

# THE POTENTIAL ROLE OF US CONSUMER PROTECTION LAWS IN IMPROVING DIGITAL ACCESSIBILITY FOR PEOPLE WITH DISABILITIES

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## INTRODUCTION

People with disabilities need equal access to digital content to participate fully in many aspects of personal, professional, and civic life. Online education, news, entertainment, shopping, job listings, social networking, employment, online dating, and e-government all require accessibility to websites. With assistive technologies, which typically are alternate forms of input or output, people with disabilities can theoretically have equal access to these online resources. But too often, access is denied. People who are Deaf or Hard of Hearing are frustrated by video without captions, and audio without transcripts. Blind users are blocked from accessing websites that are

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incompatible with screen reader software; web forms and search tools often are inaccessible. Smartphone apps often lack accessibility features. People with disabilities thus face barriers that exclude them from full participation in digital content and technology.

The Web Content Accessibility Guidelines (WCAG), a set of technical standards that define best practices for website accessibility (and digital accessibility in general), were introduced in 1999 by the Web Accessibility Initiative of the World Wide Web Consortium, the main international standards organization for the Internet. If every website and app adhered to the approaches described by WCAG, all of the barriers cited above would disappear. WCAG is not prescriptive, and provides for flexibility and innovation while ensuring equal access. Unfortunately, a technical standard by itself is not enforceable under U.S. law, unless a law or regulation specifically cites the technical standard as a legal requirement. Technical standards represent only one piece of the puzzle. The Human-Computer Interaction (HCI)<sup>1</sup> community has developed an extensive set of inclusive design and evaluation methods such as usability testing, expert inspection, and automated testing. Despite having all of these guidelines, standards, and design/evaluation tools, much of the digital content and technology remains inaccessible to people with disabilities. Because voluntary conformance to WCAG has been so poor, advocates have employed U.S. law to require equal access to digital content and technology for people with disabilities. Four areas of law, as described in the next section, have been invoked in this effort. This article presents the idea that a fifth area of law, consumer protection law, could be utilized by disability rights activists to improve accessibility in consumer-related situations. A legal framework for how consumer protection statutes, regulations, and case law could be applied to improve accessibility online for people with disabilities, will be presented in this paper.

## I. EXISTING AREAS OF LAW UTILIZED FOR ICT ACCESSIBILITY

### *A. Disability Rights and Civil Rights Law*

Disability and civil rights laws, including the Americans with Disabilities Act (ADA), and Sections 504 and 508 of the Rehabilitation Act, have been used to improve online access for people with disabilities. Title II of the ADA relates primarily to state and local government<sup>2</sup>, and Title III relates to public accommodations.<sup>3</sup> Regulatory processes that describe specific requirements for websites under Title II and III of the ADA have been ongoing since 2010, although the regulatory process has recently been declared inactive. Section 504 of the Rehabilitation Act covers entities that receive Federal funds, and Section 508 of the Rehabilitation Act requires that Federal agencies, when they “develop, procure, maintain, or use” information and communications technologies

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<sup>1</sup> Human-computer interaction is a field, rooted in disciplines such as computer science, psychology, and sociology, that focuses on studying and improving the use of interactive computing systems by humans. The field is much broader than just focusing on input/output devices and screen design, also including user-centered design methods, user experience, emotion, communication, persuasion, creativity, user diversity, and computer-supported cooperative work. The field of HCI is represented by two large professional organizations, ACM SIGCHI (the Special Interest Group on Computer-Human Interaction), and UXPA (the User Experience Professionals Association). In general, SIGCHI focuses more on researchers and UXPA focuses more on practitioners.

<sup>2</sup> See 42 U.S.C. § 12101 (2008).

<sup>3</sup> *Id.*

(ICT), ensure that it is accessible for people with disabilities.<sup>4</sup> The civil rights divisions of the U.S. Department of Justice and the U.S. Department of Education, respectively, have been enforcing the ADA and Section 504, while the U.S. Access Board has been managing (but not enforcing) Section 508.<sup>5</sup> These disability rights laws are the legal tools primarily utilized by disability advocates in their efforts to make digital content and technology accessible.

Section 508 of the Rehabilitation Act, with regulations in effect since 2001, provides specific technical details of the requirements for accessibility. The updated Section 508 regulations were issued in a final rule in January 2017, providing clarity in the requirements.<sup>6</sup> The updated Section 508 regulations utilize the Web Content Accessibility Guidelines version 2.0. This is an international technical standard, created by the Web Accessibility Initiative through a multi-year process involving many stakeholders, including companies, computer scientists, researchers, and policymakers.<sup>7</sup> The WCAG 2.0 is often used in legal settlements negotiated by the Department of Justice and Department of Education, and is also utilized by governments around the world that have laws requiring accessibility to digital content and technology.<sup>8</sup>

One of the challenges of utilizing the ADA for enforcing accessibility is that while the legal coverage includes digital technology and content, the associated regulations do not yet mention either digital technology or content. The U.S. Department of Justice first stated publicly in 1996 that the protections of the ADA do apply to web sites as a part of the effective communication requirement,<sup>9</sup> a position that the DOJ confirmed as recently as September 2018.<sup>10</sup> The DOJ has also been involved in a number of lawsuits and enforcement actions related to ADA requirements for accessible digital content and technology. The DOJ, in a statement of interest in *New v. Lucky Brand Dungarees Store, Inc.*, clarified that even when an accessibility standard has not been defined yet for a particular technology, the general ADA requirements of equal access under Title III (Public Accommodations) still apply, as the ADA cannot predict, in advance, every potential technology that could be utilized in a public accommodation.<sup>11</sup>

This situation—the ADA applying to digital content and technology, but the regulations not yet defining a technical standard or specific thresholds of coverage—has led to confusion on multiple fronts. Consequently, defendants in recent cases related to web accessibility are now making a dual argument for a motion to dismiss. First, defendants claim that plaintiffs cannot request compliance with a technical standard such as the WCAG (which is not cited in the ADA regulations) because that would violate due process, and second, defendants claim that due to the primary jurisdiction doctrine, DOJ, which has responsibility for the regulatory process, is the

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<sup>4</sup> 29 U.S.C. § 794 (d) (2015).

<sup>5</sup> JONATHAN LAZAR, DANIEL GOLDSTEIN, & ANNE TAYLOR, *Ensuring Digital Accessibility Through Process and Policy*, 29 (2015).

<sup>6</sup> 82 Fed. Reg. 5790 (Jan. 18, 2017) (codified at 36 C.F.R. pt. 1193 and 36 C.F.R. pt. 1194).

<sup>7</sup> JONATHAN LAZAR ET AL., *supra* note 5, at 76.

<sup>8</sup> *Id.* at 195, 125–131.

<sup>9</sup> Letter from Assistant Att’y Gen. Deval Patrick to Sen. Tom Harkin (Sep. 9, 1996) available at [http://www.justice.gov/crt/foia/readingroom/frequent\\_requests/ada\\_tal/tal712.txt](http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt) [<https://perma.cc/D5NT-V5RC>].

<sup>10</sup> Letter from Assistant Att’y Gen. Stephen Boyd to Hon. Ted Budd (Sept. 25, 2018) available at <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf> [<https://perma.cc/45A6-8XLL>].

<sup>11</sup> *Statement of Int. of the USA, New v. Lucky Brand Dungarees Store, Inc. (S.D. Fla.) (14-cv-20574)*, available at [http://www.ada.gov/briefs/lucky\\_brand\\_soi.pdf](http://www.ada.gov/briefs/lucky_brand_soi.pdf) [<https://perma.cc/R2XS-5DHU>].

appropriate administrative body to adjudicate this claim, instead of the courts.<sup>12</sup> In general, courts have rejected this dual claim, except in one case, *Robles v. Dominos Pizza LLC*, which was subsequently reversed on appeal at the Ninth Circuit.<sup>13</sup>

While disability advocates have generally been successful in their ADA lawsuits related to web accessibility, there is currently a circuit split on one aspect of the applicable law. While some circuits require a nexus between a physical store (which would be covered under Title III as a public accommodation), and a web site (which is a service of the physical store), other circuits say that a consumer web site, by itself, counts as a public accommodation<sup>14</sup>. Given that the regulatory process for web site accessibility under Titles II and III of the ADA has now been declared inactive, the judicial branch is currently the most active venue for advocating for increased accessibility of digital content under the ADA.

### B. Human Rights Law

Human rights law includes human rights statutes, and international treaties such as the U.N. Convention on the Rights of Persons with Disabilities (CRPD), which specifically mentions accessible technology. Typically, human rights statutes are used more outside the U.S. than in the US, where disability rights and civil rights are the preferred legal approaches for improving access. Two articles of the U.N. Convention on the Rights of Persons with Disabilities (CRPD), articles 9 and 21, specifically focus on accessible information and communications technologies (ICT).<sup>15</sup> Article 9 of the CRPD calls upon countries to “[p]romote access for persons with disabilities to new information and communications technologies and systems, including the Internet” and Article 21 encourages countries to “[provide] information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities.”<sup>16</sup> Other articles of the CRPD, such as Article 22 (Privacy), Article 24 (Education), and Article 30 (Cultural Life, Recreation, Leisure, and Sport) may also have implications for ICT accessibility.<sup>17</sup> While the United States has signed the CRPD, it has not yet ratified the treaty (as 175 countries have)<sup>18</sup>, although it continues to influence discussions in the disability community. It is important to note that some local municipalities do have human rights protections, such as the Philadelphia Fair Practices Ordinance, which covers disability.<sup>19</sup> However, there is no evidence that local human rights statutes have been used to promote ICT accessibility.

<sup>12</sup> *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 401 (E.D.N.Y. 2017).

<sup>13</sup> *Robles v. Dominos Pizza LLC*, No. CV 16-06599, 2017 U.S. Dist. LEXIS 53133 (C. D. Cal. Mar. 20, 2017), *reversed and remanded by Robles v. Domino’s Pizza, LLC*, No. 17-55504, 2019 U.S. App. LEXIS 1292 (9th Cir. Jan. 15, 2019).

<sup>14</sup> *See Andrews*, 268 F. Supp. 3d at 388–93 (describing circuit split between Third, Sixth, Ninth and Eleventh Circuit precedent and First and Seventh Circuit precedent).

<sup>15</sup> G.A. Res. 61/106, at 8–12 (Jan. 24, 2007).

<sup>16</sup> *Id.* at 9, 12.

<sup>17</sup> JONATHAN LAZAR & MICHAEL STEIN, *Disability, Human Rights, and Information Technology*, 150 (2017).

<sup>18</sup> U.N., *CRPD and Optional Protocol Signatures and Ratifications*, available at <http://www.un.org/disabilities/documents/maps/enablemap.jpg> [https://perma.cc/9UBW-5T83].

<sup>19</sup> Philadelphia Commission on Human Relations, *The Philadelphia Fair Practices Ordinance: Prohibitions Against Unlawful Discrimination* (Nov. 6, 2018), [http://www.phila.gov/HumanRelations/PDF/FPO%20Ch9-1100%209-2016\\_%20nc.pdf](http://www.phila.gov/HumanRelations/PDF/FPO%20Ch9-1100%209-2016_%20nc.pdf) [https://perma.cc/4S8L-S868].

### C. Intellectual Property Law

Intellectual property law is often used to provide exceptions to copyright requirements to allow non-profit entities to transform content, such as printed books, into more accessible formats, which are usually digital. For instance, the Chafee Amendment to the U.S. Copyright Act,<sup>20</sup> provides an exception to copyright to allow for copying and transformation (primarily converting printed books into digital formats), when the materials are produced in a format specifically for, and only for use by, people with print-related disabilities (such as people who are Blind, have learning disabilities, or have trouble physically handling printed materials). This exception only applies to authorized entities, such as the Library for the Blind and Physically Handicapped, and non-profit organizations such as Bookshare, which have a stated mission of providing specialized services to people with print disabilities.<sup>21</sup> In the landmark *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) case, the Second Circuit upheld a lower court ruling protecting the rights of a coalition of university libraries (HathiTrust), under fair use, to digitize books to allow for the creation of a full-text database to assist in searching, which at the same time, also served the rights of patrons with print disabilities under the Chafee Amendment.<sup>22</sup>

Another important legal instrument within Intellectual Property law is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. It is a copyright treaty administered by the World Intellectual Property Organization (WIPO), adopted in 2013, ratified by twenty countries by 2016, and now in force in forty-five countries.<sup>23</sup> Two key provisions of the treaty are that contracting parties must have an exception in their national copyright law, for the transformation of copyrightable materials into formats that are accessible for people with print disabilities (similar to the Chafee Amendment), and that contracting parties must allow for cross-border flows of accessible formats.<sup>24</sup> The United States recently ratified the Marrakesh Treaty,<sup>25</sup> and according to WIPO it will be in force in the USA on May 8, 2019.<sup>26</sup>

### D. Telecommunications Law

Telecommunications laws include the Telecommunications Act and the Twenty-First Century Communications and Video Accessibility Act (CVAA). Many of the disability rights laws cover purchasers of technologies, like when a covered entity (e.g. state or local government, or a university) purchases software. However, the CVAA covers the actual manufacturers of

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<sup>20</sup> 17 U.S.C.S. § 121.

<sup>21</sup> *Id.*

<sup>22</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014).

<sup>23</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled*, June 26, 2013. See also, WIPO, *Marrakesh VIP Treaty Contracting Parties*, [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) [<https://perma.cc/G3QF-WVL2>].

<sup>24</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled*, art. 4–5, June 26, 2013.

<sup>25</sup> *Marrakesh Treaty Implementation Act*, Pub. L. No. 115-261, 132 Stat. 3667, (2018).

<sup>26</sup> Krista Cox, *ARL Celebrates President Trump's Signing of the Marrakesh Treaty Implementation Act, Urges Administration to Complete Implementation*, ASS'N RES. LIBR. (Oct. 10, 2018), <https://www.arl.org/news/arl-news/4646-arl-celebrates-president-trumps-signing-of-the-marrakesh-treaty-implementation-act-urges-administration-to-complete-implementation#.W9cn2ScpCqA> [<https://perma.cc/EVQ3-93BE>].

communications devices and telecommunication service providers.<sup>27</sup> The CVAA, one of the newest laws related to disability and technology, modified the Communications Act of 1934, and also added five new sections, Sections 715-719, to be enforced by the Federal Communications Commission (FCC).<sup>28</sup>

These telecommunications laws require, *inter alia*, that telecommunications manufacturers ensure that advanced communications devices such as smart phones, and services such as VoIP, must be accessible for people with disabilities. Under the CVAA, e-book reader devices, which have wi-fi, are classified as telecommunications devices. The Coalition of E-reader Manufacturers asked for a waiver from the FCC, stating that e-reader devices are primarily used to read, not to communicate, and waivers from the accessibility requirements of the CVAA have now been granted multiple times.<sup>29</sup> Similar FCC waivers have also been provided to manufacturers of gaming devices, so it is unclear if the CVAA will be an effective law for advocating for the accessibility of digital technologies over time.

## II. THE POTENTIAL OF CONSUMER PROTECTION LAW

### *A. The Consumer Power of People with Disabilities*

Companies and organizations often do not view people with disabilities as consumers. They view helping people with disabilities as a charitable action, rather than a good business decision. However, people with disabilities are a large potential market. In the United States, the most recent estimate is that 12.6% of the population has a disability.<sup>30</sup> Perhaps part of the misconception of the consumer power of people with disabilities is due to the fact that the employment rate for people with disabilities is often lower than for the general population. In adults aged 18-64, the most recent estimate is that 34.9% of people with disabilities are employed, compared to 76.0% of people without disabilities.<sup>31</sup> This statistic can be misleading, however, because for those who have the disabilities most impacted by inaccessible technologies, the employment rate is higher. The employment rate is 51% for hearing impairments and 41.8% for visual impairments, with no nationally collected statistics reported for people with motor impairments that would impact their computer usage.<sup>32</sup> Of U.S. households, 35% have at least one member with a disability, and consumers with disabilities spend on average more money per shopping trip, and have more shopping trips per year, compared to consumers without disabilities.<sup>33</sup> In addition, consumers with disabilities tend to spend more than consumers without disabilities in certain categories (e.g. medication, pet food and care, prepared foods, and baked goods).<sup>34</sup> Clearly,

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<sup>27</sup> JONATHAN LAZAR ET AL., ENSURING DIGITAL ACCESSIBILITY THROUGH PROCESS AND POLICY 151 (2015) (EBOOK).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 152-53.

<sup>30</sup> INST. ON DISABILITY, UNIV. OF N.H., 2016 DISABILITY STATISTICS ANNUAL REPORT, 5 (2017), [https://disabilitycompendium.org/sites/default/files/user-uploads/2016\\_AnnualReport.pdf](https://disabilitycompendium.org/sites/default/files/user-uploads/2016_AnnualReport.pdf) [<https://perma.cc/N6DK-REUR>].

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.* at 18.

<sup>33</sup> NIELSEN, REACHING PREVALENT, DIVERSE CONSUMERS WITH DISABILITIES 8, 12 (2016), <http://www.nielson.com/content/dam/corporate/us/en/reports-downloads/2016-reports/reaching-prevalent-diverse-consumers-with-disabilities.pdf> [<https://perma.cc/KMU7-78TJ>].

<sup>34</sup> *Id.* at 10.

there is a great opportunity for businesses to access the market of consumers with disabilities. In addition to increased sales, there is a potential that consumers with disabilities could inform companies to potential innovations, new product lines, and new business opportunities.

Despite the potential revenue, companies in the past have not considered the needs of their consumers with disabilities. Even after the passage of the Americans with Disabilities Act in the early 1990s, companies were not removing the physical barriers that existed for those with mobility impairments to physically have access to a store.<sup>35</sup> Often, businesses will cite the costs of making their physical locations, their buildings, accessible to people with mobility impairments or costs of making physical modifications such as adding Braille. So while most companies will not say outright that they do not want people with disabilities as their customers, companies frequently do not make the accommodations necessary for the people with disabilities to become their customers. Only in rare circumstances would businesses outright say that they are hostile to the idea of having consumers with disabilities. For instance, in one case, upon learning that a potential customer had AIDS (which is a disability as defined by the Americans with Disabilities Act), a car dealership decided that it did not want that individual as a customer.<sup>36</sup>

### *B. Examples of Consumer Discrimination*

Consumer discrimination is not a new concept, and people with disabilities are certainly not the first to experience it. More than a half-century since the passage of the Civil Rights Act of 1964, there are many current examples from case law of African-Americans being treated unequally as consumers. Discriminatory tactics include: charging higher prices<sup>37</sup>, demanding alternative methods of payment (e.g. being asked to prepay for gas when Caucasians were not required to),<sup>38</sup> providing unequal delivery options,<sup>39</sup> and questioning one's ability to pay or altogether refusing service.<sup>40</sup> Based on a history of being treated negatively by sales staff at stores, African-Americans sometimes avoid physical stores to avoid discrimination, preferring catalogs, mail orders, or internet sales.<sup>41</sup> While African-Americans can utilize the Civil Rights Act of 1964 for redressing unequal treatment as a consumer, people with disabilities are not a protected class under that law. People with disabilities instead would tend to use the ADA, which is structurally (but not substantively) based primarily on the Civil Rights Act of 1964.<sup>42</sup>

While there are still cases today that focus on physical access to public accommodations, websites did not exist when the ADA was enacted in 1990. A large percentage of websites are for e-commerce. These websites are usually business-to-consumer, although there are other types of e-

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<sup>35</sup> See Michael Petkovich, *Consumer Rights Under the Americans with Disabilities Act*, 4 LOY. CONSUMER L. REV. 44, 48 (1992).

<sup>36</sup> Plumley v. Landmark Chevrolet, 122 F.3d 308, 310 (5th Cir. 1997).

<sup>37</sup> See Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 869-70 (N.D. Ohio 2000); see generally Kathryn Graddy, *Do Fast-Food Chains Price Discriminate on the Race and Income Characteristics of an Area?* 15 J. BUS. & ECON. STAT., 391 (1997) (concluding that fast food restaurants charge more in black neighborhoods).

<sup>38</sup> See Blanchard v. Speedway Superamerica, LLC, 222 F.R.D. 353, 353-54 (N.D. Ill. 2004).

<sup>39</sup> See Arnett v. Domino's Pizza I, LLC, 124 S.W.3d 529, 534-37 (Tenn. Ct. App. 2003).

<sup>40</sup> See Green v. Dillard's, Inc., 483 F.3d 533, 538-39 (8th Cir. 2007).

<sup>41</sup> See Deseriee Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 284-85 (2001).

<sup>42</sup> Robert Dinerstein, *The Americans with Disabilities Act of 1990: Progeny of the Civil Rights Act of 1964*, 31 HUM. RTS. 10, 10 (2004).

commerce sites (e.g. consumer-to-consumer sites such as eBay). People with disabilities like shopping online for many of the same reasons as any other users: websites have a larger selection of items and sizes; consumers save time by not visiting a store; and prices online are often less expensive than in-store. In some cases, shopping online is the precursor to shopping in a physical store, allowing for planning and determining what is in stock. This idea relates to the “nexus” requirement between a website and a physical store in some circuits.

In several well-publicized cases, people with disabilities have filed lawsuits demanding that retailers with websites make those sites accessible. In 2006, a blind individual along with advocacy groups for blind individuals sued Target, requesting that Target make its website accessible so that the individuals could shop online and use the website to plan ahead for their trips to physical Target stores.<sup>43</sup>

After a number of court victories by the blind plaintiffs, Target settled out of court and made their web site accessible.<sup>44</sup> In another case, Peapod, a large grocery delivery company, only made their website and mobile app accessible to potential consumers with disabilities after being forced to do so by the U.S. Department of Justice.<sup>45</sup> These two examples are a part of a long string of cases involving disability advocates attempting to force businesses to make their primarily consumer-oriented websites accessible.<sup>46</sup>

Similarly to how companies have often overlooked the role of people with disabilities as consumers, consumer protection laws have been overlooked by disability advocates as an avenue to improve accessibility for people with disabilities. In the next section, three scenarios are presented that describe discriminatory situations that people with disabilities face as consumers online. It is important to note that scenario 1 is caused by inaccessible websites. In scenarios 2 and 3, however, the websites providing the products or services may be fully accessible, even though the products and services themselves may not be.

#### Scenario 1: Higher prices because an individual has a disability.

Imagine that someone with a disability is interacting with a website. The website detects that they are using a form of assistive technology, and therefore most likely have a disability. In response, the website automatically raises the prices of its goods. Although technically feasible,<sup>47</sup> most people would be able to immediately identify that the price increase would be an illegal form of discrimination. Modifying pricing based on demand (e.g. charging higher prices for roses on

<sup>43</sup> Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006).

<sup>44</sup> Nat’l Fed’n of the Blind v. Target Corp., 2009 U.S. Dist. LEXIS 67139, at \*19 (N.D. Cal. Aug. 3, 2009).

<sup>45</sup> U.S. DEP’T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND AHOLD U.S.A., INC. AND PEAPOD, LLC, at 5 (Nov. 17, 2014) <https://www.justice.gov/file/163956/download> [<https://perma.cc/GV9X-9B2S>].

<sup>46</sup> See, e.g., Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340 (S.D. Fla. 2017); Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381 (E.D.N.Y. 2017); Access Now, Inc. v. Blue Apron, LLC, Civil No. 17-cv-116-JL, 2017 U.S. Dist. LEXIS 185112 (D.N.H. Nov. 8, 2017).

<sup>47</sup> Kendria Alt, *Browser Enhancer Detection by Employers and Insurance Companies*. 10 J. ON TELECOMM. & HIGH TECH. L., 445, 464 (2012); JONATHAN LAZAR & MICHAEL STEIN, *DISABILITY, HUMAN RIGHTS, AND INFORMATION TECHNOLOGY* 199-211 (2017).

Valentine's Day or higher prices for a subway or taxi during rush hour) is completely legal and expected. However, a company cannot charge someone more money for the same service based solely on being in a protected class (e.g. based on race, gender, religion, or disability). Determining that someone has a disability and then raising the price compared to others for the same service would clearly be a violation.<sup>48</sup>

People with disabilities, however, frequently do get charged a higher price for the same service, simply because they have a disability. If an e-commerce web site is not accessible, but has lower prices than the physical store, and an individual with a disability must instead use alternate means to access commerce, they may then wind up paying a higher price for the same goods or services.

A basic example is presented in *Andrews v. Blick Art Materials*. In that case, a blind individual was unable to use coupons and receive discounts that were available on the inaccessible website and could be utilized by customers without visual impairment.<sup>49</sup> Furthermore, the same coupons and discounts were not available in the physical stores.<sup>50</sup> The individual with a disability lost the opportunity to get the lower prices available exclusively online, a situation that occurs on a frequent basis when there are websites representing physical stores and the lowest prices are only available via the web site.<sup>51</sup>

Another example of potential pricing discrimination is in the airline industry. If an individual is blind and the airline website is inaccessible, that individual will call an airline on the phone and may get a message saying that "lower fares are available on our website." To make matters worse, not only might the individual be charged a higher airfare, but the individual might be charged a "call center fee" on top of that. Two previously published studies document that when airline websites are inaccessible and blind individuals are forced to contact an airline call center instead, prices (including fares and call center fees) are frequently higher, as frequently as 40% of the time for one airline.<sup>52</sup> Furthermore, having to use alternative means to contact an airline (or other consumer provider) and describe why the web site or technology does not work requires that an individual identify openly that they have a disability which may lead to any of the forms of consumer discrimination described earlier.<sup>53</sup> If that seems like a remote chance, in the study on pricing discrimination, when individuals called airlines and identified as being blind, one call center employee said, "I feel bad for you. That's sad," and another call center employee spoke slowly and loudly, as if the blind person was unable to understand.<sup>54</sup> When a customer, due to an inaccessible web site, is forced to identify themselves as having a disability, it can lead to forms of inappropriate treatment or even outright discrimination.

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<sup>48</sup> 28 C.F.R. § 36.302(c)(8) (2016).

<sup>49</sup> *Andrews*, 268 F. Supp. 3d at 386.

<sup>50</sup> *Id.*

<sup>51</sup> Jonathan Lazar et al., *Potential Pricing Discrimination Due to Inaccessible Web Sites*, 6946 LECTURE NOTES COMPUTER SCI. 108 (2011).

<sup>52</sup> Jonathan Lazar et al., *Up in the Air: Are Airlines Following the New DOT Rules on Equal Pricing for People with Disabilities When Websites Are Inaccessible?*, 27 GOV'T INFO. Q., 335 (2010); Jonathan Lazar et al. *Still Up in the Air: Government Regulation of Airline Websites and Continuing Price Inequality for Persons with Disabilities Online*, 13 ANN. INT'L CONF. DIGITAL GOV'T RES. 240, 242 (2012).

<sup>53</sup> Jonathan Lazar et al., *Potential Pricing Discrimination Due to Inaccessible Web Sites*, 6946 LECTURE NOTES COMPUTER SCI. 108 (2011).

<sup>54</sup> Jonathan Lazar et al., *Up in the Air: Are Airlines Following the New DOT Rules on Equal Pricing for People with Disabilities When Websites Are Inaccessible?*, 27 GOV'T INFO. Q., 334-35 (2010).

A third, and newer, form of pricing discrimination (not related to web site accessibility) occurs by trying to charge someone more due to the presence of their service animal. While most companies are aware that this is clearly an illegal practice<sup>55</sup>, some individuals who rent out their homes via sharing services (e.g. Airbnb) have attempted to charge renters with service animals higher costs.<sup>56</sup> Charging a cleaning fee to a consumer simply because they have a service animal violates the ADA and certainly violates Airbnb's own policies.<sup>57</sup> If, however, the service animal causes damages, then if the company's policy is to charge for animals that do damage, under the ADA, the consumer with a disability can be charged for damages (but not simply for cleaning).

Scenario 2: An individual does not know if the Software/App that they are purchasing is accessible.

Imagine that an individual is interested in purchasing an item of clothing but the web site does not provide information of what size in which the item is available. Would a rational person purchase the item of clothing without knowing what size it was? That scenario seems outlandish. However, not knowing whether an item to be purchased is appropriate and useful for a consumer is a frequent occurrence for people with disabilities purchasing apps online. "App stores," such as those provided by Apple and Google, are where people can pay small amounts of money to download a new software application for their smartphone, tablet, or computer, and which epitomize this scenario.

None of the main app stores currently have a mechanism to indicate which applications are designed to be accessible and which are not. If an individual has a disability, it is often necessary to purchase an application without knowing, up-front, whether it will be compatible with the individual's assistive technology. Some internet bloggers go as far as to assert that all apps should be tested for accessibility before being released in the app store.<sup>58</sup> The National Federation of the Blind also passed a resolution at its national conference in 2014, calling for Apple to require all apps in the app store to be accessible, stating, "Apple Inc. is not reluctant to place requirements and prohibitions on application developers, but has not seen fit to require that applications be accessible to VoiceOver users."<sup>59</sup> Providing *information* about the accessibility of an app is where the consumer protection angle comes into play, not requiring that all apps be accessible. The latter would likely be a requirement under disability rights law, not consumer protection law. It seems almost misleading not to provide information to potential consumers of apps about whether or not the app will be accessible for them. Furthermore, there are a number of logistical challenges to requiring all apps to be accessible before being released in the app store. For example, Apple would not have the time to test millions of apps for accessibility, so they would rely on individuals who likely know very little about accessibility testing to self-report the accessibility testing results of

<sup>55</sup> 28 C.F.R. § 36.302(c)(8) (2016).

<sup>56</sup> Mason Ameri et al., *No Room at the Inn? Disability Access in the New Sharing Economy*, 5 ACAD. MGMT. DISCOVERIES (forthcoming 2019).

<sup>57</sup> *Id.*

<sup>58</sup> See blinky321, *Apps Should Not Be Released in the App Store Without Being Tested for Accessibility*, AV APPLEVIS, (Dec. 9, 2012), <https://www.applevis.com/forum/accessibility-advocacy/apps-should-not-be-released-app-store-without-being-tested> [<https://perma.cc/GX2H-JK4U>].

<sup>59</sup> *Resolution 2014-12: Regarding Policies, Standards, and Procedures to Ensure and Maintain Accessibility of Apple Inc. Apps*, NAT'L FED'N BLIND, at 11 (July 5, 2014) <https://nfb.org/images/nfb/documents/word/passedresolutions2014.doc> [<https://perma.cc/S3U9-BCXN>].

their app. This would likely lead to very misleading and incorrect results (and perhaps the tort of innocent misrepresentation).

Scenario 3: An individual does not know if the service that is being purchased online is accessible.

The third scenario is similar to the second one in which a consumer with a disability does not know in advance if the software application they want to purchase is accessible. Instead of purchasing software, the third scenario involves purchasing non-technical items via websites while being unaware whether or not the items are accessible.

People with physical and mobility disabilities, like any other users, like the convenience of making travel and transportation arrangements online, where the prices are often lower for services such as hotel rooms. While the website may be accessible to an individual who is a wheelchair user and is not using any form of alternate input/output device, the travel website does not indicate whether the room that is being booked is accessible, or whether the hotel itself has accessibility features built-in (e.g. are the public areas of the hotel accessible?).

The sharing economy, involving companies such as Airbnb, Uber, and Lyft, creates new challenging issues for accessibility. An individual with a disability may not know accurately in advance if the home or car to be utilized is actually accessible. A recent research article documents that Airbnb hosts treated consumers with disabilities differently, being less likely to preapprove and more likely to reject them.<sup>60</sup> Meanwhile, after drivers had refused to pick up Blind individuals with service dogs, Uber was sued by the National Federation of the Blind of California.<sup>61</sup> Uber stated that they were not a public accommodation subject to Title III of the ADA, which the DOJ disagreed with, stating “even if Defendants were not covered as a public accommodation under § 12182, they still could be covered as a transportation service provider under § 12184.”<sup>62</sup> The case settled prior to trial.<sup>63</sup>

While the Uber case focused on refusing to serve consumers with disabilities (a violation of the ADA), one can imagine a similar case where it is not clear whether the cars being utilized by Lyft or Uber, or the homes being rented out by AirBnB, are wheelchair-accessible (which could violate consumer protection laws of being required to purchase without having all of the relevant information). Unlike a corporate chain, which may have clear standards for marking a hotel or conference center as wheelchair-accessible, AirBnB relies upon an owner’s descriptions, which may or may not be accurate.<sup>64</sup> So, the consumer with a disability is placed into the same challenge as in scenario number two: being forced to make a purchase decision before knowing if the service will be useful and accessible to them.

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<sup>60</sup> Mason Ameri et al., *No Room at the Inn? Disability Access in the New Sharing Economy*, 5 ACAD. MGMT. DISCOVERIES (forthcoming 2019).

<sup>61</sup> Nat’l Fedn. of the Blind of Cal. v. Uber Techs., Inc., 103 F. Supp. 3d 1073, 1077 (N.D. Cal., 2015).

<sup>62</sup> U.S. Department of Justice, *Statement of Interest of the USA in Nat’l Fedn. of the Blind of Cal. v. Uber Techs.* (Feb. 5, 2015), [https://www.ada.gov/briefs/uber\\_soi.pdf](https://www.ada.gov/briefs/uber_soi.pdf) [<https://perma.cc/2VC3-VESG>].

<sup>63</sup> Settlement Agreement and Release, *NFB of California vs. Uber Technologies, Inc.* (Nov. 6, 2018), [https://dralegal.org/wp-content/uploads/2016/07/Settlement\\_Agreement\\_Executed\\_w\\_Addenda.pdf](https://dralegal.org/wp-content/uploads/2016/07/Settlement_Agreement_Executed_w_Addenda.pdf) [<https://perma.cc/LLQ7-DC5E>].

<sup>64</sup> Mason Ameri et al., *No Room at the Inn? Disability Access in the New Sharing Economy* (May, 2017), [http://www.4wheeledlefty.com/wp-content/uploads/2017/06/disability\\_access\\_in\\_sharing\\_economy.pdf](http://www.4wheeledlefty.com/wp-content/uploads/2017/06/disability_access_in_sharing_economy.pdf) [<https://perma.cc/8R6J-XNWN>].

In all three of these scenarios, the individual with a disability will either pay a higher price due to their disability, or wind up purchasing services or items (such as software), that they cannot determine, until after the point of purchase, whether they could actually use the item or service.

### C. Consumer Protection Laws and Regulations

Consumer protection laws exist at both the state and Federal level. There are Federal laws, such as the Truth in Lending Act and the Fair Credit Reporting Act, as well as agencies including the Consumer Financial Protection Bureau, that all address consumer fraud in finance. Another Federal law, the Fair Packing and Labeling Act, relates to food, medicine, cosmetics, and other household devices.<sup>65</sup> Many of these consumer protection laws are very specific to the types of consumer products and would not be able to address the scenarios presented in this paper.

The Federal Trade Commission Act, which created the Federal Trade Commission (FTC), provides the broadest protection to “[p]revent fraud, deception, and unfair business practices in the marketplace” (note: that is, verbatim, one of the three strategic goals of the FTC).<sup>66</sup> Many states also have broad state consumer protection statutes that are based on the Federal Trade Commission Act.<sup>67</sup> There are a number of situations in which the already-existing statutory authority of these broad consumer protection laws could potentially be used to enforce improved accessibility online. In the following sections, Federal and state consumer protection laws are described in more detail.

#### 1. Federal Laws and Regulations

The Federal Trade Commission was originally created in 1914.<sup>68</sup> The FTC authorization, amended many times over the years, prohibits, *inter alia*, “unfair or deceptive acts or practices in or affecting commerce,” which the FTC can enforce through court proceedings and cease and desist orders.<sup>69</sup> A search of the Federal Trade Commission Act (as amended) results in the word “disability” appearing only once, in the context of “in the event of the death, disability, or separation” of a staff member. However, there is nothing in the FTC Act, or regulations, that would limit its ability to be used by the FTC for consumer discrimination against people with disabilities. The FTC Act, however, cannot be utilized for private rights of action.<sup>70</sup>

While the FTC seems like the appropriate Federal agency for addressing consumer discrimination against people with disabilities, multiple searches (including searching on FTC decisions, advocacy filings, and amicus briefs on Lexis/Nexis, searching the FTC web site, and interviewing both a current FTC investigator and a previous chief technologist at the FTC) reveal no evidence of FTC involvement on this topic. The issues of consumer discrimination against people with disabilities are barely mentioned on the FTC web site. When disability is mentioned, it is mentioned as an example in consumer guidance, not of work done by the FTC (e.g. in an FTC

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<sup>65</sup> The Federal Trade Commission, *The Fair Packaging and Labeling Act* (Nov. 6, 2018), <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-packaging-labeling-act> [<https://perma.cc/8WQA-7YXR>].

<sup>66</sup> Dee Pridgen and Richard Alderman, *Consumer Protection and the Law* (2017).

<sup>67</sup> Henry Butler & Joshua Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 165 (2011).

<sup>68</sup> 15 U.S.C. § 41 (1914).

<sup>69</sup> *Id.* at § 45(a)(1) (2006).

<sup>70</sup> Butler & Wright, *supra* note 67.

blog post about booking on a hotel's actual web site rather than an aggregator web site, the post notes that consumers often have problems when booking on an alternate web site, for example, "finding reserved rooms didn't reflect special requests like disability access."<sup>71</sup> There is just one FTC case that mentions disability, *Federal Trade Commission vs. Crooked Oak Investments et al.*,<sup>72</sup> but it did not involve consumers with disabilities. In that case, the defendants, selling common household items by phone, incorrectly claimed that all or most people employed by the defendants had disabilities, and sales would benefit those individuals with disabilities, neither of which was accurate.<sup>73</sup>

For addressing scenarios two and three, involving the challenge that consumers with disabilities often face, needing to purchase goods or services before determining whether they are accessible, it seems that § 8402, Prohibitions against certain unfair and deceptive Internet sales practices,<sup>74</sup> might offer a potential path for action: "(1) before obtaining the consumer's billing information, the post-transaction third party seller has clearly and conspicuously disclosed to the consumer all material terms of the transaction, including (A) a description of the goods or services being offered."<sup>75</sup> Because inaccessible apps and hotel rooms are frequently offered by an organization on a third-party aggregator site (e.g. an app store or an aggregator site such as hotels.com), the third-party seller rule may apply, and there is not a full description ("all material terms") of the accessibility of the good or service. However, it is important to note that this is an enforcement action that can be taken by the FTC, or by a state Attorney General, but not by a private right of action.<sup>76</sup> There is potentially one exception: in the case that the FTC has already brought a cease and desist order, a district court has held that private consumers might then have a private right of action for enforcing a previous FTC decision.<sup>77</sup> However, given that the FTC has not yet brought any actions related to consumer discrimination against people with disabilities, there would be nothing to enforce under this loophole.

Logically, it would seem that pricing discrimination against people with disabilities, or other consumer protections, might be an express protection by the ADA. The closest that one can find in the ADA is § 12182, Prohibition of discrimination by public accommodations, subsection (b)(1)(A)(ii) - Participation in unequal benefit:

*"It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or*

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<sup>71</sup> Federal Trade Commission, *Consumer Information: Did you book that night at the hotel's site?* (Jul. 14, 2015), <https://www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site> [<https://perma.cc/96PK-U4AF>].

<sup>72</sup> Federal Trade Commission, *Arizona-Based Telemarketing Firm Settles FTC Charges of Selling Household Goods by Misrepresenting Themselves as Handicapped or Disabled* (Aug. 8, 2000), <https://www.ftc.gov/news-events/press-releases/2000/08/arizona-based-telemarketing-firm-settles-ftc-charges-selling> [<https://perma.cc/8ZBD-PJFE>].

<sup>73</sup> *Id.*

<sup>74</sup> 15 U.S.C. § 8402 (2010).

<sup>75</sup> *Id.*

<sup>76</sup> 15 U.S.C. §§ 8404-05 (2010). *See also* *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988 (D.C. Cir. 1973) (confirming that there is no private right of action under the FTC Act).

<sup>77</sup> *Guernsey v. Rich Plan of Midwest*, 408 F. Supp. 582, 588 (N.D. Ind. 1976).

*accommodation that is not equal to that afforded to other individuals.*<sup>78</sup>

This text of the ADA might address the pricing discrimination, but it is far from certain that a court would interpret the ADA in that manner.

There is one federal regulation, specific to airlines, that deals with the problem of unequal pricing for people with disabilities. “Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports” is a final rule issued by the U.S. Department of Transportation (DOT) on November 12, 2013.<sup>79</sup> The regulation provides, in pertinent part:

”Today, individuals with disabilities often cannot use an airline’s Web site because it is not accessible. There are many disadvantages to not being able to do so even with the existing prohibition on airlines charging fees to passengers with disabilities for telephone or in-person reservations, or not making web fare discounts available to passengers with disabilities who cannot use inaccessible Web sites. For example, the cheapest prices for air fares and ancillary services are almost always on the airline’s Web site. As a practical matter, the cheapest fares may not be made available to many consumers with disabilities who book by phone or in person as they may be unaware of their right to ask for the Web fare discounts. A few airlines also do not have telephone reservation operations or ticket offices, making it particularly difficult for passengers with disabilities to purchase tickets from them. Inaccessible Web sites also prevent persons with disabilities from checking out many airlines’ fares online for the best price before making a choice, booking an online reservation any time of day or night, or avoiding long wait times associated with making telephone reservations.”<sup>80</sup>

There are many components of this 2013 DOT regulation, but the ones most relevant to this article include: 1) requiring that all airline web sites be compliant with WCAG 2.0 AA by December 2016, 2) requiring airlines to do usability testing of their websites involving people with disabilities, and 3) requiring that airlines offer any web-based discounts to individuals with disabilities who are unable to use the airline web site and instead use a ticket counter or phone center.<sup>81</sup> It is also important to note that air carriers are outside of the scope of FTC enforcement, as per the FTC Act.<sup>82</sup>

## 2. State Consumer Protection Laws

By the 1980s, every state had some form of Consumer Protection Act (CPA), which vary

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<sup>78</sup> 42 U.S.C. § 12182 (1990).

<sup>79</sup> Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, 78 Fed. Reg. 67,882 (Nov. 12, 2013) (to be codified at 14 C.F.R. pts. 382 and 399), <https://www.regulations.gov/contentStreamer?documentId=DOT-OST-2011-0177-0111&contentType=pdf> [<http://perma.cc/7CFX-3UZK>].

<sup>80</sup> *Id.* at 67,882.

<sup>81</sup> *Id.*

<sup>82</sup> 15 U.S.C. § 45(a)(2) (2017).

greatly but generally offer a private right of action.<sup>83</sup> In part, these CPAs were created because of the perception that common law approaches were not reasonable for plaintiffs from a cost-benefit analysis.<sup>84</sup> It would not make logical sense for a plaintiff to spend tens of thousands of dollars to sue for a consumer harm of fifty dollars. Under the state-level CPAs, there are usually more remedies (such as equitable relief, punitive damages, payment of attorneys' fees, etc.) and lower thresholds for proof.<sup>85</sup> These state-level CPAs generally allow for the state attorney general to take actions similar to those provided for in the FTC Act.<sup>86</sup> In fact, many federal statutes related to consumer protection (everything from nutrition labeling and telemarketing to credit reporting and even boxing safety) allow for enforcement of the federal statutes by state attorneys general.<sup>87</sup> There were a series of model statutes that influenced many of the state CPAs, including the Uniform Deceptive Trade Practices Act (UDTPA) and the Model Unfair Trade Practices and Consumer Protection Law (UTPCPL).<sup>88</sup>

Since the federal statutes do not specifically mention the types of consumer discrimination described in this paper, these forms of discrimination generally would fall under the catch-all heading of "deceptive or unfair practices," for which there is no private right of action under the FTC Act. So, state-level CPAs may be the most effective way for a private action to deal with the types of discrimination described in this paper. And even absent a state-level CPA, in both scenario two and three, it is possible to argue that the common law fraud of "misrepresentation by nondisclosure" could have been committed.<sup>89</sup> State-level CPAs can be used in unexpected ways. For instance, a recent case utilized the Iowa Private Right of Action for Consumer Frauds Act in filing a lawsuit for mistreatment of teenagers in a residential school for troubled youth.<sup>90</sup>

#### *D. Consumer Protections Outside of the United States*

While this paper has focused primarily on the United States, it is important to note that there are at least two notable efforts related to consumer protection outside of the US. The Organisation for Economic Co-operation and Development (OECD), a non-governmental organization, issued a recommendation report in 2016 called Consumer Protection in E-Commerce.<sup>91</sup> Principle 24 says, "Businesses should consider the needs of persons with disabilities when designing e-commerce platforms and online payment systems."<sup>92</sup> Furthermore, principle 5 says, "Businesses should not misrepresent or hide terms and conditions that are likely to affect a consumer's decision regarding a transaction,"<sup>93</sup> and principle 32 mentions providing "Key

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<sup>83</sup> See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 169, 173 (2011).

<sup>84</sup> *Id.* at 169.

<sup>85</sup> *Id.* at 174, 176.

<sup>86</sup> *See id.* at 169, 172.

<sup>87</sup> *See* Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 56 (2011).

<sup>88</sup> *See* Butler & Wright, *supra* note 83, at 170.

<sup>89</sup> DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW (2017).

<sup>90</sup> *Hunt v. Midwest Academy, LLC*, No. LALA006303 (Iowa Dist Ct. 2016).

<sup>91</sup> OECD, CONSUMER PROTECTION IN E-COMMERCE (2016), <http://www.oecd.org/sti/consumer/ECCommerce-Recommendation-2016.pdf> [<https://perma.cc/247A-5FJJ>].

<sup>92</sup> *Id.* at 12.

<sup>93</sup> *Id.* at 10.

functionality and interoperability features.”<sup>94</sup> Both principle 5 and principle 32 could relate directly to scenarios two and three, or consumers having to make a purchase decision before knowing if their app or service is accessible.

The European Union also has, at times, discussed the issues presented in this paper. For instance, in the 2002 European Parliament resolution on general aspects of consumer protection policy, item 19 “Calls for more information to be provided regarding the accessibility of holiday accommodation to disabled consumers, with more common definitions of aspects such as wheelchair access being adopted by all Member States.”<sup>95</sup> The 2012 European Commission report titled, “A European Consumer Agenda - Boosting confidence and growth” states that “The current context [referring to the use of digital means for selling to consumers] may also exacerbate the disadvantaged situation of vulnerable consumers, such as people with disabilities or with reduced mobility, who face difficulties in accessing and understanding information and in finding appropriate products and services on the market.”<sup>96</sup> While both the OECD and EU admirably have mentioned consumer protections for people with disabilities in their planning and recommendation reports, it is not clear that these reports have in any way impacted national or multinational laws.

### III. POTENTIAL ACTIONS

There are a number of potential actions that could be taken to move forward the idea of using consumer protection laws to assist consumers with disabilities in having an equal experience online.

#### *A. Collecting Data*

The problems described in this paper, of consumer discrimination against people with disabilities, are not well-known. The author of this paper is one of the few who has collected and published data about these specific forms of consumer discrimination against people with disabilities. Furthermore, data has only been collected about scenario one (involving paying higher prices), but not about scenarios two and three (involving the inability to determine the accessibility of goods or services before purchase). It is conceivable, when presented with this problem, that companies will ignore the issue, saying that it does not seem to be a problem that occurs often. The collection of additional data would assist in supporting these arguments. One suggested action is to collect and publish more data on the prevalence of this problem. In addition to being useful in convincing companies to end these practices, data can also be useful in nearly all of the other suggested actions: convincing the FTC to take action, judicial consideration of class action lawsuits, and advocating for modifications to laws and regulations.

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<sup>94</sup> *Id.* at 14.

<sup>95</sup> European Parliament, European Parliament resolution on general aspects of consumer protection policy and, in particular, consumer information and education with regard to the application of Directive 90/314/EEC (2001/2136(INI)) (Jan. 16, 2002), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2002-0003+0+DOC+XML+V0//EN> [<https://perma.cc/NH9D-TBRW>].

<sup>96</sup> European Commission, A European Consumer Agenda - Boosting confidence and growth, (May 22, 2012), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0225:FIN:en:PDF> [<https://perma.cc/TJ26-U78G>].

*B. Disability Advocates Encouraging the FTC to Take Actions*

Under their statutory charge to investigate and eliminate “unfair or deceptive acts or practices in or affecting commerce,” the FTC already has the necessary statutory authority to investigate potential consumer discrimination against people with disabilities.<sup>97</sup> Based on searching on LexisNexis, the FTC web site, and interviews with a current FTC investigator and a former Chief Technologist at the FTC, this is not an area that the FTC has addressed. One potential approach is to file informal complaints about specific situations or web sites with the FTC, and hope that the FTC will take action.<sup>98</sup> A second approach would be for disability advocates with corporate representatives to meet with FTC commissioners and bring attention to these general areas. A third, more unorthodox approach might be to publicly shame the FTC through social media for not protecting the consumer rights of people with disabilities.

There are a number of previous examples of disability advocates informing government agencies of potential problems related to digital accessibility and encouraging them to act. One prominent example is with the Amazon Kindle device, which was not accessible for a long time. Amazon wanted large contracts for Kindle devices with government agencies, schools, and universities, yet it was a violation of Section 508 of the Rehabilitation Act of 1973 (for federal government), Section 504 of the Rehabilitation Act (for those who receive federal funding), and/or the ADA (with Title II applying to state and local government), for federal or state money to be spent on acquiring inaccessible technologies for use in government agencies, schools, or libraries. After disability advocates filed complaints with the Departments of Justice and Education, the civil rights offices of the two agencies issued a joint statement on the inaccessibility of the Kindle devices, noting that if universities did acquire them, the universities were also required to provide accessible alternatives for students with disabilities.<sup>99</sup> Disability advocates originally forced the cancellation of two contracts to Amazon: a \$16.5 million contract from the U.S. Department of State<sup>100</sup> and a \$30 million contract from the New York City Department of Education.<sup>101</sup>, because of the inaccessibility of the devices. This eventually led to Amazon deciding to make the next generation of Kindle devices accessible, which led to their future contracts going through, such as an eventual contract with New York City public schools.<sup>102</sup>

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<sup>97</sup> 15 U.S.C. § 45(a)(1) (2006).

<sup>98</sup> See Stephanie Kroeze, *The FTC Won't Let Me Be: The Need for a Private Right of Action under Section 5 of the FTC Act*, 50 Val. U. L. Rev. 227, 240 (2015).

<sup>99</sup> U.S. Dep't of Educ. & U.S. Dep't of Justice, Joint “Dear Colleague” Letter: Electronic Book Readers (June 29, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.pdf> [<https://perma.cc/NLQ3-JDW3>].

<sup>100</sup> See Letter from National Federation of the Blind to Secretary of State Hillary Clinton 1–2 (June 18, 2012), <https://www.scribd.com/document/97451466/Mauer2clinton-Nfb> [<https://perma.cc/822U-3S58>] (“[T]he United State Department of State is pursuing a contract with Amazon.com, Inc. for the acquisition of 35,000 Kindle e-readers at the anticipated value of 16.5 million dollars. . . . Unfortunately, the contemplated agreement with Amazon does not provide for accessible Kindles.”).

<sup>101</sup> See Letter from National Federation of the Blind to the Chancellor of the New York City Department of Education 1 (August 7, 2015), [https://nfb.org/images/nfb/documents/pdf/kindle-books/nfb\\_letter\\_to\\_new\\_york\\_city\\_department\\_of\\_education\\_8.7.15.pdf](https://nfb.org/images/nfb/documents/pdf/kindle-books/nfb_letter_to_new_york_city_department_of_education_8.7.15.pdf) [<https://perma.cc/M3BU-FT9L>].

<sup>102</sup> Elizabeth Weiss, *Amazon Inks \$30 Million Deal with New York Schools*, USA Today (Apr. 21, 2016), <https://www.usatoday.com/story/tech/2016/04/21/amazon-ebooks-textbooks-30-million-new-york-schools/83298960/> [<https://perma.cc/2N8S-NE7M>].

### C. Class action lawsuits

Class action lawsuits seem particularly appropriate for areas of consumer protection, where the harm to each individual consumer is small and usually not worth the time or expense of a lawsuit; however, there are major wrongs that need to be addressed and deterred in the future.<sup>103</sup> There are those who say that consumer fraud cases are hard to litigate as class actions for a number of reasons,<sup>104</sup> and the rules for class actions differ depending on the state, but the rules are reasonably similar to the Federal Rules of Civil Procedure.<sup>105</sup> As an example, Massachusetts class actions that challenge an unfair or deceptive trade practice do not need to meet strict commonality; it only needs to be shown that individual consumers in the class were “‘similarly situated’ and have suffered a ‘similar injury.’”<sup>106</sup> That can be contrasted with Louisiana, where the Attorney General may bring a class action related to deceptive or unfair practices, but individuals cannot do so.<sup>107</sup> New Jersey allows for a “provisional class certification” for discovery to take place, whereas the Texas Supreme Court specifically rejected that practice.<sup>108</sup>

However, in all three of the scenarios presented earlier in the paper, each consumer would have likely had an identical claim for that scenario: 1) being charged a call center fee and/or a higher fare when using the call center rather than the web site (or being charged a higher price in the physical store than is available on the inaccessible website), or 2) having to purchase an app (in Scenario 2) or a service (in Scenario 3) without knowing whether it would be accessible for them. Absent injunctive relief, the individuals with disabilities are likely to suffer harm again from the same practice (e.g., purchasing another hotel room or another app or another flight). It is important to note that a requirement to prove future harm depends on the state (e.g., California and Washington would not require that a class representative prove the likelihood of suffering future harm).<sup>109</sup> It also may be useful to investigate which state Attorneys General have previously taken actions related to web accessibility (e.g., New York<sup>110</sup> and Massachusetts).<sup>111</sup>

The most prominent example of a class action lawsuit related to digital accessibility, is *National Federation of the Blind v. Target Corp.*<sup>112</sup> A group of Blind individuals sued Target Corporation (“Target”) under Title III of the ADA, because Target refused to make their website

<sup>103</sup> DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW §§ 6.28–6.34 (2017).

<sup>104</sup> *Id.* at §§ 6.28–6.33.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at § 6.30 (*citing* *Aspinall v. Phillip Morris Cos.*, 813 N.E.2d 476, 485 (Mass. 2004)).

<sup>107</sup> *Id.* at § 6.33.

<sup>108</sup> *Id.* at § 6.29.

<sup>109</sup> *Id.* at § 6.32 (*citing* *Comm. on Children’s Television, Inc. v. Gen. Foods. Corp.*, 673 P.2d 660 (Cal. 1983); *Lazar v. Hertz Corp.*, 191 Cal. Rptr. 849 (Cal. Ct. App. 1983); *Hockley v. Hargitt*, 510 P.2d 1123, 1133 (Wash. 1973)).

<sup>110</sup> See Press Release, Attorney General of New York State, Spitzer Agreement To Make Web Sites Accessible To The Blind And Visually Impaired (Aug. 19, 2004), <https://ag.ny.gov/press-release/spitzer-agreement-make-web-sites-accessible-blind-and-visually-impaired> [<https://perma.cc/PS56-FCNH>].

<sup>111</sup> See Press Release, Attorney General of Massachusetts, Attorney General Martha Coakley and the National Federation of the Blind Reach Agreement with Apple, Inc. to Improve Accessibility of iTunes (Sept. 26, 2008), <http://www.mass.gov/ago/news-and-updates/press-releases/2008/ag-and-national-federation-of-the-blind-reach.html>; See Press Release, Attorney General of Massachusetts, Monster.com First in Industry to Make Website Accessible for Blind Users, (Jan. 30, 2013) <http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-01-30-monster-agreement.html> [<https://perma.cc/WZ6Y-S4LU>].

<sup>112</sup> 452 F. Supp. 946 (N.D. Cal. 2006).

accessible for people with disabilities.<sup>113</sup> This is the first case in which a judge stated that the ADA does indeed apply to web sites of certain types of public accommodations (the “nexus requirement” described in Section II.A. of this article). After denying a motion to dismiss in 2006, the court granted a motion to certify a class in 2007.<sup>114</sup> The parties settled in 2008, providing a \$6 million settlement to the individuals in the class, as well as attorney fees and costs of \$3.7 million approved by the court in 2009.<sup>115</sup>

#### D. Pushing for modifications to existing statutes or regulations

Currently, with the exception of the U.S. Department of Transportation regulation *Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports*,<sup>116</sup> which only applies to air carriers, no federal statutes or regulations expressly outlaw the consumer discrimination scenarios described in this paper. There are a number of potential modifications to existing statutes or regulations that would make it easier to file lawsuits when consumer discrimination occurs to people with disabilities.

Although the statutory basis for investigating consumer discrimination claims against people with disabilities already exists in the FTC Act, it would certainly bring attention to the topic, as well as increase the likelihood that the FTC would take action, if the FTC Act was modified to specifically address these types of consumer discrimination claims. Modifications to wording in the Americans with Disabilities Act to expressly forbid the consumer discrimination described in this paper would at first seem to be ideal. However, given the current fractured state of Congress, and also the risk that the current Congress would reduce protections under the ADA rather than enhance them (see the ADA Education and Reform Act of 2017<sup>117</sup>), modifications to the ADA are both unlikely and potentially risky.

It is likely that no modifications of state-level CPAs are needed to obtain relief for disability discrimination. Some modifications, though, might improve enforcement. Advocating for modifications to the state-level CPAs, or even new laws at the state level, are potentially more successful efforts than similar advocacy at the federal level. Utilizing previously successful strategies from advocates, one can imagine advocating for modifications to two or three state CPAs where there is big tourist-related commerce, such as California, Florida, Hawaii, or New York, outlawing some of these discriminatory practices (for instance, in Scenario 3, where it is unclear if travel accommodations are accessible), with support from the state Attorney Generals who will enforce it. Large travel web sites (e.g., Travelocity, Orbitz, Hotels.com, etc.) which serve the hot travel destinations in those states, would then be forced to detail the accessibility features of services sold on their web sites, due to changes in only two or three states.

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<sup>113</sup> *Id.* at 949–50.

<sup>114</sup> Nat’l Fed’n of the Blind v. Target Corp., 582 F. Supp. 2d 1185, 1189 (N.D. Cal. 2007).

<sup>115</sup> Nat’l Fed’n of the Blind v. Target Corp., No. C 06-01802 MHP, 2009 U.S. Dist. LEXIS 67139, at \*5, \*28 (N.D. Cal. Aug. 3, 2009).

<sup>116</sup> See Dep’t. of Transp. Nondiscrimination on the Basis of Disability in Air Travel, 14 C.F.R. pt. 382 (2013); Dep’t. of Transp. Statements of General Policy, 14 C.F.R. pt. 399 (2013).

<sup>117</sup> The ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. 2d Sess. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/620/text> [<https://perma.cc/QHW8-Y3HV>] (This bill would add an additional requirement by implementing a waiting period after a person with a disability notifies the offender, which is not currently required under the law).

It is possible to imagine a similar idea for Scenario 2, of unclear accessibility of apps purchased in app stores. If two or three large states changed their CPAs to expressly outlaw the practice as being misleading, the tech companies would be forced to make the change, rather than miss the opportunity to sell apps in those states. Just as states have varying levels of plaintiff-friendliness in their consumer protection acts, states also have varying levels of strength of existing ICT accessibility laws, applying to government, schools, and commerce.<sup>118</sup> It would also be worth investigating which states have both strong laws on accessibility and disability-friendly legislators (e.g., Massachusetts, California, Maryland) to advocate for modifications to existing laws related to ICT accessibility, instead of, or in addition to, modifications to consumer protection laws.

There might also be an opportunity to advocate for modifications to existing regulations related to disability rights, which are often easier to change than statutes.<sup>119</sup> The regulatory process for web site accessibility under Title III of the ADA would be an ideal regulation in which to place these enhancements for consumer protection. This is because companies, such as Microsoft, specifically encouraged the DOJ to provide more specific guidance on what the legal requirements were. Unfortunately, the regulatory process for web accessibility under Title III has been placed on hiatus seven years after it started, making it unlikely that the process will commence or finish any time soon.<sup>120</sup>

#### IV. CONCLUSION

This paper describes the existing legal framework utilized by disability advocates to make the world of digital content and technology more accessible for people with disabilities. Similar to how companies often overlook the consumer potential of people with disabilities, the paper argues that legal developments have also overlooked the potential of consumer protection laws to address incidents of consumer discrimination that people with disabilities face online on a daily basis. The paper described three scenarios of consumer discrimination that people with disabilities face online. The existing legal framework of consumer protection helps inform the discussion of potential actions that could be taken utilizing existing consumer protection laws, or a consideration of modified laws or regulations that could specifically outlaw the discriminatory practices.

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<sup>118</sup> Natalie Shaheen & Jonathan Lazar, *K-12 Technology Accessibility: The Message From State Governments*, 33 J. SPECIAL EDUC. TECH. 83, 90-94 (2018) (explaining that “many states have policies or other forms of guidance pertaining to technology accessibility” and including tables and graphs showing the differences across states).

<sup>119</sup> See generally Jonathan Lazar, Daniel Goldstein & Anne Taylor, ENSURING DIGITAL ACCESSIBILITY THROUGH PROCESS AND POLICY (2015).

<sup>120</sup> OFFICE OF MGMT. & BUDGET, *FALL 2018 UNIFIED AGENDA OF REGULATORY AND DEREGULATORY ACTIONS* (2018), <https://www.reginfo.gov/public/do/eAgendaMain> [<https://perma.cc/JF6X-J98C>].