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Katherine Rengel

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COMMENT

THE AMERICANS WITH DISABILITIES ACT AND INTERNET ACCESSIBILITY FOR THE BLIND

KATHERINE RENGEL

I. INTRODUCTION

“The Internet is not just a window on the world, but more and more the Internet is the world. It is where we talk, it is where we shop, and it is where we make our living.”¹ Gary Wunder, a visually impaired American, spoke these words while advocating for Internet accessibility for the blind at the 2000 House Judiciary Hearing on the Americans with Disabilities Act (“ADA”) and the Internet.² While most Americans are accustomed to constant access to the Internet, Mr. Wunder, like millions of other visually impaired Americans, is unable to access an estimated ninety-eight percent of Internet Web sites because they are not designed to be accessible to the visually impaired.³ Dubbed the “digital divide,” the inability for blind Internet users to access Web sites has excluded

1. *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the H.R. Subcomm. on Constitution Of the H. Comm. on the Judiciary*, 106th Cong. 16 (2000) [hereinafter *Hearing on the ADA and the Internet*] (stating testimony of Gary Wunder, advocate for visually impaired Americans).

2. *Id.* (declaring that visually impaired individuals are not the only ones who are suffering because they cannot access the Internet; however, the scope of this article is limited to Internet accessibility for the blind); see New York City Bar Ass’n, *Web site Accessibility for People with Disabilities*, 62 *THE REC.* 118, 119 (2007) Those with dyslexia also know the [d]ifficulties of accessing Web sites . . . without features necessary to use audible screen reading technology; those with hearing impairments know the frustration of trying to navigate a Web site that relies on audible cues and lacks accompanying textual cues; and those with limited manual dexterity know the hardship of trying to access computer functions designed to require more dexterity than these individuals possess.

3. Michael O. Finnigan, Jr., Brian C. Griffith & Heather M. Lutz, *Comment and Case-note: Accommodating Cyberspace: Application of the Americans With Disabilities Act to the Internet*, 75 *U. CIN. L. REV.* 1795 (2007); Jeffrey Scott Ranen, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 *B.C. THIRD WORLD L.J.* 389, 390 (2002).

visually impaired Americans from a major part of American life.⁴

Access to the Internet is an integral part of the lives of most Americans. One study suggests that almost seventy percent of Americans are using the Internet regularly.⁵ Internet use has exploded with popularity, more than doubling in the past seven years, increasing from ninety-five million users in 2000 to over 210 million users in 2007.⁶ The Internet's popularity is particularly evident in the realm of online shopping.⁷ A great many Americans have replaced traditional retail shopping with online shopping.⁸ Studies have suggested that online retail spending has accounted for one-third to almost forty percent of total retail spending in the United States,⁹ and that Internet commerce is predicted to grow at an estimated nineteen percent annually.¹⁰

The explosion in popularity of online shopping is not surprising given the increased benefits and convenience that online shopping provides customers when compared to shopping in physical retail stores. Online shopping is far more efficient than traditional shopping.¹¹ The Internet allows customers to search for an item, access information about the item, compare prices, and purchase the item in seconds, with the click of a mouse. More importantly, customers are able to do all of

4. See Finnigan, *supra* note 3 (proposing that the "digital divide" is a result of the transition from text-based Web sites to graphic-based Web sites with multimedia functions); see also Richard E. Moberly, *The Americans With Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Web sites*, 55 MERCER L. REV. 963 (2004).

5. Kenneth Kronstadt, *Looking Behind the Curtain: Applying Title III of the Americans With Disabilities Act to the Businesses Behind Commercial Web sites*, 81 S. CAL. L. REV. 111, 134 (2007).

6. *Id.*

7. *Id.* at 134-35 (noting that Internet use for higher education is skyrocketing). One study estimates that enrollment for online higher education could rise to over twenty-five percent in the next ten years.

8. Chuleeporn Changchit, Shawn J. Douthit & Benjamin Hoffmeyer, *Online Shopping: What Factors Are Important to Shoppers?*, J. ACAD. BUS. & ECON., (March 2005), available at http://findarticles.com/p/articles/mi_m0OGT/is_3_5/ai_n16619676 (defining online shopping as "a computer activity/exchange performed by a consumer via a computer based interface, where the consumer's computer is connected to, and can interact with, a retailer's digital storefront through a network.")

9. Kronstadt, *supra* note 5, at 134; see also Mary Wolfenbarger & Mary Gilly, *Shopping Online For Freedom, Control and Fun*, http://www.csulb.edu/~mwolfin/Freedom_Control_Fun.pdf (last visited Mar. 24, 2008) (citing a Forrester Research study that projects that by 2010, one third of purchases in many retail categories will be online purchases).

10. National Retail Federation: Shop.org, *Statistics: International Shopper*, http://www.shop.org/learn/stats_intshop_general.asp (last visited Mar. 24, 2008).

11. M/Cyclopedia of New Media, *Online Shopping - Benefits for Buyers*, http://wiki.media-culture.org.au/index.php/Online_Shopping_-_Benefits_for_Buyers (last visited Mar. 24, 2006) (citing a 2003 study by M2 Presswire that showed that shoppers were able to complete their Christmas shopping four to six times faster online as opposed to shopping in traditional, physical stores).

this without having to leave their home or office.¹² Web sites also provide a larger variety of goods at lower costs than traditional retail stores,¹³ and customers can conveniently shop at anytime, day or night.¹⁴

The National Federation of the Blind (“NFB”),¹⁵ and other proponents of blind Internet accessibility argue that inaccessible Web sites not only put blind people at a social and economic disadvantage, but they are also illegal.¹⁶ Advocates argue that inaccessible Web sites violate the Americans with Disabilities Act (“ADA”), which requires that “places of public accommodation” are reasonably accessible to the disabled.¹⁷ Some examples of places of public accommodation that the ADA gives, include: restaurants, theaters, shopping centers, travel services, parks, museums, and gymnasiums.¹⁸

Although the ADA does not specifically mention the Internet, some advocates for the blind argue that the ADA should apply to Web sites.¹⁹ The purpose of the ADA is to, “bring individuals with disabilities into the

12. See Changchit, *supra* note 8.

13. *Online Shopping – Benefits for Buyers*, *supra* note 11 (pointing out that Web sites are able to offer a larger variety of goods because they are not confined by the limitations on physical space that retail stores encounter). In addition, Web sites can offer goods at cheaper prices because buyers purchase directly from the supplier. This eliminates retail overhead and distribution costs. Studies have found that online prices are on average, six to sixteen percent lower than off-line prices. *Id.*

14. *Online Shopping – Benefits for Buyers*, *supra* note 11.

15. National Federation of the Blind Homepage, <http://www.nfb.org> (stating that the National Federation of the Blind (“NFB”) is the largest membership organization of blind people in the United States with more than 50,000 members in all fifty states). The NFB considers itself the “voice of the nation’s blind.” The NFB is dedicated to improving blind people’s lives by protecting their civil rights and fighting for equality. *Id.*

16. NCD, *Position Paper: When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web* (July 10, 2003), <http://www.ncd.gov/newsroom/publications/2003/adainternet.htm> [hereinafter *When the Americans with Disabilities Act Goes Online*]; Moberly, *supra* note 4, at 964; Ranen, *supra* note 3, at 415-417.

17. 42 U.S.C. § 12182(a) (1990) (entitled “Prohibition of Discrimination by Public Accommodations”); *Access Now v. Southwest Airlines*, 227 F. Supp 2d 1312, 1316 (S.D. Fla. 2002); *When the Americans with Disabilities Act Goes Online*, *supra* note 16; Moberly, *supra* note 4, at 965-66; see also Isabel Arana DuPree, *Recent Development: Web sites as “Places of Public Accommodation”: Amending the Americans with Disabilities Act in the Wake of National Federation of the Blind v. Target Corporation*, 8 N.C. J.L. & TECH 373, 276 (2007) (explaining that “[b]y enacting the ADA, Congress intended to provide enforceable standards to address discrimination against the disabled in these areas, and to vest the enforcement role in the Federal Government.”)

18. 42 U.S.C. § 12181(7) (1990).

19. 42 U.S.C. § 12181 et seq (1990); Anita Ramasastry, *Should Web-only Businesses Be Required to Be Disabled-Accessible?*, <http://www.cnn.com/2002/LAW/11/07/findlaw.analysis.ramasastry.disabled/index.html> (Nov. 7, 2002) (explaining that Web sites should be included in the ADA because it applies to “other service establishments”); Moberly, *supra*

economic and social mainstream of American life,” which is frustrated by the fact that blind individuals are unable to access the Internet and other non-physical services.²⁰ Since the enactment of the ADA, the Internet has become a major part of Americans’ daily lives.²¹ Advocates conclude that in order to advance the purpose of the ADA, Web sites should be required to comply with such ADA standards.²²

On March 9, 2006, the NFB tested its cause in federal court in the case of *NFB v. Target*.²³ The NFB sought a class action lawsuit against Target Corporation (“Target”) on behalf of visually disabled Americans, who are unable to shop at Target.com, Target’s online store.²⁴ The NFB argued that Target.com violated Title III of the ADA because it is inaccessible to the blind.²⁵ Target filed a motion to dismiss the claim, arguing that the plaintiffs failed to state a cause of action because the ADA does not apply to Internet Web sites.²⁶

On September 6, 2006, Federal District Court Judge Marilyn Hall Patel, denied Target’s motion to dismiss, finding that the NFB had a valid Title III action against Target for violating the ADA by operating an inaccessible Internet site.²⁷ For the first time in history, a court determined that ADA regulations applied to a private commercial Web site.²⁸ In her opinion, Judge Patel noted that “the purpose of the statute is broader than mere physical access – seeking to bar actions or omissions which impair a disabled person’s ‘full enjoyment’ of services or goods of a covered accommodation.”²⁹

note 4, at 971; Sarah Lacey, *For the Blind, a Welcoming Web* (Oct. 27, 2004), <http://nfb.org/legacy/bm/bm05/bm0501/bm050109.htm>.

20. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994); Moberly, *supra* note 4, at 971-73.

21. Kronstadt, *supra* note 5, at 134-35.

22. Moberly, *supra* note 4, at 971-73.

23. 452 F. Supp. 2d 946 (N.D. Cal 2006).

24. *Nat’l. Fed’n. of the Blind v. Target Corp.*, 452 F. Supp. 2d at 949 (explaining that Target.com is a Web site owned and operated by Target. Through this Web site, among other options, customers can purchase items, access store information such as location and hours of operation, refill a prescription, order pre-order photos to be picked up at a Target store, and access and print coupons redeemable in Target stores).

25. *Target*, 952 F. Supp. 2d at 949 (explaining that the NFB alleged many violations of the ADA in its complaint against Target). For example, the NFB shows that Target.com’s lack of alternative text prevents screen readers from describing them to blind users. A mouse is required for purchases because the keyboard controls do not work. The image maps are inaccessible and headings are missing that are necessary to navigate through the page using a screen-reading device. The NFB also included that Target.com violates two California statutes: the Unruh Civil Rights Act and the Californian Disabled Person Act.

26. *Id.* at 949.

27. *Id.* at 956.

28. *Id.*

29. *Id.* at 954.

On October 2, 2007, Judge Patel issued another landmark order in the *Target* case.³⁰ Judge Patel certified a national class action on behalf of blind Internet users throughout the country under the ADA.³¹ The class consists of “all legally blind individuals in the United States who have attempted to access Target.com and as a result have been denied access to the enjoyment of goods and services offered in Target stores.”³² This monumental class action is pending trial.³³

Advocates for the blind believe Judge Patel’s opinion was a great victory and could be the gateway to ADA applicability to the Internet in general.³⁴ Mazen Basrawi, Equal Justice Works Fellow and the NFB’s attorney in the action against Target said, “If a pure [I]nternet business looked at this case and said ‘we’re off the hook’, they’re greatly mis-

30. *NFB v. Target*, No. C 06-1802 (N.D. Cal. Oct. 2, 2007), available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2006cv01802/177622/149/> [hereinafter *Certification for Class Action in NFB v. Target Case*].

31. *Id.* In order to attain a class certification, the plaintiff has the burden of satisfying both the four part test for class certification under Rule 23(a) of the Federal Rules of Civil Procedure, as well as, one of the three requirements in Rule 23(b). Rule 23(a) requires that a plaintiff establish “(1) that the class is so large that joinder of all members is impracticable (i.e., numerosity); (2) that there are one or more questions of law or fact common to the class (i.e., commonality); (3) that the named parties’ claims are typical of the class (i.e., typicality); (4) that the class representatives will fairly and adequately protect the interests of other members of the class (i.e., adequacy of representation).” Rule 23(b)(2) “permits class actions for declaratory or injunctive relief where the party opposing the class ‘has acted or refused to act on grounds generally applicable to the class.’” *Id.* at 4. The court held that the plaintiffs met its burden of establishing a class action is proper under Rule 23. *Id.* at 23.

32. *Id.* (additionally finding that Plaintiff, Bruce Sexton, did not qualify as member of the nationwide class because he failed to demonstrate that he suffered a legally cognizable injury). Sexton submitted declarations describing the difficulties he has experienced due to the inaccessibility of Target.com for visually impaired Internet users. He explained that he frequently “pre-shops” on stores’ Web sites before physically shopping, and his inability to do this before shopping at Target stores has cost him time and money. Sexton also cited that he has been unable to access the online advertisements that Target.com offers for use in the stores. The Court found that these inconveniences are not enough to establish that Sexton has suffered a legally cognizable injury. It reasons that Sexton’s declarations have not established “how his difficulties with the Target.com Web site have impeded his access to the goods and services in the store.” The Court pointed out that Sexton’s experiences could qualify under the class definition if he incurred increased expense and time from the inability to access Target.com completely. Although Sexton had to hire a driver and arrange for a companion to escort him to the Target store, he did not establish that these costs and time resulted from the inability to access Target.com. *Id.* at 24-25.

33. *Id.*

34. Dralegal.org, *Disability Rights Advocates Case: NFB v. Target National Federation of the Blind v. Target: Legal Precedent Set for Web Accessibility*, http://www.dralegal.org/cases/private_business/nfb_v_target.php (last visited Mar. 26, 2008); Out-Law.com, *Target Lawsuit Tests Limits of US Web Accessibility Law*, <http://www.out-law.com/page-7285> (Dec. 9, 2006).

taken.”³⁵ Basrawi as well as members of the NFB are optimistic that “the day of the ADA’s application to all Web sites could come.”³⁶

Although advocates herald the *NFB v. Target* opinion as a giant step towards applying the ADA to Internet Web sites,³⁷ the reality is that Judge Patel’s order is a limited, fact-specific holding.³⁸ Contrary to the NFB optimistic interpretation, the opinion concludes that Target.com is only subject to ADA standards if a court finds that the Web site’s inaccessibility impedes blind Internet users from equal enjoyment of the goods and services of Target’s physical retail stores.³⁹ The opinion establishes there must be a “nexus” between the Web site and a physical store.⁴⁰ In the absence of such a nexus, Target.com need not comply with ADA regulations.⁴¹

This comment analyzes the current debate over Internet accessibility for the blind in light of the pending *Target* case. Part II provides background on the ADA and blind Internet and gives a brief overview of the Department of Justice and court interpretations of the ADA. Part III begins by providing a textual analysis of the language of Title III of the ADA, explaining that although the stated purpose of the statute is broad, the statutory language limits court interpretations to physical places of public accommodation. Part III presents an in-depth analysis of case law regarding the ADA’s applicability to the Internet and establishes that the majority of courts have adopted the “nexus requirement” approach, which requires that there be a connection between the Web site and a physical place of public accommodation for the ADA to apply to the Web site. Finally, Part III argues that the “nexus requirement” is an arbitrary requirement, developed by the courts to promote the public policy favoring Internet accessibility for the blind by fitting an intangible entity into a statute that is limited to physical entities. Part IV proposes an amendment to the ADA which would require that all Web sites make

35. Out-Law.com, *supra* note 34.

36. *Id.*

37. Dralegal.org, *supra* note 34.

38. DuPree, *supra* note 17, at 290 (finding that the Target opinion is “limited to cases where the Web site offers information and services connected to storefronts). Based on the required connection, it seems an online-only retailer would not be vulnerable to a Title III action against its Web site.” *Id.* at 292.

39. *Target*, 952 F. Supp. 2d at 956.

40. *Target*, 952 F. Supp. 2d at 952. Although this opinion follows the Ninth Circuit precedent requiring a “nexus” to a traditional “place of public accommodation,” the opinion is very significant in that it is the first time the ADA could apply to the Internet as a service of a place of public accommodation under Title III.

41. *Target*, 952 F. Supp. 2d at 956 (holding that “[t]o the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA”).

reasonable accommodations so they are accessible to the visually impaired. The amendment would remedy the problems associated with the arbitrary nature of the nexus requirement, comply with the purpose of the ADA, and promote the public policy of equal access to all. Part V concludes that given the Internet's prevalence in today's society, an amendment to the ADA is essential to promote equality and bring the ADA into the Internet age.

II. BACKGROUND

A. HISTORY OF AMERICAN'S WITH DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT OF 1990

In the past century, society has undergone a revolution with regard to the rights and status of Americans with disabilities.⁴² Blind Americans have been the victims of a long history of discrimination in many areas including "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."⁴³ Until recently, there were no legal means to redress discrimination based on disability.⁴⁴

In 1984, Congress established the NCD as an independent federal agency,⁴⁵ with the responsibility of making recommendations to the President and Congress on what steps are necessary to enhance the quality of life for disabled Americans.⁴⁶ In the mid-1980s, the NCD revealed a study that discrimination against persons with disabilities were "still substantial and pervasive" in many sectors of society and were a "major obstacle to achieving the societal goals of equal opportunity and full participation of individuals with disabilities."⁴⁷

In order to redress the problems exposed by the NCD, President

42. See Louis S. Rulli, *Symposium the Americans with Disabilities Act – Past Present and Future: Developing Law over a Decade: Employment Discrimination Litigation Under the ADA from the Prospective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 346-50 (2000).

43. 42 U.S.C. § 12101(a)(3) (1990).

44. 42 U.S.C. § 12101(a)(4) (1990).

45. National Council on Disability, *NCD at a Glance*, <http://www.ncd.gov/brochure.htm> (last visited Mar. 26, 2008). In 1978, the National Council on Disability was established as an advisory board within the Department of Education. "The Rehabilitation Act Amendments of 1984 transformed the National Council on Disability into an independent agency. The overall purpose of the agency is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature or severity of the disability and to empower them to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society".

46. *Id.*

47. Rulli, *supra* note 43, at 347.

George W. Bush signed the ADA into law on July 26, 1990.⁴⁸ The ADA is a widespread piece of legislation that aims to ban discrimination by targeting four main areas of discrimination.⁴⁹ Title I deals with employment discrimination, Title II addresses public services provided by a government entity, Title III covers places of public accommodation, and Title IV applies to telecommunications relay service employers.⁵⁰ Title III of the ADA provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”⁵¹ The ADA defines “public accommodation” as a place affecting commerce that falls within one of the following categories: a place of lodging, a food or beverage establishment, a place of entertainment, a service establishment, a place of public transportation, of public display, of recreation, of education, and a of social service.⁵²

Congress intended for the ADA to promote equality by eliminating discrimination against those with disabilities; a problem that prevents people with disabilities from equally pursuing the opportunities and the array of goods available to non-disabled persons.⁵³ The ADA should serve as a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” by addressing the “major areas of discrimination” that people with disabilities face on a daily basis.⁵⁴ The stated purpose of Title III in particular is to “bring individuals with disabilities into the economic and social mainstream of American life. . . in a clear, balanced, and reasonable manner.”⁵⁵ By enacting the ADA, Congress sought to ensure that those with disabilities have equal access to goods and services.⁵⁶

B. THE BLIND AND INTERNET USE

The ADA was signed into law on the brink of the Internet revolution. It is doubtful that members of Congress imagined the pervasive role of

48. *Access Now*, 227 F. Supp 2d at 1314; *see also* Rulli, *supra* note 43 (explaining that the ADA was the final product of two years of “debate, negotiation, and compromise”).

49. *See* 42 U.S.C. § 12101

50. 42 U.S.C. § 1201

51. 42 U.S.C. § 12182(a).

52. 42 U.S.C. § 12181(7).

53. 42 U.S.C. § 12182(a).

54. 42 U.S.C. § 12101(b).

55. H.R. 485, 101st Cong. § 2 (1990).

56. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Assn. of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994) (holding that establishments of “public accommodation” are not limited to actual physical structures).

the Internet in non-disabled Americans' lives, let alone envisioned that blind Americans would be able to use the Internet to shop online.⁵⁷ Times have changed. The Internet revolution has transformed virtually every aspect of society, and technology has enabled blind individuals to access Web sites and participate in Internet commerce.

Blind or visually impaired individuals are able to surf the Internet by using computer assistant software.⁵⁸ A Web site's code must be written in "alternative text" in order to be accessible to the blind.⁵⁹ Alternative text is invisible text, embedded beneath Web sites' graphics, that describes a Web site's contents.⁶⁰ Screen reader software "reads" the alternative text and gives an audio explanation of the Web site's text and graphics.⁶¹ Navigation links can also be screen reader compatible, allowing blind users to navigate through Web sites by using a keyboard instead of a mouse.⁶² Computer assistant software includes voice-dictation software, voice navigation software, and magnification software that assists the visually disabled in navigating through Web sites' text and graphics.⁶³ At a minimum, a Web site's code must contain alternative text in order to be accessible to blind users.⁶⁴

57. Kronstadt, *supra* note 5, at 113.

58. Jessica E. Vascellaro, *Web Sites Improve Service for Blind People Google, AOL, Yahoo Retool Pages, Boosting Compatibility With Screen-Reading Aids*, (July 20, 2006), available at <http://mailman1.u.washington.edu/pipermail/accessibleweb/2006/000240.html> (stating most accessibility software is programmed to read a description of the site's features aloud). In addition, accessibility hardware can display portions of Web sites in Braille so that blind users can decipher a Web site's contents by touch.

59. *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1316 (S.D. Fla. 2002); see also *Nat'l. Fed'n. of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949 (N.D. Cal 2006). (explaining that alternative text is a type of web code, or invisible description of a Web site, that programmers use when putting graphics on a Web site. Screen reader software reads the invisible alternative text and converts it to vocalized descriptions of the Web site's contents); Wunder, *NFB Testifies on Internet Access and the ADA*, <http://www.nfb.org/Images/nfb/Publications/bm/bm00/bm0004/bm000406.htm> (last visited Mar. 26, 2008)

[o]ne of our biggest difficulties comes when we try to shop on-line using pages where the creator of the Web site has failed to label the pictures he shows with a brief textual description. Computer technology is not yet sufficiently advanced to recognize a picture and tell us what appears on the screen. For this information we must rely on the creator of the page we're viewing to add a line of text which says, for example, 'Swiss Army Knife' or 'Queen Size Electric Blanket.' These explanations are easily added and are of tremendous benefit not only to the blind but also to people who see.

60. *Target*, 452 F. Supp. 2d at 949.

61. *Id.*

62. *Id.*

63. *Access Now*, 227 F. Supp. 2d at 1314 (noting that computer assistant software was primarily developed by companies within the computer software industry).

64. *Id.* at 1314-15 (explaining that screen access technology converts screen displays into synthesized speech). Likewise, Web sites differ in their ability to allow the assistive technologies to convert the web displays effectively into meaningful audio descriptions. To complicate the problem further, there are no uniform standards for assistive software or

Blind Internet users have taken advantage of the tremendous benefit of the Internet. As one blind Internet user put it, “the Internet, when it is accessible, is the next biggest revolution for blind people since Braille.”⁶⁵ A significantly high number of blind, or severely visually-impaired individuals, regularly use the Internet via screen reader software.⁶⁶ A 2001 study found that the average use of the Internet among visually impaired individuals between the ages of twenty-five and sixty was almost sixty-two percent.⁶⁷ Over fifty-six percent of visually impaired individuals aged three to twenty-five reported regular use of the Internet.⁶⁸ Additionally, more than fifty-three percent of blind or severely visually impaired individuals purchase products and services online, which is almost three percent more than their visually-abled counterparts.⁶⁹ These statistics illustrate that America’s blind population has a strong desire to use the Internet, especially for the convenience of online shopping.

C. INTERPRETATIONS OF THE AMERICANS WITH DISABILITIES ACT AND THE INTERNET

1. *Department of Justice Regulation*

Congress authorized the Department of Justice (“DOJ”) to issue reg-

Web sites so compatibility issues arise even if Web designers factor in blind users when creating Web sites.

65. Finnigan, *supra* note 3, at 1816.

66. See Joe Clark, *Why Bother?*, available at <http://joelclark.org/book/sashay/serialization/Chapter02.html> (last visited Mar. 26, 2008) (stating that the American Foundation for the Blind estimates there are 900,000 visually-impaired computer users in the U.S.); see also National Telecommunications and Information Administration, *A Nation Online: How Americans are Expanding Their Use of the Internet*, Chapter 7, available at <http://www.ntia.doc.gov/ntiahome/dn/html/Chapter7.htm> (last visited Mar. 26, 2008) [hereinafter *A Nation Online*] (stating that a September 2001 survey was conducted by the U.S. Census Bureau). The purpose of the survey was to examine how disabilities impact computer and Internet use. The survey examined the computer habits of persons with multiple disabilities, blind persons or those with severe vision impairment, deaf persons or those with severe hearing impairment, those with difficulty walking and difficulty typing, and those who do not suffer from any of these disabilities. The results were broken into categories three categories: three to twenty-four year olds, twenty-five to sixty year olds, and those over sixty.

67. *A Nation Online*, *supra* note 66 (stating the likelihood of blindness or severe vision impairment was found to be 0.6 percent in individuals between twenty-five and sixty years of age).

68. *Id.* (finding that less than four percent of ages three to twenty-five were identified as being blind or severely impaired in a 2001 survey conducted by the U.S. Census Bureau). The study found that disabled Internet use was on par with non-disabled Internet use, with an estimated 56.9 percent of non-disabled individuals reporting Internet use.

69. *Id.*

ulations in order to carry out the provisions of the ADA.⁷⁰ When the legislature authorizes an agency to interpret a law, courts must give the interpretations “considerable weight,” and use that agency’s recommendations as the basis for their statutory analysis when deciphering the meaning of the law.⁷¹ Thus, courts will generally defer to authorized regulatory agencies when applying statutes, provided the regulations are not arbitrary or contrary to the clear intention of the statute.⁷²

In 1991, the DOJ issued its ADA regulations.⁷³ The regulations defined a “place of public accommodation” as “a facility,”⁷⁴ which is defined as “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”⁷⁵ By describing a place of public accommodation by its physical attributes, opponents of Internet accessibility argue that the DOJ implicitly limited Title III public accommodations to physical places.

2. *Court Precedent on the Americans With Disabilities Act*

The United States Supreme Court has not decided the issue of whether Web sites must conform to ADA standards of accessibility. Federal courts are divided into three schools of thought regarding the issue. The original view suggests that the ADA is only applicable to physical places of public accommodation.⁷⁶ The majority view finds that ADA applies to all services so long as there is a nexus between the service and a

70. 42 U.S.C. § 12186(b) (2006) (mandating that “[n]ot later than 1 year after the date of the enactment of this Act (enacted July 26, 1990), the Attorney General shall issue regulations in an accessible format” to carry out the provisions of Title III).

71. *When the Americans with Disabilities Act Goes Online*, *supra* note 16.

72. Matthew A. Stowe, *Interpreting “Place of Public Accommodation” Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 302 (2000).

73. 28 C.F.R. § 36.104 (2006).

74. Stowe, *supra* note 73, at 302 (defining facility under a plain and ordinary reading as a physical structure); *see also* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997) (citing 28 C.F.R. 36.104 (1999)) (stating more specifically, according to the DOJ definitions, a place of public accommodation means a “facility, operated by a private entity, whose operations affect commerce” and falls within one of the categories listed in section 12181(7) of the ADA).

75. 28 C.F.R. § 36.104 (2006).

76. *See, e.g.*, Treanor v. The Wash. Post Co., 826 F. Supp. 568 (D.D.C. July 28, 1993) (explaining that a newspaper is not comparable to any of the facilities listed in the ADA); Brown v. 1995 Tenet ParaAmerica Bicycle Challenge, 959 F. Supp. 496 (N.D. Ill. Mar. 12, 1997); Stoutenborough v. NFL, 59 F.3d 580 (1995) (finding that a television broadcast service of an NFL football game is not a “place of public accommodation” even though the game is played in a place of public accommodation and the game may be viewed on a television, another place of public accommodation).

physical place of public accommodation.⁷⁷ Finally, the minority view offers that the ADA applies very broadly to include non-physical places.⁷⁸

i. The Americans With Disabilities Act Applies Only to Physical Places

Courts first interpreting the ADA interpreted the statute very narrowly to address the issue of access to facilities only, or access to physical places of public accommodation.⁷⁹ For example, the ADA is not applicable to a newspaper publication because a published periodical was not comparable to any of the places of public accommodation listed in the statute.⁸⁰ Likewise, the ADA did not cover a bicycle race because the competition itself was not a physical place of public accommodation.⁸¹ Although this was the original interpretation of the ADA, courts have since modified their interpretations of the ADA, broadening its scope.

ii. The Nexus Requirement

A majority of courts have adopted the “nexus requirement” approach when deciding whether the ADA covers certain services.⁸² Like the original view, courts have maintained that “places of public accommodation” are limited to physical facilities;⁸³ however, the nexus approach applies the ADA to some non-physical services. In order for Title III of the ADA to apply, there must be a nexus between the disparity of benefits or services alleged, and a physical place of public accommodation.⁸⁴

Courts use the “nexus requirement” in the cases involving the ADA’s

77. See *Parker*, 121 F.3d at 1011 (following the majority view); *Rendon v. Valleycrest Prods.*, 294 F.3d 1279 (11th Cir. 2002); *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1316 (S.D. Fla. 2002); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-3 (3rd Cir. 1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

78. See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Assn. of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (following the minority view); see also *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (following the minority view).

79. *Treanor*, 826 F. Supp. 568.

80. *Id.* at 569.

81. *Brown*, 959 F. Supp. 496.

82. See, e.g., *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 34 (2nd Cir. 1999) (broadening the scope of the ADA); *Rendon*, 294 F.3d 1279; *Access Now*, 227 F. Supp. 2d 1312; *Ford*, 145 F.3d at 612-613; *Weyer*, 198 F.3d 1104.

83. *Stoutenborough*, 59 F.3d at 583 (stating that a “place” is a “facility,” and defining “facility” as “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located”).

84. *Parker*, 121 F.3d at 1011 (explaining that the plaintiff received the benefit from her employer). Since an employer is not a place of public accommodation as defined by the DOJ, the ADA did not regulate the insurance coverage.

applicability to the Internet.⁸⁵ In *Access Now, Inc. v. Southwest Airlines*, a United States District Court determined that a Web site is only subject to ADA regulations if a plaintiff can establish the Web site is a service of a physical place of public accommodation.⁸⁶ Thus, a purely Internet based company, void of a physical place of public accommodation, would fall outside of the Title III of the ADA.⁸⁷

iii. The American's With Disabilities Act Applies to Non-Physical Places

In a very controversial opinion, the United States Court of Appeals for the First Circuit interpreted Title III of the ADA to include more than "actual physical structures."⁸⁸ In *Carparts Distribution Center v. Automotive Wholesaler's Association*,⁸⁹ the court stated that under Title III of the ADA, "public accommodations" include "goods and services. . . sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services."⁹⁰ The Court stated that the purpose of the ADA, which is "to bring individuals with disabilities into the economic and social mainstream of American life," would be better achieved if the ADA applied to more than physical structures.⁹¹

III. ANALYSIS

The United States government is structured in a way that limits the courts role to interpret laws with a strict adherence to the plain language of the statute.⁹² The legislative branch is responsible for determining which of the competing public policies a law should favor. Then, after careful research and deliberation, the legislative branch must create laws that clearly encompass the intended purpose.⁹³ Congress aims to

85. See *Access Now*, 227 F. Supp. 2d 1312; see also *Target*, 952 F. Supp. 2d at 949.

86. See *Access Now*, 227 F. Supp. 2d at 1321.

87. See *id.*

88. *Carparts*, 37 F.3d 12 (holding that the plaintiff, who was diagnosed with AIDS, had a Title III cause of action against his employer). The plaintiff alleged that the lifetime cap on health benefits for individuals with AIDS represented illegal discrimination based on a disability, and therefore violated Title III of the ADA. The court agreed. *Id.*

89. *Id.* at 20.

90. *Id.* at 19 (reasoning that the illustrative list of public accommodations given by the ADA, which includes "travel service" and "shoe repair service" does not require that "public accommodations" have a physical structure to enter, but that "service establishments" in general should be covered by the ADA).

91. *Id.*

92. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1270-71 (7th Cir. 1993).

93. *Id.* at 1271.

identify its purpose through the language of the statute.⁹⁴ The role of the judicial branch is to interpret the laws enacted by Congress.⁹⁵ Courts must assume that Congress used the ordinary meaning of the words written into the statute.⁹⁶ The principle of separation of powers proscribes courts from “legislating from the bench,” or overreaching their authority by creating laws or liberally construing laws based on their notions of what is best for public policy.⁹⁷

In light of the constitutional limitations on judicial power, the issue of whether the ADA applies to the Internet becomes a question of the whether the court has the authority to interpret the ADA’s “place of public accommodation” to include Internet Web sites or non-physical public accommodations. Except in rare circumstances,⁹⁸ courts can only apply the ADA to the Internet if one of two scenarios exists: (1) where the plain language of the ADA includes the Internet; or (2) where the plain meaning of the ADA excludes Internet applicability but the interpretation is contrary to clear legislative intent.⁹⁹

A. TEXTUAL ANALYSIS OF THE AMERICANS WITH DISABILITIES ACT

1. *The Plain Language of the ADA Does Not Include the Internet as a Place of Public Accommodation*

Like every statutory analysis, one must begin by examining the “plain language of the statute.”¹⁰⁰ Title III of the ADA states “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place of public accommodation*. . . .”¹⁰¹ The ADA categorizes places of public accommodation into twelve distinct groups: places of lodging, establishments serving food or drink, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishments, stations used for public transportation, places of public display or collection, places of recreation,

94. *Richards v. U.S.*, 369 U.S. 1, 9 (1962); *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803, 807 (7th Cir. 1988).

95. *Welsh*, at 1270.

96. *Richards*, 369 U.S. at 9; *Jones*, 848 F.2d at 807.

97. *Welsh*, at 1270-71.

98. *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) (“[t]he ‘strong presumption’ that the plain language of the statute expresses congressional intent is rebutted only in ‘rare and exceptional circumstances,’ when a contrary legislative intent is clearly expressed” (internal citations omitted)).

99. *Id.* at 135-36.

100. *Ranen*, *supra* note 3, at 395; *see e.g.*, *Carparts*, 37 F.3d at 19 (beginning its analysis of the ADA by interpreting the plain language of the statute).

101. 42 U.S.C. § 12182 (a) (2006) (emphasis added).

places of education, social service center establishments, and places of exercise or recreation.¹⁰² Since the Internet does not fit within one of the twelve enumerated categories, a plain reading of the statute does not include the Internet as a place of public accommodation.

Although places of public accommodations are limited to physical entities, the statutory language of the ADA indicates that it applies to Web sites when the Web site is a service of a physical place of public accommodation.¹⁰³ A close read of the ADA reveals that the ADA applies to the services *of* a place of public accommodation, not just the services *in* a place of public accommodation.¹⁰⁴ Under the ADA, all places of public accommodation must ensure that the disabled have full and equal enjoyment of its goods and services by making “reasonable” modifications to its services.¹⁰⁵ Thus, if a Web site is a service *of a place of public accommodation*, it must make accommodations for blind Internet users.

102. 42 U.S.C. § 12181(7) (2006). The specific language of the Act mandates that [t]he following private entities are considered public accommodations for purposes of this title (42 USCS § 12181 et seq.), if the operations of such entities affect commerce:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation).

103. 42 U.S.C. § 12181(7) (2006).

104. Finnigan, *supra* note 3, at 1799 (explaining that ADA applies to more than just the services provided on the premises of a place of public accommodation).

105. *Target*, 452 F. Supp. 2d at 951.

2. *Congress Expressly Intended for the List of Public Accommodations to be Exhaustive and Limited to Physical Entities*

Courts will apply the plain language interpretation of a statute unless clear legislative intent contravenes the plain language interpretation.¹⁰⁶ The purpose of the ADA, as expressed within the statute itself, gives courts insight into the intended meaning of the statute.¹⁰⁷ According to the statute's language, the sweeping purpose of the ADA is to provide a comprehensive national mandate in order to eliminate discrimination against people with disabilities in a reasonable manner.¹⁰⁸

Despite the broad purpose of the Act, Congress intended the twelve categories be an exhaustive list.¹⁰⁹ The individual provisions of the Act, particularly the provisions prohibiting discrimination of services of places of public accommodations and telecommunications, are narrowly tailored and limit the scope of the Act.¹¹⁰ For the ADA to apply, a Web site must fit into one of the twelve categories listed above.¹¹¹ The places of public accommodation specifically listed by the ADA are all physical places. Thus, the statutory intent was aligned with a plain interpretation of the ADA: that the ADA only applies to physical places of public accommodation.

"Where Congress has created specifically enumerated rights and expressed the intent of setting forth 'clear, strong, consistent, enforceable standards,' courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights."¹¹² Consequently, courts should adhere to Congress' intention that the list of public accommodations be exhaustive and exclude services not comparable to those enumerated in the statute.

106. *Ardestani*, 502 U.S. at 135-36.

107. 42 U.S.C. § 12101 (b) (2006).

108. 42 U.S.C. § 12101 (a)-(b) (2006) (stating the Act's purpose is to provide the forty-three million disabled Americans with a legal remedy when victimized by unjust discrimination); *see also* Stowe, *supra* note 73, at 306-07 (explaining the purpose of the ADA as the language of the statute makes clear).

109. Paul V. Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U.L. REV. 1117, 1127-28 (1995) (explaining that Congress intended the list to be clear by giving specific examples of each category).

110. Finnigan, *supra* note 3, at 1802.

111. Sullivan, *supra* note 109, at 1127 (and corresponding footnote) (stating that facilities that do not fall into one of the enumerated categories are not considered places of public accommodation).

112. *Access Now*, 227 F. Supp 2d at 1318.

3. *The Department of Justice Regulation Interpretation of the ADA Limits Places of Public Accommodation to Physical Entities*

The Department of Justice's ADA regulations define places of public accommodation as physical entities.¹¹³ Congress authorized the DOJ to assist the courts in interpreting the meaning of the ADA through such regulations.¹¹⁴ The DOJ's 1991 regulations applicable to the ADA define "place" by describing physical places of public accommodation.¹¹⁵ Specifically, the regulation confines places of public accommodation to "facilities," which include "complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."¹¹⁶

The DOJ's explanation of what constitutes a place of public accommodation indicates that the Act was not meant to apply to Web sites unconnected to physical public entities.¹¹⁷ The DOJ regulation explains that wholesale establishments selling exclusively to other businesses are not subject to ADA standards, whereas wholesale establishments selling directly to individual customers are.¹¹⁸ The DOJ illustrates this restriction by explaining that if a farmer sells crops solely to a wholesaler, the farmer is not subject to ADA regulations.¹¹⁹ However, if the farmer's business has a small roadside stand selling crops to the general public, then the farmer must reasonably comply with ADA regulations.¹²⁰ This example given by the DOJ clearly demonstrates that the ADA covers only physical entities that sell to the general public, not business transactions unrelated to a physical store.¹²¹

Advocates for ADA applicability to the Internet offer an alternative stance on the DOJ's interpretation of a place of public accommodation. Based on a 1996 letter from the Assistant United States Attorney General to Senator Harkin, advocates argued that the DOJ intended for the ADA to apply to Web sites.¹²² The letter stated that the ADA requires

113. Stowe, *supra* note 73, at 302 (2000).

114. *When the Americans with Disabilities Act Goes Online*, *supra* note 16; 28 C.F.R. § 36.104 (2006).

115. Stowe, *supra* note 73, at 302.

116. 28 C.F.R. § 36.104 (2006).

117. *Parker*, 121 F.3d at 1011-12 (citing 28 C.F.R. § 36.104 at pt. 36 (2006)).

118. *Id.* at 1012

119. *Id.*

120. *Id.* (explaining that the farmer must only comply with ADA regulations with regard to the roadside stand).

121. *Id.*; *but see* Ramasastry, *supra* note 19 (arguing that the DOJ has never suggested that Web sites must have a nexus to a physical location to be covered by the ADA).

122. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Tom Harkin, U.S. Senator (Sept. 9, 1996) [hereinafter *Letter to Senator Harkin*] available at <http://www.usdoj.gov/crt/foia/cltr204.txt> (writing a response to a letter from Senator

that “places of public accommodation . . . furnish appropriate auxiliary aids and services” to make the public accommodations accessible to disabled individuals and ensure effective communication with such individuals.¹²³ The letter explained that places of public accommodation that use the Internet for communications must make those communications accessible to blind users.¹²⁴ For example, the letter recommends that Web sites’ information be available in text format rather than exclusively in graphic format.¹²⁵ This would accommodate the needs of the visually impaired using assistive software to make the Web site screen reader compatible.¹²⁶

Although the Assistant Attorney General’s letter clearly applied the ADA to *some* Web sites, it did not apply the ADA to *all* web sites.¹²⁷ Each time the letter addressed Internet accessibility as a requirement, it qualified the statement by applying the requirement only to “covered entities,” which the letter defines as “State and local governments and places of public accommodation.”¹²⁸ Thus, contrary to the hopes of advocates for the blind, the letter did not conclude that the ADA regulate all Web sites.

4. *The Places of Public Accommodation Provision of the Civil Rights Act is Analogous to the ADA and Limited to Physical Places of Public Accommodation*

Courts have used the Civil Rights Act of 1964¹²⁹ as a model for in-

Harkin on behalf of his constituent regarding accessibility of Web sites to people with visual disabilities).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (stating that “[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.” (emphasis added) In this relatively short letter (approximately two pages long) the Assistant-Attorney General uses the term “covered entities” three times, particularly when using the terms “required” and “must”; see also *When the Americans with Disabilities Act Goes Online*, *supra* note 16 (stating that since the letter was written, the DOJ has submitted amicus briefs arguing for coverage of the Internet under Title III of the ADA in *specific* instances); *Parker*, 121 F.3d at 1013 (criticizing the First Circuit for ignoring the definition of places of public accommodation given in the DOJ regulations).

129. 42 U.S.C.S. § 2000(a)-(b) (2006) Prohibition against Discrimination or segregation in places of public accommodation.

(a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any

terpreting the places of public accommodation provision in the ADA because of their similar history and identical language.¹³⁰ The ADA's enactment represented a step in the ongoing progression of the civil rights movement.¹³¹ The modern disability rights movement began as an offshoot of the civil rights movement.¹³² In the 1960's, as an oppressed minority unable to enjoy equal benefits of society, disabled individuals equated their situation to racial minorities and joined the momentum of the civil rights movement to advocate equality through social and legislative change.¹³³ Like civil rights leaders, disability rights advocates endeavored to use "the legal system as a means of remedying gross imbalances in political and social power that prevented [disabled individuals] from securing the fruits of American life."¹³⁴ Ultimately, the two movements shared the same goal: to attain "equal opportunity

place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings, facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serve the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (b) which holds itself out as serving patrons of such covered establishment).

130. *Ford*, 145 F.3d at 606 (calling the Civil Rights Act essentially a "sibling statute" to the ADA).

131. Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 211 (2000)

[a]ccess rights for disabled people and the resulting legislation grew out of the disability rights movement of the late 1960s and 1970s. The disability rights movement was largely based on the civil rights movement, which brought into being the concept that equal access to society for African Americans and other minorities was a civil right.

132. Ranen, *supra* note 3, at 347.

133. Rulli, *supra* note 43, at 347.

134. *Id.*

and full participation” in American society.¹³⁵

In addition to a common statutory history, the “places of public accommodation” provision of the Civil Rights Act contains virtually identical language to Title III of the ADA.¹³⁶ The ADA includes each entity of public accommodation listed in the Civil Rights Act, as well as several additional places, all of which are physical.¹³⁷ Since the two statutes are so similar in purpose and are nearly identical language, courts interpreting Title III of the ADA should follow the Civil Rights Act’s interpretation of “places of public accommodation.”¹³⁸

Courts interpreting “place of public accommodation” within the context of the Civil Rights Act have held that in order to be governed by the Act, entities must “maintain a close connection to a structural facility.”¹³⁹ Like the ADA, the text of the Civil Rights Act provides a list of specific examples of places of public accommodation that are followed by a broad category that encompasses the specific places.¹⁴⁰ For example, “bowling alleys, golf courses, tennis courts, gymnasiums, swimming pools and parks” are specific examples that are followed by the general category of “other places of exhibition or entertainment.”¹⁴¹ Courts charged with interpreting Title II have determined that because the ADA contains a list of several specific physical places and then attaches a broader category to encompass comparable places not specifically mentioned, those broader categories of places are limited to physical entities as well.¹⁴² Thus, the fifteen specific examples of places are intended to illuminate the meaning of the term “place.”¹⁴³ Applying the statute to an array of dissimilar types of entities would frustrate the purpose of the

135. *Id.* at 347 (commenting that the disabled rights movement modeled itself after the civil rights movement when arguing that individuals with disabilities have a civil right to equal access of places of public accommodation).

136. 42 U.S.C. § 2000(a) (2006) .

137. 42 U.S.C. § 12181(7) (2006). Note that at the time the ADA was enacted, many companies were just beginning to conduct business via non-physical entities such as over the phone and the beginning of the Internet.

138. *Ford*, 145 F.3d at 606; *see also* *Ganden v. Natl. Collegiate Athletic Assn.*, 1996 U.S. Dist. LEXIS 17368, at * 28 (N.D. Ill. Nov. 19, 1996) (comparing a statutory analysis and case law analysis of the Civil Rights Act of 1964 to Title III of the ADA because the Acts’ legislative history is similar and so is the “place of public accommodation” provision).

139. *Welsh*, 993 F.2d at 1269 (stating that “[a] reading of the statute for its plain meaning renders but one conclusion: Congress when enacting § 2000(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of place of public accommodation. The statute clearly governs only an entity that; (1) serves the public and (2) may be classified as an establishment, place, or facility.”)

140. *Id.*

141. 42 U.S.C. § 2000(a) (2006).

142. *Welsh*, 993 F.2d at 1269.

143. *Id.*

list of categories, in effect making the statute's list superfluous in the statute.¹⁴⁴ If courts interpret the statute to make words or phrases "meaningless, redundant or superfluous," they consequently undermine the Legislature's role.¹⁴⁵

Courts have conducted similar structural analyses with Title III of the ADA, as they have when addressing the Title II of the Civil Rights Act. For example, in *Access Now*, the court applied the canon of statutory construction *ejusdem generis* to the ADA. This canon 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."¹⁴⁶ Therefore, a broader category of places could conceivably include non-physical entities if it is unaccompanied by specific examples. However, where the specific examples provide an illustrative definition of the broader category, the covered entities are limited to physical places.¹⁴⁷ Based on this reasoning, courts have interpreted the ADA in a similar manner as the Civil Rights Act and have limited the ADA's applicability to physical places.¹⁴⁸

B. CASE LAW INTERPRETING THE AMERICANS WITH DISABILITIES ACT

In 1994, a Michigan federal district court defined the elements necessary to establish a *prima facie* case under Title III of the ADA.¹⁴⁹ The

144. *Id.* at 1272.

145. *Id.*; see also *Zimmerman v. North Am. Signal Co.*, 704 F. 2d 347, 353 (7th Cir. 1983).

146. *Access Now*, 227 F. Supp. 2d at 1318; see also Anita Ramasastry, *supra* note 19.

147. For example, "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, [and] hospital" are all descriptive examples of a "service establishment." 42 U.S.C. § 12181(7)(f).

148. *Parker*, 121 F.3d at 1014 (criticizing the *Carparts* opinion, which expands the meaning of "place of public accommodation" to include non-physical entities, because it "disregarded the statutory canon of construction, *noscitur a sociis*" which provides that the meaning of ambiguous terms should be "ascertained by reference to the meaning of other words or phrases associated with it" in order "to avoid the giving of unintended breadth to the Acts of Congress."). The ambiguity that could arguably be read into the listing of "travel service and "shoe repair service" be clear because it should be read with all the other terms which are physical place and should be limited as such. It would have been simple for the drafters of the ADA to simply apply the law to all "services offered to the public," but instead the court limits its application by giving examples to provide courts with illustrations of the characteristics of entities intended to be covered by the ADA.

149. *Mayberry v. Von Valtier & Rochester Fam. Prac.*, 843 F. Supp. 1160, 1164 (E.D. Mich. Feb. 8, 1994) (holding that a doctor violated the ADA when he refused to continue to give medical care to a deaf patient because accommodating the patient was expensive). The court determined that discriminatory intent is not a necessary element of a cause of action under the ADA.

plaintiff must prove: (1) that he or she has a disability; (2) that the defendant maintains a place of public accommodation; and (3) that the plaintiff was discriminated against by being refused "full and equal enjoyment" of the accommodation or service.¹⁵⁰ Since the inception of Title III, courts have been unable to reach a consensus in the definition of the provision "place of public accommodation."¹⁵¹ Moreover, the growth in Internet popularity has added a new facet to this debate, that is, whether the ADA is applicable to the Internet.¹⁵²

1. *What is a "Place of Public Accommodation?"*

Although Congress intended that the list of categories of public accommodations be exhaustive, the statute does not explicitly list every covered entity. As a result, courts must determine on a case-by-case basis whether an unlisted entity is a public accommodation covered by the ADA. Courts have considered several factors to determine whether an entity falls within the definition of a "place of public accommodation," such as: the plain language of the statute, the DOJ regulation, the purpose of Title III, the legislative history and the policy rationale behind the statute.¹⁵³

In 1993, the federal district court for Washington D.C., in *Treanor v. Washington Post*, became the first court to interpret the meaning of "places of public accommodation" within the ADA.¹⁵⁴ In that case, the plaintiff, a disabled author, alleged that the defendant, a newspaper

150. *Mayberry*, 843 F. Supp at 1164 (ultimately concluding that a plaintiff does not have to allege discriminatory intent to make out a cause of action under the ADA).

151. *Stoutenborough*, 59 F.3d at 583 (stating that the "the plaintiffs' argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute"); see also *Parker*, 121 F.3d at 1010-11 (stating an insurance office is a public accommodation because it is a physical entity). The court reasoned that insurance policies provided by an insurance office are goods provided by a public accommodation, but a benefit plan offered by an employer is not similarly covered because an employer is not a place of public accommodation. *Id.*; see also *Carparts*, 37 F.3d at 19 (stating that the plain meaning of the terms does not require that "public accommodations" have physical structures); *Ford*, 145 F.3d at 613 (stating the plain language of the ADA is unambiguous and does not include non-physical entities). The court decided that there was no need to look at legislative intent because the statute on its face was unambiguous. *Id.* The court held that the phrase "place of public accommodation" is clear in the context of the examples provided by the ADA. *Id.*; *contra Doe*, 179 F.3d at 559 (deciding that the plain, anti-discriminatory purpose of the ADA is fulfilled when the Act is applied virtually any public entity, even Web sites).

152. *When the Americans with Disabilities Act Goes Online*, *supra* note 16.

153. See *Stowe*, *supra* note 73; see also *Torres v. AT&T Broadband*, 158 F. Supp. 2d 1035, 1037 (N.D. Cal. Mar. 30, 2001) (holding that the fact that defendant's cable service is not as valuable to the visually impaired plaintiff as it would be if he were not visually impaired does not violate the ADA).

154. *Treanor*, 826 F. Supp. 568.

company, violated Title III of the ADA by failing to publish a review of his book when it had published reviews of similar books by non-disabled authors.¹⁵⁵ After conducting a textual analysis of the Act, the federal district court rejected the plaintiff's argument that a newspaper was a place of public accommodation. The court held that a newspaper column is not included in the list of covered entities nor is it comparable to any of the categories listed in the ADA.¹⁵⁶ Thus, the *Treanor* Court limited the scope of the ADA to accommodating access to a facility comparable to those listed in Title III, and maintained that places of public accommodation are physical entities.¹⁵⁷

A majority of courts have followed the *Treanor* approach and have held that the statutory language of Title III confines places of public accommodation to physical entities.¹⁵⁸ For example, in *Parker v. Metropolitan Life Insurance Company*, the court held that where an employer is not a place of public accommodation, employers are not required to offer insurance benefits that abide by ADA regulations.¹⁵⁹ In *Rendon v. Valleycrest Productions*, another court found that a game show studio fell squarely within one of the examples of physical places of public accommodation listed by the ADA, "theaters and other places of public entertainment."¹⁶⁰ Finally, in *Access Now*, a federal district court in Florida reaffirmed that a public accommodation must be a physical, "brick-and-mortar" structure. The court explained that expanding the ADA to include "virtual spaces" would circumvent the role of Congress by creating rights that are not found in the text of the ADA.¹⁶¹

The scope of the ADA's "physical" requirement has been addressed by several district courts.¹⁶² For example, in *Stoutenborough v. National Football League*, the court held that the National Football League's stadiums are public accommodations, but the cable television channel that broadcasts the football games is not because the channel is not a physical

155. *Id.* at 569.

156. *Id.* The court rationalized that reading the statute in this way would also avoid possible constitutional difficulties. If the court expanded the definition of the ADA to incorporate newspapers, the court's decision would come in conflict with the defendant's First Amendment freedom of the press. A "[g]overnmental intrusion into the editorial process is clearly a violation of the First Amendment freedom of the press." Thus, requiring a newspaper to publish certain articles would unconstitutionally violate the defendant's First Amendment rights.

157. *Id.*

158. *Access Now*, 227 F. Supp. 2d at 1318 (citing *Rendon*, 294 F.3d 1279) Since Congress has provided "such a comprehensive definition of 'public accommodation,' we think the intent of Congress is clear enough".

159. *Parker*, 121 F.3d 1006.

160. *Rendon*, 294 F.3d 1279.

161. *Access Now*, 227 F. Supp 2d at 1321.

162. See e.g., *Stoutenborough*, 59 F.3d 580.

entity.¹⁶³ Basing its holding on the DOJ regulations, the court specifically rejected applying Title III to non-physical entities and confirmed that doing so would contravene the plain language of the statute.¹⁶⁴ The court limited the scope of Title III to apply only to services provided by, or connected in some way to, physical places of public accommodation.¹⁶⁵

2. *The Nexus Requirement*

The *Stoutenborough* opinion set the stage for “the nexus requirement;” the approach that a majority of courts across the nation have adopted. This approach is consistent with the *Treanor* principle, that a place of public accommodation is a physical entity. However, the ADA applies where “a nexus” exists between the physical place of public accommodation and the disparity of benefits or services offered.¹⁶⁶

Although Title III potentially applies to a wide variety of services, most Title III actions concerning non-physical public accommodations have arisen in the insurance context, making it a good arena to analyze the nexus requirement.¹⁶⁷ Courts dealing with insurance cases have explained that the nexus requirement maintains that an insurance policy or benefit must have a nexus to a physical place of public accommodation, for example, an insurance office, in order to be subject to ADA regulations.¹⁶⁸ Alternatively, the insurance industry has been the platform for opinions criticizing the nexus requirement and applying the ADA to non-physical entities.¹⁶⁹

163. *Stoutenborough*, 59 F.3d 580; see also *Torres*, 158 F. Supp. 2d 1035 (holding that the “plaintiff’s contention that digital cable services constitute a place of public accommodation is contrary to the plain language of the statute and its implementing regulations.”)

164. *Stoutenborough*, 59 F.3d at 583.

165. *Stoutenborough*, 59 F.3d at 583. The court cited the DOJ regulations, which state that a “place is a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve public accommodation categories. Facility, in turn is defined as all or any portion of buildings, structures, sites, complexes. . . or other real or personal property.” *Id.*

166. *Parker*, 121 F.3d 1006 (holding that because the plaintiff’s employer, not an insurance office, offered the insurance policy, there was no nexus with a place of public accommodation); see also *Weyer*, 198 F.3d at 1119 The court held that where the administrator of an employer-provided fringe benefit is an insurance office, the ADA is applicable. *Id.* However, where the administrator of the benefit is an insurance company, the ADA is not applicable because unlike an office, a company is not necessarily a “place of public accommodation.” *Id.*; see also *Pallozzi* 198 F.3d 28 (finding that since the insurance policy in this case was a service of an insurance office, the policy is subject to ADA regulations because a nexus exists between nexus between the physical place of public accommodation, the insurance office, and the benefit, the insurance policy).

167. *Stowe*, *supra* note 73, at 299.

168. See e.g. *Parker*, 121 F.3d 1006; *Pallozzi*, 198 F.3d 28; *Ford*, 145 F.3d 601; *Weyer*, 198 F.3d at 1114-1115.

169. See *Carparts*, 37 F.3d 12; see also *Doe*, 179 F.3d 557.

Several courts have affirmed the nexus requirement, maintaining that a connection between the insurance policy and a physical place of public accommodation must exist in order to apply the ADA.¹⁷⁰ For example, in *Pallizzo v. Allstate Life Insurance*, the court held that insurance policies must abide by ADA standards because the policies are the “goods” provided by the insurance office—the “place of public accommodation.”¹⁷¹ Inversely, in *Parker*, because the plaintiff’s employer, and not an insurance office, offered the insurance benefits at issue, the court found that there was no nexus to a place of public accommodation. Since an employer is not a place of public accommodation, the plaintiff failed to state a Title III claim.¹⁷² The *Parker* and *Pallizzo* courts agree there must be a nexus between a service and a physical place like an office.¹⁷³ Accordingly, if an insurance office, or any other physical place of public accommodation, offers a service that is denied to disabled individuals on the basis of their disability, that place is liable for violating Title III of the ADA.¹⁷⁴

In 1994, the United States Court of Appeals for the First Circuit rejected the nexus requirement and held that Title III public accommodations are not limited to actual physical structures.¹⁷⁵ In *Carparts*, the court reasoned that the illustrative list of public accommodations given by the ADA, which includes “travel service” and “shoe repair service,” does not require that public accommodations have a physical structure.¹⁷⁶ Rather, according to the opinion, the ADA was intended to apply to all service establishments, including non-physical ones.¹⁷⁷ Therefore, businesses that deal solely over the phone or by mail should be subject to the same regulations as those who conduct business in an office or other facility.¹⁷⁸ According to the *Carparts* court, an insurance benefit provided by the plaintiff’s employer could be subject to ADA regulations.¹⁷⁹ The court rationalized its decision by holding that “it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same

170. See *Pallozzi*, 198 F.3d 28; see also *Parker*, 121 F.3d 1006; *Ford*, 145 F.3d 601; *Weyer*, 198 F.3d at 1115.

171. *Pallozzi*, 198 F.3d at 31.

172. *Parker*, 121 F.3d at 1011 (finding that the plaintiff failed to state a claim because there was “no nexus between the disparity of benefits and the services which MetLife offers to the public from its insurance office.”)

173. *Pallozzi*, 198 F.3d 28; *Parker*, 121 F.3d at 1006.

174. *Pallozzi*, 198 F.3d 28.

175. *Carparts*, 37 F.3d at 12.

176. *Id.* at 19.

177. *Id.*

178. *Id.* at 20.

179. *Id.*

services over the telephone or by mail are not.”¹⁸⁰ The court concluded that the purpose of the ADA is consistent with the understanding that ADA applicability is not limited to physical structures.¹⁸¹

The broad interpretation of the ADA set forth in *Carparts* has been very controversial,¹⁸² and arguably exceeds the constitutional limitations on courts’ authority to interpret the law. In *Ford v. Schering-Plough Corporation*, the Third Circuit Court of Appeals criticized the *Carparts*’ decision for failing to read “ambiguous” examples of public accommodations, like “travel services,” in the context of the other examples specified by the statute.¹⁸³ In *Parker*, the court applied the doctrine of *noscitur a sociis*, which is defined as “it is known from its associates.”¹⁸⁴ The court held that the meaning of doubtful words or phrases in a statute should be ascertained with reference to the meaning of accompanying words.¹⁸⁵ The *Ford* and *Parker* courts explained that words like “goods” and “services” are not “free-standing concepts,” but must be interpreted within the context of the statute.¹⁸⁶ The specific examples provided in the text of the ADA all refer to places with resources utilized by access to a physical place, and courts should not expand the illustrative definition of place of public accommodation.¹⁸⁷ By applying the ADA to non-physical entities, the *Carparts* court disregarded the clear language of the ADA and Congressional intent, thereby exceeding its role as an interpreter of the law by unconstitutionally shaping the law.

The *Rendon* case provides a clear illustration of the nexus requirement. The Eleventh Circuit Court of Appeals held that when a game show’s telephone selection process screened out hearing disabled individuals as contestants, it violated the ADA.¹⁸⁸ A benefit offered by this game show was the opportunity to become a contestant on the show.¹⁸⁹

180. *Id.* at 19.

181. *Id.*; see also *Doe*, 179 F.3d at 559. The court’s decision is the broadest interpretation of the ADA’s places of public accommodation provision. The court interpreted the ADA to mean “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, (citation omitted) 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.”

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

183. *Id.* (applying the “doctrine of *noscitur a sociis*” which directs courts to interpret words with “reverence to the accompanying words of the statute to avoid giving an unintended breath to the Acts of Congress.”)

184. *Parker*, 121 F.3d at 1014.

185. *Id.* at 1113.

186. *Ford*, 145 F.3d at 613; see also *Parker*, 121 F.3d at 1113.

187. *Ford*, 145 F.3d at 613.

188. See *Rendon*, 294 F.3d 1279.

189. *Id.* at 1283 (reasoning although the phone-in contest presented an intangible barrier to entry, it is still a barrier to enter a physical place of public accommodation). For example, intangible barriers such as eligibility requirements and screening rules or policies

Although the selection process—the “benefit”—was solely done over the phone, the court drew a nexus to the actual game show studio—one of the twelve categories listed in Title III of the ADA.¹⁹⁰

In 2002, Access Now, an advocacy group for disabled individuals, first tested the ADA’s applicability to the Internet.¹⁹¹ Access Now brought a class action lawsuit against Southwest Airlines for violating the ADA by operating a Web site that is inaccessible to the blind.¹⁹² The court rejected Access Now’s argument and upheld the nexus requirement.¹⁹³ The court determined that absent a nexus to a physical entity, Title III of the ADA does not require that Web site operators modify their sites in order to provide access to visually impaired individuals.¹⁹⁴ The court reasoned that the language of the ADA is “plain and unambiguous” and limits places of public accommodation to the list of twelve categories.¹⁹⁵ Ultimately, the court decided that Southwest Airlines’ Web site was not covered under the ADA because Access Now failed to demonstrate a nexus between the Internet service and a physical place of public accommodation.¹⁹⁶

Although the *Target* case is still pending trial, the California federal court sustained the nexus requirement when it denied Target’s motion to dismiss.¹⁹⁷ The court held that because of Target.com’s nexus to Target’s physical stores, the plaintiffs maintained cause of action, and a court could find that Target must modify Target.com in accordance with ADA regulations.¹⁹⁸ Specifically, the court held 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

that prevent disabled individuals from accessing a place of public accommodation’s goods, services or privileges. In essence, it is irrelevant whether or not the barrier is tangible or intangible so long as the place of public accommodation is tangible.

190. See *Id.* at 1283 (holding a “place of public accommodation was an entity that fulfilled the following requirements: it affected commerce, and it fell within one of the twelve enumerated categories of Section 12181(7)). The court distinguished this case from the *Stoutenborough* case.

191. See *Access Now*, 227 F. Supp. 2d 1312.

192. *Id.*

193. *Id.* at 1321.

194. *Id.*

195. *Id.* at 1317-18.

196. *Id.* at 1321.

197. See *Target*, 452 F. Supp. 2d 946 (rejecting the *Carparts* and *Doe* opinions that expanded the definition of a place of public accommodation to non-physical entities). The court upheld the *Stoutenborough*, *Rendon*, *Ford*, and *Weyer* decisions, requiring a nexus between a service offered and a physical place of public accommodation. The court decided that the service need only be on “of” a place of public accommodation, not one offered “in” a place of public accommodation, concluding that “Title III covers ‘all of the services which the public accommodation offers.’” *Id.* at 152-153.

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

plaintiffs state a claim, and the motion to dismiss is denied.”¹⁹⁹

Although the *Target* case was the first time that a court found that a private Internet Web site could be subject to ADA standards, the opinion does not represent a step toward ADA applicability to the Internet in general. Rather, the court’s decision strictly adheres to the nexus requirement.²⁰⁰ The *Target* court rejected the argument that virtual places are covered entities.²⁰¹ The court found a nexus exists between Target.com and Target’s physical stores because the two entities work together in an “integrated merchandising” effort to promote Target’s sales.²⁰² With a strict adherence to the nexus requirement, the Court limited the scope of its decision by holding that Target.com is only responsible for modifying online services that have a connection to the “brick and mortar” Target store.²⁰³ To the extent 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 failed to state a claim under Title III of the ADA. Thus, information and services unconnected to the Target’s physical stores need not be modified for blind accessibility.²⁰⁴ Under the nexus approach, within a single Web site, the court explained that some Internet services must be accessible to disabled, while others need not, depending on the relation between the service and a physical place of public accommodation.²⁰⁵

C. THE ARBITRARY NATURE OF THE NEXUS REQUIREMENT

The Constitution limits the role of judicial interpretation and requires that courts adhere to the text of the ADA, which necessitates a connection between a service and a physical place of public accommodation.²⁰⁶ Courts cannot ignore the plain language of the ADA; the statute’s illustrative list of places confines the definition of public accommodations to physical entities.²⁰⁷ In light of the statutory limitation, visually impaired plaintiffs’ right to Internet access is limited to Web sites that are connected to a physical entity.²⁰⁸ Courts agree that the law does not explicitly or implicitly guarantee blind accessibility to

199. *Id.*

200. *Target*, 452 F. Supp. 2d at 952.

201. *Id.* at 954 (following the *Access Now* court’s holding that “[v]irtual ticket counters are not actual, physical places, and therefore not places of public accommodation.”)

202. *Id.* at 955.

203. *Id.* at 956.

204. *Id.*

205. *Id.* at 960.

206. *Welsh*, 993 F.2d at 1269-70.

207. 42 U.S.C. § 12181(7) (2006).

208. See generally *Ford*, 145 F.3d at 612-13; *Pallozzi*, 198 F.3d 28; *Parker*, 121 F.3d 1006.

the Internet, and courts lack the constitutional authority to carve such a meaning into the statute. By limiting the ADA's application to Web sites that are linked to a physical entity, courts attempt to justify incorporating the Internet into a statute that does not mention the Internet or any non-physical entity, without infringing on Congress' power.²⁰⁹

Common sense dictates that the drafters of the ADA did not intend for the question of accessibility to hinge on whether there is a nexus to a physical entity. The arbitrary nature of the nexus requirement can be clearly illustrated by comparing two Web sites that primarily sell books: www.BarnesandNoble.com and www.Amazon.com.²¹⁰ Both Web sites offer the same merchandise, and public policy certainly supports blind accessibility to both Web sites. However, because BarnesandNoble.com is affiliated with the Barnes and Noble's "brick and mortar" stores and Amazon.com is not, only BarnesandNoble.com must comply with ADA accessibility regulations and [Amazon](http://Amazon.com) does not.²¹¹ The disparate treatment of Amazon.com and BarnesandNoble.com shows the arbitrariness of the "nexus requirement," which is arguably being used by courts as the only constitutional way to promote blind Internet accessibility under the ADA.²¹²

As American commerce continues to become increasingly Web-based, the "nexus requirement" will no longer serve its purpose of allowing visually impaired individuals to access the Internet. Completely web-based industries are foreseeable.²¹³ For example, the airline industry could avoid ADA regulations and exclude the blind from accessing

209. Moberly, *supra* note 4, at 967.

210. *Id.* at 995-96 (illustrating that under the nexus analysis, the Web site of a bookstore with a physical location (for example Barnes and Noble) must be ADA compliant, while the Web site of Amazon.com, which also sells books but does not maintain physical facilities open to the public, does not).

211. *Id.* at 995-96.

212. See Moberly, *supra* note 4, at 963 (stating, conversely, that proponents of the nexus requirement argue that the "nexus approach" is a better solution than the alternative "extreme positions.") There are important policy reasons supporting courts conclusion that a nexus is necessary. The nexus approach provides a bright-line rule that limits the applicability of the ADA to the Internet. By requiring a nexus, only places of public accommodation are expected to abide by ADA applicability requirements. Places of public accommodation are not caught off guard by ADA applicability requirements because Title III explicitly refers to such places. In this way, the nexus approach provides clarity and consistency in applying the ADA. The nexus requirement also takes into account the cost and benefits of making a public accommodation accessible, requiring that only reasonable accommodations be made. By excluding the Internet from the list of places, Congress and the Courts have recognized that the Internet industry is not like other industries that fall neatly in the category of places. Proponents of the nexus requirement agree that the nexus approach is the best way to deal with the unique Internet industry.

213. *When the Americans with Disabilities Act Goes Online*, *supra* note 16.

flights by selling tickets exclusively over the Internet.²¹⁴

Following the nexus requirements will cause problems in the future. Many businesses that previously maintained physical stores have moved all of their transactions to the Internet.²¹⁵ The NCD has pointed out that:

With the passage of time, as more and more goods, services, informational resources, recreation, communication, social and interactive activities of all kind migrate, wholly or partly, to the Net, maintenance of legal distinctions among otherwise similar Web sites, based on their connection or lack of connection to a physical facility, will become increasingly untenable and incoherent.²¹⁶

As more and more businesses go online, courts will become bogged down with arbitrary decisions over what constitutes a nexus connection, rather than important decisions like balancing the burdens and the benefits of Web site modifications.

D. PUBLIC POLICY PROMOTES INTERNET ACCESSIBILITY FOR THE BLIND

A theory explaining the creation of the nexus requirement is that strong public policy supports blind Internet accessibility, and the nexus requirement is a constitutional means to that end. The Internet has evolved into the most important tool for establishing economic, social, and political power.²¹⁷ Regardless of disability, all persons should have access to this important resource. Tim Berners-Lee, inventor of the World Wide Web, stated, "The power of the Web is its universality. Access by everyone regardless of disability is an essential aspect."²¹⁸ The United States Assistant Attorney General remarked, "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."²¹⁹

214. See *Access Now*, 227 F. Supp 2d 1312. At the time *Access Now* was decided, there were other alternatives for purchasing airline tickets from alternative airlines. If all airlines decided to follow Southwest Airlines lead and make their Web sites (in effect, their tickets) inaccessible to blind individuals, in upholding the precedent set forth in *Access Now*, blind users would be completely unable to access airline flights.

215. New York City Bar Ass'n, *supra* note 2, at 119-20. There is "a wide, and growing, range of services provided over the [I]nternet—from shopping to online banking and brokerage services to university degree courses—[that] are beginning to replace reliance on physical business locations." In addition, the article points out that "[s]ome businesses encourage Web-only transactions, charging more at their walk-in stores than for the same transaction over the Web."

216. *When the Americans with Disabilities Act Goes Online*, *supra* note 16 (admitting that "[w]ere there no nexus doctrine, and were all Web sites to be per se excluded from coverage, the law, however unjust, would at least be clear.")

217. *Hearing on the ADA and the Internet*, *supra* note 1.

218. New York City Bar Ass'n, *supra* note 2, at 120.

219. *Letter to Senator Harkin* *supra* note 123.

Public policy discourages courts from allowing businesses to exclude blind users from accessing their Web sites. When compared to non-disabled users, individuals with disabilities receive magnified benefits from Internet access because a majority “lead isolated lives and do not frequent places of public accommodation.”²²⁰ By prohibiting people with disabilities from using the Internet, Web sites suppress disabled American’s ability to obtain the benefits of the computer age, and prevent these individuals from fully enjoying the benefits of society.²²¹ Blocking access to Web sites is contrary to the purpose of the ADA.

Internet accessibility will not only benefit today’s visually impaired Internet users, it will also benefit the estimated twenty-five percent of Americans who will experience a period of disability at some time in their lives.²²² As the baby boomer generation ages, the number of visually impaired Americans will increase.²²³ Given the large sector of society that will experience a visual disability, it is in the general public’s best interest to protect accessibility.²²⁴

Opponents of Internet accessibility use the potentially high cost of accessible Web sites as a policy disfavoring access for the disabled. They argue that applying the ADA to the Internet or requiring that all Web sites be accessible to the blind would create an undue hardship for small web-based businesses.²²⁵ A Forrester Research study found retrofitting, or modifying a site not already under renovation, can cost up to

220. Finnigan, *supra* note 3, at 1813.

221. *Hearing on the ADA and the Internet*, *supra* note 1.

222. *Id.* (stating that an estimated 48.9 million people or 19.4 percent of non-institutional people in the United States, have a disability” according to the President’s committee on Employment of People with Disabilities.)

The population of older U.S. citizens is one of the fastest growing propositions that are attempting to take advantage of the Internet. Many older individuals will be impacted by the lack of accessibility as the aging process results in a need for a Web that can accommodate their special needs. . . . Most of us will experience the effect of a broken bone that requires a cast or an injury that in some way impairs our ability to function in the way we are accustomed to. There are additional situations where we experience similar problems that people with disabilities face. If you’re working somewhere there is an abundance of noise such as a plane, airport, or a factory, you may experience the same condition as someone who is hearing impaired. Sometimes technology ‘glitches’ cause us to modify the way we work. If we have a broken mouse, we may have to rely on the keyboard just as someone who’s blind or quadriplegic might.

223. Finnigan, *supra* note 3, at 1795.

224. *Hearing on the ADA and the Internet*, *supra* note 1 (explaining that the large aging sector of society is one of the reasons for enacting the ADA).

225. Wunder, *NFB Testifies on Internet Access and the ADA*, at <http://www.nfb.org/Images/nfb/Publications/bm/bm00/bm0004/bm000406.htm> (last visited Mar. 26, 2008) (citing a memo by a staffer for the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives).

\$160,000.²²⁶ Opponents of accessibility laws maintain that requiring accessibility would “slow the expansion of the fastest-growing segment of the economy, and in general stifle creativity.”²²⁷ Some critics even argue Web sites accessibility requirements violate the Web creator’s First Amendment right to free speech²²⁸ by limiting the visual attractiveness and graphic capabilities of their Web sites with textual labels.²²⁹

Three main arguments can be made to defeat the argument that Internet accessibility is economically oppressive for businesses. First, research determined the cost of accessibility for most Web sites is not impractical.²³⁰ One study found that eighty percent of accommodations needed to make most Web sites accessible would cost a business less than \$500.²³¹ Once accessible, Web sites cost less to update and maintain.²³² Second, legislation ensuring Web sites accessibility for the blind would not be burdensome to businesses because businesses need only make *reasonable* modifications to their Web sites. Lastly, accessible Web sites serve a larger base of customers, extending to any geographical location and overcoming many disabilities that would impede their access to physical retail stores.²³³

226. See Lacey, *supra* note 19; see also Wunder, *supra* note 226 (stating “it is often easier to write a program from scratch than it is to go into someone else’s program, figure out what he was trying to accomplish, and then determine [how] to make the requested changes”); see also Clark, *supra* note 66 (stating that when the Sydney Olympics were required to modify their Web sites, experts said it would cost \$2.8 million (Australian dollars) to add accessibility designs to the computer database; see *contra* Clark, *supra* note 66 (stating that building Web accessibility into the Web design from the start would only add 2% to the cost. . . . Basic accessibility is generally “so cheap it can only be measured in pennies,” also arguing that companies spend thousands of dollars on high end graphics and technology that a few more dollars to enable thousands of blind individuals to use their sites should not be over burdensome).

227. Wunder, *supra* note 226.

228. U.S. Const. amend. I (mandating, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances”); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2005) (holding that a government regulation, limiting the creative expression of a sexually explicit Web sites is unconstitutionally overbroad because it limits the Web site creator’s protected creativity, not just limited obscenity). The First Amendment protects Web sites that have “significant literary and artistic value” from overbroad government laws.

229. Wunder, *supra* note 226.

230. *Hearing on the ADA and the Internet*, *supra* note 1.

231. Kronstadt, *supra* note 5, at 137.

232. *Id.* at 118; see also *Hearing on the ADA and the Internet*, *supra* note 1 (explaining that in the early days of the Internet, Web sites were accessible to visually impaired users because they were text based). In contrast, today’s Web sites are complicated displays advanced graphics, making them inaccessible to blind users. Accessibility techniques can and must keep up with the ever-changing Internet technology.

233. Kronstadt, *supra* note 5, at 118.

Internet accessibility for the blind would greatly benefit the economy as a whole.²³⁴ Internet shopping is becoming increasingly popular and profitable.²³⁵ Since blind Internet users tend to shop online more than the average Internet user, it follows that Internet businesses would profit from developing accessible Web sites.²³⁶ An increase in sales for one sector of the economy creates positive repercussions throughout the entire economy.

IV. PROPOSAL: A NEW AMENDMENT

An amendment to the ADA is necessary to promote the strong public policy that supports Internet accessibility. As previously discussed, courts looked to Title II of the Civil Rights Act for guidance when interpreting the scope of Title III of the ADA. The courts concluded that Congress would need to amend the statute for the Civil Rights Act to apply to non-physical places of public accommodation.²³⁷ Judges lack the authority to “attempt to rewrite the laws duly enacted by the legislative branch of government.”²³⁸ Courts interpreting the Civil Rights Act held that Congress was aware of the limiting language of the statute and decided not to amend the Civil Rights Act, excluding the Internet from the Act.²³⁹ Due to the similarities between the two statutes, one can deduce that if Congress chooses to apply the standards of the ADA to the Internet, legislative action is required.

Congress possesses the authority to amend the ADA to include the Internet, as it has amended similar anti-discriminatory statutes.²⁴⁰ The precursor to the ADA, the 1973 Rehabilitation Act, proscribed discrimination on the basis of disabilities in places that receive federal financial

234. *A Nation Online*, *supra* note 66 (stating that over fifty-three percent of blind Internet users use the Web to purchase items online). Since a significant amount of blind Internet users are engaging in online shopping when accessible, it can be inferred that opening up more Internet businesses to blind shoppers will increase spending, benefiting the overall economy.

235. James Maguire, *The State of E-Commerce: Online Shopping Trends*, (Aug. 2, 2005) available at, <http://www.ecommerce-guide.com/news/trends/article.php/3524581>.

236. *A Nation Online*, *supra* note 66 (finding that 73.2 percent of blind Internet users shop online, compared to 70.2 percent of visually-abled Internet users).

237. *Welsh*, 993 F.2d at 1271.

238. *Id.*

239. *Zimmerman*, 704 F. 2d at 354 (finding that courts are limited by “definitional restrictions”).

240. Bick, *supra* note 132, at 212 (explaining that the Rehabilitation Act was enacted in 1973 and applied the ideals of equality in the Civil Rights Act to federal disability nondiscrimination). “Section 504 of the Rehabilitation Act includes a broad prohibition against discrimination on the basis of disabilities, barring discrimination against an ‘otherwise qualified individual with a disability,’ but is expressly limited to programs and activities that are federally funded”.

assistance.²⁴¹ In 1998, Congress amended the statute to require that all electronic and information technology used by recipients of federal financial assistance be accessible to the blind unless an undue burden would be imposed on the agency.²⁴² By amending the Rehabilitation Act, Congress clarified that “places” does not include the Internet or electronic and information technology. For this discussion, the 1998 Amendment to the Rehabilitation Act is not significant with regards to what Congress did, but rather what Congress did not do. Congress neither included private companies in the Rehabilitation Act,²⁴³ nor did Congress correspondingly amend the ADA to require that non-federally assisted companies using technology follow the same standards.

The Rehabilitation Act amendment shows two things: (1) that cyberspace is not a place of public accommodation in statutes sharing the same language as the Rehabilitation Act, including the ADA; and (2) that if Congress wanted to include the Internet in the ADA, Congress would amend the ADA as it amended the Rehabilitation Act. The 1998 amendment provides a strong implication that, at that time, Congress did not intend for the ADA to require accessibility for all private Internet Web sites. Congress could have amended the ADA when it passed the amendment to the Rehabilitation Act, but refrained from doing so.²⁴⁴ Therefore, if Congress wishes to expand the ADA’s applicability to Web sites, Congress must amend the Act.

Due to the Internet’s unique forum, a new amendment that specifically addresses the Internet is a better solution than simply adding the Internet to the list of Title III places of public accommodation.²⁴⁵ The Supreme Court has recognized that the Internet is “a unique medium – known to its users as ‘cyberspace’ – located in no particular geographical location but available to anyone, anywhere in the world, with access to

241. 29 U.S.C.S. § 794 (LEXIS 2006).

242. Ranen, *supra* note 3, at 401; 42 U.S.C. § 12182(b)(2) (2006).

243. Ranen, *supra* note 3, at 401.

244. Moberly, *supra* note 4, at 1002.

245. *When the Americans with Disabilities Act Goes Online*, *supra* note 16 (citing the Digital Millennium Copyright Act of 1998 and the Digital Signature Act of 2000 as models of “Internet-specific” laws). Also cited are the changes that privacy law has had to undergo to accommodate the Internet technologies. *Id.* The paper goes on to argue, however, that existing laws like the ADA can be applied to the Internet alleviating the need to create new legislation. *Id.* Also note that other unique entities are covered under laws specifically designed for these entities. For example, airplane accessibility is not listed under Title III of the ADA, but rather has its own statute, the Air Carrier Access Act of 1986; see 49 U.S.C. § 41705(a) (LEXIS 2006). The Act requires that when

providing air transportation, an air carrier, including . . . any foreign air carrier, may not discriminate against an otherwise qualified individual on the following rounds: (1) the individual has a physical or mental impairment that substantially limits one or more major life activities.(2) the individual has a record of such an impairment. (3) the individual is regarded as having such an impairment. *Id.*

the Internet.”²⁴⁶ The Internet has realigned many basic legal concepts.²⁴⁷ Internet-specific laws in the area of intellectual privacy law, illustrate that Internet-specific laws are possible and at necessary times.²⁴⁸ Internet-specific legislation should be added to the ADA to address the unique circumstances posed by the Internet.²⁴⁹

Congress should create Internet accessibility for the blind with a separate amendment to the ADA. Adding the Internet to Title III's list of public accommodations would threaten the clarity of the entire section. The public accommodations listed in Title III have certain attributes in common, including that they are all physical entities.²⁵⁰ Courts use these common characteristics to decide whether a non-listed accommodation should be covered.²⁵¹ Adding the Internet to Title III could lead to ADA applicability of a seemingly endless array of non-tangible services. Including all non-physical entities under the ADA would produce an unpredictable result not covered in this analysis. A separate

246. *When the Americans with Disabilities Act Goes Online*, *supra* note 16.; *see contra*, Finnigan, *supra* note 3, at 1815-16 (internal citations omitted). Finnigan explains that:

The Internet is actually an all-encompassing medium, which can provide many of the services available at the listed public accommodations. This is especially evident when comparing the Internet to the “other similar” language included in the public accommodation section. For example, the Internet can be a place of exhibition or entertainment when one downloads streaming video and audio to watch or listen to in the home; it can be a place of public gathering in the form of chat rooms and public online forums; it can be a sales or rental establishment where one can purchase virtually anything available at any brick and mortar store; it can be a service establishment, where one can book vacations, get legal advice, and check insurance quotes; it can be a place of public display or collection, granting users access to the contents of museums and libraries spanning the globe; and it can be a place of education through the use of virtual lectures, virtual libraries, and online degree programs. *Id.*

Although these are sound examples of the similarities between the Internet and places of public accommodation, the article ultimately concludes that the Internet is a “new venue” in many respects and as such requires legislation that is specifically tailored to account for the unique problems associated with the Internet. *Id.* at 1825-26.

247. *When the Americans with Disabilities Act Goes Online*, *supra* note 16 (arguing that courts should consider redefining traditional concepts such as “place” to adapt to the transformation of the Internet); *see also* Charles D. Mockbee IV, *Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses*, 28 S. ILL. U. L. J. 553, 562 (2004) (stating that “[I]nternet technology has created a new type of language.”)

248. *When the Americans with Disabilities Act Goes Online*, *supra* note 16 (arguing that the Internet is no longer self-regulated as it was in its inception and needs legislative regulations in order to abide by the principles of law).

249. *See* Finnigan, *supra* note 3, at 1825-26 (explaining that “[t]he Internet is a new venue in so many respects that it deserves its own legislation to deal with its own special problems”); *see also* Mockbee, *supra* note 248, at 560 (arguing that the ADA should add “Internet business” to places of public accommodation).

250. 42 U.S.C. § 12181(7) (2000).

251. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997).

section of the ADA should address only the Internet to minimize the risk of making the statute overbroad.

A. REQUIRING ONLY REASONABLE MODIFICATIONS TO INTERNET WEB SITES

A statutory amendment should require Web sites to make reasonable modifications to achieve the goal of Internet access for the blind. Similar to Title II, the public service provision of the ADA, the new amendment should only required modifications "necessary" to ensure effective electronic communication for individuals with disabilities.²⁵² The amendment would not require modifications if doing so would result in "a fundamental alteration to the program or service or in an undue burden."²⁵³ An undue burden, as defined by the Department of Justice, is a "significant difficulty or expense."²⁵⁴ Courts should consider two main factors when determining whether an undue burden exception to ADA mandatory accessibility is warranted: (1) whether the cost of modification is excessive; and (2) whether the business is financially able to make the accommodation.²⁵⁵ Practical restraint is essential to ensure the burden of modification is properly allocated.²⁵⁶ Legislation that requires "reasonable modifications" will ensure that changes in Web sites will not become too costly for businesses.²⁵⁷ With the interest of business owners in mind, the requirements should be "unobtrusive, inexpensive and easily accomplishable."²⁵⁸ If, for example, a small business would risk

252. *Letter to Senator Harkin, supra* note 123.

253. *Id.*

254. Kronstadt, *supra* note 5, at 117-18.

255. Kronstadt, *supra* note 5, at 118.

256. Legislation has already had to deal with questions of allocation in the past. For example, a person using a wheelchair is responsible for attaining the wheelchair but is not responsible for reconstructing sidewalks and stairwells to become accessible.

257. *Hearing on the ADA and the Internet, supra* note 1 (stating that the ADA does not require businesses to alter the fundamental nature of their goods or services). The Hearing goes on to state that:

Many State and local governments are transitioning to the Internet to process a variety of administrative services. If we are making these transitions using taxpayer money, we must make sure that those who are paying for it can take advantage of that transition and can participate. Many sites will focus on avoiding litigation instead of addressing the real need of disabled citizens to have access to the valuable content they provide. The cost of potential litigation could also discourage some Web sites from coming online. There is a risk in applying the ADA to the Internet before industry has been given an opportunity to address the issues of accessibility in a commercial and a competitive environment. Incentives for early adopters might also increase the speed in which this occurs.

258. Anita Ramasastry, *supra* note 19 (finding that many opponents argue that the cost of requiring Web sites to adhere to ADA standards would be too great for businesses). For example, in a February 2000 Congressional hearing, opponents of mandatory Internet accessibility for the blind argued that requiring Web sites to comply with the ADA standards

bankruptcy by revamping its Web site, the business could claim an undue burden and be exemption from the accessibility requirement.

Opponents often erroneously argue that highly technical or graphically intensive Web sites would lose their appeal if required to provide textual descriptions of the work displayed.²⁵⁹ The amendment would not require textual descriptions of complex graphics. The existing ADA does not require modifications that might “jeopardize the overall viability” of the public accommodation.²⁶⁰ If requiring the Web site to be accessible to the blind would destroy its aesthetic appeal, the new amendment would not require accessibility. The *Target* opinion clearly mandates that courts should use discretion to not require businesses to alter the nature of goods so long as there is effective communication of the services provided.²⁶¹ The same vigilance should be followed by courts when applying the new amendment to ensure that only “reasonable modifications” are required. Existing Internet-specific statutes, like the Rehabilitation Act, demonstrate that Web site modifications can be defined and implemented in a reasonable manner not financially burdensome to companies.²⁶²

Reasonability of Web site modifications should be determined on a case-by-case basis, just as it is determined in addressing whether physical places of public accommodation need to be modified. The ADA has a four-part test for determining the reasonability of modifications to public

would be too costly for businesses. *Id.* Specifically, opponents testified that “millions of [web] pages will have to be taken down and many will be forced to stay down, due to the cost of modifications.” *Id.* The article goes on to say that in reality, research has shown that it would not in fact be overly costly for businesses because the ADA only requires “reasonable” modifications. *Id.*

259. Mockbee, *supra* note 248, at 572-73 (explaining that if the ADA required textual explanations of artistic graphics, then Title III would arguably convert “an art Web site into an art commentary Web site.”) This would exceed the ADA requirements of a “reasonable accommodation” and would arguably cause an undue burden on the Web site provider. *Id.*

260. Mockbee, *supra* note 248, at 572-73.

261. *Target*, 452 F. Supp. 2d 946 ,955-56 (holding that it is unclear whether requiring Target.com to be redesigned for accessibility would change the nature of the service). The court conceded that a party may offer the defense that communicating the information over the telephone is a reasonable alternative to modifying its Web site. *Id.* The court did not address this argument, however, because the issue before the court was procedural, a motion to dismiss, not substantive. *Id.*

262. *When the Americans with Disabilities Act Goes Online*, *supra* note 16 (citing *Access Now*, 227 F. Supp 2d 1312 (S.D. Fla. 2002), and commenting that such laws do not restrict design requirements on operators or limit creativity of Web sites). The comment also maintains that such regulations do not subject companies “to perpetual fear or uncertainty at the prospect of some regulatory bureaucrat swooping down on them for serious or trivial violations.” *Id.*

accommodations.²⁶³ Courts consider the following factors in determining reasonability: “(A) the nature and cost of the action needed; (B) the overall financial impact of the action; (C) the overall financial resources of the covered entity; and (D) the type of operation of the covered entity.”²⁶⁴ With the test already in place, applying the same factors to Web site accessibility would be relatively seamless.

B. ALREADY EXISTING STANDARDS FOR AN AMENDMENT

Reasonable Internet accessibility standards already exist, which make amending the ADA relatively easy and predictable. The World Wide Web Consortium (“W3C”) sets computer programming standards for Web-related technologies.²⁶⁵ In 1999, the W3C issued voluntary accessibility guidelines for Web sites.²⁶⁶ The guidelines required core aspects of each Web site to be written in alternative text to enable screen-reading devices to convert the text into audio format. Additionally, the guidelines recommended Web sites ensure all functions can be performed using a keyboard instead of a mouse. Furthermore, it required that the headings be labeled so that blind users can navigate through the site.²⁶⁷

The W3C guidelines set the standard used by other countries requiring Web site accessibility.²⁶⁸ Several major industrial nations enacted legislation requiring Web sites to adhere to the W3C Web accessibility guidelines.²⁶⁹ For example, Great Britain and Australia, two countries with similar disability rights laws as the United States, extended their statutes to include Internet accessibility for all.²⁷⁰ Great Britain initially modeled its Disabled Discrimination Act after the ADA. In 1999, Great Britain amended the Act to require Internet accessibility for all.²⁷¹ Notably, there are no indications that Web accessibility requirements, as applied in any of the European or in several Asian nations, have resulted in difficulty or disruption of business.²⁷² It is likely that the United

263. Bick, *supra* note 132, at 215 (explaining the “readily achievable” standard which is defined as “easily accomplishable and able to be carried out without much difficulty or expense.”)

264. Bick, *supra* note 132, at 215.

265. Lacey, *supra* note 19.

266. *Id.*

267. Finnigan, *supra* note 3, at 1797.

268. Lacey, *supra* note 19.

269. *When the Americans with Disabilities Act Goes Online*, *supra* note 16 (citing England and Australia as countries who have extended Internet accessibility requirements to the private sector).

270. *When the Americans with Disabilities Act Goes Online*, *supra* note 16.

271. Lacey, *supra* note 19.

272. *When the Americans with Disabilities Act Goes Online*, *supra* note 16.

States can make a similar smooth transition if it amends the ADA to require Internet accessibility.

C. TITLE IV OF THE AMERICANS WITH DISABILITIES ACT
AS A MODEL FOR PROPOSED LEGISLATION

Twenty years ago, hearing-impaired Americans faced a similar problem as blind Internet users face today. Hearing-impaired Americans were unable to use the telephone network because some telecommunication services were not compatible with telecommunication devices for the deaf.²⁷³ A congressional advocate of Title IV commented, “too many deaf or hearing-impaired persons have been cut off from our nation’s most important communications system, the telephone network, because there are not enough telecommunications devices for the deaf.”²⁷⁴

Congress determined that Title III does not cover telecommunications because telecommunication services are unlike the places of public accommodations listed.²⁷⁵ Therefore, Congress needed to amend the ADA in order to ensure that hearing-impaired Americans were able to use the telephone network.²⁷⁶

Congress enacted Title IV to specifically address companies that provide telephone service to the general public.²⁷⁷ “Title IV of the ADA re-

273. 47 U.S.C. § 225 (2006).

274. Finnigan, *supra* note 3, at 1814-15.

275. See 47 U.S.C. § 225 (2006) (Amendment 541 to S. 993 offered by Senator John McCain. The McCain Amendment was incorporated into the ADA as Title IV of statute and is codified at 47 U.S.C. § 225. The primary sponsor of the ADA, Senator Harkin, was a co-sponsor of the amendment.; see also Finnigan, *supra* note 3, at 1820:

[i]f the text of Title III of the ADA addressed telecommunication services, there would have been no need for this amendment. Thus, it was clear Congress understood at the time the ADA was being enacted that Title III did not affect telecommunication services, and, yet, they failed to amend the legislation despite this knowledge. This is a clear indication Congress did not intend to include telecommunication services as a ‘public accommodation’ in Title III of the ADA.

276. See 47 U.S.C. § 225 (2006).

277. 47 U.S.C.S. § 225(b) (2006)

(1) [i]n order to carry out the purposes established under §1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) Use of general authority and remedies. For the purposes of administering and enforcing the provisions of this section and the regulations prescribed there under, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this [Act] with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as

quires local and long distance phone companies to offer relay services for hearing-impaired and speech-impaired people, which facilitate communication for individuals who use assistive devices to translate voice signals into written messages and vice-versa.”²⁷⁸ Congress explicitly indicated that Title III did not cover telecommunications, but Congress intended for telecommunications to be included in the ADA through Title IV.²⁷⁹ Title IV is “markedly more specific than other provisions of the ADA, mandating that telecommunications providers make available a *specific* service to a *specific* group of people.”²⁸⁰ Title IV requires that companies offer telephone relay service to individuals who use telecommunication devices for the deaf (TDDs) or similar devices.²⁸¹

Today, Congress is faced with a similar problem as the one faced in 1989. Visually-impaired Americans are again being “cut off” from the national’s most important communication system, the Internet.²⁸² Congress intended for the ADA to accommodate technological advances.²⁸³ In order to keep pace with the rapidly changing technology, Congress must update the ADA by creating an amendment that specifically applies to the Internet.

D. PROPOSED AMENDMENT TO THE AMERICANS WITH DISABILITIES ACT

The following is a suggested amendment for the Americans With Disabilities Act:

Requirement of Internet Accessibility

(1) In order to carry out the purposes established under Section 12101, to secure equal opportunity for individuals with disabilities, and to increase the accessibility of the Internet, owners and operators of Internet Web sites are required to make reasonable modifications to ensure that accessibility is available to the extent possible, to all disabled individuals in the United States.

(2) Specific prohibitions

(a) failure to make reasonable modifications, as defined by Section 12181(9) of this Act, when such modifications are necessary to ensure Internet accessibility for disabled individuals in the United States, is prohibited.

(3) Remedy

are applicable to a violation of this Act by a common carrier engaged in interstate communication.

278. Finnigan, *supra* note 3, at 1814.

279. *See* 47 U.S.C. § 225 (2006).

280. Finnigan, *supra* note 3, at 1808 (emphasis added).

281. 47 U.S.C. § 225(b) (2006).

282. Finnigan, *supra* note 3, at 1814-15.

283. *Id.* at 1814.

(a) Any violation of this section by owner or operator of the Internet shall cause such owner or operator of the Internet to be subject to the same remedies, penalties, and procedures as are applicable to a violation of Section 12182 of this Act.

V. CONCLUSION

In a world fascinated with cutting-edge technology, inaccessible Web sites have isolated blind Internet users from society. Permitting isolation of blind individuals is unacceptable in a country that advocates equality as essential for human dignity.

The recent *Target* case shed light on the fact that courts are limited to the language of the ADA and unable to apply the ADA to the Internet. Limiting the scope of the ADA to physical places of public accommodation contravenes a social goal that gleams importance. To solve this discrepancy, some courts have used the nexus requirement to construe the law in order to achieve the desired end of ensuring equality for disabled individuals.²⁸⁴ There is no logical foundation for requiring a nexus between a Web site and a physical entity. The resulting paradox is that two Web sites that provide the same services, BarnesandNoble.com and Amazon.com, are subject to different standards of accessibility.²⁸⁵ As more businesses go exclusively online, the nexus requirement threatens to leave blind individuals out of the cyber sector of commerce, contradicting our nation's most fundamental principal of access and equality for all.

The hole in the legislative progress towards eliminating discrimination against disabled Americans that cannot be filled through case law, but rather needs to be patched up by an amendment. Congress should update ADA to accommodate the Internet revolution. Congress must adhere to the virtuous policy of equal access for all, and amend the ADA to allow blind users access to one of our greatest resources by properly allocating the cost of accessibility, allowing those with vision disabilities to join the rest of us in the computer age.

284. See e.g., *Parker*, 121 F.3d 1006; *Ford*, 145 F.3d 601; *Weyer*, 198 F.3d 1114-15.

285. Moberly, *supra* note 4, at 995-96.

