Website Liability Under US Accessibility Laws

# Slide 1

[Text on Slide: Website Liability Under US Accessibility Laws

Ken Nakata

Director

Accessible Consulting Practice

Cyxtera, Inc.]

Rough Transcript: Welcome to today’s presentation, “Website Liability Under US Accessibility Laws.” We’ve got a lot of ground to cover, so let’s get started.

# Slide 2

[Image: Picture of Ken Nakata]

[Text on Slide:

Ken Nakata

Director of Accessibility Practices

* 12 years as a Senior Trial Attorney with the U.S. Department of Justice
* Helped shape the government’s policies for the Americans with Disabilities Act and Section 508 of the Rehabilitation Act
* Helps organizations manage the change towards accessibility in all aspects
* Crafts policies, develops stakeholder ownership, and forges awareness and commitment to the legal and business case supporting accessibility]

Rough Transcript: My name is Ken Nakata and I direct the Accessibility Consulting Practice at Cyxtera Technologies. Our company focuses a lot on web and server technologies and has over 4,000 employees around the globe. I work in a small sector of the company that focuses on web accessibility. Before joining Cyxtera, I was a Senior Trial Attorney in the Disability Rights Section at the U.S. Department of Justice for 12 years. I spent the first half of my career at DOJ focusing on traditional ADA cases and the second half working on digital technology, including Section 508 of the Rehabilitation Act. Today, I help companies become accessible both from a physical aspect and a digital aspect. And, I use my legal background to help them overcome legal and business challenges around accessibility.

# Slide 3

[Image: Text that reads “No More Bullet Points”]

Rough Transcript: This year, the conference organizers asked us to refrain from using bullet points on slides and to follow the design philosophy of PowerPoint experts like Guy Kawasaki. So, these are (hopefully) the last bullet points that you're going to see in my presentation. I'm not sure that this style really works with a legal presentation because lawyers like to see the abstract legal concepts on the screen and the citations of cases that they're discussing – but I'll ask you at the end of the presentation for your thoughts.

# Slide 4

[Video: Woman watching something very scary]

[Text reads, “Concerned about Web Accessibility Lawsuits?”]

Rough Transcript: One of the other points that was mentioned during our speaker orientation was the need for identifying the reason why audiences should care about our presentations. Well, I think it's pretty easy to say that you wouldn't be here if you weren't concerned about web accessibility lawsuits. I don't know whether you're as concerned as this woman is on the slide, but I’m sure you’re concerned nonetheless or you wouldn’t be here.

# Slide 5

[Video: Overhead view of woman typing on laptop]

Rough Transcript: We use the Internet for just about everything. We use the Internet for applying for benefits, for online shopping, and for registering classes and downloading assignments. In fact, it's difficult to imagine a world without the Internet.

# Slide 6

[Video on Left Side: Same video as slide 5]

[Video on Right Side: Time-lapse video of shoppers busily scurrying around indoor shopping mall]

Rough Transcript: As the Internet has evolved, however, the line between services offered only over the Internet and those offered only in traditional bricks-and-mortar physical locations has blurred. For instance, purchases online can now be returned in stores and coupons for stores are available online. This blurry line between online and physical locations will be really important for our discussion later because, as we will see, it will mean that it is a lot easier today to be sued for having an inaccessible website.

# Slide 7

[Image: Hand Holding a Compass]

[Text: “Where We’re Going: Trends, Laws & Scenarios”]

Rough Transcript: Let me give you a quick overview of where we’re going. Basically, we’re going to cover trends, laws, and different scenarios in that order. In other words, first we'll talk about the trends in statistics in the number of lawsuits. Then, we'll talk about the laws that are at play, particularly the Americans with Disabilities Act and California’s Unruh statute. Finally, I'd like to spend the most of my time today discussing various scenarios that have come up in litigation as these are some of the most interesting scenarios that I’m sure you’re all curious about.

# Slide 8

[Graph: Volume of lawsuit from 2015-2018, tripling each year to over 2,000 in 2018]

[Text: “Thousands of Lawsuits, Tripling Each Year”]

Rough Transcript: So first let’s talk about trends. The number of lawsuits in web accessibility has more than tripled every year since 2015. In 2018, there were over 2,250 lawsuits that alleged web accessibility violations. Most of these lawsuits have taken place in New York or Florida, even though the defendants have been nationwide. In fact, last month, a sizable hotel chain in Honolulu was sued for web accessibility.

# Slide 9

[Graph: Same as Slide 7]

[Text: “… Doesn’t Include Thousands of Other Complaints”]

Rough Transcript: However, it's important to keep in mind that these numbers don't include the much larger number of complaints that have been filed with federal agencies (such as the U.S. Department of Justice and the U.S. Department of Education) as well as complaints in state courts and state agencies. Also, lawsuits don’t always start with a complaint in federal court. One of the most litigious law firms in the country always begins their web accessibility cases with a demand letter—and only a tiny fraction of their cases ever show up as Federal lawsuits. While we don’t have good numbers, I think it’s safe to say that there are at least 4-5 times as many complaints from these other sources, bringing the total number to over 10,000 web accessibility formal complaints per year—and this number is only likely to grow. Okay, so you get the idea: there’s an explosion of activity in web accessibility. Now let’s turn to the law.

# Slide 10

[blank slide]

Rough Transcript: First, let’s talk about the ADA.

## First Animation

[Image: Text on building reads “Government”]

[Text: “ADA Title II”]

Rough Transcript: Title II of the ADA focuses on state and local governments. Title II is similar to Section 504 of the Rehabilitation Act and focuses on overall access to government programs, services and activities. Disability advocates talk about "program access" – the idea here is to see whether the program, when looked at from all the different ways it is made available as a whole, is accessible to people with disabilities. The lead case here is Martin v. MARTA and the facts are very instructive here. Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362 (N.D. Ga. 2002). In Martin, a group of disabled plaintiffs sued MARTA, the regional transit authority in Atlanta. One of the plaintiffs was blind and he alleged that he could not get information about how to travel from one point in Atlanta to another. So there’s the program—getting information about how to use a government transit system to go between two points in Atlanta. MARTA responded that they provided several ways for people who are blind to get this information. First, the information was available on their website. Second, they offered it over the telephone. Finally, they also sent out braille train and bus schedules upon request. The plaintiff replied that the website was inaccessible, that MARTA never answered their phone, and that the braille schedules were always out of date. The court held that this violated Title II because the program wasn’t accessible. While more than a few disability advocates have used the MARTA case to claim that Title II websites must always be accessible, that’s not exactly what the court said. Instead, it’s safer to say that the overall programs that include websites need to be accessible. Another similar case involving captioning on city government websites is Sierra v. City of Hallandale Beach, 904 F.3d 1343 (11th Cir. 2018). We’ll have more to say about the Sierra case later.

## Second Animation

[Image: Woman operating cash register]

[Text: “ADA Title III”]

Rough Transcript: Title III of the ADA is very different from Title II. Title III affects private sector businesses which it calls "places of public accommodation". This language is important—particularly the words “place” of public accommodation. And lawyers and judges like to argue about where that “place” is when they are talking about websites. Is it the company’s headquarters? Is it where the web servers are located? Is it where the user’s computer screen is located? At a more fundamental level, is there even any “place” when we’re talking about websites? Currently, there is a major split in the circuits over whether websites are considered "places" of public accommodation.

# Slide 11

[Image: Map of United States divided by judicial circuit]

[Text: None]

Rough Transcript: On the slide is a map of the United States broken down by the different circuits that comprise the federal judiciary. Each of the circuits is numbered, except for the DC Circuit, which only hears federal cases from Washington, DC. Each of the circuits is overseen by an appellate court (a so-called “Circuit Court”), which controls the decisions that district courts within the circuit must follow. So when we say that there is a “split in the circuits,” we mean that there is either an appellate decision or a trend in the district courts within a circuit that differs from the opinions in another circuit.

## First Animation

[Text: “Nexus Approach (3rd, 6th, 9th and 11th Circuits)”]

Rough Transcript: The most common approach to web accessibility is the so-called "nexus" approach which is followed by the

* Third Circuit (Delaware, New Jersey, Pennsylvania and the Virgin Islands),
* Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee),
* Ninth Circuit (Alaska, Washington, Oregon, California, Arizona, Idaho, Montana, Nevada, and Hawaii), and
* 11th Circuit (Alabama, Florida, and Georgia).

This approach requires some sort of connection (or “nexus”) between a website and a physical bricks-and-mortar establishment in order for activities on the website to be subject to the ADA. Remember, how I said earlier that business’s websites and physical locations are overlapping more and more? For instance, you can buy things online and make returns at physical stores? Finding these kinds of connections between a website and a bricks-and-mortar establishment is critical in these so-called "nexus" jurisdictions if you want to sue a company for its inaccessible website. Basically, a plaintiff needs to gather as much evidence as possible of where the company’s online activities connects the website to the physical location. In addition to offering returns of online purchases at physical stores, other evidence may be online coupons that can be redeemed in stores or a store locator service. The more evidence of these kinds of connections, the easier it is to establish a nexus between a website and physical locations, which is essential in these nexus circuits.

## Second Animation

[Text: “Place Of Public Accommodation Approach (2nd Circuit)”]

Rough Transcript: Another approach that broadens the "nexus" approach slightly is the approach taken in the

* Second Circuit (Connecticut, New York, and Vermont).

This is notable because so many lawsuits happen in New York State – and New York State is part of the Second Circuit. This approach focuses in on the language of goods and services “of” a place of public accommodation. Courts in the Second Circuit point out that Congress didn’t write “goods and services at a place of public accommodation”—and the use of the word “of” instead of “at” reflects Congress’s intention to read the words broadly and cover lots of activities. So under this approach to web accessibility, there still has to some bricks and mortar establishment. Then, as long as the inaccessible website is associated with that business, there’s potential liability. Courts in the Second Circuit just don’t require quite the same degree of connection between the website and the physical location. You don’t have to show, for instance, that the website offers benefits at physical stores. All that you have to show is common ownership.

## Third Animation

[Text: “Physical Place not Relevant (1st and 7th Circuits)”]

Rough Transcript: The last approach are those circuits that don’t require a physical location at all. This approach is followed by the

* First Circuit (Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico) and
* Seventh Circuits (Illinois, Indiana, and Wisconsin)

and only these circuits allow entirely online businesses that have no physical locations to be sued. This follows the “spirit” of the ADA rather than a literal interpretation of its text.

While these distinctions might seem like legal irrelevancies, they are very relevant in the real world. For instance, in 2012 Netflix was sued both in California and in Massachusetts for not providing captioning on its videos. Because Netflix does not have any physical locations, the suit in California was dismissed. Why? Because California is in the Ninth Circuit so the courts there require showing a nexus to a physical location—and because Netflix had no physical locations, the case was kicked out. But, the lawsuit in Massachusetts was able to proceed forward. The reason for this is that Massachusetts is in the First Circuit, which doesn’t require a nexus between a website and physical establishments. Then the courts each followed the different approaches mandated by the circuit courts overseeing them.

So that’s the fractured and confusing state of the law with respect to the ADA’s coverage of internet websites. As you probably have heard, the Supreme Court recently declined hearing the appeal in the Robles v. Domino’s Pizza case. This just means that this chaotic state is going to stay chaotic for some time to come—and so we should expect the wave of lawsuits and complaints to continue.

# Slide 12

[Video: Map of United States zooming into Calfornia]

[Text: “California State Law Much Tougher than ADA”]

Rough Transcript: Let's move past the ADA and discuss the other big law that can affects website accessibility. California's Unruh and Disabled Persons Act are much broader and tougher than the ADA in all respects, including website accessibility. Oddly, there haven't been that many lawsuits under these laws but the potential is always there. Compared to the ADA,

* Unruh is much broader in coverage and affect all business establishments. The ADA covers 12 broad categories of types of businesses. Granted this covers the vast majority of businesses but Unruh goes even further. Unruh can reach any commercial or business activity. This has been interpreted to cover things like condominium board association meetings, which the ADA could never cover.
* Second, Unruh and the Disabled Persons Act do not have a "nexus" requirement for website accessibility. Because California is in the Ninth Circuit (which has a nexus requirement), this means that California residents would be able to sue purely online businesses under these state laws even though they couldn’t sue them under the ADA.
* Third, ADA violations are automatically violations of Unruh. This makes it easier for plaintiff attorneys to prove their cases.
* Fourth, there is the opportunity for much larger damages. Unruh permits liquidated damages of $4,500 per claim. While that may not seem like a lot, it can quickly add up. In fact, the liquidated damages provision was essential to the NFB v. Target Corporation settlement agreement, in which Target Corporation agreed to pay $6 million in a settlement to the National Federation of the Blind because its website was inaccessible.

# Slide 13

[Image: None]

[Text: “Real-Life Scenarios and Legal Defenses”]

Rough Transcript: Okay, so we’ve talked about the two important laws that affect website accessibility. With that background out of the way, let's talk about some real-life scenarios that have come up in litigation. These offer us a great opportunity to get past abstract legal theories and gets us into some of the thorny issues that come up.

# Slide 14

[Image: Person on telephone reading out credit card number]

[Text: “Can’t We Just Post our Customer Service Number?”]

[Subtext: “(aka “Effective Communication”)“]

Rough Transcript: Web accessibility cases are almost always based on the "effective communication" requirement of the ADA. This requirement gives some flexibility to organizations in how they accommodate the communication needs of people with disabilities. So this leads to the natural question: “can an organization just commit to answering the telephone instead of making their website accessible?”

This argument has almost been always rejected in the federal case law—but it’s important not to read too much into the decisions. Two useful cases here are the Blue Apron and the Dave & Buster cases from New York and California, respectively. Access Now v. Blue Apron, 2017 U.S. Dist. LEXIS 185112 (D.N.H. 2017); Gorecki v. Dave & Buster’s, Inc., 2017 U.S. Dist. LEXIS 187208 (C.D. Cal. 2017).

But it's important to remember that both the Blue Apron and Dave & Buster’s cases were decided on defendant’s motion to dismiss-- a very early stage of litigation. To set some background, after a lawsuit is filed, a defendant can make a “motion to dismiss.” In doing so, the defendant is saying that the plaintiff’s case is so flawed that it shouldn’t be heard by the court and the case should be kicked out. In this case, the defendants are saying that telephone access will always ensure effective communication even if the website is inaccessible. That’s obviously a tall order because sometimes the phone may be busy or the plaintiff can only place an order during non-business hours. In other words, the only way to see if a telephone provides effective communication when the website is inaccessible is to let the facts develop—and the only way to do that is to deny the defendant’s motion to dismiss. One case where telephone access was looked on favorably by the court is the original district court opinion in the Domino's Pizza case. Robles v. Domino’s Pizza LLC, 2017 U.S. Dist. LEXIS 53133 (C.D. Cal. 2017), rev’d on other grounds, 912 F.3d 898(9th Cir. 2019), cert. denied 2019 U.S. LEXIS 5397 (Oct. 7, 2019). That case was sent back to the district court by the Supreme Court, so the final outcome isn’t clear. At the same time, there are a few cases that have gone to trial such as the Thurston v. Midvale Corporation case, (Cal. Super. Ct. 2018) (available at <https://tinyurl.com/ycmqxzar>), aff’d by 39 Cal. App. 5th 634, 650-51 (Cal. Ct. App. 2019), in which the court held that a telephone alternative was never an acceptable alternative to an inaccessible website. But, in that case, the defendant offered no evidence to suggest that a telephone WAS an acceptable alternative so the court had no choice but to find that effective communication wasn’t provided. The case is also of limited value because it’s a state court case.

In summary, I would say that courts are disinclined to find that a website doesn’t need to be made accessible if the company is willing to offer an accessible alternative, such as a telephone number or email address. But there’s just enough wiggle room in the opinions that we can’t say for sure that a defendant couldn’t succeed with that argument in the future.

# Slide 15

[Image: Hands on blueprint making edits]

[Text: “No One Said We Need to Design to WCAG”]

[Subtext: “(aka “Failure to State a Claim”)“]

Rough Transcript: Okay, let’s move on to a different scenario. Say you own a restaurant and you get sued for your inaccessible website—but the plaintiff’s complaint only identifies where your website failed to comply with WCAG 2.0 A/AA. Could you get this case dismissed because the plaintiff failed to show any actual harm? This argument worked for Domino's Pizza case at the district court level, but was reversed on other grounds on appeal. In general, the law requires that a plaintiff identify some actual harm as a prerequisite to bringing a lawsuit—and simply pointing out accessibility barriers won’t cut it.

This has also been framed as a Due Process violation. The way that this argument goes is that neither Congress nor the Department of Justice has ever said that businesses must comply with WCAG, so being held to that standard would violate the defendant’s constitutional rights. The Due Process angle has received mixed reviews by the courts. But it has led to a movement by businesses to try to limit or bar ADA web accessibility cases until the Justice Department develops clear regulations about the application of WCAG to websites. (https://tinyurl.com/y7rlhqxh)

# Slide 16

[Image: Callout reads “No es mi problema”]

[Text: “I Don’t Control the Content So Why am I Being Sued?”]

[Subtext: “(aka “Lack of Ownership or Control”)“]

Rough Transcript: Okay, let’s switch to another scenario. Another issue that comes up is where a defendant does not own or have direct control over the web content that the plaintiff is complaining about. This often happens, for instance, where an organization uses third-party entities like social media channels—and plaintiffs can’t access those channels. For instance, in Sierra v. City of Hallandale Beach, the plaintiff complained about videos that were posted by the city to its social media channels. Because the city had no control over its social media channels, they could not be expected to ensure that they were accessible. Sierra v. City of Hallandale Beach, 904 F.3d 1343 (11th Cir. 2018). I don’t agree with this opinion, however. To the extent that the city was using these other social media channels for its government programs, the accessibility of those channels needs to be taken into consideration. For instance, if the city was only using Facebook to make announcements of important events, then they would not be able to say that they don’t have to consider accessibility if Facebook itself was inaccessible.

# Slide 17

[Image: Nerdy guy holding stack of binders]

[Text: “Shouldn’t We Leave This to the Experts?”]

[Subtext: “(aka “Primary Jurisdiction: DOJ”)“]

Rough Transcript: In 2010, the Department of Justice started a rulemaking effort to add web accessibility to the ADA regulations. As most of you know, this effort took a long time and ultimately was stopped during the Trump Administration. This has caused a lot of frustration for both disability advocates and for businesses. On the one hand, businesses have complained because they lack the guidance and standards for designing accessible websites and for prioritizing content that needs to be made accessible. At the same time, disability advocates have complained that the lack of clear requirements has made businesses more reluctant to make their websites accessible. From a legal perspective, defendants have raised this argument in two ways. First, they argue that holding them liable would violate their Right to Due Process as guaranteed by the Constitution, because there is no clear mandate that they needed to make their websites accessible. This is a variation of the same argument that we talked about earlier when we were discussing WCAG. Second, defendants argue that the courts should refrain from deciding on a legal issue that really needs to be decided somewhere else—in this case, in the rulemaking process at the Department of Justice. This is called the doctrine of “Primary Jurisdiction.” The courts have rejected both arguments because, even without guidance from the Department of Justice, courts can determine what constitutes an ADA violation. This is one of the bases for the Ninth Circuit to reverse the District Court in the Domino's Pizza case. This argument was also raised and rejected in Reed v. 1-800-Flowers.com, Inc., 327 F. Supp. 3d 539 (EDNY 2018).

# Slide 18

[Image: Nerdy guy seated in chair raising his hand]

[Text: “Okay, What About a Different Expert?”]

[Subtext: “(aka “Primary Jurisdiction and Exhaustion of Remedies: FCC”)“]

Rough Transcript: Another clever argument was raised in Sierra v. City of Hallandale Beach, 904 F.3d 1343 (11th Cir. 2018). In this case, the city posted uncaptioned videos on its website that were also shown on local television. That raises obvious problems under the ADA. It turns out, however, that video content creators are subject to another law called the 21st Century Communication and Video Accessibility Act (or ”CVAA”). And, complaints under the CVAA are handled exclusively by the FCC. Therefore, the city argued that the plaintiff’s complaint needed to first go to the FCC to determine if there was a violation (something lawyers call “exhaustion of administrative remedies”) and that only the FCC had the expertise to handle CVAA claims (that is the “primary jurisdiction” argument we talked about earlier) In effect, what the defendants were saying is that the CVAA claims trump the ADA claims. The 11th Circuit rejected this argument because a claim could exist under both the CVAA and the ADA. The fact that a claim could be covered by the CVAA does not mean that the potential ADA violation could not be heard at the same time.

# Slide 19

[Image: Sign that reads “Sorry We Are Closed”]

[Text: “The Plaintiff isn’t Interersted in My Business Anyways”]

[Subtext: “(aka “Standing to Sue Part 1”)“]

Rough Transcript: Credit unions have been a favorite target for the plaintiffs bar in web accessibility cases. A lot of credit unions, however, are set up for very specific audiences and have very strict membership requirements. This hasn't stopped plaintiffs from visiting the credit union websites and suing them for being inaccessible – even if the plaintiffs have no intention of becoming a customer or may be completely ineligible to become a customer. The National Association of Federally-Insured Credit Unions (NAFCU) has been vigorously defending these cases on the basis of a lack of standing to sue. Almost universally, they have succeeded because the plaintiffs were ineligible for meeting the membership requirements of the business. Two useful examples are Mitchell v. Dover-Philadelphia Credit Union and Carroll v. Roanoke Valley Community Credit Union. See, e.g. Mitchell v. Dover-Phila Fed. Credit Union, 2018 U.S. Dist. LEXIS 105798 (N.D. Ohio June 25, 2018); Carroll v. Roanoke Valley Community Credit Union, 2018 U.S. Dist. LEXIS 98284 (W.D. Va. June 11, 2018). As an aside, NAFCU has vigorously lobbied Congress to ask DOJ to restart its web accessibility rulemaking to clarify the web accessibility requirements under Title III of the ADA.

# Slide 20

[Image: Square peg round hole]

[Text: “… and They Shoudn’t Be Able to Ask For What They’re Demanding”]

[Subtext: “(aka “Standing to Sue Part 2”)“]

Rough Transcript: Another way that standing can come up is in the remedies requested by plaintiffs. In almost every web accessibility case, a blind plaintiff asks that a website comply with all provisions of WCAG 2.0 A/AA in order to resolve the case. WCAG 2.0 A/AA, however, addresses many disabilities other than blindness. For instance, WCAG includes requirements for captioning videos, avoidance of flashing content, ensuring that there is sufficient contrast between text and background, and a host of other requirements that have little or nothing to do with the needs of blind individuals. Yet, on what basis can a blind person ask for captions that he can’t see to be placed on video? From a legal perspective, a defendant can argue that the plaintiff would have no standing to request these kind of changes that are part of full compliance with WCAG 2.0 A/AA. Nevertheless, this argument has not been raised in litigation to the best of my knowledge.

A closely related issue that has been coming up recently is the scope of expert witness testimony in web accessibility cases. In the few cases that have gone to trial, expert witnesses have been called to testify regarding the compliance of a website with WCAG 2.0 A/AA. Again, however, many of these violations can be unrelated to the specific barriers that a plaintiff encounters in accessing the website. So defendants argue that expert witness testimony about WCAG should be excluded.

Two cases that are interesting to compare and contrast here are Diaz v. Lobel’s of New York, 2019 U.S. Dist. LEXIS 127126 (EDNY 2019) and Gomez v. General Nutrition Corp., 323 F. Supp. 3d 1368 (S.D. Fla. 2018) in which two courts considered whether expert witness testimony from the same expert witness (McAffrey) should be allowed into evidence. His testimony was rejected in the Diaz case and accepted in the Gomez case. In Diaz, the expert was rejected because he failed to show that his testing techniques were established in the industry. But his testimony was accepted in the Gomez case because he focused on the practical impact of his testing on users with similar disabilities as the plaintiff. If you are in a web accessibility case and there is an expert witness involved, it’s important that your attorney read these two cases thoroughly.

I think that Gomez strikes the right balance for the value of expert witnesses. Often, there are times when a blind plaintiff is completely blocked at a page—and it is impossible (or nearly impossible) to get past that block. Therefore, if we relied only on the plaintiff’s testimony, many other barriers that lie beyond that block would remain unknown. This is where expert witnesses are valuable because they can look beyond these barriers. While their initial reports may discuss all of WCAG, a court can limit their testimony to those barriers throughout a site that will likely affect the plaintiff and people with similar disabilities.

# Slide 21

[Video: White stamp mark that reads “finished” over black background]

[Text: “I Just Settled a Similar Case and Now I’m Being Sued Again?”]

[Subtext: “(aka “mootness”)“]

Rough Transcript: Now imagine that you run a big restaurant chain that has a website that includes your menu and directions to your nearest location. A blind plaintiff then sues your company and you agree to make your website accessible. As you're working to make your website accessible, however, a second unrelated plaintiff sues your company and insists that you make your website accessible. Naturally, you're upset and you seek to have the second case dismissed because the claims were addressed in the settlement of the first lawsuit. In other words, the second lawsuit is moot. This is exactly what happened to Hooters of America. Haynes v. Hooters of America LLC, 893 F.3d 781 (11th Cir. 2018). In that case, the court rejected the argument that the case was moot because the second plaintiff was not a party to the first lawsuit. This means that, if the defendant decided to renege on the settlement agreement with the first plaintiff, the second plaintiff could not enforce it. In addition, the court noted that the only way for the case to be moot is for Hooters of America to make their website fully WCAG 2.0 A/AA accessible. Until that time, they would still be subject to suit. Another case that follows the same reasoning is Markett v. Five Guys Enterprises, LLC, 2017 U.S. Dist. LEXIS 115212 (S.D.N.Y. 2017).

# Slide 22

[Image: Man holding binoculars and looking into distance]

[Text: “I’m Being Sued in a Court That’s Thousands of Miles Away?!?!”]

[Subtext: “(aka “Personal Jurisdiction”)“]

Rough Transcript: To wrap up, I’m going to take you to the first year of law school and a civil procedure class. One of the basic concepts that you learn about are the different types of jurisdiction that allow a court to exercise its authority. First, there’s subject matter jurisdiction, which asks if this is the right kind of case for the court to hear. To have subject matter jurisdiction, there has to be some violation of a legally protected right, such as a violation of the ADA. Second, there’s personal jurisdiction, which asks if these are the right people to be before the court. Often the answer depends on where the parties are located. Usually a defendant needs to be physically located in the district where the court sits. It’s this second kind of jurisdiction which I’d like to talk about now. So imagine that you run a Seattle-based clothing company that sells sportswear (like sweatshirts and T-shirts) through your website. Most of your clothing is printed with the names of colleges and universities from around the country. You also don't have any stores, so it is impossible for you to be sued in Seattle for web accessibility because your online presence has no "nexus" to a bricks-and-mortar physical location. After all, you are in the Ninth Circuit, which has a strong nexus requirement, so all should be fine, right? Then, you are sued by a blind plaintiff from Massachusetts (where there is no nexus requirement) and you are being asked to hire a local attorney and defend the case in US District Court in Massachusetts. Of course, you try to have the case dismissed for lack of personal jurisdiction. These are the facts in Access Now v. Sportwear, Inc., 298 F. Supp. 3d 296 (D. Mass. Mar. 22, 2018). In this case, the court noted that the Seattle-based sportswear company made products that were tailored to Massachusetts colleges and universities. In doing so, the company "deliberately targeted" Massachusetts as a potential market in an attempt to appeal to this customer base—even though only 3% of its sales were from Massachusetts. But this was enough for the district court to have personal jurisdiction over them.

So remember earlier when I showed you a picture of the different circuits in the United States? If you are in one of the circuits that have a more limited view on website accessibility, that’s relevant but it doesn’t tell the full story. And remember how I also mentioned that most of web accessibility lawsuits are being filed in Florida and New York? If you don’t live in one of those states, that also doesn’t tell the full story. The reality is that, because your website reaches everywhere, you have potential customers everywhere—and that also means that you can be successfully sued from just about anywhere.

# Slide 23

[Image: Image of Slide 19]

[Text: “New Style”]

Rough Transcript: Before we get to questions, I mentioned that I wanted to take a quick poll about the effectiveness of this style of presentation when discussing fairly dense legal stuff like today’s discussion. On the screen is one of the slides you saw before… the one that dealt with standing to sue. In my opinion, while it’s inviting, it hardly says anything and isn’t very informative.

# Slide 24

[Image: Image of text-based heavy version of Slide 19]

[Text: “Old Style”]

Rough Transcript:… and here is an image of the what this slide originally looked like. It includes a fairly lengthy textual description of the issue and full citations to all of the cases. To me, this is a much better slide for this kind of dense legal presentation. It summarizes the issue at hand and then lists the cases for and against that concept.

# Slide 25

[Image: Image of Slides 23 and 24 next to each other]

[Text: “Old Style” and “New Style”]

Rough Transcript: But what do you guys think? Which do you prefer?

# Slide 26

[Image: None]

[Text: “Questions? Ken Nakata, Cyxtera, 603.578.1870, ken.nakata@cyxtera.com]