

Does Your New Project Website Keep You Up at Night?



Welcome and Introductions

Shelah F. Lynn, Real Estate

Panelists

Kim Phan
Privacy and Data Security

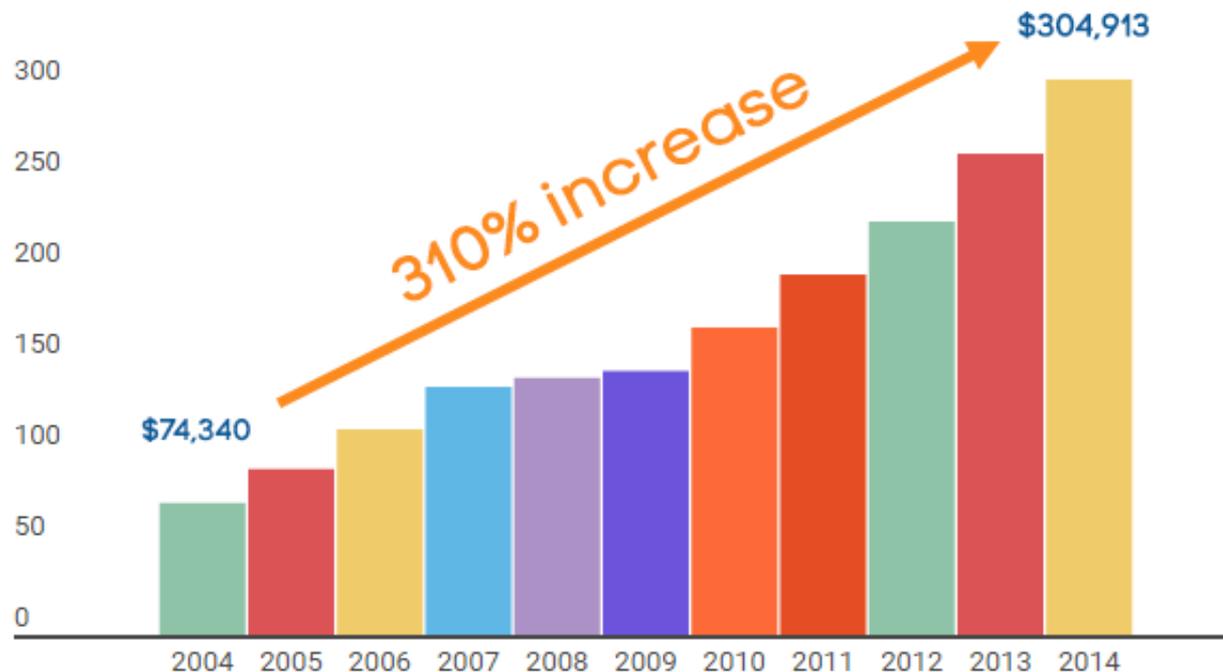
Olabisi “Bisi” Ladeji Okubadejo
Accessibility

Website Legal Considerations

Speaker: Kim Phan, Privacy and Data Security

E-Commerce is Growing

TOTAL VALUE OF ECOMMERCE SALES IN USA
(\$ BILLIONS)



Data: US Commerce Department



Online Agreements

Website Terms of Use

Common elements of website terms of use:

- Eligibility requirements and restrictions
- Intellectual property rights, including third-party content and user-submitted content
- User responsibilities, including requiring users to keep confidential any online credentials and prohibiting abusive practices, such as web scraping
- Legal disclosures, such as disclaimers of warranties, limitations of liability, indemnification, choice of law, etc



Website Privacy Policy

Common elements of website privacy policies:

- Identify the categories of PII collected on the website
- Identify how PII is used by the company
- Identify with whom the company shares PII
- Description of any process to review and request changes to any of PII collected on the website
- Description of how consumers will be notified of material changes to the company's privacy policy for the website
- Identify the privacy policy's effective date
- Disclose whether other parties may collect PII over time and across different web sites when a consumer uses the company's web site or service
- Communication preferences

Specific website privacy policy requirements in CA, DE, and NV.

Online Contract Formation

Clickwrap v. Browsewrap

- *Nicosia v. Amazon* (E.D.N.Y. Feb. 4, 2015) (whether the placement of disclosure text was sufficient to incorporate the terms of use into the purchase agreement)
- *Sgouros v. TransUnion*, 14 C 1850 (N.D. Ill Feb. 5, 2015) (scrollable text box not considered part of the agreement)
- *Sprecht v. Netscape* (2d Cir. 2002) (download terms button was insufficient)



E-SIGN Requirements

- Required disclosures must be clear and readily understandable, in writing, and in a form the consumer may keep.
 - Right to receive paper records
 - Consequences of later withdrawing consent to receive electronic records
 - Hardware and software requirements for access to and retention of electronic records
- Consumer consent
 - Affirmative demonstration of consent (e.g., checking a box)
 - Consent must be obtained electronically in a manner that reasonably demonstrates that the consumer is able to access the electronic records that are the subject of the consent



Internet Advertising



Advertising Content

All the same rules for print apply!

- Unfair or deceptive acts or practices
- Clear and conspicuous disclosures
- Substantiation of claims
- Endorsements / Testimonials
- Native advertising
- Children

Online Behavioral Advertising

Online behavioral advertising (“OBA”) is defined as the practice of collecting “data from a particular computer or device regarding Web viewing behaviors over time and across non-affiliate web sites for the purpose of using such data to predict user preferences or interests to deliver advertising to that computer or device based on the preferences or interests inferred from such Web viewing behaviors.”

Tracking technologies:

- Cookies, web beacons, pixel tags, etc.
- First party trackers
- Third party trackers
- Do Not Track



Self-Regulatory Principles

- Education
- Transparency
- Consumer control
- Data security
- Material changes
- Sensitive data collection limits
- Accountability



Social Media

Social Media Engagement

- Official corporate properties
- Employees' personal activities
- Third party pages



Social Media Program Best Practices

- Governance
- Policies and procedures
- Third-party relationships
- Employee training
- Oversight / monitoring
- Compliance audits
- Periodic evaluations





Consumer Review Fairness Act



Illegal for a company to use a contract provision that:

- bars or restricts the ability of a person to review a company's products, services, or conduct;
- imposes a penalty or fee against someone who gives a review; or
- requires a waiver of intellectual property rights in the content of reviews.

OK to prohibit or remove a review that:

- contains confidential or private information;
- is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic;
- is unrelated to the company's products or services; or
- is clearly false or misleading.

Accessible Websites and Online Content

Speaker: Olabisi “Bisi” Ladeji Okubadejo, Accessibility

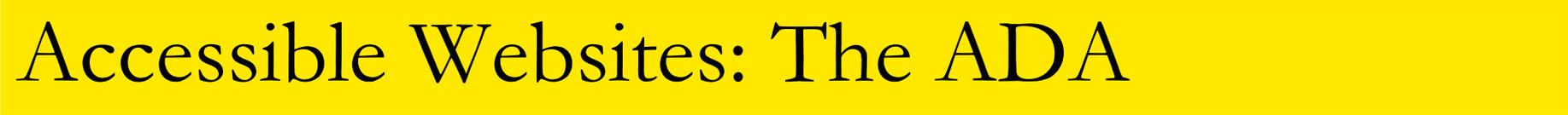
Overview of Common Accessibility Barriers



Common Vulnerabilities

- Keyboard access
- Text alternatives for images
- Forms
- Captions
- Color Contrast
- Other WCAG non-conformance issues

Current Legal and Regulatory Landscape



Accessible Websites: The ADA

- ADA Title III
 - Applies to places of public accommodation
 - Requires equal access to goods and services offered to public
 - Requires effective communication
 - Applicability to websites
 - Government inactivity
 - Circuits are split
 - Emerging trends

Accessible Websites: Other Laws

- Other laws
 - Section 504 of the Rehabilitation Act
 - Section 508 of the Rehabilitation Act
 - Air Carrier Access Act
 - State laws



DOJ Delays and Shifting Priorities

- DOJ 2010 Advanced Notice of Proposed Rulemaking
- Rulemaking for Title III delayed until fiscal year 2018
- Supplemental Advanced Notice of Proposed Rulemaking
- Change in administration
 - Website accessibility rulemaking status: inactive
 - Impact on use of WCAG 2.0 guidelines
 - Likely increase in complaints and civil actions by advocacy groups and private litigants
 - Continued activity by plaintiffs' firms



Domino's Pizza

- Central District of CA, March 2017
- Grant of defendant's motion to dismiss
- Website and mobile application reported to be inaccessible to screen reader but Domino's had staffed telephone line and option to call store to place order
- Court declined to defer to DOJ ANPRM, statements of interest, and consent decrees



Winn-Dixie

- Southern District of Florida, June 2017
- Trial of ADA website accessibility case
- Website deemed inaccessible
- Court ordered injunctive relief and attorneys' fees
 - Website accessibility policy adopting WCAG 2.0 criteria
 - Conformance by third-party vendors
 - Accessibility statement on homepage
 - Training to IT staff and ongoing monitoring/testing

Recent New York Cases

- *Blick Art (E.D.N.Y. August 2017)*
 - Websites must be ADA compliant
 - No nexus requirement
 - Businesses should not wait for DOJ to promulgate regulations
- *Five Guys (S.D.N.Y. July 2017)*
 - Businesses can rely on WCAG 2.0 conformance standards
 - Court's inquiry involved whether website was currently accessible, regardless of improvements underway

- *Blick Art court:*

Today, internet technology enables individuals to participate actively in their community and engage in commerce from the comfort and convenience of their home. It would be a cruel irony to adopt the interpretation of the ADA espoused by Blick, which would render the legislation intended to emancipate the disabled from the bonds of isolation and segregation obsolete when its objective is increasingly within reach.

Demand Letters and Litigation Strategies

Digital Accessibility - Litigation

- Claims increasing against large and small businesses
 - Often, demand letter sent before lawsuit:
 - provides opportunity to raise defenses and negotiate resolution
 - Ignore letter and plaintiffs' firms often file suit

Digital Accessibility - Litigation

- Sample demand letter:
 - lists accessibility barriers identified
 - may mention accessibility of privacy statement
 - states that compliance with WCAG 2.0 is required
 - attaches settlement agreement

Digital Accessibility - Litigation

- Typical complaint:
 - Seeking injunction and court order for consultant to improve website accessibility after a website audit
 - Alleges absence of corporate ADA policy
 - Also includes training, testing policy and other periodic audits
 - Lists accessibility barriers
 - Requests attorneys' fees and costs

Digital Accessibility - Litigation

- Typical resolution:
 - In PA, one judge is assigned all cases and orders early alternative dispute resolution and mediation.
 - Motions to dismiss generally unsuccessful (jurisdiction-specific). Theories often include: applicability of ADA to websites/nexus, standing.
 - Settlement/injunctions:
 - Website audits and remediation
 - Attorneys' fees and costs
 - Policy changes, training

Building an ADA Compliance Program



Essential questions

- Who owns this issue?
 - Designated ADA administrator/coordinator
- What are you communicating to the public about accessibility?
 - External policies and procedures
- Do internal stakeholders understand their role in responding to accessibility barriers?
 - Internal policies and procedures
 - Trained IT staff



Essential questions

- What are your vulnerabilities?
 - Audit and privileged website assessment
 - Experienced accessibility consultants
- Do you have procedures and third party relationships in place to provide auxiliary aids and services?
 - Vendor relationships
- How do you monitor ongoing compliance?
 - Regular training
 - Practices regarding newly added content

Questions?

Thank you for your time!

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Moderator – Shelah F. Lynn

- Of Counsel at Ballard Spahr and a member of the firm's Real Estate Department and the Real Estate Development and Complex Transactions Group.
- Concentrates on representing developers in the development and construction of many types of mixed-use, condominium, and planned community projects including residential, retail, office, hotel, and other similar uses. Such projects include new and conversion condominiums, mixed-ownership developments, and planned-unit developments.
- Advises developer clients on design and construction contracts and the drafting of project formation documents. She also represents existing community associations, whether developer or owner controlled, and advises clients on all aspects of community association operation.
- Represents developers in the defense and resolution of warranty, construction, and transition disputes related to the development, construction, and sale of residential and mixed-use condominiums and communities and the pursuit of third-party claims, where applicable. Such representation includes informal negotiation, mediation and arbitration, and litigation, if necessary, but with heavy emphasis on alternate dispute resolution methods and procedures.

Panelist – Olabisi “Bisi” L. Okubadejo

- Of Counsel at Ballard Spahr and a member of the firm’s Litigation Department and the firm’s Consumer Financial Services, Higher Education, Labor and Employment, and White Collar Defense/Internal Investigations Groups.
- Regularly advises clients on compliance with the Americans with Disabilities Act, including with regard to the accessibility of websites, effective communication requirements under the ADA, and Section 504 compliance. Provides training to clients and web developers on ADA accessibility requirements. National presenter and author on accessibility matters.
- Assists clients with civil rights and employment issues, particularly on matters arising from alleged discrimination on the basis of race, disability, and sex, including sexual harassment and sexual violence. Advises educational institutions on complying with various federal laws, including the ADA, Title VI of the Civil Rights Act, Title IX, the Clery Act, VAWA, FERPA, Section 504, and the Age Discrimination Act
- At the Department of Education, Ms. Okubadejo was most recently an OCR Supervisory General Attorney, managing civil rights attorneys and equal opportunity specialists who investigated discrimination complaints against educational institutions, including under the ADA, Section 504, and Title IX.

Panelist – Kim Phan

- Of Counsel at Ballard Spahr and a member of the firm’s Privacy and Data Security Group.
- Focuses on privacy and data security law in areas including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Gramm-Leach-Bliley Act, the Telephone Consumer Protection Act, and other privacy statutes.
- Work encompasses strategic planning and guidance for companies to incorporate privacy considerations throughout product development, marketing, and implementation.
- Assists companies with data breach prevention and response, including establishing data security programs prior to a breach and the assessment of breach notification obligations following a breach.
- Provides guidance to clients on regulatory compliance matters, including interactions with the Consumer Financial Protection Bureau.
- Experience includes responding to CFPB supervisory and enforcement activity, preparing non-bank companies to participate in the CFPB consumer complaint system, and submitting public comments on proposed rules.