IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY HAMMOND MURPHY,

Plaintiff,

v.

EYEBOBS, LLC.,

Defendant.

Civil Action No.   1:21-cv-17

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

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Plaintiff Anthony Hammond Murphy[1] ("Murphy" or "Plaintiff"), for his Complaint against

Eyebobs, LLC ("Eyebobs" or "Defendant"), by and through his counsel, alleges upon personal

knowledge as to himself and upon information and belief as to all other matters, based upon the

investigation conducted by and through his counsel, which includes, among other things, an

investigation of Defendant's digital properties, as follows:

NATURE AND SUMMARY OF THE ACTION

1.   This action arises from Defendant's failure to make its digital properties accessible

to blind individuals,[2] which violates the effective communication and equal access requirements

of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189. These

provisions were enacted "to provide a clear and comprehensive national mandate for the

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[1]   He/Him/His (*see* University of Pittsburgh, Gender-Inclusivity Guidelines, available at
http://www.gsws.pitt.edu/node/1432 (last accessed Dec. 7, 2020)).
[2]   Murphy uses the word "blind" to describe individuals who, as a result of a visual
impairment, have substantially limited eyesight. This includes individuals who have no vision at
all as well as people who have low vision.

elimination of discrimination against individuals with disabilities"[3] by "assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency."[4]

2.   Although styled as an individual action, the injunctive relief that Murphy seeks will inure to the benefit of an estimated 2.3 percent of the United States population who report having a visual disability,[5] and to Defendant, who will extend its market reach to this population.[6]

3.   For this significant portion of Americans, accessing websites, mobile applications, and other information via their smartphones has become a necessity, not a convenience. In contrast to the largely stationary internet of the early 2000s, Americans today are increasingly connected to the world of digital information while "on the go" via smartphones.[7]

4.   Indeed, a growing share of Americans use smartphones as their primary means of online access at home. Today roughly one-in-five American adults are "smartphone-only" internet users—meaning they own a smartphone, but do not have traditional home broadband service.[8]

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[3]   42 U.S.C. § 12101(b)(1).

[4]   42 U.S.C. § 12101(a)(7).

[5]   Erickson, W., Lee, C., von Schrader, S., *Disability Statistics from the American Community Survey (ACS)*. Ithaca, NY: Cornell University Yang-Tan Institute (YTI), available at www.disabilitystatistics.org (last accessed Dec. 7, 2020).

[6]   Sharron Rush, W3C Web Accessibility Initiative, *The Business Case for Digital Accessibility* (Nov. 9, 2018), available at https://www.w3.org/WAI/business-case/ (last accessed Dec. 7, 2020) ("The global market of people with disabilities is over 1 billion people with a spending power of more than $6 trillion. Accessibility often improves the online experience for all users.").

[7]   The wide-scale adoption of this technology is staggering. According to Pew Research Center, the vast majority of Americans – 96% – now own a cellphone of some kind. And the share of Americans that own smartphones has climbed from just 35% in 2011 to 81% in 2019—amounting to more than 265 million people in the United States. U.S. Census Bureau, U.S and World Population Clock, available at https://www.census.gov/popclock/ (last accessed Dec. 7, 2020) (U.S. population on June 12, 2019 was 328.1 million).

[8]   Pew Research Center, *supra* note 7.

5.   The growth of smartphone usage is rivaled only by the myriad ways in which users can harness the capabilities of the internet for the betterment of their lives through education, employment, entertainment, commerce, and countless other pursuits.

6.   The U.S. Chamber of Commerce has documented consumers' increasing reliance on mobile platforms to shop online:

> The average consumer spends more than $1,700 per year on online shopping, a number that's continuing to rise. The convenience, affordability and ability to compare prices with ease has led more and more customers to visit e-commerce sites before heading to a brick-and-mortar location.[9]

> New research by Leanplum found that 95% of consumers will buy at least half of their gifts online. Shoppers, especially millennials and Gen Zers, favor the convenience and the great offers and discounts associated more with shopping online than visiting a brick-and-mortar location. It's these groups that are driving e-commerce retailers to be strategic with their website design. The Leanplum survey found that 80% of respondents shop on their mobile devices.[10]

7.   But "[a]s technology continues to evolve at a rapid pace, it is important to consider factors that can facilitate or impede technology adoption and use by people with disabilities."[11]

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[9]   Emily Heaslip, U.S. Chamber of Commerce, *A Guide to Building an Online Store* (Sept. 20, 2019), available at https://www.uschamber.com/co/start/startup/how-to-build-online-stores (last accessed Dec. 7, 2020).

[10]   Emily Heaslip, U.S. Chamber of Commerce, *5 Ways to Optimize Your E-Commerce Site for Mobile Shopping* (Jan. 6, 2020), available at https://www.uschamber.com/co/run/technology/building-mobile-friendly-ecommerce-websites (last accessed Dec. 7, 2020). According to one report, e-commerce is growing 23% each year[.] Emily Heaslip, U.S. Chamber of Commerce, *The Complete Guide to Selling Online* (Jan. 28, 2020), available at https://www.uschamber.com/co/run/technology/small-business-ecommerce-guide (last accessed Dec. 7, 2020).

[11]   National Council on Disability, *National Disability Policy: A Progress Report* (Oct. 7, 2016), available at https://ncd.gov/sites/default/files/NCD_ProgressReport_ES_508.pdf (last accessed Dec. 7, 2020).

8.   This is especially true with respect to accessing the internet by smartphone, where people with disabilities stand to benefit immensely if online services were fully and equally accessible to them. The National Federation of the Blind explains:

> In many ways, individuals with disabilities rely on Web content more so than their nondisabled peers because of inherent transportation, communication, and other barriers. A blind person does not have the same autonomy to drive to a covered entity's office as a sighted person. A deaf or hard of hearing person does not have the same opportunity to call a covered entity's office. A person with an intellectual disability does not have the same ability to interact independently with the staff at a covered entity's office. The 24-hour-a-day availability of information and transactions on covered entity websites and mobile apps provides a level of independence and convenience that cannot be replicated through any other means. That is why the number of Americans who rely on the Internet has increased year after year and why entities offer information and transactions through that unique medium.[12]

9.   When digital content is properly formatted, it is universally accessible to everyone. When it's not, the content provider fails to communicate to individuals with a visual disability effectively. In turn, these individuals must expend additional time and effort to overcome communication barriers not applicable to sighted users, which may require the assistance of third parties or, in some instances, may deny outright access to the online service.[13]

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[12]   Comment from disability rights organizations to DOJ Supplemental Advance Notice of Proposed Rulemaking "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities," C RT Docket No 128, RIN 119 -AA65, available at https://nfb.org/ada-title-iiinternet-regulations-joint-sanprm-comments (last accessed Dec. 7, 2020), Answer 57 (October 7, 2016) (citations omitted).
[13]   These factors often lead disabled individuals to abandon the process of purchasing items online after they begin. Kasey Wehrum, Inc., *Your Website is Scaring Customers Away. 5 Easy Ways to Fix It* (Jan. 2014), available at https://www.inc.com/magazine/201312/kasey-wehrum/how-to-get-online-customers-to-complete-purchase.html (last accessed Dec. 7, 2020) (documenting the most common causes of shopping cart abandonment, including: "Your Checkout button is hard to find[,]" "Shoppers question the safety of their personal info[,]" and "Getting through the checkout process takes multiple clicks.").

10.   Unfortunately, Defendant fails to communicate effectively with Murphy because its digital properties are not properly formatted. Because of these communication barriers, Defendant deprives consumers with visual disabilities, including Murphy, from accessing information about its products and using its online services, all of which is readily available to sighted persons.

11.   This action seeks to remedy that discrimination and inequality.

JURISDICTION AND VENUE

12.   The claims alleged arise under Title III such that this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 12188.

13.   Defendant attempts to, and indeed does, participate in the Commonwealth's economic life by offering and providing products and services over the internet to Pennsylvania residents, including Murphy. Unlike, for example, a winery that may not be able sell and ship wine to consumers in certain states, Defendant purposefully avails itself of the benefits and advantages of operating an interactive, online business open 24-hours a day, 7-days a week, 365-days a year to Pennsylvania residents.[14] These online sales contracts between Defendant and Pennsylvania residents involve, and indeed require, Defendant's knowing and repeated transmission of computer files over the internet in Pennsylvania.

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[14]   *See Gniewkowski v. Lettuce Entertain You Enterprises*, Case No. 2:16-cv-1898-AJS, Order, ECF 123 (W.D. Pa Apr. 25, 2017) *clarified by Order of Court*, ECF 169 (W.D. Pa. June 22, 2017) (Judge Schwab) (*citing Zippo Mfg. Co. v. Zippo Dot Com, Inc*., 952 F.Supp. 1119 (W.D. Pa. 1997) (exercising specific personal jurisdiction over forum plaintiff's website accessibility claims against out-of-forum hotel operator); *Law School Admission Council, Inc. v. Tatro*, 153 F.Supp.3d 714, 720-21 (E.D. Pa. 2015) (exercising personal jurisdiction over out-of-forum website operator); *Access Now Inc. v. Otter Products, LLC*, 280 F.Supp.3d 287 (D. Mass. 2017) (exercising personal jurisdiction over forum plaintiff's website accessibility claims against out-of-forum website operator); *Access Now, Inc. v. Sportswear, Inc*., 298 F.Supp.3d 296 (D. Mass. 2018) (same).

14.   Murphy was injured when he attempted to access the Digital Platform from Erie,

Pennsylvania, but encountered communication barriers that denied him full and equal access to

Defendant's online products, content, and services.

15.   Venue in this District is proper under 28 U.S.C. § 1391(b)(2) because this is the

judicial district in which a substantial part of the acts and omissions giving rise to Murphy's claims

occurred.

PARTIES

16.   Murphy is a natural person over the age of 18. He resides in and is a citizen of Erie,

Pennsylvania, located in Erie County.

17.   He graduated from Edinboro University with a degree in sociology in 1999 and

today he works for the Commonwealth of Pennsylvania.

18.   Murphy is and, at all times relevant hereto, has been legally blind and is therefore

a member of a protected class under the ADA, 42 U.S.C. § 12102(2), and the regulations

implementing the ADA set forth at 28 CFR §§ 36.101 *et seq*. As a result of his blindness, Murphy

relies on screen access software, including JAWS 2020 from Freedom Scientific and VoiceOver

with iOS, to access digital content, like an email, a website, or an app.

19.   Murphy has advocated for blind individuals his entire life.[15] To this end, in a class

action complaint asserting claims identical to this individual action, the United States District

Court for the Western District of Pennsylvania found that Murphy would fairly and adequately

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[15]   *How did Erie plow crews do?: Your view from Facebook*, GoErie.com (Jan. 7, 2018),
https://www.goerie.com/opinion/20180107/how-did-erie-plow-crews-do-your-view-from-
facebook ("Anthony Hammond Murphy: As a visually impaired person, I find it very difficult to
cross streets via curb cuts due to the snow and ice being plowed into these corners. The plow
drivers should be allowed to triangulate and get the corners as well, and not just go north-south
and east-west.") (last accessed Dec. 7, 2020)

represent a class of "[a]ll blind or visually disabled individuals who use screen reader auxiliary aids to navigate content and who have accessed, attempted to access, or been deterred from attempting to access, or who will access, attempt to access, or be deterred from accessing the [defendant's website] from the United States." *Murphy v. Charles Tyrwhitt*, 2020 U.S. Dist. LEXIS 222540, at *9 (W.D. Pa. Nov. 25, 2020).

20.   Defendant is a Delaware corporation with a principal place of business in Minnesota.

21.   Defendant sells eyewear to consumers.

22.   In order to access and purchase the products and services that Defendant offers, Murphy may visit Defendant's website at https://www.eyebobs.com/ (the "Digital Platform").

23.   Defendant owns, operates, and/or controls its Digital Platform and is responsible for the policies, practices, and procedures concerning the Digital Platform's development and maintenance.

STANDING UP FOR TITLE III OF THE ADA

24.   "Congress passed the ADA in 1990 to fix a serious problem—namely, the seclusion of people with disabilities resulting in explicit and implicit discrimination."[16] "It was called the '20th Century Emancipation Proclamation for all persons with disabilities.'"[17] "Title III of the ADA

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[16]   Kelly Johnson, *Testers Standing up for the Title III of the ADA*, 59 Cas. W. Res. L. Rev. 683, 684 (2009), available at http://scholarlycommons.law.case.edu/caselrev/vol59/iss3/6 (last accessed Dec. 7, 2020) (*citing* H.R. REP. No. 101-485, pt. 2, at 28-29 (1990)).
[17]   Kelly Johnson *supra* note 16 (*quoting* Russell Hymas & Brett R. Parkinson, Comment, *Architectural Barriers Under the ADA: An Answer to the Judiciary's Struggle with Technical Non-Compliance*, 39 CAL. W. L. REV. 349, 350 (2003), available at https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1166&context=cwlr   (last accessed Dec. 7, 2020)); *see also* 136 CONG. REC. 17,369 (1990) (statement of Sen. Tom Harkin) (discussing how facilities have failed to comply with the ADA by not removing barriers that impede access).

contained broad language covering numerous public accommodations; both new construction and existing facilities were required by the statute to remove barriers to access. The disabled population hoped that, as a result of the ADA, their lives would no longer be shaped by limited access and the inability to choose."[18] "However, reality—a lack of compliance with the ADA and severe underenforcement of the statute—soon destroyed this hope."[19]

25.   Thirty years "after the passage of the ADA, numerous facilities are still not compliant leaving the disabled population in a second-class citizenship limbo. Title III of the ADA allows both the U.S. Attorney General[20] and private individuals[21] to sue, but the rate at which [ ] the Attorney General [is] bringing suit seeking compliance is extremely low. The Department of Justice's Disability Section, tasked with ADA enforcement, is understaffed[.]"[22]

26.   Thus, "private suits by necessity represent the main tool for ensuring compliance with Congress' intent in passing the ADA,"[23] most of which suits "are brought by a small number of private plaintiffs who view themselves as champions of the disabled."[24]

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[18]   Kelly Johnson *supra* note 16 (*citing* Elizabeth Keadle Markey, Note, *The ADA's Last Stand?: Standing and the Americans with Disabilities Act*, 71 FORDHAM L. REV. 185 (2002), available at https://ir.lawnet.fordham.edu/flr/vol71/iss1/4 (last accessed Dec. 7, 2020) (arguing for a more lenient standard for standing under the ADA)).

[19]   Kelly Johnson *supra* note 16 (*citing* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 3 (2006), available at https://www.uclalawreview.org/the-perversity-of-limited-civil-rights-remedies-the-case-of-abusive-ada-litigation/ (last accessed Dec. 7, 2020) (discussing the need for private enforcement in Title III of the ADA and the fact that the limitations courts are placing on ADA plaintiffs are causing abusive litigation)).

[20]   42 U.S.C. § 12188(b).

[21]   42 U.S.C. § 12188(a).

[22]   42 U.S.C. § 12188(a).

[23]   *Betancourt v. Ingram Park Mall*, 735 F. Supp. 2d 587, 596 (W.D. Tex. 2010).

[24]   *Id.* (*quoting Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007); *D'Lil v. Best Western Encina Lodge & Suite*s, 538 F.3d 1031, 1040 (9th Cir. 2008) (same).

27.   DOJ supports this dynamic, recognizing that because it "cannot investigate every

place of public accommodation" for ADA compliance, "[p]rivate plaintiffs play an important role

in enforcing the ADA[.]"[25]

28.   So do courts.

> [Defendant] also points to the number of cases filed by the same plaintiff in this
> jurisdiction. Counsel have filed nine cases in this jurisdiction on behalf of [the
> plaintiff]. I am not impressed by this argument. If the ADA were enforced directly
> by the government, as are, for example, the fair housing laws, it is likely that
> government lawyers would have reached out to disabled individuals — "testers" as
> they are called — to find out which businesses were complying and which were
> not. [The named plaintiff] has functioned here as a "tester," which is entirely
> appropriate.[26]

29.   Consistent with the policies summarized above, Murphy now assumes the role of

private attorney general to ensure Defendant communicates effectively with him and other

consumers who demand full and equal screen reader access to Defendant's digital services.

SUBSTANTIVE ALLEGATIONS

30.   The internet is a significant source of information, services, and transactions with

instant and 24/7 availability and without the need to travel to attain them.

31.   Individuals who are blind access the internet and mobile applications from

smartphones and/or personal computers by using keyboard controls and screen access software,

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[25]   Statement of Interest of the United States of America, *ERC v. Abercrombie & Fitch Co.*,
Case No. 1:09-cv-03157 (D. Md.), ECF No. 38, at 1 (July 6, 2010); *See also Hensley v. Eckerhart*,
461 U.S. 424, 445 (1983) ("All of these civil rights laws depend heavily upon private enforcement,
and fee awards have proved an essential remedy if private citizens are to have a meaningful
opportunity to vindicate the important Congressional policies which these laws contain.").

[26]   *Norkunas v. HPT Cambridge, LLC*, 969 F. Supp. 2d 184, 194 (D. Mass. 2013) (Young, J.)
(*quoting Iverson v. Braintree Prop. Assocs., L.P.*, No. 04cv12079-NG, 2008 WL 552652, at *3 n.5
(D. Mass. Feb. 26, 2008) (Gertner, J.); *see also Murphy v. Bob Cochran Motors, Inc.*, No. 1:19-
cv-00239, 2020 U.S. Dist. LEXIS 139887, at *15-16 (W.D. Pa. Aug. 4, 2020), *adopted by Murphy
v. Bob Cochran Motors, Inc.*, 2020 U.S. Dist. LEXIS 177593 (W.D. Pa., Sept. 28, 2020)
(upholding tester standing in a substantially identical ADA website accessibility case).

which vocalizes information presented visually on a computer screen or displays that information

on a user-provided refreshable braille display. Such software provides the only method by which

blind individuals can independently access digital information and content. When websites and

applications are not designed to allow for use with screen access software, blind individuals are

unable to access the information, products, and services offered through the internet.

      32.   Screen access technology has existed for decades[27] and widely-accepted standards

exist to guide entities in making their websites and apps accessible to screen access software,

including legal standards under Section 508 of the Rehabilitation Act. The U.S. Department of

Health & Human Services maintains Best Practices for Accessible Content to ensure that

accessibility is "considered throughout the [website] development process."[28] The Commonwealth

of Pennsylvania has maintained an Information Technology Accessibility Policy since March 16,

2006[29] and a separate Accessibility Policy that recognizes "[a]ccessible websites ensure that as

many people as possible can use internet-based information and services, regardless of disability

or functional limitation."[30]

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[27]   Annemarie Cooke, American Foundation for the Blind, *A History of Accessibility at IBM* (Mar. 2004), available at https://www.afb.org/aw/5/2/14760 (last accessed Dec. 7, 2020) (Jim Thatcher created the first screen reader at IBM in 1986.).

[28]   *See* U.S. Department of Health & Human Services, usability.gov, Accessibility Basics, available at https://www.usability.gov/what-and-why/accessibility.html (last accessed Dec. 7, 2020).

[29]   Pennsylvania Office of Administration, Information Technology Policy: Information Technology Accessibility Policy, Mar. 16, 2006, available at https://www.oa.pa.gov/Policies/Documents/itp_acc001.pdf (last accessed Oct. 13, 2020).

[30]   Commonwealth of Pennsylvania, Accessibility Policy, available at https://www.pa.gov/accessibility-policy/ (last accessed Oct. 13, 2020).

Defendant's Inaccessible Digital Platform

33.   Defendant owns, operates, developed, procured, maintains and/or uses the Digital Platform for the purpose of communicating information about its products and services to consumers through computers, smartphones, and other mobile devices.

34.   Defendant is required to ensure that its Digital Platform communicates information about its products and services effectively to people with disabilities. Despite this obligation, Defendant fails to communicate this information effectively to individuals who are blind because the Digital Platform is not compatible with screen reader auxiliary aids.

35.   Specifically, Murphy attempted to access Defendant's Digital Platform from Pittsburgh, Pennsylvania using JAWS 2020 from Freedom Scientific or VoiceOver with iOS (i.e. on his Apple iPhone).

36.   "VoiceOver is a gesture-based screen reader that lets you enjoy using iPhone even if you don't see the screen. With VoiceOver enabled, just triple-click the Home button (or the side button on iPhone X or later) to access it wherever you are in iOS. Hear a description of everything happening on your screen, from battery level to who's calling to which app your finger is on. You can also adjust the speaking rate and pitch to suit you. …You can control VoiceOver using a simple set of gestures. Touch or drag your finger around the screen and VoiceOver tells you what's there. Tap a button to hear a description, then double-tap to select. Or flick left and right to move from one element to the next. When you interact with an element, a black rectangle appears around it so sighted users can follow along. When you prefer privacy, you can activate a screen curtain to turn off the display completely, but still hear all that VoiceOver has to say. And

now with iOS 13, you can choose from a wide range of gestures and assign those you're most comfortable with to the commands you use most."[31]

37.   Here is an example of another online store's successful use of alternative text to describe its products to screen reader users.[32] The image on the left illustrates what shoppers perceive visually when browsing the online store with an iPhone. To the right, is an image from the online store with the alternative text highlighted for that image in green. Although invisible to the eye, screen access software reads this highlighted text aloud in order to describe the image to shoppers who cannot perceive content visually. In this example, when shoppers tab to the image file with a screen reader, the online store announces,
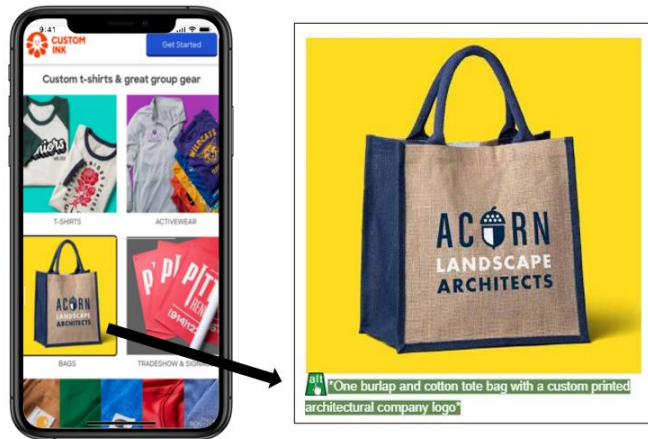
"One burlap and cotton tote bag with a custom printed architectural company logo." Blind shoppers require descriptive alternative text like this to access digital content fully, equally, and independently.

38.   Unfortunately, because of Defendant's failure to build its Digital Platform in a manner that is compatible with screen access software, including VoiceOver, Murphy is unable to understand, and thus is denied the benefit of, much of the content and services he wishes to access from his smartphone.

39.   As a result of visiting the Digital Platform, and from investigations performed on his behalf, Murphy found that Defendant fails to communicate information about its products and

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[31]   *See* Apple, Accessibility, https://www.apple.com/accessibility/iphone/vision/ (last accessed Dec. 7, 2020).
[32]   *See* Custom Ink, Homepage, https://www.customink.com/ (last accessed Mar. 28, 2019).

services effectively because screen reader auxiliary aids cannot access important content on the

Digital Platform. Click the images or links at the end of each subparagraph below to watch a short

video illustrating some of the communication barriers on Defendant's Digital Platform.

(a)   Defendant installed a low-cost overlay on the Digital Platform developed

by a company called accessiBe. accessiBe claims this overlay can automatically bring a website

into compliance with the ADA by resolving the website's underlying accessibility issues.

Unfortunately, the overlay fails to provide screen reader users, including Murphy, full and equal

access to the Digital Platform. Attached as Exhibit A is a report from Karl Groves entitled, *Sole*

reliance on accessiBe will not be sufficient in ensuring full and equal access to a website. Mr.

Groves has nearly two decades of experience consulting corporations and government agencies in

Information   Technology   Accessibility.   *See*   Karl   Groves   Resume,   available   at

https://karlgroves.com/resume (last visited Dec. 10, 2020). The report "describes the ways in

which the accessiBe product does not and/or cannot ensure full and equal access to a website. In

addition, it provides evidence that the accessiBe widget itself adds net-new accessibility problems

to the customers' site." Ex. A at 3. The report summarizes Mr. Groves research of 50 websites

using the accessiBe overlay and concludes there is no "significant divergence from what has been

found across the broader set of websites I have tested. In other words, the accessiBe customer sites

are neither better nor worse than the broader Web as a whole." Ex. A at 8. In light of the report's

findings, it is no surprise that accessiBe's Terms of Service warns "that the installation of the

accessiBe Systems cannot guarantee that claims will not arise, and that embedding the accessiBe

Systems in the Licensee Website does not, on its own, fulfill all of the requirements of applicable

law in respect of website accessibility (accessiBe does not remediate PDF files or create subtitles

for videos, for example). The Company does not undertake that the Licensee Website will be 100%

accessible at any given moment, owing to factors such as Licensee changes made to the Licensee Website, issues originating in the Licensee Website and /or limitations stemming from technological reasons." *See* accessiBe, *Terms of Service*, available at https://accessibe.com/terms-of-service (last accessed Dec. 10, 2020). Nor is it surprising the Terms provide that each accessiBe customer "irrevocably waives any claims against the Company from any liability, legal or otherwise, and that it shall assert no claims against the Company in this regard (including in relation to any Claims Support Services, if provided)." *Id.*

(b)   What's more, the accessiBe overlay makes it impossible for some screen reader users to access the Digital Platform after they visit Defendant's Accessibility Statement. As this video demonstrates, screen reader users may tab to Defendant's Accessibility Statement shortly after entering the Digital Platform. However, their screen readers become stuck after closing the accessibility interface. Screen readers can neither tab "back" nor "forward" in order to navigate the Digital Platform in a predictable manner. Because screen reader users, including Murphy, are likely to become stuck so soon after arriving to Defendant's online store, this accessibility barrier has a particularly deterring effect on their future use of the Digital Platform. As a result, Murphy is more likely to look elsewhere for the products that Defendant sells. Click the picture contained in this paragraph or following link to view a short video describing this access barrier: https://youtu.be/aHnaJKHgQjU.
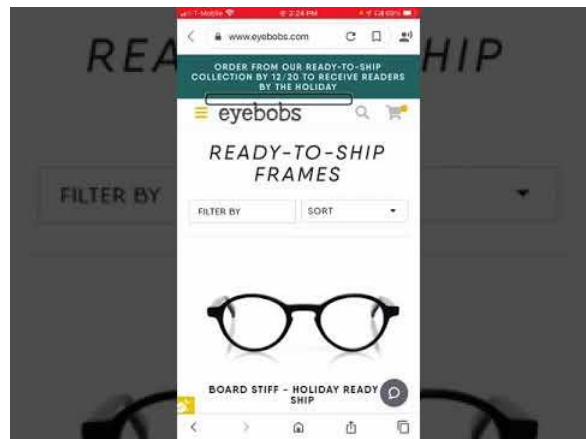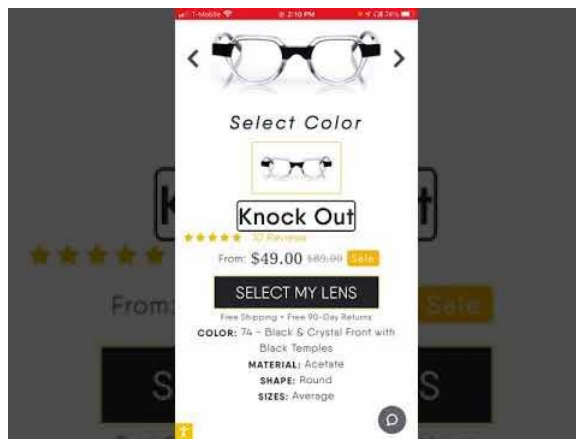
(c)   The   Digital   Platform prevents screen reader users from accessing some primary content. For example, when consumers visit the Digital Platform from a new IP address, Defendant displays a pop-up window inviting them to "[e]njoy 10% off your next purchase. Offer ends soon." Consumers who perceive content visually can type their email into the text field that Defendant provides in the pop-up window, then click "enjoy 10% off" to claim the promotion. Unfortunately, Defendant does not alert screen readers of this pop-up window. Instead, screen readers remain focused on the content of the Digital Platform's underlying page, making the pop-up invisible to screen reader users. As a result, it is impossible for Murphy to perceive this promotion independently, the effect of which would require him to pay more on his order than consumers who do not use screen reader technology to shop online. Click the picture contained in this paragraph or following link to view a short video describing this access barrier: https://youtu.be/UvtjU3FXUFU.
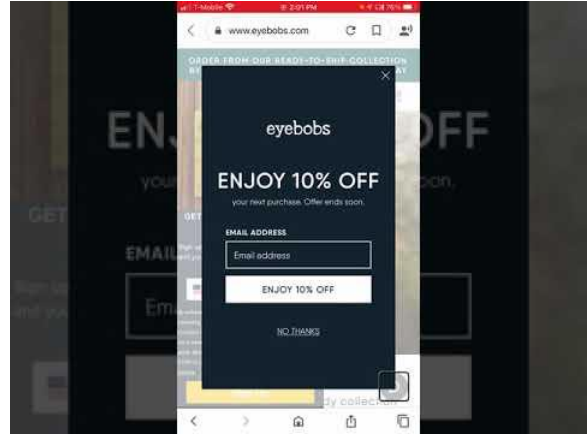
(d)   Similarly, Defendant also offers consumers the chance to "get a free bobcare kit with next purchase." This information is also contained within a pop-up window that prompts consumers to submit contact information. Again, consumers who perceive content visually can provided their telephone number in the text box Defendant provides in the pop-up window, then click "Sign Up" to claim the free cleaning kit. Unfortunately, again, Defendant does not alert
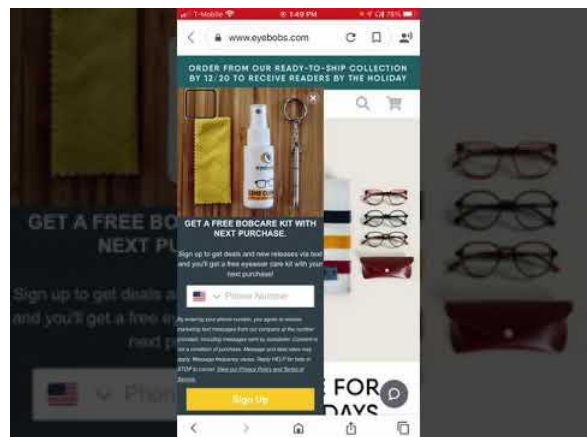
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screen readers of this pop-up window. Instead, screen readers remain focused on the content of the Digital Platform's underlying page, making the pop-up invisible to screen reader users. As a result, it is impossible for Murphy to perceive this promotion independently, the effect of which denies him the opportunity to get the free Bobcare kit. Click the picture contained in this paragraph or following link to view a short video describing this access barrier: https://youtu.be/-ya9TyAfsU4.

(e)   The Digital Platform does not provide a text equivalent for non-text elements. Providing text alternatives allows the information to be rendered in a variety of ways by a variety of users. A person who cannot see a picture, logo, or icon can have a text alternative read aloud using synthesized speech. For example, the Digital Platform provides a five-star rating for many products that Defendant sells. Consumers who perceive content visually can see whether a particular product has one, two, three, four, or five stars, and base their purchasing decisions on this information. Unfortunately, Defendant's accessibility policies fail to provide sufficiently descriptive alternative text for this important rating information. To this end, screen readers do not provide any audio information for the stars on the Digital Platform because screen readers skip this content entirely. As a result, Murphy must make his purchasing decisions without the benefit of knowing whether the products he's researching are well received by other consumers. Click the picture contained in this paragraph or following link to view a short video describing this access barrier: https://youtu.be/aPtvqY1yJBk.

Plaintiff's Injury

40.   As a result of the access barriers described above, and others, Defendant fails to communicate information about its products and services to Murphy effectively, which in turn denies Murphy full and equal access to Defendant's online store and deters him from returning to the store in the future.[33]

41.   Still, Murphy intends to attempt to access the Digital Platform within the next six months to research the products and services Defendant offers or to test the Digital Platform for compliance with the ADA.[34]

42.   If the Digital Platform were accessible (*i.e.* if Defendant removed the access barriers and implemented the practices described herein), Murphy could independently access Defendant's online services.

Defendant's Digital Platform Must Comply with the ADA

43.   The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'"[35]

44.   Title III advances that goal by providing that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the products, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[36]

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[33]   *Your Website is Scaring Customers Away. 5 Easy Ways to Fix It*, *supra* note 13.

[34]   *See Norkunas* and *Iverson supra* note 28.

[35]   *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 (1999) (*quoting* 42 U.S.C. § 12101(b)(1)).

[36]   42 U.S.C. § 12182(a).

45.   DOJ regulations require that a public accommodation "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."[37]

46.   DOJ defines "auxiliary aids and services" to include "accessible electronic and information technology" or "other effective methods of making visually delivered materials available to individuals who are blind or have low vision."[38]

47.   Therefore, the ADA mandates that places of public accommodation provide auxiliary aids and services to make visual materials available to individuals who are blind.[39]

48.   Defendant is a place of public accommodation under the ADA because it is a "sales or rental establishment" and/or "other service establishment."[40]

49.   The Digital Platform is a service, facility, advantage, or accommodation of Defendant.

50.   As a service, facility, advantage, or accommodation of Defendant, Defendant must ensure blind patrons have full and equal access to the Digital Platform.

51.   Indeed, the ADA expressly provides that a place of public accommodation engages in unlawful discrimination if it fails to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[41]

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[37]   28 C.F.R. § 36.303(c)(1); *see Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (holding that DOJ's administrative guidance on ADA compliance is entitled to deference).
[38]   28 C.F.R. § 36.303(b)(2).
[39]   28 C.F.R. § 36.303.
[40]   42 U.S.C. § 12181(7)(E), (F).
[41]   42 U.S.C. § 12182(b)(2)(A)(iii).

Defendant Received Fair Notice of its ADA Obligations

52.   Defendant and other covered entities have had more than adequate notice of their

obligation to offer individuals with disabilities an equal opportunity to access and enjoy their

services and communications, including the Digital Platform.

53.   Since its enactment in 1990, the ADA has clearly stated that covered entities must

provide "full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or

accommodations" to people with disabilities,[42] and must "ensure that no individual with a

disability is excluded, denied services, segregated or otherwise treated differently than other

individuals because of the absence of auxiliary aids and services."[43]

54.   The United States Department of Justice ("DOJ") first announced its position that

Title III applies to websites of public accommodations in a 1996 letter from Assistant Attorney

General Deval Patrick responding to an inquiry by Senator Tom Harkin regarding the accessibility

of websites to blind individuals.[44]

55.   Since then, DOJ has "repeatedly affirmed the application of [T]itle III to Web sites

of public accommodations."[45]

56.   In 2000, DOJ argued to the Fifth Circuit that a business providing services solely

over the internet is subject to the ADA's prohibitions on discrimination on the basis of disability.[46]

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[42]   42 U.S.C. § 12182(a).

[43]   42 U.S.C. § 12182(b)(2)(A)(iii).

[44]   Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), available at w https://www.justice.gov/crt/foia/file/666366/download (last accessed Dec. 7, 2020)

[45]   75 Fed. Reg. 43460-01, 43464 (July 26, 2010).

[46]   Brief of the United States as Amicus Curiae in Support of Appellant, *Hooks v. Okbridge, Inc.*,   Case   No.   99-50891   (5th   Cir.   June   30,   2000), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/hooks.pdf (last accessed Dec. 7, 2020) ("A COMMERCIAL BUSINESS PROVIDING SERVICES SOLELY OVER THE

57.   In 2002, DOJ argued to the Eleventh Circuit that there need not be a nexus between a challenged activity and a private entity´s "brick-and-mortar" facility to obtain coverage under Title III. DOJ argued that Title III applies to any activity or service offered by a public accommodation, on or off the premises.[47]

58.   In 2014, DOJ entered into a settlement agreement with America's then-leading internet grocer to remedy allegations that its website, www.peapod.com, is inaccessible to some individuals with disabilities, in violation of the ADA. DOJ's enforcement action against this online-only business affirms the ADA covers public accommodations that do not operate brick-and-mortar facilities open to the public.[48]

59.   In a September 25, 2018 letter to U.S. House of Representative Ted Budd, U.S. Department of Justice Assistant Attorney General Stephen E. Boyd confirmed that public accommodations must make the websites they own, operate, or control equally accessible to individuals with disabilities. Assistant Attorney General Boyd's letter provides:

> The Department [of Justice] first articulated its interpretation that the ADA applies to public accommodations' websites over 20 years ago. This interpretation is consistent with the ADA's title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities.[49]

INTERNET IS SUBJECT TO THE ADA'S PROHIBITION AGAINST DISCRIMINATION ON THE BASIS OF DISABILITY.") (emphasis in original).

[47]   Brief for the United States as Amicus Curiae in Support of Appellant, *Rendon v. Valleycrest Productions, Inc.*, Case No. 01-11197, 294 F.3d 1279 (11th Cir. 2002), available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/rendon.pdf (last accessed Dec. 7, 2020).

[48]   *See* Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC, DJ 202-63-169 (Nov. 17, 2014), available at https://www.justice.gov/file/163956/download (last accessed Dec. 7, 2020).

[49]   *See* Letter from Assistant Attorney General Stephen E. Boyd, U.S. Department of Justice, to Congressman Ted Budd, U.S. House of Representatives (Sept. 25, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf (last accessed Dec. 7, 2020).

60.   In 2019, the United States Supreme Court declined to review a Ninth Circuit

decision holding that (1) Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

("Title III") covers websites and mobile applications and (2) the imposition of liability on

businesses for not having an accessible website and mobile application does not violate the due

process rights of public accommodations.[50]

61.   Thus, since at least since 1996, Defendant has been on notice that its online

offerings must effectively communicate with disabled consumers and facilitate "full and equal

enjoyment" of the products and services it offers.[51]

SUBSTANTIVE VIOLATION

Title III of the ADA, 42 U.S.C. § 12181 *et seq.*

62.   The assertions contained in the previous paragraphs are incorporated by reference.

63.   Title III of the ADA guarantees that individuals with disabilities shall have full and

equal enjoyment of the products, services, facilities, privileges, advantages, or accommodations of

any place of public accommodation.[52]

64.   Defendant is bound by the regulations implementing Title III of the ADA, which

require that places of public accommodation ensure effective communication to individuals with

disabilities.[53]

65.   Murphy is legally blind and therefore an individual with a disability under the

ADA.

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[50]   *See Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019) cert. denied 589 U.S. ___ (U.S. Oct. 7, 2019) (No. 18-1539).
[51]   42 U.S.C. § 12182(a).
[52]   42 U.S.C. § 12182; 28 C.F.R. § 36.201.
[53]   28 C.F.R.§ 36.303(c).

66.   Defendant is a place of public accommodation under the ADA because it is a "sales or rental establishment" and/or "other service establishment."[54]

67.   Defendant owns, operates, or maintains the Digital Platform.

68.   The Digital Platform is a service, facility, privilege, advantage, or accommodation of Defendant.

69.   The Digital Platform contains communication barriers that prevent full and equal use by blind persons, including Murphy, using screen access software.

70.   Because of these communication barriers, Defendant denies Murphy full and equal enjoyment of the information, products, services, facilities, privileges, advantages, or accommodations that it makes available to the sighted public through the Digital Platform.

71.   These access barriers now deter Murphy from attempting to use the Digital Platform.

72.   Defendant's discrimination is ongoing.

PRAYER FOR RELIEF

WHEREFORE, Murphy requests judgment as follows:

(A)   A Declaratory Judgment that at the commencement of this action Defendant was in violation of the specific requirements of Title III of the ADA described above, and the relevant implementing regulations of the ADA, in that Defendant took no action that was reasonably calculated to ensure Defendant communicated the digital content of its Digital Platform to individuals with disabilities effectively such that Murphy could fully, equally, and independently access Defendant's products and services;

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[54]   42 U.S.C. § 12181(7)(E), (F).

(B)   A permanent injunction pursuant to 42 U.S.C. § 12188(a)(2) and 28 CFR § 36.504(a) which directs Defendant to take all steps necessary to communicate the content of its Digital Platform to screen reader users effectively such that Defendant's online products and services are fully, equally, and independently accessible to individuals with visual disabilities, and which further directs that the Court shall retain jurisdiction for a period to be determined to ensure that Defendant has adopted and is following an institutional policy that will in fact cause it to remain fully in compliance with the law—the specific injunctive relief requested by Plaintiff is described more fully below:[55]

(1)   Within 90-days of the Court's Order, Defendant shall complete an accessibility audit of its Digital Platform that will examine the accessibility and usability of the Digital Platform by consumers who are blind.

(2)   Within 180-days of the Court's Order, Defendant shall develop a corrective action strategy ("Strategy") based on the audit findings. In addition to the deadlines outlined below, the Strategy shall include dates by which corrective action shall be completed.

(3)   Within 210-days of the Court's Order, Defendant shall disseminate the Strategy among its executive-level managers, employees, and contractors, if any, involved in digital development and post it on the Digital Platform.

(4)   Within 90-days of the Court's Order, Defendant shall develop a Digital Accessibility Policy Statement that demonstrates its commitment to digital accessibility to blind

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[55]   The injunctive relief herein is consistent with a 2011 settlement agreement entered into between National Federation of the Blind and The Pennsylvania State University, available at https://accessibility.psu.edu/nfbpsusettlement/ (last accessed Dec. 7, 2020); a 2014 settlement agreement between the U.S. Department of Justice and Ahold U.S.A., Inc. and Peapod, LLC, *supra* note 47; and a 2014 Resolution Agreement between the U.S. Department of Education and Youngstown State University, available at https://www2.ed.gov/documents/press-releases/youngstown-state-university-agreement.pdf (last accessed Dec. 7, 2020).

and other print disabled consumers, as required by the Americans with Disabilities Act. This Policy Statement shall be posted in the header of each homepage on the Digital Platform within 120-days of the Court's Order, and shall disclose that an audit is taking or has taken place and that a Strategy will be disseminated and posted on the Digital Platform within 180-days of the Court's Order.

(5)   Within 240-days of the Court's Order, Defendant shall develop procedures to implement its Digital Accessibility Policy across the entire Digital Platform. Defendant shall disseminate its Policy and procedures to its executive-level managers, employees, and contractors, if any, involved in digital development.

(6)   Within 12-months of the Court's Order, Defendant shall conduct training, instruction and support to ensure that all executive-level managers and employees involved in digital development are aware of and understand the Digital Accessibility Policy, including proper procedures, tools, and techniques to implement the Digital Accessibility Policy effectively and consistently.

(7)   Within 12-months of the Court's Order, Defendant shall hire or designate a staff person with responsibility and commensurate authority, to monitor the Digital Accessibility Policy and procedures.

(8)   Within 12-months of the Court's Order, Defendant shall develop and institute procedures that require third-party content and plug-ins built into the Digital Platform to provide blind consumers the same programs, benefits and services that they do to individuals without disabilities, except that when it is technically unfeasible to do so. Defendant shall effectuate these obligations by, among other things, implementing as part of its Request for Proposal process language that bidders meet the accessibility standards set forth in WCAG 2.0 Level AA for web-based technology and the Americans with Disabilities Act; requiring or

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encouraging, at Defendant's discretion, as part of any contract with its vendors, provisions in which the vendor warrants that any technology provided complies with these standards and any applicable current federal disability law.

(9)   Within 18-months, all pages hosted on the Digital Platform that have been published shall be Accessible to blind users. "Accessible" means fully and equally accessible to and independently usable by blind individuals so that blind consumers are able to acquire the same information, engage in the same interactions, and enjoy the same services as sighted consumers, with substantially equivalent ease of use.

(10)   Defendant shall not release for public viewing or use a substantial addition, update, or change to the Digital Platform until it has determined through automated and user testing that those proposed additions, updates, or changes are Accessible.

(11)   Defendant shall conduct (a) an automated scan monthly and (b) end-ser testing quarterly thereafter to ascertain whether any new posted content is accessible. Defendant shall notify all employees and contractors, if any, involved in digital development if corrections to Digital Platform are needed and of reasonable timelines for corrections to be made. Defendant shall note if corrective action has been taken during the next monthly scan and quarterly end-user test.

(12)   Following the date of the Court's Order, for each new, renewed, or renegotiated contract with a vendor of Third-Party Content, Defendant shall seek a commitment from the vendor to provide content in a format that is Accessible.

(13)   Defendant shall provide Plaintiff, through his counsel, with a report on the first and second anniversaries of the Court's Order which summarize the progress Defendant is making in meeting its obligations. Additional communication will occur before and after each

anniversary to address any possible delays or other obstacles encountered with the implementation

of the Digital Accessibility Policy.

 (C) Payment of actual, statutory, nominal, and other damages, as the Court deems

proper;

 (D) Payment of costs of suit;

 (E) Payment of reasonable attorneys' fees, pursuant to 42 U.S.C. § 12205 and 28 CFR

§ 36.505, including costs of monitoring Defendant's compliance with the judgment;[56]

 (F) Whatever other relief the Court deems just, equitable and appropriate; and

 (G) An Order retaining jurisdiction over this case until Defendant has complied with

the Court's Orders.

Dated: January 7, 2021   */s/ Lawrence H. Fisher*

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[56] S*ee Access Now, Inc. v. Lax World, LLC*, No. 1:17-cv-10976-DJC (D. Mass. Apr. 17, 2018) (ECF 11) ("[Plaintiff], as the prevailing party, may file a fee petition before the Court surrenders jurisdiction. Pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559 (1986), *supplemented*, 483 U.S. 711 (1987), and *Garrity v. Sununu*, 752 F.2d 727, 738-39 (1st Cir. 1984), the fee petition may include costs to monitor [Defendant's] compliance with the permanent injunction."); *see also* Amended Order Granting In Part Plaintiffs' Motion For Attorneys' Fees And Costs; Denying Administrative Motion To Seal, *National Federation of the Blind of California v. Uber Technologies, Inc.*, Case No 14-cv-04086-NC (N.D. Cal. Nov. 8, 2019), https://rbgg.com/wp-content/uploads/NFB-v-Uber-Amended-Order-Granting-In-Part-Pltfs-Motion-for-Attys-Fees-and-Costs-11-08-19.pdf (last accessed Dec. 7, 2020) (finding plaintiffs "are entitled to reasonable attorneys' fees incurred in connection with monitoring [defendant's] compliance with the Settlement" of a Title III ADA case).

Exhibit A

Karl Groves, *Sole reliance on accessiBe will not be sufficient in ensuring full and equal access to a website* **(Nov. 1, 2020)**

Sole reliance on accessiBe will not be sufficient in ensuring full and equal access to a website

Karl Groves

November 1, 2020

Introduction

accessiBe is a product marketed to customers with claims that it can automatically bring a website into compliance with the Americans with Disabilities Act (ADA) and the Web Content Accessibility Guidelines (WCAG). The product is provided to customers as a snippet of JavaScript code which must be added to each page of the customer's site. That JavaScript snippet loads an application, hosted on accessiBe servers. This application provides a series of features ranging from controls that allow the user to modify the website's appearance. It also provides a series of disability specific "profiles" which provide enhancements aimed at the challenges faced by those specific disability types. In some circumstances, the product also attempts to repair the site's underlying accessibility issues.
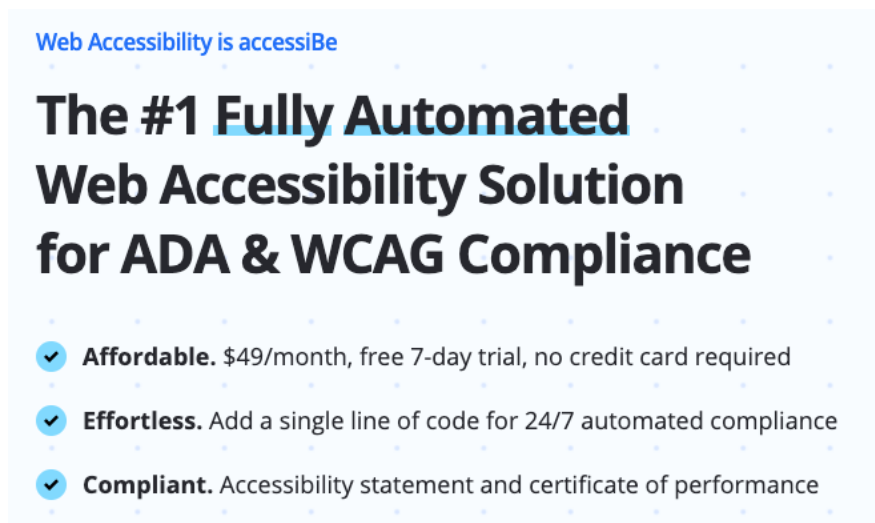
Figure 1: Screenshot from accessiBe website showing its claims regarding compliance

This document describes the ways in which the accessiBe product does not and/ or cannot ensure full and equal access to a website. In addition, it provides evidence that the accessiBe widget itself adds net-new accessibility problems to the customers' site.

Definition of accessibility

Accessibility can be viewed as the "ability to access" and benefit from some system or entity. The concept focuses on enabling access for people with disabilities, or special needs, or enabling access through the use of assistive technologies (https://en.wikipedia.org/wiki/Accessibility). The ADA has its own definition of disability allowing it to define those who are protected by the law. This definition makes clear that protected populations are not limited to those with only specific disabilities, but rather includes any "physical or mental impairment that substantially limits one or more major life activities" and are also not limited to disabilities that are only permanent. (https://www.ada.gov/pubs/adastatute08.htm#12102).

Requirements for ADA compliance

With respect to ADA compliance on the Web, the US Department of Justice says: "Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility". (https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf)

All further information and advice available from the US DOJ cites the Web Content Accessibility Guidelines (WCAG) from the W3C's Web Accessibility Initiative as the standard for use in determining a system's accessibility. WCAG is further incorporated by reference into Section 508 of the Rehabilitation Act and is used as the technical standard for nearly 2-dozen accessibility laws throughout the world (https://www.w3.org/WAI/policies). As a consequence of the above, conformance with WCAG, at the AA Level, is the standard required in legal settlements and judgments for lawsuits in the US alleging noncompliance with ADA.

In essence, a website must conform to WCAG Level AA in order to comply with the ADA.

Background on overlays

"Overlays" are third-party products which are embedded into a website with the purpose of modifying the website's presentation layer in a way that repairs or overcomes the site's accessibility issues. Such products have existed on the market since 1999 with projects like ReadSpeaker. Additional products, like BrowseAloud and ESSENTIALAccessibility entered the market in the early 2000s. All such products claimed to transform the sites onto which they were embedded so that the site would be accessible after implementation. The increased legal activity in the United States in the last few years has also created market opportunities for others to release similar products. Some of those products, like Make-Sense/ a11yAble, AudioEye, and accessiBe provide a broader array of features than the early products like BrowseAloud. While early products stated that their text-to-speech capabilities created a fully accessible site, the more recent products include the ability to also transform the UI in ways that are claimed to bring the site into compliance.

Conformance cannot be automated

To understand why all overlay products, including accessiBe, fail in their goal of automatically creating a compliant website, it is important to consider the complexities inherent to accessibility.

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The WCAG Standard, last updated on June 5, 2018, presents 13 broadly worded guidelines for creating accessible content. Those guidelines are categorized into one of 4 key principles. The guidelines are further broken down into 73 Success Criteria.

> "For each guideline, testable success criteria are provided to allow WCAG 2.0 to be used where requirements and conformance testing are necessary such as in design specification, purchasing, regulation, and contractual agreements."
> (https://www.w3.org/TR/WCAG21/)

The normative portion of the WCAG standard is 105 pages, when printed. Additional informative documents: "How to Meet WCAG", "Understanding WCAG", and "Techniques and Failures" are, cumulatively, over 2000 pages when printed. The fact that the informative content that accompanies the standard is so long is demonstrative of the fact that conformance with WCAG is not so straightforward that it can be automated.

In its description of conformance, the WCAG documentation states:
> "Conformance to a standard means that you meet or satisfy the 'requirements' of the standard. In WCAG 2.0 the 'requirements' are the Success Criteria. To conform to WCAG 2.0, you need to satisfy the Success Criteria, that is, there is no content which violates the Success Criteria."
> (https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance)

To claim conformance to a specific Level of WCAG, you must satisfy all the criteria within that level:

- For Level A conformance (the minimum level of conformance), the Web page satisfies all the Level A Success Criteria, or a conforming alternate version is provided.
- For Level AA conformance, the Web page satisfies all the Level A and Level AA Success Criteria, or a Level AA conforming alternate version is provided

(https://www.w3.org/TR/WCAG21/#conformance)

Furthermore: Conformance (and conformance level) is for full Web page(s) only and cannot be achieved if part of a Web page is excluded.

In other words, if WCAG Level AA is the standard used to determine ADA compliance, then it is to be understood that **all** Level AA Success criteria must be met on each page of the site. The converse is also

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true: **not meeting one or more Level AA Success criteria in a page means that the page is not compliant.**

The breadth of the problem

As part of the research for this report, I selected 50 websites of accessiBe customers and ran automated testing against an average of 20 pages on each site. At the time of testing, each of these websites were verified to have the accessiBe widget on the site. The purpose of this testing was to gather basic data on the scope and nature of issues which exist on a typical site. The full list of sites is listed in Appendix A.

Total Issues Discovered Per Site	1. MIN: 399 2. MAX: 12,077 3. MEAN : 2754 4. MEDIAN: 2334
Issues Per Page	5. MIN: 28 6. MAX: 932 7. MEAN : 155 8. MEDIAN: 124 9. MODE: 127
Average Page Density (Defined as number of issues per kilobyte of source)	10. MIN: 11% 11. MAX: 176% 12. MEAN : 56% 13. MEDIAN: 51% 14. MODE: 49%
Average issues per Page: Images and other non-text content	15. MIN: .26 16. MAX: 118 17. MEAN : 14 18. MEDIAN: 6 19. MODE: N/A
Average issues per page: Forms	20. MIN: 1 21. MAX: 77 22. MEAN : 12 23. MEDIAN: 5 24. MODE:2
Average issues per page: Keyboard Accessibility and Focus Control	25. MIN: 1 26. MAX: 123 27. MEAN : 19 28. MEDIAN: 15 29. MODE: 21

Percentage of pages with zero issues	30.0%

Figure 2: High level automated testing results

As the table above shows, the sites tested contained a significant number of issues with 0% of pages being completely error-free. The data above does not show any significant divergence from what has been found across the broader set of websites I have tested. In other words, the accessiBe customer sites are neither better nor worse than the broader Web as a whole.

The data above makes clear that accessibility on the Web is a serious challenge.

Fundamental truths on machine testing, automatic transformations, and accessibility

To automatically bring a non-compliant site into compliance with WCAG, it stands to reason that such a product must first be able to automatically detect every individual instance of non-compliance. For instance, to repair an issue with a Keyboard Trap (WCAG 2.1.2) such a product must be capable of detecting the existence of a Keyboard Trap. From there, the tool must be able to determine whether the Keyboard Trap is essential based on the current context or whether it is a trap with no other means of escaping. Finally, once such determination has been made, the tool must also decide on where to send keyboard focus next based on the user's interaction.

That example is only one of many complex and currently insurmountable challenges facing testing tools and automation. More examples:

1. **For 1.1.1 Non-text Content:** It is possible to detect a missing text alternative for an image, but it is not possible to know, with 100% certainty whether a text alternative, when supplied, is an accurate alternative for the meaning intended by the document author.
2. **For 1.2.2. Captions (Prerecorded):** It is possible to know, for certain audio & video embedding methods (i.e., native HTML5), whether a programmatically associated captions file exists, but it is not possible to know this for other mechanisms (Flash). It is also not possible to know if the captions don't already exist as "open captions" on the video itself. Furthermore, it is impossible to automatically test for the quality of those captions.

In fact, it is impossible to accurately judge full conformance for any of WCAG's 73 success criteria using machine testing alone. Therefore, it stands to reason that automated repair of nonconformance is impossible as well. Quite simply, some WCAG SCs are too complex to accurately test or repair (3.3.3, 1.4.1) while others are too subjective (1.1.1).

In addition to the complexity and subjectivity of testing for WCAG, using an external tool for testing & repairing of content other than HTML, CSS, and JS is impossible as well. This is due to the architecture of the Web and of Web pages. While a third-party JavaScript application such as accessiBe can gain access to all objects present in the DOM, some on-page resources cannot be manipulated with JavaScript. **Content presented in Flash, Java, Silverlight, or PDF cannot be assessed or modified by third-party JavaScript.** This is a fact that accessiBe readily admits on their own Terms of Service:

> "By way of example, accessiBe Systems do not support other components, such as Canvas, Flash and/or SVG." They also state "...accessiBe does not remediate PDF files or create subtitles for videos…" their Terms also further say "The Company does not undertake that the Licensee Website will be 100% accessible at any given moment, owing to factors such as Licensee changes made to the Licensee Website, issues originating in the Licensee Website and /or limitations stemming from technological reasons."

accessiBe further disclaim their marketing department's statements of automated conformance by stating:

> "The functionality of the accessiBe Systems requires that the Licensee Website in which they are embedded be websites based solely on HTML files and tags, and that the source code be written according to the Standard of the World Wide Web Consortium ("W3C"), without any errors or validation warning in W3C's troubleshooting inspections; please note that Licensee changes to such website may impact the functionality of the Service."
> https://accessibe.com/terms-of-service

The impracticality of the above requirement in accessiBe's Terms of Service is demonstrated in the statistics available from the W3C service they cite in the above passage. The statistics, available at https://validator.w3.org/nu/stats.html indicate that approximately 80% of all tested documents contain validation errors that would, in turn, invalidate a customer's claims that the accessiBe wasn't doing its job. However, markup validity in and of itself is unlikely to be an accessibility issue, evidenced by the fact that WCAG removed such a requirement when going from version 1.0 to 2.0.

By requiring that customer websites' markup consist of valid HTML, and by failing to support PDF, video, or other "limitations stemming from technological reasons" accessiBe is indicating that it recognizes the fact that it is impossible to fully automate compliance.

8

Key examples of accessiBe's failure to provide a completely accessible experience

This section describes an array of examples, for a variety of different content types, where accessiBe does not effectively repair accessibility issues.

AccessiBe is unable to correct accessibility issues in images and other non-text content

Images are an integral part of the web and are commonplace on most websites. The image element (`<img>`) has an `alt` attribute which allows an author to provide a clear, concise alternate description of the image's content. Other methods exist to provide text-based alternatives including, where necessary, mechanisms which will cause assistive technologies to ignore images for which no text-based alternative is necessary.

Alternate descriptions allow low and no vision users to understand the image's content and, importantly, intent behind its placement. Without meaningful alternate descriptions, assistive technology users will not be able to understand website content the same way non-assistive technology users can.

Alternate descriptions should communicate information critical to understanding what the image is meant to convey. An alternate text description should also capture pertinent thematic details, such as the color, texture, and materials for product photography. Doing so ensures that the experience has a parity in quality with what a non-assistive technology user experiences. A full description of the decision making needed to create an effective text alternative is available at:
https://www.w3.org/WAI/tutorials/images/decision-tree/ and a fully detailed description is available in the HTML5 specification, Section 4.8.4.4 Requirements for providing text to act as an alternative for images (https://html.spec.whatwg.org/multipage/images.html#alt)

accessiBe purportedly uses "computer vision" to automatically create and apply alternate descriptions (https://accessibe.com/product/artificial-intelligence). This automation of alternate descriptions may fail in one (or more) of the following instances:

1. accessiBe may not detect the presence of an image, and therefore will not assign it an image description.
2. accessiBe creates an image description, but the image description does not accurately represent the image's content and meaning to the end user.
3. The existing image description is insufficient and accessiBe does not overwrite it.

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In each case, these issues are a failure of Web Content Accessibility Guidelines 2.1 Success Criterion 1.1.1 Non-text Content (https://www.w3.org/TR/WCAG21/#non-text-content). Following are a representative sampling of instances of these issues.

Situations in which accessiBe does not detect the presence of an image

In certain cases, accessiBe is unable to detect the presence of an image and, as a result, does not attempt to provide a text alternative for it.

Figure 3: Example from Belkin https://www.belkin.com/us/

Code for one of the icons above:

```
<svg viewBox="0 0 512 512"><path d="M211.9 197.4h-
36.7v59.9h36.7V433.1h70.5V256.5h49.2l5.2-59.1h-54.4c0 0 0-22.1 0-33.7
0-13.9 2.8-19.5 16.3-19.5 10.9 0 38.2 0 38.2 0V82.9c0 0-40.2 0-48.8 0
-52.5 0-76.1 23.1-76.1 67.3C211.9 188.8 211.9 197.4 211.9
197.4z"></path></svg>
```

- ▪ Original text alternative: None provided
- ▪ Alternate description with accessiBe's Blind User Profile active: None provided
- ▪ Issues:
  - ○ The images are defined using SVG, not an image element. SVGs are an alternate way to display images, typically used for icons and simple illustrations. SVGs also require an alternate description, provided using techniques that differ from the image element's alt attribute.
  - ○ SVG without an alternate description cannot be understood by low and no vision users navigating via assistive technology.
  - ○ Each of these SVG images does not have an alternate description.

○ accessiBe does not detect these SVG images, and therefore does not provide an alternate description. accessiBe explicitly states that it does not support SVG (https://accessibe.com/terms-of-service) and, as a result, cannot bring into compliance any site which makes use of SVG.

Figure 4: Example from Belkin Student Discount https://www.belkin.com/us/studentdiscount/

```
<iframe
src="https://connect.studentbeans.com/v2/belkin/us?stb_offer_path=http
s%3A%2F%2Fwww.belkin.com%2Fus%2Fstudentdiscount%2F&amp;validate_iframe
=true" width="100%" height="720" frameborder="0"
seamless="seamless"></iframe>
```

- Original text alternative: None provided
- Alternate description with accessiBe's Blind User Profile active: None provided
- Issues:
  - This image is part of an embedded widget provided by StudentBeans, a third-party service.

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○ This image does not have an alternate description provided by StudentBeans.

○ accessiBe does not detect images inside of embedded widgets, and therefore does not provide an alternate description.

Situations in which accessiBe creates an inaccurate image description

Bella Lace Wedding Dress

US $198.00

Figure 5: Example from Kiyonna: Featured Styles > Office Chic

https://www.kiyonna.com/plus-size-clothing/plus-size-work-clothes.html

▪ Original text alternative: None provided

▪ Text alternative with accessiBe's Blind User Profile active: "Grass nature and summer".

▪ Issues: accessiBe's machine-based description does not sufficiently communicate image content and purpose.

Flirty Flounce Wrap Dress - Sale!!

US $60.00

Figure 6: Example from Kiyonna: Featured Styles > Office Chic

https://www.kiyonna.com/plus-size-clothing/plus-size-work-clothes.html

- Original text alternative: None provided
- Text alternative with accessiBe's Blind User Profile active: "Fashion woman and girl"
- Issues: accessiBe's machine-based description does not sufficiently communicate image content and purpose.

Figure 7: Example from carousel on https://www.kiyonna.com/behind-the-seams/protective-face-masks/

- Original text alternative: "" (in other words, it was purposefully left empty)
- Text alternative with accessiBe's Blind User Profile active: "BTS-2"
- Issues:
  - Alt description has been intentionally left blank but is not decorative.
  - The nulled alt description does not sufficiently describe the image's content.
  - accessiBe description does not sufficiently communicate image content and purpose.
    - In this instance, it appears accessiBe's automation logic cannot identify significant shapes within the image, and defaults to using a modified version of the uploaded filename, "BTS-2-500x280.jpg". If the filename does not describe the image's contents, the description will be insufficient.

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Wemo WiFi Smart Plug

20% Off $19.99 $24.99

Figure 8: Example from https://www.belkin.com/us/exclusive-deals/

- Original text alternative: None provided
- Text alternative with accessiBe's Blind User Profile active: "Processing the data, please give it a few seconds..."
- Issues: accessiBe description has failed to load and is using the alt description to communicate a status message. This does not sufficiently communicate the image's content and purpose.

CAR CHARGERS

Figure 9: Example from https://www.belkin.com/us/products/

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- Original text alternative: None provided
- Text alternative with accessiBe's Blind User Profile active: "belkin. Power electricity and addiction"
- Issues: accessiBe's machine-based description does not sufficiently communicate image content and purpose

Figure 10: Example from https://annieselke.com/c/pineconehill

- Original text alternative: "" (in other words, it was purposefully left empty)
- Text alternative with accessiBe's Blind User Profile active: "Fas blogfooter1"
- Issues: accessiBe description does not sufficiently communicate image content and purpose. In this instance, it appears accessiBe's automation logic cannot identify the text used in the image, and defaults to using a modified version of the uploaded filename, "FAS_BlogFooter1?fmt=png-alpha". Since the filename does not describe the image's contents, the description is insufficient.

Situations in which accessiBe does not correct an inaccurate image description

Figure 11: Example from https://www.kiyonna.com/

- Original text alternative: "Treat Yourself Sale"

- Text alternative with accessiBe's Blind Users (Screen-reader) mode active: "Treat Yourself Sale"
- Issues: the accessiBe product did not correct the insufficient alt attribute value supplied by the customer site
    - Does not provide information about the $30 separates.
    - Does not provide information about the $60 separates.
    - Does not provide information about the shop sale call to action.

Figure 12: Screenshot from Kiyonna site. All content in this screenshot is a single image.

- Original text alternative: "Masker-AID Masks"
- Text alternative with accessiBe's Blind Users (Screen-reader) mode active: "Masker-AID Masks"
- Issues: the accessiBe product did not correct the insufficient alt attribute value supplied
    - Does not provide information about how Masker-AID is by Kiyonna.
    - Does not provide information about the headline, "You (M)asked, we listened".
    - Does not provide information about the description, "Made in the USA with 3 layers of 100% Soft Cotton! They are breathable, reversible, reusable, and washable."
    - Does not provide information about the shop masks call to action.
    - Does not provide information about the exclusion message, "(This item is excluded from all promotions and codes)".
    - Does not provide information about the three labeled polaroids with product photos and models.

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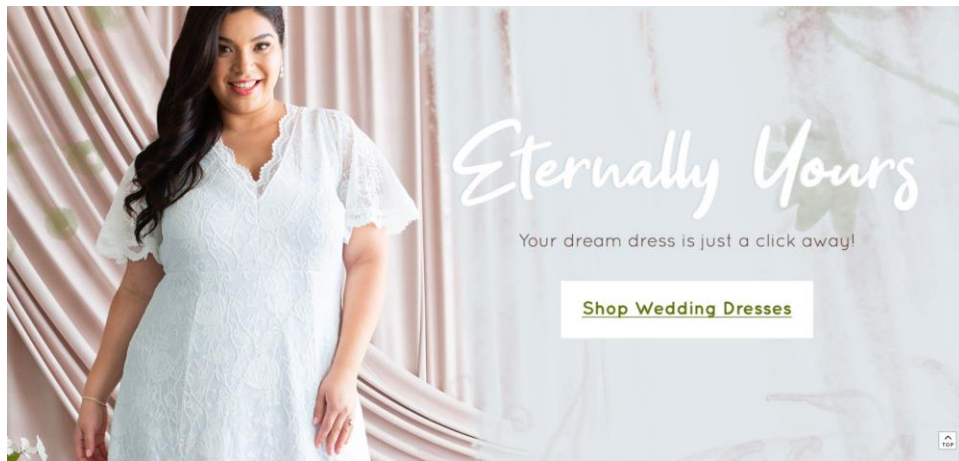
Figure 13: Screenshot from Kiyonna site. This entire screenshot is a single image

- Original text alternative: "New Wedding Dresses"
- Text alternative with accessiBe's Blind Users (Screen-reader) mode active: "New Wedding Dresses"
- Issues: the accessiBe product did not correct the insufficient alt attribute value supplied
  - Does not describe the subtitle, "Your dream dress is just a click away!"
  - Does not provide information about the presence of a model in a wedding dress.
  - Does not provide information about the Shop Wedding Dresses call to action.

**BOOST↑CHARGE™ Wireless
Charging Stand + Speaker**

★★★★⯪

$49.99

Figure 14: Example from https://www.belkin.com/us/c/speakers-headphones/

- Original text alternative: "prodImage"
- Text alternative with accessiBe's Blind User Profile active: "prodImage"
- Issues:
    ○ Existing alternate description does not sufficiently describe the image.
    ○ accessiBe does not update the insufficiently described image.

Figure 15: Example of logo on https://www.belkin.com/us/

- Original text alternative: "" (in other words, it was purposefully left empty)
- Text alternative with accessiBe's Blind User Profile active: ""
- Issues:
  - Alt description has been left blank but is not decorative.
    - The nulled alt description does not sufficiently describe the image's content.
  - A nulled title attribute is also present on this image element.
    - The nulled title attribute also prevents describing the image's content.
  - accessiBe description does not sufficiently communicate image content and purpose, navigating home.

Figure 16: Example from https://www.belkin.com/us/p/P-BBM001/

- **Original text alternative:** "BOOST ↑ UP Wireless Charging Dock on bedside table"
- Text alternative with accessiBe's **Blind User Profile** active: "BOOST ↑ UP Wireless Charging Dock on bedside table"
- Issues:
  - Existing alternate description incorrectly describes the image.
  - accessiBe does not update the incorrectly described image.

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Figure 17: Example from https://annieselke.com/about-us

- ▪ Original text alternative: "Timeline 9"
- ▪ Text alternative with accessiBe's Blind User Profile active: "Timeline 9"
- ▪ Issues: the accessiBe product did not correct the insufficient alt attribute value supplied
    - ○ Existing alternate description incorrectly describes the image.
        - ■ The image contains both images of text and photos, and the presence of both are not announced.
    - ○ accessiBe does not update the incorrectly described image.

The above demonstrates that accessiBe's approaches to handling text alternatives for images is ineffective and cannot correct inaccessibility thereof. Its attempts at creating text alternatives via image recognition fall short due to the inherent limitations of machine learning as well as the inappropriateness of such an approach in the first place.

An effective text alternative for non-text content is not merely a description of what an image contains but instead must consist of what *meaning* that the image contributes to the content. That meaning is heavily dependent on surrounding content and on the context in which it is used. Ultimately, only the web page's author truly knows what that is and using a machine to guess *meaning* is a mistake.

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Even the world's largest software company cannot get this right, as evidenced by the screenshots below. Not long ago Microsoft Office added image recognition, which uses image recognition to attempt to make it easier for users to add text alternatives to images. As the screenshots below demonstrate, image recognition can often be wildly incorrect. In the first example, Microsoft's AI suggests "A close up of a speaker" for the image displaying the WiFi Smart Plug. In the second example which shows a car charger adapter from Belkin, Microsoft's AI merely says "Diagram"
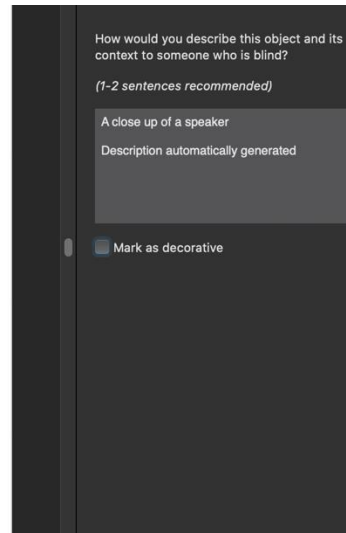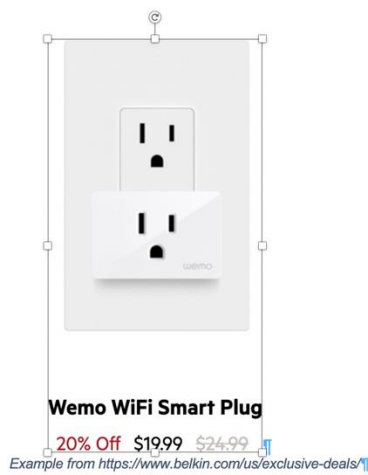
Figure 18: Screenshot of MS Word's alt text panel
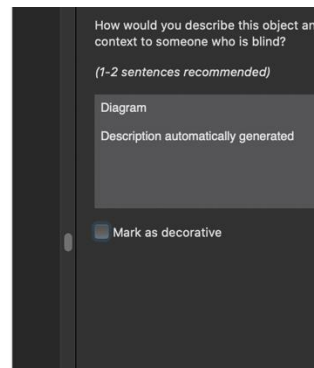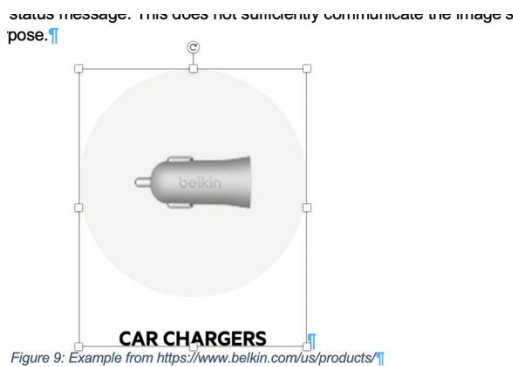
Figure 19: Screenshot of MS Word's alt text panel

AccessiBe is unable to correct accessibility issues in Forms

Forms allow a user to act on website content and submit information for processing. They are a common fixture on websites, as they allow for things like eCommerce, job applications, email correspondence, and social media posting to be conducted.

Forms are constructed from a predefined set of HTML elements, including `<form>`, `<fieldset>`, `<label>`, `<input>`, `<textarea>`, `<select>` and `<button>`. These elements allow a user to conduct actions such as input text, select, and check options, upload files, and transmit information. These HTML elements also map to hooks provided by assistive technology such as screen readers. This allows low and no vision users to be able to understand the presence of a form, as well as what sorts of input it can receive.

accessiBe claims to use artificial intelligence to "solve" issues with "buttons," "forms," and "dropdowns"—all component parts found in forms. (https://accessibe.com/product/artificial-intelligence) The quality and accuracy of this automation is suspect given the results of before & after inspection of the sites of accessiBe customers.

A clear demonstration of accessiBe's inability to properly fix accessibility issues can be seen on the CandleScience website at the following URL: https://www.candlescience.com/quick_order/soap-fragrance-oil

Figure 20: Screenshot of Bulk order grid on the CandleScience website

By default, there is no `<label>` element present for each input, nor is any other mechanism provided to create an accessible name for them. Without a sufficiently described accessible name for each input in the grid, it becomes difficult or impossible for low and no vision users to understand what each input is for.

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accessiBe's approach appears to simply locate nearby text content and assign it to the closest applicable input to create an accessible name for the input via the `aria-label` attribute. For example, after enabling the Blind User profile on accessiBe, the inputs' markup are modified considerably as in the following example:

```
<input type="number" min="0" class="form-control" data-acsb-
navigable="true" data-acsb-now-navigable="true" data-acsb-textual-
type="null" data-acsb-validation-uuid="al3fvrgm6xsb" data-acsb-field-
visible="true" aria-label="4 oz - $8.92" placeholder="4 oz - $8.92"
data-acsb-tooltip="4 oz - $8.92">
```

The relevant accessibility "repair" is highlighted above. The accessiBe product has used that adjacent string of text (4 oz - $8.92) and applied it as the value for the `aria-label` attribute.

It also creates a placeholder attribute and a custom tooltip. The ultimate effect of this "repair" from accessiBe is:

1. Depending upon the screenreader user's settings, they may hear this same string of text - at minimum - twice, because the `aria-label` and `placeholder` values are the same.
2. The label provided is no better than the default behavior of all major screen readers, which means that this approach could be the same as doing nothing.

A label that consists solely of the size and price of the product is not an accurate or suitable label, as non-visual users will not know which product these features relate to. accessiBe does not associate each input with their corresponding fragrance listed to the left of the row(s) of inputs. With no association, a low or no vision user has no way of understanding what number of what fragrances they are purchasing.

There is an average of 126 instances of this type of issue on each of the 50 sites tested in Appendix A

Another example of accessiBe's inability to provide a good accessible name for a control can be seen in the main menu of the CandleScience website

Without the accessiBe widget enabled, the button element used to toggle open a search field does not have an accessible name. A `<button>` can be given an accessible name by providing text content in between the opening and closing <button> element tags. Other mechanisms exist to create an accessible name for buttons, such as by using `aria-label`. Buttons require an effective accessible name to create an announcement for screen readers about what functionality the button triggers. With no accessible name, a low or no vision user has no way of understanding what functionality the button triggers.

Enabling accessiBe's Blind User profile showed no modification to the button that would create an accessible name for this button.

There is an average of 28 instances of this type of issue on each of the 50 sites tested in Appendix A

AccessiBe is unable to correct accessibility issues in document heading structure

Semantic structure should be used to ensure that users can access all the content on a page. Regions, headings, lists, links, even paragraph tags can be used to simplify navigation through web content. Headings fulfill an important role for users who are blind, low-vision, and cognitively impaired. Visually, headings can convey to users what the page - and the content under each heading - is about. Screenreader users can also get this same understanding by listening to the headings. The level of each heading can be used to infer an "outline" of the page and its content. If headings are not identified or are identified out of order, blind users will be unable to understand the content structure in the same ways as a user who is not blind.
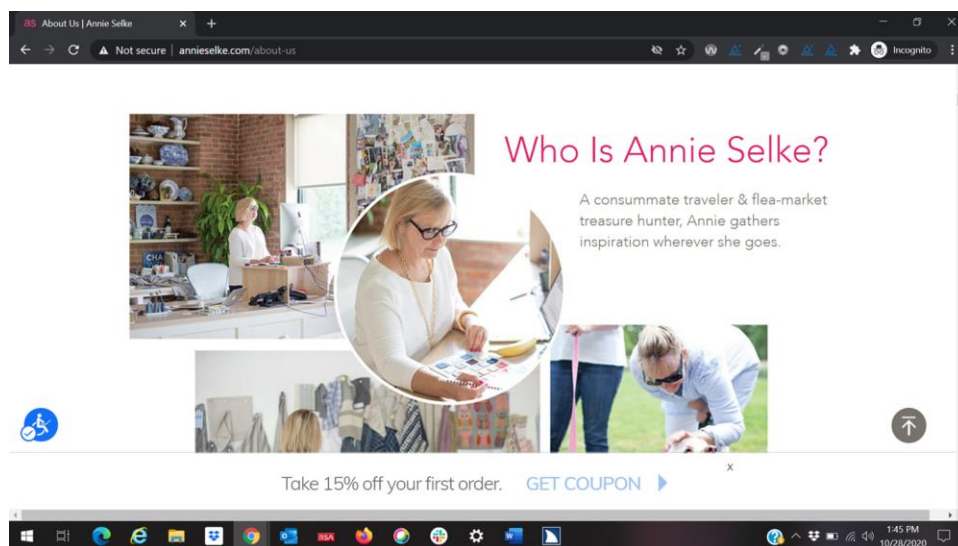

Figure 21: Screenshot of the AnnieSelke.com "About Us" page

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When engaging with the "About Us" page on the Annie Selke page using JAWS alone, only "About Us" is identified as a heading. Users cannot navigate to other content on the page that is styled in a way that appears as a heading. With Accessibe's Blind User Profile enabled and JAWS turned on, "Who is Annie Selke" is identified with a role of heading, but it is assigned a Heading level 4. Users navigating through the heading structure alone are likely to find this content confusing.

However, even with this "enhancement," not all the content that looks like a heading is identified as one:

1. "Mission & Philosophy" is not identified as a heading
2. "Commitment to Quality" is identified as two separate heading level 4s
3. "We Bring Happy Home" is not identified as a heading
4. "Who We Are" is not identified as a heading
5. Rather than sub-heading and content, the timeline is presented as a series of images identified as "Timeline 1," "Timeline 2," etc. through "Timeline 10."

Like the example above, the product listing pages feature suboptimal heading structure. In this example, the page is reasonably structured in premise: It has a single H1, and the subheadings are used - despite skipping around. What's noticeably challenging is that the page structure is not set up in a logical way. The left rail navigation comes after the main content in the body of the page, so the order is off. This is reflected in the outline view of the page:
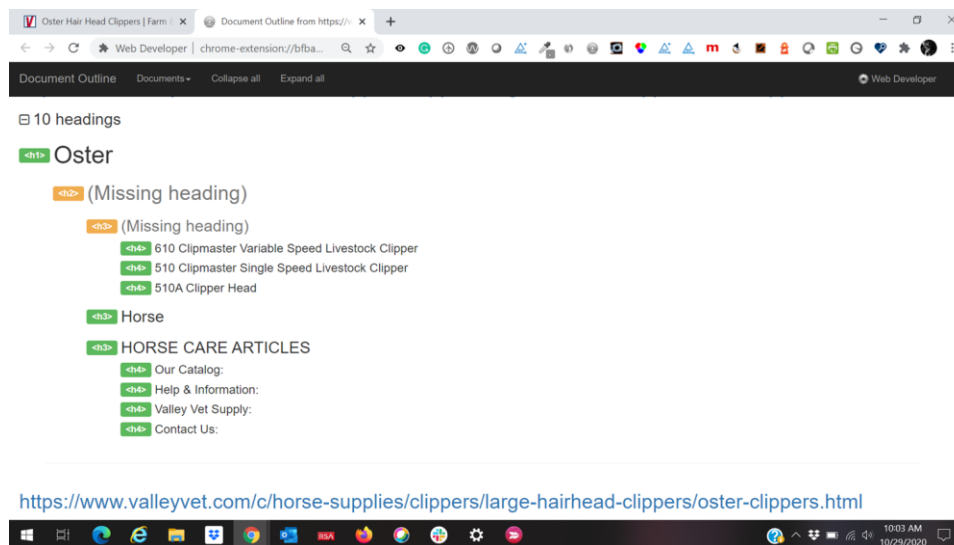

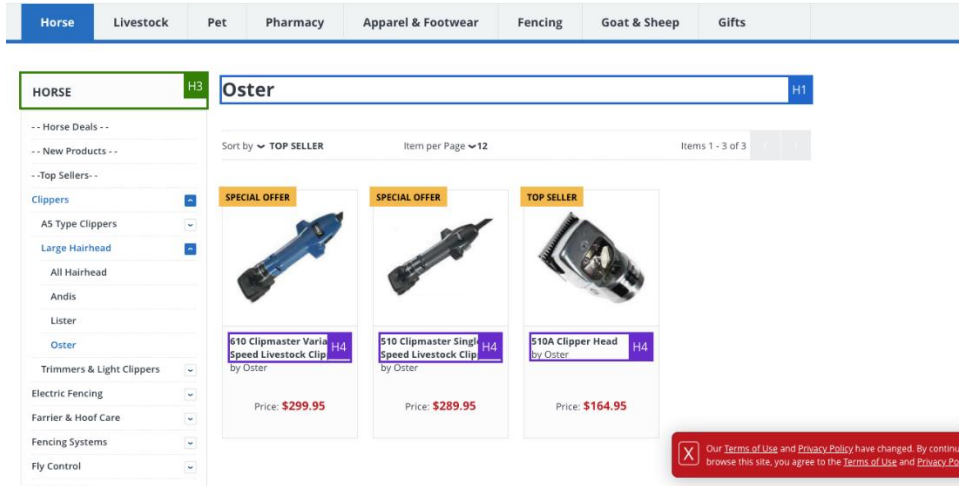*Figure 22: Screenshot demonstrating the poor heading structure on the ValleyVet site*

Figure 23: The same page as above, showing the headings in context

In both cases - be it the suboptimal heading structure and the poor content order, accessiBe does not fix these issues.

AccessiBe is unable to correct accessibility issues in Keyboard Navigation

On the ShowMeCables.com website, the "Shopping Options" sidebar on the left of the product list does not appear in the correct tab order (all shopping pages are affected). To navigate to this section, one must tab completely through the main content section. Only then is a keyboard user able to choose filters for sorting items. Some of the options, such as   options for length and color, never achieve focus via keyboard at all.
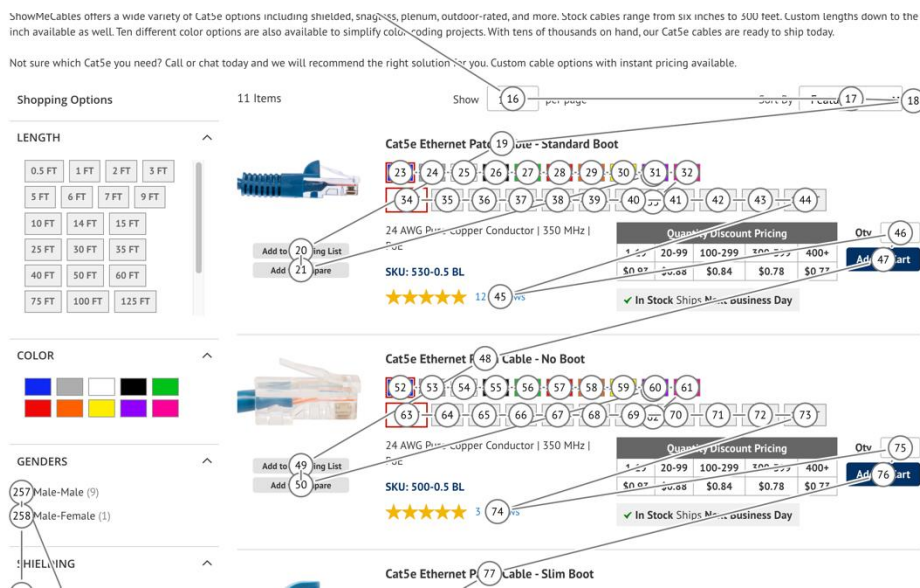

Figure 24: Screenshot from the ShowMeCables.com website showing the tab order.

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As the screenshot above shows, the next tab stop after the global navigation and breadcrumb is #16: the control for users to select how many products to show per page. The filter controls on the left for "Genders" is #257.

Screen reader users and keyboard-only users expect that content on the Web will be in left-to-right and top-to-bottom order. On an interface like the one in the screenshot above, users expect to interact with the "Shopping Options" on the left before the list of products. Using the site with accessiBe's Blind User profile enabled this deficiency is not repaired.

On the same site, the "Custom Cable" building tool is wholly inaccessible to keyboard users. All operation in this tool requires the use of the mouse and this is not repaired by accessiBe's Blind User profile
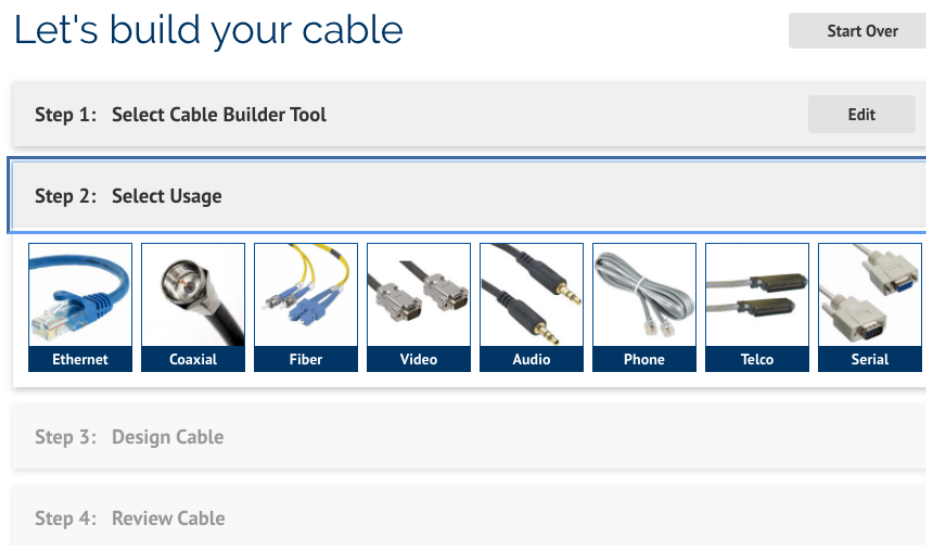

Figure 25: Screenshot of ShowMeCables.com's custom cable builder

Accessibility issues within the accessiBe widget

The previous several pages have demonstrated the vast array of accessibility problems that accessiBe does not correct. However, even if accessiBe was able to fix everything on the underlying page, the widget itself introduces its own set of new problems. The following is a brief, select list of issues within the accessiBe widget that constitute *new* accessibility issues that further bring the customer's site out of compliance.

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Operating the Widget

To access the accessibility options and contents of the widget, the user must either click on the accessiBe icon or they can discover the content by tabbing into the page at which time an "Accessibility Feedback and Statement" control visually appears and is in the keyboard order. It is not clear from the accessible name of this control that it will lead to the various accessibility control options within the widget. Once it has been activated the user is taken directly to the statement which needs to be closed before the widget internals are exposed. This risks reducing the likelihood that end users will reach the widget to enable any of its features
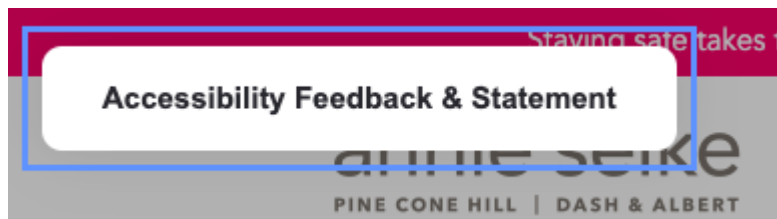

Figure 26: Screenshot of the initial tab stop in the product.

The control to select the language is a button with one default language selected (e.g., English) and no information is communicated about the ability to select from a list of languages. The button's label merely states the current language rather than convey that it allows users to switch the language.
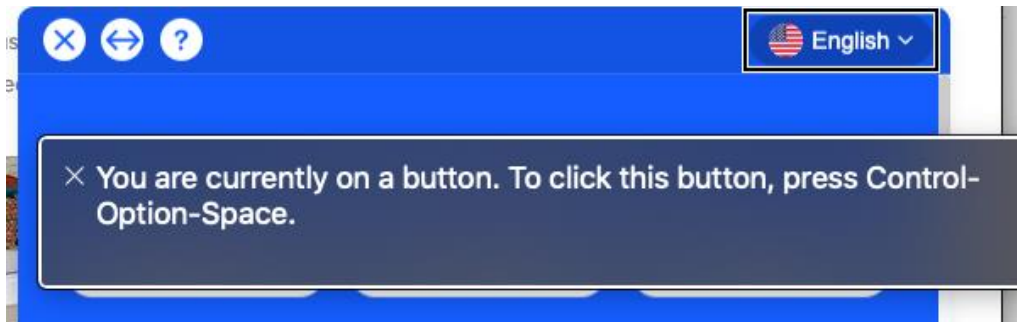

Figure 27: Screenshot of accessiBe widget and the caption output from Voiceover screenreader on MacOS

Once a user has activated the language button, a dialog opens that allows the user to select their desired language for the accessiBe widget's interface.
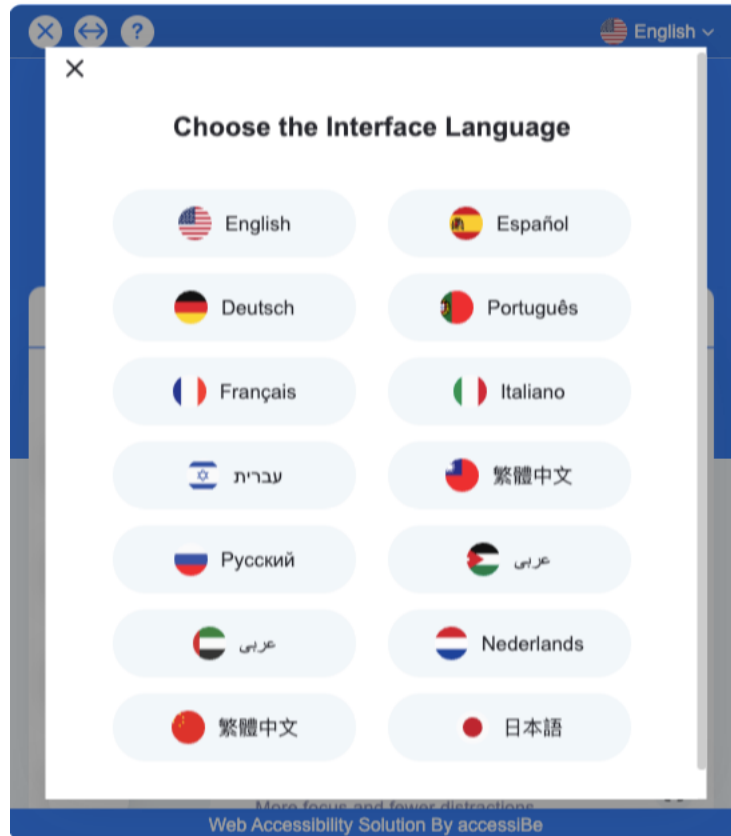
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*Figure 28: Screenshot of the accessiBe widget's language options*

Each of the language options are presented as a button with an icon and the text for each language, localized to the proper name of the language for speakers of same.

As demonstrated in the following code snippet, taken from the button used to select the German language option, the <img> element showing the German flag does not have a text-based alternative or a means to cause it to be ignored by assistive technology. As a result, the accessiBe widget violates WCAG 1.1.1. Further, the change to German language for the text label has not been identified, which is a violation of WCAG 3.1.2.

```
<div class="acsb-language" role="button" tabindex="0" data-acsb-
language="de">
    <span class="acsb-language-flag">
        <img
src="https://acsbapp.com/apps/app/assets/media/languages/de.svg">
    </span>
```

```
    <span class="acsb-language-text">Deutsch</span>
</div>
```

Inside the widget's options, the descriptive text underneath each profile type has an insufficient text color contrast of 3.9:1 (should be 4.5:1 per WCAG 1.4.3).
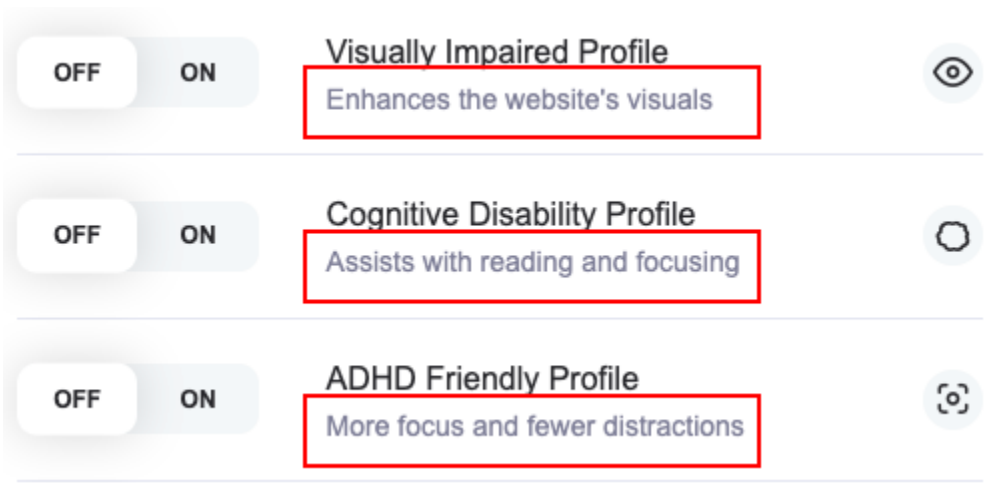
Finally, some operations within the widget will cause the widget to close with no warning provided to the user that such a change of context will occur, which violates WCAG 3.2.2

Conclusion

Sole reliance on accessiBe will not allow a website to achieve full and equal access for users with disabilities.

1. accessiBe's Terms of Service acknowledges that the product cannot bring into compliance any content in Flash, Java, Silverlight, SVG, or PDF.

2. accessiBe's Terms of Service acknowledges that the product cannot bring into compliance any content presented in video and audio.

3. accessiBe's Terms of Service expressly disclaims content that uses invalid markup, which is around 80% of pages on the Web.

4. Testing reveals that accessiBe does not effectively fix problems with
   a. Images and non-text content

      b. Document structure

      c. Forms

      d. Keyboard accessibility and focus control

      e. Content within i-frames

5. In addition, the accessiBe widget itself introduces new accessibility issues.

This report demonstrates that implementing the accessiBe product onto a website cannot ensure full and equal access to a website as required by the ADA. As a result, clients must not rely solely on accessiBe and must instead take a more direct and strategic approach to managing their own accessibility.

Appendices

Appendix A: Automatically Tested Websites of accessiBe customers

1. american-apartment-owners-association.org
2. amp-research.com
3. annieselke.com
4. arteza.com
5. belkin.com
6. bensdiscountsupply.com
7. bestbuyautoequipment.com
8. bigdotofhappiness.com
9. bigelowtea.com
10. budgetgolf.com
11. bulkapothecary.com
12. bushwacker.com
13. candlescience.com
14. cariloha.com
15. cases.com
16. conference-board.org
17. decadeawards.com
18. dinntrophy.com
19. eataly.com
20. eset.com
21. glyde.com
22. hdaccessory.com
23. hoveround.com
24. hyperikon.com
25. kiyonna.com
26. knfilters.com
27. linksys.com
28. makingcosmetics.com
29. manhattanportage.com
30. nemoequipment.com
31. neurogan.com
32. oransi.com
33. pinnaclepromotions.com
34. rag-bone.com

35. rampageproducts.com
36. rollnlock.com
37. ross-simons.com
38. sagegoddess.com
39. samys.com
40. scottevest.com
41. seatow.com
42. showmecables.com
43. sidneythomas.com
44. stampedeproducts.com
45. t3micro.com
46. teleflora.com
47. the-cover-store.com
48. tonnopro.com
49. valleyvet.com
50. wenzelco.com

Appendix B: Manually inspected websites of accessiBe customer

1. annieselke.com
2. belkin.com
3. candlescience.com
4. kiyonna.com
5. kiyonna.com
6. scottevest.com
7. showmecables.com
8. the-cover-store.com