reality, it’ll be much more difficult to enact. Enforcement and reporting mechanisms will have to be constructed, as well as guidelines and technical standards be codified and reviewed by whatever agency is deemed to have jurisdiction. Then there will have to be a grace period to provide entities with enough time to fall into compliance. It’s not impossible to effectively enact this legislation and enforcement structure; and Colorado’s new law may be a model for legislators in the future for a plan for enactment.

8 Conclusion

Web inaccessibility remains as a significant barrier to digital inclusivity in today’s hyper digitized world. With about 94% of all web pages failing to be inclusive, disabled users find themselves subject to forms of discrimination on the internet. Such discriminatory behavior is believed to be, by many, illegal under the Americans With Disabilities Act of 1990, as it discriminates against the protected class of disabled individuals. Others argue that, while a moral imperative may exist such that it ought to be prohibited by the law in the future, the current law (ADA) makes no provisions to guarantee equity in access on the web. Both arguments hold sway in federal jurisdictions; and to date, the Supreme Court has not agreed to hear a case to answer this question.

Still, the fact remains that little is known about the future of the internet and the laws that govern it. With 175 new websites created each minute (252,000 a day), the problem only seems to be growing.⁵³ As the global society continues to adapt to the changes brought about by the internet, a global effort ought to be made to make the internet more inclusive for all people.

⁵² In favor of public accommodation: Justice Thomas, Justice Barrett, and Justice Breyer*. Not a public accommodation: Justice Kavanaugh and Justice Gorsuch. Unknown: Justice Sotomayor, Justice Alito, Chief Justice Roberts, and Justice Kagan. *Justice Breyer has announced his retirement from the Supreme Court and at date of writing are awaiting confirmation on his replacement to the bench.

⁵³ Nick Huss et al., “How Many Websites Are There in the World? [2021],” Siteefy, November 18, 2021, <https://siteefy.com/how-many-websites-are-there/#How-Many-Websites-Are-Created-Every-Day>.