The Changing Legal Landscape of Web Accessibility in Higher Education
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Introduction

Universities face liability if their Web content is inaccessible. This is further complicated by new laws and regulations that change some of these obligations, but also the standards for what constitutes “accessible” Web content. Colleges and universities also face the increasing chance of liability due to disability rights organizations filing more complaints and lawsuits based on these laws. The lawsuits filed are also extending liability beyond the Web to include other new technologies used in education.

This white paper will provide guidance on the changing legal landscape of Web accessibility in higher education. The four main goals of this whitepaper are to:

1. First provide background on Web accessibility explaining why colleges and universities must ensure that their Web content is accessible;
2. Second to explain how laws and regulations are changing and being reshaped by lawsuits and complaints;
3. Next to put this in context as to how these apply to you;
4. And finally to focus on practical solutions and best practices.

Background on Web Accessibility

Applying old laws to new technologies is always challenging. Over the last ten years, advocates have relied on two different types of traditional disability rights laws to cover college and university IT and Web accessibility. The first types of laws include Section 504 of the Rehabilitation Act and its concept of “program access” and the second on specific standards like Section 508. It is important to remember that these laws extend to all IT used by colleges and universities that provide education and related services.
Laws like Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act focus mostly on the concept of “program access.” The idea behind “program access” is that a program, service or activity needs to be accessible when viewed in its entirety. This means that if a program is offered through the Web and/or in live classrooms, the overall program needs to be equally accessible to people with or without disabilities. This can often be more art than science because it may mean looking at the way in which those programs are offered and when, as well as how they are accessed by particular disabled populations.

Any college or university that receives federal financial assistance has had these obligations since 1973 under Section 504. All public universities and colleges have also had these obligations (regardless of federal financial assistance or not) under Title II of the ADA since 1991. Until recently, these accommodations have been made on an individual basis by college and university Section 504 or ADA Coordinators.

In 1998, Congress amended Section 508 of the Rehabilitation Act. The federal version of Section 508 applies only to the Federal Government and has no application to colleges and universities. However, many states have adopted laws that mirrored the federal version of Section 508 and other states (as well as colleges and universities) have adopted policies that formally or informally use the federal version of Section 508 as a starting point. Section 508 and laws and policies that mirror Section 508 are different from “program access” based laws for two reasons:

1. They are primarily procurement-based laws that use market forces to encourage manufacturers to create more accessible products.

2. They are highly specific in the standards that must be followed—lawsuits or complaints for violations of law that mirror Section 508 or policies are based on non-conformance with these design standards (unlike “program access” based laws where complaints are based on the actual denial of access to a particular person with a disability).

Web accessibility, and accessibility of other IT, for colleges and universities has been based on two points. The first is founded on fairness, asking if the means of accessing a program, either through the Web or other IT, really affords people with disabilities the same level of access as that which is provided to people without disabilities. Laws like Section 508 and the ADA generally follow this course of analysis.
The second is based on the universal design principles. Here, the question is not whether a person with a disability received the same level of access as her nondisabled counterparts. Instead, the focus is on whether Web content, or other IT used in an education program, meet specific agreed-upon standards in design. Historically, this has meant adherence to Section 508 standards and, more recently, Web Content Accessibility Guidelines (WCAG) 2.0 level AA.

Lawsuits, Changing Legislation and Policies

Lawsuits

Recently, a number of lawsuits and complaints by disability rights organizations have amply demonstrated the effectiveness of the legal framework in compelling colleges and universities to make their IT and Web content accessible for students with disabilities.

For instance, in 2010, the Department of Justice (DOJ) settled a complaint (known as Kindle) by the National Federation of the Blind (NFB) against the University of Arizona under Title II of the ADA.1 This sparked concern among a number of other universities that course materials provided through e-Readers (and other mobile technologies) may also have to be accessible. In June 2010, the DOJ and Department of Education (ED) jointly advised both public and private sector universities that reliance on e-Readers may violate Titles II and III of the ADA.2 In September 2012, the U.S. State Department withdrew a single-source contract with Amazon involving the Kindle devices, possibly due to concerns over the device’s lack of accessibility.3

Another noteworthy example is the settlement between the NFB and Pennsylvania State University (Penn State). On November 12, 2010, NFB filed a complaint with ED regarding Web and other IT used on Penn State campuses. In 2011, this complaint was settled and required Penn State to make sweeping changes to their Web content (it agreed to follow the WCAG 2.0 level AA) and its IT generally (including IT used in classrooms, campus banking, library services, etc.). The Penn State settlement is recommended as a model for improving IT accessibility at colleges and universities generally and will likely be the minimum benchmark for settlements going forward.

Both the Kindle and Penn State settlement agreements demonstrate the effectiveness of traditional accessibility laws (like Section 504 and the ADA) in the context of Web and IT accessibility at colleges and universities. Even though non-compliance was not at the root of the complaint, as part of both these settlements, both parties agreed to comply with WCAG 2.0.

1 http://www.ada.gov/arizona_state_university.htm
2 http://www.ada.gov/kindle_ltr_eddoj.htm
3 http://globalaccessibilitynews.com/2012/09/07/nfb-comments-on-new-kindles/
Because disability rights organizations are using accessibility standards to settle complaints, if repeated enough, these standards will become the de facto regardless of the fact that no law or regulation specifically dictates that universities need to be WCAG compliant. It remains to be seen if this last point changes as laws and policies affecting Web accessibility are amended.

Legislation and Policies

While Section 504 and the ADA have proven very effective in requiring colleges and universities to ensure that IT and Web content is accessible, laws and policies are also changing to make these requirements stricter. Ultimately, it will make technologies more accessible to students with disabilities.

The first change is that the United States Access Board has started updating the federal version of Section 508 standards. While these standards are unlikely to be finalized until late 2013 or even 2014, current drafts clearly show that the Federal Government is moving toward WCAG 2.0 level AA as the basic standard for Web accessibility. It is highly likely that Section 508 will harmonize with WCAG 2.0 level AA as governments worldwide have already successfully adopted it as the minimum standard for Web content.

In addition, on July 26, 2010, the DOJ issued four advance notices of proposed rulemaking (ANPRMs) including one that addresses Web accessibility and applicable Web standards. Given the success of foreign governments in adopting WCAG 2.0 level AA combined with the Federal Government’s clear migration to the guidelines, it is likely that the regulations supporting ADA and ultimately Section 504 will eventually harmonize to WCAG 2.0 level AA. This further supports that colleges and universities should ensure that Web content conforms to WCAG 2.0 level AA now as a way to meet these inevitable changes.

What These Changes Mean to You

The Kindle compliant and Penn State settlement agreements highlight three important points that colleges and universities need to bear in mind.

1. **Consider ALL of the IT Used by Your College or University.** Cutting-edge technology (such as e-Readers) offer wonderful opportunities, but as the Kindle compliant reminds us, colleges and universities need to consider how these technologies will be accessed by students with disabilities. Also, it’s not just technologies in the classroom. The Penn State settlement agreement reminds us that ANY technology used by your college or university that is accessed by students or faculty as part of your college or university’s programs, services, or activities needs to be accessible.
Web Content Should Conform to WCAG 2.0 Level AA.

Settlement agreements like Penn State, the Federal Government and governments worldwide are all using WCAG 2.0 Level AA. In the future, it is highly likely that the ADA itself will use WCAG 2.0 Level AA. Given the effects Web accessibility compliance has on an organization, there should be little confusion over what is the de facto standard. Colleges and universities should therefore use, or start using, WCAG 2.0 Level AA for Web content.

Do It Now. Disability rights organizations like NFB and government agencies like the DOJ and ED are becoming increasingly active in this area—and their consistent settlement agreements leave little room for questioning what they expect. Rather than being the next headline and incurring enormous legal expenses, start planning and remediating content now.

How to be Proactive

Web Accessibility

Fortunately, it is relatively easy to be proactive with Web accessibility in even the largest organizations. There are four steps for proactive Web accessibility:

1 Benchmark Your Web Content. Audit your current sites so that you can benchmark your accessibility to assess where improvements can be made. There is no need for this to be a completely manual project. Instead, make use of all resources available including conducting a Web accessibility assessment that uses an automated solution to validate your site against accessibility guidelines, combined with some manual testing. This will give you a feel for how automated solutions work and how they can benefit you as a more permanent solution. Benchmark activity should include:

   • Automated testing of all or most of your domains. A good automated solution can also identify PDFs and other non-HTML content that may need special manual review.

   • Manual testing (by assistive technology experts) of a small number of Web pages in each domain or major area of your website(s). For instance, WCAG requires that the overall structure of the site is logical and an automated solution alone could not make this assessment.

   • Specific manual transaction testing to assess the accessibility of key functionality, such as registering for courses, applying for a job, or other key functionality provided by your website(s).
2 Make Corrections and Refine Training. The benchmark review will help guide you in understanding what types of Web accessibility problems occur on your site(s) and where. If a good automated solution was used for the assessment, it should also identify exactly what lines of code a problem occurred so that your development teams can easily fix the problem(s). If you also included manual testing as part of the benchmarking, it will help prioritize these problems and provide a clear picture of the issues that automated testing cannot check. This information informs your organization of exactly what to fix—and what areas require improved training.

3 Consider Regular Use of an Automated Solution. Regular reviews using an automated solution together with occasional and limited manual reviews will give you clear metrics of your success. It will also help to immediately identify issues as they arise, preventing major problems.

4 Consider Outsourcing. If you just do not have the staff resources to address accessibility, consider having a third party help you get started. There are companies that specialize in this work and can help you avoid a long, steep, and expensive learning curve.

IT Accessibility (Other than Web)

1 Committees and Interested Stakeholders. Ideally, to meet these challenges it is important to bring together the right stakeholders as part of an Accessibility Committee. Stakeholders may include:

- Students and faculty with disabilities
- IT staff
- Course design staff
- Student disability services
- Section 504/ADA Coordinators

California State University System: Ensuring accessibility through automated compliance monitoring

**Background**

- 23 campuses, 450,000 students and 46,000 faculty and staff.
- CSU strives to find scalable solutions to help implement Web accessibility, instructional materials accessibility and procurement of accessible information technology.
- New and updated administrative websites, Web applications and Web content produced by the CSU or by third-party developers should conform to baseline accessibility standards as defined in Section 508.

**Solution**

- Once CSU established the Accessible Tech Initiative (ATI), the university selected HiSoftware's automated solutions to check campus websites for accessibility.
- HiSoftware Compliance Sheriff provides all affiliated staff, faculty and students with access to the solutions, and will enable the system of 23 diverse campuses to carry out the ATI's directives.

**Bottom Line**

- Compliance Sheriff allows CSU to define and conduct custom tests, providing complete and concise reports on the total accessibility, quality and policy compliance status of content that has been tested.
- Compliance Sheriff provides documentation to present to the various groups at multiple CSU campuses coordinating ATI standards.

“CSU strives to provide all of our students with an equal education. Providing accessible online services and materials is an important part of meeting this goal. We had used an earlier version of HiSoftware’s product for accessibility compliance and had been very successful. But we wanted to see what else was on the market.

We evaluated four enterprise-level Web accessibility solutions. HiSoftware Compliance Sheriff was ultimately selected for its robust functionality, reasonable price and excellent customer service.”

- Cheryl Pruitt,
  Director of the Accessible Technology Initiative
  at California State University
2 **Inventory Current Technologies and Baseline Web Content Accessibility.** It is important to understand what you are dealing with. This first requires understanding the different programs, services or activities at the college or university. Then identifying the different technologies supporting that program, service or activity. Next, the accessibility of each of those technologies needs to be considered. The college or university also needs to establish clear policies that all new technologies be approved by the Accessibility Committee.

3 **Accessible Technologies and Content.** Only where it is fundamentally required will inaccessible technologies be permitted. For instance, inherently visual content may be required in an art appreciation class. In all other areas, select only accessible technologies and ensure that all content delivered through these technologies is accessible. This includes having appropriate agreements with vendors as well as appropriate training material. In addition, it may also mean retrofitting existing technologies.

4 **Be Responsive.** Set a schedule and inform others of your progress. While changes are being made, make sure that individual requests for accessible content or materials are handled quickly. Consider having a team of vendors ready to help.

This process can take some time, but once in motion, can easily become part of the institutional culture of IT accessibility helping to promote openness. It may also safeguard against lawsuits. If a college or university can show that they are proactive in addressing Web accessibility through a developed plan and use of an automated compliance solution, it may prevent the NFB or ED from bringing a lawsuit against the school.

**Introduction to HiSoftware Solutions for Education**

Automated solutions play a key role in addressing Web accessibility for higher education. HiSoftware Compliance Sheriff® enables colleges and universities to help achieve accessibility goals, making online content equally available to staff, faculty, students and alumni. It provides automated compliance auditing and reporting for all intranets, public-facing websites, portals, document libraries and SharePoint sites. Compliance Sheriff allows colleges and universities to automatically verify accessibility compliance with out of box checkpoints for Section 508 standards or WCAG 2.0 level AA guidelines, provides issue alerts and detailed guidance on how to repair website content, measure progress against goals over time and actively monitors digital environments across the organization for on-going accessibility.
As the industry leader in Web accessibility software, HiSoftware has helped hundreds of public sector customers, including leading colleges, universities and federal agencies, to shape their accessibility policies and practices, and leverage the best in accessibility software products. In today's business world with tight deadlines and overloaded staff, organizations often need more than just a product. With that in mind, the company also offers customers flexible consulting service options, including Web Content Assessment and Remediation that allow you to ramp up quickly and enhance your best practices, based on your needs.

About the Author

Ken Nakata

Ken Nakata is one of the most well-known attorneys in the area of IT accessibility and is the Director of HiSoftware’s Accessibility Consulting Practice (ACP). His work focuses on Web and software accessibility from both a legal and technical perspective. Nakata’s ACP team helps organizations manage the change towards accessibility in all aspects, providing consulting services aimed at shaping their accessibility policies and practices, and evaluating the overall state of their Web properties leveraging HiSoftware’s accessibility solutions.

Nakata worked for twelve years as a Senior Trial Attorney with the U.S. Department of Justice. He has argued on behalf of the United States government many times before the federal courts and has helped shape the government's policies for the Americans with Disabilities Act and Section 508 of the Rehabilitation Act. Nakata also worked as Director of Accessibility and Government Compliance at BayFirst Solutions, a Washington, DC consulting firm.

In 2000, Attorney General Janet Reno presented Nakata with the Attorney General's Award for Excellence in Information Technology. In addition to practicing law, Nakata is active in software and Web-based technologies, including Java, JavaScript, SQL, and ColdFusion. In July 2001, he was certified by Sun Microsystems as a programmer for the Java 2 Platform. Nakata is a frequent speaker on both law and technology and is equally adept at conducting one-on-one workshops with programmers and developers as well as explaining law and policy to large audiences.

He holds a Bachelors of Art degree in mathematics from John Hopkins University and a Juris Doctor degree from the University of Pennsylvania Law School, and is admitted to the bars of New York, the District of Columbia, Pennsylvania and Washington.

For more information on HiSoftware solutions for Education go to www.hiosoftware.com/solutions/by-industry/education.aspx
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About HiSoftware Inc.

HiSoftware provides content-aware compliance and security solutions for the monitoring and enforcement of risk management and privacy guidelines across digital environments. The company’s solutions provide a data governance and compliance platform for content management and collaboration processes that support corporate and brand integrity, site quality, accessibility and confidentiality for public websites and portals, as well as internal intranets and SharePoint sites. HiSoftware’s customers include some of the largest US and international government agencies, as well as Global 2000 companies. For more information, visit http://www.hisoftware.com.