Legal and Regulatory Update

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Does your website comply with legal requirements for accessibility?

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Received (in revised form): 8 April 2005

Abstract

The founding father of the internet, Tim Berners-Lee, once said: 'The power of the internet is in its universality. Access by everyone regardless of disability is an essential aspect.'

It is almost ten years since the Disability Discrimination Act 1995 (DDA) arrived on the statute books in an attempt to stem the discrimination that many disabled people face on a daily basis.

It simply does not make economic sense for brand owners to ignore this group. For example, according to the Employers Forum on Disability, the estimated purchasing power of people with disabilities is £40–50bn a year.

The intention of Parliament was to protect disabled people in terms of employment; access to goods, facilities and services; the management, buying or renting of land or property; and access to education. Progress in all these areas is at best patchy. According to the Disability Rights Commission (DRC) that polices compliance with the DDA, there is still a long way to go.

Parts of the DDA were enacted in 1996 and other parts have been enacted over the last ten years.

For example, brand owners must not treat disabled people less favourably than other people for a reason related to their disability; they must make reasonable adjustments for disabled people, such as providing extra help or making changes to the way they provide their services; and must make reasonable adjustments to overcome physical barriers to access at their premises.

But there is evidence that the DDA has not made the impact on public websites that was envisaged ten years ago, and therefore the vision of Tim Berners-Lee has yet to become reality for millions of people in the UK.

Increased use of proprietary technologies and failure to follow guidelines when designing websites has meant that large areas of the internet continue to remain inaccessible for many disabled people.

Disability and the web

Computing and disability charity AbilityNet recently criticised UK brand owners for failing to make their websites accessible to people with disabilities. The charity surveyed ten high-profile websites for usability

Keywords: disability, discrimination, law, internet, access, marketers

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and accessibility, and found that none met the needs of visitors with visual problems, dyslexia or physical disabilities that made using the computer mouse difficult.

Key accessibility issues included:

- text size coded in such a way that it cannot be enlarged
- text labels on images missing or uninformative
- use of pictures of text instead of actual text — these cannot be read by screen readers if not labelled correctly
- moving images and flash animations — these distract viewers with a cognitive impairment and make things difficult for people who cannot use a mouse.

Failure of web sites

There are currently around 10 million people with disabilities in the UK, so web content needs to be prepared to allow people with disabilities full access to the information and services available over the internet, extranet or intranet.

And as AbilityNet's survey confirms, because many websites fail to be accessible for disabled users, the net effect is to exclude a significant section of the population from fully benefiting and participating in the increased use of and reliance on e-commerce and e-learning.

Issue of compliance

The DDA falls short in defining in any meaningful way the standards with which one is expected to comply. This is left to two sets of guidelines available on the internet:

Industry guidelines

- World Wide Web Consortium's Web Accessibility Initiative (W3C WAI)
- Web Content Accessibility Guidelines 2.0 (updated July 2004).

From a practical perspective, marketers need to concern themselves with the second item, the latest guidelines for web content accessibility, as this is an area that is constantly evolving.

At their core, the guidelines follow four key principles:

Four principles

- Principle 1: Content must be perceivable.
- Principle 2: Interface elements in the content must be operable.
- Principle 3: Content and controls must be understandable.
- Principle 4: Content must be robust enough to work with current and future technologies.

It then gets more complicated from this point in, as each principle is supported by a total of 14 technical guidelines and three success levels for each guideline!

Fourteen guidelines

The 14 guidelines divide into three categories of success criteria (level 1 is the lowest level of success and level 3 the highest).

Level 1 success criteria are as follows:

Level of success

- Do not specify how information is presented.
- Are reasonably applicable to all websites.
- Some are machine-testable. Others require human judgment. Success criteria that require human testing yield consistent results among multiple testers.

Level 2 success criteria are detailed below:

- May require an author to present content in particular ways.
- Are reasonably applicable to all websites.
- Some are machine-testable. Others require human judgment. Success criteria that require human testing yield consistent results among multiple testers.

Level 3 success criteria are as follows:

- Are additional criteria that go beyond Levels 1 and 2 that may be applied to make sites accessible to more people with all or particular types of disability.

If brand owners comply with these standards, they can promote this fact of conformance on their websites and thereby demonstrate their corporate social responsibility credentials to the rest of the world.

The W3C defines five levels of conformance for Web Content Accessibility Guidelines 2.0:

- In order to make a valid conformance claim for a web resource, the resource must satisfy all Level 1 success criteria for all guidelines.
- A conformance claim of 'WCAG 2.0 Level A' can be made if all Level 1 success criteria for all guidelines have been met.
- A conformance claim of 'WCAG 2.0 A+' can be made if all Level 1 success criteria for all guidelines and some Level 2 success criteria have been met.
- A conformance claim of 'WCAG 2.0 AA' can be made if all Level 1 success criteria and all Level 2 success criteria for all guidelines have been met.
- A conformance claim of 'WCAG 2.0 AAA' can be made if all Level 1, Level 2 and Level 3 success criteria for all guidelines have been met.

Double whammy

In many ways the requirements imposed on marketers under the DDA are a 'double whammy' when read in light of the requirements imposed by the EU Directive on Privacy and Electronic Communication.

Under these EU regulations, the planting of cookies on users' computers and the sending of information all require consent from the recipient in 90 per cent of all cases and an opt-out mechanism for the remaining 10 per cent of instances where there had been existing communication before the regulations came into effect.

EU Directive on Privacy and Electronic Communication

DRC formal investigations

Falling foul of these regulations attracts the attention of the Information Commissioner's Office, which has wide-ranging powers of enforcement and compliance.

In addition, the DRC is empowered by the Disability Rights Commission Act 1999 to conduct a formal investigation for any purpose connected with the performance of its duties under s.2(1) of the 1999 Act.

Those duties include:

- to work towards the elimination of discrimination against disabled persons
- to promote the equalisation of opportunities for disabled persons
- to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons
- to keep under review the working of the DDA 1995 and of the Disability Rights Commission Act 1999.

Investigations by the Information Commissioner and the DRC are not therefore a desirable outcome for marketers. But evidence exists that marketers are running these risks and are oblivious to the sanctions that can be imposed on them.

Research on the issue of accessibility

The DRC published its research last year¹ and reported on the continuing difficulties of many disabled people in booking a holiday, opening a bank account or buying theatre tickets online.

Working with the Centre for Human Computer Interaction Design at London's City University, the DRC looked at a representative sample of 1,000 public websites.

Among these, 100 sites were subjected to in-depth evaluation by a disabled users' group who had a range of impairments. Researchers also canvassed the views of more than 700 businesses that had commissioned websites and nearly 400 website developers.

Over 80 per cent of all public websites failed to meet minimum standards for disabled web access and were not compliant under the terms of the 1995 Act.

The survey also found that the average homepage contains 108 barriers that make it impossible or very difficult for disabled people to use.

The evaluation of 100 websites by the disabled users' group revealed that because of poor accessibility over a quarter of the most routine and straightforward online tasks could not be completed successfully.

Blind people faced the most discrimination. They were unable to perform nearly half the tasks set them despite using devices such as screen readers.

In the same study, the DRC found that levels of accessibility expertise among website developers were low, and only 9 per cent of developers had used disabled people to test their sites.

This would appear to contravene the 1995 Act, which states that it is unlawful for 'a provider of services' to discriminate against a disabled person, and fails to comply with its provisions.

Eighty per cent of all public websites fail to meet disabled web access standards

Breach of DDA 1995

The risk for brand owners is that unless they take heed of research like this, they could face legal challenges in the courts and the negative media coverage that could follow, which also carries a substantial reputational risk.

Solution for marketers?

The report did not name and shame offenders, but revealed a number of websites that were acclaimed for adopting best practice:

Examples of good practice

- egg.com (internet bank)
- oxfam.org.uk (charity)
- sisonline.org (spinal injuries voluntary organisation)
- copac.ac.uk (online catalogues of research libraries)
- whoohoo.co.uk (comedy dialect translator).

Cranfield University

Dr Phil Nobles of the Information Systems Department at Cranfield University, Shrivenham, Oxfordshire, adds that web designers must consider users of assistive technologies (such as screen readers, speech recognition, touchscreens, switches, modified mice etc) in the building of websites if they are to comply with legal requirements for accessibility.

‘Tools that help design and validate for accessibility are already available, including online checkers (such as Bobby). Even something as simple as viewing your site design in a text-based browser, such as Lynx, gives an indication of how difficult your site is to interpret for someone with a visual impairment or disability. In the short term, web developers could create an alternative version of the website, in much the same way that low bandwidth, text-only and mobile-user versions are already created.’

At a minimum, marketers who commission websites must ensure that the designers are familiar with designing for accessibility and follow the W3C WAI guidelines.

Practical measures

Dr Nobles recommends the following minimum steps for good design:

- text alternatives for all non-text content (eg ALT text for all images)
- include an audio description of information in multimedia videos
- include alternatives for scripted elements
- clearly identify the targets of links.

‘Many of the accessibility guidelines are simply examples of good practice that make a site easier to navigate for all users, with little or no effect on the visual impact of the site,’ concludes Dr Nobles.

So marketers need to get surfing in order to ensure that they are up to date with current design best practice which takes account of these accessibility issues if they are to stay on the right side of the law.

Useful resources available on the internet

- World Wide Web Consortium’s Web Accessibility Initiative (W3C WAI), www.w3.org.

- AbilityNet, www.abilitynet.org.uk/content/home.htm.
- 'Engineering the dis out of disability: IT — The universal enabler', lecture by David Livermore, www.iee.org/events/kelvin.cfm.
- Disability Rights Commission, www.drc-gb.org/.
- RNIB Web Access Centre, www.rnib.org.uk/xpedio/groups/public/documents/code/public_rnib008789.hcsp.
- RNIB — The legal requirement for web accessibility, www.rnib.org.uk/xpedio/groups/public/documents/PublicWebsite/public_legalcase.hcsp. The site refers to the case brought against the Sydney Olympics Committee in Australia in 2000. This resulted in a landmark decision against the website owners, requiring them to pay A\$20,000. In his judgment, Judge Hon. William Carter QC said:

'This response, I am satisfied, was very hurtful for him; the suggestion that he enlist the aid of a sighted person to assist him was wholly inconsistent with his own expectations and what he himself, unaided, had been able to achieve, both at university level and in business, in spite of his disability.

'To dismiss him and to continue to be dismissive of him was not only hurtful, he was also made to feel, I am satisfied, various emotions including those of anger and rejection by a significant statutory agent within the community of which he himself was a part.'²

No legal action has been taken to date in the UK, so there is no case law on the subject.

- RNIB — Business benefits, www.rnib.org.uk/xpedio/groups/public/documents/PublicWebsite/public_businesscase.hcsp.
- The Guild of Accessible Web Designers, www.gawds.org/.
- Bobby online accessibility checker, <http://bobby.watchfire.com/>.
- Macromedia, www.macromedia.com/macromedia/accessibility/.
- Microsoft Frontpage, www.microsoft.com/office/frontpage/prodinfo/accessibility.mspx.
- AccVerify SE DS2 for Frontpage software, www.hisoftware.com/msacc/.
- Employers' Forum on Disability, www.employers-forum.co.uk/.
- University of Wisconsin Trace Center, <http://trace.wisc.edu/world/web/>.
- *Washington Post*, 'You'd think they'd learn: Bad design kills websites', www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A48167-2001Oct24¬Found=true.
- Jakob Nielsen's website, www.useit.com/.
- BBC, 'How well can you use the web?', <http://news.bbc.co.uk/2/hi/technology/3578149.stm>.
- BBC, 'A web open to all?', <http://news.bbc.co.uk/1/hi/technology/3629599.stm>.

References

1. Disability Rights Commission (2004) Research results, available at www.drc-gb.org/publicationsandreports/report.asp.
2. www.tomw.net.au/2001/bat2001/html.