

Americans With Disabilities Act Reaches Into Cyberspace

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When the Americans with Disabilities Act was passed, it established a broad structure for addressing discrimination against individuals on the basis of disability. In addition to imposing a regimen of non-discrimination on employers and the government, the ADA brought within its protection "places of public accommodation." Restaurants, office buildings, retailers and other places open to the public became obliged to provide disabled individuals full access and enjoyment of those facilities. Some of the first developments were easy to see, taking the form of wheelchair ramps and Braille signage. But now, 16 years after the law's passage, the reach of the ADA may be extending into the virtual world. This Fall, a federal district court judge in California refused to dismiss a lawsuit complaining that a retailer's web site was not sufficiently accessible to shoppers with visual impairments. The suit asserted claims under the ADA and California anti-discrimination laws. While it is unlikely to spell the end of Internet shopping as we know it, the ruling does raise important issues that e-commerce players would do well to understand.

The case, *National Federation of the Blind v. Target Corporation*, was brought as a class action against the Target chain of retail stores

by a blind man and two advocacy groups for the visually impaired. The plaintiffs (collectively referred to here as NFB) alleged that visually impaired users could not readily use the company's Target.com web site due to shortcomings in its design. Specifically, NFB alleged that the Target.com site failed to use so-called "alt tags," which are brief textual descriptions of images that appear on a web page. While "alt tag" text is typically not visible when using a standard web browser, special "screen reading" software used by blind and visually impaired individuals rely heavily on such text to provide descriptions of visual elements. NFB asserted

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that alt tags are widely used in the industry, and that Target could implement them at a nominal cost.

To Target, however, the cost of revamping its web site is beside the point. The company asserted that the ADA simply does not apply to its online presence. Seeking to deprive NFB of a place on which to hang its ADA hat, Target claimed that, unlike its brick-and-mortar stores, Target.com has no physical location and therefore cannot be a "place of public accommodation." Courts are split on the question of whether "places of public accommodation" must be physical places. For example, a federal appeals court in the Ninth Circuit

(ADA, continued from p. 1)

concluded that an insurance company offering a discriminatory insurance policy could not be sued under the ADA because, while the company's offices were places of public accommodation, the company itself was not. Conversely, a federal appeals court in the First Circuit (which includes Massachusetts) reached the opposite conclusion, holding that "public accommodations" may include not only an insurance company's offices, but the company itself. At least with respect to this issue, the California court sided with Target, reading into the statute the requirement of a physical location.

That conclusion did not end the analysis, however. Because although the court declined to view the Target.com web site as a public accommodation in and of itself, it considered at length the relationship of the web site with the company's brick-and-mortar stores. This follows from the fact that the ADA does more than merely prohibit discrimination within the four walls of a place of public accommodation. Rather, it extends to "goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation." As an example, the court recounted a case brought against the producers of the "Who Wants to Be a Millionaire?" television game show, who had used a telephone screening process to identify prospective contestants. The process was held to violate the ADA by discriminating against people with hearing disabilities, even though it did not occur in the studio – the public accommodation – where the show took place. As the court succinctly explained, "[A] plaintiff may allege an ADA violation based on unequal access to a 'service' of a place of public accommodation, [if] there is a 'nexus' between the challenged service and the place of public accommodation." Consequently, if NFB alleged facts sufficient to demonstrate that Target.com was actually a service of Target's retail stores, that could sustain its ADA claim.

The court found that such a nexus did, indeed, exist. Aside from being able to directly purchase items on Target.com, customers can perform a number of store-related functions

on the web site. These include accessing information on physical store hours and locations, refilling prescriptions or ordering photo prints to be picked up at a specific Target store, and printing coupons for use at Target stores. Based on this, the court concluded that Target.com is a service of Target stores, and falls within the ambit of the ADA.

Target argued that, even if such a nexus exists, its web site need not be changed because the information it provides is available to blind and visually impaired users through alternative means – such as by telephone. The court, while not rejecting this defense, said that Target would only be able to make such a showing later in the litigation. Thus, while NFB has not yet established a violation under the ADA, it has earned the right to try to make that showing.

The court's decision in *NFB v. Target Corporation* is significant, and sends a message that the World Wide Web is not a safe haven from the obligations of accessibility and equal enjoyment under the ADA. But the opinion's direct impact on other retailers, and more generally, public web sites, is far from certain. First, it is only a federal district court opinion, and until several circuit courts (and perhaps the Supreme Court) weigh in, the jurisprudence of cyberspace discrimination will remain fluid. Second, the decision hinges heavily on its facts, and is more limited than it appears. Had the case been brought against Amazon.com instead of Target, the lack of physical retail outlets would have drastically changed the analysis. So, too, one might have expected a different result if Target.com were exclusively an independent retail venue, and not also a means of enhancing customers' shopping experiences at Target stores. Finally, it is still early in the litigation process, and Target's defenses have not yet played out. The questions of whether toll-free 800 numbers or web site design considerations can ultimately repel such claims remains to be seen. In the end, though, if you use the Internet as a door to your business, you may want to give some consideration to building a ramp. Δ

High Court Eases Antitrust Rules In IP Cases

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The Supreme Court, in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, has unanimously set a new legal standard for antitrust challenges to intellectual property owners who use tying arrangements. The term "tying arrangement" refers to the business practice of conditioning the sale of one product on the purchase of additional products from the same seller.

In the *Illinois Tool Works* case, the tying arrangement involved an ink jet printer. Illinois Tool Works, which sells the printer, requires its customers to purchase their ink refills exclusively from the company. Independent Ink, the other party to the suit, sells ink that also works in those printers but costs significantly less.

Independent Ink claimed that Illinois Tool Works' tying arrangement violated antitrust law, alleging that it allowed Illinois Tool Works to unfairly restrain competition in the replacement ink market.

Before the *Illinois Tool Works* decision, the law favored Independent Ink's position. The Supreme Court had developed an antitrust rule in cases involving patented products, whereby the patent holder was presumed to have so-called "market power," a necessary element for tying to be illegal.

This "patent equals market power" presumption was based on two fundamental principles. First was the Supreme Court's view that tying arrangements "serve hardly any purpose beyond the suppression of competition." Second was the generally held belief that the benefits conferred by a patent were tantamount to a grant of "market power," or even a monopoly, in a particular industry. This second premise lasted for the better part of half a century.

Over time, however, the prevailing view about patent owners' ability to manipulate the market changed. In recent years, legal experts and economists have publicly criticized the "patent equals market power" presumption and urged the Supreme Court to abolish it entirely. Those opposed to the antitrust rule include the Federal Trade Commission and the Department of Justice (the agencies responsible for antitrust enforcement) and even some courts. Furthermore, in 1988, Congress amended the patent law to remove the "patent equals market power" presumption from that area of the law. This was a noteworthy development because the presumption initially existed solely in the Patent Code before migrating into antitrust law. Thus, there were clear signals even before the *Illinois Tool Works* decision that the antitrust presumption was in trouble.

Rightly sensing that the presumption's days were numbered, Independent Ink argued that the presumption should be modified to keep pace with recent developments. It offered the Court several alternatives to the "patent equals market power" presumption in an effort to limit its application and effect. One such alternative involved the replacement of the un rebuttable presumption of "market power" with a rebuttable presumption that could be overcome by evidence offered by the patentee.

Ultimately, the Supreme Court decided to eliminate the "patent equals market power" presumption altogether, recognizing that its very foundation had eroded over time. The written opinion in the *Illinois Tool Works* case shows that the Court relied heavily on the arguments presented by non-parties, some of whom had convinced the Court to create the presumption in the first place. Conclud-

(Antitrust, continued from p. 3)

ing that a patent does not automatically bestow “market power,” the Court ruled that “market power” should be proven, not presumed.

The consequences of the opinion are significant and will likely result in more tying arrangements. By requiring plaintiffs to prove “market power” in all tying cases, pursuing these claims will become a more expensive and difficult undertaking in many cases. Many competitors hurt by product tying will simply find the prospect of raising an antitrust challenge impractical.

In addition to abolishing the “patent equals market power” presumption, the *Illinois Tool Works* decision sends an unmistakable signal that tying arrangements are no longer viewed in a negative light by the Supreme Court. After decades of holding that tying arrangements were essentially intended for the “suppression of competition,” the Supreme Court has now declared that “[m]any tying arrangements ... are fully consistent with a free, competitive market.” Consequently, the *Illinois Tool Works* decision indicates that tying arrangements are currently enjoying a level of acceptability unseen in modern legal history. Δ

To everyone at our 20th Anniversary Party, thank you for making it a success!

