Understanding the Proposed Department of Justice Rule on Website Accessibility

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The ADA and Website Accessibility

ADA Signing

- In 1990, Congress passed the Americans with Disabilities Act (ADA) by a bipartisan majority.
- The ADA signing brought thousands of disability advocates to Washington.
Lack of IT Accessibility in ADA

• The ADA was not designed by disability advocates or its framers to apply to information technology.
• Largely, this was because most information technology at the time was text-based, and largely accessible.

1990 Internet Technology

• In 1990, if you wanted to access the internet, you could access other servers using text-only search engines like “Archie” and “Veronica.”

Size of Internet in 1990

• At that time, you could access all of the available online sites from one page.
In 1993, three years after the passage of the ADA, only about fourteen million people - less than 0.3% of the world’s population - used the internet.
The Standards Challenge

- The rapid growth of the internet and information technology not only sparked an e-commerce revolution, but a concomitant challenge in terms of developing standards to make the new technologies accessible for people with disabilities.

The Standards Engine

- The engine that drives the ADA is standards. In the built environment, the ADA Access Guidelines (ADAAG) tell architects and builders exactly what they need to do to make any building accessible.

A Need for Standards

- The EEOC publishes guidance on the employment provisions of the ADA.
- The Department of Justice published technical assistance manuals on Title II and Title III of the ADA.
- But there is no detailed, technical guidance for accessible web content.
First Steps on Standards

- In 1995, Dr. Gregg Vanderheiden of the Trace Center at the University of Wisconsin published one of the first scholarly papers on making pages on the World Wide Web more accessible.

The W3C Standards

- In 1999, the World Wide Web Consortium (W3C), an industry group led by Tim Berners-Lee, developed the most widely-used set of standards for online accessibility, Version 1.0 of the Web Content Accessibility Guidelines (WCAG).

WCAG Checkpoints

- WCAG 1.0 set forth 65 checkpoints in three levels:
  - Priority 1: Web developers must satisfy these requirements.
  - Priority 2: Web developers should satisfy these requirements.
  - Priority 3: Web developers may satisfy these requirements.
“Bobby” Software

• In 1995, the Center for Applied Special Technology (CAST) published the “Bobby” software, that allowed users to check the accessibility of their websites.

Section 508

• In 1998, Congress passed a reauthorization of the Vocational Rehabilitation Act that contained new language, known as Section 508, which required federal websites to meet accessibility standards.

Section 508 Standards

• In 2000, the U.S. Access Board published the Section 508 standards, which were similar to the WCAG standards (but did not have the three priorities).
• The Access Board is the same federal agency that drafted the initial ADAAG standards for the built environment.
The Department of Justice and Online Accessibility Standards

The First Question

- In 1996, an attorney for American College Testing in Iowa City, Iowa sent a letter to then-Senator Tom Harkin, asking his opinion as to whether or not the ADA required places of public accommodation to provide text-only websites for users who are blind.

The DOJ Response

- Senator Harkin forwarded the letter to Deval Patrick, who was at that time an Assistant Attorney General in the Civil Rights Division for the U.S. Department of Justice (DOJ).
The Patrick Letter

• In September 1996, Patrick wrote a letter to Harkin regarding the Department of Justice’s opinion regarding applying the ADA to the internet, which is available at: http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt

Excerpts from Patrick Letter

• Patrick’s letter read, in part:
  - Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.

The First Brief

• The Patrick letter led directly to a DOJ brief, written in 1999, calling for a California website to allow a person with a mental illness access to its online bridge tournaments, arguing that the website was a “place of public accommodation.”
The DOJ Guide

- In 2003, DOJ published a guide for state and local governments on website accessibility:
  - [http://www.ada.gov/websites2.htm](http://www.ada.gov/websites2.htm)

Project Civic Access

- Additionally, DOJ has reached a number of settlements with local governments through its “Project Civic Access” program, and now routinely includes language regarding website accessibility in those agreements.

2010 ANPRM

- In July 2010, on the 20th anniversary of the ADA, the Department of Justice issued four advance notices of public rulemaking (ANPRM).
- The ANPRM is the first step federal agencies take in developing new regulations.
**Action on 2010 NPRM**

- The Justice Department held hearings and took 440 comments from individuals on whether or not the DOJ should set standards related to website accessibility under Title II and Title III of the ADA.

**Standards In 2010 NPRM**

- At that time, DOJ sought comment on whether the Section 508 standards should be used to determine accessibility under Title II and Title III of the ADA.

**Section 508 Refresh**

- While the Department of Justice was preparing for the next round of rulemaking, the U.S. Access Board announced that it would “refresh” the Section 508 standards, to keep up with new technology.
Section 508 Refresh Results

• In 2015, the Access Board determined that it would scrap the existing Section 508 standards in favor of adopting version 2.0 of the W3C standards.

2016 SANPRM

• As a result, on May 9, 2016, the Department of Justice issued a new Supplemental Advance Notice Of Proposed Rulemaking (SANPRM).

Purpose of 2016 SANPRM

• The purpose of the SANPRM is “in order to solicit public comment on various issues relating to the potential application of such technical requirements to the Web sites of Title II entities and to obtain information for preparing a regulatory impact analysis.”
What The SANPRM Does And Doesn’t Do

What the SANPRM is Not

• The SANPRM is not new rulemaking.
• The SANPRM does not require anyone to make any changes to their existing websites.
• The SANPRM does not apply at all to anyone covered by Title III of the ADA.

What the SANPRM Is

• The SANPRM is an intermediate step in the rulemaking process.
• It is a series of questions that DOJ is asking to stakeholders, in the disability and AT communities and outside, about what future standards might look like, and how they might be implemented.
SANPRM - State and Local

- The SANPRM only requests information relative to Title II entities (state and local governments).
- The next step in the process will be the publication of a draft rule.

SANPRM - Next Steps

- After the draft rule would then come a final rule.
- Even after a final rule is published, Title II entities will likely have at least two or three years to comply.
- There may be a separate Title III document eventually.

Areas of the SANPRM

- The SANPRM requests feedback in several distinct areas:
  - What “web content” comes under the standards?
  - Who should be exempt from the standards?
  - What is the cost/benefit analysis of the standards?
DOJ Concerns (1 of 2)

• DOJ is concerned about several specific issues in the SANPRM:
  - What about smaller entities?
  - What about entities that accept online comments?
  - What about legal filings?
  - What about online grading portals for K-12 schools?

DOJ Concerns (2 of 2)

• DOJ is concerned about several specific issues in the SANPRM:
  - How do we calculate the cost-benefit analysis for accessibility?
  - Can smaller entities find the staff they need to make sites accessible?
  - What about online distance education?
  - What about social media?

Webinars

• Not surprisingly, there is an awful lot of concern about how to make webinars like this accessible.
Comments on the SANPRM

The DOJ is asking for public comment on the questions in the SANPRM. Nobody should be expected to file comments on every question in the SANPRM, because the questions require a lot of economic and technical detail that no one person has access to.

Best Practices for Commenting

The regulations.gov site has a “Tips for Submitting Effective Comments” PDF file that is very useful, if you haven’t commented before:

https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf
How to Comment

• You can comment directly from the Federal Register home page.

Other Online Comment

• Or you can comment at the regulations.gov website:

Comment Via Letter

• Or you can write a letter to:
  - Rebecca Bond
    Chief, Disability Rights Section
    Civil Rights Division
    U.S. Department of Justice
    P.O. Box 2885
    Fairfax, VA 22031-0885
  - Docket ID: DOJ-CRT-2016-0009
  - RIN: 1190-AA65
Due Date for Comments

- Comments are due August 8, 2016.