Cooley

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Recent headlines around a high-profile settlement between the US Department of Justice and edX, Inc., one of the largest and earliest distributors of MOOCs, have once again highlighted the importance of understanding the rules for making online courses and services accessible to those with various types and levels of disabilities. While much of the media coverage of the edX settlement has focused on the fact that the government sued so high-profile—and respected—an online provider, to date there has been little recognition that the enforcement action may signal an effort to extend the ADA's accessibility requirements not only to a broader range of non-institutional entities providing web-based instruction, but also to those that provide other education-related services.

Background: Federal accessibility law

The Americans with Disabilities Act of 1990 ("ADA") is an amalgam of two civil rights laws that broadly prohibits discrimination on the basis of disability. Three key federal provisions govern accessibility standards for public and private entities and online environments: Title II of the ADA; Title III of the ADA; and Section 504 of the Rehabilitation Act. The protections of the ADA and Section 504 extend to individuals with a disability, defined broadly as a person who has a physical or mental impairment that substantially limits one or more major life activities.[1] Generally, these laws prohibit excluding qualified individuals from any program or activity or denying such individuals the benefits of any program or activity as a result of their disability. Title III requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established in the ADA. In addition, an institution, company, or organization that is covered by the law must provide what are described as "auxiliary aids and services" sufficient to enable the person to fully participate in and benefit from its programs and services.

Application of the ADA to websites

The scope of Title II and Section 504 with respect to websites is well-established: Title II applies to state and local public entities, including public colleges and universities, while Section 504 applies to entities accepting federal funds, specifically including institutions (both for- and non-profit) whose students participate in the federal grant and loan programs. In effect, virtually all postsecondary institutions, as well as all public and many private K-12 institutions, are "covered entities." DOJ and the Department of Education's Office of Civil Rights ("OCR") have long taken the position that both Title II and Section 504 apply to the websites of covered institutions as representing an integral part of the services provided by those institutions to their students.

The scope of Title III, on the other hand, is decidedly unsettled. Title III applies to private entities but only to the extent the entity falls within the ADA's definition of a "public accommodation." The ADA definition enumerates types of private entities that are considered public accommodations including, for example: restaurants, theaters, parks, and museums. It also expressly includes secondary, undergraduate, and postgraduate private *schools* (regardless of whether they are recipients of federal funds), and then adds a catch-all term: "place[s] of education."

However, unlike Title II and Section 504, it is unclear whether Title III reaches the websites of covered private entities. The lack of clarity stems from Title III's focus on types of *places* of public accommodation in establishing the scope of the law rather than the types of services provided by those entities. For obvious reasons—the first website was not launched until 1992—Congress did not address accessibility to virtual spaces when it enacted the ADA in 1990, and although the ADA has been amended several times, the applicability of the law to websites and other virtual spaces remains absent in the current definition of places of public accommodation and in DOJ's corresponding regulations.

The federal courts have wrestled with the issue of whether Title III covers websites, resulting in a split among the circuits. The First, Second, and Seventh Circuits have held that a place of a public accommodation *doesnot* have to be a physical structure. Relying on the statutory language of the ADA, these courts noted the places listed under the Act were not limited to places in which services were conducted exclusively within a physical structure.[2] On the other side, the Third, Sixth, Ninth, and Eleventh Circuits have concluded that Title III only

applies to physical structures. A nonphysical good or service is only a public accommodation to the extent it has "a nexus to a physical structure."

The implication of this split is that online-only entities with a broad geographic presence face a patchwork of liability based on where a plaintiff is located. By way of example, Netflix—a service provider that is exclusively Internet-based with no legally cognizable physical structure—found itself on both sides of the split in 2012. A federal court in Massachusetts concluded Netflix was covered by the ADA because the ADA's definition of public accommodation is not limited to physical structures. Later that year, a federal court in California decided Netflix *was not* covered by the ADA because, applying that circuit's established standard, the ADA *is* limited to physical structures, and will only apply to a website if there is some connection to the physical structure.[3]

Despite the division of opinion in the courts, the government's position on this issue has been clear since 2010, when DOJ issued an Advance Notice of Proposed Rulemaking. The notice signaled DOJ's intent to promulgate rules that would formalize its position that (1) no physical structure is necessary for an entity to qualify as a place of public accommodation under Title III of the ADA, and (2) a website is within the scope of Title III so long as it provides goods and services within one of the twelve categories of public accommodations listed in the ADA. But until the edX case, the DOJ had not applied this standard to purely online educational providers. In fact, DOJ has pursued settlements in only a handful of cases against any online entities that have no connection to a physical location, and the edX settlement marks one of the only instances in which DOJ actually initiated such an action on its own rather than intervening in an existing action brought by a private party.

The edX settlement

Notwithstanding an absence of statutory clarity, settled case law, or specific regulations, the edX settlement should be seen as strongly affirming DOJ's position. edX is clearly not a "school" in any conventional sense: it does not offer degrees or academic credits, it does not even charge for its courses. It aggregates content from a consortium of schools, converts it to high-level online courses, and markets and distributes those courses in the form of MOOCs. While edX also serves as a platform for schools to distribute their own courses online, DOJ appears to have sought to impose liability on edX based on the DOJ's interpretation of edX *itself* as a "place of education" within the meaning of the ADA's definition of public accommodation. The fact that the institutions that provide edX content or that use edX as a platform for their own courses are themselves physical entities subject to the ADA appears to have been irrelevant in DOJ coming to its conclusion that Title III applies to the virtual edX.

Public action by DOJ on this long-contemplated position is significant for two reasons. First, it confirms that DOJ will apply Title III to a purely online enterprise that it determines to operate as a public accommodation, regardless of whether the provider's website is tied to a physical structure. This places purely online educational entities that do not have a brick-and-mortar operation and are not otherwise within the ambit of Title II and Section 504 because they are either public or receive federal funds squarely within the scope of DOJ's authority under Title III as being a "place of education," a broad and currently undefined term.]

Second, with the nebulous term "place of education" as the hook, DOJ may be laying the groundwork to implicate other web-based education-*related* service providers. An entity like edX that is offering MOOCs—inarguably instructional programs—seems to fit logically within the definition of a "place of education" if one does not require "place" to describe a physical location. Similar entities providing purely online instruction, whether for credit or not, should certainly take note and be prepared to demonstrate the accessibility of their services. But the settlement agreement could also be read to imply that entities that provide education-related services that make delivery of course content possible, such as web-based platforms, may also fall under DOJ's newly extended interpretation, even though such entities may not think of themselves as "place[s] of education" under any legal theory. The DOJ seemed to expressly recognize that edX was providing an education-related service. For example, as part of the settlement, DOJ required edX to provide "guidance and authoring tools to the entities that create and post courses on www.edx.org … to assist them in creating accessible course content" for the stated goal of "enabl[ing] other MOOC providers to enhance the accessibility of their online offerings."

Although edX denied that its website or platform was covered by Title III, it nevertheless chose to take a principled position and enter into a voluntary settlement agreement requiring it to take extensive steps to ensure the courses it distributes online meet certain minimal accessibility standards.[4]

What the edX settlement means for online education providers

DOJ's settlement with edX should put online education providers on notice: Any private entity that provides online learning, whether for-profit or non-profit and regardless of whether the education is free or for credit or leading toward a degree, needs to consider whether its content is accessible under the standards of Title III. In light of the edX settlement, online education providers and third parties that provide course delivery services would be well-advised to consider taking steps now to review their web-based content and services and ensure they meet minimum accessibility standards. This means that, at a minimum, online content must be compliant with the Web Content Accessibility Guidelines ("WCAG") 2.0 standards, which outline technical guidelines for making web content accessible to individuals with disabilities.

In addition, it is now increasingly likely that the DOJ may consider entities that *enable* the distribution of online content to fall within the category of "place of education" and therefore subject to Title III. Online education providers and companies that provide course delivery services should establish accessibility policies for *creating* online content and web-hosting services. Moreover, those enterprises that *support* online learning, without actually distributing the course content, may find themselves the target of Title III complaints. Even well-thought out websites and online content may turn out to be inaccessible to some users. Users need to be provided with a clear reporting structure to field and respond to issues as they arise. A responsive system to field complaints may prevent users from filing complaints or seeking restitution through federal and state agencies or the courts.

As it is significantly more costly to update existing websites or make material changes to a service platform than incorporating common accessibility features into the product's design from the outset, consultation with digital accessibility experts during the design phase of any new content is clearly a prudent approach.

NOTES

1. Examples of physical or mental impairments include conditions related to orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, cancer, heart disease, diabetes, mental disability, emotional illness, and specific learning disabilities.
2. *Carparts Distribution Ctr. v. Automotive Wholesaler's Assoc. of New England, Inc.,* 37 F.3d 12, 19 (1st Cir. 1994).The court also found support for its holding in the purpose and legislative history of the ADA, stating, "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." *Id.*
3. This approach reasons that the ADA plainly prohibits discrimination at a "place of public accommodation," and goods and services—such as those provided through a website—are not freestanding and therefore cannot fall under the ADA without connection to the physical location. For example, in *National Federation of the Blind v. Target Corp.*, the U.S. District Court for the Northern District of California emphasized that a Target store's website is a place of public accommodation because the sale of goods and services online is so intricately tied to the company's brick-and-mortar operation. *Nat'l Fed. of the Blind v. Target Corp.,* 452 F. Supp. 2d 946, 946 (N.D. Cal. 2006).
4. It also of course avoided a potentially lengthy and costly judicial proceeding. Among universities there are still memories of an entirely unrelated case in which DOJ brought an antitrust action against the Ivy League and MIT (which spawned edX) for conspiring to coordinate student aid offers. The Ivies settled, but in 1991 MIT took the case to court. The three-week federal trial was broadcast live on "Court TV." Ultimately, the Court of Appeals agreed with DOJ that the antitrust laws applied, but with MIT that the courts must consider social welfare as well as economic welfare of consumers in deciding whether an antitrust violation existed, and remanded the case back to the trial court. Rather than go through another proceeding, DOJ withdrew the lawsuit and MIT agreed to a "Standards of Conduct" allowing the continuation of some but not all prior conduct. In the current matter, edX has avoided a protracted, very costly (and highly public) judicial proceeding.

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