

## Massachusetts Federal Court Rules That the ADA Applies to Online-Only Business as a “Place of Public Accommodation”

On June 19, 2012, the U.S. District Court for the District of Massachusetts held, in *National Association for the Deaf, et al. v. Netflix, Inc.*, that Netflix’s online video-streaming service, known as “Watch Instantly,” qualified under the Americans with Disabilities Act (“ADA”) as a “place of public accommodation” obligated not to discriminate against the disabled. This decision extends an existing circuit split regarding the ADA’s applicability to internet-based businesses, and should prompt all companies and organizations providing services via the Internet or selling goods online to consider carefully whether and to what extent their websites are sufficiently accessible to those with visual and auditory disabilities.

### Background

Under the ADA, “place[s] of public accommodation” must not discriminate against an individual on the basis of disability. This statutory dictate includes the requirement that qualifying businesses “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”

In the *Netflix* case, the National Association for the Deaf argued that Netflix had violated this provision of the ADA by failing to provide closed captioning for all of its Watch Instantly content. Netflix moved to dismiss the complaint, in part, on the ground that an online-only service is not a *place* of public accommodation within the meaning of the ADA. Netflix additionally argued that the term “place of public accommodation” could not be extended to reach the private residences where customers access its Watch Instantly content.

### The Court’s Decision

The court rejected Netflix’s arguments, relying upon First Circuit precedent from the mid-1990s which had applied the ADA to businesses that take orders via telephone or by mail. Here, the court interpreted the ADA to apply to web-based businesses, reasoning that “in a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would run afoul of the purposes of the ADA,” leaving in place barriers that would prevent individuals with disabilities from participating fully in opportunities otherwise generally available to the public.

The court likewise found “unpersuasive” Netflix’s contention that a service providing video-streaming to private residences does not implicate “public” accommodations. In this regard, the court emphasized the statutory language which prohibits discrimination in the services “of” any place of public accommodation, rather than services “in” or “at” a place of public accommodation.

The court did not, however, order Netflix to make any changes to its Watch Instantly service. Under the ADA, covered businesses must take steps to ensure accessibility for the disabled unless such steps “would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” In the *Netflix* case, the court noted that it had not been presented sufficient evidence regarding the costs and challenges associated with providing closed captioning for all Watch Instantly videos, and reserved for future decision the question of whether the plaintiffs’ requested relief would be unduly burdensome.

## Legal Context

The *Netflix* ruling, in declaring the ADA applicable to websites, steps into an already deep disagreement among the federal courts of appeal over the scope of the ADA's coverage and the meaning of the term "place of public accommodation." Compare *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997), *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000), and *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000) (all holding that the ADA prohibits only discrimination at or in a *physical* place of public accommodation) with *Carparts Distribution Ctr., Inc. v. Automotive Wholesalers' Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), *Pallosz v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 2000) and *Rendon v. Valleycrest Productions Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (holding that the ADA may be implicated by discrimination that occurs in non-physical spaces). The applicability of the ADA to the internet is an issue destined to be resolved by the U.S. Supreme Court.<sup>1</sup> Until then, though, businesses are well advised to be thinking about the accessibility of their on-line products and services.

## Steps To Consider

For companies and organizations in Massachusetts, the *Netflix* decision—though not technically binding precedent—represents the current state of the law. For companies and organizations conducting business in virtual spaces in other jurisdictions, the *Netflix* decision provides yet another reason to evaluate the accessibility of their online offerings.

Companies and organizations providing services via the Internet or selling goods online would be well advised to review the accessibility of their websites. Some technological accessibility solutions may be available and, to an increasing extent, are not cost-prohibitive. For example, screen-reader technology permits blind and visually impaired users to interact with text fields in websites, and there exist widely accepted web design standards that ensure websites are compatible with such technology. (ADA litigation brought against large banks more than a decade ago made talking ATMs an industry standard.)

Other considerations might include whether audio content is available in a format accessible to the hearing impaired, and whether any interactive content is reasonably usable by those with limited ability to manipulate a keyboard and/or mouse. Such accessibility measures, while not (yet) a matter of legal mandate under the ADA, may commend themselves from a business or operational perspective, to the extent they expand the pool of customers or users who can interact with a business's online space.

For more information about the *Netflix* decision, disability law, or anti-discrimination compliance, please contact an attorney in the [labor & employment department](#) at Ropes & Gray.

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<sup>1</sup> For its part, the Department of Justice has made clear its view that the ADA "reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations." See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (July 26, 2010). The Department of Justice also filed a Statement of Interest in the *Netflix* case, arguing that Netflix's online-only services constitute a place of public accommodation subject to the ADA.