

Throwing the Switch: Empowering Advocates to Make the Most of Current Trends in Disability and Technology Policy

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Overview: This presentation surveys the latest developments in technology policy affecting people with disabilities. Specifically, session attendees will gain a greater understanding of the landmark Twenty-First Century Communications and Video Accessibility Act (CVAA) and its impact on the usability of telecommunications and video programming technologies. The session will also briefly explore the linkages and overlapping policy concerns of the CVAA and other laws, such as the Americans with Disabilities Act (ADA) and copyright law. The session will provide attendees with practical advice on how people with disabilities can make use of complaint and other processes to advocate and ensure accessibility. The goal of this presentation is to raise awareness of the new rights and requirements now available under the law and to encourage their use to promote change in technology industry behavior.

Presenter: Mark Richert serves as the Director of Public Policy for the American Foundation for the Blind (AFB), the leading national nonprofit to which Helen Keller devoted more than four decades of her extraordinary life. AFB's mission is to expand possibilities for people with vision loss of all ages. Mark is AFB's primary representative before the U.S. Congress and Executive Branch agencies, and he is responsible for the development and implementation of AFB's public policy and policy research agendas. Prior to joining AFB, Mark was the Executive Director of the Association for Education and Rehabilitation of the Blind and Visually Impaired, the membership organization representing professionals serving children, working-age adults, and seniors with vision loss.

Mark is a co-founder of the Coalition of Organizations for Accessible Technology (COAT) and a co-chair of the Civil Rights and Telecommunications and Technology Task Forces of the Consortium for Citizens with Disabilities (CCD). Over the course of his career, Mark has shaped the vision loss community's work in a host of areas. He crafted provisions of copyright law establishing the right to reproduce copyrighted works in specialized formats such as Braille. He spearheaded provisions of the Help America Vote Act ensuring the availability of at least one accessible voting machine in each polling place in America. His advocacy on behalf of children with vision loss led to sweeping improvements in America's special education law guaranteeing each child who is blind or visually impaired the right to timely and effective access to textbooks and related instructional materials. Most recently, Mark and his COAT colleagues achieved enactment of the historic Twenty-First Century Communications and Video Accessibility Act, the most comprehensive disability policy signed into law since the landmark Americans with Disabilities Act.

Mark is a graduate of the George Washington University National Law Center and has been a member of the Florida Bar since 1993. He lives in Arlington, Virginia.

Presentation Outline

I. Brief History of Disability and Technology/Information Access Policy

During the last dozen years of the twentieth century, an array of policy improvements were achieved to address much-needed change in technology accessibility for people with disabilities and the right to accessible information.

The Tech Act set up a structure for funding, training, technical assistance and research and development concerning assistive technology devices and services.

In addition to its sweeping effective communication and other provisions impacting the right to accessible information, the ADA also established a national system of telephone relay services for people who are deaf or hard of hearing.

The TV decoder circuitry legislation ensured that most televisions are able to provide closed captioning.

The Telecommunications Act of 1996, particularly section 255, required manufacturers and providers of telecommunications equipment and services to make their offerings accessible if readily achievable. These provisions are almost exclusively concerned with technologies to initiate, route, and terminate conventional telephone calls.

The so-called Chafee Amendment in 1996 made it clear that nondramatic literary works can be produced by authorized entities in specialized formats exclusively for use by people with print disabilities without first needing to obtain permission to do so from copyright owners.

In 1998, Congress amended the Rehabilitation Act of 1973 to beef up the section 508 requirements on the federal government to procure, design, maintain and use accessible electronic and information technology (E&IT), now commonly referred to as information and communications technology (ICT).

The Digital Millennium Copyright Act (DMCA), while representing aggressive protections for copyright owners' rights in new media, established processes that ultimately allow people with print disabilities to avoid the DMCA's civil and criminal penalties for circumventing so-called digital rights management measures when doing so is necessary to enable use of screen reader and other assistive technologies.

II. Twenty-First Century Communications and Video Accessibility Act (CVAA)

Title I of the CVAA deals with the accessibility of so-called advanced communications services (e.g., electronic messaging, skype, web browsers on mobile phones, etc), expanded hearing aid compatibility, clarification of the use of relay services for speech-to-speech communication, and establishment of a low income deaf-blind equipment distribution program.

Title II of the CVAA requires video description, improved access to emergency broadcast information, expansion of the range of video devices that must allow closed captioning, and the accessibility of so-called set top boxes and video playback and recording devices through audible menus.

Title I builds on the Telecommunications Act of '96 and improves on that older law by requiring that equipment and services must be accessible unless it is not achievable to do so, effectively changing the default from inaccessibility to accessibility.

Beginning October, 2013, consumers can file complaints with the FCC to enforce the Title I accessibility requirements pertaining to advanced communications. In weighing the merits of a complaint, the FCC will apply criteria to assess the provider's capacity to make accessibility happen in the instance that is the subject of the complaint, as well as the extent to which the provider makes accessibility happen across services and product lines.

The FCC will be phasing in the Title II requirements over the next several years. In addition, the FCC may be asked by industry to waive this or that requirement for certain technologies; the FCC has already granted limited waivers in a few narrow instances concerning technologies that bundle advanced communications with gaming devices, IP-enabled TV, and cable boxes.

III. The ADA and DOJ on Information Accessibility

As part of the U.S. Department of Justice's (DOJ's) comprehensive review and revision of the ADA's Title II and Title III regulations, the provisions concerning effective communication were augmented to clarify that communication is only effective when it honors the privacy and independence of the individual with a disability.

The DOJ is exploring additional rulemakings to clarify the ADA's applicability to so-called free standing equipment that state and local governmental entities and public accommodations expect patrons to use. The rulemakings under consideration would also clarify the standards applicable to Internet delivery of programs, goods and services and the extent to which video description and captioning must be offered by movie theatres.

The Target.com and Netflix litigation demonstrate the dynamics currently in play governing how the ADA applies to web accessibility in the absence of additional DOJ rulemaking.

In a recent report, the DOJ cataloged widespread failure on the part of federal agencies to comply with the technology accessibility requirements of Section 508, recommending in part that more federal agencies need to establish formal internal 508 policies and procedures and to engage in validation, assessment of a product's or service's compliance with the 508 standards as a condition of purchase.

IV. Copyright

Pursuant to the DMCA, the Librarian of Congress recently exempted people with disabilities and authorized entities that serve them from civil and criminal penalties for circumventing copyright protection measures when doing so is either necessary to enable screen readers or other AT or when, in the case of authorized entities, such entities are acting in accordance with the Chafee Amendment. This three-year exemption had been previously granted in an inferior form and then withdrawn. The reinstated and improved exemption has dramatic potential for information access, particularly in light of recent litigation.

A recent federal district court ruling in the HathiTrust case concerning the digitization of more than ten million books by Google made available through a university consortium held that the project amounts to a fair use of the literary works in question. The court was particularly impressed by the argument that the ADA's information access obligations may very well confer Chafee-defined authorized entity status on ADA covered entities, meaning that the pool of authorized entities may be profoundly larger than authors and publishers usually contend.

In addition to the DMCA exemption discussed above, the Librarian of Congress also extended protection to entities that circumvent copyright protections built into audio visual works when circumvention is needed to allow such entities to research and develop innovative means for producing captioning or description for people with disabilities.

Internationally, a World Intellectual Property Organization (WIPO) effort is ongoing to settle on provisions of a potential treaty concerning the so-called cross-border sharing of materials for the benefit of people with print disabilities. One of the principal sticking points for copyright owners is that the commercial availability of a given work in this or that specialized format should determine whether authorized entities (or so-called trusted intermediaries in the language of the treaty discussions) would be allowed to distribute the work.

V. What's Missing?

While the ADA and provisions of the Affordable Care Act call for greater accessibility of medical diagnostic equipment, exam tables, etc., what about the accessibility of home health/self-care devices, either prescribed or OTC?

In the absence of any additional rulemaking by DOJ, what about the accessibility of home appliances and consumer electronics not within the jurisdiction of the FCC or some other federal or state regime?

Although the ADA does require effective communication by retail pharmacists who have historically failed to consistently provide prescription drug label access, what possible improvements to drug label accessibility might emerge from the current Access Board proceeding to develop so-called best practices for retail and other pharmacies to use?

What about the accessibility of instructional materials, particularly electronic text and multimedia materials, used in higher education?

What additional legislation and/or regulation may be needed? Does policymaking hurt or help both the free market and the cause of technology/information access?