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I. Introduction

In September 2006, disabled individuals in the United States achieved a small victory towards equal access when the United States District Court for the Northern District of California held that Title III of the Americans with Disabilities Act (ADA)[1] applies to websites that have a nexus with a physical place of public accommodation.[2] The victory, however, was bittersweet. The ruling only gives disabled individuals a valid claim for accessibility against websites with a nexus to a physical place, but the ruling does not give a similar claim against online-only websites, such as Amazon.com.[3] In light of the massive expansion of websites, virtual worlds, and businesses that operate solely over the internet, the digital divide between the disabled and nondisabled will only increase if courts do not recognize that cyberspace is a "place" under Title III of the ADA.

Title III of the ADA only applies to a "place" of public accommodation.[4] Congress enacted Title III to enhance the equality of treatment and the availability of products and services for persons with disabilities.[5] Nevertheless, legal academics and advocates for the disabled so far have failed to convince the courts that the Act should apply to the online world that has no

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1. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (prohibiting employment discrimination based on an individual's disability).

2. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (concluding 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").

3. *See id.* (determining that plaintiffs do not have a valid claim if there is no nexus between Target.com and enjoyment of goods and services offered in Target stores).

4. *See* 42 U.S.C. § 12182(a) (2000) ("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.") (emphasis added).

5. *See id.* § 12101(b) (stating that the purpose of the Act was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

connection to the physical world.[6] Requiring websites to be accessible only when the website has a nexus to a physical place will encourage businesses to move everything online or to separate completely the online portion of their business to avoid compliance with Title III. Instead of promoting equal participation of disabled individuals in society, application of the nexus approach will deny the disabled access to the wealth of opportunity and services of the online world.

On the other hand, a modern understanding of the concept of "place" to include the internet would comport with common sense and the underlying purpose of Title III. A place is a space to which one goes or which one occupies.[7] Before the invention and use of the internet and virtual worlds, a place could be thought of only as a physical area.[8] The increase in internet usage and the growth of virtual worlds have changed the traditional perception of a place. Now, a person can enjoy many of the same activities online that he would in a physical place, like shopping, chatting with friends, earning a

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6. *See Target*, 452 F. Supp. 2d at 956 ("To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA."); Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (holding that inaccessibility of virtual ticket counters through Southwest.com did not state a valid claim under the ADA).

7. Dictionary.com, http://dictionary.reference.com/browse/place (last visited January 8, 2008) (on file with the Washington and Lee Law Review). The definitions of place relevant to this Note include:

> 1. a particular portion of space, whether of definite or indefinite extent.
>
> 2. space in general: [*T*]*ime and place.*
>
> 3. the specific portion of space normally occupied by anything . . . .
>
> 4. a space, area, or spot, set apart or used for a particular purpose: *[A] place of worship; a place of entertainment.*
>
> . . . .
>
> 14. a region or area: [*T*]*o travel to distant places.*
>
> 15. an open space, or square, as in a city or town.
>
> . . . .
>
> 17. a portion of space used for habitation, as a city, town, or village: *Trains rarely stop in that place anymore.*
>
> 18. a building, location, etc., set aside for a specific purpose . . . .
>
> 19. a part of a building: *The kitchen is the sunniest place in the house.*

Id.

8. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 946 (11th ed. 2006) (defining a place in physical terms). The different definitions of "place" illustrate the changing perception of what is a place. *See* Dictionary.com, *supra* note 7 (extending the definition of a place to include a portion of space, not limited to a definite structure).

college degree, reading the news, and even watching television shows.[9] The internet is designed to be used as a place, is used as a place, and individuals think of the internet as a place. Thus, courts must take action to recognize that websites that do not have a nexus with a physical place can be interpreted as "places" of public accommodation under Title III.

Concerns in the legal community about the feasibility of requiring websites to be accessible, and the power of the courts to interpret "place" in this manner are unjustified. Congress already requires that all federal government websites be accessible to individuals with disabilities.[10] Other countries have also begun to require that private websites comply with accessibility standards.[11] Thus, it is possible to make private websites accessible, and the federal government's accessibility standards can serve as an initial guide for private websites. Moreover, requiring websites to be accessible is subject to a standard of reasonableness and when an undue burden would result, the Act does not require modifications.[12]

Interpreting the term "place" in light of the purpose of Title III and changing technology is also within the powers of the court. It is even preferable that the judiciary act instead of Congress because any legislation by Congress carries with it a possible limitation of application to current technology, and the applicability of Title III to future "places" will then resurface. To prevent further isolation of disabled individuals from mainstream society, this Note argues that courts must recognize that the internet can be a place of public accommodation under Title III and require that private websites be accessible to the disabled.

Part II of this Note considers the growth of both websites and virtual worlds and the potential number of disabled individuals that will be barred

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9. *See, e.g.*, ABC Home Page, http://abc.go.com (broadcasting full episodes of television shows for viewing on one's computer); American Military University Home Page, http://www.amu.apus.edu (providing students around the world an opportunity to earn an associate's, bachelor's and master's degree online); CNN Home Page, http://www.cnn.com (displaying news from around the world); Facebook Home Page, http://www.facebook.com ("[A] social utility that connects you with the people around you."); Target Home Page, http://www.target.com (enabling individuals to purchase items online).

10. *See* 29 U.S.C. § 794d(a)(1) (2000) (requiring that federal agencies provide disabled individuals with access to "electronic and information technology . . . that is comparable to the access" provided to nondisabled individuals).

11. *See* Nancy J. King, *Website Access for Customers with Disabilities: Can We Get There from Here?*, 7 UCLA J.L. & TECH. 6, at 71–75 (2003), http://www.lawtechjournal.com/articles/2003/06_031219_king.pdf (discussing the policies implemented in Australia and the United Kingdom).

12. *See infra* Part VIII.C (noting that modifications to websites are subject to a reasonableness standard).

from the online world if it is not made accessible. Part III of this Note analyzes the coverage of Title III in light of its purpose and examines how different circuits have come to different conclusions as to whether Title III can apply to nonphysical places. Part IV discusses the two cases that have addressed the applicability of the ADA to websites and examines related cases that focused on the applicability of the ADA using the nexus approach. Part V insists that the nexus approach is the wrong approach to applying Title III liability. Part VI distinguishes the internet from other mediums discussed in the nexus cases. Part VII argues that the online world can be a place of public accommodation covered under Title III. Part VIII considers the reasons why courts have been reluctant to apply Title III to the online world. Finally, Part IX explains that it is appropriate for the courts to take action and that courts should not wait for Congress to eventually speak up.

II. Digital Divide Increases with Expansion of the Online World

A. Growth of Websites and Virtual Worlds

The roots of the internet existed in the 1960s, but public use and expansion of the world wide web did not occur until the mid-1990s.[13] Since then, there has been a dramatic change in the way people access information and services through the online world.[14] As of November 2007, 71.4% of the U.S. population were using the internet.[15] The over 100 million websites,[16] consisting of an estimated 30 billion webpages,[17] reflect the increased usage

13. *See* JANET ABBATE, INVENTING THE INTERNET 3 (1999) (tracing "the history of the Internet from the development of networking ideas and techniques in the early 1960s to the introduction of the World Wide Web in the 1990s").

14. *See* Michael Goldfarb, Comment, Access Now, Inc. v. Southwest Airlines, Co.—*Using the "Nexus" Approach to Determine Whether a Website Should Be Governed by the Americans with Disabilities Act*, 79 ST. JOHN'S L. REV. 1313, 1313 (2005) (discussing dramatic technological advances and "exponential increases in Internet usage").

15. *See* Internet World Stats, http://www.internetworldstats.com/america.htm (last visited Jan. 18, 2008) (noting current world internet usage and population statistics) (on file with the Washington and Lee Law Review). The estimated U.S. population is 301,139,947, and as of November 2007, 215,088,545 of the population were internet users. *Id.* Thus, approximately 71.4% of the U.S. population is using the internet. *Id.*

16. *See* Marsha Walton, *Web Reaches New Milestone: 100 Million*, CNN.com, Nov. 1, 2006, http://www.cnn.com/2006/TECH/internet/11/01/100millionwebsites/ (last visited Jan. 18, 2008) (discussing number of websites in existence) (on file with the Washington and Lee Law Review).

17. *See WWW FAQs: How Many Websites Are There?*, Boutell.com, Feb. 15, 2007, http://www.boutell.com/newfaq/misc/sizeofweb.html (last visited Feb. 16, 2008) (estimating the

and importance of the internet in the daily lives of Americans. Although the world wide web initially began as a medium for social networking and information, today multiple goods and services are also offered on the internet. One can earn a college degree, watch television, read the news, shop for clothes, order groceries, do legal research, and much more online.[18]

The expansion of the metaverse[19] has also been significant.[20] To many Americans, the concept of virtual worlds was previously familiar only through movies depicting a futuristic world where humans would put on special gear and enter another environment.[21] Nowadays, virtual worlds are known to many Americans, although perhaps not identical to the worlds envisioned in the past. Virtual worlds have been around for over ten years but only recently have they really started to increase in popularity and recognition.[22] Today's virtual worlds are three-dimensional environments that consist of objects and places that can have value in the real world economy.[23] Individuals use these virtual

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number of web pages on the internet based on a previously recorded percentage of web pages to websites) (on file with the Washington and Lee Law Review).

18. *See supra* note 9 (listing various websites that provide services, information, and goods).

19. *See* Todd David Marcus, Note, *Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content*, 52 N.Y.L. SCH. L. REV. 67, 70 (2007) (defining the metaverse as a "cohesive universe of virtual environments"). Neal Stephenson introduced the term "metaverse" in the book *Snow Crash* as "an online environment that was a real place to its users, one where they interacted using the real world as a metaphor and socialized, conducted business, and were entertained." Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 81 (2004); *see also* NEAL STEPHENSON, SNOW CRASH 23–25 (1992) (describing a character in the novel walking down the Champs Elysées of the Metaverse).

20. *See* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1058–63 (2005) (noting the various virtual environments in existence and the millions of users throughout the world).

21. *See* D. Benjamin Beard & Christina L. Kunz, *Virtual Worlds Alongside the Real World*, BUS. L. TODAY, Nov.–Dec. 2007, at 19 (differentiating between virtual reality as depicted in science fiction and the current state of virtual reality).

22. *See id.* ("While these games and worlds have been around for the last 10 or more years, it has been in the last year or two that the phenomenon has really caught the imagination of large numbers of people."); David Itzkoff, *I've Been in That Club, Just Not in Real Life*, N.Y. TIMES, Jan. 6, 2008, at 21 (exploring replicates of locations from the real world online and discussing how MTV has started creating virtual worlds based on some of its more popular television shows); L.A. Lorek, *Virtual Worlds*, SAN ANTONIO EXPRESS-NEWS, July 1, 2007, at 1K ("'There's a real explosion going on in the teens and the preteen category for virtual worlds,' said Steve Prentice, chief of research at Gartner Group in London. 'There just seems to be another coming along every week.'").

23. *See* Fairfield, *supra* note 20, at 1059 ("There is crossover between virtual environments and the real world: [P]eople buy virtual objects with real money, and vice versa.").

environments not only for social interaction but also for politics, medical therapy, military training, and commercial purposes.[24] Millions of users are already active in virtual worlds, some even spending approximately twenty hours a week in these worlds.[25] It is anticipated that the three-dimensional context of virtual worlds may soon replace the two-dimensional interface of the internet.[26]

B. Impact on Persons with Disabilities

The increasing presence of the online world is a benefit to most Americans. However, it has also created a "digital divide" between the disabled and the nondisabled.[27] As of July 2006, there were approximately 51.2 million individuals with disabilities in the United States.[28] Because the

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24. *Id.* at 1058–63. Individuals use virtual environments as a social networking interface. *Id.* at 1059. However, virtual environments have a use far beyond social networking. Therapists have used these environments to help patients with Asperger's Syndrome, "a neurological disorder that impairs the ability of a person to respond to social cues," to understand social spaces, and to teach them social interaction. *Id.* (citing Posting of John Lester to Braintalk, http://braintalk.blogs.com/brigadoon/2005/01/about_brigadoon.html (Jan. 9, 2005, 14:57 EST)). Moreover, virtual environments have been used as forums for political debate in Second Life, The Election Comes to Second Life!, Posting of Wagner James Au to New World Notes, http://secondlife.blogs.com/nwn/2004/04/the_election_co.html (Apr. 12, 2004, 7:15 EST) (last visited Jan. 18, 2008) (on file with the Washington and Lee Law Review), and for training the military in the Virtual Baghdad Project, Lindsey Arent, *The Army's Virtual World*, G4TV, Mar. 16, 2004, http://www.g4tv.com/screensavers/features/492/The_Armys_Virtual_World.html (last visited Jan. 18, 2008) (on file with the Washington and Lee Law Review).

25. *See* Nick Yee, *The Demographics, Motivations and Derived Experiences of Users of Massively-Multiuser Online Graphical Environments*, 15 PRESENCE: TELEOPERATORS & VIRTUAL ENV'TS 309 (2006), *available at* http://nickyee.com/index-papers.html ("On average, respondents spent 22.71 hours [ ] each week in their chosen [virtual environment]. The median was 20 hours per week.").

26. *See* Joshua A.T. Fairfield, Anti-Social Contracts: The Contractual Governance of Online Communities 8 (Feb. 13, 2008) ("By recent estimates, four out of five people who use the internet will work or play in virtual worlds by the year 2011.") (unpublished manuscript, on file with the Washington and Lee Law Review), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002997.

27. *See* Justin D. Petruzzelli, Note, *Adjust Your Font Size: Websites Are Public Accommodations Under the Americans with Disabilities Act*, 53 RUTGERS L. REV. 1063, 1065 (2001) ("The digital divide describes the recent and rapid transition of the Internet from being text-based to increasingly multimedia-based."). This rapid transition has created access barriers to the internet for individuals with certain disabilities. *Id.*

28. *See* West Suburban Access News Association, How Many Persons With Disabilities Are There in America?, http://www.wsana.org/id115.html (last visited Feb. 16, 2008) (providing an overview of statistics on individuals with disabilities that the U.S. Census Bureau released in 2006) (on file with the Washington and Lee Law Review).

internet is primarily a visual medium, it is mostly individuals with visual disabilities that have problems accessing the goods and services provided online. Thus, legal commentators and cases focus on the blind;[29] yet, other disabilities can also make navigating and enjoying the internet difficult. An individual with cerebral palsy who has limited freedom of movement cannot use a mouse to navigate a website.[30] Access is denied to the hearing disabled "when a Web page does not provide captions of a Web cast or a video clip" and the learning disabled have trouble enjoying websites that are not easy to navigate or have complex design layouts.[31] Hence, although not all 51.2 million of disabled individuals will have problems accessing the online world, there remains a significant portion of the population that will be barred from equal access if Title III does not apply to websites.

The feasibility of making websites accessible to these various disabled individuals may at first seem daunting; however, modifications required for accessibility involve simple concepts. For example, website designers should label images and graphics in a clear identifying manner, navigation links should be used so that an individual does not need to have a mouse in order to enjoy the website, and webcasts or video clips should contain captions.[32] There are also many resources available to help entities create websites that are accessible to individuals with a variety of disabilities.[33]

When Congress enacted Title III in 1990, the internet was in its inception, and websites were not even in existence.[34] Congress did not foresee the expansion, reach, or potential for accessibility of the online world. An analysis

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29. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006) (describing that the plaintiff is a blind individual); Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002) (noting that an advocacy group for the blind and a blind plaintiff filed a complaint alleging that Southwest Airline's website was not accessible in violation of Title III of the ADA). *See generally* Jeffrey Scott Ranen, Note, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 391 (2002); 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, 50 (2001).

30. *See* Cassandra Burke Robertson, *Providing Access to the Future: How the Americans with Disabilities Act Can Remove Barriers in Cyberspace*, 79 DENV. U. L. REV. 199, 201 (2001) (describing an individual with Cerebral palsy who is able to design websites by "typ[ing] commands into her keyboard through a pointer strapped to her forehead").

31. Petruzzelli, *supra* note 27, at 1066.

32. *See infra* Part VIII.B and accompanying footnotes (describing different techniques that can be used to make a website accessible).

33. *See infra* note 179 (referring to a comprehensive resource on guidelines to creating accessible websites).

34. *See* ABBATE, *supra* note 13, at 217 (noting that distribution to the public of the first web browser called Mosaic did not occur until November 1993).

of the purpose and language of the Act and case law reveals that there is room to interpret that Congress did not limit a place of public accommodation to a physical place, and that Title III applies to websites.

III. Purpose and Coverage of Title III of the ADA

In 1990, President George H.W. Bush signed the Americans with Disabilities Act (ADA) into law in front of a 3,000 person crowd.[35] President Bush stated that "[the ADA] will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream."[36] Congress enacted the ADA pursuant to findings that over 43 million Americans suffered from a physical or mental disability, and that they were discriminated against in the economic and social mainstream of American life.[37] The purpose of the Act was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[38] and "to

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35. *See* Ranen, *supra* note 29, at 389 ("On July 26, 1990, in front of a gathering of more than three thousand onlookers, President George Bush signed into law the Americans with Disabilities Act (ADA).").

36. Matthew Heller, *Rolling Thunder: An Unorganized Army of the Aggrieved is Trying to Force Businesses to Comply with State Law and the Americans with Disabilities Act; Woodland Hills' Jarek Molski Also Happens to Be Getting Rich at It*, L.A. TIMES, Oct. 2, 2005, (Magazine) at 12.

37. 42 U.S.C. § 12101(a) (2000). Congress found that:

> (1) some 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;
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> . . . .
>
> (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
>
> (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id.

38. *Id.* § 12101(b).

assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals."[39]

To make public accommodations available to disabled individuals, Congress enacted Title III.[40] Title III of the ADA 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."[41] Title III defines public accommodations as private entities that affect commerce.[42] Congress also provided a list of private entities that are considered places of accommodation under Title III.[43] The list included specific examples, but then noted that other entities that fell within the general category were also places of public accommodation. For example, Congress stated that a theater was a place of public accommodation, as were "other place[s] of exhibition or entertainment."[44]

All specific examples only include physical entities; a website is not listed as a place of public accommodation—understandable given that the internet did not exist in 1990. A website could, however, fit into some of the overall categories noted. The places of public accommodation listed that are relevant to the internet include: a "place of exhibition or entertainment" (online television), a "place of public gathering" (chatrooms), a "sales or rental establishment" (Amazon.com), a "service establishment" (online bank), a "place of public display or collection" (online library), a "place of recreation" (online games), and a "place of education" (online school).[45]

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39. *Id.* § 12101(a)(8).

40. *See* Ranen, *supra* note 29, at 394 (stating that Congress enacted Title III to provide disabled persons equal access to public accommodations).

41. 42 U.S.C. § 12182(a) (2000).

42. *Id.* § 12181(7); *see also id.* § 12181(1) (defining commerce as "travel, trade, traffic, commerce, transportation, or communication—(A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country").

43. *See id.* § 12181(7) (listing twelve categories of "private entities [that] are considered public accommodations").

44. *Id.* § 12181(7)(c).

45. *Id.* § 12181(7); *see* Robertson, *supra* note 30, at 206 ("[M]any commercial websites also fit into at least one of the categories enumerated in the statute. Amazon.com . . . could fit into (E) as a 'sales or rental establishment;' Concord University School of Law, a law school offering classes exclusively over the Internet, could fit into (J) as a 'postgraduate private school.'").

Although this list of public accommodations is exhaustive, in that an entity must fall within one of the given categories,[46] Congress intended that the categories be construed liberally.[47] Congress explained that a "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."[48] Thus, the fact that the Act does not list websites does not mean that the Act could not cover websites. The Department of Justice, the agency responsible for the enforcement of the Act, has even stated that websites must be made accessible to the disabled.[49] Furthermore, court decisions in several circuits demonstrate that there is no clear meaning to "a place of public accommodation" and that Congress did not intend to limit Title III to physical structures.

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46. *See* 28 C.F.R. § 36.104 (2007) (defining place of public accommodation as a private entity falling in "at least one of the [given] categories"); H.R. REP. No. 101-485, pt. 3, at 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 477 (stating that the twelve categories of entities included in the definition of the term "public accommodation" are exhaustive).

47. *See* H.R. REP. No. 101-485, at 477. Congress noted:

> These 12 listed categories are exhaustive. However, within each category, the bill lists only a number of examples. For example, under category (5), the bill lists "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." This list is only a representative sample of the types of entities covered under this category. Other retail or wholesale establishments selling or renting items, such as a book store, videotape rental store, or pet store, would be a public accommodation under this category.
>
> 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.

Id.

48. *Id.*

49. *See* Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div. to Sen. Tom Harkin (Sept. 9, 1996), *available at* http://www.usdoj.gov/crt/foia/cltr204.txt (last visited Feb. 18, 2008) ("The Internet is an excellent source of information and, of course, people with disabilities should have access to it as effectively as people without disabilities.") (on file with Washington and Lee Law Review); Brief of the United States as Amicus Curiae in Support of Appellant at 8, Hooks v. OKBridge, Inc., 232 F.3d 208 (5th Cir. 2000) (No. 99-50891), *available at* http://www.usdoj.gov/crt/briefs/hooks.htm (last visited Feb. 18, 2008) ("OKBridge [is a service establishment that] offers its services to its customers via the internet .... Its services would, therefore, seem easily to qualify as the 'services ... of [a] place of public accommodation.'") (citations omitted) (on file with the Washington and Lee Law Review); *but see* Ranen, *supra* note 29, at 400 ("The [Department of Justice] letter, although suggesting that the Internet is a covered entity applicable to the public accommodation clause of Title III, does not explicitly state that the Internet is a public accommodation, nor does it mention the current debate on whether public accommodations are limited to physical structures.").

A. Title III May Apply to Nonphysical Places According to Some Circuits

In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*,[50] the United States Court of Appeals for the First Circuit faced an issue of first impression: Whether "establishments of 'public accommodation' are limited to actual physical structures."[51] The trial court determined that a health benefit plan sponsor and "a self-funded uninsured medical reimbursement plan"[52] were not places of public accommodation covered under Title III because "neither of defendants is a health care provider to which [plaintiff] went to in order to obtain health services."[53] The trial court interpreted that a place of public accommodation is "limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein."[54] The court of appeals concluded that the trial court had erred in limiting Title III's application to physical places which a person must enter.[55] The court stated that the plain meaning of the statute did not limit coverage in such a way and "[e]ven the meaning of 'public accommodation' is not plain; it is, at worst, ambiguous."[56] The *Carparts* court came to this conclusion through an analysis of the legislative history of the ADA, policy concerns, and agency regulations.[57]

The *Carparts* court noted that the Act covers travel services and an insurance office, which are not necessarily open to the public.[58] The First Circuit emphasized that many travel services interact with customers through the phone or mail, without ever requiring that the customer enter an office.[59]

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50. *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng. Inc., 37 F.3d 12, 21 (1st Cir. 1994) ("[I]n concluding that defendants were not 'public accommodations' under Title III, we hold that the district court erred in dismissing plaintiffs' complaint.").

51. *Id.* at 19.

52. Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng. Inc., 826 F. Supp. 583, 586 (D.N.H. 1993), *vacated*, 37 F.3d 12 (1st Cir. 1994).

53. *Id.*

54. *Id.*

55. *Carparts*, 37 F.3d at 19.

56. *Id.*

57. *See id.* at 19–20 (noting that the language of the statute is ambiguous, but an interpretation of Title III to include nonphysical structures would be "consistent with the legislative history of the ADA").

58. *See id.* at 19 ("By including 'travel service' among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure.").

59. *See id.* ("Many travel services conduct business by telephone or correspondence

The court recognized 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."[60] Therefore, with the *Carparts* ruling, the First Circuit signaled its willingness to apply the ADA to entities other than physical places.

In *Doe v. Mutual of Omaha Insurance Co.*,[61] the United States Court of Appeals for the Seventh Circuit addressed whether an insurance company can implement an insurance cap for a person with HIV.[62] The court noted the prohibition against discrimination under Title III in places of public accommodation and stated that an "insurance company cannot . . . refuse to sell an insurance policy to a person with AIDS."[63] The court assumed that an insurance company, regardless of its location, could not discriminate against individuals. The Seventh Circuit thus believes that Title III does not limit a place of public accommodation to a physical structure. In dicta, Judge Posner explicitly stated that the Title III definition of a place of public accommodation applies to the internet. He declared:

> The core meaning of this provision, 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.[64]

Although only dicta, such a statement is significant: The Seventh Circuit is the first circuit to unambiguously state that Title III covers websites. Other circuits, however, have interpreted the language in Title III much more narrowly.

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without requiring their customers to enter an office in order to obtain their services.").

60. *Id.*

61. *See* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 564 (7th Cir. 1999) (concluding that judgment must be entered for the defendant because "section 302(a) of the Americans with Disabilities Act does not regulate the content of the products or services sold in places of public accommodation and because an interpretation of the section as regulating the content of insurance policies is barred by the McCarran-Ferguson Act").

62. *See id.* at 558 (explaining that "Mutual of Omaha does not question [that AIDS is a disability], but argues only that the Americans with Disabilities Act does not regulate the content of insurance policies").

63. *Id.* at 559.

64. *Id.*

B. Other Circuits Hold Title III Only Applies to a Physical Place

Unlike the First and Seventh Circuits, the Third, Sixth, Ninth, and Eleventh Circuits have refused to look beyond the statutory text of Title III. Notwithstanding the ambiguity found by other circuits and governmental agencies, these circuits have maintained that the statute is not ambiguous. They have thus interpreted the statute on its face—in line with the traditional canons of statutory construction.

In *Parker v. Metropolitan Life Insurance Co.*,[65] the Sixth Circuit concluded that Title III applies only to public accommodations that are physical places.[66] The court invoked the canon of *noscitur a sociis*, which "instructs that a term is interpreted within the context of the accompanying words to avoid the giving of unintended breadth to the Acts of Congress."[67] The court emphasized that all of the terms listed in the ADA § 12181(7) represent a physical place.[68] The logical conclusion was that the Act limits public accommodations to physical buildings because although the term itself may be vague, all examples given are physical structures.[69] The court did not find any support in the First Circuit's reasoning that a travel service and insurance office created room to interpret a public accommodation as possibly something other than a physical structure.[70] Instead, the court reasoned that "[r]ather than suggesting that Title III includes within its purview entities other than physical places, it is likely that Congress simply had no better term than 'service' to describe an office where travel agents provide travel services and a place where shoes are repaired."[71]

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65. *See* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011–14 (6th Cir. 1997) (holding that when a disability policy is offered through an employer instead of an insurance company, there is no valid Title III claim).

66. *See id.* at 1014 ("The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place.").

67. *Id.* (citations omitted).

68. *See id.* ("Every term listed in § 12181(7) and subsection (F) is a physical place open to public access.").

69. *See* Ranen, *supra* note 29, at 398 ("Thus, the court reasoned that although the term public accommodation itself is vague, the fact that every other term in the statute represented a physical structure means that public accommodations are limited to physical structures.").

70. *See Parker*, 121 F.3d at 1014 ("The terms travel service, shoe repair service, office of an accountant or lawyer, insurance office, and professional office of a healthcare provider do not suggest [that public accommodations include nonphysical places].").

71. *Id.* The court further noted that an "[o]ffice of an accountant or lawyer, insurance office, and professional office of a healthcare provider, in the context of the other terms listed, suggest a physical place where services may be obtained and nothing more." *Id.* However, the dissent in *Parker* provided an alternative viewpoint, caustically stating:

> It boggles the mind to think that Congress would include only the few people who walk into an insurance office to buy health insurance but not the millions who get

The Third and Ninth Circuits agreed with the Sixth Circuit. In *Ford v. Schering-Plough Corp.*[72] and *Weyer v. Twentieth Century Fox Film Corp.*,[73] the Third Circuit and Ninth Circuit, respectively, noted that the principle of *noscitur a sociis* requires that seemingly ambiguous words be interpreted according to their context and by reference to the accompanying words of the statute.[74] Thus, looking to the examples given, the Third and Ninth Circuits agreed with the Sixth Circuit that the statute was not ambiguous and that a public accommodation must be a physical place.[75]

The Eleventh Circuit also came to the conclusion that a place of public accommodation must be a physical place in *Access Now, Inc. v. Southwest Airlines*.[76] The Eleventh Circuit, however, used the statutory canon of *ejusdem generis*, which states 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."[77] Noting that the enumerated terms are all physical structures, the *Access Now* court stated that the "the general terms, 'exhibition,' 'display,' and 'sales establishment,' must also be limited to physical, concrete places."[78] Under this canon, the *Access Now* court would not

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> such insurance at work. This distinction drawn by the Court produces an absurd result. The Court limits § 12182(a) "to physical access to an office," rejecting the contrary view of the other circuit and district courts that have decided the issue, as well rejecting the Department of Justice and the EEOC view that employer group health insurance is covered. In the end, the unnecessary conflict between these two views will now have to be resolved by the Supreme Court.

Id. at 1021–22 (Merritt, J., dissenting).

72. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 612–13 (3d Cir. 1998) (holding that when a disability policy is offered through an employer instead of an insurance company, there is no valid Title III claim).

73. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15 (9th Cir. 2000) (holding that when a disability policy is offered through an employer instead of an insurance company, there is no valid Title III claim).

74. *See Ford*, 145 F.3d at 614 (noting that *noscitur a sociis* requires that ambiguous terms "should be interpreted by reference to the accompanying words of the statute"); *see also Weyer*, 198 F.3d at 1114 ("The principle of *noscitur a sociis* requires that the term, 'place of public accommodation,' be interpreted within the context of the accompanying words.").

75. *See Ford*, 145 F.3d at 614 ("[The court does] not find the term 'public accommodation' or the terms in 42 U.S.C. § 12181(7) to refer to nonphysical access or even to be ambiguous as to their meaning."); *see also Weyer*, 198 F.3d at 1114 ("[T]his context suggests that some connection between the good or service complained of and an actual physical place is required.").

76. *See* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (concluding that Southwest.com is not a place of public accommodation under Title III and that plaintiffs have not established a nexus with a physical building).

77. *Id.* at 1318–19 (citations omitted).

78. *Id.* ("Here, the general terms, 'exhibition,' 'display,' and 'sales establishment,' are

apply Title III to the internet because the internet is not a physical structure.[79] Therefore, although the Eleventh Circuit used a different canon of statutory construction from the Sixth, Third, and Ninth Circuits, each circuit came to the same conclusion—a public accommodation must be a physical place.

The differences in interpretations of the term "place of public accommodation" and the ambiguity in the statute have created a circuit split. This suggests that there is no plain meaning to the language of the statute, and that Title III may not be limited to a physical place. It is thus possible for a court to interpret Title III to apply to websites. The issue is an important one; nevertheless, seventeen years have passed since the passage of the Act, and only two cases have directly addressed whether Title III could apply to the online world.[80] Unfortunately, in those two cases, the plaintiffs presented the argument that Title III could apply to nonphysical places, but in one case, the plaintiffs failed to explain to the court why the internet is a place,[81] and in the

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limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely: 'motion picture house, theater, concert hall, stadium'; 'museum, library, gallery'; and 'bakery, grocery store, clothing store, hardware store, shopping center,' respectively.").

79. *See id.* ("[T]his Court cannot properly construe 'a place of public accommodation' to include Southwest's Internet website, Southwest.com.").

80. The issue of whether the ADA is applicable to the internet has arisen in other lawsuits, but these were either settled or dismissed without a published decision. *See, e.g.*, Access Now, Inc., v. Claire's Stores, Inc., No. 00-14017-CIV, 2002 WL 1162422, at *1 (S.D. Fla. May 7, 2002) (approving settlement between plaintiffs and Claire's Stores in a lawsuit that alleged that Claire's Stores was violating the ADA in its stores and internet sites); Brief of the United States, *supra* note 49, at 2–4 (providing the facts of an unpublished summary judgment decision where a plaintiff, alleging he was disabled because of a bipolar disorder, sued a website that allowed members to play in online bridge tournaments when it canceled his membership); Robertson, *supra* note 30, at 203–04 (describing the National Federation of the Blind's lawsuit against AOL for website accessibility that ended in settlement); *Priceline, Ramada Agree to Make Web Site More Accessible*, ConsumerAffairs.com, Aug. 20, 2004, http://www.consumeraffairs.com/news04/ada_webs.html (last visited Jan. 18, 2008) [hereinafter Priceline] (discussing a settlement agreement where Priceline and Ramada, agreed to make their websites accessible to the disabled) (on file with the Washington and Lee Law Review).

81. *See* Complaint at 4, Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (No. 02-21734) (stating that Southwest's "website is a public accommodation," omitting the word place). In a later brief, the plaintiff in *Access Now* did state in a heading that the website is a "place of public accommodation," but continued to refer to the website only as a public accommodation in the text. Memorandum in Response to Motion to Dismiss Complaint with Prejudice at 3–8, Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (No. 02-21734) [hereinafter Response Memorandum]. Furthermore, on appeal, the plaintiffs completely abandoned the argument that the website itself was even a public accommodation. Access Now, Inc. v. Sw. Airlines, Co., 385 F.3d 1324, 1328–29 (11th Cir. 2004).

other, the plaintiffs did not even pursue the argument that the internet is a place.[82]

IV. Treatment of the Issue by Different Courts

A. Access Now, Inc. v. Southwest Airlines

In *Access Now*, a nonprofit advocacy organization for disabled individuals and a blind individual brought suit against Southwest Airlines to seek injunctive and declaratory relief under Title III of the ADA.[83] The plaintiffs argued that Southwest.com was inaccessible to blind persons, and this exclusion from the virtual ticket counters that provided Southwest's goods and services was in violation of the ADA.[84] At the commencement of the suit, Southwest was the fourth largest U.S. airline in domestic travel, and a leader in providing online access to ticket purchases.[85] It was the first airline to establish an internet website.[86] Accessibility to its flights through the internet proved to be a successful strategic decision; for the first quarter of 2002, Southwest reported that "approximately 46 percent, or over $500 million, of its passenger revenue . . . was generated by online bookings via Southwest.com."[87] Through its website, Southwest sought "the highest level of business value, design effectiveness, and innovative technology use achievable on the Web today."[88]

Nevertheless, Southwest decided to fight the tide of companies choosing to make their websites accessible to the disabled,[89] arguing that it did not have to make its website ADA accessible. Southwest contended that its website was not a place of public accommodation and thus not covered under Title III.[90] Although this was an issue of first impression for the Eleventh Circuit, the

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82. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (noting that the "[p]laintiffs' legal theory is that unequal access to Target.com denies the blind the full enjoyment of the goods and services offered at Target stores," not that Target.com is a place itself).

83. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).

84. *Id.* at 1315.

85. *Id.*

86. *See id.* (describing Southwest's initiative in establishing a home page on the internet).

87. *Id.*

88. *Id.*

89. *See* Priceline, *supra* note 80 (discussing several other companies that faced the similar choice and decided to settle).

90. *See* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002) (noting defendant's reasoning behind the motion to dismiss).

Access Now court felt compelled to follow its circuit's precedent that Title III applies only to physical places of public accommodation.[91] The *Access Now* court believed that expanding the definition of place to include a website would "create new rights without well-defined standards."[92] Thus, the court dismissed the plaintiffs' suit against Southwest Airlines.[93]

It is understandable that the court would come to this conclusion given the arguments put forth by the plaintiffs. Although plaintiffs stated in the Complaint that Southwest.com was a public accommodation and noted that it was a "place of exhibition, sales and display establishment," plaintiffs never explained how a website was even a "place."[94] Instead, they pointed to cases in other circuits that stated that Title III was not necessarily limited to a physical place and stopped there.[95] Because the Eleventh Circuit had already held that the term "place" was restricted to a physical place,[96] the plaintiffs needed to address how the district court could nevertheless apply Title III to websites. The key difference between the precedents where the courts had to determine whether Title III applied to health-benefit plans, a telephone, or a televised

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91. *See id.* at 1318 ("Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure.").

92. *Id.*

93. *See id.* (holding that the plaintiffs have failed to state a valid claim and dismissing the lawsuit). The court also concluded that the plaintiffs failed to establish a nexus between the website and a physical place. *Id.* at 1319. In actuality, the plaintiffs never even contended that such nexus existed, "instead arguing that no link to a physical location was necessary for a website to be covered by Title III." Access Now, Inc. v. Sw. Airlines, Co., 385 F.3d 1324, 1328 (11th Cir. 2004). On appeal, plaintiffs tried to focus on this nexus theory alleging that Title III applied to Southwest.com because of the website's connection to Southwest's travel service, a public accommodation specifically listed under the Act. *Id.* at 1328–29. However, because "the new argument depends on critical facts (and a new theory) neither alleged in the complaint nor otherwise presented to the district court," the Eleventh Circuit Court of Appeals dismissed the appeal. *Id.* at 1329.

94. Complaint at 4, Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (No. 02-21734) (stating that Southwest's "website is a public accommodation," omitting the word place). In a later brief, the plaintiff in *Access Now* did state in a heading that the website is a "place of public accommodation," but continued to refer to the website only as a public accommodation in the text. Response Memorandum, *supra* note 81, at 3–8. Furthermore, on appeal, the plaintiffs completely abandoned the argument that the website itself was even a public accommodation. Access Now, Inc. v. Sw. Airlines, Co., 385 F.3d 1324, 1326–27 (11th Cir. 2004).

95. *See* Response Memorandum, *supra* note 81, at 4–7 (citing *Carparts* and *Doe* that held Title III did not restrict public accommodations to physical structures).

96. *See Access Now*, 227 F. Supp. 2d at 1318 ("In interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress's clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation.").

broadcast, and *Access Now*, is that a website is a place and these other services and mediums are not.[97] The internet is distinct in that it is designed, used, and perceived as a place.[98] If the plaintiffs had focused on this significant difference, the court could have distinguished this case from others decided in the Eleventh Circuit and applied Title III to websites.

B. National Federation of the Blind v. Target Corp.

Perhaps deterred by the decision in *Access Now*, in *National Federation of the Blind v. Target Corp.*,[99] the plaintiffs did not even pursue the argument that a website could be a place. In *Target*, the plaintiffs—an association representing the blind and a blind customer—filed a class action lawsuit against the retailer Target seeking injunctive, declaratory, and monetary relief under Title III.[100] Target "operates approximately 1,400 retail stores nationwide," and has a website, Target.com, that enables its customers to purchase items available in the stores and to access store information.[101] The plaintiffs alleged that Target's website was inaccessible to the blind, denying them "full enjoyment of the goods and services offered at the Target stores, which are places of public accommodation," in violation of the Act.[102]

Unlike *Access Now*, the plaintiffs in *Target* alleged that the website was a service of the physical Target stores, not that the website was a "public accommodation" or "place" in and of itself.[103] Title III's decree that "[n]o

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97. *See infra* Part V (providing an overview of cases that addressed the applicability of Title III to other mediums).

98. *See infra* Part VII (arguing that cyberspace is a place).

99. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (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," but no claim is stated if such a nexus does not exist).

100. *See id.* at 949 (naming the plaintiffs and setting out the issue of the case).

101. *See id.* (describing Target and Target.com). The description of Target.com lays out a nexus between the store and the website:

> By visiting Target.com, customers can purchase many of the items available in Target stores. Target.com also allows a customer to perform functions related to Target stores. For example, through Target.com, a customer can access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store.

Id.

102. *Id.* at 952.

103. *See id.* (noting that the "[p]laintiffs' legal theory is that unequal access to Target.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation," *not* that Target.com is itself a place of public accommodation

individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation," is the basis for the plaintiffs' argument that Title III applies to Target's website.[104] This nexus argument is a judicially adopted approach where courts determine whether a place of public accommodation discriminates "in the provision of a good, service, facility, privilege, advantage, or accommodation," and not whether the place of public accommodation discriminates at its physical location.[105]

Pursuant to this understanding of the nexus theory, the *Target* court concluded that it was not necessary "[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation."[106] The court noted that the plaintiffs' barrier to enjoyment of a good or service would violate the Act, and a violation of the Act is not restricted to a barrier to physical access to a brick-and-mortar place.[107] Noting that "many of the benefits and privileges of the website are services of the Target stores,"[108] the court refused to dismiss the plaintiffs' claims to the extent that accessibility was impeded as to those benefits and privileges.[109] In adherence to this nexus requirement, however, the court also concluded that "[to] the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA."[110]

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as the defendant contends the plaintiff is claiming).

104. Kenneth Kronstadt, Note, *Looking Behind The Curtain: Applying Title III Of The Americans With Disabilities Act To The Businesses Behind Commercial Websites*, 81 S. CAL. L. REV. 111, 125 (2007).

105. *Id.*

106. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006). The court stated:

> The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation, [so limiting the statute in such a way] would contradict the plain language of the statute. To the extent defendant argues that plaintiffs' claims are not cognizable because they occur away from a "place" of public accommodation, defendant's argument must fail.

Id.

107. *See id.* at 953–54 ("[N]o court has held that under the nexus theory a plaintiff has a cognizable claim only if the challenged service prevents physical access to a public accommodation.").

108 *Id.* at 954.

109. *See id.* at 956 (noting that plaintiffs alleged a valid claim of action as to those factors).

110. *See id.* (denying the defendant's motion to dismiss as it relates to allegations of inaccessibility to goods and services offered in Target stores, and granting dismissal to claims that are unconnected to the physical stores).

V. The Nexus Approach Is the Wrong Approach

In *Access Now* and *Target*, the plaintiffs failed to establish that a website is a place deserving Title III coverage.[111] Although in *Target* the plaintiffs did convince the court that Title III should apply to websites to the extent the services and goods of the website are connected to a physical store, the nexus approach fails to provide ADA protection to businesses that operate solely over the internet.[112] Thus, any business with a physical facility open to the public may have to make its website accessible to individuals with disabilities but the many businesses operating only online would not have to create websites accessible to the disabled. It is true that the nexus approach is "a positive step for disabled individuals" in that it would require some websites to be accessible;[113] however, this limited application of Title III to websites will neither promote the goals of equal participation and access of disabled individuals to mainstream society nor will it be simple to implement. In the end, instead of fulfilling the purposes of the Act, the nexus approach permits the courts to escape addressing whether websites can be a place under Title III.

First, the results of the nexus approach do not fulfill the objectives of the ADA. It does not make sense that the ADA covers stores with a nexus to a physical place but lets online-only retail stores such as Amazon.com bar entry to persons with disabilities.[114] The purpose of the Act was to provide equal access to all disabled persons.[115] Simply because the internet did not exist in 1990 does not mean that Congress intended unequal access to a public accommodation based on whether that public accommodation is online or not; this defies common sense and the purpose of the Act.

Moreover, use of the nexus approach to impose liability will encourage businesses with a physical store and website to take steps to avoid coverage under Title III. Exemption of online-only businesses from Title III coverage will give these businesses an unfair advantage. To address the disparity, businesses with a connection to the physical world will attempt to sever the

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111. *See supra* Part IV (observing that the courts in *Access Now* and *Target* both stated that a place of public accommodation must be a physical place).

112. *See* Krondstadt, *supra* note 104, at 129–30 (noting that under the nexus approach "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 of public accommodation").

113. *Id.* at 129.

114. *See id.* at 130 (addressing the disparity between requiring that the ADA apply to businesses that operate a physical building and exempting online-only businesses).

115. *See supra* Part III (discussing the Act's legislative history).

connection between their business in the "real" world and their website. This could entail moving their business entirely online, or creating a separate entity to run the online portion of their business. Thus, instead of promoting equal access to all disabled persons, the nexus approach encourages businesses to engage in practices that exclude individuals with disabilities.

Second, an appeal of the nexus approach is its perceived simplicity. Courts have used the nexus approach to avoid addressing whether Title III covers all websites. Courts and some academics seem to believe that the nexus approach is easier to apply and comports better with the purpose of the statute.[116] Applying the nexus approach, however, will require significant analysis and interpretation. First, a court must determine whether there is a "nexus" and what that nexus is; the difficulty of this initial step is evident in the different outcomes of the *Access Now* and *Target* cases. In *Access Now*, the court found that because Southwest.com did not impede physical access to a physical place of public accommodation, the nexus theory did not apply.[117] In contrast, in *Target*, the court decided that as long as a website impeded access to services in a physical store, the nexus approach could be used to find liability under Title III.[118] But even if a court does establish a nexus, more complications ensue. A court must then determine the strength of the nexus and the extent of integration between the website and the physical building.[119]

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116. *See generally* Richard E. Moberly, *The Americans With Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963 (2004).

117. *See* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (finding that a nexus theory applies only to the denial of access to a physical place of accommodation and because Southwest.com's website does not exist in a particular geographical location, there is no nexus).

118. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (determining that the nexus approach applies if a website impedes access to services of a place of public accommodation).

119. *Id.* at 956 n.4. The *Target* court stated:

> It appears from a review of the website in question—which the court notes is not in evidence but nonetheless does raise some questions—that Target treats Target.com as an extension of its stores, as part of its overall integrated merchandising efforts. This suggests to the court that perhaps with more evidence, the court's determination of what may be covered under the ADA in this kind of integrated merchandising may be subject to amendment. The website is a means to gain access to the store and it is ironic that Target, through its merchandising efforts on the one hand, seeks to reach greater numbers of customers and enlarge its consumer-base, while on the other hand it seeks to escape the requirements of the ADA. A broader application of the ADA to the website may be appropriate if upon further discovery it is disclosed that the store and website are part of an integrated effort.

Id. (citations omitted).

This process requires an in-depth analysis into both the workings of the physical store and the goods and services offered on the website. In *Target*, the court hinted that such a rigorous analysis would be necessary and that if Target intended its website to be a full extension of its store, Title III may apply to the entire website.[120]

Finally, the nexus approach simply creates an opportunity for the courts to avoid addressing whether Title III covers websites directly. Technology is changing rapidly, and it is understandable that the courts would rather find a way to address applicability of Title III to the internet without getting into the complexities of explaining if and how the internet can be a place. The nexus approach gave them this opportunity. It allowed them to stay within the safe realm of the "real" world by allowing potential liability only if there was a nexus with a physical building.

VI. Nexus Cases Involve Services and Goods

In *Target* and *Access Now*, the courts relied on several cases to help them determine how to apply the nexus approach.[121] The mediums and services at issue in those cases are different than websites and thus could only have possible ADA coverage under the nexus approach. It is worthwhile to provide an overview of those cases.

In *Stoutenborough v. National Football League*,[122] a hearing-impaired individual and an association of individuals with hearing impairments filed a class-action lawsuit against the National Football League (NFL), its member club, and broadcasting companies.[123] The plaintiffs alleged that the "'blackout rule,' which prohibits the live local broadcast of home football games that are not sold out seventy-two hours before game-time," violated Title III because it "unlawfully discriminates against them in a disproportionate way because they have no other means of accessing the football game 'via telecommunication technology.'"[124] There was no dispute in the United States Court of Appeals for the Sixth Circuit as to whether the televised broadcast was a service, but

120. *See id.* (suggesting that an "integrated effort" between the store and the website could result in application of Title III to the entire website).

121. *See Target*, 452 F. Supp. 2d at 952–55 (discussing a number of prior cases); *Access Now*, 227 F. Supp. 2d at 1319–21 (citing and discussing Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279, 1280–81 (11th Cir. 2002)).

122. *See* Stoutenborough v. Nat'l Football League, 59 F.3d 580, 583 (6th Cir. 1995) (holding that a televised broadcast is not a service of public accommodation).

123. *See id.* at 581–82 (naming the parties and the issue in the case).

124. *Id.* at 582.

only as to whether the entity providing the service was a place of public accommodation under Title III.[125] The court even implied that if the televised broadcast had been a service of the stadium—a place of public accommodation—then Title III would apply.[126]

The Sixth, Third, and Ninth Circuits have also had to rely on the nexus approach in cases related to the provision of insurance benefits. The dispute in these cases also focused on whether the entity that provided the insurance was a place of public accommodation.[127] The benefit of insurance was consistently described as a service and there was no discussion about whether insurance was anything but a service.[128]

Finally, in the Eleventh Circuit's decision, *Rendon v. Valleycrest Productions, Ltd.*,[129] individuals with hearing and mobility impairments filed a class action complaint against Valleycrest Productions, Ltd. and the American Broadcasting Company (ABC).[130] The plaintiffs alleged that the telephone screening process for would-be contestants on the show *Who Wants To Be a Millionaire* discriminated against persons with disabilities, in violation of Title III.[131] The court held that although the screening process occurred offsite, the

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125. *See id.* at 582–83. The court stated:

> [T]he "service" that [plaintiffs] seek to obtain—the televised broadcast of "blacked-out" home football games—does not involve a "place of public accommodation." Although a game is played in a "place of public accommodation" and may be viewed on television in another "place of public accommodation," that does not suffice.

Id. at 583.

126. *See id.* at 583 ("The televised broadcast of football games is certainly offered through defendants, but not as a service of public accommodation. It is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers which fall within the scope of Title III.").

127. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15 (9th Cir. 2000) (holding that when a disability policy is offered through an employer instead of an insurance company, there is no valid Title III claim); Ford v. Schering-Plough Corp., 145 F.3d 601, 612–13 (3d Cir. 1998) (same); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011–14 (6th Cir. 1997) (same).

128. *See Ford*, 145 F.3d at 612–13 (discussing insurance as a service); *Parker*, 121 F.3d at 1011 ("There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office.").

129. *See* Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279, 1280–81 (11th Cir. 2002) (concluding that the telephone process for screening contestants for the privilege of competing on *Who Wants To Be a Millionaire*, filmed in a studio, a place of public accommodation, discriminated against persons with disabilities).

130. *See id.* at 1280 (naming the plaintiffs and defendants).

131. *See id.* at 1280–81 (alleging that defendants violated the ADA "by operating a telephone selection process that screened out disabled individuals who wished to be contestants on the show *Who Wants To Be a Millionaire*").

telephone screening process was a discriminatory process that denied the plaintiffs the opportunity to compete for the privilege of appearing as a contestant at the studio, a place of public accommodation.[132]

The facts of these cases are useful because of how the mediums at issue differ from the internet. A television broadcast, insurance, or a telephone is not designed, used, or perceived as a place.[133] In these cases, there was no dispute as to whether these services or mediums required coverage under Title III as a place of public accommodation. Instead, the alleged discrimination involved the service provided by a place and the opportunity to compete for a privilege of a particular place (whether or not that place was a place of public accommodation).[134] Therefore, although these cases are important because they provided subsequent courts with an analytical tool to potentially apply Title III to the internet, courts do not need to resort to the nexus approach because websites are a place.

VII. The Online World As a Place

The courts could interpret the online world as a place of public accommodation under Title III. A place is a space where one goes.[135] Traditionally, a place could really be thought of only as a physical place. Before the expansion of the world wide web, when individuals wanted to go shopping, they would have to leave a place (their home) to go to another place (a store or shopping mall). Today, however, an individual does not necessarily have to displace himself in order to go shopping or to perform other tasks. A person simply has to open up a browser and type in the website of his choice to find a wealth of goods and services at his fingertips.[136] Most services, information, and goods that one could once find only by going to a physical

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132. *Id.*

133. *See* Dan Hunter, *Cyberspace As Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 458 (2003) (arguing that metaphorically people think of cyberspace as a place).

134. Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15 (9th Cir. 2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 612–13 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011–14 (6th Cir. 1997); Stoutenborough v. Nat'l Football League, 59 F.3d 580, 583 (6th Cir. 1995).

135. *See supra* note 7 (providing several definitions of a place to include a space that is not necessarily a physical space); *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 8 and accompanying text (noting that even dictionaries vary on whether the definition of place includes a physical aspect).

136. *See supra* note 9 (listing a sample of websites that provide various goods and services).

place can now be found online.[137] Many people view cyberspace as a "place" because of the emergence of reflections of the "real world" online.[138] Some scholars even argue that "all legislators, judges, and lawyers unconsciously think that cyberspace is a place, even though at times they may argue vehemently that it is not."[139]

It is apparent that individuals think of cyberspace as a place because of how they talk about cyberspace.[140] People talk about surfing the web, chatting online, and shopping online—"the language that we use to discuss cyberspace is shot through with physical references and implications."[141] Cyberspace is not, however, simply a metaphor for a place.[142] Cyberspace is a place not only because individuals think of cyberspace as a place but also because websites were *designed* to be a place[143] and people *use* websites as places.[144] What constitutes a place is more of a social construct than a matter of defining precisely what characteristics must be present for a "place" to exist. In other words, simply because a bookstore providing all the same services and all the same goods as a physically located one is operating only online, it does not make sense to say that the one is a place, while the other is not.

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137. *See* Fairfield, *supra* note 20, at 1059 ("Virtual environments are currently used for medical, political, educational, military, social, entertainment, and commercial purposes.").

138. *See id.* at 1063 ("[V]irtual property is code that mimics the properties of real-space objects.").

139. Hunter, *supra* note 133, at 446–47.

140. *See id.* at 453–54 ("We SURF this WEB, MOVING from one SITE to the next, ENTERING or VISITING this site, or, in the slightly old-fashioned nomenclature, we access someone's HOMEPAGE. We HANG OUT IN CHATROOMS communicating with our ONLINE buddies.").

141. *Id.* at 458.

142. *See id.* at 447–58 (arguing that cyberspace is a place metaphor, and not that cyberspace is actually a place).

143. *See id.* at 455–56 (noting how individuals "generate a sense of place in the physical world, and how this sense of place mapped to the virtual world"); Fairfield, *supra* note 20, at 1053–55 (stating that the real world characteristics of rivalrousness, persistence, and interconnectivity also exist in virtual property and thus "virtual property should be treated like real world property under the law").

144. *See* Hunter, *supra* note 133, at 456 ("[O]ur use of [online] space is similar to our uses of physical world space."). Dan Hunter explained one theory of how individuals transpose understandings and uses of the physical world into the online world:

> We promenade along the public spaces. We explore frontier regions, urban neighborhoods, and imaginary worlds. We name the spaces we inhabit with titles that reflect our personality or the usage of the space: chatrooms are called "the Flirt's Nook" or "StarFleet Academy" and the like. [Some] physical spaces [are] being directly "moved" into the online environment. These range[] from schools to stock exchanges to prisons.

Id.

In fact, the Supreme Court's decision in *Marsh v. Alabama*[145] supports this argument. In *Marsh*, the Supreme Court decided whether a company-owned town should be considered a state actor that must comply with the requirements of the First and Fourteenth Amendments.[146] The Court emphasized that, except as to ownership, the corporation's town carried out the functions of a public town; thus, it must comply with due process and could not restrict fundamental liberties.[147] Justice Frankfurter, in his concurrence, stated: "[A] company-owned town is a town. In its community aspects it does not differ from other towns. These community aspects are decisive in adjusting the relations . . . before [the Court]."[148] Just as the privately owned town's design and use as a public town resulted in the Court's viewing the town as a state actor, the design, use, and perception of the internet as a place supports the argument that cyberspace is a place.

As noted in Part III, the circuits are split on whether a place of public accommodation is limited to a physical place. This split enables courts to recognize that Title III applies to cyberspace as a place under the Act. This interpretation would require all businesses with websites to make reasonable accommodations to the disabled, fulfilling the purpose of Title III to provide disabled individuals with equal access to mainstream society.[149] Furthermore, the courts would avoid problems inherent in the nexus approach: Businesses will not be inclined to escape Title III liability by moving all their operations online or by separating their online business from the business of the physical entity.[150]

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145. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946) (concluding that a state cannot permit a corporate-owned community to restrict fundamental liberties).

146. *See id.* at 502 ("In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management.").

147. *See id.* at 509 (discussing the public function doctrine). The Court concluded that:

> [T]he circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute.

Id.

148. *Id.* at 510–11 (Frankfurter, J., concurring).

149. *See* Heller, *supra* note 36, at 12 (stating that "[the ADA] will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream").

150. *See supra* Part V (discussing why the nexus approach can have dire consequences).

VIII. Reasons for Courts' Reluctance to Address Issue Unjustified

This Note argues that courts should interpret place to include websites. Even if courts are willing to concede this point, however, there still remain challenges to application of Title III to the online world. Courts are reluctant to analyze whether the internet could be a place for three main reasons: (1) they believe it would be too difficult to apply Title III to the online world;[151] (2) they question the feasibility of making websites accessible to the disabled;[152] and (3) they do not want to impinge on the power of Congress.[153] As the next three subparts show, these fears are unjustified and do not excuse the courts' reluctance to determine whether the internet deserves Title III coverage as a place of public accommodation.

A. Applying Title III to the Internet Would Require Standard Judicial Analysis

First, applying Title III to the internet would require standard judicial tools of interpretation and application. Assuming that a website is a place, a court would have to determine whether it is a public accommodation that affects interstate commerce.[154] Courts must perform this same analysis with any public accommodation. A website's status as a nonphysical place does not necessarily imply that this analysis will be more difficult. Just as a court would look to the revenue and customers targeted by a business to determine whether the business affects interstate commerce, a court would look to similar factors of the website.[155] For example, a court could take into account the number of hits

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151. *See* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321–22 n.13 (S.D. Fla. 2002) ("[Because] of the rapidly developing technology at issue, and the lack of well-defined standards for bringing a virtually infinite number of Internet websites into compliance with the ADA, a precondition for taking the ADA into 'virtual' space is a meaningful input from all interested parties via the legislative process.").

152. *See id.* at 1314–15 (discussing that various assistive technologies and accessibility guidelines exist, but that there seems to be no generally accepted technology or standard creating "a situation where the ability of a visually impaired individual to access a website depends upon the particular assistive software program being used and the particular website being visited").

153. *See id.* at 1321–22 n.13 ("As Congress has created the statutorily defined rights under the ADA, it is the role of Congress, and not this Court, to specifically expand the ADA's definition of 'public accommodation' beyond physical, concrete places of public accommodation, to include 'virtual' places of public accommodation.").

154. *See* 42 U.S.C. § 12181(7) (2000) (defining a public accommodation as a private entity that affects commerce).

155. *See* Goldfarb, *supra* note 14, at 1335 ("Many non-retail and non-commercial websites

on the website, whether the website targets customers in several states, and the extent of advertising done on the website. A website would also have to be open to the public.[156] Thus, just as a business in a physical place that directs itself only to other businesses would not be considered a public accommodation required to make its store accessible, a website targeted to businesses would also be exempt from Title III coverage.[157] The concern that it may be difficult to apply Title III to websites is also not justified in light of the use of the nexus approach. As discussed in Part V, applying the nexus approach does not facilitate the determination of liability under Title III.

B. Public Sector and International Arena: It is Feasible to Make Websites Accessible

Second, making websites accessible to persons with disabilities is feasible and would not be as difficult to implement as the courts seem to think. The enactment of Section 508 of the Rehabilitation Act, which requires all federal websites to be accessible to persons with disabilities,[158] demonstrates that it is possible to make websites accessible to the disabled. Congress charged the federal Architectural and Transportation Barriers Compliance Board (Board) with developing technical accessibility standards for Electronic and Information Technology (E&IT).[159] The Board promulgated regulations setting the standard of accessibility required for websites.[160] These accessibility standards do not

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that are either personal in nature or merely provide information would arguably not satisfy [the requirements under the Commerce Clause].").

156. *See* 28 C.F.R. pt. 36, app. B. (2007) (exempting entities that are not "open to the public" from the requirements of Title III).

157. *See id.* (clarifying the application of Title III to "wholesale establishments"). The Department of Justice regulations state:

> The Department intends for wholesale establishments to be covered under this category as places of public accommodation except in cases where they sell exclusively to other businesses and not to individuals. For example, a company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these transactions.

Id.

158. 29 U.S.C. § 794d(a)(1) (2000); *see* 36 C.F.R. § 1194 (2007) (requiring that federal agencies make electronic and information technology accessible to individuals with disabilities).

159. *See* 29 U.S.C. § 794d(a)(2) (2000) (stating that the Board "shall issue and publish standards setting forth . . . the technical and functional performance criteria necessary to implement the requirements [for accessibility to individuals with disabilities]").

160. *See* 36 C.F.R. § 1194.22 (2007) (stating sixteen criteria that federal websites must comply with to have an accessible website).

require significant changes to a website, but primarily consist of having the website designer clearly identify images and links on the web page.[161] Section 508 also applies to contractors who are working under contract with a federal agency.[162] The fact that all federal agencies, and the great number of contractors who contract with the government, must create websites that are accessible to the disabled demonstrates that implementing a working standard for accessibility is possible.

Moreover, the international context demonstrates that private websites can be made accessible to the disabled.[163] The most notable case requiring private websites offering public services to be accessible is *Maguire v. Sydney*

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161. *See, e.g., id.* ("(a) A text equivalent for every non-text element shall be provided (e.g., via "alt," "longdesc," or in element content)."); U.S. Dep't of Justice, Accessibility of State and Local Government Websites to People with Disabilities (2003), http://www.usdoj.gov/crt/ada/websites2.htm (last visited Feb. 16, 2008) [hereinafter Dep't of Justice Accessibility Guidance] (providing a specific example of a website that complies with Section 508) (on file with the Washington and Lee Law Review). The Department of Justice gives some guidance on how to make a website accessible:

> 1. When navigation links are used, people who use a screen reader must listen to all the links before proceeding. A skip navigation link provides a way to bypass the row of navigation links by jumping to the start of the web page content.
>
> 2. All images and graphics need to have an alt tag or long description.
>
> 3. Use alt tags for image maps and for graphics associated with the image map so that a person using a screen reader will have access to the links and information. . . .
>
> 4. Some photos and images contain content that cannot be described with the limited text of an alt tag. Using a long description tag provides a way to have as much text as necessary to explain the image so it is accessible to a person using a screen reader but not visible on the web page.
>
> 5. Text links do not require any additional information or description if the text clearly indicates what the link is supposed to do. Links such as "click here" may confuse a user.
>
> 6. When tables with header and row identifiers are used to display information or data, the header and row information should be associated with each data cell by using HTML so a person using a screen reader can understand the information.
>
> 7. A link with contact information provides a way for users to request accessible services or to make suggestions.

Id.

162. *See* 36 C.F.R. § 1194.2 (2007) (requiring application of accessibility standards to E&IT "developed, procured, maintained, or used by agencies directly or used by a contractor under a contract with an agency which requires the use of such product, or requires the use, to a significant extent, of such product in the performance of a service or the furnishing of a product").

163. *See* JIM THATCHER ET AL., WEB ACCESSIBILITY: WEB STANDARDS AND REGULATORY COMPLIANCE 547–80 (2006) (discussing worldwide initiatives for accessibility on the internet for the disabled); King, *supra* note 11, at 68–75 (providing an overview of international policies related to internet accessibility).

Organising Committee for the Olympic Games (SOCOG).[164] In *Maguire*, the plaintiff, Bruce Maguire, complained that the websites for the Sydney 2000 Olympic Games were not accessible and thus discriminated against him on the basis of his disability.[165] Australia has disability discrimination statutes that contain language very similar to Title III.[166] "Like Title III of the ADA, Australia's disability discrimination statute prohibits disability discrimination by facilities that provide services, including entertainment and recreation services, and makes no reference to the Internet or websites."[167] Nevertheless, the Australian Human Rights and Equal Opportunity Commission found that its statute covered private websites and thus held that SOCOG discriminated against Maguire when it did not make its website accessible.[168]

Australia is the leader in mandating that private websites be accessible to individuals with disabilities.[169] Several other countries, however, such as

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164. *See* King, *supra* note 11, at 71–74 (describing the much publicized *SOCOG* case illustrating that Australia requires private websites to be accessible to persons with disabilities).

165. *See* Maguire v. Sydney Org. Comm. for the Olympic Games (SOCOG), Australian Human Rights and Equal Opportunity Comm'n, No. H 99/115, Aug. 24, 2000, *available at* http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm (last visited Feb. 17, 2008) (determining that SOCOG's website discriminated against the plaintiff because it was inaccessible) (on file with the Washington and Lee Law Review).

166. *See* King, *supra* note 11, at 72–73 (noting the similarities between Title III of the ADA and the Australian discrimination statutes). Section 24 of the Australian Disability Discrimination Act of 1992 (hereinafter DDA) provides:

> (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's disability . . . (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.
>
> (2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available, would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

DDA, 1992, § 24 (Austl.), *available at* http://scaleplus.law. gov.au/html/pasteact/0/311/top.htm. Section 4 of the DDA defines "services" to include "services relating to entertainment, recreation or refreshment." *Id.* § 4.

167. King, *supra* note 11, at 72–73.

168. *See Maguire*, ("[C]omplainant was clearly the recipient of less favourable treatment by the respondent in that he was unable to access the services offered by the respondent by means of its web site . . . .").

169. *See* King, *supra* note 11, at 75 ("[A]lthough Australia is clearly the international leader having mandated accessible customer websites under its disability discrimination law, an

Canada, Portugal, and the United Kingdom, "have issued policy statements that encourage accessible website design by government and/or commercial websites" or have been subscribing to international web accessibility guidelines.[170] For example, the United Kingdom strives to achieve equality for disabled individuals and proactively tests websites for accessibility.[171] Websites that are found not to be in compliance with the law face legal action if they do not make their websites accessible.[172]

C. Modifications to Websites Subject to Reasonableness Standard

Third, because making websites accessible is technically and financially feasible, implementing standards to make websites accessible to the disabled for most websites would not be an undue burden. The ADA requires only reasonable modifications to ensure that disabled individuals are not excluded from or treated differently with respect to access to "goods, services, facilities, privileges, advantages, or accommodations."[173] In order to make websites accessible, a private entity would have to modify its website to be compatible with assistive technologies.[174] A screen reader is an example of an assistive

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international move toward accessibility is also evident.").

170. *Id.* at 69.

171. *See generally* Disability Rights Comm'n, *The Web Access and Inclusion for Disabled People* (2004), *available at* http://83.137.212.42/sitearchive/DRC/PDF/2.pdf (last visited Feb. 17, 2008) (reporting the results of a formal investigation into web accessibility compliance) (on file with the Washington and Lee Law Review).

172. *See id.* at v (noting that vigorous enforcement of website accessibility requirements will ensue if businesses are not complying with the DDA).

173. 42 U.S.C. § 12182(b)(2)(A) (2000).

> Discrimination includes . . . (ii) [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, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

Id.; *see also* Evgenia Fkiaras, *Liability Under the Americans with Disabilities Act for Private Web Site Operators*, 2 SHIDLER J.L. COM. & TECH. 6, ¶ 6 (2005), http://www.lctjounal.washington.edu/Vol2/a006Fkiaras.html ("[T]he ADA requires compliance only insofar as it does not create an 'undue burden' on a business, an issue that has not been addressed by the courts with regard to its relevance to websites.").

174. *See* Laura Michelle Stewart, Student Comment, *Take Flight by Cyber-Sight: The Failure of Courts to Require the Americans With Disabilities Act Title III Public Accommodations Provision to Govern Public Places Such as an Airline's Website*, 30 U. DAYTON L. REV. 275, 292 (2004) ("Requiring a business like Southwest to alter or modify its website to provide adequate technology compatible with screen readers does not place an undue

technology; it converts a website's text to voice or Braille, permitting an individual to understand what is being shown on the screen.[175] Private entities can also benefit from the standards set out in Section 508 of the Rehabilitation Act and use these same regulations to make their websites accessible.[176] The Web Accessibility Initiative (WAI) has also set out more specific guidelines on making a website accessible.[177] The WAI is a subgroup of the World Wide Web Consortium, an organization that "standardizes the programming language followed by all web developers."[178] This organization describes in detail the essential components of web site accessibility, in addition to providing many tips on how a web designer can easily adjust its website.[179]

Moreover, making a website accessible saves an entity costs in the long run and increases the activity and income-generating potential of the website.[180] The WAI demonstrates that making a website accessible is beneficial. If implemented early, developing an accessible site for the blind does not add significant costs to the process and, in some circumstances, it can even reduce the cost of updating or maintaining websites.[181] Opening up a website to the millions of disabled individuals will also increase the range of customers that will be able to use the website.[182] These guidelines are "abstract enough to keep up with technological advances on the internet and to remain stable over extended periods of time making them cost efficient."[183]

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burden on the company or require a fundamental alteration of its website.").

175. *See id.* at 275 n.2 ("Blind individuals use technology developed by a number of computer companies called screen readers which either convert the text on a website to voice or to Braille to allow them to get the same information off the site that a sighted individual can.").

176. *See* Dep't of Justice Accessibility Guidance, *supra* note 161 (providing examples of modifications that would create an accessible website).

177. *Id.*

178. *Id.*

179. *See id.* ("A more comprehensive resource is the Web Content Accessibility Guidelines developed by the Web Accessibility Initiative. These guidelines help designers make web pages as accessible as possible to the widest range of users, including users with disabilities.").

180. *See* Web Accessibility Initiative, Financial Factors in Developing a Web Accessibility Business Case for Your Organization (2005), http://www.w3.org/WAI/bcase/fin.html (last visited Feb. 16, 2008) (discussing the cost-effectiveness of making a website accessible to the disabled) (on file with the Washington and Lee Law Review).

181. *Id.*

182. *See id.* ("Web accessibility can make it easier for people to find a Web site, access it, and use it successfully, thus resulting in increased audience (more users) and increased effectiveness (more use).").

183. Stewart, *supra* note 174, at 292.

Furthermore, private entities with websites that would suffer an undue burden in making their websites accessible would not be forced into making changes under the Act.[184] "Undue burden means significant difficulty or expense."[185] The Department of Justice regulations set out several factors to consider in the determination of an undue burden, including the cost and impact of the modification necessary to comply with the Act.[186] Worries that a business will be driven to financial ruin if forced to comply with Title III are thus unjustified.

D. Courts Empowered to Apply Title III to Websites

The reluctance of the courts to impinge on the powers of Congress is the other primary source of judicial unwillingness to address this issue. The *Access Now* court noted that "[a]s Congress has created the statutorily defined rights under the ADA, it is the role of Congress, and not this Court, to specifically expand the ADA's definition of 'public accommodation' beyond physical, concrete places of public accommodation, to include 'virtual' places of public accommodation."[187] This statement assumes a place of public accommodation

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184. *See* 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (providing that reasonable modifications must be made to accommodate individuals with disabilities unless such modifications "would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden").

185. 28 C.F.R. § 36.104 (2007).

186. *Id.* The Department of Justice put forth the following factors to consider in an undue burden analysis:

> (1) The nature and cost of the action needed under this part;
>
> (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
>
> (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
>
> (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Id.

187. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321–22 n.13 (S.D. Fla. 2002).

is limited to a physical place. Only if Congress has limited a public accommodation to a physical place, however, would the application of Title III to the internet be an expansion of the definition that could possibly impinge on the role of Congress. The circuit split on that issue demonstrates that such a conclusion is not so clear.[188] Thus, by finding that Title III applies to the internet, a court would not be expanding the definition of public accommodation, but would simply be interpreting the term to include the internet. As noted in subpart A, interpretation is a standard judicial tool. Courts would not be creating new rights or responsibilities, but would simply be fulfilling the purposes of Title III without contradicting any specific language of the statute limiting a public accommodation to a physical place.

IX. Why the Courts?

The courts' fears are unwarranted. It is essential then that the courts take action to carry through the purposes of Title III and require that all websites that fall under the purview of the Act be made accessible. The courts, and not Congress, are capable and better suited for applying Title III to the constantly changing technological world.

First, although Congress could specify that the internet is a place of public accommodation under the Act, such precise definition is neither necessary nor recommended. As discussed in Part III, there is room for interpretation in the Act to find that Title III covers the internet. Moreover, as can be seen with the development of virtual worlds, the online world is constantly changing.[189] Any specific definition of what online entities should be covered would only result in more confusion as the technological landscape continues to evolve.[190]

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188. *See supra* Part III (discussing how circuits are split on whether Title III applies only to physical places).

189. *See supra* Part II.A (noting the great expansion of virtual worlds).

190. *See The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Oversight Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 28, 30 (2000) (statement of Dennis C. Hayes, Chairman, U.S. Internet Industry Association). Mr. Hayes noted:

> [T]he application of the ADA to the Internet in some kind of "one-size-fits-all" mandate is not the right approach [ ]:
>
> 1) The Internet is an evolving media, not a physical structure. And it is a dynamic media that is changing at a rate that is not well suited to the regulatory style of the last century. If we apply regulations based on the technologies and possibilities of today, we may in fact limit the development of better access tools simply because we couldn't conceive of them when the regulation was drafted.
>
> 2) The variety of disabilities [are] too broad to address in a single piece of

Determining the applicability of Title III to the online world will require a case-by-case analysis, adjusted over time according to the different online landscapes, technologies developed, and costs required to facilitate accessibility.[191] For example, it is currently difficult to imagine how virtual worlds can be made accessible to the blind. Thus, if Congress were to exclude virtual worlds from coverage, but then technology develops in a few years that enables the disabled to access the virtual worlds, Congress would have to revisit this issue. The current setup of the Act, which requires only "reasonable modifications" and takes into account the burden of change on private entities, is flexible and courts can better address the evolving concepts of a place of public accommodation.[192]

Second, businesses and disabled individuals alike will suffer if they must continue to wait for Congress to act. If the courts continue to wait for Congress to take action on an issue that is within the courts' capacity to address, many businesses will continue to expand upon websites that are not accessible. If and when Congress does act, these businesses will incur more significant costs to repair their more expansive websites than they would have if they had made their websites accessible at an earlier stage.[193] Furthermore, if the courts recognize that Title III is applicable to websites, new internet businesses will create websites that are accessible from the outset, saving both time and money.

On this issue, which the courts are fully capable of addressing, waiting for Congress to speak up would mean that inaccessible websites may bar

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> legislation. Attempting to define how accessibility should work for the visually-impaired will do little for the hearing-impaired, or the physically handicapped, or the cognitively challenged. Meeting the needs of some at the expense of others may be worse than no change at all.

Id.

191. *See* Schloss, *supra* note 29, at 54 ("[T]he determination of whether a particular modification is 'reasonable' 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."); *see also* Fairfield, *supra* note 26, at 10, 45–46 (noting that the common law—"a method of iterative, incremental, experimental judicial decision-making"—will make "[l]imited decisions governing limited cases [that] make for a humble and constrained body of law that does not have large spillover effects in networked systems").

192. *See* Schloss, *supra* note 29, at 50–55 (describing factors a court considers to determine whether a modification is reasonable); *see also* Fairfield, *supra* note 26, at 45 (noting that judges are more adept at solving "emerging technological issues").

193. *See* Symposium, *The Internet: Place, Property, or Thing—All or None of the Above?*, 55 MERCER L. REV. 867, 887–89 (2003) (commenting that the cost of making a website is greater when a business has to fix its website than when it creates a website that is accessible at the outset).

individuals with disabilities from ever fully participating in the modern world. Congress held a day-long hearing in February of 2000 on the applicability of the ADA to private internet sites.[194] Various entities discussed the precise issue of whether the ADA applied to private internet websites.[195] Nevertheless, eight years have passed since the hearing and still, no action has been taken.[196] The courts should recognize that they are capable and empowered to require that websites comply with the ADA. It is not necessary to wait until the disabled are fully cut off from the technological world in order to require the equality that Title III promises.

X. Conclusion

The online world has an ever-increasing presence in the daily lives of Americans. Unfortunately, although the internet enriches the lives of many as a source of entertainment while also facilitating purchases, research, and the acquisition of information, courts have yet to demand that disabled individuals have equal access to these advantages of modern society. Congress enacted Title III to enhance participation of disabled individuals in equal respects to the nondisabled. Had the internet existed at the time of the Act's enactment, Congress surely would have required that Title III apply to websites. Nevertheless, the wording of the Act does not preclude application to the online world.

In the two cases that have had the opportunity to address the applicability of Title III to the online world, the plaintiffs failed to argue that the internet is a place. Regardless of whether a website is a space where one can visit in person, cyberspace was designed to resemble a place, is used as a place, and individuals perceive cyberspace as a place. The concept of a place is a social construct that is capable of change as the world we live in continues to evolve. To adhere to the purpose of Title III, courts must require that all websites that affect interstate commerce make reasonable accommodations so that the disabled may access private websites. Applying the nexus approach does not sufficiently fulfill the purposes of Title III. Courts must act and recognize the significance of the online world and the potential of excluding disabled

194. *See id.* at 892 (noting that the House Judiciary Committee held a day-long hearing where representatives from Internet businesses, advocates for the disabled, and technical experts, commented on the applicability of the ADA to private internet websites).

195. *Id.*

196. *See id.* ("From a legal matter . . . [those who testified at the House Judiciary Committee hearing] debated the exact same things that we have debated here today: Should [Title III] apply [to the internet]? Nothing has happened.").

individuals from an essential part of society, a consequence that Congress sought to prevent with the enactment of Title III. Waiting for Congress to act when such action is not necessary or desirable will not only result in more costs to businesses in the long run, but will also increase the isolation and separateness of disabled individuals in our society.