ADA and the Internet: Standardizing the Accessibility of Web Sites

Laura Corcoran, University of Arizona

Available at: https://works.bepress.com/laura_corcoran/1/
Abstract

The Department of Justice (DOJ) is currently considering what standards should be applied to commercial web sites to make online information and services accessible to people with disabilities. Should the overall performance of a website be the measuring standard, or would compliance with technical rules be a sufficient measure of web accessibility?

There are dangers in adopting technical standards in DOJ regulations. The process of updating regulations is slow and will not keep pace with changing technology. Accessibility issues involving detailed technical standards would likely deteriorate into battles about computer programming techniques. Compliance with technical standards does not necessarily guarantee that a Web site is accessible. Worse still, technical standards in DOJ regulations may be an unconstitutional regulation of commercial speech. For these reasons, the DOJ should adopt performance standards in applying the ADA to web sites.

However, based on the public comments submitted to the Federal Register last year, performance standards are not what the public wants. This paper explores the public opinion, why technical standards in regulations will ultimately weaken the effect of the ADA, and why performance standards in DOJ regulations are the best choice in applying the ADA to web sites.
ADA and the Internet: Standardizing the Accessibility of Web sites .......................... 1

**Background** .................................................................................................................. 4
  An Illustration .................................................................................................................. 4
  The Americans with Disabilities Act and Related Disability Laws .............................. 5
  Courts are Split as to whether Title III of the ADA Applies to Web sites .................. 9

**Performance verses Technical Standards** ................................................................. 13
  Classifying Current Standards ..................................................................................... 13
  Three Viewpoints on Performance verses Technical Standards ............................ 17

**Analysis** ....................................................................................................................... 20
  Performance Standards in Regulations, Technical Standards in Guidance .............. 20
  Why Web Accessibility Technical Standards Don’t Belong in Regulations ............ 24

**Conclusion** .................................................................................................................. 28

**Appendix A – WCAG and Section 508 Standards of Accessibility Design** ....... 30
ADA and the Internet: Standardizing the Accessibility of Web Sites

By Laura Corcoran

“The Internet has put over one billion people globally in touch with each other and has had a profound influence on the global economy.”² But for people with disabilities, access to the Internet is disproportionately empowering.³ Through the Internet, a person with a disability may independently control their financial interests, access current news information, and handle personal commercial dealings.⁴ Perhaps at no other time in history have the stakes for people with disabilities been so great.⁵ The opportunities for employment and economic advancement via technology must be recognized, protected, and expanded.⁶ “As cultural and economic life grows more and more bound to the Internet and digital technology, those outside of the loop may grow increasingly isolated from the mainstream of society, creating or exacerbating serious rifts that can rupture tranquility.”⁷

The Americans with Disabilities Act (ADA) recognizes and protects the civil rights of people with disabilities.⁸ When the ADA was signed into law on July 26, 1990 the Internet as we know it today did not exist.⁹ Three decades after hypertext was first introduced to the scientific community in 1960, researcher Tim Berners-Lee “came to realize the potential of a system that would allow loose arrangement of ideas and data unconstrained by hierarchies or categorization.”¹⁰ In December 1990, Berners-Lee presented a hypertext language, a client program called a browser, and a server to host hypertext pages to his research community.¹¹ He called his invention the World Wide Web.¹² At the time, almost nobody cared.¹³ It was not until 1992 that a web browser capable of handling color, graphics, animations, or a point and click interface for links
within pages existed. By 1995, only fourteen percent of American adults had ever used the Internet. Thus the Internet was in its infancy when the ADA was enacted.

It is not surprising then, that the ADA statutes do not explicitly address access to Web sites. Currently, there are no Department of Justice (DOJ) regulations which specifically address this issue either. The DOJ has interpreted the statute’s broad mandate for non-discrimination to include goods and services provided by covered entities on Web sites over the Internet. However, creating specific regulations to interpret the ADA in the context of Web sites will provide clear legal notice of what is required to satisfy the law. The DOJ published an Advanced Notice of Proposed Rule Making (ANPRM) in July, 2010 seeking public comment concerning web accessibility regulation. Imposing ADA regulatory requirements on the Web sites of public accommodations and State and local government entities will have far reaching effects. The question of Web site regulation under the ADA will not likely be fully resolved by the actions of the DOJ. Although Congress has authorized the DOJ to promulgate rules, the courts will apply the *Chevron* test to decide whether to defer to the regulations. The DOJ’s Title III regulations are entitled to *Chevron* deference because the ADA specifically authorizes the DOJ to issue regulations to carry out the provisions of Title III.

To effectively regulate Web sites without stifling innovation and growth, it is crucial that the DOJ identify appropriate standards of accessibility. This question of standards is a main focus of the ANPRM and one that elicited much response from a wide variety of individuals and groups. This paper will address the question posed in the ANPRM regarding whether the regulations should set forth performance or technical
standards to measure accessibility and usability by persons with disabilities. Specifically, the DOJ asked for comments to this question: “Given the ever-changing nature of many Web sites, should the [DOJ] adopt performance standards instead of any set of specific technical standards for Web site accessibility?”

The DOJ should adopt both performance standards and technical standards to ensure that Web sites meet the mandate of the ADA. Both are needed to facilitate readily achievable barrier removal and effective communication. Neither type of standard alone is sufficient to achieve these goals. Performance standards alone will be too vague to guide the web developers and technical staff who implement changes to the Web sites. Technical standards alone may result in compliance with the standard without satisfying the ADA mandate for accessibility. Rather, performance standards should be adopted as regulatory rules; technical standards should be included as guidelines for accessibility. This structure for accessibility standards will ensure the ADA mandate for non-discrimination is upheld.

There are important issues which arise in the context of applying the ADA to Web sites that this paper will not address. This paper will not address whether a Web site is a place of public accommodation. There is disagreement among the courts that have addressed whether “a place of public accommodation” has a more expansive meaning than simply a physical place. For purposes of addressing the issue presented in this paper, a place of public accommodation is assumed to include a Web site. A related question, posed by the DOJ in its ANPRM, that will not be addressed here is which Web sites should be considered Title III entities? Should any Web site that has a commercial purpose be covered, or only Web sites that satisfy the “nexus test”, or should some other
categorization be used? In the following discussion, we assume that a Web site can be considered a place of public accommodation, that a Web site may qualify as a “facility” within the meaning of the ADA, and failure to remove structural barriers from the Web site, provide auxiliary services through the Web site, or modify policies and procedures governing the use of the Web site may constitute discrimination under Title III of the ADA.

**Background**

**An Illustration**

Websites that are designed without accessibility in mind can pose serious obstacles to people with disabilities. A simple illustration involves people with visual impairments. Many people who are visually impaired use specialized software to read the contents that appears on the computer screen. This software is commonly referred to as a “screen reader.” The screen reader software works together with the web browser software and the Web site code to read out loud the contents of the webpage requested by the visually impaired user. Technical standards have been created to specify how these three components should work together. If the website code does not conform to the standards, it is likely that the information the screen reader presents to the listener will be unintelligible. The screen reader looks for certain information fields within the Web site code. If the sought after field is not provided, the screen reader will read other information as a substitute. Often the substituted information is not understandable to anyone other than the Web site programmer.
For example, a poorly formatted link on a shopping Web site that a sighted user sees as “six piece cotton towel set” might be read out loud as “blank ref equals nav underline t underline s p underline…” which, obviously, is completely unhelpful to the visually impaired user who is trying to shop online. This error occurs because the underlying code of the Web site is not formatted in a way that is compatible with screen reader software. This particular type of problem can easily be avoided by following technical standards of accessible webpage design. Whether such technical standards alone are sufficient to make an entire Web site ADA compliant is a topic of this paper.

The Americans with Disabilities Act and Related Disability Laws

The ADA statutory provisions are broad and have been interpreted by the DOJ and by some courts to cover the services provided by Web sites. Any ADA regulations the DOJ creates concerning Web site accessibility will apply to entities covered under Titles II and III. Title II covers State and local government entities whereas Title III covers “places of public accommodation” and services operated by private entities. Although Titles II and III of the ADA have similar goals, there are key differences in the wording within the statute’s provisions which have led to different legal precedent about the extent of the covered entities’ obligations under the law.

Title II of the ADA and, if the government entities receive federal funding, the Rehabilitation Act of 1973 generally require that State and local governments provide qualified individuals with disabilities equal access to their “services, programs, or activities” unless doing so would fundamentally alter “the nature of the service, program, or activity” or would impose an undue burden. A person protected under Title II is referred to as a "qualified individual with a disability", meaning a person who, with or
without accommodation, meets the essential eligibility requirements of the public entities’ program. Title II states,

“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

In contrast, Title III of the ADA covers public accommodations and services run by private entities. The general provision of Title III states,

“[N]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

Title III explicitly includes privately run restaurants, hotels, theaters, shopping centers, retail stores, museums, libraries, parks, schools, and day care centers as covered entities. However, the broad coverage of the statute also includes any privately run operations effecting commerce involving food or drink service, places of exhibition entertainment, public gatherings, sales or rental establishments, service establishments, places of public display or collection, recreation, education, social service centers, or places of exercise.

The ADA prohibits such places of public accommodation from discriminating against individuals on the basis of disability. This means the entity cannot deny a person the opportunity “to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodation of an entity.” It is also discriminatory to offer an opportunity to participate that is not equal to that offered to other individuals. Offering different or separate services is also discriminatory unless necessary to provide the service. The goods and services must be offered in the most integrated setting
appropriate. Entities are required to make reasonable modifications in policies, practices, or procedures when necessary unless the modifications would fundamentally alter the nature of the goods and services.

The ADA was designed to address discrimination based on different types of disabilities: sensory disabilities (e.g. vision or hearing impairments), mobility disabilities (e.g. wheelchair and artificial limb usage), and cognitive disabilities (e.g. dyslexia, autism). Title II and III describe three general methods available to provide equivalent access to goods and services: barrier removal, auxiliary aids, and modification of policies. Barrier removal in the physical word might include installing wheelchair ramps for building entrances, having Braille text on signage, or having a pictogram on signage. Examples of auxiliary aids include sign language interpreters, notetakers, and closed captioning. An example of a policy modification is allowing a service animal in an establishment that does not generally permit animals to enter.

Title III applies separate standards for each of these methods of providing equivalent access. For barrier removal, the standard of “readily achievable” applies. “Readily achievable” means easily accomplishable and able to be carried out without much difficulty or expense. If barrier removal is not readily achievable, the statute allows alternative methods to be used. For auxiliary aids and services, unless it would “fundamentally alter the nature” of the goods or service, or offering the accommodation would result in an “undue burden”, the aid or service must be provided to ensure individuals are not excluded, denied services, segregated, or otherwise treated differently. A policy modification is required unless it would “fundamentally alter the nature” of the goods, services, facilities, privileges, advantages, or accommodations.
In addition to the ADA, Section 508 of the Rehabilitation Act, as amended in 1998, is another federal law that addresses accessibility. Section 508 covers electronic and information technology developed, procured, maintained, or used by federal government departments or agencies. In particular, it covers accessibility of Web sites operated or funded by the federal government. Section 508 requires that people with disabilities are allowed access to information that is comparable to the access provided to non-disabled individuals, unless an undue burden would be imposed. The Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for setting technical and functional performance criteria to implement the requirements of Section 508. The law includes a provision that requires biennial reporting of information on and recommendations regarding the state of Federal department and agency compliance with the Section 508 accessibility requirements. It appears that report was made only once, in 2001.

Some states have adopted legislation that has similar requirements to those of the ADA or Section 508 of the Rehabilitation act. For example, the Maryland Information Technology Nonvisual Access (MD IT NVA) requires that Maryland state government agencies provide Web sites that are nonvisually accessible. Arkansas Government or state funded entities must have Web sites that are equally accessible to blind or visually impaired visitors. For instance, Web sites must provide text equivalents for all non-text elements such as images, animation, audio and video. California has the Unruh Civil Rights Act, which was the basis of a claim in the Target lawsuit. The court in Target ruled that allegations by a blind customer that Target.com was not accessible to blind individuals, and that such inaccessibility denied blind customers’ full and equal access to
retailer’s stores as well as the ability to enjoy retailer’s services offered to the public through the Web site, were sufficient to state claim under California's Unruh Act.\textsuperscript{57}

\textit{Courts are Split as to whether Title III of the ADA Applies to Web sites}

The wording of Title II’s prohibition of discrimination has no reference to a “place of” with respect to the services, programs or activities of the covered entity.\textsuperscript{58} In contrast, Title III refers to goods, services, etc. of any “place of” public accommodation. This distinction has made a significant difference in the court’s willingness to apply the ADA’s protections to Web sites. Consequently, courts agree that Title II covers Web sites because the Web sites provide a service. But courts disagree on whether Title III covers Web sites because a Web site is not a physical place. Although this paper assumes Title II and Title III cover Web sites, the development of case law demonstrates the need for DOJ regulation to help shape future court decisions.

Litigation over whether Title III of the ADA should apply to Web sites has created a split in the circuit courts. The legal issue was first considered by Judge Richard Posner of the Seventh Circuit Court of Appeals.\textsuperscript{59} Judge Posner stated that Title III could be construed to cover "electronic space" including a Web site because the ADA's non-discrimination provisions for public accommodations were broad enough to include a “Web site or other facility (whether in physical space or in electronic space) ... that is open to the public."\textsuperscript{60} In 2002, a Florida district court became the first to explicitly hold that Title III did not cover Web sites as places of public accommodation because they were not physical places.\textsuperscript{61} The court stated that “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.” But in 2006, the Northern District of California Court ruled that a claim against Target Stores could proceed to the extent that unequal access to the Target.com Web site denied full enjoyment of the goods and services offered at the physical retail stores. This ruling has come to be known as the “nexus test” and marks the first time the federal courts have applied Title III of the ADA to Web sites. Critics point out that this approach leads to absurd results.

The Target case ended with a settlement between the parties for $6,020,000 in March 2009. This was the amount allocated to be paid directly to the claimants of the class action law suit. The National Federation of the Blind was awarded reasonable attorney's fees and costs of $3,738,864.96. In addition, the National Federation of the Blind certified the Target Web site through its Nonvisual Accessibility Web Certification Program after agreed upon improvements were completed in early 2009. Target and NFB agreed to a three-year relationship during which NFB will perform accessibility testing of the Target Web site. A decision like Target demonstrates the high stakes involved for a company when it does not have an accessible Web site as well as the importance of a method of measuring accessibility by a reliable measure or source.

*The Structure of ADA Implementation: Statutes, Regulations, and Guidelines*

Generally, as with any statute, there are four tools for courts to use to interpret a statute: 1) the express language of the statute, 2) the regulations promulgated by an agency with authority to do so, 3) the interpretive guidance or guidelines developed by an agency and 4) the legislative history. Obviously, courts also look to precedent when the statute is ambiguous or the agency charged with filling in the gaps have not done so. Similarly, the ADA has four distinct sources used to interpret Title II and III of the ADA:
statistics passed by Congress, regulations issued by the DOJ, and guidance written by either the Access Board or the DOJ, and a rich legislative history. The ADA statutes are codified in 42 U.S.C. 12101 et al. These are legislative rules that Congress voted on and passed in 1990. The ADA was amended in 2008 in response to prior judicial interpretations of the law which limited coverage of the ADA in ways Congress had not intended.

When Congress enacted the ADA, it explicitly gave the Attorney General, who heads the DOJ, responsibility for implementing the Act. The Attorney General coordinates with the Department of Transportation and the Access Board to provide technical assistance to individuals and institutions. The DOJ has promulgated regulations to provide interpretive guidance for Title II and III of the ADA. They are codified in Title 28 of the Code of Federal Regulations (CFR) and have been modified through various Federal Register Final Rules announcements. The courts use the Chevron test to decide whether the regulations are followed as rules of law that can be enforced with penalties. When the Access Board issues standards for a new construction and alterations, the DOJ must adopt them as the minimum standards for accessibility in the design and construction of facilities, but the DOJ has discretion to set the bar higher.

Although DOJ guidance does not have the force of a regulation, it serves as persuasive authority, unless it conflicts with DOJ regulations or the ADA statute. Courts must give the DOJ interpretation of its own regulations “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” Examples of guidance include: DOJ and (U.S. Housing and Urban Development’s) Joint Guidance on the ADA
and Reasonable Accommodations in Housing, and the DOJ’s guides, The ADA Guide for Small Businesses, Readily Achievable Barrier Removal and Van Accessible Parking.80

Once the DOJ has published regulations and guidelines, as litigation involving the new regulations arises, the courts must decide whether to follow the new DOJ regulations. To determine whether the regulations are to be afforded deference by the court the Chevron test is applied.81 In reviewing the DOJ regulations implementing the ADA under the Chevron analysis, the court must first determine whether the statute has “directly spoken to the precise question at issue.”82 Since the ADA does not specifically address accessibility of Web sites, or is ambiguous on the topic, the court will then ask whether the DOJ regulation is based on a permissible construction of the statute.83 The agency’s interpretation does not have to be the only permissible reading of the statute.84 A regulation is adopted as a rule of law unless it is “arbitrary, capricious, or manifestly contrary to the statute.”85 The court may look to the legislative history to determine the intent of Congress.

As for the guidance the DOJ might publish regarding Web site accessibility, the courts will not apply the same level of deference as for regulations, but treat it as persuasive evidence.86 “[I]t is enough to observe that the well reasoned views of the agency when implementing the statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”87 Courts appear more likely to accept agency guidance where they fill in the gaps about how to implement requirements. For example, courts have previously relied on EEOC guidance for determining whether a pre-employment test was a medical examination.88 Although Title I of the ADA explicitly limits the ability of employers to use “medical examinations
and inquiries” as a condition of employment, the ADA provides no statutory definition of “medical examination”. The EEOC Enforcement Guidance provides a seven factor test to determine if a test qualifies as a medical examination. Courts have relied on this seven factor test in deciding discrimination claims against employers.

The DOJ interpretation of the ADA mandate for “full and equal enjoyment” requires nondiscrimination by a place of public accommodation in the offerings of all its goods and services, including those offered via Web sites. The DOJ points to language of the ADA statute to assert that Web sites are covered entities because the provisions of the ADA apply to discrimination in offering the goods and services “of” a place of public accommodation rather than “at” a place of public accommodation. Creating specific regulations to interpret the ADA in the context of Web sites will provide clear legal notice of what is required to satisfy the law. The focus of the ANPRM is not whether the ADA should apply to Web sites, but rather what standards should apply and which Web sites constitute covered entities.

**Performance verses Technical Standards**

**Classifying Current Standards**

In order to apply the ADA to Web sites, the DOJ must establish objective criteria to use in determining whether a Web site is accessible to people with disabilities. Standards provide the objective criteria. They give guidance to Web site developers. Standards separate structure from style, and presentation from content. To regulate Web sites, the DOJ must decide what types of standards are appropriate. The ANPRM requested comments on, among other things, whether performance or technical standards would be the preferred method for regulating Web sites. In considering what accessibility
standards to apply to Web sites of covered Title II and III entities, the ANPRM asks “Given the ever-changing nature of many Web sites, should the Department adopt performance standards instead of any set of specific technical standards for Web site accessibility?”

The question is deceptively simple. It uses the phrases “performance standards” and “technical standards” as if the two categories were clear cut and well defined. The ANPRM does not define “performance standard”, “technical standard”, or describe differences between the two. To make sense of DOJ’s question and respond clearly and appropriately, this section discusses the difference between technical and performance standards.

“Section 508” and “WCAG 2.0” are two standards mentioned by name in the ANPRM. However, there is no express indication whether the DOJ considers Section 508 or WCAG to be performance or technical standards. There is support for either conclusion. The wording of ANPRM Question 4 implies that the DOJ considers these to be sets of specific technical standards. But Section 508 standards include a chapter entitled “Functional Performance Criteria”, a name that suggests the Section 508 authors consider the work to include performance standards. The wording of the Section 508 ANPRM also supports this conclusion. With respect to the WCAG, an email from a member of the WCAG Working Group stated, “We're writing a performance standard, not a [technical] standard. We articulate principles and then give cases, based on specific technologies (e.g., alt text in HTML), on how to meet the principles.” But the official documentation for the WCAG 2.0 states, “The WCAG 2.0 document is designed to meet the needs of those who need a stable, referenceable technical standard.” These
seemingly conflicting statements are evidence that the two types of standards exist on a continuum and reasonable minds can differ on whether a particular standard is a “performance” standard or a “technical” standard.

Examples of what the DOJ considers to be performance standards are illustrative. The DOJ refers to § 35-160(d) as a performance standard. Section 35-160 was recently amended in Title II’s effective communications regulation to include video remote interpreting (VRI) services as a kind of auxiliary aid that may be used to provide effective communication. The new regulation states,

(d) Video remote interpreting (VRI) services. A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides—
(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;
(3) A clear, audible transmission of voices; and
(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

In contrast, the DOJ also refers to the “qualitative viewing angle language” contained in the 2010 ADAAG Standards: Titles II and III §221.2.3 as “sufficient to provide a performance-based standard.” The Department believes that as a general rule, the vast variety of sizes and configurations in assembly areas requires it to establish a performance standard for designers to adapt to the specific circumstances of the venue that is being designed. The rule states,

Wheelchair spaces shall provide spectators with choices of seating locations and viewing angles that are substantially equivalent to, or better than, the choices of seating locations and viewing angles available to all other spectators.
Obviously, these two examples of DOJ performance standards are quite different in their level of specificity. The first provides criteria for whether VRI technology is sufficient to produce effective communications whereas the second gives the broad test for satisfying the provision of seating for viewing angles.

Although the ANPRM does not define it, and people may disagree as to whether a particular standard qualifies as such, there is general consensus that performance standards are broad functional statements. Usually, a performance standard has three essential parts: the requirement, the criterion, and the test. Performance standards describe what has to be accomplished, but not how it must be accomplished. They must be adapted to specific circumstances. Performance standards are holistic, looking at the whole system rather than concentrating on the individual components.

Technical standards are precise specifications. “[T]he term ‘technical standards’ means performance-based or design-specific technical specifications and related management systems practices.” They provide specific solutions to meet stated requirements.

An example of a web accessibility standard currently included in WCAG 2.0 is,

**1.1.1 Non-text Content:** All non-text content that is presented to the user has a text alternative that serves the equivalent purpose.

Is this a performance standard or a technical standard? On one hand, some might consider this to be a performance standard because “non-text content” is a broad category, there is no specific method given for providing “text alternatives”, and the criteria of “serves an equivalent purpose” might leave the reader wondering how exactly that would be tested or measured. On the other hand, some might consider this to be a technical standard.
because it only addresses a specific type of content used on a Web site, namely non-text content. It does not address the accessibility of a Web site as a whole.

Whether a standard is seen as a performance or technical standard can depend on a person’s point of view. When looking at the Section 508 or WCAG in the specific context of techniques of web development, rules such as the “non-text content” rule above may be seen as a performance standard because there is no specific methodology provided to achieve to goal. But in the broader context of Web site accessibility, the same rule can be considered a technical standard because it does not address the system as a whole.

For the purpose of this paper, the WCAG and Section 508 standards are technical standards and other rules are performance standards when they address the accessibility of a Web site as a whole.

*Three Viewpoints on Performance verses Technical Standards*

The public comments to the ANPRM regarding performance verses technical standards largely fall into one of three main viewpoints. The first is that only technical standards should be adopted as regulations. The second viewpoint is that both performance standards and technical standards should be adopted as regulations, with performance standards providing an alternate means for compliance when implementing the technical standards is not feasible. The third viewpoint is that only performance standards should be adopted as regulations.

Those with the viewpoint favoring adoption of technical standards alone express concern that compliance with performance standards would be too hard to measure. An approach that applies rules that are specific, clear, objective, and easy for developers to
understand is preferable. Making compliance based on technical standards will lead to a higher success rate.

The second viewpoint, favoring adoption of both types of standards as regulations, sees the technical standards as a necessity due to resource constraints. The web developer staff tasked with ensuring accessibility standards compliance will require concrete guidance in order to be successful:

The specific detail provided in [technical standards] is necessary to provide adequate guidance. Even with this, many entities will choose to rely, at least partly, on specialists to ensure compliance. However, there is enough detail in [technical standards] that Web developers should be able to work through the requirements themselves. If broader performance criteria alone were required, entities would have to rely much more heavily on specialists and smaller entities may be unable to afford this.

The performance standards would serve as a secondary standard, referred to when compliance with the technical standards was not feasible.

The third viewpoint, favoring performance standards alone, is focused on actual accessibility of Web sites, not conformance of technical standards. Illustrative of the third point of view, Mark D. Richert, Esq., the Director of Policy for the American Federation for the Blind, asserts that compliance with technical standards is only evidence of the covered entities’ efforts to comply with the ADA and not of actual accessibility and usability.

The ADA analysis must be whether the individual with a disability in question can interact with the Web site as effectively as others. A Web site’s purported adherence to the WAI guidelines may be evidence of a covered entity’s efforts to meet their ADA responsibilities, but ultimately the obligation to ensure effective communication remains the covered entity’s responsibility apart from mere technical compliance with web design standards.

… At heart, the relevant ADA analysis has little to do with the technical coding of a given Web site and has everything to do with the conduct of the ADA covered entity’s achievement of effective communication.
Most of the public comments to the ANPRM that addressed the issue of performance verses technical standards stated that a performance standard should not be used “instead of” technical standards, but rather in addition to them. A common opinion expressed in the ANPRM public comments was that the adoption of performance standards would allow for flexibility as new technology develops because performance standards would be relied on when a web developer implements new technology not covered under the current technical standards. Under this view, whenever accessibility could be achieved without compliance with the technical standards, the performance standards would apply.

The responses to the ANPRM show that generally, these three main viewpoints roughly align with three different groups: web developers, business advocates, and disability advocates. Web developers favor adopting technical standards alone. This group wants clear and specific methods to achieve accessibility compliance. They argue that technical standards are the most efficient way to achieve compliance. Business interest groups favor adopting both performance and technical standards, so that there is flexibility in methods to allow for innovation. They assert that performance standards are the secondary option for compliance when technology advances and the standards are not up-to-date. Businesses also want assurances that the regulations are achievable. Technical standards are a concrete set of rules that can be more easily tested than performance rules. Verification of accessibility is a more complex process when a performance standard must be met. Performance standards compliance may require participation by people with disabilities to provide feedback, which can be expensive to implement. Disability
advocacy groups favor performance standards because they are seen as the only way to ensure more than just “pro forma” accessibility results from the regulation.

Richert asserts that the DOJ has already articulated a very useful overall performance standard for evaluating whether a covered entity has met its Internet-related responsibilities. The new auxiliary aids and services rule is a performance standard that would provide the framework for Web site regulation under the ADA. “A covered entity has met its ADA obligations when it provides timely access that allows the individual with a disability to benefit from the covered entity’s offerings as discreetly and as independently as individuals without disabilities.” This approach emphasizes that the ADA already applies to Web sites and that Web sites are simply another form of communication.

**Analysis**

*Performance Standards in Regulations, Technical Standards in Guidance*

From a legal standpoint, DOJ should adopt regulations that will remain relevant as technology changes, provide enough information to foster compliance by covered entities, and meet the needs of people with disabilities. Using a combination of performance and technical standards will satisfy these requirements. Given the purpose of the ADA and the current statutory wording, it would be optimal to have Web site regulations in the form of performance standards. The DOJ should provide the Web site technical standards through published written guidance.

But DOJ should not adopt both the technical and performance standards as regulations. Performance standards must be adopted as regulations to allow for flexibility in approaches to ensuring accessibility without stifling technological development.
Technical standards should be provided in DOJ guidance to make explicit methods for improving accessibility of currently used web technologies readily available to web developers. “Performance and [technical] standards are not substitutes, but should be used as compliments. Performance standards can include [technical standards] as examples of current state-of-the-art methods of meeting the performance criteria.”\textsuperscript{122} In other words, technical standards are insufficient to use as a replacement for performance standards. Technical standards are merely examples of methods that can be used to meet the performance standard.

Integrating performance standards into regulation and technical standards into guidance has several advantages. It would be consistent with the ADA’s language and congressional intent. It would be consistent with the DOJ regulatory scheme. The regulations would survive a \textit{Chevron} analysis, and courts would likely apply the expertise of the guidance under the \textit{Skidmore} analysis. Regulation of commercial conduct by performance standards would be constitutionally sound. Each of these advantages is explored in detail below.

Implementing ADA compliance through the use of performance standards in regulations and technical standards in interpretive guidance would be consistent with the language of the ADA and congressional intent. The ADA statute explicitly empowers the DOJ to promulgate regulations.\textsuperscript{123} The Attorney General “is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.”\textsuperscript{124} The legislative history of the ADA reflects Congress’ intent that the types of accommodation and services provided to individuals with disabilities “should keep pace with the rapidly changing technology of the times.”\textsuperscript{125} Moreover, Congress wants to encourage the
process of rapid technology growth, not just keep pace with it. Implementing performance standards as regulations will provide the flexibility needed to encourage the growth of technology while allowing accommodations to keep pace with the rapid changes. Technical standards in guidance would be updated as frequently as needed to keep pace with the developing technologies because the agency may issue guidance without prior publication in the Code of Federal Regulations, a comment period, or review of comments, before publication of a final rule.

Enforcing ADA compliance through the use of performance standards in regulations and technical standards in interpretive guidance would be consistent with the overall regulatory scheme. Performance standards already are integrated into the DOJ regulations, some of which could apply directly to Web site accessibility. For example, the standard for effective communication could be applied to communication through to a Web site. It states,

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. The Web site modifications could be considered auxiliary aids. The factors listed to measure the effectiveness of auxiliary aids are relevant to Web site accessibility. The standard is broad and provides a great deal of flexibility for implementation methods. The regulation also provides for alternatives if providing the auxiliary aid would
fundamentally alter the nature of the Web site or presents an undue burden. Another example is the removal of barriers provision. It refers to removal of architectural barriers, including communication barriers, where such removal is readily achievable. Although the examples given are all physical world examples, the interpretation of facility does not have to be narrowed to the physical world. If a new standard must be written to address Web site accessibility, performance standards could be written in a similar format to the existing standards and would be consistent with the current regulatory scheme.

DOJ Regulations incorporating performance standards for web accessibility would likely meet the *Chevron* deference standard. Assuming the courts determine that Web sites are covered entities, the ADA statute is ambiguous as to what standard should apply. There is no explicit reference to Web sites within the statute, and there are multiple ways to classify a Web site within the language of the statute, including as a facility, a procedure, a service, or as a means of communication, to name a few. Therefore courts would use the *Chevron* deference test to determine whether to follow the DOJ regulations. Performance standards similar in form to the current regulations would be viewed as reasonable. Courts have deferred to other Title III regulations in the past upon finding that the regulation is based on a permissible construction of the ADA statute. The ADA statute has developed over the past 20 years in a manner that emphasizes its broad mandate. Although the courts have attempted to narrow the scope of the statute over time, Congress has made its intention clear that the Act “provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provides broad coverage. An interpretation of the
statute that includes performance standards would be aligned with Congress’ intent because it would provide a holistic approach to implementation that is consistent with the broad mandate of the ADA. Therefore, with Web site regulation implemented through performance standards, the courts will defer to the agency interpretation of the statute.

Regulating commercial conduct under the ADA using performance standards would be constitutionally sound. The current standards expressed in the ADA statutes include such phrases as “readily achievable”, “undue burden”, “reasonable modifications” and “fundamentally alter the nature of” goods, services, or facilities. These phrases have withstood constitutional challenges of vagueness and have been declared by the Supreme Court as adequately specifying the actions or conduct necessary to conform to the law. In making that determination, the Court considered the DOJ interpretation of the statute. Incorporating similarly fashioned performance standards for Web site accessibility with associated technical standards in guidelines would provide adequate notice with respect to due process concerns.

*Why Web Accessibility Technical Standards Don’t Belong in Regulations*

Despite its overwhelming popularity within the ANPRM public comments, having performance standards merely as a back-up for failed compliance to technical standards is not the way to regulate Web sites under the ADA. A regulatory structure that would allow technical standards to be the primary method for compliance and performance standards for secondary use only heavily favors the interests of Web site operators over the needs of individuals with disabilities. In this structure, performance standards would be available for the convenience of web developers, but would only be relevant when a Web site is not in compliance with the technical standards. The
fundamental role played by performance standards in compliance would be lost under this arrangement. Compliance with technical standards would not necessarily guarantee that a Web site is accessible. “[I]t is quite possible, and some people with disabilities argue all too common, for a Web site to be designed in full compliance with the WAI guidelines but yet remain extremely difficult to use. This is because, though components of the Web site may be coded properly to allow screen reader software, for example, to find content and read it aloud properly, the overall layout and “busy-ness” of the site may itself be a barrier.”139 The overall layout of a Web site could be structured in a way that, despite compliance with technical standards, would be too difficult to navigate or find relevant content due to the complexity of the layout.

For example, a web page may have a highly complex arrangement of structural elements such as text, tables, and images. All of these elements might individually satisfy the technical standards. However, the density and diversity of these structural elements (text, tables, and images) looked at as a whole can significantly predict sighted users’ perception of Web page visual complexity.140 The visual complexity of a page is correlated with the cognitive effort required for interaction with that page.141 As the visual complexity of a page increases, the more cognitive effort is required to interact with the page.142 Thus, as webpage visual complexity increases, usability and accessibility decreases.143 The balance between visual complexity of the webpage and the accessibility of the webpage is something a performance standard would encompass.

Specific technical details for Web design do not belong in regulations for at least three reasons. First, it is imperative that the ADA mandates are not diminished by disagreements about computer programming techniques.
As the DOJ itself recognizes in the Internet ANPRM, the [WCAG] guidelines are something of a moving target and offer a gradation of accessibility completeness to account for the diversity of Web site features and functions that are even now still emerging. We dare not allow the ADA’s clear nondiscrimination mandates to devolve into a debate among computer programming experts before the courts as to the extent to which a given Web site does or does not comply with the WAI guidelines or whether use of one grade level of access would have been more appropriate to adhere to than another.\textsuperscript{144}

Second, technical detail should be provided through DOJ interpretive guidance because as technology changes, the guidelines can be changed quickly, whereas the regulations require a more formal process for revision.\textsuperscript{145} Although there are currently technical standards that have been adopted into the DOJ regulations and are very design specific, the nature of these standards are very different from the proposed technical standards. For example, the Access Board rules for design and construction of newly constructed and altered buildings have been adopted into the DOJ regulations.\textsuperscript{146} These regulations provide technical standards dictating such precise design features as the height of a grab bar above a finished floor, the length of a hose in a shower spray unit, or the slope of a walking surface.\textsuperscript{147} These standards are based on statistical profiles of the human body, so do not change rapidly over time. In contrast, Web technology is a rapidly changing field and technical standards must be allowed to evolve quickly. Therefore, placing technical standards in regulations is likely to stifle innovation or prevent growth in the industry.

The third reason for leaving specific technical details for Web design out of DOJ regulations is that adopting technical standards in the regulations may have a future adverse impact on the deference courts afford to the regulations. Regulations are given \textit{Chevron} deference if not contradictory. When working in a very rapidly evolving
technology, documentation very often lags emerging trends and new developments. Contradictions arise between existing and newly developing standards. DOJ regulations will be more likely to survive a *Chevron* deference analysis if technical standards are left out of the regulations and put into the guidelines.

Another concern that arises in adopting technical standards into regulation relates to commercial speech. By adopting technical standards in guidance, direct regulation of commercial speech is avoided. The content of Web sites may be viewed as commercial speech. “The Supreme Court has developed doctrine in the areas of commercial speech and compelled speech (including compelled funding of speech) but it has yet to provide clear guidance as to what happens when these two doctrines converge.”148 To regulate commercial speech, the government must pass the *Central Hudson Test*.149 This means the government has the burden to show … there is “a substantial government interest in regulating the speech, that the speech regulation directly and materially advances the government's interest, and that the regulation is no more extensive than necessary.”150

The WCAG standard includes a guideline which requires Web sites to provide a text alternative for non-text content that is presented to the user.151 A claim for compelled speech might be raised against this standard or one similar to it. “Under the compelled speech doctrine, the Supreme Court has treated compelled disclosure of noncommercial information as akin to a content-based restriction on speech, demanding the strictest scrutiny. To pass this test, noncommercial mandated disclosures are permissible if they serve a compelling state interest, avoid undue burdens on free speech, and are narrowly tailored.”152 “In *Turner Broadcasting System, Inc. v. FCC*153, the Court reviewed a regulation requiring cable television systems to carry local broadcast television stations
under so-called "must-carry" provisions. Though the regulation was content-neutral, the Court applied intermediate scrutiny, rather than rational basis review, in holding that the provisions could be sustained only if: (1) the law corrects an actual, rather than merely posited, harm; (2) the restrictions are "no greater than is essential". 154

If technical standards requiring text alternatives to non-text content, or other supplemental content, were adopted into regulation, the standard may have to pass these legal hurdles. By regulating through performance standards, where the focus is on such broad concepts as effective communication, accessibility of facilities, or policy modifications, the issue of Web site content is not explicitly raised.

Conclusion

Given the purpose of the ADA and the current statutory wording, it would be optimal to have Web site regulations in the form of performance standards. The guidelines issued by the DOJ should provide the Web site technical standards. Performance standards must be adopted as regulations to allow for flexibility in approaches to ensuring accessibility without stifling technological development. Technical standards should be provided in DOJ guidance to make explicit methods for improving accessibility of currently used web technologies readily available to web developers. There are several advantages to this structure. It would be consistent with the ADA’s language and congressional intent. It would be consistent with the DOJ regulatory scheme. The regulations would survive a Chevron analysis, and courts would acknowledge the expertise of the guidance. Regulation of commercial conduct by performance standards would be constitutionally sound. A regulatory structure which would allow technical standards to be the primary method for compliance, but
performance standards to be secondary, would heavily favor the interests of Web site operators over the needs of the disabled. This would allow the fundamental role played by performance standards in compliance to be side-stepped. By implementing performance standards in regulations and technical standards in guidance, the ADA implementation will remain relevant as technology changes, provide enough information to foster compliance by covered entities, and meet the needs of people with disabilities.
Appendix A – WCAG and Section 508 Standards of Accessibility Design

THE ANPRM explicitly mentions two options for standards: version two of the Web Content Accessibility Guidelines (WCAG 2.0) and Section 508 standards. The WCAG standards were published in 2008 by the World Wide Web Consortium (W3C). “The World Wide Web Consortium (W3C) is an international community where Member organizations, a full-time staff, and the public work together to develop Web standards.” A key component of the W3C organizational structure is the chartered groups, made up of Member representatives and invited experts. The W3C working group that is chartered to support the most recent set of accessibility standards is called the Web Content Accessibility Guidelines (WCAG) Working Group. The working group’s current charter is valid until 2013 and states that the group is only functioning in a support role. The group will not revise the standards, but only provide documentation and correction, but no major revisions. Therefore, the WCAG will not have another major revision for at least two more years. WCAG 2.0 is a collection of recommendations for making Web content more accessible. “WCAG 2.0 success criteria are written as testable statements that are not technology-specific.” The guidelines are organized by four principles that provide a foundation for Web accessibility: perceivable, operable, understandable, and robust. Under the principles are 12 guidelines, which establish the basic goals that authors should work toward in order to make content more accessible to users with different disabilities. For example, Guideline 1.4 of the WCAG is aimed at making presentation of content as easy to perceive as possible to people with disabilities. It states, “Make it easier for users to see and hear content including separating foreground from background.”
Each guideline has an associated set of testable success criteria. These success criteria are the technical standards the DOJ is considering whether to adopt. For example, one success criteria that falls under Guideline 1.4 listed above is

“1.4.1 Use of Color: Color is not used as the only visual means of conveying information, indicating an action, prompting a response, or distinguishing a visual element. (Level A)” \(^{167}\)

This rule is meant to ensure that all users can access information that is communicated through the use of color where each color has a meaning assigned to it. \(^{168}\) Notice that the criterion ends with “Level A”.

Each success criteria in WCAG 2.0 is assigned a level which ranks the overall importance of the accessibility standard based on factors including how essential the rule is to accessibility, how widely applicable the rule is to different types of Web sites and content, and the skill level required of web developers to apply the rule. \(^{169}\) Level A is the most basic, Level AA is a higher standard of accessibility, and level AAA is the highest conformance level in the WCAG. \(^{170}\)

The Section 508 standards are published by The Access Board, an independent Federal agency established by section 502 of the Rehabilitation Act. \(^{171}\) The Board was established to promote accessibility for individuals with disabilities. \(^{172}\) The Access Board consists of 25 members. \(^{173}\) Thirteen are appointed by the President from among the public, a majority of who are required to be individuals with disabilities. \(^{174}\) The other twelve are heads of certain Federal agencies. \(^{175}\)

The Access Board is tasked with establishing and maintaining minimum guidelines and requirements for the standards issued pursuant to Titles II and III of the Americans with Disabilities Act of 1990. \(^{176}\) Section 508 Standards were first developed
after the Rehabilitation Act was revised in 1998. The last official publication of the Section 508 standards was on December 21, 2000.\textsuperscript{177} The Access Board is currently revising the Section 508 standards and published a proposed draft which was announced in an ANPRM posted on March 22, 2010.\textsuperscript{178}

The scope of the Section 508 Standards, both current and proposed, is much broader than that of the WCAG 2.0 standards. Section 508 covers not only Web site accessibility, but also software and hardware accessibility.\textsuperscript{179} The proposed draft is organized by chapters and contains two categories of standards.\textsuperscript{180} For example, the Section 508 “common functionality” criteria for color is

\begin{quote}
“305.1 Not Only Color. ICT shall not use color as the only visual means of conveying information, indicating an action, prompting a response, or distinguishing a visual element.”\textsuperscript{181}
\end{quote}

This criterion is very similar to the WCAG 2.0 criteria for color. The Section 508 “Functional Performance” criteria for color is

\begin{quote}
\textbf{202.4 Without Perception of Color.} At least one mode of operation that does not require user perception of color shall be provided.”\textsuperscript{182}
\end{quote}

The Section 508 “functional performance” criteria are broader statements than the “common functionality” criteria.

The Access Board has been working together with the WCAG to harmonize the two separate standards. Currently there are still differences between the WCAG 2.0 and the proposed draft Section 508 standard. The proposed draft of Section 508 allows for compliance using WCAG 2.0 Level AA in conjunction with other enumerated Section 508 criteria. Public comments addressing the proposed draft of Section 508 Standards emphasize that harmonization is desirable for companies that must follow international standards for accessibility compliance. It is likely that these same companies will prefer
to adopt the WCAG over the Section 508 standards since this hopefully would eliminate the need to keep up to date on multiple accessibility standards.

These technical standards are critical to guide web developers in creating accessible Web sites. But they are not sufficient to promote the purpose of the ADA. In the end, a Web site can conform to all the specific technical standards of either the WCAG or the Section 508, yet still not allow for effective communication or equal access to services. Focusing only on these technical standards, while allowing performance standards to take a secondary roll in compliance, will threaten the ability of disabled Americans to participate fully in mainstream society. “The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”

As we move into the digital age, these goals can only be accomplished by demanding that Web sites are accessible as a whole. This can only be accomplished by adopting performance standards as the primary tool when measuring compliance to the ADA.

---

1 B.S., Mathematics, University of Arizona (1995); M.A. Mathematics, University of Maryland, College Park (2002); J.D., University of Maryland (2011). The author would like to thank Rose Daly-Rooney for her support and guidance.
3 Foley, Tom. For People with Disabilities, Technology is Disproportionately Empowering! http://internetinnovation.org/blog/comments/for-people-with-disabilities-technology-is-disproportionately-empowering/
4 Id.
5 Id.
6 Id.
8 42 U.S.C. § 12101
9 http://en.wikipedia.org/wiki/Internet#History last accessed on March 6, 2011.
11 Id.
12 Id. page 107.
Id. page 107.

Id. page 108.

Internet Adoption over Time, Pew Internet and American Life project.


Id. page 43465.

Brief For The United States As Amicus Curiae In Support Of Appellant, Rendon v. Valley Crest Productions, LTD, April 23, 2001.


42 U.S.C. § 12186(b).

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of state and Local Government Entities and Public Accommodations, Federal Register, Vol. 75, No. 142, July 26, 2010 page 43465. The complete question is “Given the ever-changing nature of many Web sites, should the Department adopt performance standards instead of any set of specific technical standards for Web site accessibility? Please explain your support for or opposition to this option. If you support performance standards, please provide specific information on how such performance standards should be framed.”

National Federation of the Blind v. Target Corp., 452 F.Supp.2d 946, 954 (N.D.Cal.,2006).

The “nexus test” for Web sites and Title III is discussed in Access Now v. Southwest Airlines, 227 F.Supp.2d 1312 (S.D.Fla.2002).

http://www.youtube.com/watch?v=MnCcPrl8HgI&feature=fvw, last accessed May 7, 2011.

See e.g. Brief For The United States As Amicus Curiae In Support Of Appellant, Rendon v. Valley Crest Productions, LTD, April 23, 2001; Access Now v. Southwest Airlines, 227 F.Supp.2d 1312 (S.D.Fla.2002); National Federation of the Blind v. Target Corp., 452 F.Supp.2d 946, 954 (N.D.Cal.,2006).

42 U.S.C. § 12206(c)

42 U.S.C. §§ 12132, 12182

28 C.F.R. §§ 35.149, 35.164

42 U.S.C. § 12131(2)

42 U.S.C. § 12132 (emphasis added)

28 U.S.C. § 12182(a) (emphasis added)

28 U.S.C. §12181(7)

Id.


42 U.S.C. §1212(b)(1)(B)


Although Title II refers to barrier removal in defining “qualified individuals with a disability”, Title II does not use the term to address obstacles in existing facilities. For existing facilities, Title II applies the standard of “readily accessible,” 42 U.S.C § 12147. In determining whether a program is readily accessible, the program is viewed in its entirety. 28 C.F.R. 35.150(a). Examples of methods available to make a program readily accessible include barrier removal or physically relocating the program.

42 U.S.C. §12181(9)

Id.

42 U.S.C. §1212(b)(2)(A)


28 U.S.C. 36.302(a)


29 U.S.C. 794d(a)(1)(A)


29 U.S.C. 794d(a)(1)(A)
See appendix for more information on these standards.

Putting the URL www.section508.gov into the WayBackMachine internet archive (http://www.archive.org/web/web.php). And reviewing the version of the Section 508 Web site that was archived on 7/8/2008 it shows a link to a "DOJ Survey Report 2001" and a link for a "DOJ Survey 2003": http://web.archive.org/web/20080329143351/www.section508.gov/index.cfm?FuseAction=Content&ID=53. Clicking on the "DOJ Survey 2003" link and then the links at the bottom of that page ("Cover Letter" or "Survey (Read Only)" it appears that the survey process for 2003 had never been completed and may have still been ongoing as late as 2008 (either that, or the Section 508 Web site was in desperate need of an updating in 2008). Also, from checking previously archived versions of Section 508 Web site that were archived in 2004, it appears that the deadline for agencies to submit their surveys kept getting pushed back: http://web.archive.org/web/20040606173056/www.section508.gov/index.cfm?FuseAction=Content&ID=158. Calls to the DOJ requesting information about the reports went unanswered.


Id.


Id.

Compare 42 U.S.C. § 12132 to 42 U.C.S. § 12182(a).

Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir.1999).


United States District Court, Northern District of California. National Federation of the Blind et al., plaintiffs, v. Target Corporation, Defendant (Case3:06-cv-01802-MHP Document 214 Filed 08/03/09)


Pub.L. 110–325, §§ 3 to 6, Sept. 25, 2008, 122 Stat. 3554 (29 § 706; 42 §§ 12101 to 12103, 12111 to 12114, 12201, 12205a, 12206 to 12213).


28 C.F.R. § 36.101 etc., 28 C.F.R. § 35.104 etc.

Id.


42 U.S.C. 12204(a)

See e.g. Torres v. Rite Aid Corp., 412 F. Supp. 2d 1025 (N.D. Cal. 2006) (referring to the Access Board Guidelines and the DOJ Title III Technical assistance manuals as secondary authority).


Id.

Chevron, U.S.A., Inc. v. National Resource Defense Counsel, 467 U.S. 837, 843 (1984); Komarenko v. I.N.S., 35 F.3d 432, 435 (9th Cir.1994) (“In order to be valid, a regulation must be consistent with its enabling statute.”).


Id.


See e.g. Karraker v. Rent-A-Center, Inc., 411 F.3d 831 (7th Cir. 2005) (Equal Employment Opportunity Commission (EEOC) guidelines, while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance in discrimination cases).


Id.


Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of state and Local Government Entities and Public Accommodations, Federal Register, Vol. 75, No. 142, July 26, 2010 page 43465. The complete question is “Given the ever-changing nature of many Web sites, should the Department adopt performance standards instead of any set of specific technical standards for Web site accessibility? Please explain your support for or opposition to this option. If you support performance standards, please provide specific information on how such performance standards should be framed.”

For more information on WCAG and Section 508 standards, see Appendix.

Questions 1-3 of the ANPRM discuss Section 508 and WCAG standards, then Question 4 ask for suggestions on how to frame a performance standard.


Web Content Accessibility Guidelines (WCAG 2.0) http://www.w3.org/TR/WCAG20/, last accessed April 8, 2011. (emphasis added)

Department of Justice. Title II Regulations 2010 Guidance and Section-by-Section Analysis. Guidance and Analysis page 85. (“the Department has established performance standards in §35-160(d)”)


28 C.F.R. 35.160(d).


28 C.F.R. 35.160(d).


See, for example, DOJ-CRT-2010-0005-0344.1, DOJ-CRT-2010-0005-0326.1, DOJ-CRT-2010-0005-0252.1


42 U.S.C. §§ 12134, 12206


28 C.F.R. 36.303(c)(1)(ii).

For example, the W3C has a web architecture standards group. http://www.w3.org/standards/webarch/
Classifying a Web site as a facility under Title III of the ADA would imply that only the new construction and alterations requirements of Title III apply. Otherwise, Title III coverage of Web sites would fall under the nexus test for the services of a place of public accommodation or in its own right as a place of public accommodation. Considering the dynamic nature of the Web sites, it is unclear to what extent changing the code of an existing Web site would constitute an “alteration” within the meaning of 42 U.S.C 12183. Therefore, considering a Web site as a facility could limit the requirements of accessibility that are imposed on the site.

See e.g. Enyart v. National Conference of Bar Examiners, Inc., 630 F.3d 1153 (C.A.9 2011) (holding that that 28 C.F.R. § 36.309 is entitled to Chevron deference); Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1166 n. 5 (11th Cir.2003) (concluded that the DOJ’s construction of § 12203 was reasonable and accorded Chevron deference to the DOJ regulations); Bragdon v. Abbott, 524 U.S. 624, 646, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (citing Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and explaining that the implementing regulations and views of the United States Department of Justice (DOJ) as to the ADA are entitled to deference); Disabled Rights Action Committee v. Las Vegas Events, Inc., 375 F.3d 861 (C.A.9 (Nev.) 2004) (narrowing the idea of major life activities by holding that the term is to be interpreted strictly to create a demanding standard for qualifying as disabled).


Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994). The Court ultimately vacated the district court's decision and remanded for development of the factual record concerning the importance of the issue to the broadcast industry. Id. at 668.


29 U.S.C. 792, see also http://www.access-board.gov/sec508/summary.htm

29 U.S.C. 792(b)

29 U.S.C. 792(a)(1)

29 U.S.C. 792(a)(1)(A)

29 U.S.C. 792(a)(1)(B)

29 U.S.C. 792(b)(3)(B)


Id. page 35.

Id. page 30.

42 U.S.C § 12101(a)(8)