

Technology & Sourcing Alert

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60 Seconds on Sourcing: Web Accessibility Overlays

Many companies are seeking to improve the accessibility of their digital properties to individuals with disabilities, whether to comply with the Americans with Disabilities Act (ADA) and other disability laws or simply to foster a more inclusive environment. The technology-based solutions in this area have evolved, and several vendors now offer “web accessibility overlays,” which are AI-driven tools that aim to address accessibility issues on webpages in real time and promise a substantial cost savings over more traditional web accessibility services. As with any technology solution, companies need to do their homework to understand the actual capabilities of web accessibility overlays to determine whether a particular solution meets their needs.

Key Takeaways

- Define the accessibility issues that need to be addressed and consider carefully what the proposed solution can and cannot do. While overlays can be cost-effective first steps, these solutions are tools that generally will not be able to address or solve 100% of a company's specific accessibility issues.
- Understand how the accessibility solution works with and impacts existing technology. Some users have claimed that implementation of accessibility overlays has sometimes had unintended negative impacts, including rendering existing assistive technology ineffective or more difficult to use and leaving websites open to data security vulnerabilities. Others have expressed concerns relating to the potential collection and use of sensitive personal information about users with disabilities.
- Recognize that regulatory or legal compliance obligations cannot be outsourced to third-party technology suppliers. Adding an accessibility overlay in and of itself is unlikely to fulfill a website operator's ADA or other compliance obligations.



- Understand the contractual terms including performance guarantees, limitations of liability and indemnity provisions. While some overlays are marketed with guarantees to bring websites into full compliance with industry-standard accessibility guidelines, these promises are not always reflected in the contract. The contract provisions, not the marketing copy, control the vendor's obligations.

Overlays versus Traditional Solutions

Traditional web accessibility services involve an audit of a representative sample of pages from a website, typically employing a combination of manual and automated testing. Vendors may remediate some issues by modifying the code for the site and work with a company's IT department or contracted developer to help equip them to address future challenges. Some companies offer monitoring tools designed to alert companies if new code “breaks” accessibility on the company's website. A full audit and remediation program typically takes a few months, and costs depend on the complexity of the website.

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In contrast, overlays typically involve a plug-in, widget or short string of code that, once made part of the website, attempts to “fix” issues on the fly as the page loads. Some overlays include limited additional functionality that generally replicates tasks that end users can already perform with existing access technology (such as enlarging text, adjusting contrast and reading text aloud).

An overlay can generally be implemented quickly and at a significantly lower cost than a full audit and remediation program.

Evaluating Accessibility Solutions

Like many technology solutions, overlays are often marketed as convenient, cost-effective and complete solutions, which can give website operators implementing an overlay solution a false sense of security that they are meeting their compliance obligations and insulating themselves from the risk of a lawsuit or regulatory enforcement. Companies should be aware that overlays cannot accomplish what more traditional web accessibility services do—identify and remediate accessibility problems at the code level—and may not fully accomplish companies’ accessibility goals or meet their compliance requirements.

As when implementing any technology tool, companies should carefully evaluate whether a potential web accessibility solution meets their needs.

Understand the solution and how it works with existing technology. While overlays may be one solution for companies seeking to enhance the accessibility of their websites, their effectiveness can differ greatly depending on the technology and functionality of the platform to which they are added. For example, overlays may be more effective when installed on more traditional informational platforms, and may not provide the same level of accessibility for websites with more sophisticated e-commerce or user-interactive functions.

End users with disabilities have also experienced overlay technology that impedes the functionality of their existing assistive technology, such as screen readers, or interferes with user-set accessibility options, such as type size or brightness, in their browser or operating system settings, so that websites fail to behave as expected. In some instances, the incompatibility of the overlay with a user’s existing assistive technology means that the user is

compelled to navigate the website with a more limited functionality of the overlay rather than with the more fulsome—and preferred—functionality of their assistive technology. Website accessibility issues have generated myriad ADA compliance lawsuits, and at least one vendor in the overlay space has been implicated in lawsuits alleging that its technology, rather than enhancing accessibility, has rendered websites more inaccessible.

Understand applicable compliance standards and how the solution specifically proposes to meet them.

While the ADA does not expressly define a standard for website accessibility, most ADA lawsuits and resulting settlements, as well as Department of Justice enforcement actions, reference the Web Content Accessibility Guidelines (WCAG) 2.0 or 2.1 as the prevailing standard. WCAG is also incorporated into accessibility laws and regulations in many other countries. At conformance level AA, the level that most businesses aim to achieve because it addresses the most common accessibility barriers, WCAG 2.0 requires webpages to meet 38 testable requirements (known as “success criteria”). WCAG 2.1 requires pages to meet 50 success criteria at level AA. Some overlay product suppliers market their tools as being able to achieve full WCAG 2.1 AA conformance in as little as 48 hours through the use of AI; however, given the highly contextual nature of many of the success criteria and the current state of the art for AI, this would seem to be no small feat.

Understand how adding the solution can impact other liability risks. Because of the interplay between websites and overlays, the security of a website is often tied directly to the security of the overlay. In other words, the security vulnerabilities of the overlay become the security vulnerabilities of the website operator—along with the concurrent legal and business liability risks.

Privacy is another area of potential risk in the use of overlays. Some overlays may function in such a way as to detect whether a particular identifiable site visitor has a disability. For example, some overlays automatically enable certain settings for users of screen readers or speech recognition software by detecting when these assistive technologies are running on a device, potentially revealing not only the fact that the user has a disability but often the specific nature of their disability. This information may be considered sensitive personal information under certain data privacy regimes, including

those in Europe and (after January 1, 2023) California. Even if an overlay tool purports not to collect this type of data, the end user may perceive that they are being treated differently due to a disability that they did not voluntarily disclose to the company. Some overlays also reportedly have been found to enable user settings across sites that use the same overlay, often without user knowledge and consent, and without providing an opt-out method.

Understand the provisions in the vendor agreement regarding liability and indemnity. Some of the overlays currently available are marketed to companies as providing a complete fix for accessibility issues. Some even offer to provide support should the business be sued. However, vendor agreements for technology solutions typically include limits on the vendor’s liability, and agreements for overlay solutions are no exception. Understand the language of the contract regarding the vendor’s liability exposure, including what liability, costs and expenses are covered—and what are not.

Conclusion

Improving digital accessibility makes good business sense and can engender goodwill with current and prospective customers. Companies seeking to improve their website’s ADA compliance can choose from a wide array of options, including overlay tools. Before adopting any digital accessibility solution, companies need to conduct due diligence to understand the capabilities (and limitations) of these solutions, and whether a particular solution meets the company’s business needs. .

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