

# ADA LAWSUITS FOR WEBSITES: IS YOUR WEBSITE COMPLIANT?

LEGAL ALERT

## ADA Lawsuits for Websites: Is Your Website Compliant?

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by **Dan Ballesteros**

### ADA Lawsuits for Websites: Is Your Website Compliant?

A new frontier has arrived for Americans with Disabilities Act (ADA) compliance lawsuits: lawsuits for non-compliant websites.

Now, serial plaintiffs (or their attorney) can sit in the comfort of their home and surf the web for non-compliant websites...and sue the owners of those sites.

Brick-and-mortar businesses are familiar with ADA-related lawsuits alleging the existence of physical barriers; i.e. that a business is not in compliance with the ADA and is not fully accessible according to the ADA.

We are now seeing similar lawsuits that claim that there are digital barriers as well, that a website is not in compliance with the ADA, and that the website is not accessible according to the ADA.

### **What is a Non-Compliant Website?**

Most business owners are unaware of any standards for website accessibility, and there is no federal regulation specifically addressing the accessibility of websites. However, there is an industry standard that has been adopted worldwide: the Web Content Accessibility Guidelines 2.0 (WCAG 2.0). The WCAG 2.0 was created by the World Wide Web Consortium, the main international standards organization for the internet.

According to the WCAG 2.0, website content should be:

- Perceivable
- Operable
- Understandable
- Robust

These standards are not as precise as their ADA physical counterparts (for example, a pay counter must be provided that is no higher than 36 inches). This lack of precision (and familiarity) has been used as a defense. However, the courts have not agreed with this defense.

Recently, the Ninth Circuit court ordered the defendant, Domino's Pizza, to comply with the WCAG 2.0 standard (*Robles v. Domino's Pizza, LLC* 913 F.3d 898 (2019)). The court held that the ADA's requirement on public accommodations was applicable to the digital world and sufficiently precise:

*Public accommodations must provide, "full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations," to people with disabilities and must, "ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently," than able-bodied customers.*

The situation is not going away and continues to evolve. For example, California's Consumer Privacy Protection Act (CCPA) went into effect on January 1, 2020. The CCPA requires that a company website's privacy policy be accessible to consumers with disabilities, and does not

define accessibility.

## Background

In 2013 alone, John Ho filed over 80 lawsuits against businesses and their landowners in San Jose alone, alleging the businesses were not compliant with the ADA. Many perceive this “serial plaintiff” approach to abuse the ADA. The most common reason that defendants cry foul is their belief that the plaintiff never intended to be a customer. For example, it remains doubtful to many that John Ho visited all 80 of the establishments against which he filed suit in his visit over the Cinco de Mayo weekend in 2012.

Now, serial plaintiffs can surf the web for non-compliant websites while sitting at home in their pajamas!

## What Should You Do?

- If you are an entity with no brick and mortar facility that sells your goods or provides your services (i.e. online only), you probably don't need to worry about it...yet. A 2012 lawsuit filed against Netflix was dismissed and upheld by the Ninth Circuit: *Cullen v. Netflix, Inc.* (2012) 880 F.Supp.2d 1017; dismissal upheld in an April 1, 2015, published opinion by the Ninth Circuit.
- Make sure your IT department or outside web service provider is familiar with WCAG 2.0. Web Content Accessibility Guidelines, ver. 2.1 of June 5, 2018, from the World Wide Web Consortium can be found **here**.
- Hire an expert to identify and address issues. Reputable website accessibility solutions include **builders**, **UserWay**, and **AccessiBe**.
- Serial plaintiffs seek easy targets. Test the accessibility and function of your website and app frequently, from both a desktop and a mobile device.
- Consider loss allocation techniques such as indemnity. You may negotiate with your web service provider or insurance carrier to indemnify your business should you be sued.

Prevention is more cost-effective than the cure. This is especially true in litigation and lawsuits. Get compliant, publicize that compliance, and stay compliant! If you are still sued, be sure to contact a knowledgeable and experienced lawyer.

*If you have any questions regarding ADA website compliance, please contact:*

**Dan Ballesteros** is an aggressive litigator who has successfully represented brokers, sellers, and buyers in cases involving the nondisclosure of defective conditions,





**Stephanie Sparks** is a shareholder at Hoge Fenton and chairs the firm's Privacy & Data Security and Intellectual Property practice groups. She counsels companies on privacy laws and helps them create and implement administrative, technical, and physical safeguards for data security. Stephanie also conducts onsite data security and compliance assessments; provides privacy and data security awareness training; prepares record management policies, record retention/destruction schedules, and data breach incident response plans.

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