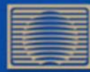

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Obama-Era DOJ Violated Free Speech Through Burdensome Demands for Disabled Access

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In March, the University of California at Berkeley began removing 20,000 college lectures from the Internet. It did so in response to the Justice Department telling Berkeley that posting the lectures violated the Americans with Disabilities Act, because they were not fully accessible to the blind and deaf.

The Americans with Disabilities Act says that services do not have to be made accessible to the disabled if doing so would impose an "undue burden" on the provider. The Obama Justice Department paid only lip service to this provision in its August 30, 2016, letter telling Berkeley that it was in violation of Title II of the Americans with Disabilities Act. It claimed there was no "undue burden" in forcing Berkeley to make all of those lectures available to the blind and deaf, even though the cost apparently would have exceeded $1 million, a prohibitive amount for a free web site that does not make a profit. Moreover, it claimed there was no "fundamental alteration" of the service required, even though the Justice Department's demands for accessibility required more than just verbatim captioning or transcription, effectively requiring Berkeley to create new content. This gave short shrift to limits on the reach of the ADA, which does not require regulated entities to "fundamentally alter" their programs and services to accommodate the disabled.

In response, Berkeley announced that it will:

"… cut off public access to tens of thousands of video lectures and podcasts in response to a U.S. Justice Department order that it make the educational content accessible to people with disabilities … On March 15, the university will begin removing the more than 20,000 audio and video files … a process that will take three to five months — and require users sign in with University of California credentials to view or listen to them."

A third-party digital library copied the lectures from Berkeley's web site, and plans to make them available to the public on its website, but it remains to be seen whether this will trigger intellectual-property takedown demands or lawsuits.

As the Cato Institute's Walter Olson noted last year, Berkeley's removal of its internet content could harm disabled people with mobility impairments: "Even if the welfare of disabled persons is treated as the only important outcome, the application of the ADA is probably going to do harm, because online alternatives to classroom instruction are particularly valuable to disabled persons, notably those with impaired mobility."

Reason magazine argued that by effectively defining "equal access" as "no access for anybody," the Obama Justice Department put itself in the role of "the Handicapper General" from the satirical and dystopian science fiction story *Harrison Bergeron*.

The Justice Department's demands exceeded its authority under the Americans with Disabilities Act, by effectively reading words like "undue burden" out of the statute. They also trigger First Amendment scrutiny because they restrict the flow of information to willing listeners. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976) (commercial speech is protected because "the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

Such demands can also burden the free-speech rights of speakers (college professors), by barring them from posting their speech, unless they first translate it into modes of expression that the blind and deaf can comprehend. The burden of doing so can in turn reduce their willingness and ability to disseminate their speech, especially when the speech is difficult to convey to a blind person, and additional commentary must be added. (*See, e.g.,* Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U.J. Sci. & Tech. L. 26 (2001); Ali Abrar & Kerry J. Dingle, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 Harvard C.R-C.L. L. Rev. 133, 167 (2009)).

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For example, the Justice Department's letter to Berkeley complained that "in one video lecture, a professor pointed to and talked about an image and its structure without describing the image, making it inaccessible to individuals with vision disabilities," and "Approximately half the videos did not provide audio description or any other alternative format for the visual information (graphs, charts, animations, or items on the chalkboard)." It also complained that "Some visual content presented in the slide presentations had low color contrast. For example, two video lectures referenced computer code on the screen that had insufficient color contrast, making it difficult for an individual with low vision to discern. Another video lecture used different colored lines on a graph, but the colors could not be differentiated by an individual with low vision."

These demands to "provide textual translations of graphical images" violate the ADA's statutory limits, which do not require regulate entities to incur an undue burden, or fundamentally alter the service provided. (*See* Charles D. Mockbee IV, *Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses*, 28 S. Ill. U. L.J. 553, 571-73 (2004) ("Many disability advocates argue that Title III requires websites to provide textual translations of graphical images," which would fundamentally alter "an art website into an art commentary website"; "If a court did interpret Title III to require business websites to supply textual or audible descriptions of complex graphics, such an interpretation would possibly violate the limits of the ADA."); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (stating that entities don't have to make "substantial" or "fundamental" changes to their services, or engage in "affirmative action"; later Supreme Court decisions have drained these limits of some of their meaning)).

Forcing a speaker to disseminate unwanted speech can violate the First Amendment. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974). That case involved a

Florida "right of access" statute wherein a newspaper that published criticism of political candidates was forced to print the candidate's response at no cost to the candidate and in the same type and space as used to print the original criticism. The Supreme Court held that the statute violated the First Amendment because it operated as a command to newspapers to publish that which "'reason' tells them should not be published. …" The Court held that the statute exacted a content-based penalty due to the cost of printing the reply and because the reply took limited space that could have been devoted to preferable material.

The Justice Department's restrictions on web pages are not so content-discriminatory as the right-of-access statute in the *Tornillo* case (since its interpretation of the ADA mostly requires "translation" of content, rather than additions to it, much less rebuttals), but they likewise could be seen as exacting a "penalty" on speakers whenever they choose to relay certain types of information that defy ready. The penalty includes devoting additional space on a web server to accommodate the extra information required to create handicapped accessible content.

Even if the ADA's application to Berkeley's web sites is not viewed as content-based (despite DOJ's demand to create additional speech to describe "media-rich" content such as images, *see* Ali Abrar & Kerry J. Dingle, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 Harvard C.R-C.L. L. Rev. 133, 136, 167 (2009)), it still triggers at least intermediate scrutiny under the First Amendment. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the Supreme Court reviewed a regulation requiring cable television systems to carry local broadcast television stations under so-called "must-carry" provisions. Though the regulation was content-neutral, the Court applied intermediate scrutiny, rather than rational basis review, in holding that the provisions could be sustained only if: (1) the law corrects an actual, rather than merely posited, harm; (2) the restrictions are "no greater than is essential" to the furtherance of the government's interest; and (3) the importance of correcting the harm justifies the degree to which the law inhibits speech. These would likely be the minimum requirements the government would have to meet in order to uphold application of Title III to a private Internet site under the First Amendment. The regulations in *Turner* were upheld on a 5-to-4 vote, but only because they "do not produce any net decrease in the amount of available speech." *Id.* at 647.

In contrast to the regulations upheld in *Turner*, Berkeley's removal of the 20,000 lectures and videos obviously could produce a "net decrease in the amount of available speech." Removing thousands of videos previously available to everyone just because a few disabled people could not fully access their content is like "burning the house to roast the pig." *See Reno v. ACLU*, *521 U.S.* 844, 882 (1997).

Here, DOJ only paid lip service to the idea that accessibility will not always be required regardless of cost in its letter to Berkeley. After first conceding that "UC Berkeley is not, however, required to take any action that it can demonstrate would result in a fundamental alteration in the nature of its service, program or activity or in undue financial and administrative burdens," it asserted without any explanation that "UC Berkeley has not established that making its online content accessible would result in a fundamental alteration or undue administrative and financial burdens." *See The United States' Findings and Conclusions Based on its Investigation Under Title II of the Americans with Disabilities Act of the University of California at Berkeley*, DJ No. 204-11-30 (Aug. 30, 2016), at pp. 8-9.

The fact that Berkeley chose to remove thousands of videos despite the fact that this "process … will take three to five months," tends to bely this claim that making the content accessible would not be burdensome — as does the fact that making them accessible would have required additional services that legal commentators have viewed as being an undue burden or fundamental alteration. (*See, e.g.,* Charles D. Mockbee IV, *Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses*, 28 S. Ill. U. L.J. 553, 571-73 (2004)).

While the Justice Department's Berkeley findings involved Title II of the ADA (which deals with public entities and transportation), not Title III (which deals privately-owned public accommodations), it has also demanded that private entities make web sites accessible to the blind or deaf, such as in a legal settlement with a private educational consortium, edX. *See Justice Department Reaches Settlement with edX Inc., Provider of Massive Open Online Courses, to Make its Website, Online Platform and Mobile Applications Accessible Under the Americans with Disabilities Act*, May 12, 2015.