

---

---

## NOTES

# LOOKING BEHIND THE CURTAIN: APPLYING TITLE III OF THE AMERICANS WITH DISABILITIES ACT TO THE BUSINESSES BEHIND COMMERCIAL WEBSITES

KENNETH KRONSTADT\*

### I. INTRODUCTION

In 1990, Congress enacted the Americans with Disabilities Act (the “ADA” or the “Act”)<sup>1</sup> with the goal of eliminating discrimination against disabled Americans by providing clear, strong, consistent, and enforceable standards to combat the type of discrimination people with disabilities face in their everyday lives.<sup>2</sup> The ADA is the force behind the wheelchair ramps so common in American buildings, the wide doors and large bathroom stalls to accommodate the disabled, the talking ATMs to assist individuals who are blind, and the acceptance of service animals in restaurants and shops.<sup>3</sup> Yet the ADA has provided little help to disabled Internet users.

---

\* Class of 2008, University of Southern California Gould School of Law; B.A. Business Economics 1993, University of California, Santa Barbara. I would like to thank Beth Garrett for her invaluable guidance throughout the research and writing of this Note, as well as the staff and editors of the Southern California Law Review for their hard work. This Note is dedicated to my wife, Andrea, whose love, support, and encouragement I cherish, and to our daughter, Amanda, who stayed in just long enough for Daddy to finish editing.

1. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000).

2. *Id.* § 12101(b)(1)–(4).

3. Press Release, Senator Tom Harkin (D-IA), 16th Anniversary of Americans with Disabilities Act (July 26, 2006), available at [http://www.abilitymagazine.com/news\\_July26\\_ADA\\_comments.html](http://www.abilitymagazine.com/news_July26_ADA_comments.html).

While people with disabilities benefit from a world of accommodations whenever they leave home, the world on their computer screens, when they navigate the Internet, is far less accommodating. This is particularly true for the blind, who, in order to “read” the contents of a website, require a website to have alternative text labels linked with graphical images so that the screen reader software the blind use to navigate the Internet can read the text aloud. While alternative text labels are relatively easy and inexpensive to implement, many sites do not use them.

Meanwhile, the flow of commerce to the Internet has widened from a trickle to a river since the enactment of the ADA. Court attempts to force change have been unsuccessful thus far. Unless the ADA is interpreted to protect against the discrimination blind people face when they navigate the Internet, technology will leave them behind. To fully address the plight of people with disabilities, and to ensure that the ADA fulfills its bold mandate of eliminating the discrimination faced by people with disabilities in their everyday lives, a “place of public accommodation,” as defined in title III of the ADA,<sup>4</sup> must include all commercial entities selling goods and services to the public, including those doing so through a website. This will resolve the inconsistency inherent in applying the ADA to physical structures, but not to entities offering similar goods and services to the public via the Internet.

Part II of this Note examines the growth of the Internet and common accessibility issues for visually disabled individuals who try to access websites. Part III of this Note will discuss Congress’s most comprehensive legislation combating disability discrimination: the ADA, focusing on title III of the Act, which deals with places of public accommodation.

Part IV of this Note will examine judicial analysis of whether the Internet is itself a place of public accommodation, and whether a website might alternatively qualify as a service of a public accommodation under the nexus approach. This Part will focus, in particular, on two seminal cases: *Access Now, Inc. v. Southwest Airlines Co.*, the first case to issue a holding regarding ADA applicability to the Internet;<sup>5</sup> and *National Federation of the Blind v. Target Corp.*, determining that a nexus can exist between a place of public accommodation and an Internet website.<sup>6</sup> The nexus approach is derived from the ADA’s fundamental mandate of

---

4. 42 U.S.C. § 12182.

5. *Access Now, Inc. v. Sw. Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

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

protecting against discrimination “in the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations of any place of public accommodation.”<sup>7</sup> As applied to websites, this test views the website of a public accommodation as a “service,” and asks whether there is a nexus between the source of the discrimination—the website—and a qualifying place of public accommodation. This Part will conclude that even a correct application of the nexus approach fails to fully protect against discrimination by Internet businesses engaging in precisely the types of commerce to which the ADA was intended to apply.

Part V will suggest an approach that ensures title III will apply to the types of businesses Congress enumerated, even if such businesses conduct transactions exclusively via the Internet. The suggested approach, this Part establishes, is consistent with the language of the ADA, the purpose behind the ADA’s enactment, and the nature of the Internet, yet it allows the ADA to adapt to a changing world without straining the plain meaning of the word “place.”

## II. THE INTERNET AND THE CHALLENGES IT PRESENTS FOR DISABLED INDIVIDUALS

Although the term “Internet” was first used in 1982 to describe a “connected set of networks, specifically those using TCP/IP,”<sup>8</sup> the Internet as we know it today did not exist when Congress enacted the ADA in 1990.<sup>9</sup> The “World Wide Web” was released in 1991.<sup>10</sup> Although the number of Internet hosts reached one million in 1992,<sup>11</sup> it was not until 1993 that the web browser Mosaic allowed the World Wide Web to become accessible to the general public.<sup>12</sup> Traditional dial-up services such as America Online, Prodigy, and CompuServe did not provide Internet access to subscribers until 1995.<sup>13</sup> Today, over 210 million people in the United States—almost 70 percent of the population—use the Internet.<sup>14</sup> On

---

7. 42 U.S.C. § 12182(a).

8. Robert H. Zakon, Hobbes’ Internet Timeline, <http://www.zakon.org/robert/Internet/timeline/> (last visited Nov. 10, 2007).

9. 42 U.S.C. §§ 12101–12213.

10. Zakon, *supra* note 8.

11. *Id.*

12. *Back to the Future*, UTNE MAGAZINE, Jan.–Feb. 2003, available at [http://www.utne.com/issues/2003\\_115/promo/10216-1.html](http://www.utne.com/issues/2003_115/promo/10216-1.html).

13. Zakon, *supra* note 8.

14. INTERNET WORLD STATS, UNITED STATES OF AMERICA INTERNET USAGE AND BROADBAND USAGE REPORT, <http://www.internetworldstats.com/stats14.htm> (last visited Oct. 3, 2007) [hereinafter INTERNET WORLD STATS].

average, American Internet users access the Internet more than once a day and visit approximately seventy Internet domains and 1500 web pages per month.<sup>15</sup>

An estimated 15 percent of the disabled individuals in the United States use the Internet.<sup>16</sup> Much of the Internet's content, however, remains inaccessible to individuals with visual impairments.<sup>17</sup> This inaccessibility has been created by the transition of the Internet from text-based formats to multimedia-based formats, which are incompatible with many of the assistive technologies employed by disabled users to navigate the Internet.<sup>18</sup>

Many blind or visually impaired Internet users rely on screen readers to read the text on their screen.<sup>19</sup> Screen reading software reads aloud the on-screen text from a website for a visually disabled individual to hear.<sup>20</sup> This software encounters problems when websites use graphical images with no alternative text labels because the screen reading software is unable to "read" these images.<sup>21</sup> Alternative text labels provide a textual equivalent for images by linking the image to a textual description which can be read by screen reading software.<sup>22</sup>

---

15. GLOBAL INDEX CHART, NIELSEN//NET RATINGS, at [http://www.nielsen-netratings.com/resources.jsp?section=pr\\_netv&nav=1](http://www.nielsen-netratings.com/resources.jsp?section=pr_netv&nav=1) (last visited Nov. 10, 2007).

16. See, e.g., *Access Now, Inc. v. Sw. Airlines Co.*, 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002) ("According to Plaintiffs, of the nearly ten million visually impaired persons in the United States, approximately 1.5 million of these individuals use the Internet.").

17. Richard E. Moberly, *The Americans With Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 963 (2004); 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, 1314 (2005); Adam M. Schloss, Note, *Web-Sight for Visually-Disabled People: Does Title III of the Americans With Disabilities Act Apply to Internet Websites?*, 35 COLUM. J.L. & SOC. PROBS. 35, 35 (2001).

18. Goldfarb, *supra* note 17, at 1314; Schloss, *supra* note 17, at 36.

19. JUDY BREWER, WORLD WIDE WEB CONSORTIUM, HOW PEOPLE WITH DISABILITIES USE THE WEB (2001), <http://www.w3.org/WAI/EO/Drafts/PWD-Use-Web/Overview.html>.

20. *Id.*

21. *Id.* See *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 31–32 (2000) (statement of Gary Wunder, Programmer Analyst-Expert, ITS-Hosp. Bus. Apps., Univ. of Mo.), available at [http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm) [hereinafter Hearings] ("Computer technology is not yet sufficiently advanced to recognize a picture and tell us what [sic] appears on the screen.").

22. See BREWER, *supra* note 19.

### III. THE ADA WAS CREATED TO ADDRESS THE NEEDS OF DISABLED INDIVIDUALS

There are over forty-three million disabled individuals in the United States,<sup>23</sup> and as many as 11.5 million people, ages five and over, have a sensory disability.<sup>24</sup> Congress realized that disabled individuals have traditionally been isolated, segregated and discriminated against<sup>25</sup> and continue to encounter discrimination and exclusion on a daily basis in virtually all facets of everyday life.<sup>26</sup> To combat these problems,<sup>27</sup> Congress in 1990 enacted the ADA to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals.”<sup>28</sup> Central to the ADA’s enactment was the recognition by Congress that one of the main forms of discrimination faced by people with disabilities was the “discriminatory effects of architectural, transportation, and communication barriers.”<sup>29</sup>

Congress’s stated purposes behind the creation of the ADA were:

- (1) [T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>30</sup>

---

23. 42 U.S.C. § 12101(a)(1) (2000). “[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.” *Id.* According to the Census 2000 Brief, 49,746,248 people age five and older identify themselves as disabled. JUDITH WALDROP & SHARON M. STERN, U.S. DEP’T OF COMMERCE, ECON. AND STATISTICS ADMIN., U.S. CENSUS BUREAU, DISABILITY STATUS: 2000—CENSUS 2000 BRIEF 2 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-17.pdf>.

24. U.S. DEP’T OF COMMERCE, ECON. AND STATISTICS ADMIN., U.S. CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY S1801 DISABILITY CHARACTERISTICS (2005), available at [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=01000US&q\\_1=ACS\\_2005\\_EST\\_G00\\_S1801&-ds\\_name=ACS\\_2005\\_EST\\_G00](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&q_1=ACS_2005_EST_G00_S1801&-ds_name=ACS_2005_EST_G00).

25. 42 U.S.C. § 12101(a)(2).

26. *Id.* § 12101(a)(3), (5).

27. *Id.* § 12101.

28. *Id.* § 12101(a)(8).

29. *Id.* § 12101(a)(5).

30. *Id.* § 12101(b).

The ADA is divided into five distinct titles.<sup>31</sup> Title III, the focus of this Note, is the public accommodation section of the ADA. Title III states, “No individual shall be discriminated against on the basis of disability 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.”<sup>32</sup> Title III identifies twelve specific categories of public accommodation:

- (A) [A]n inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (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 rental 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

---

31. *Id.* §§ 12101–12213. Title I, Employment, prohibits discrimination by covered entities against disabled individuals because of their disability with respect to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* § 12112. With respect to public services, employers must make reasonable accommodations unless those accommodations prove unduly burdensome or unrealistic; title II states, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” *Id.* § 12132. Title II “requires that the services and programs of local and State governments, as well as other non-Federal government agencies, operate their programs so that [they] . . . are readily accessible to and usable by individuals with disabilities.” The Americans with Disabilities Act, Students Toward Empowerment Project, <http://p3.csun.edu/stepaccess/tools/ada.html> (last visited Aug. 16, 2007). Title IV, Telecommunications, requires that “interstate and intrastate telecommunications relay services are available . . . to hearing-impaired and speech-impaired individuals in the United States.” 47 U.S.C. § 225(b)(1) (2000). The Federal Communications Commission oversees this section of the ADA. *Id.* § 225(e)(1). Title V, Miscellaneous, contains provisions covering various areas not covered in titles I–IV of the ADA, and prohibits coercing, threatening, or retaliating against disabled individuals or those attempting to aid disabled individuals in asserting their rights under the ADA. 42 U.S.C. § 12203 (2000). The Equal Employment Opportunity Commission is responsible for enforcing title V. *Id.* § 12209.

32. 42 U.S.C. § 12182.

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.<sup>33</sup>

Pursuant to Congress's grant of authority to the Attorney General to issue regulations to carry out the ADA, the applicable federal regulations define a place of public accommodation as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve enumerated] categories" listed above.<sup>34</sup> The federal regulations define "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."<sup>35</sup>

Title III ensures that people with disabilities receive "full and equal enjoyment of the goods and services of places of public accommodation" by "requir[ing] 'reasonable modification' of 'policies, practices, and procedures,' the provision of auxiliary aids to ensure effective communication with the disabled, and the removal of architectural and communication barriers."<sup>36</sup> Thus, the ADA requires "that places of public accommodation take affirmative steps to accommodate the disabled."<sup>37</sup>

Title III requires an entity to take steps necessary to ensure that people with disabilities are not discriminated against unless the entity can prove such steps would cause an undue burden.<sup>38</sup> The Department of Justice defines undue burden as a "significant difficulty or expense,"<sup>39</sup> and has established factors to be considered in determining whether a requested

---

33. *Id.* § 12181(7).

34. 28 C.F.R. § 36.104 (2007).

35. *Id.*

36. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 951 (N.D. Cal. 2006) (quoting 42 U.S.C. §§ 12182(a), (b)(1)(A)(ii-iv)).

37. *Id.* (citing H.R. REP. NO. 101-485, pt. 2, at 104 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 387). *See also* 42 U.S.C. §§ 12182(b)(2)(A)(ii-iv).

38. 42 U.S.C. § 12182.

39. 28 C.F.R. § 36.104.

accommodation is reasonable, including the cost of making the modification and the financial ability of the business to accommodate.<sup>40</sup> Ultimately, determining whether a requested accommodation is reasonable—that is, determining whether the accommodation can be provided in another format, or whether the requested accommodation would either fundamentally alter the product or service, or result in an undue burden—requires the courts to engage in case-by-case balancing of individual circumstances.<sup>41</sup>

The changes necessary to allow blind individuals to navigate the Internet are relatively easy and inexpensive to implement. The World Wide Web Consortium (“W3C”), created in part by Tim Berners-Lee, the founder of the World Wide Web, is an association of international organizations that work together to create Internet standards and guidelines.<sup>42</sup> According to the W3C guidelines, developing a site accessible to disabled individuals does not add significant costs, and can often reduce the expense of updating or maintaining websites, as well as serve a wider range of customers and provide enhanced usability by making accommodations for the disabled.<sup>43</sup> Making a website accessible is not only “very straightforward,” but coding a website to accommodate screen reader technology actually increases the likelihood that the website will show up on Internet search engine results, thus creating a competitive advantage.<sup>44</sup>

---

40. *Id.*

41. The determination of reasonableness involves a “fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.” Schloss, *supra* note 17, at 54 (citing *Staron v. McDonald’s Corp.*, 51 F.3d 353, 357 (2d Cir. 1995) (internal quotations omitted)).

42. About the World Wide Web Consortium, World Wide Web Consortium (W3C), <http://www.w3.org/Consortium/> (last visited Nov. 10, 2007).

43. Fact Sheet for “Web Content Accessibility Guidelines 1.0, World Wide Web Consortium (W3C), <http://www.w3.org/1999/05/WCAG-REC-fact> (last visited Nov. 10, 2007). See Hearings, *supra* note 21 (testimony of Judy Brewer, Director, Web Accessibility Initiative (WAI) Int’l Program Office, World Wide Web Consortium (W3C) (“Web accessibility solutions are generally inexpensive and easy to implement.”)); Charles D. Mockbee IV, Comment, *Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses*, 28 S. ILL. U. L.J. 553, 571–73 (2004). But see Justin D. Petruzzelli, Note, *Adjust Your Font Size: Websites are Public Accommodations Under the Americans With Disabilities Act*, 53 RUTGERS L. REV. 1063, 1091 (2001) (noting that the cost of conversion is not insignificant, but that the “statute does allow for a sliding scale approach so that accessibility can be prioritized depending on the financial status of the website”).

44. Bob Tedeschi, *Do the Rights of the Disabled Extend to the Blind on the Web?*, N.Y. TIMES, Nov. 6, 2006, available at <http://www.nytimes.com/2006/11/06/technology/06ecom.html?ex=1166504400&en=f9cdaf3c51df1e7e&ei=5070> (quoting Dayna Bateman, senior information architect at Fry Inc., which operates e-commerce websites on behalf of large retailers like Brookstone, Eddie Bauer and Spiegel).

Despite the existence of title III of the ADA, and despite the ease and affordability of the technical accommodations necessary to provide people with disabilities equal access to websites, the majority of websites are still incompatible to some degree with the tools most typically used by people with disabilities to navigate the Internet.<sup>45</sup> In 2000, Congress held hearings “to consider the impact of the ADA on the Internet.”<sup>46</sup> At the time of those hearings, the applicability of the ADA to the Internet had not yet been determined by any court. In his Opening Statement, however, Charles T. Canady, Chairman of the Subcommittee on the Constitution, Committee on the Judiciary, emphasized that the position of the Department of Justice, the agency responsible for enforcing the ADA, was that “the accessibility requirements of the Americans with Disabilities Act already apply to private Internet websites and services.”<sup>47</sup> The hearings consisted of two panels of speakers: one panel discussed “technical issues relating to the accessibility of the Internet to the disabled” and whether the ADA “is an appropriate vehicle for increasing access to the Internet by the disabled,” and a second panel discussed “policy and legal implications of the ADA’s application to private Internet sites.”<sup>48</sup> Congress did not take any action in response to those hearings.

To gain more effective access to Internet content, people with visual disabilities have filed lawsuits in federal courts, pursuant to the ADA, to compel commercial entities on the Internet to utilize formats that are more compatible with the assistive technologies utilized by persons with disabilities in navigating the Internet. These lawsuits, however, have been met with mixed results. While several suits have resulted in settlements requiring that the websites accommodate the disabled, the only two courts to rule on the issue of whether a website can be a place of public accommodation under title III have determined that it cannot.<sup>49</sup>

---

45. “[A]pproximately 98 percent of existing Websites . . . aren’t compatible with the tools that people with disabilities use to navigate the Web, such as text readers and text-to-braille translators.” Sally McGrane, *Is the Web Truly Accessible to the Disabled?*, CNET, Jan. 26, 2000, available at [http://www.cnet.com/4520-6022\\_1-105104-1.html?tag=feat.2](http://www.cnet.com/4520-6022_1-105104-1.html?tag=feat.2).

46. Hearings, *supra* note 21, at 9.

47. *Id.* at 8.

48. *Id.* at 11.

49. See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006); *Access Now, Inc. v. Sw. Airlines Co.*, 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002). *Cf.* *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362, 1366 (N.D. Ga. 2002) (holding in a suit brought under title II of the ADA that the defendants discriminated against disabled individuals because their website provided information to the general public, which was not available in formats accessible to the visually impaired). In 1999, the National Federation of the Blind sued America Online, Inc. (“AOL”) for disability inaccessibility issues. Jay Lindsay, *AOL to Increase Access for Blind; Online Service Signs Pact to Settle Suit Accusing it of Violating the Americans with Disabilities Act*, THE

---

---

#### IV. COURT DETERMINATIONS OF WHETHER TITLE III OF THE ADA APPLIES TO A WEBSITE

To succeed in a title III claim, a plaintiff must establish that a website falls within the scope of the ADA by being either (1) a place of public accommodation, or, under the nexus approach (2) a “service” provided by such a place of public accommodation.<sup>50</sup> The issue at the center of lawsuits seeking to compel Internet entities to use formats compatible with assistive technology has been whether a place of public accommodation is narrowly limited to brick-and-mortar facilities or whether it also incorporates intangible entities, such as Internet sites.<sup>51</sup>

##### A. BEFORE *ACCESS NOW, INC. v. SOUTHWEST AIRLINES CO.*

Prior to *Access Now, Inc. v. Southwest Airlines Co.*,<sup>52</sup> holdings and statements issued by two particular courts indicated that a website should be required to accommodate the disabled under title III of the ADA. In *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Association of New England, Inc.*, the First Circuit determined that “the plain meaning” of the twelve categories of public accommodation listed in title III “do[es] not require ‘public accommodations’ to have physical structures for persons to enter.”<sup>53</sup> The court added that even if the meaning of public accommodation “is not plain, it is, at worst, ambiguous,” and that this ambiguity, considered with agency regulations and public policy concerns support the conclusion that title III does not require physical entry into a place of public accommodation.<sup>54</sup>

The court first looked to the language of the statute and noted that, by including “travel service” among the twelve categories of public accommodation, “Congress clearly contemplated that ‘service

---

CONTRA COSTA TIMES (Contra Costa, CA), July 27, 2000, at B01. The Federation dismissed the suit because AOL agreed to modify its software to become compatible with assistive technology. *Id.* In 2004, New York State Attorney General Eliot Spitzer announced settlements with two major travel Internet sites, ramada.com and priceline.com, based upon their agreement “to implement a variety of accessibility standards that will permit users of assistive technology, such as screen reader software, to more easily navigate these web sites.” ANDREW M. CUOMO, OFFICE OF THE N.Y. STATE ATTORNEY GEN., SPITZER AGREEMENT TO MAKE WEB SITES ACCESSIBLE TO THE BLIND AND VISUALLY IMPAIRED (Aug. 19, 2004), available at [http://www.oag.state.ny.us/press/2004/aug/aug19a\\_04.html](http://www.oag.state.ny.us/press/2004/aug/aug19a_04.html).

50. Goldfarb, *supra* note 17, at 1315.

51. *Id.* at 1315–16.

52. *Access Now*, 227 F. Supp. 2d at 1312.

53. *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

54. *See id.*

establishments' include providers of services which do not require a person to physically enter an actual physical structure," because "[m]any travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services."<sup>55</sup> The court added that "one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services."<sup>56</sup> Because of this, the court stated that "[i]t 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."<sup>57</sup>

The court added that this determination was consistent with the legislative history of the ADA,<sup>58</sup> specifically targeting the Act's stated purposes of "invok[ing] the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities,"<sup>59</sup> "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"<sup>60</sup> and "bring[ing] individuals with disabilities into the economic and social mainstream of American life."<sup>61</sup> Finally, the court noted that, in drafting title III, "Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities."<sup>62</sup>

While this determination did not explicitly address businesses offering products and services via the Internet, this reasoning logically extends to such entities. Like sales and service establishments conducting business by mail and phone, Internet businesses make their goods available to the general public, but do so without customers physically entering the businesses' facilities to make use of their goods or services.

Five years later, the Seventh Circuit agreed with the First Circuit determination that title III applies to websites. In *Doe v. Mutual of Omaha*

---

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (quoting 42 U.S.C. § 12101(b)(4) (2000) (internal quotations omitted)).

60. *Id.* (quoting 42 U.S.C. § 12101(b)(1) (internal quotations omitted)).

61. *Id.* (quoting H.R. REP. NO. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382).

62. *Id.* (citing S. REP. NO. 101-16, at 58 (1989)).

*Insurance, Co.*,<sup>63</sup> the Seventh Circuit considered whether an insurance provider violated title III by offering insurance policies that capped coverage for AIDS and AIDS-related conditions below the limit at which it capped coverage for other conditions.<sup>64</sup> Judge Posner added to the foundation laid by *Carparts*<sup>65</sup> and explicitly stated that a “Web site” falls within title III’s definition of public accommodation:

The core meaning of [title III’s provision that ‘no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation’], 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*) . . . 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.<sup>66</sup>

Because the defendant’s insurance policies were not alleged to have excluded AIDS patients from coverage,<sup>67</sup> Judge Posner’s statements were not central to the ultimate reversal of a judgment in favor of the plaintiffs on the grounds that “section 302(a) of the [ADA] does not regulate the content of the products or services sold in places of public accommodation.”<sup>68</sup>

#### B. *ACCESS NOW, INC. V. SOUTHWEST AIRLINES CO.*

The first court to issue a holding on the issue of whether the Internet qualifies as a place of public accommodation was the U.S. District Court for the Southern District of Florida in *Access Now*.<sup>69</sup> In *Access Now*, the plaintiffs, a disability advocacy organization called Access Now and a blind individual named Robert Gumson, filed a suit alleging that the functionality of southwest.com—the Southwest Airlines website which allows customers to purchase airline tickets, check fares and schedules, and

---

63. *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

64. *Id.* at 558.

65. *See id.* at 559 (citing *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) for the proposition that covered entities should include both those in “physical space” and “electronic space”).

66. *Id.* (quoting 42 U.S.C. § 12182(a) (2000)) (emphasis added) (citation omitted).

67. *Id.*

68. *Id.* at 564.

69. *Access Now, Inc. v. Sw. Airlines Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (determining that title III does not apply to websites, and applies only to concrete, physical structures).

receive up-to-date sales promotions—violated the ADA because the offerings at southwest.com’s “virtual ticket counters” were inaccessible to blind individuals.<sup>70</sup> Specifically, the plaintiffs claimed that southwest.com did not provide the alternative text labels necessary for screen reader software to allow a blind individual, like Gumson, to utilize Southwest’s website effectively.<sup>71</sup> The plaintiffs asked the court to hold that southwest.com, a website, was a “place of public accommodation.”<sup>72</sup>

The court began its analysis by observing that it need look no further if it determined that the language of title III of the ADA has a plain and unambiguous meaning.<sup>73</sup> The court next observed that “the plain and unambiguous language of the statute and relevant regulations does not include websites among the [twelve specifically enumerated categories defining] ‘places of public accommodation.’”<sup>74</sup> Following Eleventh Circuit precedent,<sup>75</sup> the court concluded that to fall within the ADA, a public accommodation must be a “physical, concrete structure.”<sup>76</sup> In a footnote, the court also referred to the fact that this determination aligned with the Third,<sup>77</sup> Sixth,<sup>78</sup> and Ninth<sup>79</sup> Circuits’ conclusions that a place of public

---

70. *Id.* at 1314–15.

71. *Id.* at 1314–16.

72. *Id.* at 1318.

73. “The ‘first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’ A court need look no further where the statute in question provides a plain and unambiguous meaning.” *Id.* at 1317 (quoting *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 n.6 (11th Cir. 2002) (citation omitted)).

74. *Id.* at 1318.

75. The court based its conclusion on two prior Eleventh Circuit cases, *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000), and *Rendon*, 294 F.3d 1279, neither of which clearly establishes such a precedent. In *Stevens*, the Eleventh Circuit determined that “the intent of Congress is clear enough” because “Congress has provided such a comprehensive definition of ‘public accommodation,’” in the form of the twelve enumerated categories, and thus concluded that cruise ships featuring restaurants, bars, and other specifically enumerated public accommodations are themselves public accommodations, even though cruise ships are not enumerated within Congress’s definition of public accommodation. *Stevens*, 215 F.3d at 1241. In *Rendon*, the Eleventh Circuit held that a television game show screening process that discriminated against potential disabled contestants off-site from the physical place of public accommodation still violated title III because the Act:

[C]overs both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation’s facilities and accessing its goods, services and privileges, and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person’s ability to enjoy the defendant entity’s goods, services and privileges.

*Rendon*, 294 F.3d at 1283 (citation omitted).

76. *Access Now*, 227 F. Supp. 2d at 1318 (stating that “to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards”).

77. *Id.* at 1320 n.10 (citing *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998)) (noting that “[t]he plain meaning of Title III is that a public accommodation is a place . . .”).

78. *Id.* (citing *Parker v. Metro Life Ins. Co.*, 121 F.3d 1006, 1010–14 (6th Cir. 1997)) (noting

accommodation is a physical space.

The court based its holding in part on the rule of *ejusdem generis*, which dictates that “where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated.”<sup>80</sup> The plaintiffs alleged that the southwest.com website was a place of “exhibition, display and a sales establishment,” resting their argument on a definition created by selecting language from three separate subsections of the ADA’s twelve enumerated categories.<sup>81</sup> The court concluded that the general terms “exhibition,”<sup>82</sup> “display,”<sup>83</sup> and “sales establishment”<sup>84</sup> are limited to the specifically enumerated terms they follow in the language of the statute, all of which are “physical, concrete structures.”<sup>85</sup> For that reason, the court concluded that none of the terms could reasonably be said to include nonphysical establishments that offer goods and services to the public such as Southwest’s website.<sup>86</sup> Thus, the Southwest Airlines website was not a “place” within the meaning of title III.

### C. THE NEXUS APPROACH

Even though the *Access Now* court determined that southwest.com was not itself a place of public accommodation, Southwest Airlines might still have been required to make reasonable accommodations for people with disabilities if the plaintiffs established that a nexus existed between southwest.com and a qualifying place of public accommodation. The nexus

---

that “[a]s is evident by § 12181(7), a public accommodation is a physical place . . .”).

79. *Id.* (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000)) (noting that “some connection between the good or service complained of and an actual physical place is required”).

80. *Id.* at 1318 (quoting *Allen v. A.G. Thomas*, 161 F.3d 667, 671 (11th Cir. 1998)). *See also* WILLIAM N. ESKRIDGE ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 823 (3d ed. West 2001).

81. *See* 42 U.S.C. § 12181(7)(C) (2000) (“[A] motion picture house, theater, concert hall, stadium, or other *place of exhibition* or entertainment.” (emphasis added)); 42 U.S.C. § 12181(7)(H) (“[A] museum, library, gallery, or other place of public *display* or collection.” (emphasis added)); 42 U.S.C. § 12181(7)(E) (“[A] bakery, grocery store, clothing store, hardware store, shopping center, or other *sales* or rental *establishment*.” (emphasis added)). It is unclear why the plaintiffs failed to allege that southwest.com was a “travel service,” a public accommodation specifically enumerated in 42 U.S.C. § 12181(7)(F).

82. *Access Now*, 227 F. Supp. 2d at 1319 (quoting 42 U.S.C. § 12181(7)(C)) (internal quotations omitted).

83. *Id.* (quoting 42 U.S.C. § 12181(7)(H)) (internal quotations omitted).

84. *Id.* (quoting 42 U.S.C. § 12181(7)(E)) (internal quotations omitted).

85. *Id.* at 1319.

86. *Id.*

approach is a judicially adopted approach<sup>87</sup> based on title III's general rule that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."<sup>88</sup> Under the nexus approach, a place of public accommodation must be an actual physical space. A court asks not whether the discrimination occurs *at* a place of public accommodation, but whether the discrimination occurs in the provision of a good, service, facility, privilege, advantage, or accommodation *by* an existing place of public accommodation.<sup>89</sup> As the *Rendon* court explained:

A reading of the plain and unambiguous statutory language at issue reveals that the definition of discrimination provided in title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, *see* 42 U.S.C. § 12182(b)(2)(A)(iv), *and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges, see* 42 U.S.C. § 12182(b)(2)(A)(i)–(ii).<sup>90</sup>

The nexus approach recognizes that the discrimination alleged by a plaintiff need not occur *at* the physical location of a public accommodation.<sup>91</sup> In *Rendon*, the Eleventh Circuit addressed whether Valleycrest Productions and ABC, the producers of the television quiz show "Who Wants to Be a Millionaire," violated title III by utilizing a "fast finger process" for screening potential contestants that required potential candidates to answer questions by quickly dialing appropriate keys on their

---

87. The nexus approach was first applied in *Pappas v. Bethesda Hospital Association*, 861 F. Supp. 616, 620 (S.D. Ohio 1994), *abrogated by* *Parker v. Metro. Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996). In *Pappas*, the plaintiff was a nurse, employed by a hospital, who had applied for and was denied health insurance coverage for her family. The plaintiff claimed that she was denied coverage because her spouse and child suffered from disabilities. *Id.* at 617. The plaintiff sued both the hospital and its insurance service provider alleging that denying her coverage violated title III of the ADA, but the court determined that "neither [the hospital nor insurance provider] is a public accommodation *in regard to their provision of health insurance benefits and services,*" even though "both hospitals and insurance offices are places of public accommodation." *Id.* at 619–20 (emphasis added). The court stated that "there is no nexus whatsoever between the alleged discrimination and any public accommodation." *Id.* at 620.

88. 42 U.S.C. § 12182(a).

89. *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002).

90. *Id.* (emphasis added) (footnote omitted).

91. *Id.* at 1285.

telephone keypad.<sup>92</sup> The plaintiffs, individuals with hearing and upper-body mobility impairments who attempted to compete on the program, alleged that the “fast finger process” discriminated against them on the basis of their disabilities.<sup>93</sup> The defendants essentially urged the court to hold “that so long as discrimination occurs off site, it does not offend title III.”<sup>94</sup> The court found such a reading untenable, noting that “off-site screening appears to be the paradigmatic example contemplated in the statute’s prohibition of ‘the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability.’”<sup>95</sup>

Under the nexus approach, a website should be considered one method by which an entity subject to title III communicates with and offers goods and services to the public.<sup>96</sup> Thus, utilizing the nexus approach, the plaintiffs in *Access Now* could have argued that Southwest Airlines’ ticket counters were themselves public accommodations, and a nexus existed between those accommodations and southwest.com. Under such an argument, the airline would not be permitted to make services available to nondisabled individuals over the Internet without also making those services available to disabled individuals either over the Internet or via some other method. This requirement follows the logic of the *Rendon* court, wherein the producers of “Who Wants to Be a Millionaire” could not screen out disabled contestants by utilizing a discriminatory contestant selection process without somehow accommodating potential disabled contestants.

The plaintiffs in *Access Now*, however, did not include a nexus argument in their pleading, choosing instead to limit their argument to the contention that Southwest’s website should qualify as a “place.” Thus, they offered no evidence to support the finding of such a nexus by the district court.<sup>97</sup> The district court considered, *sua sponte*,<sup>98</sup> whether title III might apply to southwest.com by establishing “a nexus between the challenged

---

92. *Id.* at 1280.

93. *Id.* at 1280–81.

94. *Id.* at 1285.

95. *Id.* (quoting 42 U.S.C. § 12182(b)(2)(A)(i) (2000)).

96. Moberly, *supra* note 17, at 994.

97. This point was emphasized by the Eleventh Circuit when considering plaintiff’s appeal. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1328 (11th Cir. 2004) (noting that the district court concluded that no nexus existed “not because the plaintiffs had tried and failed to establish some connection between the web site and a physical location, but rather because the plaintiffs never attempted to establish any such link, instead arguing that no link to a physical location was necessary for a website to be covered by Title III”).

98. *Id.* at 1327 (noting that none of the plaintiff’s four claims at the district court level referenced any “nexus” with any other goods or services, such as travel services, provided by Southwest Airlines).

service and the premises of the public accommodation.”<sup>99</sup> The court, however, determined that no nexus existed because “southwest.com did not exist in any particular geographical location,” making it impossible for the plaintiffs to “demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space.”<sup>100</sup>

The court essentially reversed the nexus approach. Rather than considering whether Southwest’s website was a service of an existing place of public accommodation, such as a travel service, or Southwest’s physical ticket counters, the court applied the nexus approach as if the approach required that Southwest’s website be the place of public accommodation. Thus, the website’s lack of physicality precluded the finding of such a nexus.<sup>101</sup> Rather than consider whether a nexus existed between southwest.com and a qualifying public accommodation such as Southwest’s physical ticket counters, the court did little more than reiterate that the website was not a physical structure. Many commentators have criticized the court’s application of the nexus approach as a misapplication.<sup>102</sup> Subsequent courts, however, have explained the *Access Now* court’s application of the nexus approach as being a direct result of the pleadings before the court alleging only that southwest.com was itself a place of public accommodation.<sup>103</sup>

On appeal, the plaintiffs alleged new facts to attempt to establish that Southwest Airlines “as a whole is a place of public accommodation because it operates a ‘travel service,’” and that Southwest “violated Title III precisely because of the website’s *connection* with Southwest’s ‘travel service.’”<sup>104</sup> The Eleventh Circuit, however, dismissed the case because the plaintiffs were alleging new facts that the district court had not been given an opportunity to analyze in order to reach a decision on the merits with

---

99. *Id.* at 1320 (quoting *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1284 n.8 (11th Cir. 2002) (internal quotations omitted)).

100. *Id.* at 1321.

101. See Moberly, *supra* note 17, at 994.

102. See, e.g., *id.* at 995 (“The conclusion drawn by the court in *Access Now* focused on the wrong nexus connection: The connection is between the Internet website and the business of the ticket counters, not between the selling of tickets and the virtual ticket counter.”); Goldfarb, *supra* note 17, at 1331 (“The district court also erred . . . by requiring the plaintiff to demonstrate . . . that the website discriminates by *impeding access to a ‘specific, physical, concrete space.’*” (quoting *Access Now, Inc. v. Sw. Airlines Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002))).

103. See, e.g., *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (“Since there was no physical place of public accommodation alleged in *Access Now*, the court did not reach the precise issue [of] . . . whether there is a nexus between a challenged service and an actual, physical place of public accommodation.”).

104. *Access Now, Inc.*, 385 F.3d at 1328.

respect to the establishment of a nexus.<sup>105</sup> Thus, neither the district court nor the appellate court ever considered a properly pleaded argument addressing whether a nexus can exist between a website and a place of public accommodation.

D. *NATIONAL FEDERATION OF THE BLIND V. TARGET CORP.* APPLIES THE NEXUS APPROACH

Faced with similar plaintiffs and a similarly inaccessible website, the U.S. District Court for the Northern District of California, in *National Federation of the Blind v. Target Corporation*, determined that the website of a place of public accommodation must accommodate the disabled via the nexus approach.<sup>106</sup> The plaintiffs in *Target*—The National Federation of the Blind and Bruce Sexton, a blind individual—sued Target alleging that target.com violated the accessibility requirements of title III because the website was inaccessible to blind individuals due to its failure to provide alternative text labels that would permit blind individuals to use screen reading software to navigate the site.<sup>107</sup>

Target Corporation filed a motion to dismiss the plaintiffs' claims, citing *Rendon, Access Now*, and *Stoutenborough v. National Football League*<sup>108</sup> for the proposition that “the ‘off-site’ discrimination must still deny physical access to Target’s brick-and-mortar stores” under the nexus approach.<sup>109</sup> The court disagreed and noted that the nexus approach also applies to nonphysical means of accessing a place of public accommodation because the ADA applies to discrimination in the full and equal enjoyment of “the services *of* a place of public accommodation, not services *in* a place of public accommodation.”<sup>110</sup> The nexus approach is necessary because “[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.”<sup>111</sup> The court added that “[s]uch an interpretation would effectively limit the scope of title III to the provision of ramps, elevators and other aids that . . . remove physical barriers to entry,” an unacceptable result given that such an interpretation would “effectively [read] out of the ADA the broader provisions enacted by

---

105. *Id.* at 1331 (quoting *Depre v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991)).

106. *Target*, 452 F. Supp. 2d at 956.

107. *Id.* at 949–50.

108. *Stoutenborough v. Nat'l Football League*, 59 F.3d 580 (6th Cir. 1995).

109. *See Target*, 452 F. Supp. 2d at 953.

110. *Id.*

111. *Id.*

Congress.”<sup>112</sup>

Like the *Access Now* court, the *Target* court concluded that places of public accommodation must be “actual, physical places,” citing the earlier Ninth Circuit decision of the *Weyer v. Twentieth Century Fox Film Corp.* court.<sup>113</sup> Unlike the *Access Now* court, however, the *Target* court concluded that this did not preclude a website from qualifying as a service of an existing place of public accommodation under the nexus approach.<sup>114</sup> The court based this on the *Weyer* court’s conclusion that “whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods or services.”<sup>115</sup> The *Target* court explicitly dismissed *Access Now* as inapplicable due to the manner in which the plaintiffs stated their claim, saying that “[because] there was no physical place of public accommodation alleged in *Access Now*, the court did not reach the precise issue presently in dispute: whether there is a nexus between a challenged service and an actual, physical place of public accommodation.”<sup>116</sup> Thus, the court concluded that the nexus approach *does* apply to websites, stating that “to the extent that plaintiffs allege that the inaccessibility of target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim, and the motion to dismiss is denied.”<sup>117</sup>

The *Target* court’s articulation of the nexus approach is a positive step for disabled individuals, but does not fully reflect the modern face of commerce. The nexus approach, as stated by the *Target* court, applies the ADA’s protection to a website that can be linked to a qualifying physical structure offering goods and services to the public. It does not apply, however, to businesses that offer the exact same goods and services to the public solely through the operation of a website, regardless of the website’s impact on commerce. So, whereas Target might be required to make reasonable accommodations on its website, a business operating a website that offers similar goods such as amazon.com or buy.com would not need to make *any* accommodations because they have no facility deemed a place

---

112. *Id.* at 955.

113. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). “Although the Ninth Circuit has determined that a place of public accommodation is a physical space, the court finds unconvincing defendant’s attempt to bootstrap the definition of accessibility to this determination.” *Target*, 425 F. Supp. 2d at 955.

114. *Target*, 452 F. Supp. 2d at 956.

115. *Weyer*, 198 F.3d at 1115.

116. *Target*, 452 F. Supp. 2d at 954.

117. *Id.* at 956.

of public accommodation.<sup>118</sup> Similarly, even if the approach taken by the *Target* court had been applied by the *Access Now* court, and southwest.com had been required to provide reasonable accommodations as a travel service, Internet-only travel services such as travelocity.com or expedia.com still would not need to make *any* accommodations. Thus, the nexus approach distinguishes between businesses offering similar goods and services to the public based solely upon the means by which they serve the public.

#### V. A NEW MODEL: THE PUBLIC-ACCOMMODATING COMMERCIAL ENTITY (“PACE”) APPROACH

Whether the ADA applies to purely Internet businesses depends upon the function of the twelve enumerated categories considered public accommodations under title III. If the listed entities represent the *venues* at which discrimination is impermissible, then title III can apply only to exclusively Internet-based businesses if the Internet is deemed a place. If, however, the listed entities represent the types of commercial services Congress intended to be available to the public free from discrimination, the inquiry shifts from whether a website is a place to whether a business that provides such services to the public solely via a website still qualifies as a place of public accommodation. Parts V.A and V.B, *infra*, argue that the purpose behind the ADA and the language used in title III indicate that the enumerated categories should represent the types of commercial services—not merely the venues—that Congress intended to be free from discrimination. Even assuming, however, that viewing the categories in this manner is appropriate, such a view still does not circumvent title III’s applicability only to a *place* of public accommodation.

An Internet business *should* qualify as a place of public accommodation, but not because the Internet is a place, as defined by the Act. The *Access Now* and *Target* courts were correct that a place of public accommodation must be a concrete, physical structure. A business that operates a website, however, does so from a concrete, physical structure that fits the definition of place of public accommodation provided by the federal regulations, and the website of such a business is part of the operations of that place.

The federal regulations implementing title III define a place of public accommodation as “a facility, operated by a private entity, whose

---

118. Amazon already accommodates people with disabilities by providing a text-only site (amazon.com/access) designed to work with screen reading software. Tedeschi, *supra* note 44.

operations affect commerce and fall within at least one of the [twelve enumerated] categories.”<sup>119</sup> Those regulations also define “[f]acility” as “all or any portion of buildings, structures, sites, complexes, equipment . . . .”<sup>120</sup> These definitions clearly require that a place of public accommodation be a physical facility, but they require only that the operations of the facility affect commerce and fall within one of the twelve categories. As the *Target* and *Carparts* courts noted, title III does not require that the public must physically enter any such “place” to be protected against discrimination.<sup>121</sup>

Under these definitions, a business operating a website is a place of public accommodation and the website is part of the operations of that place. The website certainly is not a physical facility, but behind every website engaged in commerce there is a physical place of business. That business operates from a physical structure—a facility as required by the Act—inside which employees generate the website’s content, bill and service customers, store and ship goods or offer services, and perform the administrative tasks required to keep the business and its website operating. Those activities, although solely related to the content and function of the website and to serving Internet customers, are part of the operations of the facility. Such a business offers goods and services to the public through the operations of its website. The fundamental difference between a bookstore in a mall and a bookstore on the Internet is that the public physically enters the former, but not the latter. For either bookstore, as the *Target* court, quoting the Ninth Circuit Court of Appeals, explained: “whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services.”<sup>122</sup>

As long as a facility running an Internet business: (1) is “operated by a private entity;” (2) has operations, including the operation of a website, that affect commerce; and (3) provides goods and services to the public that fit one of the twelve categories of public accommodation, that business fits the

---

119. 28 C.F.R. § 36.104 (2007).

120. *Id.*

121. *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (“Congress clearly contemplated that ‘service establishments’ include providers of services which do not require a person to physically enter an actual physical structure.”). *See Target*, 452 F. Supp. 2d at 955 (The meaning of the ADA’s prohibition against discrimination in the enjoyment of goods, services, facilities or privileges is that “whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services”) (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (internal quotations omitted)).

122. *Target*, 452 F. Supp. 2d at 955 (quoting *Weyer*, 198 F.3d at 1115) (internal quotations omitted).

---

---

definition of a place of public accommodation provided in the federal regulations. Under such an interpretation, it is irrelevant whether the facility literally opens its doors to the public, or whether it serves the public by phone, facsimile or website. That the facility serves the public via a website does not change the fact that it is “a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve enumerated] categories.”

This approach, which for the purposes of this Note will be referred to as the Public-Accommodating Commercial Entity (“PACE”) approach, was implicitly adopted by the First Circuit in *Carparts* when it noted that a disabled person need not physically enter a structure to be protected against discrimination when purchasing goods or services over the telephone or by mail:

Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and 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.<sup>123</sup>

The Internet, like telephone or mail, is a means by which businesses communicate with and offer goods and services to customers without those customers physically entering any premises.

Considering a business operating a website in this manner renders obsolete theoretical arguments of whether the Internet itself is a place. This approach instead shifts the focus of the debate regarding the public accommodation provision away from what *venues* should accommodate the disabled to the *types of commercial services* Congress intended to be made available free from discrimination. An entity providing the types of commercial services Congress included within the twelve categories should qualify as a place of public accommodation even if it serves the public solely via a website. The PACE approach is consistent with the language of the ADA, the purpose behind the ADA’s enactment, and the nature of the Internet, yet it allows the ADA to adapt to a changing world without

---

123. *Carparts*, 37 F.3d at 20.

disturbing the plain meaning of the word “place.”

A. THE PACE APPROACH IS CONSISTENT WITH THE LEGISLATIVE HISTORY BEHIND THE ADA’S ENACTMENT

The legislative history behind the ADA’s enactment supports the view that Congress did not intend to limit title III’s reach to only those entities that are physically accessible for the purchase of goods and services. Congress intended title III of the ADA to “bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner.”<sup>124</sup> In drafting title III, “Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities.”<sup>125</sup> Congress explicitly stated its intent that the ADA, and title III specifically, have broad applicability. Limiting title III to entities the public must physically enter to purchase goods and services frustrates Congressional intent. Applying title III under the nexus approach to the websites of some businesses, but not to those of other businesses offering similar goods and services to the public, equally frustrates Congressional intent.

In enacting the ADA, members of both houses of Congress explicitly stated their intention that the list of public accommodations included in the ADA be construed broadly. The House Report expressly states that the focus of title III should be on whether an entity facing a charge of discrimination serves the public, not on how similar the entity is to an accommodation included on the enumerated list.

A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category. *For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient that the jewelry store sells items to the public.*<sup>126</sup>

The Senate Report states that the “other similar” language at the end of some of the twelve enumerated categories should be construed liberally:

[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase “other similar”

124. H.R. REP. NO. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382.

125. *Carparts*, 37 F.3d at 19 (citing S. REP. NO. 116, at 58 (1989)).

126. H.R. REP. NO. 101-485, pt. 3, at 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 477 (emphasis added).

entities. The Committee intends that *the “other similar” terminology should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.*<sup>127</sup>

Based upon the stated purpose of the ADA, and Congress’s stated intention that the Act be construed liberally to ensure applicability to all entities serving the public, it seems unlikely that Congress would have intended the ADA not to apply to a business serving the public via a website. This is especially true in light of the key role websites play in the economy and their provision of the types of goods and services Congress intended to be free from discrimination.

The Internet has become such an integral part of commerce in the United States that the ADA cannot fulfill its purpose if it is inapplicable to businesses operating websites engaged in commerce. Internet commerce and use has risen dramatically in recent years. From 2000—when Congress held hearings to consider the ADA’s applicability to websites—through October 2007, U.S. Internet use has more than doubled, increasing from approximately 95 million users to over 210 million users.<sup>128</sup> Almost seventy percent of the U.S. population is now using the Internet regularly.<sup>129</sup> In 1999, the year before the congressional hearings, online retail spending was only \$12.3 billion, or 16.3 percent of total retail spending.<sup>130</sup> By 2005, online retail spending rose to almost \$81 billion, representing 39.7 percent of total retail spending.<sup>131</sup> These numbers provide clear evidence that the Internet has become an integral part of both commerce and day-to-day life in the United States. Despite the exponential growth of Internet commerce and use in the United States since 2000, disabled individuals continue to face discrimination on the Internet. If the ADA is to fulfill its mission, the ADA must be applicable to websites.

Entities specifically included in the enumerated list of public accommodations are transitioning from serving the public via physical access to doing so via Internet access. This transition highlights the need to

---

127. S. REP. NO. 101-16, at 59 (1989) (emphasis added).

128. The total number of Internet users in the United States, as of October 3, 2007 was 210,575,287, and “Use Growth” for the period 2000-2007, has increased 115.2%. INTERNET WORLD STATS, *supra* note 14.

129. *Id.*

130. U.S. DEP’T OF COMMERCE, ECON. AND STATISTICS ADMIN., U.S. CENSUS BUREAU, TABLE 1024: ONLINE RETAIL SPENDING, 1998 TO 2005, AND PROJECTIONS, 2006 (2006), <http://www.census.gov/compendia/statab/tables/07s1024.xls> (last visited Nov. 10, 2007).

131. *Id.*

interpret the ADA broadly to ensure that the types of commercial services Congress intended to be available to the public free from discrimination remain so. For example, Internet-based travel services, in particular, have thrived in recent years. Internet travel sales in the United States were approximately \$72 billion in 2005, and were estimated to rise to \$85 billion in 2006. By 2011, online travel sales are expected to reach \$128 billion in the United States,<sup>132</sup> or 38 percent of industry revenues.<sup>133</sup> Given this rapid growth, it seems wholly inconsistent with the ADA to prevent a travel service in a shopping center from discriminating against people with disabilities, while allowing a travel service making the same services available via the Internet to do so. As the *Carparts* court stated: “Congress could not have intended such an absurd result.”<sup>134</sup>

Another category of public accommodation that has seen dramatic Internet growth in recent years is “undergraduate,” and “postgraduate private school[s].”<sup>135</sup> Recent reports indicate that while higher education enrollment in the United States has been “virtually stagnant, online enrollment is skyrocketing.”<sup>136</sup> Some experts estimate that the proportion of students taking all of their classes online could rise over the next ten years from the current 7 percent to 25 percent.<sup>137</sup> The rise of Internet-based educational institutions proves that a “school” no longer needs to be physically accessible to the public in order to provide education to the public. Applying title III to businesses that serve the public regardless of the manner in which they do so avoids the odd result of applying title III inconsistently to schools and businesses offering the same curriculum, goods, and services to the public based solely on the means by which they do so.

The proposed approach requires that courts adapt established legal principles to new technology in order to maintain the comprehensive protection the ADA intended to bestow upon disabled individuals. Such adaptation is hardly groundbreaking. The adaptation of the Fourth

---

132. Nicole Ridgway, *Have PC, Will Travel*, SMARTMONEY.COM, Dec. 1, 2006, <http://www.smartmoney.com/Techsmart/index.cfm?story=20061201> (last visited Nov. 10, 2007).

133. Kristina Knight, *Travel Spending Going Online*, BIZREPORT.COM, Nov. 15, 2006, [http://www.bizreport.com/2006/11/travel\\_spending\\_going\\_online.html](http://www.bizreport.com/2006/11/travel_spending_going_online.html) (last visited Nov. 10, 2007).

134. See *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

135. 42 U.S.C. § 12181(7)(J) (2000).

136. Daniel Golden, *Online University Enrollment Soars as Quality Improves; Tuition Funds Other Projects*, WALL ST. J., May 9, 2006, at B1.

137. Sam Dillon, *Online Colleges Receive a Boost From Congress*, N.Y. TIMES, Mar. 1, 2006, <http://www.nytimes.com/2006/03/01/national/01educ.html?ei=5070&en=b1437e52bc6759c2&ex=1189> (last visited Nov. 10, 2007).

Amendment to telephone technology serves as a template for adapting the ADA to new technology.<sup>138</sup> The Supreme Court originally took a restrictive approach to applying the Fourth Amendment's protection against illegal searches to technology.<sup>139</sup> In *Olmstead v. United States*, the Court refused to hold that wiretapping of telephone lines violated the Fourth Amendment:

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized. . . . The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office.<sup>140</sup>

The Court changed its stance thirty-nine years later, recognizing that the Fourth Amendment should apply to searches of electronic media because the purpose of the Amendment is to protect *people*, not *areas*, against illegal searches:<sup>141</sup>

To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. . . . [O]nce it is recognized that the Fourth Amendment protects *people*—and not simply "*areas*"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.<sup>142</sup>

In this regard, the ADA is analogous to the Fourth Amendment in that the ADA was intended to protect *people* with disabilities against discrimination, not merely intended to protect against discrimination in specific *areas*. The federal regulations implementing title III clearly state that "[i]t is the public accommodation, and not the place of public accommodation, that is subject to the regulation's nondiscrimination requirements."<sup>143</sup> To limit the ADA's applicability to tangible places completely ignores the broad mandate behind the ADA's enactment.

---

138. See Brief for United States as Amicus Curiae Supporting Appellant at \*17–18, *Hooks v. Okbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99–5089), available at <http://www.usdoj.gov/crt/briefs/hooks.pdf> [hereinafter Amicus Brief].

139. *Id.*

140. *Olmstead v. United States*, 277 U.S. 438, 464–65 (1928) (emphasis in original).

141. See Amicus Brief, *supra* note 138.

142. *Katz v. United States*, 389 U.S. 347, 352–53 (1967) (emphasis added).

143. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,551 (July 26, 1991) (codified at 28 C.F.R. pt. 36 (2007)).

Congress held hearings in 2000<sup>144</sup> to address the issue of applying title III to the Internet, but has not taken any action in response to those hearings. The absence of Congressional action does not counsel against applying the ADA to businesses operating websites. It is certainly possible that Congress did not intend the ADA to apply to websites. Based upon the posture and content of the hearings, however, it seems more likely that Congress believed that the ADA already applied to websites; thus, there was no need for Congressional action.

At the time of the hearings there had not been any court decisions on whether the ADA applied to the Internet, but the prevailing sentiment was that the ADA would, in fact, apply to websites. As mentioned in Part III above, the hearings were held “to consider the impact of the ADA on the Internet,” not *whether* the ADA applied to the Internet.<sup>145</sup> Furthermore, Chairman Canady stressed in his Opening Statement that the Department of Justice’s position was that the ADA already applied to Internet websites.<sup>146</sup>

The context of these hearings indicates that lawmakers believed the ADA would apply to private websites. Chairman Canady expressed his belief that “the hook [that makes title III applicable to websites] here is [the inclusion of] ‘sales establishment’” in the enumerated list of places of public accommodation.<sup>147</sup> Representative Melvin Watt expressed his view that the exclusion of websites from the enumerated categories does not preclude ADA applicability because “[t]hose are just examples.”<sup>148</sup> Representative Robert C. Scott also indicated that when similar legislation was considered in Virginia, “80 percent of the accommodations needed would cost the business less than \$500,” thus “a lot of things that need to be done can be done for a very small amount of money and those that cost a lot would be unreasonable and, therefore, not required under the ADA.”<sup>149</sup> Scott’s statements imply that the *reasonable* accommodations for websites engaged in commerce *are* required by the ADA.

The questions asked of Elizabet Dorminey of Wimberly, Lawson, Steckel, Nelson & Schneider, a panelist who took the position that the ADA should not apply to the Internet, provide further insight into lawmakers’ beliefs. Part of Dorminey’s prepared statement to the Committee suggested that applying the ADA to private websites might

---

144. Hearings, *supra* note 21.

145. *Id.* at 9.

146. *Id.* at 8.

147. *Id.* at 141 (referring to 42 U.S.C. § 12181(7)(E) (1994)).

148. *Id.* at 138.

149. *Id.* at 153.

violate the First Amendment by regulating website content.<sup>150</sup> Watt challenged Dorminey on this point, asking, “How do you perceive that [applying the ADA to websites] is content based?”<sup>151</sup> Watt then interrupted Dorminey’s answer to state that “nobody here . . . has testified about limiting [content]. Maybe I am missing something here.”<sup>152</sup> Dorminey also took the position that the Internet should not be considered a public accommodation.<sup>153</sup> When Dorminey tried to explain that many websites are not commercial in nature, Watt interrupted to ask if Dorminey would “concede that the ADA applies to the commercial [websites].”<sup>154</sup>

The only pending case mentioned during the hearings was *National Federation of the Blind v. America Online, Inc.*, a lawsuit in which the Federation sued America Online for disability inaccessibility issues.<sup>155</sup> Shortly after the hearings, the Federation dismissed the suit because America Online agreed to modify its software to become compatible with assistive technology.<sup>156</sup> While far from conclusive, if Congress monitored the case and believed that the ADA would apply to the Internet, the settlement would not have signaled a need to amend the ADA to ensure applicability to the Internet. Conversely, if Congress believed the ADA would not apply to the Internet, the settlement would have made it more likely that Congress would amend the ADA.

#### B. THE PACE APPROACH IS CONSISTENT WITH THE LANGUAGE OF THE ADA

Because the Internet as we know it did not exist when Congress enacted the ADA in 1990, the text of the ADA is silent with respect to applicability to the Internet. The language used within the enumerated categories of public accommodation and the stated purpose of the Act, however, reflect Congress’s intent for title III to apply to *any* entities that offer goods and services to the public. Congress did not express any intent to limit the applicability of title III to businesses that do so only by physically opening their doors to the public.

---

150. *See id.* (Prepared Statement of Elizabeth K. Dorminey, at 98 [hereinafter Dorminey Statement]).

151. *Id.* at 133.

152. *Id.* at 134.

153. *See id.*

154. *Id.* at 139.

155. *Nat’l Fed’n of the Blind v. Am. Online, Inc.*, No. 1:99-cv-12303-EFH (D. Mass. filed Nov. 4, 1999) (voluntarily dismissed by National Federation of the Blind on July 26, 2000.)

156. Lindsay, *supra* note 49.

The language in title III introducing the twelve categories states that “[t]he following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce.”<sup>157</sup> Title III does not state, nor should it be interpreted to require, that title III applies only if commerce is affected by the public physically entering an entity included on the list. Had Congress intended such a requirement, it could have explicitly stated so. Instead, courts have applied canons of word association to infer such a requirement, but the presence within the categories of entities that do not require physical entry belies such interpretations.

Despite the conclusion of the *Access Now* and *Target* courts that a place of public accommodation must be a “concrete, physical space,”<sup>158</sup> there is nothing in the text of the Act indicating that the public must physically enter such a facility to purchase its goods and services.<sup>159</sup> Furthermore, the twelve categories include entities that do business with the public by telephone or mail, indicating that physical access was not required.

The *Access Now* court reached its conclusion by applying the rule of *ejusdem generis*<sup>160</sup> within the framework of the federal regulations defining “place of public accommodation.”<sup>161</sup> The court, however, applied *ejusdem generis* only to the portions of the three categories of public accommodation cited by the plaintiffs, and not to the entire list of public accommodations.<sup>162</sup> The court determined that all of the entities listed in *those three sections* were physical structures, thus the general words in each of the three sections should similarly be limited to physical structures.<sup>163</sup> While this was appropriate given the unique manner in which the plaintiffs framed their argument, applying the rule of *ejusdem generis* to title III as a whole yields an entirely different result.

Similarly, the *Target* court restated the conclusion of the *Weyer* court “that places of public accommodation are ‘actual, physical places.’”<sup>164</sup> The

---

157. 42 U.S.C. § 12181(7) (2000).

158. *See id.*

159. *See Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (“Further, it is clear that the purpose of the statute is broader than mere physical access—seeking to bar actions or omissions which impair a disabled person’s ‘full enjoyment’ of services or goods of a covered accommodation.” (citing 42 U.S.C. § 12182(a))).

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

161. *Id.* at 1317–18.

162. *Id.* at 1318–19.

163. *Id.*

164. *Target*, 452 F. Supp. 2d at 952 (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198

*Weyer* court applied the rule of *noscitur a sociis*,<sup>165</sup> which holds that “a thing shall be known by its associates.”<sup>166</sup> The court concluded, “[a]ll the items on this list . . . are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services.”<sup>167</sup> A closer look at all the enumerated entities reveals that, while all of the listed entities are physical places, the public does not have to physically enter all of them to purchase goods and services.

As the *Carparts* court noted, “travel service” is included in one of the twelve categories of public accommodation, and a “travel service” does not require that customers physically enter a structure to purchase the goods and services it offers to the public.<sup>168</sup> When the ADA was enacted in 1990, it was not uncommon for a travel service to do business exclusively by telephone or mail. If Congress intended to exempt such a travel service from ADA applicability, it could easily have done so. But lawmakers did not.

Furthermore, the public accommodation categories include “office of an accountant or lawyer . . . insurance office, professional office of a health care provider . . .”<sup>169</sup> Such entities, while based out of a physical office, frequently do business with the public strictly by telephone or mail. This indicates that Congress intended to include all entities that offer goods and services to the public. While a website may not have a location on a topographical map, its virtual storefront is powered by a business with a physical location. In this sense, an Internet business is not significantly different from a business serving the public by phone, mail, or facsimile. While neither actually opens their doors to the public, both are accessed by the public through nonphysical means.

Other courts have interpreted the language of title III to include businesses serving the public by phone or mail. In *Baker v. Hartford Life Insurance Co.*,<sup>170</sup> for example, the plaintiff’s disabled son was denied health insurance due to his history of seizure disorder.<sup>171</sup> The plaintiff’s

---

F.3d. 1104, 1114 (9th Cir. 2000)).

165. *Weyer*, 198 F.3d at 1114.

166. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 261 (2d ed. 2006).

167. *Weyer*, 198 F.3d at 1114 (emphasis added).

168. *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (citing 42 U.S.C. § 12181(7)(F) (1994)).

169. 42 U.S.C. § 12181(7)(F).

170. *Baker v. Hartford Life Ins. Co.*, No. 94C4416, 1995 U.S. Dist. LEXIS 14103 (N.D. Ill. Sept. 28, 1995).

171. *Id.* at \*2–\*3.

only correspondence with the insurance company was by mail, facsimile and telephone.<sup>172</sup> The court held that even though the ADA's "use of the word 'place' does imply a physical location," the ADA nonetheless "does not require a plaintiff to be physically present at the place of public accommodation to be entitled to non-discriminatory treatment."<sup>173</sup> Thus, while the existence of a physical place may be required, the public need not enter it to purchase public goods and services in order to be protected.

Although the *Baker* court clearly recognized that a telephonic communication system is not itself a public accommodation, it also recognized that an entity doing business via telephone communications falls within one or more of the twelve categories of public accommodation, and thus, the ADA still applies to that entity.<sup>174</sup> Similarly, if an entity doing business with the public via the Internet falls within one of those categories, it should also be subject to the ADA even though the Internet, like the telephone, is not a public accommodation. Like telephone, mail, and facsimile, the Internet can be part of the operations of a place of public accommodation, and a means by which that place offers its goods and services to the public.

Interpreting the language used to describe the categories of public accommodation as including internet commerce is entirely consistent with the stated purpose of the ADA. Part of this purpose is to provide a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "address the major areas of discrimination faced day-to-day by people with disabilities."<sup>175</sup> Congress clearly established that the ADA's goal was to eliminate discrimination against the disabled. In 1990, when the ADA was enacted, travel services, accountants, lawyers, health care providers and many other establishments were already serving the public from physical facilities by telephone, mail, and facsimile without the public entering their facilities to purchase goods and services. It seems absurd to interpret the public accommodation provision of the Act with such an ambitious stated purpose to apply only to entities that serve the public via physical access, given that Congress

---

172. *Id.* at \*2-\*4. Baker telephoned the insurance provider to learn that his son's insurance application had been denied but that he could appeal that denial. Baker also received letters notifying him of this information. *Id.* The plaintiff sent a second letter to appeal the decision, but the defendant never replied. *Id.* The plaintiff later phoned the defendant twice: one time he was told that his son's file was still under review pending receipt of a physician's statement, and the second time he was told that the physician's statement had been received and his son had been denied coverage. *Id.*

173. *Id.* at \*9.

174. *Id.*

175. 42 U.S.C. § 12101(b)(1), (4) (2000).

neither expressly committed any such requirement to paper, nor stated a desire to restrict the ADA in such a manner.

Congress intended the ADA to apply broadly to discrimination against the disabled. The Internet as we know it did not exist in 1990, but the language of title III, and many court interpretations of that language, support the idea that title III was meant to apply to businesses that serve the public by means other than a physically accessed facility. Title III provides a broad range of covered entities within the twelve categories, including entities that serve the public by telephone, mail, and facsimile. Congress also inserted the “or other similar” language at the end of each category to reach businesses that provide goods and services beyond the confines of those specifically enumerated. It seems reasonable to conclude that Congress intended to ensure that all businesses that offer their goods and services to the public do so without discriminating against the disabled, regardless of whether the public physically enters their premises to purchase those goods and services.

C. THE PACE APPROACH ALIGNS WITH THE POSITIONS OF THE CIRCUIT COURTS THAT HAVE SPOKEN ON THE ISSUE OF ADA APPLICABILITY TO INTERNET SITES

While the nexus approach does not fully resolve the differing positions of the First, Third, Sixth, Seventh, Ninth, and Eleventh Circuits, the proposed PACE approach does. The Third, Sixth, Ninth Circuits, and the *Access Now* court in the Eleventh Circuit have all concluded that only a concrete, physical space can qualify as a place of public accommodation.<sup>176</sup> In *Carparts*, the First Circuit concluded that physical entry into the concrete, physical space is not required.<sup>177</sup> In *Mutual of Omaha* the Seventh Circuit stated that a facility or website that is open to the public cannot exclude the disabled from entering or using the facility in the same way the nondisabled do.<sup>178</sup>

The proposed approach concludes that a business operating a website can qualify as a place of public accommodation because it serves the public from a facility. Whenever the operations of such a facility, including the operation of the website, affect commerce and fit within one of the twelve enumerated categories, it is subject to title III. This approach agrees with those circuits that require a place of public accommodation to be a

---

176. See discussion *supra* Part IV.B.

177. See discussion *supra* Part IV.A.

178. See *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

concrete, physical space, and simultaneously aligns with the position of the First Circuit that the public need not enter that physical space for it to be subject to title III. The nexus approach also follows this logic, but applies title III only to those websites associated with physical spaces that the public actually enters.

The proposed approach extends title III applicability to any website that serves the public, is operated by a private entity, affects commerce, and fits into one of the enumerated categories. In doing so, the proposed approach incorporates the position of the Seventh Circuit that any entity that fits the definition of a public accommodation should be required to accommodate the disabled, regardless of the manner by which the public purchases goods and services from the entity. Whether such an entity offers goods and services to the public by physical access, telephone, mail, facsimile, or website, it should be required to accommodate disabled individuals.

#### D. THE PACE APPROACH RECONGNIZES THAT NOT ALL WEBSITES ARE ENGAGED IN COMMERCE

Internet sites are hardly generic in their function. Websites run the gamut from sites that are almost purely commercial, such as southwest.com, target.com, and amazon.com, to sites that are almost purely communicative, such as wikipedia.com or google.com, to sites that are a blend of commercial and communicative content. The PACE approach recognizes this distinction, in that it builds on the ADA's existing definition of place of public accommodation and applies only to businesses operating websites that affect commerce. This is particularly appropriate, given that the ADA was enacted under Congress's commerce powers.

To advocate that the ADA should apply to the Internet as a whole requires one to ignore the commercial versus communicative website distinction and to contort the concept of "affecting commerce." Conversely, excluding all websites from ADA applicability requires one to ignore the fact that some websites accommodate the public and affect commerce.

The middle ground taken by the PACE approach strikes a balance between accessibility and preserving the nature of the website in a manner wholly consistent with the Act. As the federal regulations enacting the ADA indicate:

The purpose of the ADA's public accommodations requirements are to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has

typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books.<sup>179</sup>

Following this logic, an Internet-based bookstore like amazon.com would be required under this approach to make its website accessible to individuals with disabilities, but would not be required to stock books in Braille. A purely communicative website that existed solely to review books, however, would not need to make any changes because it does not sell any goods or services or otherwise engage in commerce. A website whose function is purely communicative or informative should not have to accommodate the public under legislation enacted under Congress's Commerce Clause power.

Some critics might argue that requiring websites to make accommodations will have a devastating effect on Internet commerce and the continuing development of the Internet, but it is important to bear in mind that title III requires only reasonable accommodations. An accommodation which fundamentally alters the nature of a website would not be required. Title III offers four definitions of "discrimination."<sup>180</sup> Three of these definitions<sup>181</sup>—"a failure to make reasonable modifications in policies, practices, or procedures;"<sup>182</sup> a failure to provide auxiliary aids and services;<sup>183</sup> and "a failure to remove architectural barriers, and communication barriers that are structural in nature"<sup>184</sup>—might arguably apply to an Internet business's failure to provide accommodations for people with disabilities. Under each of these three definitions, however, an

---

179. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,571 (July 26, 1991) (codified at 28 C.F.R. pt. 36 (2007)).

180. See 42 U.S.C. § 12182(b)(2)(A)(i)–(iv).

181. The first definition, 42 U.S.C. § 12182(b)(2)(A)(i), defines discrimination as "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." This definition most likely would not apply to a business operating a website, as most commercial websites do not impose eligibility requirements upon individuals navigating such website.

182. *Id.* § 12182(b)(2)(A)(ii) (defining discrimination as "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities").

183. *Id.* § 12182(b)(2)(A)(iii) (defining discrimination as "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").

184. *Id.* § 12182(2)(A)(iv) (defining discrimination as "a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities").

entity need not provide accommodations that would fundamentally alter the nature of its website or be unreasonably burdensome.<sup>185</sup>

Additionally, under the auxiliary aids requirement, a website would be exempted from providing an accommodation on its website if it reasonably accommodated the public through the telephone or an alternative format.<sup>186</sup> As the *Target* court explained, “a restaurant must ensure that an employee is available to explain a menu to a blind customer, and a museum offering audio tours must provide alternative formats of the tour that a deaf patron could use.”<sup>187</sup> These requirements, however, are “flexible,”<sup>188</sup> such that a public accommodation can choose an appropriate format and method of communication.<sup>189</sup> For example, if a menu cannot be read by a blind person, the restaurant can choose to have waiters available to read the menu to customers rather than provide a menu in Braille.<sup>190</sup> Therefore, if a business operating a commercial website would prefer to serve disabled customers by telephone instead of making its website accessible to the blind, it will be able to do so, provided that doing so is reasonable and communication by telephone is an effective substitute for an accommodating website.

It will not always be clear at what point a requested accommodation becomes a fundamental alteration of the nature of the good or service provided via the Internet, or results in an undue burden for the business. Similarly, it will not always be clear at what point a requested accommodation might be accomplished through a communication medium other than the Internet. Such issues, however, deal with the enforcement of title III and have no bearing on a determination of whether title III should

---

185. Title 42, section 12182(b)(2)(A)(ii) offers an exception if an entity “can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations,” but also requires only “reasonable” modifications. Title 42 section 12182(b)(2)(A)(iii) offers an exception if “the entity can demonstrate that [making a particular accommodation] would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” Title 42 section 12182(b)(2)(A)(v) provides an exception if an entity “can demonstrate that the removal of a barrier under clause (iv) is not readily achievable.” The factors used to determine whether an accommodation is readily achievable include the nature and cost of the accommodation, the financial impact of the accommodation on the entity and its facilities, and the nature of the entity’s operations. *Id.* § 12181(9)(A)–(C).

186. *Id.* § 12182(b)(2)(A)(iii).

187. *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006) (citing 56 Fed. Reg. 35,566 (July 26, 1991) (codified at 28 C.F.R. § 36.303 (2007))).

188. *Id.* at 956 (citing 56 Fed. Reg. 35,566 (July 26, 1991) (codified at 28 C.F.R. § 36.303 (2007))).

189. *Id.*

190. *Id.*

apply to businesses operating websites. As with existing ADA jurisprudence, the determination of reasonableness involves a “fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.”<sup>191</sup>

Alternative text labels are not only easy to implement and cost-effective, but also benefit a website by increasing the likelihood that the website will show up on Internet search engine results.<sup>192</sup> Thus, it seems unlikely that such a requirement would fundamentally alter the goods and services of a website or result in an undue burden. A court applying the proposed approach, however, would still be free not to require that a website use alternative text labels if such a change would unduly burden the business, or the business’s existing toll-free customer service department provides an acceptable substitute for text descriptions.

## VI. CONCLUSION

The nexus approach reaches only the websites of entities that are already considered places of public accommodation, but the discrimination faced by people with disabilities on the Internet extends well beyond those websites. The proposed approach overcomes the inability of the nexus approach to fully address the discrimination faced by the disabled in accessing the Internet. The purpose and legislative history behind the ADA clearly indicate that websites engaged in commerce should not be able to discriminate against the disabled.

When the ADA was enacted in 1990, the notion of a business being able to accommodate the public via an interconnected network of computers was inconceivable to all but a few. Similarly, as technology progresses, other methods might arise to allow businesses to serve the public. The PACE approach provides the ADA with the flexibility to adapt to new situations as technology changes the landscape of public accommodation.

This approach correctly shifts the focus of the debate regarding the “public accommodation” provision from what *venues* should be made accessible to disabled persons, to what *commercial services* should be made accessible to disabled persons, regardless of the means by which they are made available to the public. Furthermore, this shift in focus is entirely

---

191. Schloss, *supra* note 17, at 54 (citing *Staron v. McDonald’s Corp.*, 51 F.3d 353, 357 (2d Cir. 1995)).

192. See *supra* text accompanying notes 43–44.

consistent with the language of the ADA, and the purpose behind the ADA's enactment. More importantly, it interprets the ADA in a manner that gives the Act the flexibility to adapt to future technology, ensuring that the ADA can continue to protect against the discrimination faced by disabled individuals in their daily lives and ensure equal access for the disabled everywhere.

