

# PUBLICATION

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## Retail Websites May Face ADA Compliance Issues: Accessibility in the Virtual Sales World

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New legal developments suggest that online sellers may need to do a quick web redesign. Recent legal decisions and a new interest from Congress and the Department of Justice (DOJ) regarding Title III of the Americans with Disabilities Act (ADA) may mean that all retailers with an online presence will need to provide new website accommodations that address the common disabilities of retail users.

The ADA was enacted to eliminate discrimination against individuals with disabilities. Title III of the ADA requires that “public accommodations” provide the same goods and services to individuals with disabilities as provided to individuals without disabilities. Recently, the definition of “public accommodations” seems to be expanding to include not only physical facilities but also web-based facilities made available to the general public by retailers.

The ADA was enacted in 1990, prior to the Internet's pervasive presence and the resulting e-commerce industry. Thus, the language of the ADA does not specifically address the Internet or online retailers. U.S. federal courts have split over whether the definition of public accommodation in the ADA is limited to actual physical structures or whether the definition includes digital infra-structure, such as retail websites. Some federal courts have found that the definition of public accommodation was not limited to an actual physical structure (usually reasoning that Title III of the ADA does not mention physical boundaries or physical entry; therefore, virtual public accommodations could be included within the statute's reach). In these cases, the courts have ruled that the failure to apply the ADA to online sales sites would effectively mean that businesses could discriminate against disabled individuals in the design and display of their online offerings. In contrast, other federal courts have held that the definition of public accommodation was limited to an actual physical structure (reasoning that the ADA does not include any provision with respect to online sales or web-based accommodations and therefore it is up to Congress, and not the courts, to extend the application of the statute beyond the physical structures explicitly referenced in the statute).

Lower court opinions seem to provide some middle ground between these two distinct and opposite applications of the ADA to virtual retail facilities. In one California federal district court, the ruling as to the applicability of the ADA seemed to focus on whether a retail website prevents the disabled person from fully enjoying all of the goods and services offered *inside of the physical retail store*. Basically, the court ruled that there must be a connection or nexus between the physical and virtual retail space. This nexus means that brick and mortar stores that also offer the convenience of online shopping would have to ensure that their websites are fully accessible to disabled individuals and comply with the ADA. For example, brick and mortar stores may need to ensure that their websites provide color contrasts or larger text to make objects easier to view, text alternatives for pictures or predictability in website organization.

The current question that remains unresolved on the federal level is whether online retailers that do not have public brick and mortar stores must also comply with the ADA.

While the U.S. Supreme Court has yet to address this issue (and resolve the conflict across the federal circuits), a new report seems to indicate Congressional interest is moving in the direction of application of the ADA to retail websites (regardless of whether there is a physical sales location). Similarly, recent statements

by the DOJ seem to indicate that they will look to retailers, including online-only retailers, to modify their websites to be compliant with Title III of the ADA. Practically, it may be a matter of whether online retailers are proactive in anticipation of a consistent federal approach to the application of the ADA to retail websites or take the risk/expense of incurring a rapid web-development project to comply in response to changes to the statute or in the enforcement environment.