COMMENT

WHY THE *TARGET* "NEXUS TEST" LEAVES DISABLED AMERICANS DISCONNECTED: A BETTER APPROACH TO DETERMINE WHETHER PRIVATE COMMERCIAL WEBSITES ARE "PLACES OF PUBLIC ACCOMMODATION"*

TABLE OF CONTENTS

I. INTRODUCTION 992

II. THE PROBLEM OF INACCESSIBLE WEBSITES.........................997
A. *How Specific Disabilities Affect Internet Use* 999
B. *Common Methods of Improving Website Accessibility* 1002

III. THE LANGUAGE AND HISTORY OF ADA TITLE III...1004
A. *The Content and Requirements of Title III*.................1005
B. *The Problem of "Places" of Public Accommodation* 1009

IV. THE CIRCUIT SPLIT AND THE "NEXUS TEST".......................1012
A. *Courts That Do Not Require a "Physical Place"*.........1012
B. *A Court Whose Stance Is Unclear*...............................1016
C. *Courts That Require a "Physical Place," and the Development of the "Nexus Test"* 1017

* This Comment received the Weil, Gotshal & Manges Award for the outstanding paper in the area of civil rights. The Author would like to thank her family—especially her husband, Russell—for all of their love and support. Additionally, the Author would like to thank the editors and staff of the *Houston Law Review* for their assistance in bringing this article to completion.

V. A BETTER APPROACH: THE COMMERCE- AND CHARACTER-BASED TEST FOR WEBSITES 1024

VI. CONCLUSION 1028

I. INTRODUCTION

A hypothetical: Jill is profoundly visually impaired but otherwise self-sufficient. Because she cannot operate a car or navigate a busy city on foot without assistance, shopping for groceries (or anything else) is a difficult task. Jill's city has four stores. Store A has a physical storefront only. Store B has a physical storefront as well as a website; shoppers can buy items via the store or the website. Store C has a physical storefront and a website, but regularly offers special "online-only" deals that apply only to website purchases. Store D has no physical storefront at all; a website is its sole method of selling its goods to the public.

Visually impaired Jill also cannot navigate a website in the same manner that a sighted person can. Because Jill cannot read the text on the screen, she must use a "screen reader," a device that turns the text of the website into a format she can understand.[1] Further, she cannot use a mouse because she cannot see where to direct it; she must navigate via her keyboard alone, typically by tabbing through the available items on the screen and waiting for the screen reader to tell her when she has landed on the appropriate item.[2] Despite the fact that her navigation may take longer than a sighted person's, Jill's ability to use the Internet eliminates many of the barriers she faces when her only option is to venture out into the physical world. When she can shop via website, she does not need to find transportation, take a seeing-eye dog, or have someone walk her through the store as she makes her purchases.[3] But she only

---

1. *See* Web Accessibility in Mind, Visual Disabilities—Blindness, http://www.webaim.org/articles/visual/blind.php (last visited Sept. 5, 2008) [hereinafter Visual Disabilities—Blindness]. Generally, screen reading programs either read onscreen text out loud, allowing the user to listen to the content, or reproduce the text on a refreshable braille display that the visually impaired user may read with her fingers (an especially helpful format if the user is also hearing impaired). *Id.*

2. *See id.* (explaining that blind users obviously do not use their eyes to access the Internet; the problem is "not that blind people are incapable of moving or clicking a mouse; it's just that they don't know where to move it or when to click it").

3. *See* WebsiteSource, Disabilities Dissolve on the Internet, Disabled Population Destined to Grow (2006), http://www.websitesource.com/news/internet-disabled.shtml (noting "[c]omputer technology and the increasing popularity of the [I]nternet have

reaps this advantage if the owners of a given website have set it up in a way that enables her to make sense of it using her screen reader and keyboard. If, for example, a website consists entirely of unlabeled pictures instead of text, or Flash animations that require a mouse and cannot interact with her screen reader, Jill is out of luck.[4]

How many of these retailers—Stores A, B, C, and D—must take steps to ensure that Jill can interact with them in a meaningful way? The most intuitive response: all of these otherwise equal stores should make a reasonable effort to accommodate Jill's disability, both in person and online, if she is to have any sort of parity with the nondisabled population. Under the current state of the law, however, the answer may depend entirely on where Jill lives.[5]

Twenty years ago, the law might have required *none* of these stores to accommodate Jill's disability, leaving her potentially unable to obtain the goods and services she would need.[6] The Americans with Disabilities Act (ADA), passed in 1990, was designed as a broad remedial statute to end such discrimination, both intentional and unintentional, against Americans with disabilities of all kinds.[7] Title III of the ADA, which pertains specifically to private (nongovernmental) entities, designates twelve specific types of businesses as "public accommodations" and requires these businesses to make reasonable efforts to accommodate disabled patrons at their "place[s] of public accommodation."[8]

---

tremendous potential to broaden the lives and increase the independence of people with disabilities" because they can accomplish a wide range of tasks without leaving home).

4. *See* Visual Disabilities—Blindness, *supra* note 1 (describing some shortcomings of screen readers).

5. *See* discussion *infra* Parts III–IV (discussing the statutes covering Jill's situation and the different approaches courts have taken in interpreting these statutes).

6. *See* 42 U.S.C. § 12101(a)(4)–(5) (2000) (conveying Congress's findings in 1990 that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion" as well as "failure to make modifications to existing facilities and practices," among other slights, and that the disabled "have often had no legal recourse to redress such discrimination"); *see also* Dick Thornburgh, *Reflections on the Americans with Disabilities Act*, 37 HOUS. L. REV. 987, 988 (2000) (describing how, before passage of the ADA, "attitudinal, architectural, and communications barriers" created an environment in which "[v]ast numbers of individuals with disabilities lived in isolation and dependence").

7. *See* 42 U.S.C. § 12101(b) (2000) (outlining the goals of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," providing clear and coherent standards, ensuring "that the Federal Government plays a central role in enforcing" such standards, and invoking congressional authority under the Fourteenth Amendment and the Commerce Clause); *see also* discussion *infra* Part III (describing further the legislative history of Title III).

8. 42 U.S.C. §§ 12181(7), 12182(a), 12182(b)(2)(A) (2000). Generally, covered

In 1990, the listed categories—such as hotels, sales and rental establishments, places of public gathering, and places of entertainment—seemed relatively straightforward.[9] Since then, the explosion of the Internet and online business has raised complicated questions in public accommodation law.[10] The Title III language does not specifically mention or exclude websites. This silence has led to debate in the courts about whether a "place of public accommodation" must be an actual physical place, or may be any "place" that satisfies the "public accommodation" definition in Title III, such as a private commercial website.[11] Despite holding a hearing on the subject in the year 2000, Congress has never taken a position on the issue.[12] The Department of Justice (the government arm tasked with interpreting the ADA) has filed amicus briefs and otherwise made known its position that "place of public accommodation" does encompass websites, but has yet to state this authoritatively through regulations.[13]

Within the scarce jurisprudence on the subject, the few cases that deal with the "physical place" issue reflect a deep split within the circuits, unresolved by the Supreme Court.[14] Accordingly, hypothetical Jill's results may vary, depending on where she lives. Courts that do not read Title III to require that "places of public accommodation" be physical might tell Jill that all four of these retailers must take reasonable steps to accommodate her visual impairment, in both their physical and online stores.[15] Courts that apply an especially strict view, that a "place" must be physical to

---

businesses must make accommodations for the disabled unless such accommodations would "fundamentally alter" the nature of the good or service offered or would constitute an "undue burden" on the entity. 42 U.S.C. § 12182(b)(2)(A).

9. *See* 42 U.S.C. § 12181(7) (2000).

10. *See* Robert H. Zakon, Hobbes' Internet Timeline, http://www.zakon.org/robert/internet/timeline (last visited Sept. 5, 2008) (describing the rise of the Internet from the mid-1990s onward); *see also* discussion *infra* Part IV.

11. *See* 42 U.S.C. §§ 12181–12189 (2000); *see also* discussion *infra* Parts III–IV.

12. *See* discussion *infra* Part III.B.

13. *See* discussion *infra* Part III.B; *see also* 28 C.F.R. § 36.104 (2007) (revealing no mention or exclusion of the Internet in the definitions promulgated to interpret Title III).

14. *See* discussion *infra* Part IV. One possible reason for the dearth of cases is that public accommodations cases are not lucrative for plaintiffs; under the statute, monetary damages are not an option unless the Attorney General so requests. 42 U.S.C. § 12188(b)(2)(B) (2000). Injunctive relief is the typical remedy. *See* 42 U.S.C. § 12188(a)(2) (2000).

15. *See infra* Part II.B. For stores with a physical component, this might mean modifications to the building itself, a willingness to allow seeing-eye dogs on the premises, or simply a designated employee to help her as she shops. For stores with a web presence, this might mean adjustments to the code of the website that allow Jill's screen reader to function properly and allow her to navigate the site without a mouse.

fall under Title III, might tell Jill that Stores A, B, and C only have to accommodate her in their physical storefronts, and Store D would not have to help her at all.

The most recent judicial development pertaining to Title III and websites, the "nexus test," only confuses the issue further. As delineated in *National Federation for the Blind v. Target Corp.*, the "nexus test" presumes that a "place of public accommodation" must be physical, and requires "a 'nexus' between the challenged service and the place of public accommodation."[16] Under this logic, a website does not qualify as a place of public accommodation in its own right, but may fall under Title III's purview if sufficiently connected (as a "service") to a physical place of public accommodation.[17] Extending this reasoning further, even on a website that meets the nexus test, only the portions that directly relate to a physical storefront must abide by Title III.[18]

Advocates heralded the *Target* case as a victory on behalf of the disabled because it was the first case to apply Title III to a website in any capacity.[19] But this victory rings hollow.[20] Application of this test leads to absurd results; where does Jill stand now? Store A, with a physical store only and no website, clearly must accommodate her. Store B must accommodate her in its physical store, and in the parts of its website that pertain to the physical store—whatever those may be, under subjective "nexus test" analysis—but is free to leave the rest of its website inaccessible. Store C must accommodate her in its physical store, but probably does not have to accommodate her on its website, as "online-only" deals or products do not pertain to the physical store. And Store D, which operates purely online, does not have to accommodate her at all—meaning she has literally no way to

---

16. Nat'l Fed'n for the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006).

17. *See id.* at 956 (distinguishing between enjoyment of services offered in physical stores and those offered on the website which are unconnected to such stores).

18. *See id.* (dismissing all claims under the ADA regarding online features and content of Target.com unconnected to physical Target stores).

19. Press Release, Nat'l Fed. of the Blind, Legal Precedent Set for Web Accessibility (Sept. 7, 2006), *available at* http://www.nfb.org/nfb/Target_Sept_Release.asp?SnID=1856320445.

20. Precedent-setting as it may be, the *Target* ruling still advances the conception of websites as subordinate "services" of a physical storefront, rather than places of public accommodation in their own right. *See id.* (quoting Mazen M. Basrawi, one of the plaintiff's lawyers, explaining that the court's ruling means that "any place of public accommodation is required to ensure that it does not discriminate when it uses the [I]nternet *as a means to enhance the services it offers at a physical location*" (emphasis added)).

access its services. Under the *Target* "nexus test," not only is Jill at a serious disadvantage compared to sighted persons, she finds herself in a complex and confusing legal situation with little guidance about how to improve her access to the goods and services she needs. This result is distressing enough in a hypothetical, but far worse in reality because it affects the lives of 54 million disabled Americans—a number that will only grow as the country's "Baby Boomer" population continues to age.[21]

Government entities recognized the issue of whether Title III encompasses private commercial websites as early as 1996.[22] However, the legal landscape has changed with the emergence of the *Target* "nexus test"—an attempt to meet in the middle that ultimately makes everyone worse off. This Comment discusses why the "nexus test" and the current state of the law create such unsatisfactory results and proposes a better solution in the absence of congressional or regulatory change.[23] Rather than focusing on connection to a physical place—a distinction that legislative history and the Department of Justice interpretations do not support—this Comment asserts the proper line-drawing exercise should turn on a given website's commerciality and character, in accordance with the specific language of Title III.[24] First, does the website meet the definition of "commercial," in that it affects interstate commerce? Second, does the character of the website align with any of the enumerated "public accommodations" of Title III? And, as an additional consideration, can the site owner make "reasonable" accommodative changes to the website, or would any change constitute a fundamental alteration or an "undue burden," given the size and resources of the site?

---

21. Disabilities Dissolve on the Internet, *supra* note 3.

22. *See* Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to Senator Tom Harkin, U.S. Senate (Sept. 9, 1996), *available at* http://www.usdoj.gov/crt/foia/cltr204.txt (addressing the Senator's question on this subject and articulating the position that Title III does include the Internet).

23. Despite the Author's position that congressional intent and the statutory language are unambiguous as to inclusion of private commercial websites, some courts do not agree. The easiest and most decisive end to this debate would be congressional clarification via new statutory language; the next best alternative would be a concrete regulation on the subject from the Department of Justice. As neither has occurred to date, nor has the Supreme Court taken up the issue, this Comment advocates a different approach for the many courts and circuits that have not yet handled a website case.

24. *See infra* Part III.B; *see also* 42 U.S.C. § 12181(1) (2000) (defining "commerce"); 42 U.S.C. § 12181(7) (2000) (describing, based on the character of their business activities, the types of private entities to be considered "public accommodations" if their operations affect commerce); 42 U.S.C. § 12182(b)(2)(A) (2000) (providing the reasonableness–undue burden framework for analyzing the steps that a given public accommodation must take).

This approach hews much more closely to the broad remedial purpose of Title III.[25] It gives courts an appropriate level of flexibility in determining borderline cases—such as a small weblog that sells a few T-shirts and coffee mugs per year—while bringing more obvious online enterprises under the Title III umbrella.[26] It also eliminates the need to make tedious and subjective determinations of exactly which parts of a given site relate closely enough to a physical place. Finally, this approach includes online-only businesses under Title III, allowing the disabled to achieve true parity with those who do not require assistive technologies to use the Internet.

Part II illustrates the various issues disabled Americans face in attempting to use the Internet, the magnitude of the problem of web inaccessibility, and the primary ways people can make websites accessible to those with disabilities. Part III delves into the language of Title III, the legislative process that led to its adoption, and the reaction of federal authorities to the debate. Part IV details the "physical place" issue's progress through the courts, as well as the current "nexus test" as applied to websites. Part V argues that the "nexus test" is harmful, exclusive, and not within the spirit of the ADA. The proper line-drawing exercise should resemble the process used for a business located in the physical world: Is it commercial? In terms of character, how close is it to a listed "public accommodation" category? What, if any, modifications would be reasonable (i.e., not an undue burden)? By applying this test, courts could heed the plain language of Title III while placing millions of disabled Americans on equal footing with everyone else. Part VI concludes this comment.

II. THE PROBLEM OF INACCESSIBLE WEBSITES

What does it mean for a website to be "accessible" to those with disabilities? Generally, it means users can "perceive, understand, navigate, and interact with" the website, as well as make contributions of their own.[27] In an online store, this might

---

25. *See supra* note 7; *infra* Part III.A.

26. Due to the wide range of types and sizes of private websites, this approach would require a great amount of line drawing (for example, determining whether a given site is similar enough to a "sales and retail establishment" to qualify as a public accommodation, or whether a site is so small, and makes so little money, that the expense of any modifications would be an undue burden). The flexibility this test allows addresses one criticism of Title III applicability to websites: that it would generate a flood of shutdowns of small or barely commercial sites, such as the weblog with T-shirts mentioned above.

27. Web Accessibility Initiative, Introduction to Web Accessibility, http://www.w3.org/WAI/intro/accessibility.php (last visited Sept. 5, 2008) [hereinafter

include the ability to find a particular link or item on the screen, search for items, understand the difference between several items for sale, access the Frequently Asked Questions to learn about shipping rates, and successfully complete the transaction using a credit card. In a news site, this might include the ability to choose between several news stories on the front page, post a comment in the comments section, or perceive the content of a news video. Or accessibility could simply mean the ability to use a popular search engine and understand the search results.

For the roughly 54 million disabled Americans—almost twenty percent of the population[28]—using the Internet is not a one-size-fits-all experience. Some disabilities, such as paraplegia, may not affect a person's ability to use the Internet at all.[29] Web accessibility therefore "encompasses all disabilities that affect access to the Web, including visual, auditory, physical, speech, cognitive, and neurological disabilities."[30] An inaccessible website, because of its design or coding or both, presents significant barriers to those who cannot interact with it in the "typical" way (i.e., with full vision, hearing, and motor control).[31]

Those without a disability may easily overlook the need for website accessibility. Yet, in a society where the Internet has permeated many aspects of commerce, personal interaction, and daily life, accessibility is the only way to avoid creating a second class of citizens with limited opportunities.[32] As many businesses added a Web presence or moved there exclusively, online sales reached $175 billion in 2007, excluding travel sales.[33] In addition to the wide range of jobs now carried out entirely via computer and the Internet, "A person can shop for groceries, get a college degree, buy a house, make new friends and research [her] health issues regardless of [her] ability to walk, talk, see, hear, or move [her] arms"—*if* the websites she needs to make that happen actually allow her to do so.[34] A shocking ninety-seven percent of the time,

---

Introduction to Web Accessibility].

28. Disabilities Dissolve on the Internet, *supra* note 3.

29. *Id.*

30. Introduction to Web Accessibility, *supra* note 27.

31. *Id.*

32. Web Accessibility Initiative, Social Factors in Developing a Web Accessibility Business Case for Your Organization, http://www.w3.org/WAI/bcase/soc (last visited Sept. 5, 2008).

33. *See* Daniel Gross, *America Has Too Many Stores*, SLATE, Feb. 16, 2008, http://www.slate.com/id/2184492 (describing online-only stores as "a real long-term threat" to brick-and-mortar stores due to e-commerce growth of more than 20% annually for the last four years).

34. Disabilities Dissolve on the Internet, *supra* note 3.

however, Web inaccessibility closes these life-changing doors for the disabled.[35] How can this be, and what can be done about it?

The following Sections briefly discuss the most common difficulties people with various disabilities face in using the Internet, as well as some common methods of addressing those difficulties to make a website accessible to the disabled.

A. How Specific Disabilities Affect Internet Use

Of the wide range of potential disabilities, those that most commonly affect Internet use fall into three categories: visual, auditory, and motor disabilities.[36]

Visual disabilities most obviously affect Internet use, as one can easily imagine the difficulties that ensue from an inability to see the computer screen. People with "low vision"—who have some vision, but whose vision problems cannot be completely resolved via glasses, contacts, or surgery—typically have difficulties perceiving "content that is small, does not enlarge well, or which does not have sufficient contrast."[37] Common obstacles to low-vision users include sites designed with muted colors that blend together, or text that blends into the background.[38] Low-vision users often use screen magnifiers to enlarge the text and other objects onscreen.[39]

While low-vision users can react to at least some visual cues, completely blind users must rely entirely on their senses of hearing and touch while navigating a website.[40] Blind users therefore navigate using a combination of their keyboards and screen readers, programs that convert onscreen text into

---

35. *See* Nomensa, United Nations Global Audit of Web Accessibility, http://www.nomensa.com/resources/research/united-nations-global-audit-of-accessibility.html (last visited Sept. 5, 2008). This United Nations-initiated survey of websites in a variety of sectors from around the world indicated 97% of the websites tested were inaccessible to the disabled, as measured against the "globally recognized benchmark for web accessibility: The Web Content Accessibility Guidelines version 1.0." *Id.* This figure seems to contradict suggestions that, left to themselves, businesses will correct the accessibility problem on their own.

36. Web Accessibility in Mind, Introduction to Web Accessibility, http://www.webaim.org/intro (last visited Sept. 5, 2008).

37. Web Accessibility in Mind, Visual Disabilities—Low Vision, http://www.webaim.org/articles/visual/lowvision.php (last visited Sept. 5, 2008). Different types of low-vision disabilities include macular degeneration, in which vision is lost at the center of one's sight; glaucoma, which causes vision loss at the outside of one's vision; and cataracts, which produce blurred vision. *Id.*

38. *Id.*

39. *Id.*

40. Visual Disabilities—Blindness, *supra* note 1.

vocalized speech or into braille on a braille display.[41] A person using a screen reader may let it read all of the text on the screen or may tab around the screen (between links, headings, or frames) in search of a particular item.[42] However, screen readers proceed from left to right across the screen, and they can only read the text that someone has taken the time to put there.[43] Sites full of poorly organized content, unlabeled (or unhelpfully labeled) images, or lengthy charts and tables present great difficulties to blind users.[44] Screen readers also cannot solve the problem of sites that require the use of a mouse to activate certain features or trigger the appearance of drop-down menus.[45] Nor can screen readers interpret "CAPTCHA" tests—an increasingly popular form of security question that requires a user to interpret warped images of letters and then input them.[46]

Colorblindness (the inability to perceive some or all colors) causes fewer difficulties than low vision or total blindness, but is one of the most common visual disabilities for men.[47] Colorblind users may have trouble distinguishing between items on the screen if color is the only means of differentiation.[48] Colorblindness can also prevent users from understanding the

---

41. *Id.* Users who are both hearing impaired and blind choose screen readers with refreshable braille displays, allowing them to perceive the content without needing to listen to it. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Screen readers cannot analyze an image for its content; they can only read the "alternative text" (alt text) coded into the website along with the picture. If the picture has no alt text, or if the text simply says "image," for example, the blind user cannot perceive what is being presented. In the case of data tables, a large chart that would be easy to perceive onscreen becomes difficult to comprehend when a screen reader reads out each cell from left to right. *Id.*

45. *Id.* Examples include the need to click on a portion of animated content or a menu that only appears when a user moves her mouse over a specific place on the screen. *Id.*

46. *See* Matt May, *Inaccessibility of CAPTCHA* (World Wide Web Consortium, Working Group Note, Nov. 23, 2005), *available at* http://www.w3.org/TR/turingtest. Websites often use CAPTCHA tests as a registration procedure. Because human input is required (computers cannot interpret the images), CAPTCHA tests help to prevent large numbers of "spam" registrations by computer programs. Without assistance, a blind user with a screen reader would be unable to register on a website that uses a CAPTCHA test as its sole method of user verification. *Id.*

47. Judy Brewer, ed., How People with Disabilities Use the Web (World Wide Web Consortium, Working-Group Internal Draft, May 5, 2005), *available at* http://www.w3.org/WAI/EO/Drafts/PWD-Use-Web/Overview.html.

48. *See* Web Accessibility in Mind, Visual Disabilities—Color-Blindness, http://www.webaim.org/articles/visual/colorblind.php (last visited Sept. 5, 2008) (providing the example of a London Tube map in which the different train lines are indicated only by color; it is nearly impossible to tell which line goes where if one cannot see the colors).

meaning a website author intends to convey, if only signified by a change in color.[49]

The wide range of auditory disabilities presents a different challenge to Internet users.[50] This group ranges from those who have mild hearing loss (which may make speech harder to understand) to those with profound hearing loss (no hearing whatsoever), as well as those who have lost a part of their hearing range (high-frequency or low-frequency hearing).[51] Deaf or hard of hearing users can use a mouse and respond to visual cues, but (depending on their degree of hearing loss) likely cannot understand audio content on a website unless the site provides captioning or a transcript.[52]

The term "motor disabilities" generally encompasses users who cannot effectively "use a mouse, click on small links, or operate dynamic elements."[53] Motor disabilities come in many forms and from many sources, including limb injuries, paralysis-inducing spinal cord injuries, cerebral palsy, muscular dystrophy, Parkinson's disease, arthritis, and any other disease or condition that restricts movement or causes a loss of muscle control.[54] Sites that require the use of a mouse, especially those that require careful and precise movement, shut out many motor-disabled users.[55] Complex and poorly organized sites present an extra challenge for people who exclusively use a keyboard, or who cannot use their hands at all.[56] Motor-disabled users also may need additional time to complete forms on a website, such as shipping information on a retail site; if a website has a short limit on response times, the person may be unable to enter the information quickly enough on her own.[57]

---

49. One such example: a retail website in which new items were indicated by green type and clearance items were indicated by red type. *See* Brewer, *supra* note 47.

50. Web Accessibility in Mind, Auditory Disabilities—Types of Auditory Disabilities, http://www.webaim.org/articles/auditory (last visited Sept. 5, 2008) [hereinafter Auditory Disabilities—Types of Auditory Disabilities].

51. *Id.*

52. Web Accessibility in Mind, Auditory Disabilities—Introduction, http://www.webaim.org/articles/auditory (last visited Sept. 5, 2008); Auditory Disabilities—Types of Auditory Disabilities, *supra* note 50.

53. Web Accessibility in Mind, Motor Disabilities—Types of Motor Disabilities, http://www.webaim.org/articles/motor/motordisabilities.php (last visited Sept. 5, 2008).

54. *Id.*

55. *Id.*

56. *See id.* Quadriplegics, for example, might rely on an eye tracking device, voice recognition software, a mouth stick, or a head wand to use a computer; navigation of especially complex websites might require a great deal of physical effort. *Id.*

57. Brewer, *supra* note 47.

B. Common Methods of Improving Website Accessibility

To tackle the problem of website accessibility, one must understand how disabled people actually use the Internet—the difficulties they face as well as the adaptive technologies they employ.[58] Only then can a web developer create a site that is perceptible, understandable, and accessible to everyone. Thankfully, accessibility does not have to cost a fortune—once a developer knows what to do, simple changes to the code of a website can make all the difference (along with a corresponding change in policy, so that the website remains accessible with future updates).[59] For obvious reasons, designing a new website with accessibility in mind usually takes less effort and costs less than rehabilitating an existing site, depending on how much work the existing site needs.[60] However, all patrons (even those without a disability) generally find an accessible site much easier to use, which can bring significant business benefits.[61]

Realizing that a coherent, global set of standards would help web developers design accessible sites, the World Wide Web Consortium created the Web Content Accessibility Guidelines (WCAG).[62] The guidelines boil down to simple principles, including:[63]

- Provide text alternatives for any non-text content. For example, developers can use "alt text" to label

58. Web Accessibility in Mind, Constructing a POUR Website—Putting People at the Center of the Process, http://www.webaim.org/articles/pour (last visited Sept. 5, 2008). POUR is a Web Accessibility in Mind acronym standing for Perceivable, Operable, Understandable, and Robust.

59. *See* Introduction to Web Accessibility, *supra* note 27 (describing various factors affecting the difficulty of making websites more accessible).

60. Web Accessibility Initiative, Financial Factors in Developing a Web Accessibility Business Case for Your Organization, http://www.w3.org/WAI/bcase/fin (last visited Sept. 5, 2008) [hereinafter Financial Factors]. For existing sites that need multiple changes, the Web Accessibility Initiative recommends maximizing cost effectiveness by starting with accessibility barriers that occur most frequently, cause the most difficulty for users, and are the simplest to repair. Web Accessibility Initiative, Improving the Accessibility of Your Web Site, http://www.w3.org/WAI/impl/improving.html (last visited Sept. 5, 2008).

61. Financial Factors, *supra* note 60.

62. Web Accessibility in Mind, The Web Accessibility Initiative—Introduction to the Web Accessibility Initiative, http://www.webaim.org/standards/wai/ (last visited Sept. 5, 2008). The World Wide Web Consortium is the "international, vendor-neutral group that determines the protocols and standards for the web." *Id.* WCAG 1.0, the initial version of the WCAG, is available at http://www.w3.org/TR/WAI-WEBCONTENT. WCAG 2.0, still in the working draft stage, is available at http://www.w3.org/TR/WCAG20.

63. For specific examples of how to code changes like these into a website, see Jonathan Simeone, *Website Accessibility and Persons with Disabilities*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 507, 507–10 (2007). All of the guidelines listed in this Comment can be found on the WCAG 2.0 website at http://www.w3.org/TR/WCAG20.

pictures or animations in ways that make sense to blind users (such as labeling a picture of a blue sweater as "blue sweater," rather than "image001").

- Provide captions or transcripts of audio content, and full text alternatives of interactive animations.
- Do not use color as the only visual means of conveying information or indicating what action is required.
- Make the entire website accessible by keyboard.
- When choosing font and background colors, ensure there is sufficient contrast between the colors so that those with low vision can distinguish between the two.
- Program the site so that users can resize the text.
- Use actual text rather than pictures of text.
- Allow users to shut off or extend time limits for responses, or do not use time limits for responses.
- Give individual web pages, links, and headings useful titles (such as "Frequently Asked Questions" instead of "click here").
- Structure the site simply and logically, to reduce the likelihood that a user will get lost in a complicated hierarchy of pages.
- Give users an opportunity to check their responses before moving on.[64]

The Federal Architectural and Transportation Barriers Compliance Board ("Access Board"), tasked with creating compliance standards for organizations covered by section 508 of the Rehabilitation Act, maintains the other leading set of web accessibility guidelines.[65] While Section 508 applies to federal agencies, not private businesses, the guidelines suggested resemble those of the WCAG and may similarly prove helpful to interested developers.[66] Free online tools abound for checking a website's current level of accessibility and uncovering potential problems.[67] Between these tools and the WCAG, a business

---

64. This is especially important for websites in which transactions take place. Worldwide Web Consortium, Web Content Accessibility Guidelines 2.0, http://www.w3.org/TR/WCAG20 (last visited Sept. 5, 2008).

65. Scott C. LaBarre, *ABA Resolution and Report on Website Accessibility*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 504, 506 (2007). The standards are codified at 36 C.F.R. § 1194.22 (2007).

66. LaBarre, *supra* note 65, at 506.

67. *See* Simeone, *supra* note 63, at 510 (discussing several such popular tools, but cautioning that no program can "replace the judgment of a skilled human being"). For reviews and recommendations of several accessibility measuring tools, see Web Accessibility in Mind, A Review of Free, Online Accessibility Tools—Introduction,

wishing to take the first steps towards accessibility need not spend a dime.

A closer look at the problem of web accessibility reveals how easily it can be solved. While the process of rehabilitating a site may not be free, it does not have to cost a fortune, given the many free tools available to site developers. Simple changes to websites' code and structure can open doors once closed for the disabled, allowing them an equal opportunity to participate in the many online facets of modern life. The end result—equal opportunity for everyone—neatly summarizes the spirit of ADA Title III.

III. THE LANGUAGE AND HISTORY OF ADA TITLE III

The Americans with Disabilities Act (ADA), enacted in 1990 after more than a year of extensive deliberations in Congress, was designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[68] Congressional findings included at the beginning of the statute recognized the large number of disabled Americans (43 million at the time) and the pervasive discrimination, both intentional and unintentional, that they faced in all areas of public life.[69] From its inception, the ADA's proponents saw it as a civil rights effort, meant to fill the gap that past civil rights laws left open in relation to the disabled.[70] Legislators felt the need had grown great enough to involve the federal government in tackling the problem on a national scale.[71]

The ADA contains five sections: Title I, which prohibits discrimination in the employment context;[72] Title II, which

---

http://www.webaim.org/articles/freetools (last visited Sept. 5, 2008).

68. 135 CONG. REC. 19,803 (1989) (statement of Sen. Harkin); 42 U.S.C. § 12101(b)(1) (2000).

69. 42 U.S.C. § 12101(a)(1)–(9) (2000).

70. 42 U.S.C. § 12101(a)(4) (2000) (noting that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination"); *see also* 136 CONG. REC. 17,031 (1990) (statement of Sen. Kennedy) (describing the ADA as "a most comprehensive, elaborate, and a forthcoming piece of civil rights legislation").

71. *See* 42 U.S.C. § 12101(b)(3) (2000).(showing Congress's intent that the federal government play a "central role" in addressing discrimination against persons with disabilities).

72. 42 U.S.C. §§ 12111–12117 (2000) (specifically, covering "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"). Title I tends to be the most widely recognized provision, as "most ADA lawsuits are filed by people claiming wrongful termination or failure to promote." Teresa Moore, *Americans with*

pertains to public entities;[73] Title III, which covers specific types and services of private entities in commerce ("places of public accommodation" and "commercial facilities");[74] Title IV, which mandates the availability of telecommunications devices and relay services for the hearing impaired;[75] and Title V, which contains miscellaneous provisions to aid in the interpretation and enforcement of Titles I–IV.[76] Congress viewed its Commerce Clause and 14th Amendment powers as its source of authority in creating this sweeping legislation.[77]

A. The Content and Requirements of Title III

Title III, pertaining to private entities offering specific types of services to the public, is central to the issue in this Comment. Because Congress's right to regulate these activities depends upon its Commerce Clause power, Title III covers the enumerated types of private entities only to the extent that their operations "affect commerce."[78]

Disabilities Act: The Disabled Have Made Great Strides, but the Most Vulnerable Still Don't Get Hired, HEALTHY ME, 2007, http://www.ahealthyme.com/topic/ada.

73. 42 U.S.C. §§ 12131–12150 (2000). This title works in tandem with the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (2000), to prohibit discrimination by an instrumentality of any government or entity receiving government funds (the ADA covers state and local government entities, while the Rehabilitation Act covers federal government entities). 29 U.S.C. §§ 701, 794 (2000).

74. 42 U.S.C. §§ 12181–12189 (2000).

75. 47 U.S.C. § 225 (2000). Title IV stands apart from the public accommodation–website issue because it covers equipment rather than informational offerings (for example, it mandates that telephone lines support Telecommunication Device for the Deaf equipment). *Id.* As an interesting side note, the Federal Communications Commission decided in June 2007 that Title IV does apply to VoIP (Voice over Internet Protocol) providers. Press Release, Fed. Commc'n Comm'n, Disability Access Requirements Extended to VoIP Services (May 31, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273452A1.doc.

76. 42 U.S.C. §§ 12201–12213 (2000).

77. 42 U.S.C. § 12101(b)(4) (2000); Extension of Remarks on Americans with Disabilities Act, 136 CONG. REC. E1913 (daily ed. June 13, 1990) (statement of Rep. Steny Hoyer) [hereinafter Extension of Remarks] (citing Congress's power to prohibit discrimination by state and local governments per *Katzenbach v. Morgan*, 381 U.S. 641 (1966), its power to prohibit "discrimination in nongovernmental activities" per *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and its "broad authority to pass antidiscrimination laws under the commerce clause, article I, section 8 of the Constitution").

78. 42 U.S.C. § 12181(7) (2000); *see also* Extension of Remarks, *supra* note 77 (noting the adverse commercial effects of discrimination against the disabled and Congress's power to pass antidiscrimination laws under the Commerce Clause). "Commerce" is defined as "travel, trade, traffic, commerce, transportation, or communication (A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country." 42 U.S.C. § 12181(1) (2000).

Congress defined the following types of private entities as “public accommodations”:

> a) an inn, hotel, motel, or other place of lodging . . . ;
> b) a restaurant, bar, or other establishment serving food or drink;
> c) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> d) an auditorium, convention center, lecture hall, or other place of public gathering;
> e) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or retail establishment;
> f) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
> g) a terminal, depot, or other station used for specified public transportation;
> h) a museum, library, gallery, or other place of public display or collection;
> i) a park, zoo, amusement park, or other place of recreation;
> j) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
> k) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
> l) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[79]

Congress stated that this list of twelve categories was intended to be “exhaustive,” but the examples within each category were to be “construed liberally.”[80] An earlier version of

---

79. 42 U.S.C. § 12181(7) (2000). Private clubs and religious organizations are excluded. ADA Title III DOJ Technical Assistance Manual §§ III-1.5000, -1.6000 (1992). A business run solely online could not satisfy subsections (A) or (G), as these necessitate the service occurring onsite, but could potentially satisfy the rest of the subsections.

80. H.R. REP. NO. 101-485, pt. 2, at 100 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 383; *see also id.* at 317 (“It is critical to define places of public accommodations to include all places open to the public . . . because discrimination against people with disabilities is not limited to specific categories of public accommodations.”).

Section 12181(7) actually included the phrase "other similar place" wherever "other place" is included in the current version.[81] Congress deliberately removed the word "similar" from the statute to indicate its intent that these categories be interpreted broadly.[82]

Private entities covered under Title III may not discriminate against disabled individuals "in the full and equal enjoyment of the goods, 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."[83] "[I]n order to get Title III to apply in a particular situation, it is necessary not only to demonstrate that the entity in question is a public accommodation or commercial facility engaged in commerce, but also, because of this single word 'place,' that it is a 'place of public accommodation' where, or in connection with which, the alleged discrimination has occurred."[84] The debate regarding Title III applicability to websites centers on the meaning of the word "place" in this context.[85]

As "discrimination" can take many forms, Title III delineates several general and specific types of discrimination that it prohibits.[86] Under the "general prohibition" heading, places of public accommodation may not deny disabled individuals the opportunity to participate in or benefit from their goods or services; allow them to participate, but to an unequal degree compared to those who are not disabled; provide a separate type of good or service to the disabled, unless necessary to

---

81. 42 U.S.C. § 12181(7) (2000); H.R. REP. NO. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 383.

82. H.R. REP. NO. 101-596, at 75 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 565, 584; Extension of Remarks, *supra* note 77 ("For example, category 5 is: 'a bakery, grocery store . . . or other sales or retail establishment. The intent is that any sales or [retail] establishment would be included within this section. Indeed, one of the clarifications made . . . and adopted in the final bill, was to delete the word 'similar' . . . . *The point is that a person alleging discrimination does not have to prove that a particular business is similar to one of the businesses listed[,] for example, similar to a grocery store, but rather, that the business falls within the general category described*." (emphasis added)).

83. 42 U.S.C. § 12182(a) (2000).

84. Lex Frieden, *When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web*, NAT'L COUNCIL ON DISABILITY, July 10, 2003, http://www.ncd.gov/newsroom/publications/2003/adainternet.htm.

85. *See id.* ("But many people continue to doubt that a Web site can be a 'place' of public accommodation or a commercial 'facility' as required for coverage of the law."). Clearly, a private website can be commercial and can carry out activity that falls squarely within one of the listed categories. But critics of ADA applicability to websites argue that, semantically, a website that meets the definition of "public accommodation" still cannot be a "place of public accommodation" because it is not a physical place. *Id.*

86. 42 U.S.C. § 12182(b) (2000).

accommodate their disability effectively; use administrative standards or methods that have the effect of discriminating on the basis of disability; or discriminate against an individual or organization because of their association with a disabled person.[87]

Places of public accommodation also must heed five specific prohibitions, three of which relate best to websites:

> (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods [or] services . . . being offered;
>
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods [or] services . . . to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods [or] services . . .
>
> (iii) a failure 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, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.[88]

The Attorney General or any private citizen may file a lawsuit to stop current or impending discrimination.[89] Plaintiffs may obtain injunctive relief but generally not monetary damages, unless specifically requested by the Attorney General.[90] Additionally, the Department of Justice has the responsibility of producing regulations and guidelines to aid in the interpretation and

---

87. 42 U.S.C. § 12182(b)(1) (2000).

88. 42 U.S.C. § 12182(b)(2)(A)(i)–(iii) (2000). The other two prohibitions cover the failure to remove transportation, architectural, or communication barriers that are structural in nature, if this is readily achievable, and the absence of alternative ways to accommodate the disabled if the transportation, structural, or other barriers are not readily removable. 42 U.S.C. § 12182(b)(2)(iv) –(v) (2000).

89. 42 U.S.C. § 12188 (2000).

90. 42 U.S.C. § 12188(b)(2) (2000).

enforcement of Title III.[91] Overall, Title III provides a broad remedy for discrimination against the disabled, however it may surface.

B. The Problem of "Places" of Public Accommodation

Having established the statutory language, how does one determine whether the statute includes private commercial websites as "places of public accommodation"?[92] As may be apparent, Title III contains no mention of the Internet or online businesses, a fact cited by courts wishing to limit "places of public accommodation" to physical places and read the Internet out of the statute.[93] However, if one considers the state of the Internet in 1989 and 1990—hardly a staple of popular culture—the failure of Congress to discuss the Internet and websites at that time indicates little or nothing.[94] Further, the statute does not contain any explicit requirement that a "place of public accommodation" be a physical place. The statute merely requires a private entity to "affect commerce" and, in terms of what it does, to fit within one of the twelve categories in Section 12181(7).[95]

The Department of Justice has maintained the position that Title III does encompass the Internet since at least 1996.[96] While

---

91. 42 U.S.C. § 12186(b) (2000). The Department of Justice regulations pertaining to Title III are located at 28 C.F.R. §§ 36.101–36.508 (2007). The Department of Justice holds similar authority with regard to the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, antidiscrimination statutes similar to the ADA. 42 U.S.C. § 2000d *et seq.* (2000); 29 U.S.C. § 701 *et seq.* (2000).

92. Public websites (meaning those operated by a government entity) are not discussed here because they are explicitly included within the Rehabilitation Act, a separate piece of legislation; public websites already must meet a specific set of accessibility guidelines issued by the Department of Justice. *See* 29 U.S.C. § 794(d) (2000); 36 C.F.R. § 1194.22 (2007).

93. *See* 42 U.S.C. §§ 12181–12189 (2000). To be fair, the legislative history apparently does not contain any discussion of the Internet, either. *See* H.R. REP. NO. 101-485, pt. 2, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303; H.R. REP. NO. 101-596 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 565. This is often the basis for arguments by courts that the legislators did not intend to cover private commercial websites under the ADA.

94. *See* Jeffrey Scott Ranen, Comment, *Was Blind but Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 403 & n.128 (2002) (arguing that legislators probably did not think about the Internet when drafting the statute because the World Wide Web was not created until 1991); *see also* Zakon, *supra* note 10 (noting that the White House did not come online until 1993 and the first "shopping malls" arrived online in 1994).

95. 42 U.S.C. § 12181(7) (2000); *see also* Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 214 (2000) (noting that "[t]he statutory noun 'place' (in reference to 'public accommodation') has been found to be a term of convenience, not a term of limitation for the purpose of interpreting statutes associated with discrimination").

96. Letter from Deval L. Patrick, *supra* note 22 ("Covered entities under the ADA are required to provide effective communication, regardless of whether they generally

the Department of Justice has not issued a specific regulation articulating this belief, it has "argued for coverage of the Internet under Title III . . . in several amicus briefs, and it has negotiated or approved several complaint settlements supporting access in cases involving nonphysical location issues such as brokerage or credit card statement accessibility."[97] In *Hooks v. Okbridge, Inc.*,[98] a case resolved without reaching the Internet issue, the amicus brief filed by the Department of Justice makes its point of view very clear:

> The statute covers the services 'of' a place of public accommodation, not 'at' the place of public accommodation. The definition of a 'public accommodation' is intentionally broad and is not limited to those entities providing on-site services.
>
> . . . .
>
> The absence in the statute of any specific mention of web sites or the [I]nternet is not a reason to exclude services provided by this medium. When Congress enacted the statute, the World Wide Web had not yet been invented . . . . That Congress did not specifically envision the application of Title III to services provided over the [I]nternet does not mean that such services are excluded from coverage.[99]

The brief compares Title III coverage of websites to courts' application of the ADA to prisons and trailer parks, even though the statute mentions neither of those locations.[100] Despite consistent support of this reading of Title III, the Department of Justice has not updated its ADA regulations to resolve the "physical place" debate; if it made such a statement in a regulation, courts would likely owe *Chevron* deference to this position.[101]

---

communicate through print media, audio media, or computerized media such as the Internet.").

97. Frieden, *supra* note 84 (citations omitted).

98. Hooks v. Okbridge, Inc., 232 F.3d 208 (5th Cir. 2000) (decision without reported opinion).

99. Brief of the United States as Amicus Curiae in Support of Appellant at 5, 16–17, Hooks v. Okbridge, Inc., 232 F.3d 208 (5th Cir. 2000) (No. 99-50891), 1999 WL 33806215.

100. *Id.* at 16–17 (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998) (prisons); Dean v. Ashling, 409 F.2d 754, 755 (5th Cir. 1969) (trailer parks)). "The language of the statute is broad enough to cover services provided over this new medium, and courts are not reluctant to apply old words to new technology in a way that is consistent with modern usage and legislative intent[,]" such as applying First and Fourth Amendment protections to electronic communications and the Internet. *Id.* at 17 (citing Reno v. ACLU, 521 U.S. 844 (1997); Olmstead v. U.S., 277 U.S. 438, 464–65 (1928)).

101. *See The Supreme Court's Decisions Regarding Validity and Influence of*

Congress actually held hearings on the issue of private commercial websites and the ADA in 2000, but no change to the ADA language resulted, and Congress has not revisited the issue.[102] Critics may view this lack of action as an indication that Congress did not believe the ADA should apply to websites. One commentator suggests that Congress chose not to act at that time because the hearings "occurred towards the end of the dot-com boom," and Congress was afraid to "hinder the continuing growth of e-commerce" by imposing specific requirements on private websites.[103] Alternatively, Congress saw the impending dot-com bust and thought adding language to the ADA would not be worth the effort.[104] But the subcommittee could just as easily have believed the ADA already covered private commercial websites in its current form.[105] The subcommittee clearly knew the Department of Justice's position that Title III included the Internet and did not contradict it during the hearing.[106] Also, the members of the hearing spent a significant amount of time discussing whether a set of *standards* for web accessibility should be codified.[107] Congress may have felt it did not need to codify a list of standards because of publicly available guidelines, like the WCAG and the undue burden test, already present in the

---

ADA Regulations, NAT'L COUNCIL ON DISABILITY, June 4, 2003, http://www.ncd.gov/newsroom/publications/2003/validityandinfluence.htm (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984), for the proposition that "courts have recognized that 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer[,]'" and citing Bragdon v. Abbott, 524 U.S. 624 (1998), in which the Supreme Court said that the Department of Justice regulations interpreting Title III of the ADA should receive *Chevron* deference).

102. *See Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites*: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) [hereinafter *Applicability Hearing*].

103. Isabel Arana DuPree, *Websites as "Places of Public Accommodation": Amending the Americans with Disabilities Act in the Wake of* National Federation of the Blind v. Target Corp., 8 N.C. J.L. & TECH. 273, 296 (2007).

104. *Id.*

105. *See Applicability Hearing*, *supra* note 102, at 63–64 (in which Rep. Melvin L. Watt dismisses the "inclusio unius est exclusio alterius" argument—that the twelve categories' examples include only physical sites, therefore Congress must have meant to exclude websites—as "contrary to common sense"); *see also id.* at 68 (in which Rep. Robert C. Scott compares refusal to accommodate disabled patrons online, which effectively amounts to refusal to sell to them, with refusal to sell to African-American patrons online).

106. *See id.* at 2 (in which Rep. Charles T. Canady states in his opening statement, "[I]t is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services.").

107. *See id.* at 32–36.

statute.[108] Nor, if they believed the issue was relatively settled, could the subcommittee members have predicted the circuit split that would develop over the next seven years regarding whether, and in what way, private commercial websites may fall under Title III.

Even though Congress has not changed Title III since 1990, the weight of legislative history clearly supports the conclusion that Title III of the ADA encompasses private commercial websites.[109] Likewise, the Department of Justice has consistently articulated this position in the public forum.[110] The correct interpretation, which honors the legislative intent and remedial spirit of the ADA, therefore concludes that Title III can apply to websites and evaluates a contested site by its commerciality and character. Unfortunately, the circuit courts have taken opposing positions on the issue, leading to a currently unresolved circuit split.

IV. THE CIRCUIT SPLIT AND THE "NEXUS TEST"

The issue of whether a place of public accommodation must be a physical place originally arose in the mid to late 1990s in factual situations well outside of the Internet (primarily in the insurance context).[111] The Supreme Court and several of the circuits have yet to rule on the issue. The circuits that have heard cases on the issue fall on both sides of the fence, along with two that seem to be riding it. The following Sections discuss the courts' differing approaches to this issue.

A. Courts That Do Not Require a "Physical Place"

In 1994, the First Circuit initially tackled the "physical place" issue in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc*.[112] The plaintiff, an HIV positive man, had a health insurance policy with the same

---

108. *See id.* at 33–36, 60–62, 70–74.

109. *See* discussion *supra* Part III.A (detailing the legislative history of the ADA).

110. *See supra* notes 96–99 and accompanying text.

111. *See* McNeil v. Time Ins. Co., 205 F.3d 179 (5th Cir. 2000); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999), Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999); Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994) (all of which are insurance cases that hinged on the "physical place" issue).

112. *Carparts*, 37 F.3d at 19–20.

insurance company for nearly fifteen years.[113] Not long after he was diagnosed with HIV, the insurance company instituted benefit caps for AIDS-related illnesses that effectively reduced his coverage from $1 million to $25,000.[114] The policyholder then sued under Titles I and III, claiming the cap was illegal discrimination on the basis of a disability.[115] The First Circuit overturned the district court's limitation of "place of public accommodation" to physical structures, expressly holding that Title III did not require places of public accommodation to be physical places.[116]

The court first consulted the language of the statute, including the list of twelve types of public accommodations, and concluded that "[t]he plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter."[117] The court took special note of Congress's inclusion of establishments, such as a "travel service," that do not require a person to physically go anywhere to obtain their services.[118] The court explained its reasoning in terminology that predates the popularity of the Internet but parallels the situation created by online-only businesses: "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result."[119]

The *Carparts* court also looked to the legislative history and purpose of the ADA, describing Congress's intent to give disabled Americans "equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities."[120] The court believed arbitrary line drawing between places with a physical component and places without it would "exclude [a] broad category of businesses" and "severely frustrate Congress's intent."[121]

Judge Posner's opinion in *Doe v. Mutual of Omaha Insurance Co.*, a 1999 insurance case also involving AIDS benefit

113. *Id.* at 14.
114. *Id.*
115. *Id.* at 14–15.
116. *Id.* at 20.
117. *Id.* at 19. The opinion states that "[e]ven if the meaning of 'public accommodation' is not plain [in not requiring physical places], it is, at worst, ambiguous." *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 20.

caps, famously picks up where *Carparts* left off:

> The core meaning of [Title III], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space [cites *Carparts*]) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.[122]

Posner clarified this statement by emphasizing that Title III does not reach the content of goods or services, but the manner in which they are made available.[123] For example, a camera store could not refuse to let disabled patrons shop there or refuse to sell its cameras on the same terms that nondisabled patrons received; however, it would be free to select the number and type of cameras for sale and it would not have to alter its inventory to stock goods that are specifically designed for disabled people.[124]

The Second Circuit seems receptive to the position that no physical place is required but has not explicitly asserted that view. The married plaintiffs in *Pallozzi v. Allstate Life Insurance Co.*, both of whom had been diagnosed with mental illnesses, sued after Allstate refused to issue them a joint life insurance policy.[125] Allstate attempted to argue that the Title III public accommodation definition included "insurance offices," but not "insurance companies," because patrons do not have physical access to the company headquarters where the underwriting takes place.[126] Allstate also argued that because insurance policies are not used onsite at a place of public accommodation, they should "not qualify as goods or services '*of* a place of public accommodation.'"[127] The court dismissed both of these arguments as contrary to the language and purpose of Title III and

---

122. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999). *Doe* thus goes beyond *Carparts* in specifically including websites as appropriate places of public accommodation; the *Carparts* court of 1994 may not have foreseen the need to do so, but by 1999, the comparison would have been clear.

123. *Id.* at 559–60.

124. *See id.* In terms of a website, this might be a distinction between the actual content of the website (information, goods for sale, etc.) and the way that content is presented (through the actual coding of the site and the way it appears on one's screen).

125. Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 29–30 (2d Cir. 1999). The insurance company's action here—outright refusal to sell to the plaintiffs—is a bit different than in *Carparts* and *Doe*, in which plaintiffs, who were already policyholders, saw their benefits discriminatorily reduced compared to others. Yet all three cases ultimately concern the disabled's access to services on the same terms as the nondisabled.

126. *Pallozzi*, 198 F.3d at 32.

127. *Id.*

approvingly cited *Carparts* for the proposition that Title III is meant to guarantee more than just physical access for disabled patrons.[128] In an opinion that spends relatively little time on the public accommodation issue, the Second Circuit's choice of language from *Carparts* speaks volumes:

> *To . . . limit the application of Title III to physical structures . . . would severely frustrate Congress's intent* that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.[129]

The court also dismissed the argument that goods must be used "in" the place of public accommodation to be goods "of a place of public accommodation."[130] Notably, the *Pallozzi* opinion distinguished the two primary cases of the time that *did* require a place of public accommodation to be a physical place, further suggesting that the Second Circuit believes itself to be more in line with the First and Seventh Circuits.[131]

At least one state court handling an ADA case has also followed this line of reasoning. In a 2005 insurance case, the Rhode Island Supreme Court explicitly cited *Carparts* in holding that places of public accommodation are not limited to physical places.[132] While neither the First nor Seventh Circuit has had to revisit the "physical place" issue in terms of a website, both clearly believe a physical place is not required, and both would likely follow a commerce- and character-based test if confronted with a website case.[133] The Second Circuit was less assertive on the matter in *Pallozzi*, but based on its approval of *Carparts*, it might also follow this pattern.

128. *Id.* at 32–33.

129. *Id.* at 32 (quoting Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 20 (1st Cir. 1994)) (emphasis added). This selection from the *Carparts* opinion is the only real statement the Second Circuit makes on the subject. Nowhere else in the *Pallozzi* opinion does the Second Circuit say whether a place of public accommodation must be, or does not have to be, a physical place.

130. *Id.* at 33.

131. *Id.* at 32–33, & 32 n.3 (distinguishing Parker v. Metro. Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) and Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998)).

132. Marques v. Harvard Pilgrim Healthcare of New England, Inc., 883 A.2d 742, 748–49 (R.I. 2005).

133. The Supreme Court may also believe that Title III does not require a physical place, because it denied certiorari in *Doe*, which very strongly articulated the point of view that websites are included and no physical place is required. Doe v. Mut. of Omaha Ins. Co., 528 U.S. 1106, 1106 (denying cert.).

B. A Court Whose Stance Is Unclear

The Fifth Circuit, faced with an insurance case of its own, fell somewhere in the middle on the "physical place" issue. In *McNeil v. Time Insurance Co.*, the challenged policy had a low benefit cap for HIV- or AIDS-related illnesses for the first two years, after which the cap disappeared.[134] The plaintiff signed up for this policy, was diagnosed with AIDS soon afterward, and died of complications within a year.[135] Before his death, he sued his insurance company under Title III and on other legal theories, alleging the cap was discriminatory.[136] The district court dismissed his case for many reasons, including its belief that "places of public accommodation" under Title III required a physical place.[137]

The Fifth Circuit ultimately upheld the district court's decision, but not on the basis of the "physical place" ruling; rather, the court stated that applying Title III in this situation would amount to a regulation of the *content* of goods or services (as opposed to *access* to those goods or services).[138] The opinion emphasizes a view that Title III public accommodation cases should hinge on equal, unfettered access to a given good or service:

> This construction assures that the disabled have access to all goods and services offered by the business and the opportunity to use and enjoy that good or service without interference by the owner, etc. Our opinion merely declines to dictate . . . what types of goods and services must be offered.[139]

In this case, the court felt the plaintiff had not been denied *access* to the service in question (the insurance policy) because he had been allowed to sign up for it and had been offered the same policy that everyone else received.[140]

Interestingly, the *McNeil* opinion contains no comment whatsoever on the "physical place" issue contemplated by the district court.[141] The opinion focuses exclusively on the issue of

134. McNeil v. Time Ins. Co., 205 F.3d 179, 182 (5th Cir. 2000).
135. *Id.*
136. *Id.* at 181–82.
137. *Id.* at 182.
138. *Id.* at 186–89.
139. *Id.* at 188.
140. *Id.*
141. *See id.* at 185–86.

regulating access versus regulating content.[142] Even more perplexingly, in its discussion of the access versus content issue, the opinion cites and agrees with cases on both sides of the "physical place" issue.[143] One would think that if the Fifth Circuit agreed with the "physical place" requirement, it would have said so at least once in the opinion, especially given that it ultimately affirmed the district court's decision on other grounds. The strong emphasis on "access" in terms of ability to buy and use a public accommodation's goods, rather than on physical access to the public accommodation, also suggests the Fifth Circuit may be receptive to the *Carparts/Doe* line of cases. But without a strong statement either way, the Fifth Circuit's stance on the "physical place" issue—and how it would handle a Title III website case—remains unclear.

C. Courts That Require a "Physical Place," and the Development of the "Nexus Test"

In contrast to the four circuits discussed above, four other circuits have declared that a place of public accommodation must indeed be a physical place. Employing restrictive reasoning that runs counter to clearly stated legislative intent, these courts ignore the broad remedial purpose of Title III by reading nonphysical public accommodations out of the statute.

The Sixth Circuit initiated this contrasting line of cases via *Parker v. Metropolitan Life Insurance Co.*, in which the plaintiff's insurer terminated her disability insurance per plan requirements two years after she developed a mental illness.[144] The insurance policy in question was issued by Metropolitan Life Insurance Co. but offered through her employer (Schering-Plough Health Care Products).[145] The court seized upon this arrangement (insurance through the employer, rather than directly from the insurance company), saying that an employer-provided benefit plan is "not a good offered by a place of public accommodation."[146] Because the plaintiff obtained her benefits through her employer, the court said there was "no nexus between the disparity in

142. *Id.* at 186–88.

143. *See id.* at 188 n.12–13 (citing Parker v. Metro. Life Ins. Co., 121 F.3d 1006, (6th Cir. 1997) and Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998), both of which require a physical place, alongside Doe v. Mut. Of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999), which explicitly does not require a physical place).

144. *Parker*, 121 F.3d at 1008.

145. *Id.*

146. *Id.* at 1010.

benefits and the services which MetLife offers to the public from its insurance office."[147]

The opinion then addressed the "physical place" issue, definitively ruling that a place of public accommodation must be a physical place.[148] To support this reasoning, the court cited the Code of Federal Regulations, which define a "place" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve 'public accommodation' categories."[149] The Regulations then define a "facility" as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure or equipment is located."[150] The court also argued that via *noscitur a sociis*, the principle that terms should be interpreted within the context of nearby words, Congress must have meant for a public accommodation to be a physical place because "[e]very term listed in § 12181(7) . . . is a physical place open to public access."[151] The Sixth Circuit accused the *Carparts* court—which saw "travel service" as a perfectly good example of a place that did *not* require physical access—of not reading enough of the examples.[152]

---

147. *Id.* at 1011.

148. *Id.* at 1011–14. The court cited its earlier ruling in Stoutenborough v. Nat'l Football League, 59 F.3d 580 (6th Cir. 1995), a case which danced around the "physical place" issue but did not comment on it as squarely as *Parker* does. *Id.* at 1010–11. In *Stoutenborough*, the plaintiff attempted to argue that an NFL broadcast over his television turned his television into a place of public accommodation, which is a different argument because a home television is not commercial. *Stoutenborough*, 59 F.3d at 582. This would be akin to arguing that a website turned one's home computer into a place of public accommodation, which is not suggested in this Comment.

149. *Parker*, 121 F.3d at 1011.

150. *Id.* These snippets of the regulation, written by the Department of Justice soon after the ADA was passed, do seem at least ambiguous on the "physical place" point. But the Department of Justice itself has contradicted this reading, saying in the amicus brief in *Hooks* that, if nothing else, every website is stored on a server somewhere, and that certainly fits the description of "equipment" or "other real or personal property." Brief of the United States as Amicus Curiae in Support of Appellant, *supra* note 99 at 8. Further, in terms of a website, what type of property could it be outside of "other real or personal property"? At the very least, it is the personal property of the business that runs it.

151. *Parker*, 121 F.3d. at 1014. This reading runs directly counter to the actual legislative history of the ADA, which the *Parker* court did not cite in this opinion. *See* discussion *supra* notes 94–96 and accompanying text (highlighting Congress's intent that the examples chosen would simply be *examples*, not limiting terms). It also disregards the fact that websites could also meet the descriptions of many of the twelve "public accommodation" categories, as they simply describe what the businesses do, not where they are located.

152. *See Parker*, 121 F.3d at 1014 (listing the terms in 42 U.S.C. § 12187(7) and declaring each of them to be "a physical place where services may be obtained and nothing more").

Soon after *Parker*, the Third Circuit handled *Ford v. Schering-Plough Corp.*, in which a different plaintiff sued the same employer and insurance company involved in *Parker*, regarding the same two-year cap on mental disabilities.[153] In the *Ford* opinion, the Third Circuit adopted the Sixth Circuit's reasoning in *Parker* wholesale, repeating its *noscitur a sociis* argument that all of the examples of public accommodations in Title III refer to actual physical places.[154] The opinion also echoed the *Parker* court's reasoning that an employee receiving benefits through the employer, rather than directly from the insurance company, has no "nexus" to the insurance office.[155] However, *Ford* actually went further than *Parker*; where the *Parker* court declined to rule on whether Title III covers nonphysical access of a physical place (i.e., conducting business with a brick-and-mortar store via telephone),[156] the Third Circuit expressly ruled out such nonphysical access from falling within Title III.[157]

In yet another employer-provided insurance case, also involving a two-year mental disability cap, the Ninth Circuit jumped in line with the Sixth and Third Circuits in *Weyer v. Twentieth Century Fox Film Corp.*[158] The Ninth Circuit did not spend especially long on the "physical place" question, but simply repeated the arguments made in *Parker* and *Ford*. It found that all of the "public accommodation" examples in Title III are "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services."[159] Therefore, per *noscitur a sociis*, all places of public accommodation must be physical places.[160]

The Eleventh Circuit became the last circuit to impose a "physical place" requirement.[161] In *Rendon v. Valleycrest*

153. Ford v. Schering-Plough Corp., 145 F.3d 601, 603–04 (3d Cir. 1998). Like the *Parker* plaintiff, this plaintiff developed a mental disorder and her coverage was terminated two years later as a result. *Id.* at 603–04.

154. *Id.* at 613–14. The Third Circuit also distinguished the First Circuit's *Carparts* ruling at this point; ironically, the Third Circuit claimed that its version of "the plain meaning of 'public accommodation'" is so clear that it need not consult legislative history. *Id.* at 613.

155. *Id.* at 612–13.

156. *Parker*, 121 F.3d at 1011 n.3.

157. *Ford*, 145 F.3d at 614.

158. Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000).

159. *Id.* at 1114.

160. *Id.* Much like the *Parker* and *Ford* opinions, this opinion also disregarded the fact that websites easily meet many of these definitions because the examples simply focus on the character of a business.

161. Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1284–85 (11th Cir. 2002).

Products, Ltd., a group of disabled plaintiffs sued the producers of the television show *Who Wants to Be a Millionaire*, alleging that the "fast-finger" telephone process used to screen contestants was discriminatory because no alternative screening process existed for deaf participants or those with motor disabilities.[162] The district court dismissed the plaintiffs' case because no discrimination occurred onsite at a place of public accommodation.[163] The Eleventh Circuit overturned this ruling.[164] It said that a "place of public accommodation" had to be a physical place, so the telephone process itself could not be a "place of public accommodation," but the Millionaire television studio qualified as a physical place of public accommodation.[165] The court pointed to Title III, which specifically prohibits eligibility criteria that unnecessarily screen out large numbers of disabled people, to justify its holding.[166] The court noted discrimination does not have to occur onsite at the place of public accommodation as long as a court could find "a nexus between the challenged service and a place of public accommodation."[167] The court found a sufficient nexus between the offsite telephone screening and the television studio because the telephonic eligibility screening denied access to a physical place of public accommodation (the studio).[168] Thus, the plaintiffs' case was allowed to proceed.[169]

In 2002, a Florida district court became the first to explicitly hold that Title III did not cover websites as places of public accommodation because they were not physical places in *Access Now, Inc. v. Southwest Airlines Co.*[170] A blind person and a nonprofit group sued Southwest Airlines because the goods and services offered at its popular website, Southwest.com, were inaccessible to blind customers.[171] Notably, the plaintiffs asserted

---

162. *Id.* at 1280–81. The "fast-finger" screening required potential contestants to rapidly punch in answer choices on a telephone keypad. Some of the plaintiffs were unable to push the keys quickly enough to qualify, and some were unable to hear the questions at all. The screening process therefore kept all, or nearly all, deaf or motor disabled people from qualifying for the show. *Id.*

163. *Id.* at 1280.

164. *Id.* at 1286.

165. *Id.* at 1282–86.

166. *Id.* at 1285.

167. *Id.* at 1285 n.8.

168. *Id.*

169. *Id.* at 1286.

170. Access Now, Inc. v. Southwest Airlines Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

171. *Id.* at 1314. The "virtual ticket counters" that allowed site visitors to purchase tickets, check fares and schedules, and obtain other information were not compatible with

that Southwest.com itself was the public accommodation to which they were denied access as a place of "exhibition, display, [or] a sales establishment."[172] They did not allege that the website impeded their access to Southwest's physical ticket counters.[173] The Florida court, citing *Rendon* as precedent, dismissed the plaintiffs' case, holding that a place of public accommodation must be physical, and a website was not a physical place.[174] The court explained its view that, under *ejusdem generis*, "the general terms, 'exhibition,' 'display,' and 'sales establishment,' are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures," and none of which are websites.[175]

Next, the court distinguished the factual situation in *Rendon* (the "fast-finger" screening process) from the Southwest.com website, asserting that Southwest.com failed the *Rendon* nexus test because the site was not "a means to accessing a concrete space such as the specific television studio in *Rendon*."[176] The opinion then applied this nexus test to websites, requiring "a nexus between [the website] and a physical, concrete place of public accommodation."[177]

When *Access Now* reached the Eleventh Circuit on appeal, the plaintiffs modified their arguments, dropping the claim that Southwest.com was a place of public accommodation and suggesting instead that it met the nexus test in regard to Southwest Airlines' physical locations.[178] The court did not allow them to raise the "nexus" issue for the first time on appeal, and dismissed the appeal altogether.[179] Interestingly, the Eleventh Circuit refused to comment on whether websites should qualify as places of public

---

screen readers such as the one the blind plaintiff used to navigate the Internet. *Id.* at 1315–16.

172. *Id.* at 1318.

173. *Id.* at 1316 n.3.

174. *Id.* at 1319–22.

175. *Id.* at 1318–19. The court is misapplying both Title III (statutory examples are not meant to be limiting) and *ejusdem generis* (as the court describes it immediately before misapplying it, "where general words follow a specific enumeration . . . the general words should be limited to persons or things *similar to* those specifically enumerated" (emphasis added) (quoting Allen v. A.G. Thomas, 161 F.3d 667, 671 (11th Cir. 1998))). *Id.* at 1318.

176. *Id.* at 1320–21.

177. *Id.*

178. Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1326–30 (11th Cir. 2004).

179. *Id.* at 1329–30.

accommodation in their own right, claiming that "this case [did] not provide the proper vehicle of answering [the] question[ ]."[180]

The only other major case to address websites under Title III gives us the website nexus test in its most complex and troubling form: *National Federation of the Blind v. Target Corp*.[181] Sidestepping the "physical place" pitfall of the *Access Now* case, the blind plaintiff in *Target* alleged that Target.com's inaccessibility to the blind denied full and equal access to Target Corporation's physical stores, as well as the range of benefits available through Target.com.[182] Citing the Ninth Circuit precedent of *Weyer*, requiring places of public accommodation to be physical places, the court held Target.com was not a place of public accommodation and dismissed all claims that pertained to Target.com alone, such as the inability to purchase goods online.[183] The court allowed the plaintiffs to proceed with their claims that the inaccessibility of Target.com impeded full and equal access to brick-and-mortar Target stores.[184] Those claims raised the issue of a nexus between the website, Target.com, and a qualifying physical place of public accommodation.[185]

The opinion acknowledges that it carves up the Target.com website with this nexus test. The parts of Target.com that directly correspond to a physical Target store are fair game in the suit, but "[t]o the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA."[186] Necessarily, this ruling also excludes Target.com's listings of goods that are sold only online.

In addition to the difficulty of sorting out which portions of a website relate to a physical store, a recent development in the

---

180. *Id.* at 1335. This suggests the Eleventh Circuit might actually be receptive to changing its earlier "physical place" precedent when it comes to private commercial websites if the right case presents itself.

181. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006).

182. *Id.* at 952.

183. *Id.* at 952, 956.

184. *Id.* at 956.

185. *Id.* at 953–55. The court stated that "access" did not have to mean physical access alone, but also included "full enjoyment" of the goods and services offered by the physical stores. *Id.* at 953–54. The court cites *Rendon* as support for this proposition. The opinion distinguishes *Access Now* because the plaintiffs in that case only included Southwest.com's nonphysical "virtual ticket counters" as places of public accommodation; in this case, the plaintiffs included physical Target stores as well. *Id.* The court said the facts satisfied the nexus test to the extent the Target.com website was a "service" offered by the physical stores. *Id.* at 954.

186. *Id.* at 956.

Target case illustrates another danger of this nexus test—it draws an unclear line between groups of plaintiffs. In October 2007, the same California district court certified a class to proceed in a class action against Target.[187] In earlier proceedings, the court excluded all potential class members whose depositions indicated they preferred to shop at Target.com instead of physical Target stores.[188] But in a later ruling, the court actually ejected the original blind plaintiff from the class, stating that he had not established a sufficient nexus to the physical Target stores.[189] The original plaintiff attempted to use Target.com to buy products online and to "pre-shop" before visiting a physical Target store.[190] Because he was ultimately successful in purchasing the goods he wanted at the physical Target store, the court felt he had not suffered injury from the inaccessibility of Target.com.[191] The court stated that despite the fact that the plaintiff had to find someone to accompany him to the store, there was no proof he required this assistance only because he could not pre-shop.[192] Therefore, by the court's own ruling, this version of the nexus test not only excludes the large number of people who prefer to shop on a physical store's website—for the same goods offered in the physical store—but also requires subjective line drawing between plaintiffs who actually *do* patronize the physical stores!

The current jurisprudence therefore reflects two circuits that explicitly do not require a physical "place of public accommodation" (the First and Seventh Circuits); one that probably would not require a physical place of public accommodation (the Second Circuit); four that do require a physical place of public accommodation (the Third, Sixth, Ninth, and Eleventh Circuits, although only the Eleventh has ruled on a website case); and four that have not taken a position on the issue (the Fourth, Fifth, Eighth, and Tenth Circuits). The Supreme Court has not entered the debate. Following the "victory" of *Target*, the prospect of more website cases looms on the horizon. Given the lack of consensus, and the lack of congressional action to resolve the issue, the many courts that

187. Nat'l Fed'n of the Blind v. Target Corp., No. C 06-1802, 2007 WL 2846462, at *1, *22 (N.D. Cal. Oct. 2, 2007).

188. Nat'l Fed'n of the Blind v. Target Corp., No. C 06-01802, 2007 WL 1223755, at *4–5 (N.D. Cal. Apr. 25, 2007).

189. *Id.* at *17.

190. *Id.*

191. *Id.*

192. *Id.* The plaintiff also was unable to access coupons online to use *in the physical store*; apparently, this was not a sufficient injury, either. *Id.*

have not addressed a website case should adopt a clear and consistent standard that honors the legislative intent of the ADA and follows the language of Title III.

V. A BETTER APPROACH: THE COMMERCE- AND CHARACTER-BASED TEST FOR WEBSITES

In the absence of congressional or regulatory change, no other courts should adopt the dangerous *Target* "nexus test," and the courts that have required a physical place of public accommodation in the past should reconsider that position in light of the emergence of websites as full-fledged commercial establishments.[193] Rather than viewing a website as nothing more than a "service" of a physical place, courts should evaluate websites as potential "places of public accommodation" in their own right. A better Title III test for websites focuses on a website's commerciality and character, in accordance with the specific language of Title III.

The confusion and discrimination currently playing out in the *Target* case illustrate the shortcomings of a website "nexus test" that demands a connection to a physical place. The *Target* "nexus test" inexcusably curtails the protections of Title III, disconnecting disabled Americans from the business websites that could change their lives. Congress passed the ADA to eliminate discrimination against the disabled, but the "nexus test" provides a large loophole that allows many businesses to continue discriminating at will. The "nexus test" completely excludes online only businesses from Title III's requirements, regardless of how closely they resemble an enumerated Title III entity. The test requires the arbitrary carving up of a physical store's website to determine which parts of the website sufficiently "relate" to the physical store. The test makes it unclear whether plaintiffs have a legally recognizable injury, with no easy method of finding the answer. And it does all of this based on a line of cases that has nothing to do with websites.

The many courts and Circuits which have not yet faced a Title III website case should heed the legislative history and Department of Justice interpretation of Title III. They should allow websites to qualify as "places of public accommodation" and look to the commerciality and character of a given website to determine whether it falls under Title III. A rule like this would include all websites that are truly commercial, provide consistent

---

193. For example, Amazon.com is a giant online retailer with no physical storefront. *See* Amazon.com, Inc., Annual Report (Form 10-K), at 3 (Feb. 1, 2008).

Title III application across the board, and eliminate arbitrary line drawing between types and portions of clearly commercial websites. It would also help disabled Americans know exactly where they stand in terms of their Title III right to access the same goods and services as everyone else.

The ideal test for determining whether a website is a place of public accommodation would closely follow the actual language of Title III. First, Title III explicitly requires a public accommodation to affect interstate commerce in some way.[194] It also must be a private entity, which excludes government websites.[195] This baseline determination would rule out the myriad websites that do not actually engage in commercial activity. Websites that do not sell anything or charge for membership would be excluded per se because they do not "affect commerce."[196]

Continuing through Title III, the next point of analysis concerns the character of the commercial entity in question—based on its business activity, how closely does it resemble any of the twelve enumerated types of "public accommodations"?[197] Courts already make this determination in terms of physical places—for example, the *Target* court quickly stated that Target stores qualified as a public accommodation under the "sales or retail establishment" provision.[198] A website almost certainly could not qualify as a "place of lodging" or a "station used for specified public transportation," and probably could not qualify as a "place of exercise or recreation."[199] However, one can easily think of websites that might satisfy the other categories, based on what they do:

- An "establishment serving food or drink": PapaJohns.com, a pizza company that allows users to order and pay for food online, for home delivery.[200]

---

194. 42 U.S.C. § 12181(1), (7) (2000).

195. 42 U.S.C. § 12181(6), (7) (2000). *But see* 29 U.S.C. § 701 *et seq.* (2000) (requiring all government resources provided under the Rehabilitation Act of 1973 to be in "accessible formats" for disabled Americans); 42 U.S.C. §§ 12131–12132 (2000) (prohibiting government agencies—"public entities"—from discriminating against disabled Americans under Title II of the ADA).

196. *See* Michael Goldfarb, Comment, Access Now, Inc. v. Southwest Airlines, Co.—*Using the "Nexus" Approach to Determine Whether a Website Should Be Governed by the Americans with Disabilities Act*, 79 ST. JOHN'S L. REV. 1313, 1335 (2005) (suggesting the ADA would not apply to personal websites or those that "merely provide information").

197. *See* 42 U.S.C. § 12181(7) (2000).

198. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949, 952 (N.D. Cal. 2006).

199. 42 U.S.C. § 12181(7)(A) (2000) (lodging); 42 U.S.C. § 12181(7)(G) (2000) (transportation); 42 U.S.C. § 12181(7)(L) (2000) (recreation).

200. 42 U.S.C. § 12181(7)(B) (2000); *see* Papa John's Delivery or Carryout Pizza—Order Online and Have Your Pizza Delivered, http://www.papajohns.com/index.htm (last visited Sept. 5, 2008).

- A "place of exhibition or entertainment": Apple.com/trailers, which allows users to view and download trailers for hundreds of movies.[201]
- A "place of public gathering": Slashdot.org, a technology-focused news discussion site.[202]
- A "sales or rental establishment": Amazon.com, the massive online store.[203]
- A "service establishment": Match.com, the popular online dating service.[204]
- A "place of public display or collection": Questia.com, an online library.[205]
- A "place of recreation": Games.yahoo.com, Yahoo!'s online game portal.[206]
- A "place of education": Phoenix.edu, the University of Phoenix, offering online degree programs.[207]
- A "social service center establishment": SecondHarvest.org, a national network of food banks.[208]

A court comparing a website to the list of categories must consider the character of the business: what the website actually does. For example, consider a website that primarily serves a person's online diary, but sells a handful of T-shirts each year. Despite being technically commercial, the site probably is not close enough to a sales establishment to qualify, given that sales are not its purpose for existence. The court retains a great deal of discretion in excluding questionable cases, such as the barely commercial weblog. At the same time, courts can easily bring obvious online businesses such as Amazon.com under Title III's umbrella.

---

201. 42 U.S.C. § 12181(7)(C) (2000); *see* Apple—Movie Trailers, http://www.apple.com/trailers (last visited Sept. 5, 2008).

202. 42 U.S.C. § 12181(7)(D) (2000); *see* Slashdot: News for Nerds, Stuff That Matters, http://slashdot.org (last visited Sept. 5, 2008).

203. 42 U.S.C. § 12181(7)(E) (2000); *see* Amazon.com: Online Shopping for Electronics, Apparel, Computers, Books, DVDs & More, http://www.amazon.com (last visited Sept. 5, 2008).

204. 42 U.S.C. § 12181(7)(F) (2000); *see* Match.com—Find Singles at the World's Largest Online Dating Personals Service, http://www.match.com/matchus (last visited Sept. 5, 2008).

205. 42 U.S.C. § 12181(7)(H) (2000); *see* Questia—the online Library of Books and Journals, http://www.questia.com/Index.jsp (last visited Sept. 5, 2008).

206. 42 U.S.C. § 12181(7)(I) (2000); *see* Yahoo! Games, http://games.yahoo.com/games/front (last visited Sept. 5, 2008).

207. 42 U.S.C. § 12181(7)(J) (2000); *see* Online University Education—Online Degrees—University of Phoenix, http://www.phoenix.edu (last visited Sept. 5, 2008).

208. 42 U.S.C. § 12181(7)(K) (2000); *see* America's Second Harvest, http://www.secondharvest.org (last visited Sept. 5, 2008).

If a website meets both of these requirements, the court then goes to the next step in public accommodation analysis: has the disabled plaintiff been denied "the full and equal enjoyment" of the website's goods or services?[209] As nearly all of the Circuits agree, Title III only governs access to goods and services and does not regulate their content.[210] Thus the rule does not require a given site to change the actual goods or services it provides, merely the way that they are presented via the coding of the website.[211] And a website might not have to change anything. A crucial component of this analysis involves whether reasonable measures exist to rectify the situation. Title III provides several outlets to ensure a reasonable outcome: it allows eligibility criteria that screen out the disabled if truly necessary; it requires modifications to policies, practices, and procedures to be reasonable; modifications are not required if they "fundamentally alter the nature" of the goods or services; and auxiliary aids or services are not required if they would "fundamentally alter the nature" of the goods or services, or would "result in an undue burden."[212]

Therefore, Title III already gives courts and defendants a great deal of leeway; it allows courts to make individual determinations of what is "reasonable" or an "undue burden," based on a particular website's size and nature. This reasonableness analysis would necessarily involve fact intensive considerations unique to each defendant; those who complain about the high cost of rehabilitating a website would have the opportunity to show the downsides of such a request. Title III does not necessitate a one-size-fits-all approach; if a website's owners could show that a particular change would be incredibly expensive or unworkable, or would fundamentally alter what the

---

209. 42 U.S.C. § 12182(a) (2000).

210. *See, e.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999) ("The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated."); Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998) ("While the Dept. of Justice . . . stat[ed] that Title III does cover the substance of insurance contracts . . . such an interpretation is 'manifestly contrary' to the plain meaning of Title III and, accordingly, is not binding on this court."); McNeil v. Time Ins. Co., 205 F.3d 179, 181 (5th Cir. 2000) ("[T]he ADA does not regulate the terms or content of goods and services . . . ."). *But see* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 20 (1st Cir. 1994) ("[T]here is nothing in [the Congressional Record] that explicitly precludes an extension of the statute to the substance of what is offered.").

211. *See supra* note 59 and accompanying text (describing the changes typically needed to make a website accessible for disabled persons).

212. *See* 42 U.S.C. § 12182(b)(2)(A)(i)–(iii) (2000) (providing limitations to the statute's prohibitions, to prevent self-defeating or excessively burdensome regulation).

website does, a court following Title III's plain language would not have to require it.[213] Courts and defendants also have two handy measuring sticks to help determine reasonableness: the World Wide Web Consortium's WCAG and the Access Board's set of web accessibility requirements under the Rehabilitation Act.[214]

Consistent implementation of a test like this would not necessarily set off a flood of litigation; Title III plaintiffs still cannot recover monetary damages unless the Attorney General specifically requests them.[215] It would not bankrupt or shut down waves of websites because courts would have specific discretion to consider whether a requested change is reasonable or an undue burden.[216] Applying Title III to websites would not put a damper on new Internet technologies because it would not require anyone to stop using them. The law merely asks websites to take reasonable steps to ensure the disabled can access their goods and services in a meaningful way. But this test would focus our judicial energy on the important questions, such as how to handle borderline websites and the extent of changes to require, rather than on arbitrary line drawing that confuses everyone and leaves many excluded people with no remedy at all. It would encourage businesses to design accessible websites in the first place, to stay out of court. And it would help 54 million disabled Americans know exactly where they stand.

VI. CONCLUSION

The problem of web accessibility threatens to turn millions of disabled Americans into second tier citizens, limited in their opportunities to self-sufficiently work, socialize, and carry out their daily lives. If courts are to honor the broad mandate of the Americans with Disabilities Act—its purpose, its language, its legislative history, and its meaning to the agency that interprets it—they must disregard the *Target* "nexus test" and allow private

---

213. 42 U.S.C. § 12182(b)(2)(A) (2000) (allowing such reasonableness or undue burden determinations).

214. *See* 36 C.F.R. § 1194.22 (2007) (codifying the Web Content Accessibility Guidelines); Web Content Accessibility Guidelines 2.0, *supra* note 64. (the most recent version of the WCAG); *see also* Evgenia Fkarias, *Liability Under the Americans With Disabilities Act for Private Website Operators*, 2 SHIDLER J.L. COM. & TECH. ¶ 5 (2006), http://www.lctjournal.washington.edu/Vol2/a006Fkiaras.html (suggesting courts might consider the Access Board standards a fair measure because federal websites already must meet those requirements).

215. 42 U.S.C. § 12188(b)(2)(B) (2000).

216. Although defendants might face litigation costs to a certain extent, potential plaintiffs face the same costs without the lure of large damage awards, so they will likely prefer to resolve situations out of court if possible.

commercial websites to qualify as "places of public accommodation" in their own right. The courts that have required physical places of public accommodation have unreasonably limited the language of Title III and ignored its explicit legislative intent.

In the absence of legislative change, the appropriate Title III test for a private website focuses on its commerciality, character, and the reasonable extent of accommodative changes.[217] If websites can qualify as places of public accommodation, they can be required to modify their structures, policies, and procedures to ensure that the disabled have full and equal enjoyment of the goods and services they offer. They will not, however, have to change the types of goods or services they wish to make available to the public. This focus on commerciality and character satisfies the broad remedial spirit of Title III and gives courts a high level of flexibility in applying the statute. And it ensures that all Americans will have an equal opportunity to connect with the goods, services, communities, and opportunities proliferating online every day.

Nikki D. Kessling

217. *See* 42 U.S.C. § 12181(7) (2000) (enumerating the types of private entities subject to Title III); 42 U.S.C. § 12182(2)(A) (2000) (providing exceptions to avoid self-defeating or overly burdensome regulation); *see also* discussion *supra* Part V.