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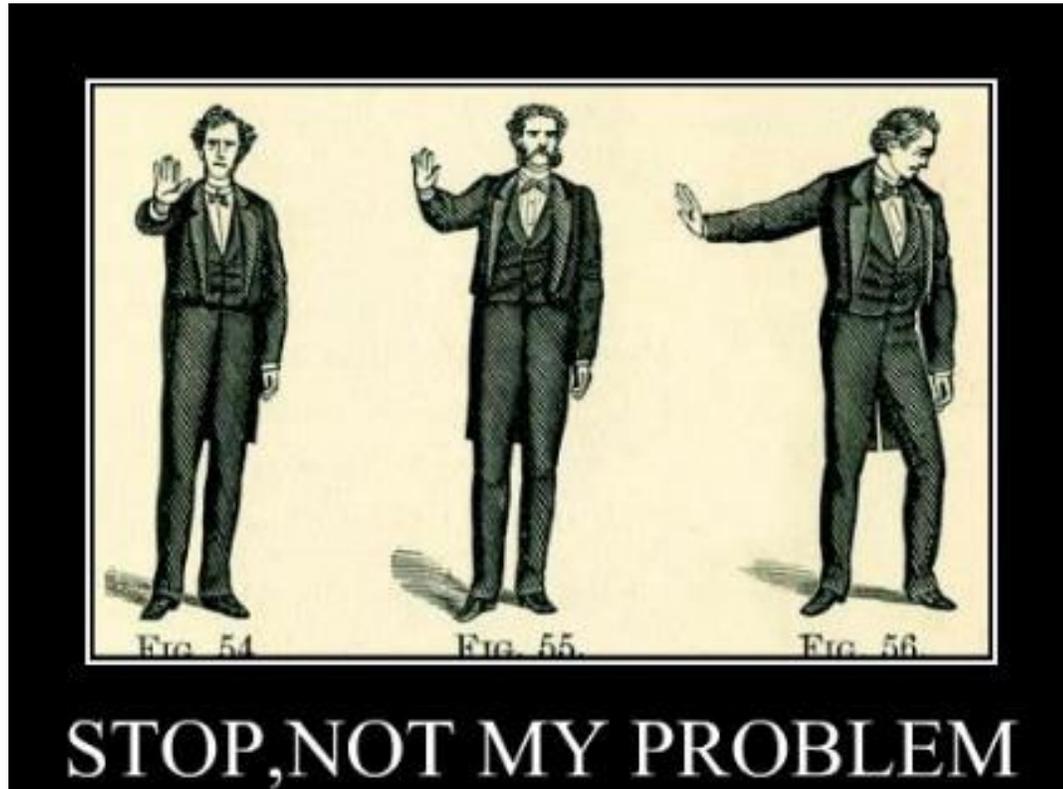
Are You Next? Trends in Digital
Accessibility Lawsuits

Understanding website accessibility litigation

Richard M. Hunt

2022

The usual (but important) disclaimer.



Nothing in this webinar creates an attorney-client relationship between the presenters and viewers, and none of our comments should be considered legal advice concerning particular matters or issues.

Who is this handsome devil?



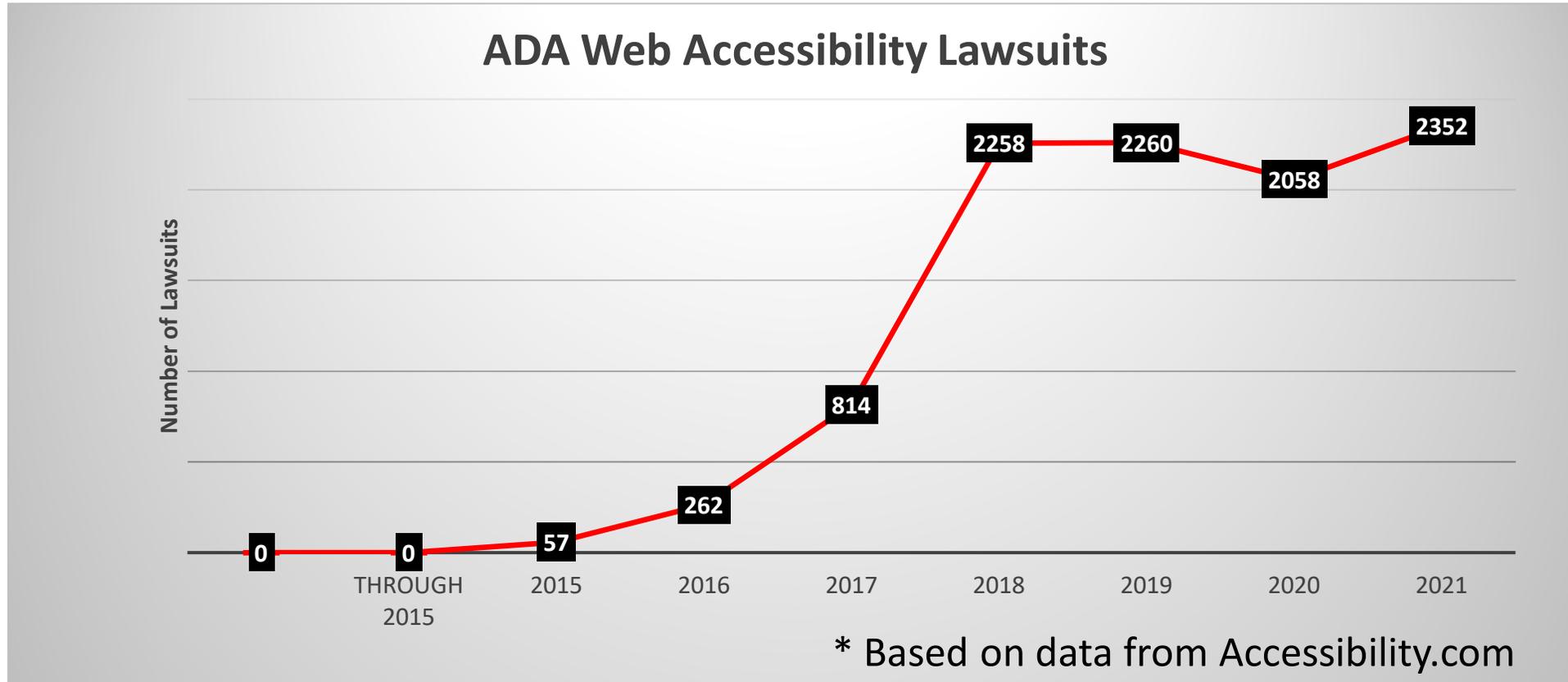
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Our Agenda / Goals

- Why we are here.
- The laws requiring accessible websites.
- Fascinating but mostly irrelevant legal issues that arise in litigation
- What to do if you are sued (and the law suddenly becomes very relevant).
- Managing website litigation risk (and why it isn't a good way to think about accessibility)

Why we are here*



THE LAWS REQUIRING ACCESSIBLE WEBSITES

Where do most accessibility obligations come from?

- Section 508 of the Rehabilitation Act
- Air Carrier Access Act
- Title II of the Americans with Disabilities Act
- Title III of the Americans with Disabilities Act
- State and local laws

Section 508 of the Rehabilitation Act

- Allows private lawsuits against some recipients of federal funds.
- Includes an explicit statutory requirement for accessibility
- Includes an explicit regulatory definition of “accessibility” equivalent to WCAG 2.0 AA.

Air Carrier Access Act

- Applies to airlines and some associated operations.
- No explicit statutory requirement that websites be accessible.
- Has a specific regulatory requirement that websites be accessible
- Has a specific regulatory definition of accessibility equivalent to WCAG 2.0 AA.
- No private cause of action

Title II of the ADA

- Covers state and local governments of all kinds.
- No explicit statutory requirement that websites be accessible *but* since websites are always “programs” of these entities there is no doubt their websites must be accessible.
- No regulatory definition of what accessibility means.

Title III of the ADA

- Covers all businesses open to the public – but maybe not to online only businesses.
- No explicit statutory requirement of accessibility
- No explicit regulatory requirement of accessibility
- No regulatory definition of what accessible means.

Fascinating but mostly
irrelevant legal issues

Key legal issues

- Are internet only businesses covered by Title III?
- If only websites associated with a physical business are covered, what kind of association triggers coverage?
- What does it mean to say a website is accessible?
- When can a business offer alternatives to website accessibility and meet Title III requirements?
- What kind of harm must a plaintiff suffer to have the right to file suit under Title III?

Are internet only businesses covered?

- Some say yes – notably courts in the Second Circuit, where many ADA Title III lawsuits are filed.
- Some say no – notably the Ninth Circuit, another place where many ADA Title III lawsuits are filed.

What about websites of physical businesses?

- Yes, they are covered.
- But there are at least 4 theories about why, and it matters..

What is an “accessible” website?

- WCAG 2.0 AA?
- WCAG 2.1 AA?
- Something else entirely?

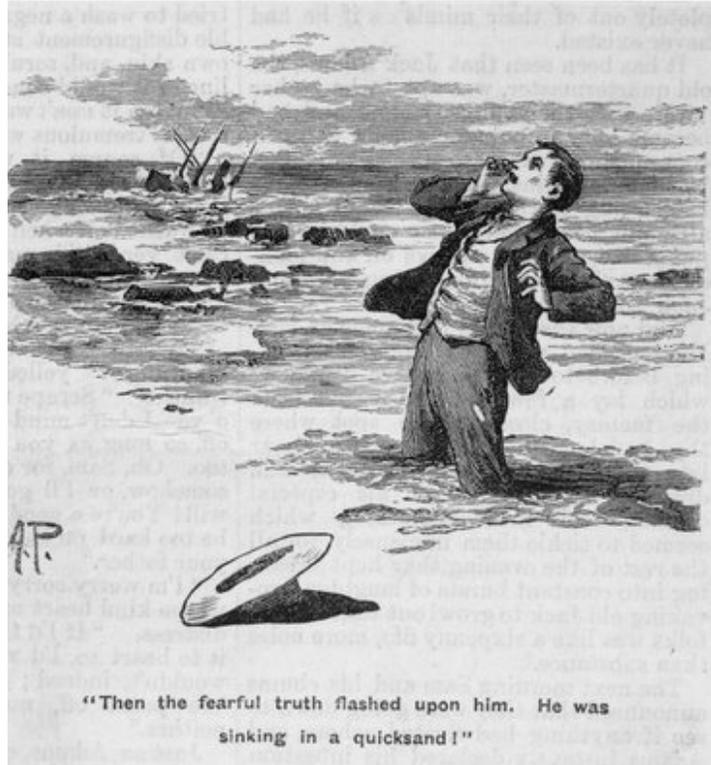
Alternative means of access

- *In theory* any equally convenient means of gaining access to the goods and services of a website will satisfy Title III of the ADA.
- But who knows what “equally convenient” really means.

What kind of harm gives rise to “standing”

- “Standing” is a legal concept from Article III of the U.S. Constitution.
- It is a monster of a defense – without standing there can be no federal court lawsuit.
- But just what a defendant needs to have standing is subject to considerable disagreement.

There ain't no easy way out (says Tom Petty)



Then the awful truth flashed upon him. He was standing in quicksand!

What to do if you are sued.

This is just another kind of serial litigation

- Controlled by lawyers.
- Goal is settlement at a profit to the lawyer.
- Price of settlement is below likely cost of even a basic defense.
- Remediation is always part of the deal.



Knowledge is power

- Know your venue
- Know the trends
- Know your judge
- Know your opposing lawyer

Four kinds of opposing lawyers

- Bottom Feeders who only send demand letters
- Bottom Feeders who file lawsuits
- Mid-tier firms who don't really want to fight
- Established firms with a history of ADA litigation.

Choose wisely

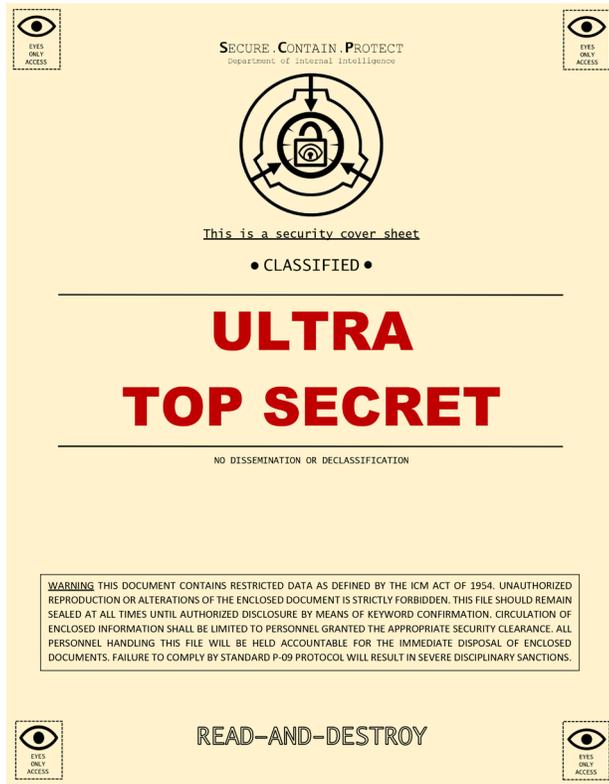
No surrender! No retreat!



Let's Make a Deal!



Confidential Settlement or Consent Decree?



A typical confidential settlement

- Money
- Remediation, but on terms that are reasonable given your financial constraints and with well-defined criteria.
- Adopt a policy of accessibility
- A release
- Enforcement limited, with a substantial notice and opportunity to cure, as well as arbitration rather than judicial enforcement.
- **No provision for later inspections or supervision of the remediation process or of the accessibility policy, or similar details.**

And if you must fight

- Be prepared to spend what it takes to win – it is better to settle at the beginning that spend large amounts on legal fees and then settle.
- Get a good expert – someone with a history in website accessibility, not just a programmer or developer who has expanded into this new area of business.
- Adopt a two pronged approach to remediation; that is, conform to WCAG standard and fix any explicitly claimed issues even if they are not needed for WCAG standards.
- Spend your money wisely. Don't file low percentage motions that can be filed later at a lower cost

Managing website litigation risk

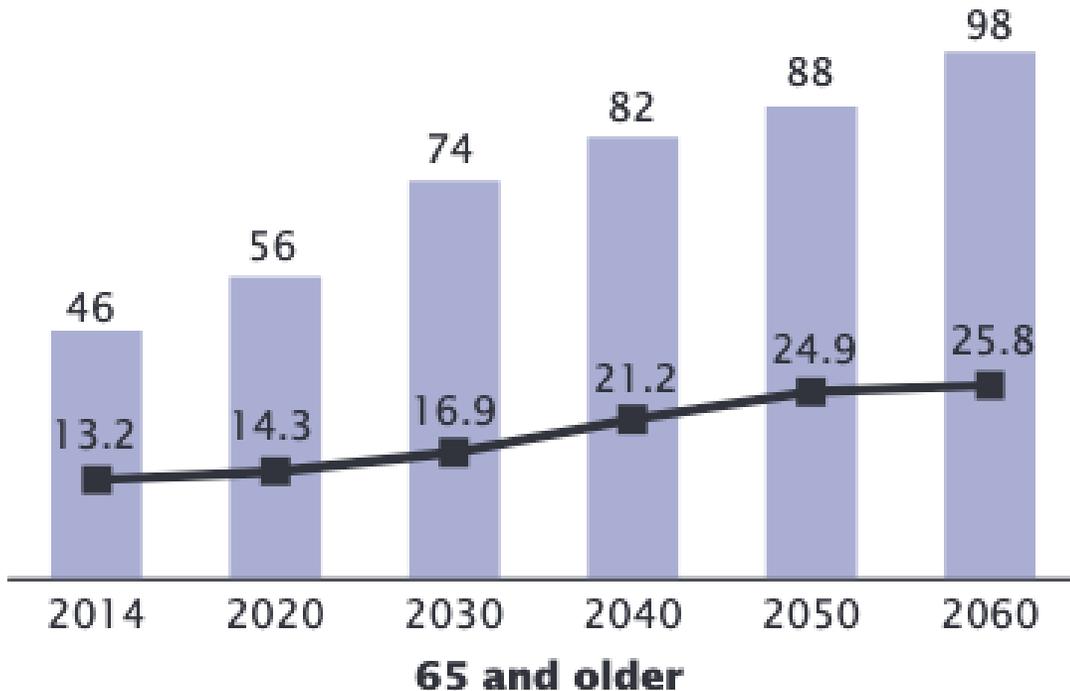
Is the wrong way to think about accessibility.

Make your website accessible . . .

- For your customers.
- To increase revenue.
- To get ahead of the curve on the law.
- Not to manage litigation risk.

Do it for your customers – they're getting older

U.S. Census Bureau data



“The prevalence of blindness and vision impairment increases rapidly with age among all racial and ethnic groups, particularly after age 75”

Vision Loss and Age – CDC Website

Do it for your revenues

69% of disabled users will click away from a website they find difficult to use.

75% will spend their money on the website that is easiest to use over the website with the cheapest prices.

90% or more will not tell the business that they had a problem before leaving.*

*Data from Level Access quoting
Click Away Pound

Get ahead of the curve on the law

[116H8478]



FEDERAL REGISTER

(Original Signature of Member)

117TH CONGRESS
1ST SESSION

H. R. _____

To amend the Americans with Disabilities Act of 1990 to include consumer facing websites and mobile applications owned or operated by a private entity, to establish web accessibility compliance standards for such websites and mobile applications, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. BUDD introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Americans with Disabilities Act of 1990 to include consumer facing websites and mobile applications owned or operated by a private entity, to establish web accessibility compliance standards for such websites and mobile applications, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*

Litigation risk is not the best reason

- More than 20 million company websites in the U.S.
- Only 4,000 website lawsuits a year.
- Odds of any one business being sued in a given year are less than .02 percent.

Accessibility may not prevent litigation

- Plaintiffs identify target websites using unreliable software tools that report “defects” that don’t affect accessibility
- Perfect accessibility – which is what you need to avoid a lawsuit – is almost impossible to maintain.

Two useful steps to take to manage risk

- Click wrap arbitration agreements.
<http://accessdefense.com/?p=5522>
- Look accessible as well as being accessible.

Make your website accessible -

- For your customers.
- To increase revenue.
- To get ahead of the curve on the law.

Key points – website accessibility litigation

Four takeaways:

Website accessibility litigation is another form of ADA serial litigation whose goal is a quick settlement.

Effective defense is made difficult by the uncertain condition of the law.

Strategic decisions require more than legal knowledge – decisions require knowledge about individual judges and opponent law firms.

The risk of litigation is low and does not constitute the most important reason for a business to work on website remediation.

I'm here to help (for a fee. . . .)



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