ENSURING EQUAL ACCESS TO THE INTERNET FOR THE ELDERLY: THE NEED TO AMEND TITLE III OF THE ADA

Michael P. Anderson

The Internet has rapidly expanded in recent years and increasingly affects every aspect of life. However, for individuals with certain disabilities, their ability to effectively and fully access various Internet sites is hampered and sometimes blocked. Under the current state of disability law, disabled persons who cannot enjoy the same Internet services as other individuals have little or no legal recourse because the Internet is not a "place of public accommodation" covered by the Americans with Disabilities Act (ADA). This problem particularly affects the elderly, since they encompass a large percentage of disabled Americans. In this Note, Mr. Anderson focuses on the ADA's lack of clarity regarding the Internet and how it affects the elderly population. Mr. Anderson discusses the various disabilities that most commonly strike the elderly and how these disabilities affect their Internet use. He then outlines various proposals and guidelines that suggest ways in which websites can be made more accessible for persons with disabilities. Next, Mr. Anderson outlines a brief history of the ADA, with an emphasis on its purpose of bringing individuals with disabilities into "the economic and social mainstream" of society, and then discusses Title III of the ADA, which deals with private entities who provide services and operate places of public accommodation. Mr. Anderson moves on to

Michael P. Anderson is Editor-in-Chief 2010–2011, Member 2009–2010, *The Elder Law Journal*; J.D. 2011, University of Illinois, Urbana-Champaign; B.A., 2008, University of Minnesota.

The author would like to thank his family and friends for being so supportive throughout law school. He'd like to dedicate this Note to his mother, Linda Manders, who has sacrificed so much over the years to get him to where he is today.

analyze the case law that has dealt with the application of the ADA Title III to the Internet and the question of whether a "public accommodation" can be a location other than a physical place. While some circuits hold that the term "public accommodation" encompasses more than a mere physical place, other courts hold a narrower view. Certain circuits follow a "nexus" test—focusing on whether a nexus exists between a website and a physical place of public accommodation. Mr. Anderson concludes that the "nexus" test is lacking because it is underinclusive and does not settle how the ADA should be applied to the Internet. Mr. Anderson recommends that all of the enumerated categories listed in Title III of the ADA should be amended to apply to the Internet by requiring that covered entities provide alternate formats through which disabled persons, including the elderly, can access their services. With this change, elderly and disabled Americans would be able to fully participate in the technological innovations of tomorrow.

> "The Internet is not just a window on the world but more and more the Internet is the world."[1]

I. Introduction

Imagine a world twenty years into the future. The Internet has become so integrated into society that few can remember a time when it did not exist. Going to a physical store to do one's shopping seems as antiquated as a drive-in movie theater. In 2030, we seemingly do everything on the Internet—we get our news, buy our groceries, watch movies, and even receive medical diagnoses. The Internet has made almost everyone's life easier; everyone, that is, except the elderly and disabled.

The Americans with Disabilities Act (ADA) guarantees the elderly and disabled equal access to employment, retail, and other places of public accommodation.[2] Yet under the legal interpretation of the ADA, the Internet is not considered a place. The Internet is something else—a stream of electrons conveying information outside of the "real" world. But what of those who can't access this world because technology has surpassed their physical capabilities? They are left with only the memory of the ADA as it existed in the 1990s—a quaint

1. *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites*: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 6 (2000) [hereinafter *Applicability of the ADA*] (statement of Gary Wunder, Programmer Analyst-Expert, University of Missouri).

2. *See* 42 U.S.C. § 12182(a) (2006); Vicki Hanson, *Web Access for Elderly Citizens*, *in* PROCEEDINGS OF THE 2001 EC/NSF WORKSHOP ON UNIVERSAL ACCESSIBILITY OF UBIQUITOUS COMPUTING: PROVIDING FOR THE ELDERLY 14 (2001), *available at* http://delivery.acm.org/10.1145/570000/564531/p14-hanson.pdf (explaining that half of the population will experience some disability by age sixty-five).

world where they had protections and rights—before the Internet was everything.

As harsh as this seems, it is a potential reality as the Internet increasingly becomes the means to accomplish what was once accomplished in physical spaces. The elderly, who represent a large percentage of the disabled population in this country, run the risk of becombecoming second-class citizens who cannot enjoy the same services as everyone else because their disabilities shut them out of the digital world. A string of cases this past decade has suggested that the Internet is not a place covered by the ADA,[3] or is only covered if the services provided by the website are tangibly connected to a physical space of public accommodation.[4]

This Note will explore the ways the courts have applied Title III of the ADA to private websites and how this affects the elderly and the disabled. Part II of this Note will examine the disabilities that commonly affect the elderly and how these disabilities affect their access to the Internet. Part II will also examine simple strategies that web developers can use to make their websites more accessible. Finally, Part II will examine the purpose and history of Title III of the ADA. Part III will examine the rules and court cases that have addressed the scope of Title III, illustrating that some courts have suggested that Title III covers more than physical spaces, while other courts have explicitly limited Title III to physical spaces. Part III will also examine the *Target* "nexus" test. Part IV will argue that the *Target* "nexus" test inadequately protects disabled persons' access to the Internet and proposes a legislative solution that ensures that the disabled and elderly will be able to enjoy equal access to the Internet and its services.

3. *See* Access Now, Inc., v. Sw. Airlines Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (explaining that the plaintiffs failed to state a claim under the ADA because they could not establish that the website "impeded" access to a physical place, nor could they establish that there was a "nexus" between the website and a physical place).

4. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (holding that plaintiffs stated a claim to the extent they alleged that access to Target.com impeded "full and equal" enjoyment of the Target stores).

II. Background

A. The Elderly, Disabilities, and Internet Use

The elderly have been described as the fastest growing group of Internet users.[5] Despite this growth, as recently as 2004, only twenty-two percent of Americans over the age of sixty-five reported using the Internet.[6] However, with those aged fifty to sixty-four, the rate of Internet usage increases to fifty-eight percent.[7] Therefore, the number of elderly Internet users is bound to increase as those who are more familiar with the Internet join the ranks of the elderly.[8]

Many of these elderly users will face challenges when they try to access the Internet because of disabilities associated with age. By age sixty-five, nearly half of the population experiences some type of disability, with one-quarter experiencing a severe disability.[9] The main disabilities that the elderly experience that make Internet use difficult are vision impairment, cognitive difficulties, dexterity problems, and hearing impairment.[10]

The most common disability that makes Internet use difficult for the elderly is vision impairment.[11] Vision impairment can include colorblindness, low vision, or total blindness.[12] Although colorblindness is the most common visual impairment in men, it causes fewer problems in using the Internet.[13] However, colorblind users may have difficulty identifying items that are only distinguishable by color or have trouble understanding meaning conveyed by a change in color.[14] For

5. Hanson, *supra* note 2, at 14.
6. SUSANNAH FOX, PEW INTERNET & AMERICAN LIFE PROJECT, OLDER AMERICANS AND THE INTERNET 13 (2004), *available at* http://www.pewInternet.org/~/media//Files/Reports/2004/PIP_Seniors_Online_2004.pdf.pdf.
7. *Id.*
8. *See id.* at 14 (explaining that as the Internet users in their fifties age, they will continue to use the Internet).
9. Hanson, *supra* note 2, at 14.
10. *Id.* at 14–15.
11. *Id.* at 14.
12. *See* Nikki D. Kessling, Comment, *Why the* Target *"Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation"*, 45 HOUS. L. REV. 991, 999–1000 (2008).
13. *Id.* at 1000.
14. *Id.* at 1000–01.

example, a person with colorblindness might have difficulty filling out a form on a website that denotes required fields in red.[15]

The more serious challenges are those faced by people with low vision or blindness, conditions that disproportionately affect the elderly.[16] Even though those over age sixty-five account for only 12.8% of the U.S. population, they make up approximately thirty percent of visually impaired individuals.[17] Low vision occurs when one's vision "cannot be fully corrected by glasses, thus interfering with daily activities . . . ."[18] Low vision is more common among the elderly than other segments of the population and can include "such conditions as macular degeneration, glaucoma, diabetic retinopathy, or cataracts."[19] People with low vision may have difficulty using websites because they have trouble perceiving small content, especially if it cannot be enlarged or if it does not contrast well with the website background.[20] These users often use screen magnifiers to assist in navigating the Internet.[21] A screen magnifier is a program that zooms in on text and enlarges it, allowing readers to see and read the text with more clarity.[22] However, screen magnifiers often cause the text of a webpage to become "blocky and pixilated" when enlarged, which may also make the text difficult to read.[23]

As might be expected, blind users face the greatest difficulty using the Internet.[24] Unlike most Internet users, who navigate the web

15. *See* W3C Working Grp., *Use of Color: Understanding SC 1.4.1*, UNDERSTANDING WCAG 2.0, http://www.w3.org/TR/UNDERSTANDING-WCAG20/visual-audio-contrast-without-color.html (last visited Feb. 16, 2011). Other examples include "using color to indicate that a link will open in a new window or that a database entry has been updated successfully" and "using highlighting on form fields to indicate that a required field has been left blank." *Id.*

16. MAYUR DESAI ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, TRENDS IN VISION AND HEARING AMONG OLDER AMERICANS 1, *available at* http://www.cdc.gov/nchs/data/ahcd/agingtrends/02vision.pdf.

17. *Id.* Visual Impairment includes blindness and is defined "as vision loss that cannot be corrected by glasses or contact lenses alone." *Id.* at 2.

18. *Visual Disabilities: Low Vision*, WEBAIM, http://webaim.org/articles/visual/lowvision (last visited Feb. 16, 2011).

19. *Id.*

20. *See id.* (explaining that websites with color combinations such as blue ink on a black background, as well as sites with small text, are difficult to read).

21. *Id.*

22. *Id.*

23. *Id.*

24. *See Visual Disabilities: Blindness*, WEBAIM, http://webaim.org/articles/visual/blind (last visited Feb. 16, 2011) (explaining that although most blind people have some degree of vision, it is not enough to adequately access the Internet).

through the use of a mouse, the blind user is reliant on the keyboard and screen readers to browse websites.[25] Screen readers are computer programs that convert certain displayed text on a website into speech.[26] Users may permit the screen reader to read the entire website top-to-bottom or to move to different headings and links using the tab key.[27] For those users who are both blind and hearing-impaired, refreshable Braille devices can read text from a website and convert it into Braille characters that a user can feel.[28] However, both of these devices have limitations.[29] For example, screen readers and Braille devices cannot relate the meaning of images on a site, analyze the visual layout of a site, skip advertisements or other side content, or clearly read data tables in a comprehensive manner.[30]

Another impairment that can make Internet use difficult for the elderly is a lack of dexterity.[31] Elderly users may have problems operating a mouse or keyboard.[32] This may be due to a lack of experience using these devices or actual motor disabilities.[33] These motor disabilities may include "limb injuries, paralysis-inducing spinal cord injuries, cerebral palsy, muscular dystrophy, Parkinson's disease, arthritis, and any other disease or condition that restricts movement or causes a loss of muscle control."[34] This problem may be particularly acute when a website requires such actions as double-clicking, dragging items across the screen, and using a scroll bar to navigate the site.[35]

Cognitive difficulties in the elderly are another barrier to using the Internet.[36] Elderly users with cognitive impairments may find it difficult to learn unfamiliar domain names and may also experience the need for longer training times, attention problems, interference from previously learned computer skills, and difficulty remembering what was learned.[37] These problems may make web navigation problematic because "visual clutter and irrelevant information are difficult

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* Hanson, *supra* note 2, at 14.
32. *Id.*
33. *Id.*
34. Kessling, *supra* note 12, at 1001.
35. Hanson, *supra* note 2, at 14.
36. *Id.*
37. *Id.* at 14–15.

for seniors to understand and navigate."[38] In addition, web animations designed to enhance a website may actually serve as a distraction for the elderly.[39]

Finally, another very prevalent disability present among elderly Internet users is hearing impairment.[40] Hearing impairment may include mild hearing loss, profound hearing loss, and a loss of hearing in either the low or high frequency range.[41] While hearing problems are not seen as a major roadblock to Internet use,[42] they can limit the full experience of a website, especially when audio or video is integrated into a website that does not provide captioning or transcripts.[43]

The difficulties posed by these impairments are compounded by the fact that many elderly users suffer from multiple concurrent impairments.[44] For example, an elderly user may suffer from both low vision and tremors and, therefore, have difficulty finding corrective devices that work appropriately together, since the devices have not been tested for compatibility.[45] Most certainly, an elderly user who has both vision and hearing problems will have the greatest difficulty navigating the Internet because adaptive technologies, like captions and screen readers, would be of little use.[46]

B. Making Websites More Accessible for the Disabled

Aside from technologies that assist disabled persons from the user's end of the computer,[47] websites can be designed to be more ac-

38. *Id.* at 15.
39. *See id.*
40. Hanson, *supra* note 2, at 15.
41. Kessling, *supra* note 12, at 1001.
42. Hanson, *supra* note 2, at 15.
43. Kessling, *supra* note 12, at 1001. Google has made major progress towards making its video-sharing website, YouTube, more accessible to the hearing-impaired through the use of technology that automatically adds closed captioning to many of the videos on its site. *See* Miguel Helft, *Google to Add Captions, Improving YouTube Videos*, N.Y. TIMES, Nov. 20, 2009, at B4, *available at* http://www.nytimes.com/2009/11/20/technology/internet/20google.html.
44. Hanson, *supra* note 2, at 15 ("Seniors . . . will often present a combination of disabilities.").
45. *Id.*
46. *See* Hanson, *supra* note 2, at 15 (explaining that many of the current user device solutions address only one disability at a time, which is problematic for users with more than one disability). *See also* Kessling, *supra* note 12, at 999–1001 (describing the solutions for vision-impaired individuals and the solutions for hearing-impaired individuals as two separate solutions for two separate problems).
47. *See* discussion *supra* Part II.A.

cessible for persons with disabilities. In order to assist web developers in creating accessible websites, the World Wide Web Consortium (W3C) established the Web Accessibility Initiative (WAI) for the purpose of creating a uniform set of guidelines on web content accessibility.[48] While already established websites may be made accessible, it is far simpler for a web developer to plan and implement accessibility measures at the beginning of the process.[49] These WAI guidelines highlight some relatively simple and effective changes that can make websites more accessible.[50] The following are a sample of the simple guidelines:

1) Labeling any non-text content with an underlying text description of the image;[51]
2) Having transcripts or captions accompany audio or video;[52]
3) Allowing the use of a keyboard to navigate the entire website;[53]
4) Choosing text and background colors with adequate contrast to make it easier for low vision readers to distinguish them;[54]
5) Allowing users to resize text;[55]
6) Using actual text and not pictures of text;[56]
7) Using descriptive headings for web pages and links;[57]
8) Structuring the site in a simple and logical manner so that users may easily navigate it.[58]

48. *See* Steven Mendelsohn & Martin Gould, *When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the World Wide Web*, 8 COMPUTER L. REV. & TECH J. 173, 207–08 (2004).

49. *See Introduction to Web Accessibility*, WEB ACCESSIBILITY INITIATIVE, http://www.w3.org/WAI/intro/accessibilty.php (Feb. 16, 2011) (explaining that a "key principle" of web accessibility is to design sites that can meet the needs of many different users).

50. *See Web Accessibility Quicktips: WCAG 2 at a Glance*, WEB ACCESSIBILITY INITIATIVE, http://www.w3.org/WAI/WCAG20/glance/ (last visited Feb. 16, 2011).

51. *How to Meet WCAG 2.0*, WEB ACCESSIBILITY INITIATIVE, http://www.w3.org/WAI/WCAG20/quickref/ (last visited Feb. 16, 2011). The website designer "can use 'alt text' to label pictures or animations in ways that make sense to blind users (such as labeling a picture of a blue sweater as 'blue sweater,' rather than 'image001')." Kessling, *supra* note 12, at 1002–03.

52. *How to Meet WCAG 2.0*, *supra* note 51.

53. *Id.*

54. *See id.*

55. *Id.*

56. *Id.*

57. *Id.* For example, using the descriptor "Frequently Asked Questions" as opposed to "click here."

The National Institute on Aging (NIA) and the National Library of Medicine have also published a set of guidelines for web developers, targeted to the creation of "senior friendly" websites.[59] Many of their recommendations are similar to the WAI guidelines, including the suggestions of text alternatives to animation, video, and audio, as well as straightforward navigation.[60] The NIA and the National Library of Medicine also make recommendations, such as using larger, bolder fonts and presenting "information in a clear and familiar way to reduce the number of inferences that must be made," which address the common vision and cognitive problems that seniors face.[61]

The relatively simple changes advocated by the WAI and the NIA need not cost a substantial amount of money and may be put in place when building a new website or when updating an existing site. Free online tools are available that assess how accessible a website is and highlight any possible problems that currently exist.[62] Once a web designer makes the decision to update a website, many problems can be fixed through relatively easy changes to the website's code and structure.[63]

C. History of the ADA

The Americans with Disabilities Act was signed into law on July 26, 1990, by President George H.W. Bush in order to "provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life."[64] The ADA expanded the protections to the disabled that were offered by the Rehabilitation Act of 1973.[65] The Rehabilitation Act, which took much of its remedial language from the Civil Rights Act of 1964, offered certain protections to persons with disabilities from discrimination, but only in the context of the federal government and private entities receiving

58. *Id.*
59. *See* NAT'L INST. ON AGING & NAT'L LIBRARY OF MED., MAKING YOUR WEB SITE SENIOR FRIENDLY (2002), *available at* http://www.nlm.nih.gov/pubs/checklist.pdf.
60. *Id.*
61. *Id.*
62. Kessling, *supra* note 12, at 1003.
63. *Id.* at 1004.
64. Jeffrey Scott Ranen, Note, *Was Blind but Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 389–90 (2002).
65. *Id.* at 394.

federal contracts.[66] The ADA, on the other hand, extended these protections further into the private sector.[67]

When Congress passed the ADA, it found that forty-three million Americans were living with a disability and that the number was increasing.[68] Congress also noted that those "who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[69] Invoking its broad powers to regulate interstate commerce and enforce the 14th Amendment, Congress passed five major provisions of the ADA.[70] Title I addressed discrimination against the disabled in employment, Title II addressed public services such as state and local governments and transportation, Title III covered private entities who provide services and operate places of public accommodation, Title IV dealt with telecommunications for hearing- and speech-impaired individuals, and Title V included other miscellaneous provisions.[71]

The provision that is most relevant for the purposes of this Note is Title III, which covers places of public accommodation. Congress passed Title III with the intention of extending the Section 504 protections of the Rehabilitation Act of 1973 to the private sector, thus bringing more persons with disabilities into the "economic mainstream" of the country.[72] In passing Title III, Congress set out to accomplish this goal of integrating the disabled into the nation's economy by ensuring them "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[73] Congress enumerated twelve categories of places that were to be considered places of public accommodation:

66. *Id.* at 393.

67. *See* 42 U.S.C. § 12101 (2006) (extending protections to the disabled in private sector employment and in the use and enjoyment of specifically enumerated places of public accommodation and meaning to provide a "clear and comprehensive national mandate").

68. § 12101(a)(1), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3(1), 2008 U.S.C.C.A.N. (122 Stat.) 3554–55 (amending section 2(a) of the Americans with Disabilities Acts of 1990 to state that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination . . . .").

69. § 12101(a)(4).

70. *See* § 12101(b)(4).

71. *See Overview of the Americans with Disabilities Act*, DBTAC-GREAT LAKES ADA CENTER, http://www.adagreatlakes.org/resources/anniversary/overview.asp (last visited Feb. 16, 2011).

72. *See* Ranen, *supra* note 64, at 389–90.

73. § 12182(a).

> (A) an inn, hotel, motel, or other place of lodging . . . ;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, . . . 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.[74]

Although Congress meant this list to be exhaustive, "the examples within each category were to be construed liberally."[75] An earlier draft of this list contained the phrase "other similar place" instead of "other place," which Congress changed in its final version precisely because it intended "these categories be interpreted broadly."[76]

Somewhat counterintuitively, Title IV of the ADA, the section that pertains to telecommunications, does not regulate the Internet and, therefore, provides no means to ensure Internet accessibility to the disabled.[77] Title IV regulates only telephone and television communications and requires covered entities to provide relay and closed-captioning services to assist the hearing-impaired.[78] The Federal Communications Commission (FCC) regulates these communications, setting minimum standards and enforcing the provisions of Title IV.[79] However, the FCC does not currently have the authority to regulate

74. § 12181(7).
75. Kessling, *supra* note 12, at 1006.
76. *Id.* at 1007.
77. *See Americans with Disabilities Act (ADA)*, WORKWORLD, http://www.workworld.org/wwwebhelp/americans_with_disabilities_act_ada_.htm (last visited Feb. 16, 2011).
78. *Id.*
79. *See Disability Rights Office*, FED. COMMC'NS. COMMISSION, http://www.fcc.gov/cgb/dro/ (last visited Feb. 16, 2011).

the Internet or Internet service providers (ISPs).[80] For these reasons, Title IV has never been used to extend the reach of the ADA to regulate the Internet.

III. Analysis

Having examined some of the background regarding the use of the Internet by the elderly and those with disabilities and some of the language and history of the ADA, this Note will now examine how the courts have interpreted Title III of the ADA and its application to the Internet.

A. *National Federation of the Blind v. America Online*

The first case that sought to apply the ADA to the Internet was filed in 1999 by the National Federation of the Blind (NFB) against America Online (AOL).[81] AOL, at the time, was the nation's largest Internet service provider[82] with nearly twenty-six million subscribers.[83] The NFB filed a class action lawsuit against AOL claiming that it violated Title III of the ADA because its services were not accessible to the blind.[84] Specifically, the NFB charged that AOL violated the ADA by failing to remove communication barriers, failing to provide auxiliary aids and services, and failing to make reasonable modifications by denying the blind the full and equal enjoyment and participation in its services.[85] The main problem with AOL software was that it was incompatible with screen reading software; therefore, the visually impaired were "effectively 'shut out' from AOL."[86] In July 2000, the lawsuit was settled after AOL agreed to make the next version of its software, AOL 6.0, accessible to the visually impaired.[87] Although the matter was never litigated in court, it incited a national debate about

80. *Internet*, FED. COMM. COMMISSION, http://www.fcc.gov/cgb/Internet.html (last visited Feb. 16, 2011).
81. Ranen, *supra* note 64, at 411.
82. *Id.*
83. *See AOL Time Warner Inc.—History of America Online*, FREE ENCYCLOPEDIA OF ECOMMERCE, http://ecommerce.hostip.info/pages/48/Aol-Time-Warner-Inc-HISTORY-AMERICA-ONLINE.html (last visited Feb. 16, 2011) ("As of June 30, 2000 . . . AOL had 23.2 million subscribers, plus 2.8 million CompuServe subscribers.").
84. Ranen, *supra* note 64, at 412.
85. *Id.*
86. *Id.*
87. *Id.* at 391, 412.

whether the ADA should apply to the Internet and served as a model for future litigation.[88]

B. Cases Expanding the Definition of Public Accommodation in Title III of the ADA

Several cases in the 1990s expanded the meaning of places of public accommodation beyond a physical place, particularly in the context of access to insurance.[89] The First Circuit heard the case of *Carparts Distribution Center v. Automotive Wholesalers Ass'n*, where the trustee of an HIV positive man's estate sued his insurance company, which had imposed a benefit cap of $25,000 for payment of HIV-related expenses, for discrimination in violation of Title I and Title III of the ADA on the basis of disability.[90] The district court dismissed the plaintiffs' claims on the basis that places of public accommodation were limited to physical structures.[91] The court of appeals overturned the dismissal and found that the "plain meaning of the terms do not require 'public accommodations' to have physical structures for a person to enter."[92] The court examined the plain meaning of the statute and found that the term public accommodation was ambiguous.[93] The court indicated that "[t]his ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures."[94] According to the court, limiting Title III to physical structures would frustrate Congress's intent in passing the ADA that disabled persons have full access to the goods and services that other members of the public enjoy.[95]

The Seventh Circuit heard a similar case in 1999, *Doe v. Mutual of Omaha*, in which insureds afflicted with AIDS sued their medical insurers regarding caps on medical insurance for AIDS-related complications, claiming that this violated the ADA's public accommodations

88. *See id.* at 418. Shortly after the NFB/AOL lawsuit was filed, Congress held hearings on whether the ADA should apply to the Internet; however, no action was ultimately taken. *See Applicability of the ADA*, *supra* note 1.

89. *See* Doe v. Mut. of Omaha, 179 F.3d 557, 559 (7th Cir. 1999); Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994).

90. *Carparts Distribution Ctr.*, 37 F.3d at 14–15.

91. *Id.* at 15; Kessling, *supra* note 12, at 1013.

92. *Carparts Distribution Ctr.*, 37 F.3d at 19.

93. *Id.*

94. *Id.*

95. *Id.* at 20.

provision.[96] Judge Posner expounded upon the *Carparts* reasoning and wrote that the meaning of public accommodation, "plainly enough, is that the owner or operator of a store, . . . Web site, or other facility (whether in physical space or in electronic space) . . . cannot exclude disabled persons from entering the facility and . . . from using the facility in the same way that the nondisabled do."[97] Judge Posner's opinion was especially important for advocates of expanding Title III to include the Internet, since he explicitly included websites and "electronic space" as potential places of public accommodation.[98] The lasting impact of his opinion, however, has been limited, because other courts have viewed his inclusion of websites as places of public accommodation as pure dictum,[99] and no other court has so explicitly described a website as such.

C. Cases Limiting Places of Public Accommodation

The Sixth Circuit applied a narrower view of places of public accommodation in the case of *Stoutenborough v. National Football League*.[100] In this case, a group of hearing-impaired individuals brought suit against the National Football League arguing that their "blackout rule," which prohibited television broadcasts of certain football games, discriminated against the deaf and violated the ADA.[101] The plaintiffs "argue[d] that 'the blackout rule' unlawfully discriminate[d] against them in a disproportionate way because they had no other means of accessing the football game 'via telecommunication technology.'"[102] They also argued that they were denied equal access to services, because the television broadcasts were "services, benefits, or privileges in places of public accommodation."[103]

In upholding the defendant's motion to dismiss, the court held that the blackout rule did not discriminate against the plaintiffs because "it applie[d] equally to both the hearing and the hearing-

96. Doe v. Mut. of Omaha, 179 F.3d 557, 558 (7th Cir. 1999).
97. *Id.* at 559 (citation omitted).
98. *See id.*
99. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1319 n.9 (S.D. Fla. 2002).
100. *See* Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) (explaining that the defendants do not "fall" within any of the categories of public accommodation to which Title III applies).
101. *Id.* at 582.
102. *Id.*
103. *Id.*

impaired populations."[104] The court also rejected the plaintiffs' argument that the defendant was subject to Title III of the ADA.[105] The court ruled that although the football game that the plaintiffs wanted to watch was *held* in a place of public accommodation, the television broadcast itself was not.[106] Courts could potentially use this same line of reasoning in the context of retail stores with web analogs by finding that, while the retail stores themselves are places of public accommodation, their websites are not.

Later, in *Parker v. Metropolitan Life Insurance Co.*, the Sixth Circuit began to develop a "nexus"-based analysis in determining what constituted a place of public accommodation.[107] In this case, the plaintiff's insurance company ended her disability coverage two years after she began suffering from a mental illness.[108] Although the insurance was issued by MetLife, it was offered by the plaintiff's employer.[109] Therefore the court found "no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office."[110]

The *Parker* court specifically examined what constituted a place of public accommodation.[111] The court used the Code of Federal Regulations (CFR) to conclude that a place of public accommodation must be a physical place.[112] The CFR defines place as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following (twelve public accommodation) categories."[113] The court then examined the CFR's definition of facility which it defines as "all or any portion of buildings, structures, sites,

104. *Id.* The plaintiffs argued that they were discriminated against because blackout games were still broadcast on the radio and, therefore, they were unable to enjoy the same services as the hearing population. The court said that "the fact that hearing individuals may be able to listen to a 'blacked out' game, if it is broadcast by radio, is irrelevant, because the 'blackout rule' neither reaches nor impacts radio broadcasting." *Id.*

105. *See id.* at 583; Isabel Arana DuPree, Recent Development, *Websites 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. 273, 281 (2007).

106. *Stoutenborough*, 59 F.3d at 582–83; DuPree, *supra* note 105, at 281.

107. *See* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997).

108. *Id.* at 1008; Kessling, *supra* note 12, at 1017.

109. *Parker*, 121 F.3d at 1008; Kessling, *supra* note 12, at 1017.

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

111. *Id.* at 1011–14; Kessling, *supra* note 12, at 1018.

112. *Parker*, 121 F.3d at 1011–12; Kessling, *supra* note 12, at 1018.

113. *Parker*, 121 F.3d at 1011 (citing 36 C.F.R. § 36.104 (2010) (alteration in original)).

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."[114] The court looked at the context of nearby words and determined that Congress intended public accommodation to be an actual physical place because "[e]very term listed in § 12181(7) . . . is a physical place open to public access."[115] The court specifically disagreed with the *Carparts* court's expansion of place of public accommodation, accusing the court "of not reading enough examples."[116]

The Third Circuit followed the reasoning of the *Parker* court in *Ford v. Schering-Plough Corp.*[117] In *Ford*, the plaintiff brought a lawsuit against the same employer and insurance company that was sued in *Parker* for termination of coverage due to the plaintiff's mental disabilities.[118] The court adopted the Sixth Circuit's argument that a contextual reading of the public accommodation provision, in light of its surrounding examples, limits a place of public accommodation to a physical place and extended that reasoning further by holding that Title III does not cover "nonphysical access of a physical place (i.e., conducting business with a brick-and-mortar store via telephone)."[119] Again, this reasoning could be used to suggest that a retail store's website involves nonphysical access of a physical place and is, therefore, not covered under Title III of the ADA.

The Ninth Circuit continued the trend of restricting places of public accommodation to physical spaces in *Weyer v. Twentieth Century Fox Film Corp.*,[120] another insurance case involving a cap on mental disability payments.[121] The court followed the reasoning of the

114. *Id.* (citing 36 C.F.R. § 36.104 (2010)).

115. *Id.* at 1014. "This reading runs directly counter to the actual legislative history of the ADA . . . . It also disregards the fact that websites could also meet the descriptions of many of the twelve 'public accommodation' categories, as they simply describe what the businesses do, not where they are located." Kessling, *supra* note 12, at 1018 n.151.

116. Kessling, *supra* note 12, at 1018.

117. *Id.* at 1019 (explaining that the court repeated the argument that the examples listed in Title III refer to physical places).

118. *Id. See* Ford v. Schering-Plough Corp., 145 F.3d 601, 603–04 (3d Cir. 1998).

119. Kessling, *supra* note 12, at 1019.

120. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1105 (9th Cir. 2000).

121. *Id.* at 1107–08.

Sixth Circuit and held that places of public accommodation are "actual, physical place[s]."[122]

D. Broadening Title III of the ADA: Intangible Barriers under *Rendon v. Valleycrest Productions*

In *Rendon v. Valleycrest Productions, Ltd.*, the Eleventh Circuit affirmed that a place of public accommodation must be a physical place, and yet also broadened the coverage of Title III to prohibit intangible barriers to accessing a physical place.[123] In *Rendon*, the plaintiffs were a group of hearing- and mobility-impaired individuals who brought suit against Valleycrest Productions and the American Broadcasting Company (ABC) for discrimination in the selection process for the popular game show, "Who Wants to Be a Millionaire?"[124] They specifically argued that a telephone hotline contest that gave home viewers the chance to be on the show by dialing a toll-free number and answering a series of trivia questions similar to the "fastest finger" challenge on the show discriminated against them, because they were unable to participate due to their physical disabilities.[125] The district court dismissed the complaint because the selection process was "not conducted at a physical location."[126]

In the defendants' response on appeal, they argued that the hotline was "not itself a public accommodation or a physical barrier to entry erected at a public accommodation."[127] Essentially, the defendants argued that the hotline did not prevent the plaintiffs from gaining access to the place of public accommodation—the studio where the show was recorded.[128] The defendants, therefore, contended that the plaintiffs were not protected by Title III.[129]

The court of appeals rejected this argument, holding that "Title III covers both tangible barriers, that is physical and architectural barriers . . . and intangible barriers, such as eligibility requirements and screening rules."[130] The court reasoned that, although the telephone hotline itself was not a place of public accommodation, the selection

122. *Id.* at 1114.
123. *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283 (11th Cir. 2002).
124. *Id.* at 1280.
125. *Id.* at 1283.
126. *Id.* at 1280.
127. *Id.* at 1280–81.
128. *Id.*
129. *Id.* at 1283.
130. *Id.*

process amounted to an intangible barrier that denied the plaintiffs the "opportunity to compete for the privilege of being a contestant on the Millionaire program," and, thus, was subject to Title III.[131] After *Rendon* was decided, the Eleventh Circuit would soon become the first circuit to specifically address the issue of whether the Internet constituted a place of public accommodation.[132]

E. *Access Now v. Southwest* and the Beginning of the "Nexus" Approach

In 2004, the Eleventh Circuit became the first circuit to tackle the specific question of whether private websites could be considered places of public accommodation under Title III of the ADA with the case of *Access Now v. Southwest Airlines Co.*[133] An advocacy group for the visually impaired and a blind man named Robert Gumson sued Southwest Airlines (Southwest) in the Southern District of Florida, arguing that Southwest's website, Southwest.com, discriminated against the visually impaired because its "virtual ticket counters" were not accessible to blind persons.[134] On its website, Southwest did not offer the same services to blind customers as it did to sighted customers, such as being able to purchase airline tickets, book hotel stays, rent a car, check airfares, and access the latest sales and promotions.[135] The website was not accessible to visually impaired users because the website did not label the graphics with "alternative text," which would have allowed screen reader programs to read what visually appeared on the site.[136]

Unlike the plaintiffs in *Rendon,* who argued that they were denied access to a place of public accommodation due to discrimination, the plaintiffs in *Access Now* did not argue that they were denied access, since they could reach the airline's services by other means, "such as by telephone, or physically visiting an airline ticket counter or travel agency."[137] Instead, they argued that they suffered from

131. *Id.* at 1286.
132. *See* DuPree, *supra* note 105, at 283–84.
133. *Id.*
134. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).
135. Michael Goldfarb, Comment, Access Now, Inc. v. Southwest Airlines, Co.—*Using the "Nexus" Approach to Determine Whether a Website Should Be Governed by the Americans with Disabilities Act*, 79 ST. JOHN'S L. REV. 1313, 1318 (2005).
136. *Id.*
137. *Id.*

price discrimination because they could not "take advantage of web-only specials."[138] Southwest filed a motion to dismiss the claims, arguing that the website was not a place of public accommodation under the meaning of Title III.[139] The district court addressed two issues: 1) whether Southwest.com was itself a place of public accommodation under the ADA and 2) whether the plaintiffs adequately established a "nexus" between Southwest.com and a "physical, concrete place of public accommodation."[140]

In addressing the first issue, the district court followed the reasoning of the other circuits that limited places of public accommodation to physical places, stating that "[i]n interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation."[141] Since Southwest.com was not a physical place, the court held that it was not a place of public accommodation.[142]

The court next addressed the issue of whether there was a sufficient "nexus" between Southwest.com and a physical, concrete place of public accommodation.[143] The court determined that no such "nexus" existed.[144] Furthermore, the court reasoned that "because the Internet website, [S]outhwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency."[145] For these reasons, the district court granted the defendant's motion to dismiss.[146]

138. *Id.* at 1319.
139. *Access Now*, 227 F. Supp. 2d at 1314.
140. *Id.* at 1317, 1319.
141. *Id.* at 1318. The court also rejected the plaintiffs' use of the statutory subsections of the ADA to argue that the website was a place of exhibition, a place of display, and a sales establishment. *Id.* The court found that the terms "exhibition," "display," and "sales establishment," "are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely: 'motion picture house, theater, concert hall, stadium'; 'museum, library, gallery'; and 'bakery, grocery store, clothing store, hardware store, shopping center,' respectively." *Id.* at 1319.
142. *Id.* at 1319.
143. *Id.*
144. *Id.* at 1321.
145. *Id.* The court said that this was different then the *Rendon* case because the telephone hotline prevented access to the television studio, which is a place of public accommodation, whereas "the Internet website at issue here is neither a

On appeal before the Eleventh Circuit, the plaintiffs amended their argument by dropping their contention that Southwest.com was a place of public accommodation and instead argued that there was a sufficient "nexus" between the Southwest.com website and Southwest Airlines as a travel service.[147] The court of appeals decided not to reach the merits of the claim "because, simply put, [the plaintiffs] presented this Court with a case that is wholly different from the one they brought to the district court."[148] In declining to hear the merits of the case, the court failed to determine whether websites could be considered places of public accommodation. The court recognized the significance of the legal questions, but determined that the case did "not provide the proper vehicle for answering these questions."[149]

It is not clear whether the plaintiffs could have prevailed if they had originally argued that Southwest.com impeded their access to the physical ticket counters of Southwest Airlines. Under *Rendon*, they would have had to argue that the inaccessibility of Southwest.com in some way created an intangible barrier that denied them access to the goods, services, or privileges of the airline.[150] While they may have been able to make such an argument, it does not seem likely that they would have prevailed because, as the district court pointed out, they had alternative avenues to access the goods, such as the company's telephone hotline or the physical ticket counter.[151]

F. Success with the "Nexus" Approach in *National Federation of the Blind v. Target Corp.*

In 2006, a court, for the first time, found a sufficient "nexus" between a website and a place of public accommodation in *National Federation of the Blind v. Target Corp*.[152] In this case, a national and state

physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space . . . ." *Id.*

146. *Id.* at 1322.

147. Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1328 (11th Cir. 2004).

148. *Id.* at 1326–27.

149. *Id.* at 1335. "In declining to evaluate the merits of this case, we are in no way unmindful that the legal questions raised are significant. The Internet is transforming our economy and culture, and the question whether it is covered by the ADA—one of the landmark civil rights laws in this country—is of substantial public importance." *Id.*

150. *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283 (11th Cir. 2002) (holding that Title III covers intangible barriers).

151. *See Access Now*, 227 F. Supp. 2d at 1316 n.3, 1321.

152. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953–55 (N.D. Cal. 2006).

association for the blind and a blind customer brought a class action lawsuit in California state court against Target Corporation (Target), seeking declaratory, injunctive, and monetary relief, that was subsequently removed to federal court in the Northern District of California.[153] The plaintiffs argued that Target.com was inaccessible to the blind and that blind individuals were denied equal access to the physical stores in violation of federal and state laws including Title III of the ADA.[154] The defendant filed a motion to dismiss for failure to state a claim, arguing, among other things, that Target.com was not subject to Title III.[155]

The district court allowed the suit to continue but "dismissed all claims that pertained to Target.com alone, such as the inability to purchase goods online."[156] The court relied heavily on precedential cases that limited places of public accommodation to physical places, including the previously mentioned Ninth Circuit case, *Weyer v. Twentieth Century Film Corp.*, which dealt with insurance caps on mental disability benefits.[157] The court, however, rejected the defendant's argument that "the ADA prohibits only discrimination *occurring on the premises* of a place of public accommodation, and that 'discrimination' is limited to the denial of physical entry to, or use of, a space."[158] In dismissing the defendant's argument that the ADA prohibits only discrimination on the premises of a place of public accommodation, the court relied on the statutory language of Title III and noted that it "applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation" while further noting that limiting the ADA in such a way would "contradict the plain language of the statute."[159]

The court also rejected the defendant's contention that Title III and the "nexus" theory under *Access Now* require a person to be denied physical access to a place of public accommodation.[160] The court

153. *Id.* at 949–50.
154. *Id.* at 949, 951.
155. *Id.* at 950.
156. Kessling, *supra* note 12, at 1022.
157. *See Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 952.
158. *Id.* at 953 (emphasis added).
159. *Id.* (emphasis in original). The court relied heavily on *Rendon v. Valleycrest Prods., Ltd.*, which held that the discriminatory selection process violated Title III even though it occurred off the premises of a public accommodation since it had the effect of denying access to a place of public accommodation, i.e., the studio where "Millionaire" was taped. *Id.*
160. *Id.* at 953–55.

noted that Title III prohibits discrimination through tangible barriers—those that restrict access to a physical space—and intangible barriers—those that restrict a disabled person's "ability to *enjoy* the defendant entity's goods, services and privileges."[161] The court, thus, allowed the plaintiffs' claims to proceed insomuch as they "allege[d] that the inaccessibility of Target.com impede[d] the full and equal enjoyment of goods and services offered in Target stores,"[162] noting that "it [was] clear from the face of the complaint that many of the benefits and privileges of the website [were] services of the Target stores."[163] The court allowed those claims to go forward that successfully established a "nexus" between Target.com and the services of the brick-and-mortar stores—the places of public accommodation.[164]

The *Target* court's "nexus" test, however, has done little to settle the issue of how the ADA should be applied to the Internet. In fact, it may have made things more confusing. Some have criticized the test as creating an uncertain line separating different types of plaintiffs.[165] For example, the court had originally dismissed all members from the class action who stated in their depositions that they preferred to shop at Target.com rather than the physical Target stores.[166] The court later removed the original blind plaintiff from the class for failure to establish "a sufficient nexus to the physical Target store."[167] The original plaintiff wanted to use Target's website to browse items online before visiting the physical store, and, since he was eventually able to buy the goods he wanted at the physical store, the court found that he had not suffered any injury from being unable to access the website.[168]

The *Target* "nexus" test has been further criticized as being underinclusive.[169] This criticism highlights the insufficiency of the "nexus" test, since the "nexus" test applies Title III of the ADA only to a website insomuch as it denies one the full use and enjoyment of a brick-and-mortar store, thereby leaving out large web-only retail web-

161. *Id.* at 954 (emphasis in original) (citing Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279, 1283 (11th Cir. 2002) (internal citations omitted)).
162. *Id.* at 956.
163. *Nat'l Fed'n of the Blind,* 452 F. Supp. 2d at 954.
164. *Id.* at 956.
165. Kessling, *supra* note 12, at 1023.
166. *Id.* at 1023.
167. *Id.*
168. *Id.*
169. *See* Ali Abrar & Kerry J. Dingle, Note, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 134, 159 (2009).

sites such as eBay and Amazon.com.[170] The irony is that the populations who could benefit the most from Internet commerce—the elderly and the disabled, who may find it difficult to get to a physical retail location—are not adequately guaranteed access to these services, either through the courts' "nexus" test or the ADA.[171]

IV. Recommendation

The current approach of the *Target* "nexus" test is unclear and insufficiently protects the millions of disabled and elderly from being discriminated against on the Internet. While there will be some difficulties, the ADA should be appropriately amended to include websites as places of public accommodation. This could be achieved by adding the following language to the ADA: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation*, whether in virtual or physical space,* by any person who owns, leases (or leases to), or operates a place of public accommodation."[172] This will help to clear the current judicial ambiguity and would be consistent with Congress's purpose behind the ADA, which is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[173]

However, amendment of the ADA and subsequent regulations must be approached with careful consideration and caution. The growth and innovation of the Internet in the past two decades has been nothing short of astonishing; the number of Internet users has increased from sixteen million in 1995 to over 1.3 billion in 2007.[174] The growth of Internet commerce is similarly impressive.[175] Any

170. *See* DuPree, *supra* note 105, at 298–99 (arguing that any amendment to the ADA will have to deal with e-commerce entities that do not have a "nexus" to a place of public accommodation).

171. *See* Abrar & Dingle, *supra* note 169, at 133–34 (arguing that the "nexus" test is under and overinclusive).

172. 42 U.S.C. § 12182(a) (2006) (proposed language in italics).

173. § 12101(b)(2).

174. *See* Abrar & Dingle, *supra* note 169, at 141 fig.1.

175. *See* Bertil C. Lindberg, *The Growth of E-Commerce*, http://home.earthlink.net/~lindberg_b/GECGrwth.htm (last updated Oct. 4, 2007) ("According to the U.S. Census Bureau sales through e-commerce in the U.S.A. (except food services) amounted to $31,823 in the 2Q of 2007. [This was] [u]p 3.9 % from $30,624 in the 1Q of 2007.").

change to the ADA must be careful not to stifle the growth and innovation of the Internet.

Any change in regulations will also certainly include costs to websites.[176] In addition, regulations must take care not to chill free speech by controlling ideas or expression on the Internet,[177] or they may face constitutional challenges in the courts.[178] These challenges should not, however, be an excuse for congressional inaction. For example, when Congress passed the original ADA, many predicted that it would drag down the American economy;[179] yet, after the passage of the ADA, the United States experienced unprecedented economic growth.[180]

Title II of the ADA provides a framework for applying the ADA to websites. Title II prohibits discrimination by state and local governments.[181] The Department of Justice (DOJ) mandates to public entities that "information must be made available to all members of the public, irrespective of disability," including "information distributed via computers and the Internet."[182] In a letter written to Senator Harkin in 1996, the DOJ explained:

> Instead of providing full accessibility through the Internet directly, covered entities may also offer other alternate accessible formats, such as Braille, large print, and/or audio materials, to communicate the information contained in Web pages to people with visual impairments. The availability of such materials should be noted in text (i.e., screen-readable) format on the Web page, along with instructions for obtaining the materials, so that people with disabilities using the Internet will know how to obtain the accessible formats.[183]

To be sure, the Internet has changed and grown substantially since this letter was written.[184] And when applying the ADA to many

176. Abrar & Dingle, *supra* note 169, at 160.

177. *See Applicability of the ADA*, *supra* note 1, at 2 (statement of Hon. Charles Canady). As Mr. Canady said in his opening statement, one of the purposes of holding the subcommittee hearing was to examine the First Amendment implications of applying the ADA to private websites. *Id. See also* Abrar & Dingle, *supra* note 169, at 165–69.

178. *See* Abrar & Dingle, *supra* note 169, at 165–69.

179. *See Applicability of the ADA*, *supra* note 1, at 2–3 (statement of Rep. Barney Frank).

180. *Id.* at 3.

181. *See* discussion *supra* Part II.C. *See also* Mendelsohn & Gould, *supra* note 48, at 182.

182. Mendelsohn & Gould, *supra* note 48, at 190.

183. *Id.*

184. *See id.* at 189 (explaining how the Internet has become more prevalent in areas such as commerce and employment).

commercial websites, it is hard to imagine that alternate formats would be sufficient or cost-effective for many of them, especially considering that many websites are constantly updated.[185]

While making websites completely accessible is the preferred option, alternate formats would be a fair way for certain websites to reasonably include the disabled without fundamentally altering the nature and character of the services. Consider Priceline.com as an example. The popular travel website has a feature where you can "name your own price" in order to obtain substantial discounts on airline fares and hotel rates.[186] If the website was unable to make this feature accessible using currently available web accessibility technology, it could provide a telephone hotline for the blind and visually impaired. The disabled person could call the hotline and a search would be run on his or her behalf. The costs would likely be negligible (the cost of hiring and staffing operators to run the searches) compared with the likely economic benefit of increased business from persons with disabilities.

The next important question is how expansive ADA coverage of the Internet should be. Should the ADA cover all websites that are analogous to the enumerated categories in Title III of the ADA?[187] Although it is likely that some enumerated categories would not be applicable to the Internet—it is hard, for example, to imagine a website being considered a "place of lodging"—extending the enumerated categories to cover analogous websites would be the clearest and fairest way to ensure equal access and enjoyment by disabled individuals.[188]

Because Congress relied on its commerce power when it passed the ADA,[189] only websites that affect interstate commerce would be covered. This would protect from regulation the countless websites that do not, in some way, engage in business, thus helping to protect free speech. Websites that do not sell goods or services would not be affected by regulation because they do not affect interstate commerce.[190]

185. *Id.* at 191–92.
186. *See* PRICELINE.COM, http://www.priceline.com (last visited Feb. 16, 2011).
187. *See* discussion *supra* Part II.C for a list of the enumerated categories that qualify as "places of public accommodation" under Title III of the ADA.
188. Kessling, *supra* note 12, at 1025.
189. *See* 42 U.S.C. § 12101(b)(4) (2006).
190. Kessling, *supra* note 12, at 1025.

If a lawsuit is brought and the website falls under one of the enumerated categories and it is determined to affect commerce, then the question becomes "has the disabled plaintiff been denied 'the full and equal enjoyment' of the website's goods or services?"[191] For example, if a website provided online games and it was determined to be a place of entertainment under the ADA, one could imagine that certain disabled persons would have a difficult time having the full and equal enjoyment of the site, especially if it was highly interactive with lots of visually intensive content. In such an instance, there may simply not be any alternative format to make the website accessible to the disabled.

Even if a court finds that disabled persons are denied full and equal enjoyment of a website, the courts have said the ADA only requires businesses to take reasonable measures to accommodate the disabled and that they are exempt from compliance if it would create an "undue burden."[192] Furthermore, alternative formats and "auxiliary aids or services are not required if they would 'fundamentally alter the nature' of the goods or services . . . ."[193] Through litigation of these matters, the courts would be especially well-equipped to make the fact-sensitive determinations of what constitutes an undue burden given the size and nature of a website, because courts already are accustomed to making fact-specific determinations about Title III.[194] Courts would likely find that a website has made reasonable accommodations if it has been designed in compliance with the World Wide Web Consortium's web accessibility guidelines mentioned previously.[195]

The expansion of the ADA to cover websites would do much to eliminate the insufficiencies that plague the current *Target* "nexus" test. The courts would no longer need to determine whether there is a sufficient "nexus" to a physical place of public accommodation because the statute would cover all websites that fit under the current enumerated categories, even if the websites do not have an actual physical presence. This would go a long way in fulfilling the purposes of the ADA to provide "clear, strong, consistent, enforceable stan-

191. *Id.* at 1027.
192. § 12182(b)(2)(i–v); Kessling, *supra* note 12, at 1027.
193. Kessling, *supra* note 12, at 1027.
194. *See id.*
195. *See id.* at 1027–28; *see supra* notes 48–58 and accompanying text.

dards addressing discrimination"[196] against the disabled and help to bring the disabled and the elderly into the new information age.

V. Conclusion

The elderly comprise a disproportionate percentage of disabled persons in the United States. Age-related blindness, motor and cognitive disabilities, and hearing disabilities can make Internet use challenging and intimidating. The web accessibility guidelines promulgated by the World Wide Web Consortium and the National Institute on Aging were meant to guide web developers to make websites that are easier for the elderly and people with disabilities to use. However, these guidelines are helpful only inasmuch as web developers actually use them when making websites.

By broadening Title III of the ADA to cover the Internet, thus requiring that certain websites be accessible to the disabled, we as a society will be ensuring that the elderly and the disabled have the opportunity to participate fully in the new information age. If we ensure that the Internet is accessible to all persons, we will be making great strides to ensure that we close the digital divide that currently keeps many older Americans from having access to the wonders the Internet has brought to society. If Congress amends the ADA to ensure that the disabled have equal access to the Internet, the Internet that develops will be fairer, more user friendly, and more beneficial for the entire population.

196. § 12101(b)(2).