



Targeting New e-Commerce Customers

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Considerations for the Disabled Aren't Just Sensitivity, They're Part of an Evolution in Big Business, And Generally a Good Idea

Today, no one can ignore our society's commitment to provide the disabled as much access to public life as possible. From user-friendly parking spots to Braille-enabled touch pads to omnipresent curb cuts — to cite just a few common examples — the American ideal (if not always the practice) is clearly equal access.

In this holiday season, certainly that commitment extends to shopping. Major retailers, from Wal-Mart to Target to Toys R Us, all proclaim the accommodations available to the disabled at their stores in their print ads. Toys R Us even trumpets a special catalog for “differently-abled kids” on its home page; after all, children enjoy presents — and fantasizing about them — whether or not they have a disability (see, http://toysrus.richfx.com/catalog_toysrus/diffabled_06_t/diffabled_06_t.html).

Unfortunately, our society did not always devote all this attention to the disabled. Instead, these retailers' physical stores are all so-called “public accommodations,” which must be made accessible to the disabled under the Americans with Disabilities Act (ADA) (see, www.ada.gov/t3hilght.htm).

But what could be easier for the disabled than to shop online from the comfort and convenience of their home or office, without the distractions and inconveniences of crowds, and stores not adapted to their disabilities? In fact, that point has been the attraction behind the growth of e-commerce (and this journal) for everyone, whether disabled or not. If the easy availability of online shopping has been a boon for all consumers, whether shopping for holiday gifts or office supplies, it should benefit the physically disabled even more because it (sometimes literally) levels the playing field as they perform their jobs and live their lives.

Fortunately, hardware and software vendors recognized this market early on, and adapted their products — something they continue to do. For example, the “Accessibility Options” feature in Windows' Control Panel lets users select from many options to ease the computing experience. A search on “Accessibility” in the Windows “Help” feature, for instance, reveals many other utilities and

ways to adapt the standard Windows environment to meet particular needs. Windows provides further information and links to its accessibility Web site at www.microsoft.com/enable. That site even breaks down information by disability to guide the user to the features that will help him or her specifically, including not only physical disabilities (for example, www.microsoft.com/enable/guides/vision.aspx for vision disabilities, and www.microsoft.com/enable/guides/dexterity.aspx for those with dexterity problems), but also the challenges of those with learning disabilities www.microsoft.com/enable/guides/learning.aspx.

(A similar search at Apple's help site also reveals many specific articles.)

There is even a page for those challenged simply because they've been on this mortal coil longer than they would care to admit — put on the bifocals and check out www.microsoft.com/enable/aging/tips.aspx. That page reveals many "accessibility" features that make life online more pleasant, particularly for eyes that have spent too many years staring at screens. As Associated Press technology correspondent Brian Bergstein noted in a recent article, "(I)mproving disability access can make products easier for everyone to use" (see, www.philly.com/mld/inquirer/business/15703889.htm). Bergstein also reports that these features will now be part of an "ease of access" center on the Windows desktop — and directed to all users, not just the disabled — to combat the potential perception of a stigma from taking advantage of these helpful features.

Are the Virtual and Real Worlds Equal?

But do the same rules that have mandated all the accommodations for bricks-and-mortar shoppers, as discussed above, apply equally to online shoppers? For instance: Must a firm's e-commerce Web site be adapted to the disabled?

That was the question presented in a case involving www.Target.com that was decided by a California federal court in September, *National Federation of the Blind et al. v. Target Corporation*, No. C 06-01802, 2006 U.S. Dist. LEXIS 63591 (N.D. Ca. 2006); www.dralegal.org/downloads/cases/target/062_order_deny_PI_grant_part_MTD.txt. (Links to the opinion, and various pleadings in the case, are available at the Disability Rights Advocates' Web site, at www.dralegal.org/cases/private_business/nfb_v_target.php, as well as at www.outlaw.com/page-7285.) That court answered "yes" — but not because of any principle of fairness, or equal access to online resources, or commitment to online accessibility. Instead, the court adopted the theory urged in the complaint of the advocacy group Disability Rights Advocates, on behalf of The National Federation of the Blind (NFB) and The National Federation of the Blind of California. The NFB argued that for the disabled to have full access to Target's physical stores, they also had to have access to the many complementary features available only online at <http://www.target.com/>. The NFB's complaint raised issues affecting all e-commerce, not just for the blind, but for anyone. It stated:

Target.com contains thousands of access barriers that make it difficult if not impossible for blind customers to use the Web site. In fact, the access barriers make it literally impossible for blind users to even complete a transaction on the Web site. Target thus excludes the blind from full and equal participation in the growing Internet economy that is increasingly a fundamental part

of the common market place.... This case arises out of Target's policy and practice of denying the blind access to Target.com, *including the goods and services offered by Target stores through Target.com*. Due to Target's failure and refusal to remove access barriers to Target.com, blind individuals have been and are being *denied equal access to Target stores*, as well as to the numerous goods, services and benefits offered to the public through Target.com." (Emphasis added.)

The court agreed with the NFB's link between the Web site and real-world stores, which are clearly places of "public accommodation" under the ADA (42 U.S.C. Section 12182.). The court stated:

Plaintiffs' legal theory is that unequal access to Target.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation. The case law does not support the defendant's attempt to draw a false dichotomy between those services that impede physical access to a public accommodation and those merely offered by the facility. Such an interpretation would effectively limit the scope of Title III to the provision of ramps, elevators and other aids that operate or serve to remove physical barriers to entry. Although the Ninth Circuit has determined that a place of public accommodation is a physical space, the court finds unconvincing defendant's attempt to bootstrap the definition of accessibility to this determination, effectively reading out of the ADA the broader provisions enacted by Congress. ... (I)n the present action, plaintiffs have alleged that the inaccessibility of Target.com denies the blind the ability to enjoy the services of Target stores. The Ninth Circuit has stated that the "ordinary meaning" of the ADA's prohibition against discrimination in the enjoyment of goods, services, facilities or privileges, is "that *whatever* goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services." Defendant's argument is unpersuasive and the court declines to dismiss the action for failure to allege a denial of physical access to the Target stores. (Citations omitted.)

Not the First Online Commerce ADA Case

Target.com was not the first attempt to subject online commerce to the ADA or other antidiscrimination laws, but it was certainly the most publicized — and the most successful. For example, a public interest group's claim that Southwest Airlines' Web site violated the ADA failed when a federal district court ruled that the Web site, by itself, was not a public accommodation, and the appellate court reached the same conclusion because the claim that the airline's "travel service" was a public accommodation had not been argued. *Access Now, Inc. v. Southwest Airlines, Co.*, 385 F.3d 1324 (11th Cir. 2004), 22 F. Supp. 2d 1312 (S.D. Fla. 2002). After listing the specific categories of public accommodations named in the ADA (without considering that the law had been written before online commerce became pervasive), the court rejected the group's claim. "Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a *physical, concrete structure*. To expand the ADA to cover 'virtual spaces' would be to create new rights without well-defined standards." (Emphasis added.)

In contrast, various online services (AOL, and several tax-filing services) have settled claims about the ADA's applicability to their Web sites, as did travel Web sites Ramada.com and Priceline.com after a

claim by Attorney General Eliot Spitzer of New York (see, www.oag.state.ny.us/press/2004/aug/aug19a_04.html). In fact, an early Department of Justice response to a senator's inquiry about Web site accessibility on behalf of a constituent stated, "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" (see, www.usdoj.gov/crt/foia/tal712.txt).

Although the *Target.com* court's ruling made the Web site part of Target's operations subject to the ADA's accessibility requirements, in theory, the court did not, in fact, order any changes to it. Under the ADA, accommodations must be "reasonable," a fact-specific test. For example, although Target had offered to show that it made its stores' services available to the blind through other means, the court treated such arguments as "premature," because it was an affirmative defense not yet reached on the motion to dismiss at issue in the case. Similarly, in my experience, an advocacy group of parents of disabled children that presented a public conference on disabilities law paradoxically did not have to provide specialized interpreters for deaf attendees because the cost of such services far exceeded the means of the sponsor. As a result, the requested accommodation was clearly unreasonable.

Accessibility and Reasonableness: A Balancing Test

This distinction between the legal duty to make a Web site accessible and the limitation that such accommodation must be reasonable could be critical for typical e-commerce entrepreneurs, who generally do not have the financial or support resources of retail behemoth Target. Although the *Target.com* court noted the plaintiff's claim that "designing a Web site to be accessible to the blind is technologically simple and not economically prohibitive," the second part of that conclusion may be quite different for many online firms, even if the first part is generally correct.

Also, the ease of market entry that has made online shopping so competitive could suffer if firms with an existing real-world presence must contend with costs that their purely online counterparts do not. The Amazon.com's of the world already proclaim price advantages from avoiding the costs of physical operations. Should we allow our goal of helping the disabled make firms that are saddled with real-world costs less competitive?

The *Target.com* case, however, focused on one type of disability (blindness). Yet the ADA prohibits discrimination against all types of disabilities. But what cost is reasonable for a Web-based seller to accommodate its customers' unknown limitations, much less *all* such challenges? For example, although the bricks-and-mortar theory underlying the court's ruling applied only to physical disabilities and barriers, what about mental, or learning disabilities? A typical Web site featuring flashing, motion-filled pop-up ads, or requiring review of multiple Web pages to check all pricing and shipping options, might be impenetrable to such a person. For those who face severe sensory limitations, to the point that even clapping of hands at an assembly is painful, voice navigation found at many sites might make the sites intolerable or inaccessible. But in the face of different disabilities identified today, should firms be required to offer customers multiple Web experiences to find one that suits customers' needs? We can all jest about "sipping and clicking" one's way to spending too much online while intoxicated (see, www.nytimes.com/2006/10/07/business/07instinct.html_r=1&th&emc=th&oref=slogin), but those whose disability affects their judgment could find that the combination of faceless shopping

and the ease of charging purchases could quickly create financial difficulties, or even ruin.

In addition, *Target.com* could lead to sharp cost differences between purely virtual firms — who would not be subject to the court’s rationale — and firms that integrate their online and offline efforts. That legal distinction could accentuate the potential cost advantage that has eased entry for firms with only a Web presence since the dawn of the Internet. On the other hand, might the *Target.com* reasoning deter established, trusted firms from expanding operations online? If only the real-world firms that can afford a technically complex online catalog like that of Toys R Us mentioned above will be able to venture online, eventually the diversity of online merchants will suffer, as only the largest firms are likely to survive.

Accessibility and Good Marketing

Instead, perhaps a better way to approach Web site design-accessibility issues is not from the perspective of general counsel, but from that of the marketing department. Rather than focus on what is required, and how to get around legal requirements, consider instead the potential benefits of accessible e-commerce Web site design. After all, no one needs the benefits of e-commerce more than those who cannot shop in a traditional manner, whether due to physical or mental limitations. If online, and bricks-and-mortar firms see that making Web sites more accessible can improve business, by attracting customers they might never have had otherwise, the issues presented by the case will fade away — firms will make Web sites accessible because it is good business, not just because of a legal requirement. Moreover, as noted in AP correspondent Bergstein’s article cited above, if accessibility features make a site easier for everyone to use, they should be adopted by more firms as part of normal competition. Removing disabilities labels from them may simply encourage greater use of their advantages by all customers, disabled or not, while making them easier to find on a Web site when they are not buried in an accessibility section.

A personal experience illustrates this point well. My son has a severe developmental disability, yet has become quite adept at searching online for his interests. In particular, his birthday and shopping lists were completed before Columbus Day because he has been able to surf freely to investigate this year’s latest videogames. What e-commerce business can afford to turn away such focused shoppers?

Long before the Internet entered homes on a large scale, the late Eleanor Roosevelt eloquently captured the spirit of the *Target.com* decision when she said: “Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: The neighborhood he lives in; the school or college he attends; the factory, farm or office where he works.”

Where better to find such rights than on the desktop we use every day?

Online Resources Mentioned in This Article

1. **Apple accessibility page:** www.apple.com/accessibility

2. Microsoft accessibility resources:

- General: www.microsoft.com/enable
- Vision difficulties and impairments: www.microsoft.com/enable/guides/vision.aspx
- Dexterity difficulties and impairments: www.microsoft.com/enable/guides/dexterity.aspx
- Learning difficulties and impairments: www.microsoft.com/enable/guides/learning.aspx
- Aging computer-users' guide: www.microsoft.com/enable/aging/tips.aspx

3. National Federation for the Blind: www.nfb.org/nfb/Default.asp

4. Toys R Us: http://toysrus.richfx.com/catalog_toysrus/diffabled_06_t/diffabled_06_t.html

5. U.S. Access Board: www.access-board.gov

6. U.S. Justice Department's ADA home page: www.usdoj.gov/crt/ada/adahom1.htm

7. U.S. Justice Department's ADA Title III facts: www.ada.gov/t3hilght.htm

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