

ASSESSING AND LIMITING LIABILITY THROUGH POLICIES, PROCEDURES AND WEBSITE AUDITS

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Through Policies, Procedures and Website Audits) of
E-Commerce and Internet Law: Legal Treatise with Forms 2d Edition
A 5-volume legal treatise by Ian C. Ballon (Thomson/West Publishing, www.IanBallon.net)

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Chapter 48

Assessing and Limiting Liability Through Policies, Procedures and Website Audits

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48.01 Overview

This part of the treatise addresses the unique liability risks faced by website owners and service providers. Internet

sites typically face exposure based on their content, as well as the conduct of employees and third parties who interact there. These risks, in turn, may arise out of a company's own acts or omissions (or those of its employees) or the conduct of customers, subscribers or other third-party visitors or users.

E-commerce is a single term which encompasses a limitless, and ever changing, collection of entities, whose business models and technologies are constantly evolving and transforming. In all cases, however, site owners and operators¹ and service providers should adopt policies and procedures to limit their exposure and, to the extent possible, seek contractual representations, warranties and indemnification commitments from solvent third parties. Internet sites and services also should ensure user privacy² and website security³ and access.

In addition to direct liability, site owners and service providers may face potential indirect liability because of the interactive nature of cyberspace. While third-party liability historically was a problem faced primarily by ISPs, today even traditional brick-and-mortar companies increasingly are offering interactive services such as blogs, bulletin boards, chat rooms, email accounts and personal profiles or homepages, which could expose them to potential indirect liability. Any business that allows third parties to post, store or transmit material potentially risks risk liability for illegal or infringing content.

This chapter outlines measures that businesses should undertake to assess their risks and develop policies and procedures to minimize their exposure for direct liability, including conducting a website audit.⁴ Chapters 49, 50 and 51, in turn, consider potential secondary liability for third party conduct and content online.

Chapter 49 assesses the unique pressures to hold service providers and site owners liable for the misdeeds of third

[Section 48.01]

¹Where the owner and operator of a site are different, the owner potentially could be held liable for the conduct of its operator under the third-party principles analyzed in chapter 49.

²See *supra* chapter 26.

³See *supra* chapter 27.

⁴See *infra* § 48.04.

parties—which typically arise under intellectual property laws, state law torts and child pornography and obscenity statutes—as well as congressional responses which have resulted in a patchwork of safe harbor provisions, exemptions and liability limitations. It methodically catalogues and summarizes the substantive liability risks and safe harbors or exemptions potentially available to all sites and services. Chapter 49 also outlines practical strategies for mitigating the risk of secondary liability for user content and conduct.

Chapters 50 and 51 analyze the particular risks confronted by specific types of businesses, such as blogs, social networks, cloud service providers, file hosting services and lockers and mobile providers. A list of special considerations for particular types of Internet businesses, and where to find them in this treatise, is provided in section 50.01.

48.02 Assessing Direct and Indirect Liability Risks

The risks a website owner, service provider, e-commerce vendor or other business with an Internet presence faces may be divided into two broad categories:

- Direct liability for their own acts (or acts of their employees); and
- Indirect or third-party liability¹ for the acts of strangers (including user content and misconduct).

The extent of an entity's exposure may be directly proportionate to the level of interactivity of its site. Non-interactive sites face more limited liability which they can more easily control (either in fact or through contractual indemnification commitments from third-party commercial content providers). By contrast, any site or service where users may post, store or transmit material that infringes third-party intellectual property rights, or otherwise is illegal or offensive, or engage in acts that may be fraudulent or unlawful, faces potential third-party liability risks which may be more difficult to control.

[Section 48.02]

¹Indirect liability, or the liability caused by third parties, is sometimes characterized (especially in copyright case law) as secondary liability because it is secondary, or derivative of, the person directly liable. See *supra* § 4.11. While this terminology—indirect, secondary or third-party liability—can be confusing, in reality these terms have the same legal meaning.

48.03 Assessing Content Liability: The Convergence of Commerce, Publishing and Entertainment

A commercial Internet site is effectively a virtual storefront grafted onto a software application. The site itself is comprised of little more than content, such as text, sound, visual images, film or graphics, which typically is protected by various forms of intellectual property. Thus, unlike on *terra firma*, where a company may have a fixed physical location and be built with bricks and mortar, an Internet business appears to the world as the user interface of a computer or television screen or PDA which may be constantly revised (both by its owners and third parties). In addition to whatever other line of business it may be in, a site owner acts like a publisher or broadcaster¹ of content when it establishes a presence on the World Wide Web. Often that content is user-generated and therefore more difficult to control.

The convergence of different technologies and business models in cyberspace has led to the phenomenon of legal convergence—where different liability issues, drawn from varying disciplines, all converge on a single website or other online location.² Among other things, website owners must consider the type of legal questions previously faced only by businesses that operated in the software, entertainment, advertising or print publishing industries.³

48.04 Conducting a Website Audit

Before going live with a new site or service, and periodically thereafter, companies should conduct website audits to

[Section 48.03]

¹The term broadcaster implies a broadband transmission, but is used in this context to underscore how, unlike on *terra firma*, the conduct of commerce in cyberspace involves a convergence of traditional business practices with advertising and entertainment.

²See *supra* §§ 2.01, 3.02[6] & chapter 1.

³On the other hand, the nature of the medium allows businesses to reduce their potential exposure by cooperating without forming joint ventures or otherwise tying their profits and liabilities to other entities the way they would on *terra firma*. The liability risks associated with co-branding and cross-promotional arrangements generally are lower than for comparable business models on *terra firma*. See *supra* §§ 20.01 *et seq.* The ease and speed with which these arrangements may be formed, however, requires vigilance on the part of a company's legal department to ensure that draft contracts (and potential liability risks) are adequately considered by counsel.

evaluate potential liability risks. A typical corporate website may include hundreds or even thousands of separate pages, many of which may be subject to being separately, instantaneously and automatically updated by different people within an organization, in some cases without any centralized control. Popular Internet businesses typically are even larger.

An audit generally should include a review of all content and intellectual property posted on a website, as well as all contracts and license agreements entered into relating to the site. While corporate culture and the nature of the industry and websites involved will likely dictate that other legal questions should be evaluated, as a general proposition the following issues should be considered:

- How is company material posted to the site?
 - Who has authority to post material?
 - What control mechanisms¹ are in place?
 - Is content posted directly or by an external host (or other third party)?²
- Can third parties post content? If yes:
 - What control mechanisms are in place?
 - What policies have been adopted to limit liability for third-party intellectual property liability and discourage the posting of infringing, illegal, obscene, child pornographic or other unwanted content?³
 - Does the site comply with the Digital Millennium Copyright Act?⁴
 - Has the site notified subscribers and account holders about and reasonably implemented a policy of terminating repeat infringers in appropriate circumstances?
 - Has the site registered its agent with the U.S. Copyright Office and included the agent's contact information on its site?
 - What internal procedures have been established for implementing the DMCA, including

[Section 48.04]

¹Control mechanisms may include guidelines, as well as procedures for referring certain material to counsel for review.

²For a discussion of issues surrounding hosting agreements, *see supra* chapter 19.

³*See infra* chapter 49.

⁴*See supra* § 4.12.

keeping track of repeat infringers and responding to “red flag” material?⁵

□ Does the site maximize its potential immunity from state law liability under the Good Samaritan exemption?⁶

□ What procedures have been established to report child pornography to appropriate police agencies in accordance with the Protection of Children from Sexual Predators Act of 1998?⁷

□ What procedures (if any) are in place to respond to third-party complaints?

□ What documentation exists with respect to past complaints?

□ What record-keeping procedures should be implemented or revised?

□ What mechanisms are in place to respond to subpoenas, warrants, court orders and requests for assistance in tracking down the identity of anonymous or pseudonymous infringers or other persons directly responsible for misconduct on the site?⁸

— Do privacy policies limit possible responses?⁹

● Review content posted on the site:

□ Who owns the content?

□ Are ownership rights in original content apparent (or may employees or other third parties claim rights)?¹⁰

□ Should copyright registration forms be filed for material posted on the site (including software, sound, video, graphics or text), the site itself or databases made available online?

□ Are trademarks adequately protected (and are they used properly)?

— Should trademarks be registered in the United States?

— Should international registrations be filed?

□ Is patent protection available for technology or business models incorporated on the site?

⁵See *supra* § 4.12.

⁶See *supra* § 37.05; *infra* §§ 49.01 to 49.04.

⁷See *infra* § 49.10[2].

⁸See *infra* § 50.06.

⁹See *supra* § 37.02; *infra* § 50.06[4].

¹⁰See *supra* § 11.02[2].

- Is third-party content licensed or otherwise permitted to be used?¹¹
- May a third-party claim moral rights in a work where all other rights have otherwise been alienated?¹²
- Does content appear to be infringing, illegal, excessively violent, harassing or otherwise objectionable (in which case it may be or in some cases should be removed pursuant to the DMCA and/or Good Samaritan exemption)?¹³
- Are databases on the site adequately protected?¹⁴
 - Is the owner entitled to protection under the EU Directive?
 - Is the database protected under U.S. copyright law and subject to contractual restrictions?
- Do representations on the site comply with state and federal advertising laws (including any special requirements for particular products)?¹⁵
 - Do advertisements and promotions comply with the FTC's Dot Com Guidelines?¹⁶
 - Does content comply with the EU Directive on comparative advertising (if directed to EU residents)?
- Does content on the site pose securities law problems?¹⁷
 - What procedures are in place to minimize the risk of employee disclosures?
- Are contests or promotions run on the site?
 - Do contests comply with the laws of all jurisdictions whose residents may participate?

¹¹See *supra* §§ 4.04, 4.05.

¹²See *supra* § 4.04[4].

¹³The Good Samaritan exemption allows a site to remove content without incurring liability, whereas the DMCA compels Service Providers to remove material if they have a “reasonable awareness” that it is infringing. See 17 U.S.C.A. § 512(i); 47 U.S.C.A. § 230(c); see generally *supra* §§ 4.12[8], 37.05 *infra* chapters 49 to 51 (outlining third-party liability risks and alternative policy responses).

¹⁴See *supra* §§ 5.01 *et seq.*

¹⁵See *supra* chapter 28.

¹⁶See *supra* § 28.04.

¹⁷See *supra* chapter 32.

- How are residents from non-complying jurisdictions excluded from the promotion?
- Could the contest be characterized as an illegal lottery?¹⁸
- Is adult content to be posted on the site?
 - What procedures are in place to ensure that obscene content and child pornography are not posted and/or are promptly removed?¹⁹
 - Have mechanisms been put in place to restrict access to minors to benefit from the broad exemption created by the Child Online Protection Act?²⁰
 - Has the site sought to minimize its exposure under the Stop Enabling Sex Traffickers Act (SESTA)/ Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) (referred to by some as “FOSTA-SESTA”), by taking advantage of the Good Samaritan exemption created by subpart 2 of the CDA²¹ and adopting practices and procedures to minimize risk of exposure for advertisements and other content.²²
 - Is the site accessible in countries with stricter decency laws than the United States (including jurisdictions where the site owner could be exposed to personal liability)?
- Does the site include racist material, hate speech or third-party libelous or defamatory statements that, while protected in the United States by the First Amendment or the Good Samaritan exemption to the Telecommunications Act of 1996, could lead to liability in other countries?²³
- Is content at the site likely to provoke hostility or negative publicity because it is offensive or violates netiquette?

¹⁸See *supra* § 28.16.

¹⁹See *infra* § 49.10.

²⁰See *infra* § 49.10[4].

²¹47 U.S.C.A. § 230(c)(2)(A); see generally *supra* §§ 37.05[4], 37.05[5][C].

²²See 47 U.S.C.A. § 230(e)(5); *supra* § 37.05[5][C].

²³See *supra* §§ 37.05, 37.06.

- Does any content on the site read like a party admission that could be harmful if introduced in court?²⁴
- If the site hosts user generated content, does it comply with the Principles for User Generated Content Services²⁵ or other best practices?²⁶
- Does the site monitor for and seek to deter abuse?
- Considerations about the site itself:
 - Are the ideas underlying the business model adequately protected under patent law (if sufficiently novel), trade secret law or state common law rules or statutes governing idea misappropriation?²⁷
 - Are disclosures and disclaimers adequately conspicuous?²⁸
 - Are links to third parties fair?²⁹
 - Are embedded or in-line links or frames used?
 - Do links or frames create a false impression about the origin of content or the sponsorship or affiliation of a site, its owner or the products sold there?
 - Should disclaimers be used in connection with any outbound links?
 - What is the site's policy with respect to third-party links and frames?
 - Do links or frames refer users to infringing material?
 - Could links from the site be deemed to incorporate or endorse referenced content under federal securities law, FDA or other regulations?
 - What are the site's practices with respect to sponsored links and keyword advertising?³⁰
 - Are third-party trademarks included in metatags or white-on-white (or black-on-black text)?³¹
 - Are the website owner's marks included in third-party metatags?

²⁴See generally *infra* §§ 58.03, 58.04 & chapter 57.

²⁵See *supra* § 4.12[17].

²⁶See *infra* § 48.08.

²⁷See *supra* §§ 8.04, 10.04, 10.07, 10.09, 13.01 *et seq.*

²⁸See *supra* § 28.04.

²⁹See *supra* §§ 9.01 to 9.06.

³⁰See *supra* § 9.11.

³¹See *supra* § 9.10.

- Have all appropriate domain names been acquired?³²
 - What TLDs are used?
 - Have rights been acquired in the appropriate ccTLDs?
 - Have obvious variations of recognized marks or domain names been acquired?
 - Have potential consumer criticism site names been acquired?
- Have local laws and regulations been complied with?
 - What countries is the site directed to?
 - Is the target audience adequately identified on the site and in terms and conditions?
- Should separate regional sites be used for different national markets?³³
 - If not, should separate contracts be posted on the site directed to residents of different countries? If so, should use be controlled through pull-down menus or left to user discretion?
- Should residents of particular countries be blocked from gaining access to the site or engaging in transactions because of the type of content or nature of the goods or services offered at the site?
- Does the site offer regulated substances such as tobacco, alcohol³⁴ or prescription drugs (in which case additional laws and advertising regulations must be complied with)?
- Is artificial intelligence (AI) or are intelligent agents used to automatically retrieve information posted on the site?³⁵
 - If so, what precautions have been taken to minimize the risk of liability?³⁶
- Does the site seek to limit access by bots or intelligent agents through Robot Exclusion Standard directions or otherwise?
- Does the site employ bots to encourage sales (and if so is the use of bots disclosed—and disclosed ad-

³²See *supra* chapter 7.

³³See *supra* chapter 36.

³⁴See *supra* § 28.15.

³⁵See *supra* §§ 5.01 *et seq.* Separate checklists for database protection and ethical screen scraping are set forth in chapter 5.

³⁶See *supra* § 5.05.

equately—to comply with California’s Bot Disclosure Law?³⁷

- Are the individual owners of the site potentially at risk for vicarious copyright liability, even if they have attempted to insulate themselves by creating a corporation or other operating entity, by virtue of having the right and ability to control content on the site and having a financial interest in it?³⁸

- Does the site comply with local language requirements imposed in jurisdictions such as France and Quebec (if applicable)?³⁹

- Does the site include specific mechanisms for registering complaints?

- Third Party Advertising on the Site/ Advertisements for the Site on Other Locations

- What are the site’s policies and practices with respect to purchases of keywords and sponsored links?⁴⁰

- Do advertisements comply with applicable laws?⁴¹

- Review contracts, policies and agreements, including:

- disclaimers posted on the site.

- Website Terms and Conditions.⁴²

- click-through or other contracts posted on the site.

- Verify whether contract provisions and formation mechanisms comply with existing law.⁴³

- Determine whether they should (and do) comply with the EU Directive on distance sales contracts.⁴⁴

- Evaluate whether software, databases or other content should be subject to a click-through or another forms of license agreement.⁴⁵

- Review other agreements entered into with customers, subscribers, visitors or other users.

³⁷Cal. Bus. & Prof. Code §§ 17940 *et seq.*; *supra* § 5.16.

³⁸*See supra* § 4.11[6][E] (providing an example of how the vicarious liability doctrine may be used to avoid the corporate form, even in circumstances where a party would be unable to pierce the corporate veil).

³⁹*See supra* chapter 36.

⁴⁰*See supra* § 9.11.

⁴¹*See supra* chapter 28.

⁴²For discussion of website T&Cs, *see supra* chapter 22.

⁴³Case law and best practices for enforcing Terms of Use agreements are addressed in chapters 21 and 22.

⁴⁴*See supra* §§ 15.03, 36.01.

⁴⁵*See supra* §§ 5.03, 15.02[2], 16.02, 21.03, 21.04, 21.05 & chapter 22.

- Evaluate all in-bound and out-bound obligations to ensure compliance.
 - Agreements should be drafted to avoid anti-trust and misuse problems.⁴⁶
- merchant agreements and other contracts relating to payment mechanisms or which could impose any potential risk of loss on the site owner.
- employment contracts and policies that may have bearing on potential employee rights in content on the site or technologies underlying it.⁴⁷
- vendor and other third-party contracts that may have bearing on ownership rights to content on the site or technology underlying it.
- content and software licenses for material posted on the site (and the website itself).
- agreements used to promote the site (including co-branding or linking agreements, keyword purchases, banner advertising arrangements or contracts relating to the use of unsolicited email to promote the site).
- other contracts with third parties relating to the site.⁴⁸
- Evaluate the substance and consistency of contracts and policy statements posted on the site (or entered into with visitors):
 - Do license agreements adequately provide for all necessary rights under copyright law in an electronic environment (distribution, reproduction, public display, public performance and adaption, which potentially overlap online)?⁴⁹
 - Do older documents need to be updated to account for changes in the law?
 - Are contracts and policies posted online internally consistent?⁵⁰
 - Do contracts adequately allocate risk and contain

⁴⁶See *supra* § 16.04 & chapter 34.

⁴⁷See *supra* §§ 11.01, 11.02.

⁴⁸Website owners generally should disclose information to avoid liability (such as potential vulnerability to crackers or service disruptions), disclaim liability for acts that cannot be controlled, and seek representations, warranties and indemnification from users, vendors and other third parties whose conduct could expose a site owner to liability. When in doubt, contractual obligations should be phrased in terms of general concepts of reasonableness.

⁴⁹See, e.g., *supra* § 4.04[3] (license rights).

⁵⁰Even large companies occasionally have inconsistent contracts or

appropriate representations, warranties and indemnification commitments?

□ Do online contracts adequately provide for periodic revision or amendment?

□ Does the site retain adequate records to establish contract formation?

□ Does the contract provide for automatic credit card renewal?⁵¹

— Are cookies used to verify whether assent has been obtained to the latest version?

— If not, what means are used to prove that a particular person assented to the terms of a particular version of a contract?

- Control for jurisdiction:

□ What is the intended audience for the site?

□ Do contracts include choice of law and forum clauses and, if applicable, arbitration or other A.D.R. mechanisms?

□ Are blocking mechanisms or disclaimers used to restrict transactions with (or access to) residents of certain jurisdictions?

□ What state and national laws should be complied with?

□ Where does the company in fact do business, both electronically and on *terra firma*?

□ Where does the company have assets or employees on *terra firma*?

- Consider issues unique to a specific site or site owner, such as:

□ government regulations that may apply to a particular industry.

□ court orders or consent decrees that may affect a particular company.

□ is the site directed to children (in which case special considerations relating to the collection of consumer information and exposure to adult content may be relevant)?⁵²

policies posted online as a result of overlapping or split responsibility for updating or expanding a particular site.

⁵¹See *supra* § 22.03[3].

⁵²See *supra* § 26.13[2]; *infra* § 49.10[4].

□ if an auction is run on the site, what precautions have been taken to limit fraud and avoid being drawn into disputes between putative buyers and sellers?⁵³

□ if a chat room is run on the site, how is the site owner maximizing its protection under the Good Samaritan exemption to the Telecommunications Act of 1996?

- Security issues:

What level of security is appropriate for the particular applications available on the site?

□ Evaluate the adequacy of a website's firewalls⁵⁴

□ Is customer data stored behind a firewall?

□ Is encryption used to protect certain stored data?

— Have applicable export controls been complied with to the extent encryption is used internationally?⁵⁵

□ What do contracts with third parties provide with respect to security issues?

— Have representations, warranties or indemnification promises been given to others?

— Have representations, warranties or indemnification promises been received?

— Does the site contractually bind third-party recipients of personally identifiable information to maintain reasonable security precautions?

□ What practices and procedures have or should be adopted as part of an information security policy?⁵⁶

— Has the site owner or service provider considered how it would respond to a security breach?⁵⁷

— What practices have been adopted, in compliance with Massachusetts and other state laws?⁵⁸

- Privacy considerations:

⁵³See *supra* chapter 22.

⁵⁴For discussion of firewalls, see *supra* § 27.02[3].

⁵⁵See *supra* chapter 27.

⁵⁶See *supra* § 27.11.

⁵⁷See *supra* § 27.08.

⁵⁸See *supra* §§ 27.04[6][E], 27.11. Separate checklists for compliance with security obligations are set forth in chapter 27.

- Is the site required to comply with the EU/EEA General Data Processing Regulation (GDPR) and if so is it compliant?⁵⁹
 - Does the website owner need to adopt Binding Corporate Rules or the EU Model Contract, adhere to an approved Code of Conduct, obtain certification from an approved certification mechanism, or self-certify pursuant to the E.U.-U.S. Privacy Shield?⁶⁰
 - Does the site comply with the EU/EEA ePrivacy Directive?⁶¹
- Is the site compliant with the California Consumer Privacy Act, which took effect on January 1, 2020?⁶²
- What is said on the website with respect to the collection, use and dissemination of personal identifying information about consumers?⁶³
- What are the site's actual practices?
 - Are the practices consistent with the policy statement or does the statement need to be revised?⁶⁴
- Does the site include a policy statement that would satisfy FTC guidelines?
- Where is the privacy statement located on the site?
 - Are links to the statement adequate?
- Does the site collect information from children?
 - If so, does it comply with the Child Online Protection Act regulations?⁶⁵
- Does the site offer health care-related services (in which case special privacy rules may apply)?⁶⁶
- Is the site engaged in financial transactions that could be subject to the requirements of 15 U.S.C.A.

⁵⁹See *supra* §§ 26.04 to 26.04B.

⁶⁰See *supra* § 26.04A.

⁶¹See *supra* § 26.04B.

⁶²See *supra* § 26.13A.

⁶³See *supra* chapter 26.

⁶⁴See *supra* § 26.14. A separate checklist for issues to consider in drafting a privacy policy is set forth in section 26.14[3].

⁶⁵See *supra* § 26.13[2].

⁶⁶See *supra* § 26.11.

§ 6801 in connection with online data collection practices?⁶⁷

□ Is a website privacy statement a contract (incorporated by reference in Terms of Use or a EULA) or statement of policy?⁶⁸

□ Does the site transfer personally identifiable information to third parties?

— Does the site treat the data in accordance with the terms of the privacy policy in effect at the time and location of its collection?

— Does the site have procedures in place to comply with California disclosure requirements?⁶⁹

— Does the site share information with ad networks and, if so, adequately disclose its behavioral advertising practices?⁷⁰

□ Has the site adopted a security notification plan?⁷¹

□ Is the site promoted by email?

— Have recipients given their consent to receive such communications? Was consent express or implied by a user's failure to opt-out?

— Do unsolicited email communications comply with the CAN-SPAM Act and applicable state laws?⁷²

— Does the site accept credit card payments while also seeking to collect personal information (and if so does it adequately comply with California law)?⁷³

○ Is the site promoted by text messages?

— Have recipients given prior express written signed consent for marketing or prior written consent for other messages?⁷⁴

● Social Networking considerations:

⁶⁷See *supra* § 26.12.

⁶⁸See *supra* §§ 21.03, 22.02, 22.05[2][C], 26.14.

⁶⁹See *supra* § 26.13[6].

⁷⁰See *supra* § 28.06.

⁷¹See *supra* § 27.08.

⁷²See *supra* chapter 29.

⁷³See *supra* § 26.13[6][E].

⁷⁴See *supra* 29.16.

- Does the site comply with laws governing Internet dating (if applicable), safety and the protection of children?⁷⁵
- Website Accessibility under the Americans with Disabilities Act and equivalent state laws:
 - Does the site arguably service physical world stores and therefore need to comply with guidelines for the accessibility of public accommodations by persons who are blind?⁷⁶
 - Sites that exist only in cyberspace and are not owned by companies that operate related physical world stores arguably need not make their sites accessible (although it may be a good business practice to do so, whether or not it is legally required).⁷⁷

48.05 Action Items Following a Website Audit

Upon conclusion of a website audit, a site or service should:

- Consider the third-party liability risks faced by e-commerce sites and services, and potential policies and procedures that may be adopted in response, as outlined in chapters 49 and 50 (if the site or service has any interactive component where third-party users may post, store or transmit illegal, unlawful or infringing content). and 51 (for social networks, blogs and wiki). Sample procedures typically may include:
 - policies included in service contracts and website Terms and Conditions;¹
 - notice and take down procedures or other policies or practices involving content monitoring; and/or
 - standard procedures for responding to cease and desist and other demand letters.²
- Revise standard contracts and website Terms and Conditions to ensure that representation, warranty and indemnification provisions (among other things) adequately protect a business;
- Implement policies and procedures to ensure that employees and consultants do not expose the company to

⁷⁵See *infra* chapter 51.

⁷⁶See *infra* § 48.06[4].

⁷⁷See *infra* § 48.06[4].

[Section 48.05]

¹See *supra* chapters 22, 23.

²See *supra* §§ 4.12, 37.06; *infra* §§ 49.01 to 49.14.

liability and to introduce adequate safeguards in the process for revising material on a company's website;

- Adopt policies and procedures to respond to warrants, subpoenas and third-party complaints (if users are allowed to post material anonymously or pseudonymously or if user contact information is not thoroughly verified and therefore could be falsified);³
- Adopt policies on links and frames;⁴ and
- Where legal standards are unclear, use disclosures, disclaimers and apply general standards of reasonableness to limit liability.

Merely conducting an initial audit may not fully insulate a company from liability. Policies and procedures adopted following an audit may become deficient in only a matter of months. New statutes and cases change the nature of Internet law much more rapidly than in any other field of legal endeavor. The business and technology models that spur developments in the law are changing at an even more astonishing pace. Internet sites therefore should be regularly audited, and policies and procedures reviewed and revised at frequent intervals.

48.06 Limiting Direct Liability

48.06[1] In General

Direct liability risks may be addressed through employee training and company policies and procedures. Indirect liability arising out of commercial relationships with content providers or website developers likewise may be mitigated through contractual representation, warranty and indemnification clauses. The conduct of third-party users, however, is more difficult to control (and is separately addressed in the following three chapters).

Based on the results of the audit, a site or service may determine that it needs to adopt particular policies or procedures or obtain content licenses to avoid or limit its liability. Typically, businesses should have in place policies identifying specific people within an organization (either by name or job title) who have authority to allow material to be placed on a website and set forth the basis on which content is screened for legal compliance.

³See *infra* § 50.06[4].

⁴See *supra* §§ 9.03 to 9.06.

Businesses also should develop policies to prevent illegal or infringing material from being posted online. Website policies and procedures often track those in place for a company's internal intranet or linked extranets.¹

48.06[2] Privacy, Security and Safety

E-commerce sites and services may expose themselves to direct liability if they fail to protect the privacy of consumer data, neglect to maintain the security of their online locations (which in turn may jeopardize customer information, as well as business data or trade secrets important to strategic partners), or allow visitor demand to exceed available site capacity effectively limiting or denying access to visitors. Privacy, security and access typically must be maintained in order to avoid alienating visitors to a site (and frequently as well to meet contractual obligations to business partners).

Issues relating to data privacy are analyzed in chapter 26. Security—which encompasses Internet and network security (including encryption), as well as the use of firewalls and other gateway protections against hackers and crackers—is analyzed in chapters 27 (security) and 46 (identity theft). Sites and services may provide their own internal support or outsource hosting and security services. Where services are provided by a third party, privacy, security and access issues should be expressly addressed in website hosting agreements or similar contracts.¹ Contracts and/or internal policies and procedures intended to ensure online privacy, security and access should be carefully scrutinized in connection with a website audit. Employee policies, which are addressed in chapter 58, likewise should be considered.

Given the number of privacy and security law issues that typically arise for an Internet business, separate checklists for legal compliance may be found in chapters 26 (privacy) and 27 (security).

Internet safety is relatively new but growing area, especially for social networks. An exhaustive checklist for compliance with best practices for Internet safety on social

[Section 48.06[1]]

¹See *infra* §§ 58.10 to 58.12 (analyzing employee intranet policies and extranet agreements and providing sample forms).

[Section 48.06[2]]

¹See *supra* chapter 19.

networks is set forth in chapter 51.

48.06[3] Challenges in Controlling Corporate Communications

Network access makes it easier for employees to steal or unintentionally divulge trade secrets or other company communications, which ultimately could be circulated to third parties or posted online. Companies likewise run into problems when employees post confidential information on securities bulletin boards and chat rooms, potentially in violation of federal securities laws.¹ Efforts to curb these problems (as well as even mundane employment disputes), in turn, may lead to the creation of employee gripe sites (much in the same way that third parties may create consumer criticism sites).²

Employee education, policies and procedures should attempt to limit the risk of unauthorized corporate disclosures. Security measures such as internal use of encryption and (where necessary) email monitoring also may help address the problem. A number of suggested internal policies are considered in chapter 58 in connection with intranet policies and extranet agreements.³ Businesses also should adopt a more gentle approach to resolving both internal and external disputes, to avoid such conflicts spilling over into cyberspace.⁴

48.06[4] Website and Mobile App Accessibility Under the Americans With Disabilities Act and Related State Laws

Websites deemed to service (or in some circuits, to constitute) *places of public accommodation* under Title III of the Americans With Disabilities Act¹ (ADA) must be accessible to those with disabilities, including people with impaired

[Section 48.06[3]]

¹See *supra* § 32.04[5].

²See *supra* §§ 6.14[5], 7.07[10], 7.12, 9.13, 12.03[3], 12.05[4]; *infra* chapter 57.

³See *infra* §§ 58.10 to 58.12.

⁴See *infra* chapter 57.

[Section 48.06[4]]

¹42 U.S.C.A. § 12182(a). The ADA “as a whole is intended ‘to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 (1999), quoting 42 U.S.C.A. § 12101(b)(1).

hearing or vision, to avoid liability under the Act. The ADA covers three main types of discrimination, each of which is addressed in one of the statute's three main subchapters: Title I prohibits discrimination in private employment; Title II prohibits discrimination by public entities (state or local governments); and Title III prohibits discrimination by a *place of public accommodation*, which is a private entity that constitutes one or more of the twelve statutorily enumerated

Title III “advances that goal by providing 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 accommodations by any person who owns, leases (or leases to) or operates a place of public accommodation.’” *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019), *quoting* 42 U.S.C.A. § 12182(a). Discrimination under the Act encompasses the denial of the opportunity, by the disabled, to participate in programs or services, or providing them separate but unequal goods or services. *See* 42 U.S.C.A. § 12182(a). It also provides that a place of public accommodation engages in unlawful discrimination if it fails to “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.” *Id.* § 12182(b)(2)(A)(iii); *see also id.* § 12103(1) (defining *auxiliary aids and services*); 28 C.F.R. § 36.303(a) (“A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense.”). U.S. Department of Justice (DOJ) regulations further require that a public accommodation “furnish appropriate auxiliary aids and services where necessary to ensure *effective communication* with individuals with disabilities.” 28 C.F.R. § 36.303(c)(1) (emphasis added); *see also Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (holding that DOJ’s administrative guidance on the ADA is entitled to deference); *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019) (same).

The DOJ defines *auxiliary aids and services* to include “accessible electronic and information technology” or “other effective methods of making visually delivered materials available to individuals who are blind or have low vision.” 28 C.F.R. § 36.303(b)(2); *Robles*, 913 F.3d at 904-05 (holding that Domino’s website and app constituted auxiliary aids and services that Domino’s, as a place of public accommodation, was required to make accessible to those who are blind); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17–3877–MWF (SKx), 2017 WL 4457508, at *4 (C.D. Cal. Oct. 3, 2017) (holding that although “the regulations emphasize that . . . no specific auxiliary aid or service is required in any given situation, whatever auxiliary aid or service the public accommodation chooses to provide must be effective.”).

commercial places available to the public.² Website and mobile app accessibility typically arises under Title III, although, as discussed later in this section, a small number of suits have been brought under Title II.

Title III does not mandate accessibility for all virtual locations, but it has been widely held applicable to websites and apps that service places of *public accommodation*, which is broadly defined under the statute to include locations that offer goods or services, facilities, stores, restaurants, hotels, and other places in the physical world. Where there is not a sufficient nexus between a website or app and a place in the physical world that qualifies as a place of public accommodation, an ADA Title III suit may not be maintained in a majority of circuits. A minority, however, have held that a website or app itself may constitute a place of public accommodation and therefore be subject to the ADA even if it does not service or have a nexus with a physical world location. State laws, such as those in force in California, also may require more broadly that websites and apps be accessible—regardless of whether they are connected to a physical location. Even where a business may not be legally required to do so, many have chosen to make their websites accessible to the deaf (through closed captioning) and blind (by making their sites compatible with screen reader software), in the interest of good customer relations.

Federal government websites must be accessible to individuals with disabilities,³ but the ADA, which was enacted in 1990, neither expressly covers nor expressly excludes private websites.

To state a claim for an ADA violation, a plaintiff must allege (1) that the plaintiff is disabled within the meaning of the ADA, (2) that the defendant owns, leases, or operates a place of public accommodation, and (3) that the defendant discriminated against the plaintiff by denying the plaintiff a full and equal opportunity to enjoy the services the defendant provides.⁴ A majority of circuit courts that have analyzed the definition of a place of *public accommodation*,⁵ including the Third, Fifth, Sixth and Ninth Circuits, have held that it

²*A.L. by and through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1289 (11th Cir. 2018).

³29 U.S.C.A. § 794(d).

⁴*E.g., Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).

⁵The statute defines a place of public accommodation as the follow-

must be a physical location.⁶ By contrast, the First and

ing (if they affect commerce):

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

⁶See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998) (rejecting the reasoning in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994), and holding that the term *public accommodation* and the list of examples in the statute were not ambiguous and did not refer to non-physical access); *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 & n.23 (5th Cir. 2016) (concluding that vending machines are not places of public accommodation because the ADA definition of *public accommodation* only includes actual physical spaces open to the public; “In following the Third, Sixth, and Ninth Circuits, we acknowledge our departure from the precedents of the First, Second, and Seventh Circuits, which have interpreted the term “public accommodation” to extend beyond physical places.”), *cert. denied*, 138 S. Ct. 55 (2017); *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1010-15 (6th Cir. 1997) (“The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place.”); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000) (holding that “some connection between the

Second Circuits have taken a broader view (which is also the view expressed in *dicta* in two Seventh Circuit opinions) by analyzing the nature of a travel agency and insurance office (which, unlike websites and apps, are expressly enumerated in the statutory definition of a place of public accommodation).⁷

good or service complained of and an actual physical place is required” because, based on the enumerated list set forth in 42 U.S.C. § 12181, a place of public accommodation must be an “actual, physical place . . . where goods or services are open to the public.”); *see also Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015) (affirming dismissal of plaintiff’s ADA claim based on *Weyer*; “Because eBay’s services are not connected to any ‘actual, physical place[],’ eBay is not subject to the ADA.”); Kathleen Finnerty, Paul McGrady & Christopher Marlow, *Web Access for the Disabled Under the ADA*, Greenberg Traurig Alert, Oct. 2006.

⁷*See, e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n*, 37 F.3d 12, 19-20 (1st Cir. 1994) (reversing the lower court’s order dismissing suit challenging the decision of a trade association and administering trust for a health benefit plan that limited lifetime benefits for illnesses related to AIDS because “[t]o . . . limit the application of Title III to physical structures . . . 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.”; “By including ‘travel service’ among the list of services considered ‘public accommodations,’ Congress clearly contemplated that ‘service establishments’ include providers of services which do not require a person to physically enter an actual physical structure.”); *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28, 32-33 (2d Cir. 1999) (citing the First Circuit’s *Carparts* decision and holding, in the context of insurance, that “Title III’s mandate that the disabled be accorded ‘full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation,’ . . . suggests to us that the statute was meant to guarantee them more than mere physical access. . . . We believe an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability.”), *amended on denial of reh’g*, 204 F.3d 392 (2d Cir. 2000); *Morgan v. Joint Administration Board, Retirement Plan of Pillsbury Co. & American Federation of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001) (stating in *dicta* that “[t]he defendant asks us to interpret ‘public accommodation’ literally, as denoting a physical site, such as a store or hotel but we have already rejected that interpretation. An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.”); *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (citing the First Circuit’s *Carparts Distribution Center* case and stating in *dicta* that section 12182(a) means that “the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, website, or other facility (whether in physical space or in electronic space, . . .) that is open to the public cannot exclude dis-

Consequently, many courts that have considered the issue to date (including the Ninth Circuit and the Eleventh Circuit (in a non-precedential case⁸) and district courts in the Sixth, Ninth, and Eleventh Circuit) have concluded that a Title III claim may not be brought against Internet-only service providers⁹ and may only be maintained over website or mobile app accessibility where there is a nexus between the website

abled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.”); *see also National Federation of the Blind v. Scribid Inc.*, 97 F. Supp. 3d 565, 568-70 (D. Vt. 2015) (observing the circuit split between the First Circuit, on the one hand, and the Third, Sixth, Seventh and Ninth Circuits).

⁸In an unreported, non-precedential case, an Eleventh Circuit panel reversed a lower court order dismissing plaintiff’s ADA Title III website accessibility claim because the plaintiff plausibly alleged a nexus between its website and physical world locations. *See Haynes v. Dunkin Donuts LLC*, 741 F. App’x 752 (11th Cir. 2018). An earlier reported decision that did not involve website accessibility could also be read to support the view that a nexus is required. In *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002), the Eleventh Circuit held that a contestant hotline for the quiz show *Who Wants to Be a Millionaire?* was a place of public accommodation because the Eleventh Circuit panel found that the definition of discrimination in Title III covered “both tangible barriers. . . and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person’s ability to enjoy the defendant entity’s goods, services and privileges.” *Id.* at 1283.

⁹*See, e.g., Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015) (affirming dismissal of plaintiff’s ADA claim, holding that the term *place of public accommodation* requires some connection between the good or service alleged to be discriminatory and a physical place; “Because eBay’s services are not connected to any ‘actual, physical place[],’ eBay is not subject to the ADA.”), *aff’g*, No. 5:11-cv-00262-JF (HRL), 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011) (noting that places of public accommodation are limited to physical places); *Zaid v. Smart Financial Credit Union*, Civil Action No. H-18-1130, 2019 WL 314732, at *6 (S.D. Tex. Jan. 24, 2019) (dismissing plaintiff’s Title III website accessibility case because a website does not qualify as an “other service establishment” within the meaning of 42 U.S.C.A. § 12181(7)(F), which “refers only to other physical locations While websites may be affiliated with brick-and-mortar businesses that are places of public accommodation, that does not render the businesses’ websites themselves places of public accommodation.”); *Namisanak v. Uber Technologies, Inc.*, Case No. 17-cv-06124-RS, 2018 WL 7200717, at *3-4 (N.D. Cal. Oct. 3, 2018) (dismissing plaintiff’s ADA claim under 42 U.S.C.A. § 12182 because the Uber app was not a place of public accommodation; “While ‘travel service’ is listed as a place of public accommodation under section 12181(7)(F), . . . [t]he fact that Uber sends cars to pick up customers at their desired location and drop them off at different locations is insufficient to qualify Uber’s rideshare service as a place of public accommodation. . . . Neither the

and a physical location,¹⁰ although a number of courts in the

street corner where a customer hails a car-for-hire nor the cars themselves fit in the same category as the locations contemplated by *Weyer*."); *Gomez v. Bang & Olufsen America, Inc.*, Case No.: 1:16-cv-23801—LENARD, 2017 WL 1957182, at *2-4 (S.D. Fla. Feb. 2, 2017) (dismissing the claim of a visually impaired plaintiff who had sued a retail store alleging that he could not access the store's website because it was not compatible with his screen reading software, where the plaintiff only alleged that he planned to order goods online; "a website that is wholly unconnected to a physical location is generally not a place of public accommodation under the ADA. However, if a plaintiff alleges that a website's inaccessibility impedes the plaintiff's 'access to a specific, physical, concrete space[,] and establishes some nexus between the website and the physical place of public accommodation, the plaintiff's ADA claim can survive a motion to dismiss."); *Kidwell v. Florida Commission on Human Relations*, No. 16-403, 2017 WL 176897, at *4 (M.D. Fla. Jan. 17, 2017) (holding that a website is not a public accommodation under the ADA); *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC (RNBx), 2014 WL 1920751, at *8-9 (C.D. Cal. May 14, 2014) (holding that a website was not a place of public accommodation because it was not a physical place and there was not a sufficient nexus between the website and physical kiosks); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012) (holding that websites were not places of public accommodation because they are not physical places), *aff'd*, 600 F. App'x 508 (9th Cir. 2015) (affirming dismissal of plaintiff's ADA-predicated California Disabled Persons Act and Unruh Civil Rights Act claims, because Netflix's services were not connected to any "actual, physical place[]" and therefore Netflix was not subject to the ADA in the operation of its website); *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at *4-5 (D. Mont. Mar. 31, 2011) (holding that a website, by itself, was not a physical place and that the plaintiff did not allege a sufficient connection between the website and a physical structure); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1114-16 (N.D. Cal. 2011) (dismissing plaintiff's ADA claim against Facebook where the plaintiff could not allege a nexus between the Facebook website and a physical place of public accommodation, in a suit where the plaintiff had been terminated for abuse for repeatedly sending friend requests to strangers, but alleged discrimination because she was bi-polar); *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1319-21 (S.D. Fla. 2002) (rejecting the application of Title III to a website because it was not a physical location nor a means of accessing a concrete space), *appeal dismissed*, 385 F.3d 1324, 1328-29 (11th Cir. 2004) (rejecting the appeal where the appellant sought to advance a new theory not addressed below).

¹⁰*See, e.g., Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904-05 (9th Cir. 2019) (holding that the ADA's mandate under DOJ regulations that "places of public accommodation, such as Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind" applied to Domino's website and app, even though customers predominantly accessed them while away from the physical restaurant, because "[t]he statute applies to the services of a place of public accommodation, not services in a place of public accommodation.") (quoting

National Federation for the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)); *Haynes v. Dunkin Donuts LLC*, 741 F. App'x 752 (11th Cir. 2018) (reversing the lower court's order granting defendant's motion to dismiss because defendant's website was plausibly alleged to provide a service that facilitated use of physical world shops, which were places of public accommodation); *Jones v. Piedmont Plus Federal Credit Union*, 335 F. Supp. 3d 1278, 1281-82 (N.D. Ga. 2018) (denying plaintiff's motion to dismiss in a Title III website accessibility case because the plaintiff alleged a nexus between the plaintiff's website and physical location); *Gomez v. General Nutrition Corp.*, 323 F. Supp. 3d 1368, 1374-76 (S.D. Fla. 2018) (granting summary judgment for the plaintiff on liability, holding that GNC's website was subject to the ADA because of a nexus with its physical premises; "The Website facilitates the use of the physical stores by providing a store locator. Moreover, the ability to purchase products remotely is, in and of itself, a service of the physical stores. By providing information about promotions and deals in addition to information about store information, the Website operates as a gateway to the physical stores."); *Tawam v. APCI Federal Credit Union*, No. 5:18-cv-00122, 2018 WL 3723367 (E.D. Pa. Aug. 6, 2018) (denying defendant's motion to dismiss plaintiff's ADA Title III website accessibility case where the plaintiff alleged that the accessibility barriers on the defendant's website prevent him from finding and visiting the APCI's physical location or learning about services offered at APCI locations); *Price v. Everglades College, Inc.*, No. 6:18-CV-492-ORL-31GJK, 2018 WL 3428156, at *3-4 (M.D. Fla. July 16, 2018) (dismissing plaintiff's claim without prejudice, explaining that there must be a nexus between a website and a brick-and-mortar place for an actionable Title III claim in the Eleventh Circuit); *Fuller v. Smoking Anytime Two, LLC*, Case No. 18-cv-60996, 2018 WL 3387692, at *2-3 (S.D. Fla. July 11, 2018) (denying defendant's motion to dismiss where the plaintiff adequately pleaded a nexus between the defendant's website and its physical stores); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 877-83 (N.D. Ohio 2018) (denying defendant's motion to dismiss plaintiff's ADA and Unruh Act claims where the plaintiff "sufficiently alleged a nexus between Jo-Ann's website and its brick-and-mortar stores."); *Robles v. Yum! Brands, Inc.*, Case No 2:16-cv-08211-ODW(SS), 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018) (denying defendant's motion for summary judgment; "Acknowledging the fact that Pizza Hut's restaurants are physical, brick-and-mortar places, and that Pizza Hut's website and mobile application are services provided by Pizza Hut, the Court finds that Pizza Hut's website and mobile app are both subject to accessibility regulations under the ADA."); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1348-49 (S.D. Fla. 2017) (entering injunctive relief following a bench trial on the ADA claim of a visually impaired man who had sued over access to Winn-Dixie's website, because the site operated as a "gateway" to the physical stores and its online offerings (which included, among other things, digital coupons) were "services, privileges, advantages, and accommodations offered by Winn-Dixie's physical store locations[,] where the plaintiff had frequented Winn-Dixie in the past, and represented that he would do so again in the future once the website became accessible to him; "The Court need not decide whether Winn-Dixie's website is a public accommodation in and of itself, because

the factual findings demonstrate that the website is heavily integrated with Winn-Dixie's physical store locations and operates as a gateway to the physical store locations."); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1317-21 (S.D. Fla. 2017) (denying defendant's motion for judgment on the pleadings where the plaintiff alleged that defendant's website was "directly connected" and had a "true nexus" to Winn-Dixie's grocery and pharmacy stores and that the website augmented Winn-Dixie's physical store locations by assisting customers in finding physical store locations, educating the public about Winn-Dixie brand grocery items, and providing the public with the ability to fill and re-fill prescriptions from its pharmacy for in-store pick-up and delivery); *Rios v. N.Y. & Co., Inc.*, Case No. 2:17-cv-04676-ODW(AGRx), 2017 WL 5564530, at *3 (C.D. Cal. Nov. 16, 2017) (denying defendant's motion for judgment on the pleadings where the plaintiff alleged a nexus; "a plaintiff may challenge the online services provided by a brick-and-mortar store, so long as the plaintiff establishes a nexus between the online services and the physical place. . . . Here, Plaintiff alleges that he was unable to visit Defendant's physical locations because of his inability to utilize Defendant's website."); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at *3-4 (C.D. Cal. Oct. 3, 2017) (denying plaintiff's motion to dismiss, where the plaintiff alleged a nexus between CVS's website and mobile app and its brick and mortar locations; "according to the Complaint, CVS has not made this service available equally to people with vision impairments. People with vision impairments are not offered, for example, any alternative store locator service, or any alternative service for determining whether a particular item is in stock in a particular store."); *Gomez v. J. Lindeberg USA, LLC*, No. 16-22966, 2016 WL 9244732, at *1 (S.D. Fla. Oct. 17, 2016) (holding, in granting in part plaintiff's request for a default judgment, that plaintiff stated a claim under the ADA by alleging that the inaccessibility of the defendant's website prevented him from purchasing the defendant's clothing online and searching for physical store locations); *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (holding that plaintiffs had alleged sufficient facts to state a claim because the website was heavily integrated with brick-and-mortar stores and operated as a gateway to those stores); see also *Jones v. Fort McPherson Credit Union*, 347 F. Supp. 3d 1351, 1353-55 (N.D. Ga. 2018) (declining to side with either the Third, Sixth and Ninth Circuits, in requiring a nexus to a physical place of accommodation, or the First, Second, and Seventh Circuits, in holding that a website itself may be a place of public accommodation, while denying defendant's motion to dismiss because, even if a nexus is required, plaintiff plausibly alleged a nexus (where the website allowed users to find the physical location of defendant's facility, provided information about the services, advantages, accommodations, and amenities, and enabled visitors to "pre-shop" before visiting the physical location), and there was no requirement that a website *enhance* a customer's experience, rather than merely facilitating use of the physical accommodation); *Jones v. Lanier Federal Credit Union*, 335 F. Supp. 3d 1273, 1277-78 (N.D. Ga. 2018) (denying defendant's motion to dismiss where plaintiff alleged a connection between defendant's website and its physical locations; "While the Eleventh Circuit has not yet considered this issue, the Court

First and Second Circuits (and elsewhere) have concluded that the ADA applies more broadly than merely to physical spaces and that a website or mobile app itself may constitute a place of public accommodation.¹¹

finds the outcome would be the same under either theory here”).

¹¹*See, e.g., National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 57-61 (D. Mass. 2019) (denying in relevant part Harvard’s motion for judgment on the pleadings, holding that its online services constituted a place of public accommodation and that a nexus to a physical place was not required, but also holding in the alternative that there was a nexus between its online services and the university, which has a physical presence in Cambridge); *Access Living of Metropolitan Chicago v. Uber Technologies, Inc.*, 351 F. Supp. 3d 1141, 1154-56 (N.D. Ill. 2018) (acknowledging the circuit split and that the court was not bound to apply dicta from Seventh Circuit case, but nonetheless applying that dicta in holding that Uber constituted a place of public accommodation and denying in relevant part its motion to dismiss); *Del-Orden v. Bonobos, Inc.*, No. 17-cv-2744, 2017 WL 6547902, at *4-11 (S.D.N.Y. Dec. 20, 2017) (denying defendant’s motion to dismiss, holding that commercial websites qualify as places of public accommodations within the meaning of the ADA, based on the court’s estimation of how the Second Circuit would resolve the issue, but ruling in the alternative that the plaintiff had stated a claim based on “the online services of real-world public accommodations” because “the ADA separately is violated where failure to afford equal access to a website impairs the user’s access to a traditional public accommodation, such as a merchant’s brick-and-mortar stores.”); *Access Now, Inc. v. Blue Apron, LLC*, Civil No. 17-cv-116-JL, 2017 WL 5186354, at *4 (D.N.H. Nov. 8, 2017) (denying defendant’s motion to dismiss, holding that the plaintiff adequately pleaded that defendant’s blueapron.com website met the statutory definition of a *public accommodation* as a “grocery store” within the meaning of 42 U.S.C.A. § 12181(7)(E)); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 391-98 (E.D.N.Y. 2017) (following *Scribid* in denying defendant’s motion to dismiss, holding that no nexus to a physical world store was required to state a claim, in a suit alleging that the website *dickblick.com* was a place of public accommodation, because the Second Circuit, in *Pallozi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), *amended on denial of reh’g*, 204 F.3d 392 (2d Cir. 2000), emphasized “that it is the sale of goods and services to the public, rather than how and where that a sale is executed, that is crucial when determining if the protections of the ADA are available”; emphasis in *Blick Art*); *Markett v. Five Guys Enterprises LLC*, No. 17-CV-788 (KBF), 2017 WL 5054568, at *2 (S.D.N.Y. July 21, 2017) (holding that a fast food restaurant’s website, *Fiveguys.com*, was “covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant’s restaurants, which indisputably are public accommodations under the statute.”); *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 251 F. Supp. 3d 908, 914-19 (W.D. Pa. 2017) (denying defendant’s motion to dismiss plaintiffs’ ADA Title III website accessibility claim, in a suit brought by visually impaired individuals alleging that defendant’s website was inaccessible to them, because

Courts have held that Facebook¹² and America Online chatrooms and related services,¹³ which exist only online, were not places of public accommodation in the analogous context of Title II Civil Rights suits (where—as under Title III of the ADA—a plaintiff must establish that a claim involves a place of public accommodation).

defendant AmeriServ Financial was a bank and the court found that its website was property that AmeriServ owned, operated and controlled, where discrimination was alleged to have taken place); *National Federation of the Blind v. Scribid Inc.*, 97 F. Supp. 3d 565, 568-72 (D. Vt. 2015) (denying the motion to dismiss of Scribid, a digital library, in a suit alleging that its website and mobile applications were places of public accommodation under Title III of the ADA because, although the examples provided in 42 U.S.C. § 12181(7) are all physical world locations, “[t]he fact that the ADA does not include web-based services as a specific example of a public accommodation is irrelevant because such services did not exist when the ADA was passed and because Congress intended the ADA to adapt to changes in technology. . . . Notably, Congress did not intend to limit the ADA to the specific examples listed and the catchall categories must be construed liberally to effectuate congressional intent. . . . [A plaintiff need] only to show that the website fell within one of the general categories enumerated in the statute . . .”), citing *National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-02 (D. Mass. 2012) (holding that Netflix’s on-demand service website was a place of public accommodation even though its services were accessed exclusively in the home, explaining that the ADA covers not only transactions that take place by phone or mail but “applies with equal force to services purchased over the Internet.”); *Straw v. American Bar Association*, No. 14 C 5194, 2015 WL 602836, at *6 (N.D. Ill. Feb. 11, 2015) (holding that even though the American Bar Association does not offer its services at a physical site, such as a store, it nevertheless could be a public accommodation for purposes of the ADA).

¹²See *Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *6 (N.D. Cal. May 9, 2019) (dismissing plaintiff’s claim under Title II of the Civil Rights Act on multiple grounds). In *Ebeid*, the court noted that “[alt]hough plaintiff points to the physical location of Facebook’s servers, plaintiff’s use of and the service provided by Facebook’s online platform ‘is unconnected to entry into a public place or facility’ and therefore ‘the plain language of Title II makes the statute inapplicable.’” *Id.* (emphasis in original), quoting *Clegg v. Cult Awareness Network*, 18 F.3d 752, 756 (9th Cir. 1994).

¹³See *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540-45 (E.D. Va. 2003), *aff’d mem.*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (dismissing plaintiff’s claim because “as the relevant case law and an examination the statute’s exhaustive definition make clear, ‘places of public accommodation’ are limited to actual, physical places and structures, and thus cannot include chat rooms, which are not actual physical facilities but instead are virtual forums for communication provided by AOL to its members.”).

To understand the current split of authority on whether a website or app on its own may constitute a place of public accommodation, it is helpful to review how case law has developed in this area.

In 2004, the Eleventh Circuit rejected the argument that Southwest Airlines' travel service, to which its website was connected, constituted a place of public accommodation, but on procedural grounds (because the issue was raised for the first time on appeal).¹⁴

In 2006, in *National Federation of the Blind v. Target Corp.*,¹⁵ Chief Judge Marilyn Patel of the Northern District of California ruled that the plaintiff stated an ADA claim against Target (as well as claims under California's Unruh Act¹⁶ and Disabled Persons Act¹⁷) by alleging that Target Corp.'s website was incompatible with screen reader software that would allow a blind person to perceive the contents of the site by vocalizing and describing the text and contents of a website based on "alternative text" commonly embedded in website code to make sites accessible to the blind.¹⁸ The court's rationale was that the website serviced the physical store, not that the site itself was a place of accommodation.

In *Target Corp.*, plaintiffs alleged that unequal access to the website effectively denied them equal access to Target stores, which are physical places of public accommodation. The court reasoned that off-site discrimination could be actionable because the statute applies to services *of* a place of public accommodation, not services *in* such a place. Judge Patel also noted in a footnote that it appeared that Target

¹⁴*See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004). The district court had rejected the claim that the inaccessibility of *Southwest.com* prevented access to Southwest's "virtual" ticket counters because virtual ticket counters are not actual physical places. *See Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004). On appeal, plaintiff sought unsuccessfully to broaden its claim for the first time, alleging that Southwest's overall travel service constituted a public accommodation, which the appellate court rejected because it had not been raised below. *See* 385 F.3d at 1328-29.

¹⁵*National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

¹⁶Cal. Civ. Code § 51.

¹⁷Cal. Civ. Code § 54.1.

¹⁸*National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949-50 (N.D. Cal. 2006).

treated *Target.com* “as an extension of its stores, as part of its overall integrated merchandising efforts.”¹⁹ The court rejected as premature Target’s alternative argument that under the ADA’s auxiliary aid provision, plaintiff could not prevail if the same information available on its website could be obtained in another reasonable format, such as over the phone, which the court noted was an affirmative defense.

Judge Patel subsequently granted plaintiff’s motion to certify a nationwide class action²⁰ under Rule 23(b)(2).²¹ The case ultimately settled, with Target proposing to pay up to \$6 million in damages (for state claims since the ADA only provides for injunctive relief), or up to \$3,500 per member of the California class, plus attorneys’ fees, and pay the National Federation tens of thousands of dollars each year, for three years, to monitor its website, and \$15,000 per session for training sessions that the National Federation would run for Target employees.²² The proposed class action settlement was approved at a fairness hearing held in early 2009. Judge Patel ultimately awarded plaintiffs’ counsel \$3,738,864.96 in attorneys’ fees and costs²³ (or roughly 62% of the maximum value of the actual settlement).

The *Target Corp.* ruling has been widely followed, including by the Ninth Circuit. In *Robles v. Domino’s Pizza*,²⁴ the Ninth Circuit held that the ADA’s mandate under U.S. Department of Justice regulations²⁵ that “places of public accommodation, such as Domino’s, provide auxiliary aids and services to make visual materials available to individuals who are blind” applied to Domino’s website and app, even though customers predominantly accessed them while away from the physical restaurant, because “[t]he statute applies to the services of a place of public accommodation, not ser-

¹⁹*National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 n.4 (N.D. Cal. 2006).

²⁰*National Federation of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007).

²¹See *supra* §§ 25.07[2], 4.22 (analyzing Rule 23).

²²See Evan Hill, “Settlement Over Target’s Web Site Marks a Win for ADA Plaintiffs,” *Law.com*, Aug. 28, 2008.

²³*National Federation of the Blind v. Target Corp.*, No. C 06–01802 MHP, 2009 WL 2390261 (N.D. Cal. Aug. 3, 2009).

²⁴*Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019).

²⁵See 28 C.F.R. § 36.303(b)(2).

vices *in* a place of public accommodation.’ ”²⁶ In *Robles*, the panel explained that the alleged inaccessibility of Domino’s website and app, if true, would impede access to goods and services of its physical pizza franchises, which are places of public accommodation.²⁷ Critical to the court’s analysis was the nexus between Domino’s website and app and the physical restaurants, which customers used “to locate a nearby Domino’s Restaurant and order pizzas for at-home delivery or in-store pickup.”²⁸ Because the website and app were deemed to facilitate access to a place of public accommodation (Domino’s physical restaurants), they were held to be subject to the ADA.²⁹

²⁶*Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019), quoting *National Federation for the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006));

²⁷*Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019), citing 42 U.S.C.A. § 12181(7)(B) (listing a restaurant as a covered “public accommodation”).

²⁸*Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (stating that “[t]his nexus between Domino’s website and app and the physical restaurants . . . is critical to our analysis.”).

²⁹*Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019). The panel distinguished *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000), explaining: Because the ADA only covers “actual, physical places where goods or services are open to the public, and places where the public gets those goods or services,” there had to be “some connection between the good or service complained of and an actual physical place.” *Id.* at 1114. While the insurance company had a physical office, the insurance policy at issue did not concern accessibility, or “such matters as ramps and elevators so that disabled people can get to the office.” *Id.* And although it was administered by the insurance company, the employer-provided policy was not a good offered by the insurance company’s physical office. *Id.* at 1115. Unlike the insurance policy in *Weyer*, Domino’s website and app facilitate access to the goods and services of a place of public accommodation—Domino’s physical restaurants. They are two of the primary (and heavily advertised) means of ordering Domino’s products to be picked up at or delivered from Domino’s restaurants. *Robles*, 913 F.3d at 905. In so ruling, the panel expressly approved of the analysis in *Robles v. Yum! Brands, Inc.*, Case No. 2:16-cv-08211-ODW(SS), 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018); *Rios v. N.Y. & Co., Inc.*, Case No. 2:17-cv-04676-ODW(AGRx), 2017 WL 5564530, at *3 (C.D. Cal. Nov. 16, 2017); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017); *Gorecki v. Hobby Lobby Stores, Inc.*, CV 17-1131-JFW(SKx), 2017 WL 2957736, at *3-4 (C.D. Cal. June 15, 2017); *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006); *Gomez v. General Nutrition Corp.*, 323 F. Supp. 3d 1368, 1375-76 (S.D. Fla. 2018); *Castillo v. Jo-Ann Stores, LLC*, 286 F.Supp.3d 870, 881 (N.D. Ohio 2018); and *Gil v. Winn-Dixie*

By contrast, other courts have found a website itself may constitute a place of public accommodation. In explaining the basis for the circuit split, one court observed:

This split in the circuits is premised to some extent on the invocation of competing canons of statutory construction. There are twelve “public accommodation” categories in the statute. *See* 42 U.S.C. § 12181(7). Category F includes an illustrative list of service establishments, those being “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.” § 12181(7)(F). The First, Second, and Seventh Circuits, viewing the list of service establishments in conjunction with agency regulations, legislative history, and the broad policy goals of the ADA, concluded that the inclusion of “travel service” in the list of service establishments meant that Congress “contemplated that ‘service establishments’ include[d] providers of services which do not require a person to physically enter an actual physical structure.” *Carparts*, 37 F.3d at 19. *Accord Pallozzi*, 198 F.3d at 32–33; *Mut. of Omaha Ins. Co.*, 179 F.3d at 558–59. The Third, Fifth, Sixth, and Ninth Circuits, relying on the principle of *noscitur a sociis* (“known by its associates”), concluded that because “[e]very term listed in § 12181(7) and subsection (F) is a physical place open to public access,” a place of public accommodation must be, or have a connection to, a physical place. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997). *Accord Magee*, 833 F.3d at 534–35; *Weyer*, 198 F.3d at 1114; *Ford*, 145 F.3d at 613–14.³⁰

When a website accessibility claim is brought against an educational institution that receives federal funds, an additional claim potentially may be asserted under section 504 of the Rehabilitation Act of 1973.³¹ Section 504 and the ADA

Stores, Inc., 257 F. Supp. 3d 1340, 1348–49 (S.D. Fla. 2017), *appeal docketed*, No. 17-13467 (11th Cir. Aug. 1, 2017). *See Robles*, 913 F.3d at 905 n.7.

³⁰*National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 59-60 (D. Mass. 2019).

³¹29 U.S.C.A. § 794; *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 61-63 (D. Mass. 2019) (denying in relevant part Harvard’s motion for judgment on the pleadings on plaintiffs’ section 504 claim based on Harvard’s alleged failure to provide accurate and timely captioning of online audiovisual content hosted by the university’s website); *see also National Association of the Deaf v. Massachusetts Institute of Technology*, Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds,

are “frequently read in sync.”³² Section 504 “provides as its general rule that ‘[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance’”³³ A program or activity includes “all of the operations of— . . . a college, university, or other postsecondary institution.”³⁴ Pursuant to implementing regulations,³⁵ at least one court has

as in *Harvard*, in plaintiffs’ parallel lawsuit against MIT); *National Association of the Deaf v. Harvard University*, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *5-10 (D. Mass. Feb. 9, 2016) (denying defendant’s motion to dismiss plaintiffs’ section 504 claim based on allegations “that much of Harvard’s online video content is inaccessible to millions of deaf and hard of hearing individuals, and their identification of captioning as a reasonable accommodation that would afford them the meaningful access millions of non-hearing impaired individuals already enjoy . . .”).

³²*National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 54-55 (D. Mass. 2019) (citing earlier cases). As explained in an earlier opinion in that case,

to state a claim for violation[s] of Section 504 and Title III, a plaintiff must allege (1) that he or she is disabled and otherwise qualified, (2) that the defendant receives federal funding (for Section 504 purposes) and is a place of public accommodation (for ADA purposes); and (3) that the defendant discriminated against the plaintiff based on disability. *Argenyi v. Creighton Univ.*, 703 F.3d 441, 447 (8th Cir. 2013) (citing *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076-77 (8th Cir. 2006)); *el Kouni v. Trs. of Boston Univ.*, 169 F. Supp. 2d 1, 2-3 (D. Mass. 2001) (citing *Katz v. City Metal Co.*, 87 F.3d 26, 30 (1st Cir. 1996)). There are three discrete theories available to a disability discrimination plaintiff. “First, a plaintiff can assert disparate treatment on account of disability, i.e., that the disability actually motivated the defendant’s challenged adverse conduct.” *Nunes v. Massachusetts Dep’t of Corr.*, 766 F.3d 136, 144 (1st Cir. 2014) (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003)). Second, a plaintiff can assert disparate impact, i.e. that a defendant’s challenged conduct, even if not motivated by a discriminatory animus, disparately affects the disabled. *Id.* at 145. “Finally, a plaintiff can pursue a third path, claiming that [the defendant] has refused to affirmatively accommodate his or her disability where such accommodation was needed to provide ‘meaningful access’” *Id.* (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-76 (2d Cir. 2003)).

National Association of the Deaf v. Harvard University, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *4 (D. Mass. Feb. 9, 2016) (footnote omitted).

³³*National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 55 (D. Mass. 2019), quoting 29 U.S.C.A. § 794(a).

³⁴29 U.S.C.A. § 794(b)(2)(A).

³⁵The U.S. Department of Justice (DOJ) is responsible for coordinating the implementation of section 504 among the various federal agencies that extend financial assistance. *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 55 & n.4 (D. Mass. 2019), citing

held that plaintiffs could state a claim for website accessibility under section 504 based on the Department of Education implementing regulation that prohibits federal fund recipients from denying qualified handicapped persons “the opportunity to participate in or benefit from provided aids, benefits, or services . . . and [from] providing qualified handicapped persons with aids, benefits, or services that are not as effective as those that are provided to others”³⁶ Whether failing to provide accurate and timely captioning of online audiovisual content on a university website amounts to the denial of “aids, benefits, or services” or meaningful access has yet to be ruled upon by any appellate court.

Where a claim is directed at a public entity such as a state

Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). DOJ coordination regulations are found at 28 C.F.R. §§ 41.1—41.58. The U.S. Department of Energy has issued regulations implementing section 504 for the programs and activities to which it provides assistance. See 34 C.F.R. §§ 104.1—104.61. DOE’s regulations must be consistent with the DOJ’s coordination regulations. 28 C.F.R. § 41.4(a); *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 55 n.5 (D. Mass. 2019).

³⁶*National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 62 (D. Mass. 2019) (construing 28 C.F.R. § 41.51(b)(1)(i)-(iii); 34 C.F.R. § 104.4(b)(i)-(iii) in denying Harvard’s motion for judgment on the pleadings); *National Association of the Deaf v. Massachusetts Institute of Technology*, Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, as in Harvard, in plaintiffs’ parallel lawsuit against MIT); *National Association of the Deaf v. Harvard University*, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *7 (D. Mass. Feb. 9, 2016) (construing 28 C.F.R. § 41.51(b)(1)(i)-(iii); 34 C.F.R. § 104.4(b)(i)-(iii) in denying Harvard’s motion to dismiss).

As explained by the court in Harvard:

Section 104.4 prohibits federal fund recipients from denying qualified handicapped persons the opportunity to participate in or benefit from provided aids, benefits, and services; affording qualified handicapped persons an unequal opportunity to participate in or benefit from provided aids, benefits, or services; and providing qualified handicapped persons with aids, benefits, or services that are not as effective as those provided to others. 34 C.F.R. § 104.4(b)(1)(i)-(iii). For aids, benefits, and services to be “equally effective,” they “must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.” *Id.* at § 104.4(b)(2). In other words, these regulations are consistent with the requirement of “meaningful access,” and, as set forth above, Plaintiffs have adequately pleaded a lack of meaningful access. *Cf. K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013) (“[T]he ‘meaningful access’ standard incorporates rather than supersedes applicable interpretative regulations, and so does not preclude [plaintiffs] from litigating their claims under those regulations.”).

National Association of the Deaf v. Harvard University, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *7 (D. Mass. Feb. 9, 2016).

or local government, rather than a private company, suit potentially may be brought under Title II of the ADA, rather than Title III.³⁷ Title II provides that no person with a qualified disability shall “be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”³⁸ To state a claim under Title II, a plaintiff must establish: (1) that the plaintiff is a “qualified individual with

³⁷See, e.g., *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1270-71, 1273-77 (M.D. Fla. 2019) (holding that Title II “undoubtedly applies to websites . . .,” but lamenting the lack of guidance from the U.S. Department of Justice “about what a government entity must do to make its website ADA compliant” and dismissing the suit of a blind Florida resident, alleging that a city’s website was incompatible with his screen reader software, for lack of Article III standing, in a suit brought under Title II of the ADA and section 504 of the Rehabilitation Act); see also *Price v. Town of Longboat Key*, Case No. 8:19-cv-00591-T-02AAS, 2019 WL 2173834, at *3-6 (M.D. Fla. May 20, 2019) (dismissing plaintiff’s ADA Title II and Rehabilitation Act website accessibility claims for lack of Article III standing and failure to state a claim where the plaintiff was not a town resident and did not allege concrete plans to move there or even visit and where the town, in response to plaintiff’s request, adjusted its website to accommodate screen reader software and provided additionally provided the requested documents via a thumb drive and, thereafter, plaintiff did not allege that he sought further accommodation); *Open Access for All, Inc. v. Town of Juno Beach, Florida*, 2019 WL 3425090 (S.D. Fla. June 30, 2019) (applying *Price v. City of Ocala*’s analysis of Article III standing in an ADA Title II (and Rehabilitation Act) website accessibility case and holding that the plaintiffs had standing where the individually named plaintiff had concrete plans to move from Miami, was seriously considering Juno Beach as a possible new home, and needed access to information about living in Juno Beach, which was on the city’s website but allegedly not accessible to him).

³⁸42 U.S.C.A. § 12132. Pursuant to implementing regulations, public entities are prohibited from “providing any aid, benefit, or service” that “afford[s] a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.” 28 C.F.R. § 35.130(b)(1)(ii). They must also “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” *Id.* § 35.130(b)(7). Public entities are further required to “take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” *Id.* § 35.160(a)(1). To accomplish this result, they are required to “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.” *Id.* § 35.160(b)(1).

a disability;” (2) that the plaintiff was “excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity” or otherwise “discriminated [against] by such entity;” (3) “by reason of such disability.”³⁹

Federal claims over website and app accessibility may be joined with state law causes of action. Thus, for example, suits have been brought under California’s Unruh Civil Rights Act⁴⁰ and California’s Disabled Persons Act (DPA).⁴¹

The Unruh Act provides that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”⁴² To establish a violation of the Unruh Act independent of a claim under the ADA, a plaintiff “must ‘plead and prove intentional discrimination in public accommodations in violation of the terms of the Act.’”⁴³ The Unruh Act “contemplates ‘willful, affirmative misconduct on the part of those who violate the Act’ and that a plaintiff must therefore allege, and show, more than the disparate impact of a facially neutral policy.”⁴⁴

The California Disabled Persons Act (DPA) provides that:

Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, . . . places of public accommoda-

³⁹*Price v. Town of Longboat Key*, Case No. 8:19-cv-00591-T-02AAS, 2019 WL 2173834, at *2 (M.D. Fla. May 20, 2019), citing *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C.A. § 12132).

⁴⁰Cal. Civ. Code §§ 51–52.

⁴¹Cal. Civ. Code §§ 54, 54.1(a).

⁴²Cal. Civ. Code § 51(b).

⁴³*Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425–26 (9th Cir. 2014) (finding no violation where CNN failed to include closed captioning on videos made available only on its website), quoting *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 94 Cal. Rptr. 3d 685 (2009) (internal quotation marks omitted).

⁴⁴*Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425–26 (9th Cir. 2014), quoting among others *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 31 Cal. Rptr. 3d 565 (2005) (internal quotation marks omitted); *Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015) (affirming dismissal where the plaintiff had not alleged intentional discrimination).

tion, amusement, or resort, and other places to which the general public is invited.⁴⁵

“‘Full and equal access’ is defined by section 54.1 to mean access that complies with the regulations developed under the federal ADA or under state statutes, if the latter imposes a higher standard.”⁴⁶ A DPA claim may also be based on merely an allegedly discriminatory policy.⁴⁷

Thus, for example, in *Earll v. eBay, Inc.*⁴⁸ and *Young v. Facebook, Inc.*,⁴⁹ where the courts had found that eBay’s and Facebook’s respective online-only locations were not places of public accommodation under the ADA and the plaintiffs had not alleged any facts beyond those supporting their ADA claims, the courts, as in *Target*, dismissed or affirmed dismissal of plaintiff’s claims under the Unruh Act and DPA (as well as, in *Young*, for breach of contract, breach of the cove-

⁴⁵Cal. Civ. Code § 54.1(a)(1).

⁴⁶*Urhausen v. Longs Drug Stores, Inc.*, 155 Cal. App. 4th 254, 261, 65 Cal. Rptr. 3d 838, 843 (1st Dist. 2007), quoting Cal. Civ. Code § 54.1(a)(3); see also *Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015) (affirming dismissal of plaintiff’s Disabled Persons Act claim after holding that the ADA did not apply to the eBay services at issue in the case, where the plaintiff “failed to allege violation of any separate, applicable accessibility standard”); *Robles v. Yum! Brands, Inc.*, Case No 2:16-cv-08211-ODW(SS), 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018) (denying defendant’s motion for summary judgment; “Because Plaintiff’s UCRA claim is premised on a violation of rights under the ADA, Plaintiff does not need to plead or prove intentional discrimination. . . . Because there is a triable issue as to whether Pizza Hut has violated the ADA, the Court cannot grant summary judgment on the UCRA claim.”); *Rios v. N.Y. & Co., Inc.*, Case No. 2:17-cv-04676-ODW(AGRx), 2017 WL 5564530, at *4 (C.D. Cal. Nov. 16, 2017) (denying defendant’s motion for judgment on the pleadings where the plaintiff stated a claim under the ADA based on alleged online inaccessibility and therefore stated a claim under the Unruh Act because, among other things, the plaintiff was not required to plead intentional discrimination); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at *3-4 (C.D. Cal. Oct. 3, 2017) (denying plaintiff’s motion to dismiss ADA Title III and California Unruh Act claims in a website and mobile app accessibility case where the court found a nexus between the website and mobile app and the defendant’s brick and mortar locations).

⁴⁷*Earll v. eBay, Inc.*, 599 F. App’x 695, 696 n.1 (9th Cir. 2015), citing *Hankins v. El Torito Restaurants, Inc.*, 63 Cal. App. 4th 510, 74 Cal. Rptr. 2d 684, 691-93 (1st Dist. 1998).

⁴⁸*Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015).

⁴⁹*Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

nant of good faith and fair dealing and negligence).⁵⁰

Similarly, in *Cullen v. Netflix, Inc.*,⁵¹ an earlier case, the court dismissed (with leave to amend) plaintiff's California state law Unruh Act and DPA claims, even as it dismissed with prejudice his ADA claim based on the court's finding that Netflix's streaming video library—"a website where consumers can access videos with an internet connection" was not "an actual physical place" and therefore, under Ninth Circuit law, not a place of public accommodation. In *Cullen*, the plaintiff, a deaf man, sued to require closed captioning (or subtitles) on all videos streamed by Netflix. Citing Judge Patel's opinion in *Target*, Judge DaVila explained that Cullen potentially could pursue his discrimination claims under California law if they were asserted "as independent claims separate from an ADA violation because both the Unruh Act and the DPA apply to websites 'as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively. No nexus to [a] physical [place] need be shown.'"⁵² To establish an Unruh Act violation absent an ADA violation, however, Judge DaVila emphasized that "Cullen's claim cannot be based solely on the disparate impact of Netflix's policies on hearing-impaired individuals but must be grounded in allegations of intentional discrimination." Judge DaVila similarly cautioned that to state a DPA claim in the absence of an ADA violation, Cullen would be required to show a violation of an accessibility regulation promulgated

⁵⁰*Young* involved the alleged termination of a user for sending an excessive number of friend requests, where the user alleged she was bipolar. Although he held that plaintiff Young had not stated a cognizable claim and dismissed plaintiff's complaint in its entirety with prejudice, Judge Fogel wrote that:

The Court is not without sympathy for Young's plight. Young was understandably frustrated that she could not discuss the termination of her account with a live person, and both this frustration and the loss of her access to Facebook's social network had a particularly acute impact on Young because of her bipolar condition. As customer service functions increasingly are handed over to automated systems, it is important that service providers . . . understand the implications that such practices can have for the less sophisticated and more vulnerable.

Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1118–19 (N.D. Cal. 2011).

⁵¹*Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012), *aff'd*, 600 F. App'x 508 (9th Cir. 2015).

⁵²*Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (citing *National Federation of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1196 (N.D. Cal. 2007), *aff'd*, 600 F. App'x 508 (9th Cir. 2015)).

under California law that exceeded the level of protection set by the ADA. Ultimately, the appellate court affirmed dismissal of plaintiff's Unruh Act and DPA claims because they were entirely dependent on his ADA claim.⁵³

Whether California's Unruh Civil Rights Act and Disabled Persons Act apply to website and mobile app accessibility where the online location is unrelated to a brick and mortar place of public accommodation was a question certified to the California Supreme Court,⁵⁴ but the question ultimately was withdrawn when the underlying case settled.⁵⁵

Some states such as New York have enacted state laws that parallel the ADA and "rise or fall in tandem with disability discrimination claims brought pursuant to the federal ADA."⁵⁶

Other web accessibility suits brought under state law have

⁵³See *Cullen v. Netflix, Inc.*, 600 F. App'x 508, 509 (9th Cir. 2015).

⁵⁴See *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 871 (9th Cir. 2014) (certifying the question "Does the DPA's reference to 'places of public accommodation' include web sites, which are non-physical places?").

⁵⁵See *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 769 F.3d 1004 (9th Cir. 2014) (dismissing the Ninth Circuit appeal and withdrawing the certification of questions to the California Supreme Court).

⁵⁶*Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 398 (E.D.N.Y. 2017), citing *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 186 n. 3 (2d Cir. 2006). In *Blick*, the court held that a legally blind plaintiff had stated a claim under the New York State Human Rights Law because a website, on its own and not ancillary to a physical location, could be a "place of public accommodation, resort or amusement" within the meaning of New York law for the same reason it qualified as a public accommodation under the ADA. See 268 F. Supp. 3d at 398-400. The relevant statutory provision states:

It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the . . . disability . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof

N.Y. Exec. Law § 296(2)(a). A *place of public accommodation, resort or amusement* is defined to include "wholesale and retail stores and establishments dealing with goods or services of any kind." *Id.* § 292(9).

The court in *Blick* also had held that the plaintiff stated a claim under the New York City Human Rights Law, N.Y. C. Admin Code § 8-107, which is intended to provide broader protection than the ADA or New York Human Rights Law. See 268 F. Supp. 3d at 400-01.

been dismissed as preempted.⁵⁷

Some ADA claims involving access to websites also have been dismissed for lack of Article III standing (where, for example, a plaintiff could not lawfully join a defendant's credit union or had no concrete plans to move to a defendant's town or patronize a defendant's business).⁵⁸ By contrast,

The *Blick* case ultimately settled with the court agreeing to allow Blick to withdraw his class allegations and settle on an individual basis. *See Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365 (E.D.N.Y. 2017).

⁵⁷See, e.g., *Foley v. JetBlue Airways, Corp.*, No. C 10-3882 JCS, 2011 WL 3359730 (N.D. Cal. Aug. 3, 2011) (dismissing plaintiff's complaint for violations of California's Unruh Civil Rights Act, Disabled Persons Act and Business and Professions Code based on JetBlue allegedly operating its website and airport kiosks in such a way that they are not accessible to the visually impaired, based on the finding that the federal Air Carrier Access Act, 49 U.S.C.A. § 41705, preempts the entire field of disability non-discrimination in air travel, but rejecting the defendant's argument that the claims also were preempted by the Americans with Disabilities Act); see also *National Federation of the Blind v. United Airlines, Inc.*, 813 F.3d 718 (9th Cir. 2016) (holding that plaintiffs' claims that defendant's airport kiosks were inaccessible to the blind because they use exclusively visual computer screen prompts and touch-screen navigation, without offering a medium accessible to the blind (such as audio output), which had been brought under the Unruh Civil Rights Act and Disabled Persons Act, were impliedly field preempted by the Air Carrier Access Act (ACAA) and its implementing regulation setting forth accessibility requirements for automated airport kiosks, while rejecting the argument that the claims were expressly preempted by the ADA); see generally *Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports*, 78 Fed. Reg. 67,882 (Nov. 12, 2013).

Other courts have found particular claims to have not been preempted. See, e.g., *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 428-30 (9th Cir. 2014) (finding no preemption of plaintiff's DPA claim arising out of CNN's alleged failure to include closed captioning on videos made available only on its website).

⁵⁸See, e.g., *Griffin v. Department of Labor Federal Credit Union*, 912 F.3d 649, 653-56 (4th Cir. 2019) (affirming dismissal of plaintiff's ADA claim against a credit union, based on alleged lack of access to its website for those who are blind, because plaintiff was ineligible under federal law to become a member of the credit union, and thus his alleged injury was neither concrete nor particularized); *Carroll v. Northwest Federal Credit Union*, 770 F. App'x 102 (4th Cir. 2019) (affirming dismissal of plaintiff's ADA claim alleging that the defendant's credit union failed to make its services accessible by making its website compatible with the screen reader that the plaintiff used to access the Internet, for lack of standing, because Carroll merely alleged that he intended to volunteer for an organization that would have allowed him to join the credit union, but was ineligible to join at the time he filed his amended complaint); *Carello v.*

Aurora Policemen Credit Union, 930 F.3d 830 (7th Cir. 2019) (affirming the lower court's holding that the plaintiff, a blind person who alleged that as an ADA compliance tester and potential customer he was deprived access to the defendant-credit union's website because it was incompatible with screen reader software, did not have Article III standing to sue on his ADA claim because, by statute, membership in the credit union was restricted to specific groups of individuals; "a person who is *legally barred* from using a credit union's services cannot demonstrate an injury that is either concrete or particularized."); *Diaz v. The Kroger Co.*, 18 Civ. 7953 (KPF), 2019 WL 2357531 (S.D.N.Y. June 4, 2019) (dismissing plaintiff's case as moot where defendant fully addressed plaintiff's concerns, "brought the Website into compliance with Plaintiff's preferred WCAG 2.0 standard, and commit[ted] to monitoring technological developments in the future to ensure that visually-impaired individuals [would] have equal access to the Website."); *Price v. Town of Longboat Key*, Case No. 8:19-cv-00591-T-02AAS, 2019 WL 2173834, at *3-5 (M.D. Fla. May 20, 2019) (dismissing plaintiff's ADA Title II and Rehabilitation Act website accessibility claims for lack of Article III standing where the plaintiff was not a town resident and did not allege concrete plans to move there or even visit); *Price v. Escalante-Black Diamond Golf Club*, Case No. 5:19-cv-22-Oc-30PRL, 2019 WL 1905865 (M.D. Fla. Apr. 29, 2019) (dismissing plaintiff's ADA Title III website accessibility suit against a golf club for the lack of Article III standing and for failure to state a claim (because he did not plead facts showing that the Black Diamond website impeded his ability to access and enjoy the golf club)); *Price v. City of Ocala*, 375 F. Supp. 3d 1264 (M.D. Fla. 2019) (dismissing the suit of a blind Florida resident, alleging that a city's website was incompatible with his screen reader software, for lack of Article III standing, in a suit brought under Title II of the ADA, which addresses discrimination by state or local governments, and section 504 of the Rehabilitation Act); *Mendez v. Apple Inc.*, 18 Civ. 7550 (LAP), 2019 WL 2611168 (S.D.N.Y. Mar. 28, 2019) (dismissing plaintiff's ADA Title III website accessibility claim, and related New York state and city claims, for lack of Article III standing, because the plaintiff failed to allege an injury in fact); *Mitchell v. BMI Federal Credit Union*, 374 F. Supp. 3d 664, 668-69 (S.D. Ohio 2019) (dismissing plaintiff's Title III website accessibility case, in a suit seeking only prospective injunctive relief, because he was not and could not become a member of BMI); *Mitchell v. Buckeye State Credit Union*, Case No. 5:18-CV-875, 2019 WL 1040962 (N.D. Ohio Mar. 5, 2019) (dismissing plaintiff's Title III website accessibility claim for lack of Article III standing where the plaintiff was ineligible to join defendant's credit union); *Gastelum v. Phoenix Central Hotel Venture, LLC*, No. CV-17-04544-PHX-DLR, 2019 WL 498750, at *3-4 & n.2 (D. Ariz. Feb. 7, 2019) (granting summary judgment for the defendant, finding that the plaintiff, who had sued over 100 hotels in and around the Phoenix area in the preceding two years, lacked Article III standing because he could not allege any concrete plans to stay at the defendant's hotel; he had merely visited the property with his son and lawyer to verify whether it was ADA compliant, and the court noted that it was not even clear whether plaintiff got out of his vehicle during his visit to the property); *Price v. Orlando Health, Inc.*, No. 6:17-CV-1999-ORL-40DCI, 2018 WL 6434519, at *4 (M.D. Fla. Dec. 7, 2018) (finding

where a plaintiff is a customer or potential customer, courts have found Article III standing.⁵⁹ Article III standing is ad-

plaintiff had not alleged a future injury related to a hospital website because of the distance between his house and the “place of public accommodation,” his failure to travel to the area frequently, and his lack of definite plans to return); *Mitchell v. Dover-Phila Federal Credit Union*, Case No. 5:18CV102, 2018 WL 3109591, at *4 (N.D. Ohio June 25, 2018) (dismissing plaintiff’s ADA claim against a credit union located 200 miles from his home, based on alleged lack of access to its website, because plaintiff was ineligible to join and expressed no intention to use its services in the future). *But see Jones v. Lanier Federal Credit Union*, 335 F. Supp. 3d 1273, 1276 (N.D. Ga. 2018) (finding standing because the injury alleged was plaintiff’s inability to access defendant’s website, rather than an inability to access its services, while rejecting without detailed analysis, in a brief opinion, the argument that the plaintiff was ineligible to join defendant’s credit union); *Jones v. Piedmont Plus Federal Credit Union*, 335 F. Supp. 3d 1278, 1280-81 (N.D. Ga. 2018) (holding that the plaintiff had Article III standing in a website accessibility case even though he was not eligible to become a member of the credit union, in an opinion involving the same plaintiff, issued by the same judge, as *Jones v. Lanier*); *Jones v. Family First Credit Union*, 340 F. Supp. 3d 1356, 1362-63 (N.D. Ga. 2018) (holding that the plaintiff had standing to pursue damages based on the barriers he encountered when he tried to access defendant’s website, but did not have standing to seek injunctive relief to prevent future harm because his complaint was devoid of allegations about his plans or intent to use defendant’s services in the future).

⁵⁹See, e.g., *Honeywell v. Harihar Inc.*, No. 2:18-CV-618-FTM-29MRM, 2018 WL 6304839, at *3 (M.D. Fla. Dec. 3, 2018) (denying defendant’s motion to dismiss an ADA website accessibility claim for lack of Article III standing where plaintiff tried unsuccessfully to access the website for defendant’s motel and alleged she was therefore deterred from visiting it, where she pleaded a future injury related to a hotel’s website by alleging she intended to travel from Fort Lauderdale to Fort Myers within six months); *Wu v. Jensen-Lewis Co.*, 345 F. Supp. 3d 438, 441- 42 (S.D.N.Y. 2018) (holding that the fact that the defendant had launched a new website, which it contended was ADA compliant, did not moot the lawsuit or deny the plaintiff Article III standing); *Gomez v. General Nutrition Corp.*, 323 F. Supp. 3d 1368, 1374 (S.D. Fla. 2018) (holding, in a brief opinion, that an online shopper who was legally blind and a “tester” of website ADA compliance had Article III standing to sue a nutrition retailer, alleging that its website did not comply with Title III of the ADA); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 873-74 (N.D. Ohio 2018) (holding that the plaintiff, who was visually impaired, had standing to bring ADA and California Unruh Act claims alleging that the defendant’s website was inaccessible to her); *Gathers v 1-800-Flowers.com, Inc.*, Civil Action No. 17-cv-10273-IT, 2018 WL 839381, at *4 (D. Mass. Feb. 12, 2018) (holding that plaintiffs had standing to sue on behalf of visually impaired users of defendants’ website where they alleged that buttons were missing labels necessary for screen reader software to operate properly, error messages generated when plaintiffs sought to place orders

dressed more extensively in section 27.07 (in connection with security breach cases), among other places in this treatise.

Claims brought against an interactive computer service provider alleging the inaccessibility of third party content (as opposed to content created by the site or service itself) will not be actionable because of the immunity provided by the Communications Decency Act (CDA), 47 U.S.C.A. § 230. This is true of both claims under the ADA⁶⁰ and claims under state statutes such as California's Unruh Act.⁶¹ CDA immunity is analyzed extensively in section 37.05 in chapter

were difficult for the screen reader software to locate and read, multiple audio streams began playing automatically at the same time on defendant's customer support page, images of items for sale did not include written descriptions, the screen reader was unable to "go back," and the screen reader was unable to locate the correct field in which to insert payment information); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1344, 1347-49 (S.D. Fla. 2017) (holding that a visually impaired man had standing because Winn-Dixie's website operated as a "gateway" to the physical stores and its online offerings (which included, among other things, digital coupons) were services, privileges, advantages, and accommodations of the store, where the plaintiff had frequented Winn-Dixie in the past, and represented that he would do so again in the future once the website became accessible to him); *Suvino v. Time Warner Cable, Inc.*, No. 16 CV 7046-LTS-BCM, 2017 WL 3834777, at *1-2 (S.D.N.Y. Aug. 31, 2017) (holding that plaintiff had Article III standing and stated a claim for an ADA violation based on access to the defendant's website, where the "Website functionalities (including service selection, online bill payment and access to streaming services) are among the service features sold through the physical locations and thus are an aspect of the goods and services offered by the stores as public accommodations."); *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 251 F. Supp. 3d 908, 913-14 (W.D. Pa. 2017) (holding that plaintiffs suffered an injury in fact under the ADA where "Defendant's website barred Plaintiffs' screen reader software from reading the content of its website," such that "Plaintiffs were unable to conduct on-line research to compare financial services and products").

⁶⁰See *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (holding the CDA applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms); see also *National Association of the Deaf v. Massachusetts Institute of Technology*, Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, in plaintiffs' parallel lawsuit against MIT).

⁶¹See, e.g., *Federal Agency of News LLC v. Facebook, Inc.*, Case No. 18-CV-07041-LHK, 2019 WL 3254208, at *5-7 (N.D. Cal. July 20, 2019) (dismissing without prejudice, as precluded by the CDA, the claims brought under Title II of the U.S. Civil Rights Act of 1964 and California

37.

The Eleventh Circuit has held that the Twenty-First Century Communications and Video Accessibility Act (CVAA), which gives the Federal Communications Commission exclusive jurisdiction over certain regulatory matters relating to closed captioning, does not bar ADA litigation by website users objecting to the lack of closed-captioning on online videos.⁶²

The volume of ADA litigation over website and mobile app accessibility has increased in the years since the *Target* decision. Many website and mobile app accessibility cases are filed in California, Florida and New York—often with particular industries targeted and in a number of instances with the same lawyers and/or plaintiffs seeking to bring putative class action suits against various defendants. As one federal court in Florida noted in 2019:

Recently there have been an explosion of cases—under both Title II and III—alleging that websites violate the ADA. Usually, they arise in the context of websites either failing to be compatible with screen reader software or failing to have closed captioning for videos. Courts have struggled to apply traditional principles of standing to these website cases and have disagreed about what features a website must have to comply with the ADA. The latter is largely due to a complete lack of rules and regulations being promulgated by the Department of Justice despite being aware of this issue for years.⁶³

Noting the practice of some lawyers and plaintiffs in bring-

Unruh Civil Rights Act, among others, by a Russian news site whose Facebook account was terminated in early 2018 after it was determined by Facebook that the account was controlled by the Russian government's Internet Research Agency, which according to a U.S. intelligence community report had created 470 inauthentic accounts on Facebook that were used to influence the outcome of the 2016 Presidential election); *Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claims under the Civil Rights Act Title II, the First Amendment to the U.S. Constitution, and California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51 *et seq.*, with prejudice, and dismissing with prejudice plaintiff's related claim under California's Unlawful Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, to the extent it relied on allegations that Facebook removed plaintiff's posts or restricted his ability to use the Facebook platform).

⁶²See *Sierra v. City of Hallandale Beach*, 904 F.3d 1343 (11th Cir. 2018).

⁶³*Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1270 (M.D. Fla. 2019) (dismissing the suit of a blind Florida resident, alleging that a city's website was incompatible with his screen reader software, for lack of Article III standing, in a suit brought under Title II of the ADA (not Title

ing numerous ADA website accessibility claims, Senior District Court Judge Loretta Preska commented—in dismissing plaintiff’s ADA Title III website accessibility claim and related New York state and city claims, for lack of Article III standing (because the plaintiff failed to allege an injury in fact)—that while there was “nothing inherently wrong with filing duplicative lawsuits against multiple defendants if the harms to be remedied do exist and are indeed identical . . . , those who live by the photocopier shall die by the photocopier.”⁶⁴

To mitigate the risk of class action litigation, businesses may choose to require customers to enter into a binding arbitration agreement. To be enforceable, however, a business must make sure that patrons with special needs in fact receive adequate notice and provide clear assent. Otherwise, the agreement will be unenforceable.⁶⁵

Contract formation and consumer arbitration provisions are analyzed in chapters 21 and 22.

For guidance on how to make a site accessible, readers should refer to the Web Accessibility Initiative of the World Wide Web Consortium (W3C) and its Web Content Accessibility Guidelines (WCAG).⁶⁶ To be accessible to the blind, for example, WCAG provides that a website should use

III), which addresses discrimination by state or local governments, and section 504 of the Rehabilitation Act).

⁶⁴*Mendez v. Apple Inc.*, 18 Civ. 7550 (LAP), 2019 WL 2611168, at *4 (S.D.N.Y. Mar. 28, 2019).

⁶⁵*See, e.g., National Federation of the Blind v. The Container Store*, 904 F.3d 70, 84 (1st Cir. 2018) (affirming the lower court’s order denying defendant’s motion to compel arbitration where the plaintiffs were blind and could not access the keypad on which the terms and conditions of a loyalty program (including an arbitration provision) were displayed because they could not read them and the defendant allegedly did not have tactile keypads on its point-of-sale devices, where the plaintiffs alleged they were not told that the loyalty program was subject to agreement to arbitrate disputes and where the defendant did not present evidence that the terms in fact were communicated to them; “Based upon the lack of any evidence that the in-store plaintiffs had any knowledge, actual or constructive, that arbitration terms applied to their enrollment in the loyalty program, we conclude that the Container Store failed to meet its burden of establishing that an agreement to arbitrate was ever consummated between it and the in-store plaintiffs.”).

⁶⁶*See* <http://www.w3.org/WAI/> WCAG 2.0 guidelines are private industry standards for website accessibility developed by technology and accessibility experts. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 902 n.1 (9th Cir. 2019). As explained by the Ninth Circuit,

alternative text that allows blind users to translate website content into speech or Braille using screen reader software and special keyboards. The U.S. Department of Justice—which is charged with issuing rules to implement the ADA⁶⁷—has neither adopted nor rejected the WCAG 2.0 standard.⁶⁸ The Eleventh Circuit, however, characterized the WCAG 2.0 web access standard in 2018 as “the recognized industry standard for website accessibility.”⁶⁹

WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. 36 C.F.R. pt. 1194, app. A (2017). In addition, the Department of Transportation requires airline websites to adopt these accessibility standards. See 14 C.F.R. § 382.43 (2013). Notably, the Department of Justice has required ADA-covered entities to comply with WCAG 2.0 level AA (which incorporates level A) in many consent decrees and settlement agreements in which the United States has been a party.

Robles, 913 F.3d at 902 n.1.

⁶⁷42 U.S.C.A. § 12186(b); *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019).

⁶⁸The DOJ announced its intention to engage in rulemaking on website accessibility in 2010, but never did so and formally withdrew this notice in 2017. See *Nondiscrimination on the Basis of Disability*, 75 Fed. Reg. 43460-01 (July 26, 2010) (issuing Advance Notice of Proposed Rulemaking (ANPRM) to “explor[e] what regulatory guidance [DOJ] can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible”); *Nondiscrimination on the Basis of Disability*, 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (withdrawing the ANPRM). The Ninth Circuit has held that the DOJ’s failure to issue rules for many years after the 2010 notice of proposed rulemaking on website accessibility did not amount to a denial of due process for a company sued for failing to provide website accessibility. See *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 906-09 (9th Cir. 2019); see also *Jones v. Fort McPherson Credit Union*, 347 F. Supp. 3d 1351, 1355 (N.D. Ga. 2018) (rejecting defendant’s Due Process argument where DOJ regulations provided that discrimination could be found because of the absence of auxiliary aids and services, noting screen reader software as an example of an auxiliary aid, and plaintiff, in any case, was not seeking relief for defendant’s failure to comply with WCAG 2.0 but with the ADA itself). The Ninth Circuit in *Robles* speculated that DOJ may have purposefully declined to provide specific instructions to afford public accommodations maximum flexibility in meeting the statute’s requirements. *Id.* at 908-09, citing *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at *5 (C.D. Cal. Oct. 3, 2017); *Nondiscrimination on the Basis of Disability*, 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (noting that DOJ “continue[s] to assess whether specific technical standards are necessary and appropriate to assist covered entities with complying with the ADA.”) (emphasis added by the Ninth Circuit panel in *Robles*).

⁶⁹*Haynes v. Hooters of America, LLC*, 893 F.3d 781, 783 (11th Cir. 2018).

Additional guidance on Web accessibility may be obtained from the State of California Web Accessibility Standards website.⁷⁰

48.07 ISP Obligations

In addition to facing potential third-party liability (which is addressed in chapters 49, 50 and 51), interactive computer services are required “at the time of entering an agreement with a customer for the provision of interactive computer service” to notify the customer “in a manner deemed appropriate by the provider” that “parental controls (such as computer hardware, software, or filtering services) are commercially available” to assist the customer in limiting access to material harmful to minors.¹ The notice must identify, or provide the customer with access to information identifying, current providers of such protections.²

ISP contract issues are addressed in chapter 23. Website terms and conditions are analyzed in chapter 22. Internet safety and the protection of children on social networks is addressed in chapter 51.

Service providers also typically must respond to subpoenas, warrants and court orders seeking disclosure of contact information for, and content posted by, pseudonymous users.³

48.08 Additional Considerations for Blogs, Social Networks and Other Web 2.0 Applications

Social networks, blogs, wiki and other Web 2.0 applications, like the introduction of the World Wide Web itself back in the early 1990s, have revolutionized the way we interact, do business and play. The central feature of a social network is the network—or the community within which users may interact. Social networks such as Google+, LinkedIn, Facebook, MySpace or Friendster allow users to create their own profiles, which are like personal websites interconnected with those of others in the social network, and communicate with one another through internal email systems and other

⁷⁰See <https://webstandards.ca.gov/accessibility/overview/>

[Section 48.07]

¹See 47 U.S.C.A. § 230(d).

²See 47 U.S.C.A. § 230(d).

³See *supra* § 37.02; *infra* § 50.06[4].

more public means.¹ User generated video sites such as YouTube and micro-blogging sites such as Twitter similarly have transformed the way information is disseminated. When events happen, both good and bad, they are instantaneously recorded and posted online. Indeed, one could argue that the Democrats gained control of the U.S. Senate in 2006 by a one vote majority in no small part because a safe Republican seat in Virginia was lost when Senator Allen's angry reaction to a member of the opposing candidate's "truth squad" was caught on videotape and posted on YouTube.

Web 2.0 applications allow individual users to more effectively broadcast their views and opinions in creative and original ways. While the level of sophistication, interactivity, and computing power has increased markedly in the span of a decade, the legal issues faced by interactive sites and services remain virtually the same as those faced by CompuServe, AOL and Prodigy at the dawn of the Internet age in the mid-1990s. Whether called an "access service" or "social network," "bulletin board" or "blog," "collaborative network" or "wiki," and whether delivered on a desktop, laptop, PDA, phone or other mobile device, Internet sites and services ultimately have had to contend with the same basic questions—to what extent can a site or service be held accountable for the misconduct of its users.

Social networks are communities where the rules of the road are determined by contract. To a greater extent than many other Internet site or service owners, operators of social networks therefore may be in privity of contract with all users (or at least all registered users) and able to limit their liability and define acceptable use by contract.

A threshold issue for any social network is the extent to which user information should be disclosed or remain private. Most social networks encourage people to use

[Section 48.08]

¹For example, on Facebook, a user may post a comment to a person's "Wall," which may be seen by others who are authorized by the user to view the user's profile. On Google+, users can broadcast content to different circles of friends, family and acquaintances. MySpace users may post comments on profiles of their friends, which can be seen by anyone viewing the profile. Users also can send bulletins, which are messages that every one of a member's friends receives. Similarly, many social networks incorporate blogs hosted by users and allow user generated content to be posted.

pseudonyms rather than their real names and not post their phone numbers or other contact information. Facebook, by contrast, encourages people to use their real names, but only allows people to interact within defined networks.

As with other interactive sites or services, owners of blogs and social networks potentially risk liability for the misconduct of users who may engage in copyright, trademark, trade secret or other intellectual property infringement, may engage in tortious or otherwise illegal conduct or post adult material. The legal framework for this type of liability is set forth in chapter 49.

Sites that host user generate videos (UGV) or other user submitted content (USC) face the same potential risks as site owners or service providers that host personal websites or other locations where potentially illegal, infringing or offensive material may be stored, posted or transmitted. By late 2007, however, certain best practices arguably had developed to deter the use of these sites for copyright infringement, which remain widely followed today. Among other things, some of the “best practices” that user generated content sites implement to deter infringement include:

- using content filters to block uploads of content registered by copyright owners;
- linking to the copyright policy from every page of a website;
- limiting the size of a file that may be uploaded (to prevent entire motion pictures or television programs from being uploaded); and
- forcing users to acknowledge the site’s copyright policy and affirm that they own all right to a work prior to being able to upload a video

Some sites also comply with the Principles for User Generated Content Services.²

To the extent companies use social networks and other Web 2.0 applications for marketing or other business purposes, they may find it desirable to adopt acceptable use policies.

Specific issues associated with social networks, blogs, wiki and other Web 2.0 issues are addressed in chapter 51.

²*See supra* § 4.12[17].

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