

1-1-2014

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### Recommended Citation

Trevor Crowley, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 BYU L. Rev. 651 (2014).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2013/iss3/11>

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# Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century

## I. INTRODUCTION

In 1990, Congress enacted the Americans with Disabilities Act<sup>1</sup> to protect disabled individuals from discrimination in a variety of forms. The Act was designed to provide disabled individuals the same opportunities that individuals without disabilities enjoy. Modifications designed to fulfill the Act's goal of equal access, such as wheelchair ramps, have become common since the Act was signed into law; however, many disabled individuals do not have equal access to the World Wide Web.

Title III of the Americans with Disabilities Act provides that “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a *place of public accommodation*.”<sup>2</sup> Some circuit courts interpret “place of public accommodation” broadly to include nonphysical places, while other circuit courts interpret this provision narrowly to require a physical tangible facility—putting virtual places like websites outside of Title III coverage.

This unresolved circuit split culminated in the summer of 2012 when two nearly identical cases regarding website accessibility were decided by two different district courts with completely different outcomes. The issue in both cases was whether the lack of video subtitles in Netflix's online streaming library was a violation of the Americans with Disabilities Act. The district court located in the Ninth Circuit held that the Americans with Disabilities Act did not apply to Netflix's website because the website was not a place of public accommodation,<sup>3</sup> while the district court located in the First Circuit held that Netflix's website was a place of public

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1. 42 U.S.C. § 12101 (2006).

2. 42 U.S.C. § 12182(a) (emphasis added).

3. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

accommodation and therefore subject to the Americans with Disabilities Act.<sup>4</sup> The decision of the latter court marks the first time that a federal court has held that a website is a place of public accommodation within the meaning of the Americans with Disabilities Act. With this precedent set, website accessibility for disabled individuals is likely to become a hot topic as any private website that is not designed to be accessible may now successfully be sued under the Americans with Disabilities Act.

This Comment offers a solution to the Americans with Disabilities Act's website accessibility problem and the unresolved circuit split. This solution, called "the storefront test," extends Title III of the Americans with Disabilities Act to a wide variety of websites without overstepping the textual bounds of the statute. The storefront test does not purport to be a substitution for legislation, but it provides a workable judicial solution that builds upon previous circuit court decisions without stepping into the realm of judicial lawmaking. The storefront test proposes the following:

Any website that acts as a storefront for an entity that offers a substantial amount of its goods or services from a physical facility may be subject to Title III if the facility and the website together form an entity that would otherwise fall under one of the enumerated<sup>5</sup> places of public accommodation.

While this test is simple and intuitive enough for easy application (as well as catchy enough to be remembered), it has enough depth and utility to be useful in a variety of complex scenarios.

Part II of this Comment discusses the history and enactment of the Americans with Disabilities Act, as well as subsequent legislative and regulatory developments, and gives an overview of the Internet and the accessibility challenges the Internet poses for some disabled individuals. Part III of this Comment analyzes the circuit split on the issue of whether Title III of the Americans with Disabilities Act applies to nonphysical places such as websites, discusses the recent Netflix decisions, and suggests the split is reconcilable at the circuit level. Part IV proposes the storefront test as a solution to the circuit split. Part IV explores the statutory boundaries of the Americans

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4. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012).

5. Title III of the Americans with Disabilities Act defines "place of public accommodation" through twelve broad, but exhaustive, categories enumerated in 42 U.S.C. § 12181(7). These categories are discussed in Part II.B.

with Disabilities Act to ensure that the storefront test provides maximum protection without exceeding the bounds of the Act. The storefront test is then analyzed in greater detail and applied in several different circumstances to demonstrate its practicality and versatility.

## II. BACKGROUND: THE AMERICANS WITH DISABILITIES ACT AND THE INTERNET

This section discusses the enactment and purpose of the Americans with Disabilities Act (“ADA” or “the Act”) and the title of the ADA relevant to this discussion—Title III. This section then gives a brief overview of the history and growth of the Internet, along with the ways disabled individuals experience website discrimination. Finally, this section discusses website accessibility-related regulations and amendments that were passed subsequent to the enactment of the ADA.

### *A. Enactment of the Americans with Disabilities Act*

On July 26, 1990, the Americans with Disabilities Act was signed into law<sup>6</sup> with overwhelming bipartisan support.<sup>7</sup> The ADA originated with the National Council on Disability,<sup>8</sup> and was largely modeled after the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.<sup>9</sup> The purpose of the Act, codified in 42 U.S.C. § 12101(b), is:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of

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6. Statement on Signing the Americans with Disabilities Act of 1990, 26 WKLY. COMP. PRES. DOC. 1165 (July 26, 1990).

7. The ADA passed with a vote of 91–6 in the Senate and 377–28 in the House. 136 CONG. REC. 17,376 (1990) (Senate); 136 CONG. REC. 17,296–97 (1990) (House).

8. 135 CONG. REC. S10,790 (daily ed. Sept. 7, 1989) (statement of Sen. Dole).

9. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,545 (July 26, 1991); see also Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 250–51, 285 (2008) (noting that the civil rights movement in the 1960s served as a model for Americans with disabilities and that language in the ADA was borrowed from the Civil Rights Act of 1964).

individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

The ADA was intended to be a comprehensive piece of civil rights legislation<sup>10</sup> that would fully integrate Americans with disabilities into society.<sup>11</sup> In enacting the ADA, Congress found that about forty-three million Americans “have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”<sup>12</sup> Congress also found that “unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”<sup>13</sup>

The ADA has impacted the lives of individuals both with and without disabilities throughout the nation. According to the National Council on Disability, the ADA has “begun to transform the social fabric of our nation,” by changing the way Americans perceive disabilities and by putting discrimination against disabled individuals on par with race or gender discrimination.<sup>14</sup> America continues to accommodate physically impaired individuals with accessible streets, buildings, sports arenas, and transportation systems.<sup>15</sup> The ADA has also helped give disabled individuals equal opportunity in the workplace.<sup>16</sup> Although the ADA provides broad protection for disabled individuals, there are no express regulations for website accessibility within the ADA.

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10. *See, e.g.*, 136 CONG. REC. 17,031 (1990) (statement of Sen. Kennedy) (describing the ADA as a comprehensive and elaborate piece of civil rights legislation).

11. 42 U.S.C. § 12101(a)(7) (2006); *see also* Burgdorf, Jr., *supra* note 9, at 249 (noting that the ultimate objective of civil rights activists—full integration and participation—was endorsed in the ADA).

12. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(1).

13. 42 U.S.C. § 12101(a)(4).

14. NAT'L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 1 (2000).

15. Senator Tom Harkin, *20 Years of Progress Thanks to the ADA*, ABILITY MAG. (June/July 2010), available at <http://www.abilitymagazine.com/20th-ADA.html>.

16. *Id.*

Complaints that a private party's<sup>17</sup> website violates the ADA are brought under Title III of the ADA.<sup>18</sup> Title III prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a *place of public accommodation*."<sup>19</sup> The ADA differs from other civil rights legislation—where a place of public accommodation is typically only prohibited from *denying* access to its goods or services on the basis of some characteristic—by requiring places of public accommodation to *affirmatively ensure* that individuals with disabilities have equal access to the goods or services.<sup>20</sup> Thus, a place of public accommodation discriminates against a disabled individual by failing to take affirmative action to accommodate the individual, such as building a wheelchair ramp. The ADA provides exceptions if the owner or operator can show that removing a barrier would not be readily achievable or that making modifications would fundamentally alter the nature of the goods or services or result in undue burden.<sup>21</sup>

Section 12181 of the Act defines a "place of public accommodation" as a place which affects commerce and falls within one of twelve enumerated categories.<sup>22</sup> Congress stated its intent

17. Websites operated by public entities are not relevant to this discussion because they are regulated by the Rehabilitation Act, which sets out specific accessibility guidelines for websites operated by public entities. 29 U.S.C. § 794d (2006); 36 C.F.R. § 1194.22.

18. See *infra* discussion Part III.

19. 42 U.S.C. § 12182(a) (emphasis added).

20. See *id.*; see also H.R. REP. NO. 101-485, pt. 2, at 104 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 389 ("These general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination . . . . In order not to discriminate against people with disabilities, however, certain steps must often be taken as well in order to ensure that an opportunity for individuals with disabilities to participate in the goods or services is effective and meaningful.").

21. 42 U.S.C. § 12182(b)(2)(A)(ii)–(iv).

22.

(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

that these twelve categories be exhaustive, but that the examples within the categories be illustrative and the catchall phrases at the end of the examples be construed liberally.<sup>23</sup>

Congress gave authority to the Attorney General to issue regulations and carry out Title III as it applies to facilities and vehicles.<sup>24</sup> Accordingly, the Department of Justice (“DOJ” or “the Department”) further defined public accommodations as “facilities,” and stated that a facility includes all portions of a building, walkways, parking lots, and equipment.<sup>25</sup>

To bring a suit under Title III of the ADA, individuals must first establish that they have a disability<sup>26</sup> and are subject to current discrimination.<sup>27</sup> Next, the individual must show that the accused party is a private entity and that the public accommodation affects

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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.

*Id.* § 12181(7).

23. H.R. REP. NO. 101-485, pt. 2, at 100 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 383 (“For example, the legislation lists ‘golf course’ as an example under the category of ‘place of exercise or recreation.’ This does not mean that only driving ranges constitute ‘other similar establishments.’ Tennis courts, basketball courts, dance halls, playgrounds, and aerobics facilities . . . are also included in this category.”); *see also* S. REP. NO. 101-16, at 59 (1989).

24. 42 U.S.C. § 12186(b).

25. 28 C.F.R. § 36.104.

26. Disability is defined in 42 U.S.C. § 12102 as a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment, meaning that an individual was subjected to discrimination based on a perceived disability, whether or not the impairment limits a major life activity; *see also* 29 C.F.R. § 1630.2(g)–(i).

27. *Schroedel v. New York Univ. Med. Ctr.*, 885 F. Supp. 594, 598–99 (S.D.N.Y. 1995) (“In order to establish an injury in fact necessary to a claim for injunctive relief, the moving party must demonstrate that a defendant’s conduct is causing irreparable harm. This requirement cannot be met absent a showing of a real or immediate threat that the plaintiff will be wronged again.”).

commerce.<sup>28</sup> The plaintiff then has the burden of establishing a prima facie case of a violation under Title III.<sup>29</sup> To do so, the plaintiff must show that the other party owns, leases, or operates a place of public accommodation<sup>30</sup> that fits under one of the twelve enumerated categories listed in 42 U.S.C. § 12181(7), and that the plaintiff was denied “the full and equal enjoyment” of the goods or services on the basis of a disability.<sup>31</sup> Note that Title III only requires private entities to provide equal *access* to the goods or services, not to provide *content* that is equally enjoyable—for example, a bookstore may be required to construct a wheelchair ramp providing access to the books, but it is not required to alter its inventory to stock Braille books.<sup>32</sup> Next, the plaintiff must show that the proposed accommodations are reasonable; namely, that they are “readily achievable,” will not result in “undue burden,” or will not “fundamentally alter the nature” of the services or goods.<sup>33</sup> The burden then shifts to the defendant to prove otherwise, and then back to the plaintiff to rebut the defendant.<sup>34</sup> Plaintiffs bringing suit under Title III can only request injunctive relief. But if the Attorney General becomes involved in the suit, the court may award damages at the Attorney General’s request.<sup>35</sup>

Although there are several possible reasons for the original ADA’s lack of regulations regarding website accessibility,<sup>36</sup> the most definite reason is that the Internet did not exist as we know it when the ADA was enacted.<sup>37</sup> While the original ADA’s lack of regulations

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28. 42 U.S.C. §§ 12181(7), 12182(a); *see also id.* §§ 12101(b)(4), 12181(1)–(2), (6). Note that public entities are covered under Title II of the ADA. *Id.* § 12132.

29. *See, e.g.,* Massachusetts v. E\*Trade Access, Inc., 464 F. Supp. 2d 52, 59–60 (D. Mass. 2006); Mayberry v. Von Valtier, 843 F. Supp. 1160, 1166–67 (E.D. Mich. 1994).

30. 42 U.S.C. § 12182(a); *see also* Mayberry, 843 F. Supp. at 1166.

31. 42 U.S.C. § 12182(a).

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

33. *See* 42 U.S.C. § 12182(b)(2)(i)–(iv); *see also* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1282 (11th Cir. 2002).

34. *See* 136 A.L.R. Fed. 1 § 2(b); *see also* E\*Trade, 464 F. Supp. 2d. at 61; Mayberry, 843 F. Supp. at 1166–67.

35. 42 U.S.C. § 12188(b)(2).

36. *See infra* discussion Part IV.A.

37. In the late 1960s, computers in different locations were connected together to exchange data for the first time, CHRISTOS J.P. MOSCHOVITIS ET AL., HISTORY OF THE INTERNET: A CHRONOLOGY, 1843 TO THE PRESENT 1, 61 (1999), however, “Internet” did not become the official word to describe the networks that had developed until 1983, *id.* at 110, when fewer than 1000 computers were connected to the Internet. Robert Hobbes Zakon, *Hobbes’ Internet Timeline*,

regarding website accessibility is understandable, the lack of subsequent legislation or regulations regarding private website accessibility for the disabled is less understandable. The DOJ has issued numerous regulations for Title III of the ADA<sup>38</sup> pursuant to its grant of authority from Congress,<sup>39</sup> but regulations concerning private website accessibility have yet to be issued.<sup>40</sup> Congress has

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ZAKON.ORG, <http://www.zakon.org/robert/internet/timeline> (last updated Dec. 30, 2011) (it is not until 1984 that the number of hosts breaks 1000). In 1991, the World Wide Web was invented, along with the first web server, browser, and website. JAMES GILLIES & ROBERT CAILLIAU, *HOW THE WEB WAS BORN: THE STORY OF THE WORLD WIDE WEB* 180–203 (2000). Thus, when the ADA was enacted in 1990, there was no such thing as a website.

38. 28 C.F.R. §§ 36.104–36.608.

39. 42 U.S.C. § 12186(b).

40. In 2010, on the twentieth anniversary of the signing of the ADA, the DOJ issued an Advance Notice of Proposed Rulemaking regarding ADA regulation of web accessibility, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (proposed July 26, 2010), available at <http://www.regulations.gov/#!documentDetail;D=DOJ-CRT-2010-0005-0001>, and President Barack Obama announced that “[e]ven as we speak, Attorney General Eric Holder is preparing new rules to ensure accessibility of websites.” *Remarks by the President on 20th Anniversary of the Americans with Disabilities Act*, WHITE HOUSE (July 26, 2010, 6:26 PM), <http://www.whitehouse.gov/the-press-office/remarks-president-20th-anniversary-americans-with-disabilities-act>. However, in July 2011 the DOJ announced that this would be a “long-term item” to the disappointment of disability advocates, meaning that it will be several years before the DOJ promulgates any actual regulation on this issue, if at all. DEPARTMENT OF JUSTICE, DOJ SEMIANNUAL REGULATORY AGENDA - FALL 2011, at 86 (Jan. 2012), available at <http://www.regulations.gov/#!documentDetail;D=DOJ-OAG-2012-0001-0001>; *DOJ Delays Web Accessibility Regulations*, LAW OFFICE OF LAINEY FEINGOLD (July 19, 2011), <http://llegal.com/2011/07/web-delay/>. In 2013, the DOJ website stated that it will issue a Notice of Proposed Rulemaking on the issue of Title II website accessibility in July 2013 and Title III in December 2013. See OFF. INFO. REG. AFF., <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1190-AA61> (last visited Sept. 8, 2013); OFF. INFO. REG. AFF., <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1190-AA65> (last visited Sept. 8, 2013). But as of the publication of this Comment, the DOJ has failed to issue a Notice of Proposed Rulemaking for Title II.

Despite the DOJ’s lack of regulations, the Department has issued several statements regarding its positions on the issue. As early as 1996, Deval Patrick, Assistant Attorney General, stated in a letter to Senator Harkin—chief sponsor of the ADA in the Senate—the DOJ’s position that Title III of the ADA applies to websites. Letter from Deval L. Patrick, Assistant Att’y Gen., Civil Rights Div., to Senator Tom Harkin, U.S. Senate (Sept. 9, 1996), available at <http://www.usdoj.gov/crt/foia/cltr204.txt>. The DOJ has also stated that Title III of the ADA applies to private websites in several amicus briefs. See, e.g., Brief for the U.S. Department of Justice, filed as Amici Curiae Supporting Appellant, *Hooks v. OKbridge*, 232 F.3d 208 (2000) (No. 99-50891), 1999 WL 33806215, available at <http://www.justice.gov/crt/about/app/briefs/hooks.pdf>; Brief for the U.S. Department of Justice, filed as Amici Curiae Supporting Appellants, *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (No. 01-111197), 2001 WL 34094038, at \*5, available at

also failed to take legislative action on this issue. In 2000, before any court had issued a ruling on whether a website is a place of public accommodation, the House's Subcommittee on the Constitution held a hearing regarding the applicability of the ADA to the Internet.<sup>41</sup> After the hearings, the committee filed a brief House report merely stating the issues that had been discussed and recognizing the DOJ's position on the issue, without expressing an opinion on the matter.<sup>42</sup> In 2008 Congress amended the ADA as a result of Supreme Court decisions that had limited the Act's breadth.<sup>43</sup> Despite Congress's awareness of the website accessibility issue—and the development of a circuit split on the issue<sup>44</sup>—the amendments did not mention website accessibility.

### *B. Internet Accessibility for Americans with Disabilities*

Americans with visual impairments—who, according to 2010 census data, number over eight million, two million of which are blind<sup>45</sup>—face the biggest obstacles with regards to website accessibility and navigation.<sup>46</sup> Individuals with mobility impairments, deafness, and epilepsy may also experience problems accessing and navigating websites.<sup>47</sup>

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<http://www.justice.gov/crt/about/app/briefs/rendon.pdf>. The DOJ has also negotiated settlements where they required accessibility in nonphysical locations, *see, e.g., Enforcing the ADA: A Status Report from the Department of Justice: April-June 2002*, U.S. DEP'T JUST., <http://www.ada.gov/aprjun02.htm> (last visited Dec. 20, 2012), and even brought a suit on its own for a Title III violation involving website inaccessibility. *See Enforcing the ADA: A Status Report from the Department of Justice*, Dec. 2010, at 4, available at <http://www.ada.gov/octdec10.pdf>.

41. Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 65-010 at 19 (2000) (statement of Gary Wunder, Programmer Analyst-Expert, ITS-Hosp. Bus. Apps., Univ. of Mo.), available at [http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm).

42. *See* H.R. REP. NO. 106-1048, at 275 (2001).

43. ADA Amendments Act of 2008, Pub. L. No. 110-325, §2, *reprinted in* 2008 U.S.C.C.A.N. 3553.

44. *See infra* discussion Part III.

45. This number only includes the civilian noninstitutionalized population of America ages fifteen and older. Matthew W. Brault, *Americans with Disabilities: 2010*, U.S. CENSUS BUREAU, July 2012, at 4, available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>.

46. Kel Smith, *The Missing Link: Understanding Web Accessibility*, PRAC. LAW., June 2007, at 31, 32, available at [http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PL\\_TPL0706-Smith\\_thumb.pdf](http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PL_TPL0706-Smith_thumb.pdf) (“[T]he term ‘web accessibility’ pertains mainly to the blind.”).

47. *See id.*; Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. ENT. & TECH. L. 363, 391–92 (2008).

As websites have become more interactive and richer in multimedia content, it has become more challenging for some individuals with disabilities to access the opportunities associated with this content.<sup>48</sup> To access the Internet, some individuals with disabilities use assistive hardware and software such as screen readers.<sup>49</sup> Screen readers convert text into speech so that blind individuals can listen to web content.<sup>50</sup> Screen readers cannot discern what an image is depicting, but the web designer can add a brief description of the image to the underlying code so that the screen reader can describe the image to the user.<sup>51</sup> To navigate the website and “click” on links, a blind person may use a keyboard.<sup>52</sup> In the early days of the Internet, when websites were primarily text based, blind individuals were able to access and navigate websites with relative ease.<sup>53</sup> However, as websites grew more sophisticated and interactive, developers started putting code in places where the graphic description would normally go, causing the screen reader to read off an indecipherable list of random words and numbers that have nothing to do with the image.<sup>54</sup> Bruce Sexton Jr., a plaintiff in *National Federation of the Blind v. Target Corp.*,<sup>55</sup> explained that when he attempted to navigate Target’s website he could not “tell whether the numbers he hears on other parts of the home page correspond to products, files or something else.”<sup>56</sup>

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48. *Id.*

49. Smith, *supra* note 46, at 32–33.

50. *Visual Disabilities*, WEBAIM, <http://webaim.org/articles/visual/blind> (last visited Dec. 19, 2012); see e.g., *JAWS for Windows Screen Reading Software*, FREEDOM SCI., <http://www.freedomscientific.com/products/fs/JAWS-product-page.asp> (last visited Dec. 19, 2012).

51. *Visual Disabilities*, WEBAIM, <http://webaim.org/articles/visual/blind> (last visited Dec. 19, 2012); Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 65-010 at 19 (2000) (statement of Gary Wunder, Programmer Analyst-Expert, ITS-Hosp. Bus. Apps., Univ. of Mo.), available at [http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm) [hereinafter *Hearings*].

52. *Visual Disabilities*, WEBAIM, <http://webaim.org/articles/visual/blind> (last visited Dec. 19, 2012).

53. Diane Murley, *Web Site Accessibility*, 100 LAW LIBR. J. 401, 404 (2008).

54. *Id.*; Smith, *supra* note 46.

55. 452 F. Supp. 2d 946 (N.D. Cal. 2006). Discussed *infra* Part III.B.2.

56. Carol Silwa, *Accessibility Issue Comes to a Head*, COMPUTERWORLD (May 8, 2006, 12:00 PM), [http://www.computerworld.com/s/article/111219/Accessibility\\_Issue\\_Comes\\_to\\_a\\_Head](http://www.computerworld.com/s/article/111219/Accessibility_Issue_Comes_to_a_Head).

Because the text of Title III and its accompanying regulations appear to limit places of public accommodation to physical places, plaintiffs have had difficulty bringing claims under Title III against websites that are not accessible to individuals with disabilities.<sup>57</sup>

### III. CIRCUIT SPLIT: IS A WEBSITE A PLACE OF PUBLIC ACCOMMODATION UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT?

The idea that networks like the Internet are a “place” was played around with as early as 1982, where the term “cyberspace” was first used in a fictional story to describe objects and events taking place inside a computer network.<sup>58</sup> One author describes cyberspace as

the ‘place’ where a telephone conversation appears to occur. Not inside your actual phone, the plastic device on your desk. Not inside the other person’s phone, in some other city. THE PLACE BETWEEN the phones . . . .

. . . .

. . . [A]nd though *there is still no substance to cyberspace, nothing you can handle, it has a strange kind of physicality now*. It makes good sense today to talk of cyberspace as a place all its own.<sup>59</sup>

The cases discussed in this section involve the question of whether a website—or other nonphysical place—is a place of public accommodation. Over the last several years, a split has developed in the circuits on this question, with some circuits interpreting “place of public accommodation” broadly to include nonphysical places, while others require a nexus between a nonphysical entity (such as a website) and an actual physical place. This section first analyzes the cases and positions of the circuits involved in the split and then discusses how the circuits’ positions may be reconciled.

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57. See *infra* discussion Part III; see, e.g., *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (2000) (“All the items on this list, however, have something in common. They are actual, physical places. . . .”).

58. BRUCE STERLING, *Introduction to THE HACKER CRACKDOWN: LAW AND DISORDER ON THE ELECTRONIC FRONTIER*, available at <http://www.gutenberg.org/ebooks/101>; Scott Thill, *March 17, 1948: William Gibson, Father of Cyberspace*, WIRED (Mar. 17, 2009), [http://www.wired.com/science/discoveries/news/2009/03/dayintech\\_0317](http://www.wired.com/science/discoveries/news/2009/03/dayintech_0317)

59. STERLING, *Introduction to THE HACKER CRACKDOWN: LAW AND DISORDER ON THE ELECTRONIC FRONTIER*, *supra* note 58.

*A. The Broad View: Title III Is Not Limited to Actual Physical Places*

The First, Second, and Seventh Circuits are often cited for taking the position that a place of public accommodation, as defined under Title III of the ADA, does not have to be a physical structure.<sup>60</sup> However, these circuit courts have not explicitly held that a *website* is a place of public accommodation as this issue has not been brought before them yet.

*1. Places of public accommodation are not limited to physical structures*

The issue of whether places of public accommodation must be actual physical structures was brought to a circuit court for the first time in *Carparts Distribution Center, Inc. v. Automotive Wholesalers Ass'n of New England, Inc.*<sup>61</sup> *Carparts* involved an employee who was enrolled in an employer-funded medical reimbursement plan. After the employee was diagnosed with HIV, the health plan was amended to limit benefits for AIDS-related illnesses to \$25,000.<sup>62</sup> After being diagnosed with AIDS, the employee<sup>63</sup> brought suit alleging, among other things, illegal discrimination on the basis of a disability under Title III of the ADA.

The district court in *Carparts* dismissed the claim, concluding that the defendants—the Automotive Wholesalers Association of New England (who offered the plan) and the plan's administrating trust<sup>64</sup>—were not liable under Title III because they were not places of public accommodation.<sup>65</sup> The district court interpreted “places of public accommodation” as “actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein” and concluded that neither the association nor the administrating trust had these characteristics.<sup>66</sup>

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60. *Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

61. 37 F.3d 12 (1st Cir. 1994).

62. AIDS is a disability under the ADA. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

63. Although the employee died before this suit was resolved, the executors of his estate were substituted as plaintiffs in this action. *Carparts*, 37 F.3d at 14 n.1.

64. *Id.* at 14.

65. *Id.* at 15.

66. *Id.* at 18.

On appeal, the First Circuit rejected the district court's interpretation of Title III and held that the plain meaning of the statute does not limit public places to physical structures. The court reasoned that the statute's inclusion of "travel service[s]" and "other service establishment[s]"<sup>67</sup> supports the position that Title III does not require a place of public accommodation to be an actual physical structure. The court explained that many customers never enter an office of a travel service because business is often conducted by telephone or correspondence: "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result."<sup>68</sup> After holding that a place of public accommodation is not limited to physical places, the court clarified that Title III does not regulate the *content* of the goods or services, only *access* to the goods or services.

While *Carparts* is an oft-cited landmark decision for individuals seeking to extend Title III protection to cyberspace, it is important to note that the First Circuit did not hold that the association or its administrating trust were places of public accommodation but remanded the case to the district court to make a determination consistent with the Circuit Court's interpretation of the statute.<sup>69</sup>

In 1999, the Seventh Circuit decided *Doe v. Mutual of Omaha Insurance Co.*, another case alleging Title III discrimination by a health insurance policy that capped benefits for AIDS-related illnesses.<sup>70</sup> Chief Judge Richard Posner wrote the opinion in this case, and started off by stating:

The core meaning of [place of public accommodation], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, *Web site*, or other facility (whether in *physical space* or in *electronic space*) . . . cannot exclude

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67. See 42 U.S.C. § 12181(7)(F) (2006).

68. *Carparts*, 37 F.3d at 19. But see *Public Citizen v. U.S. Department of Justice*, where Justice Kennedy states that the use of "absurdity" to justify a result should be limited to situations which are truly absurd, not just situations where an odd result may occur. 491 U.S. 440, 471-82 (1989) (Kennedy, J., concurring).

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

70. 179 F.3d 557 (7th Cir. 1999).

disabled persons from entering . . . and . . . using the facility in the same way that the nondisabled do.<sup>71</sup>

The court stated that an insurance company and its *policies* are “plainly” within the scope of Title III and neither the company nor its policies can refuse to sell insurance to a person with AIDS. The court also stated that if a company has a policy setting a cap on AIDS-related illnesses that *effectively* excludes individuals with AIDS from receiving the benefits of the plan, even without express restrictions, that would still be an exclusion on the basis of a disability under Title III of the ADA. The court found, however, that the policy capping benefits for AIDS related illnesses did not have such effect, as individuals with AIDS also had non-AIDS-related medical needs and were given full and equal access to non-AIDS-related coverage.<sup>72</sup>

In *Doe*, the plaintiffs were essentially asking the court to regulate the content of the insurance policy and coverage rather than the access to the policy and coverage. The court ultimately held that the plaintiffs’ Title III violation claim failed, as Title III regulates access rather than content of services and goods.<sup>73</sup>

Lastly, in 1999 the Second Circuit decided an insurance coverage case: *Pallozzi v. Allstate Life Insurance Co.*<sup>74</sup> The Second Circuit stated that Title III guaranteed “more than mere physical access”<sup>75</sup> and that it is not sufficient that an entity covered by Title III provide access to its facilities if the entity still refuses to sell merchandise to an individual on the basis of a disability. The court reasoned that the statute’s use of the word “of” in “goods [and] services . . . of any place of public accommodation,”<sup>76</sup> means that access is not limited to goods and services “inside” a place of public accommodation.<sup>77</sup> Instead, the court reasoned, access extends to any goods and services

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71. *Id.* at 559 (emphasis added). The court cited *Carparts* to support this proposition.

72. *Id.*

73. *Id.* at 554–55. *Doe* was appealed to the Supreme Court and the Court denied certiorari. *Doe v. Mut. of Omaha Ins. Co.*, 528 U.S. 1106 (2000). Unfortunately this does not provide useful fodder for speculating about whether the Supreme Court approves of a broader interpretation of Title III as *Doe’s* holding was limited to finding that Title III does not regulate content of goods or services.

74. 198 F.3d 28 (2d Cir. 1999).

75. *Id.*

76. 42 U.S.C. § 12182(a) (2006) (emphasis added).

77. *Pallozzi*, 198 F.3d at 33.

that the entity offers, irrespective of how they offer it.<sup>78</sup> The court held that the company's insurance policy *itself* may be a covered entity under Title III and remanded the case for further proceedings.<sup>79</sup>

2. *A website is a place of public accommodation*

On June 19, 2012, in *National Ass'n of the Deaf v. Netflix, Inc.* (“*Netflix I*”), a district court in the First Circuit became the first federal court to hold that a website, as a standalone entity—meaning that the website itself was the only subject of the decision and no physical selling locations, warehouses, or tangible goods were implicated<sup>80</sup>—was a place of public accommodation.<sup>81</sup> The suit, brought by deaf individuals and advocates under Title III of the ADA, alleged that Netflix did not provide equal access to its services.<sup>82</sup> Netflix is a video rental service that offers titles to subscribers through its “Watch Instantly” service, where a subscriber selects what title they would like to watch and the title is instantly streamed from Netflix's servers to the subscriber's computer or device.<sup>83</sup> The plaintiffs in *Netflix II* alleged that Netflix denied deaf subscribers equal enjoyment and access to the streaming service by only offering closed captioning on a small number of titles, effectively excluding deaf individuals from access to the non-captioned titles. Netflix filed a motion to dismiss on the basis that, among other things, its website was not a place of public accommodation under Title III.<sup>84</sup>

The United States District Court for the District of Massachusetts denied Netflix's motion, holding that Netflix's website was a place of public accommodation.<sup>85</sup> The court did not establish a “nexus” between the website and an actual “brick-and-mortar store” like other district courts have done in similar cases—as discussed in Part III.B—but instead found that the website was “analogous” to a brick-and-mortar store, such as a video rental store.

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78. *Id.*

79. *Id.* at 37.

80. *See infra* note 95.

81. 869 F. Supp. 2d 196 (D. Mass. 2012).

82. *Id.* at 200–02.

83. *See* Matt Julington, *Netflix Questions*, SALON.COM, <http://techtips.salon.com/netflix-questions-460.html> (last visited Dec. 20, 2012).

84. *Netflix II*, 869 F. Supp. 2d at 199.

85. *Id.* at 200–02, 208.

As the court was located in the First Circuit, the court cited to *Carparts* for the proposition that a place of public accommodation does not need to be an actual physical structure.<sup>86</sup>

Netflix filed a motion asking the judge to certify an interlocutory appeal to the First Circuit, calling the judge's decision "the broadest-ever extension of the ADA's scope, thereby opening the door to amorphous and seemingly limitless regulation of the Internet in a way Congress did not envision and no other court has accepted."<sup>87</sup> Netflix's motion was denied because the judge found that the case did not "present the exceptional circumstances justifying an interlocutory appeal."<sup>88</sup> After Netflix's motion was denied, Netflix entered into a consent decree with the plaintiffs.<sup>89</sup> In the agreement, Netflix agreed to caption most of its titles by 2014.<sup>90</sup>

*Netflix II* has wide-ranging implications for this area of jurisprudence. First, this decision potentially opens up all commercial websites to suit under Title III.<sup>91</sup> Second, serious forum shopping implications arise from this decision, as a nearly identical

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86. *Id.* at 200–02 (quoting H.R. Rep. 101 485(II) at 108 (1990)). Netflix also argued that it did not have control over which titles it could caption because of copyright issues, and therefore it did not own, lease, or operate a place of public accommodation under Title III. *Id.* at 202–03. The court disagreed with this argument, as Netflix did in fact own and operate the website, but indicated that Netflix may be able to amend its argument to claim that it is not able to caption the titles because of copyright issues in the future. *Id.* at 202–03. Netflix also made the argument that its streaming service does not fall under Title III because its services were accessed in private residences, not public spaces. The court found this argument unpersuasive, stating that: "The ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation." *Id.* at 201. The court likened Netflix's service to a pizza delivery service which is ordered over the phone and enjoyed in a private home. *Id.* at 201–02. The court also disagreed with Netflix's argument that a recent regulation by the FCC, which set forth captioning requirements for distributors of online video programming, preempted any Title III requirements and mooted the plaintiffs' claim. *Id.* at 203–08.

87. Motion to Amend at 1, Nat'l Ass'n of the Deaf v. Netflix, Inc., (2012) (No. 3:11-cv-30168), available at <http://pdfserver.amlaw.com/nlj/DMassNtlDeafvNetflixDoc65.pdf>.

88. Order Denying Motion to Amend, Docket No. 70, Nat'l Ass'n of the Deaf v. Netflix, Inc., (2012) (No. 3:11CV30168).

89. Order Granting Motion to Approve Consent Judgment, Docket No. 87, Nat'l Ass'n of the Deaf v. Netflix, Inc., (2012) (No. 3:11CV30168).

90. Consent Decree, Nat'l Ass'n of the Deaf v. Netflix, Inc., (2012) (No. 11-30168-MAP), available at <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>.

91. See, e.g., Eric Goldman, *Will the Floodgates Open Up for Americans with Disabilities Act (ADA) Claims Against Websites?—National Association of the Deaf v. Netflix*, TECH. & MARKETING LAW BLOG (June 26, 2012), [http://blog.ericgoldman.org/archives/2012/06/are\\_the\\_floodga.htm](http://blog.ericgoldman.org/archives/2012/06/are_the_floodga.htm); Julian Sanchez, *The ADA and the Internet*, CATO INST. (June 29, 2012, 4:43 PM), <http://www.cato-at-liberty.org/the-ada-and-the-internet/>.

claim against Netflix was dismissed in 2012 by a district court in the Ninth Circuit.<sup>92</sup> Although there is no explicit circuit court holding that a website is a place of public accommodation, the stage is now set for litigants who want to pursue Title III claims against commercial websites without any direct connection to an actual brick-and-mortar place of public accommodation.

*B. The Narrow View: There Must Be a Nexus between the Good or Service Offered and an Actual Physical Place*

On the other side of the split, the Third, Sixth, Ninth, and Eleventh Circuits have held that the plain language of Title III requires a place of public accommodation to be a physical structure.<sup>93</sup> These circuits use the “nexus” test, which requires a nexus between goods and services offered through nonphysical means to a physical place of public accommodation.<sup>94</sup> Several district courts in these circuits have held that a website as a standalone entity<sup>95</sup> cannot be a place of public accommodation. But these courts have held that a website may be subject to the ADA if a nexus can be established between the website and a physical place.<sup>96</sup> While plaintiffs bringing claims under Title III in these circuits have been successful, some commentators believe that the narrow scope of the “nexus” test does little to ensure that persons with disabilities will have equal access to websites.<sup>97</sup> The storefront test, discussed in

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92. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012). This case is discussed in Part III.B.2.

93. *See, e.g., Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1013–14 (6th Cir. 1997) (“We, therefore, disagree with the First Circuit’s decision in *Carparts* . . . . To interpret [Title III] as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute.”).

94. *See id.* at 1011.

95. By using the phrase “standalone entity” I mean to describe websites that are *only* websites, without any link to a physical selling location or warehouse, and without a connection to any physical inventory. For example, Facebook is a website that does not (generally) have any connection to a physical selling location, warehouse, or inventory. But Amazon.com would not be a “standalone entity” as it has warehouses and physical inventory. *See infra* text accompanying notes 195–96.

96. *See* discussion *infra* Part III.B.2.

97. *See, e.g., Ali Abrar & Kerry J. Dingle, From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 134 (2009) (arguing that the nexus test is “under-inclusive in that it fails to increase the accessibility of large-scale commercial websites”).

Part IV, expands upon the nexus test to provide broader Title III protection.

*1. Places of public accommodation are limited to physical structures and the nexus test*

The Sixth Circuit was the first circuit to hold that Title III only applies to physical places.<sup>98</sup> In *Stoutenborough*, a group of hearing-impaired plaintiffs sued the NFL and the Cleveland Browns over a “blackout rule,” alleging that the rule violated Title III of the ADA because it denied the plaintiffs access to the football games through communication technology.<sup>99</sup> The Sixth Circuit held that “the prohibitions of Title III are restricted to ‘places’ of public accommodation,”<sup>100</sup> and that an interpretation that Title III is not limited to physical places “contravenes the plain language of the statute.”<sup>101</sup> Under this interpretation of Title III, the court found that the NFL and its teams were not places of public accommodation. Although the NFL and its member clubs have headquarters in a physical place somewhere, the court held that its existence as a “league” is not subject to Title III as it is not itself a tangible physical structure.<sup>102</sup>

A few years after *Stoutenborough*, the Sixth Circuit decided *Parker v. Metropolitan Life Insurance Co.*, a case involving a long-term disability plan offered by an employer and issued by an insurance company.<sup>103</sup> The plan provided benefits for individuals with physical disorders until they turned sixty-five but limited benefits for individuals with mental disorders to twenty-four months.<sup>104</sup> The Sixth Circuit, deciding the case en banc, upheld the district court’s decision to grant summary judgment in favor of the defendants in an eight-to-five decision.<sup>105</sup> The court found that the insurance plan

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

99. *Id.* at 581–82.

100. *Id.* at 583.

101. *Id.*

102. *Id.*

103. 121 F.3d 1006 (6th Cir. 1997).

104. *Id.* at 1008.

105. *See id.* at 1008, 1014. It is worth noting that one of the dissenters in *Parker* disagreed with the court’s holding that Title III only applies to physical structures and pointed out that as business increasingly takes place over the phone or Internet, many disabled individuals will not have the access that Title III would guarantee if the business took place in a physical facility. *Id.*

was not a good or service of a place of public accommodation.<sup>106</sup> The court noted that although an insurance office is expressly included in Title III's categories,<sup>107</sup> the plan was not offered *from* the insurance office; instead the plan was provided by a private employer and issued by an insurance company.<sup>108</sup> The court reasoned that a member of the public could not have walked into the insurance company's office or the employer's office to receive the policy that plaintiff received.<sup>109</sup> The court then introduced the "nexus" test, which is the requirement that there must be a nexus between a good or service offered through a nonphysical medium and a public physical facility. The court found that there was "no nexus between the disparity in benefits and the services which [the insurance company] offers to the public from its insurance office" as the public could not enter the office to obtain the policy that plaintiff received.<sup>110</sup>

The Third Circuit became the next circuit to hold that Title III is limited to physical places in *Ford v. Schering Plough Corp.*<sup>111</sup> *Ford* also involved a long-term disability plan,<sup>112</sup> and the Third Circuit held that the plaintiff failed to state a claim under Title III because the disability plan was not offered at a physical place of public accommodation.<sup>113</sup> The Third Circuit, whose analysis resembled the Sixth Circuit's analysis in *Parker*, found that the policy was not offered from the insurance company's office, but from the terms and conditions of the plaintiff's employment.<sup>114</sup> The court found that, because the plaintiff received the benefit as a condition of her

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at 1020 (Boyce, J., dissenting).

106. *Id.* at 1014.

107. *See* 42 U.S.C. § 12181(7)(F) (2006).

108. *Parker*, 121 F.3d at 1010.

109. *Id.* at 1011.

110. *Id.* The court also expressly disagreed with the *Carparts's* decision and the First Circuit's reasoning that "[b]y including 'travel service' among the list of services considered 'public accommodations'" Title III was not limited to physical places. *Id.* at 1013 (quoting *Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)). The court observed that 'travel service' was used in the statute alongside a shoe repair service, office of an accountant, an insurance office, and a professional office; and since all of these places are physical, applying the canon of *noscitur a sociis* suggests that Congress intended "travel office" to be a physical location. *Id.* at 1013-14.

111. 145 F.3d 601 (3d Cir. 1998).

112. *Id.* 603-04.

113. *Id.* at 614.

114. *Id.* at 612.

employment, there was not a nexus since the disability benefit plan was not offered from the insurance office.<sup>115</sup> The Third Circuit supported its decision by comparing Title III to the Civil Rights Act, whose similar language has been found to only apply to physical places and not to organizations.<sup>116</sup> The court also pointed out that confining Title III to physical places is consistent with the DOJ's regulations, which focuses on goods or services that are utilized by access to physical places.<sup>117</sup>

The Ninth Circuit was presented with a similar issue in *Weyer v. Twentieth Century Fox Film Corp.*<sup>118</sup> As in *Parker* and *Ford*, the plaintiff in *Weyer* brought suit alleging that an employer provided disability plan that provided greater physical disability benefits than mental disability benefits violated Title III.<sup>119</sup> The Ninth Circuit stated that to successfully assert a Title III claim, there would have to be a nexus between the good or service and an actual physical place.<sup>120</sup> The court acknowledged that an "insurance office" is a place of public accommodation, but stated that the case was "not about such matters as ramps and elevators so that disabled people can get to the office."<sup>121</sup> The court found that the plan was not offered by the insurance office but was offered by the employer and administered by the insurance company. Since there was no nexus between the plan and the office, no Title III violation had occurred.<sup>122</sup>

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115. *Id.* at 613. Another interesting note about *Ford* is that Justice Alito, who now sits on the Supreme Court, took part in the decision. Unfortunately Justice Alito did not indicate his position on whether Title III applies to physical places. He did not take part in the opinion but wrote a separate, concurring opinion stating that he would uphold the lower court's dismissal on other grounds without reaching the more difficult Title III question. *See id.* at 615 (Alito, J., concurring) ("I would not reach the more difficult issue[] of . . . whether Title III's public accommodation provision guarantees anything more than physical access. Th[is] issue[] ha[s] divided the circuits, and I would reserve judgment until we are confronted with a case in which the unique considerations of insurance plans are not at stake.").

116. *Id.* at 613.

117. *Id.* The DOJ's regulations specify that a place of public accommodation is a "facility," which is further 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." 28 C.F.R. § 36.104.

118. 198 F.3d 1104 (9th Cir. 2000).

119. *Id.* at 1107–08.

120. *Id.* at 1114.

121. *Id.*

122. *Id.* at 1114–15.

In 2002 a plaintiff successfully recovered under the nexus test. In *Rendon v. Valleycrest Productions, LTD.*, the Eleventh Circuit held that a contestant hotline was subject to Title III.<sup>123</sup> *Rendon* involved an automated telephone contestant selection process for a game show, which required prospective contestants to call in and answer questions by selecting a number on the telephone keypad.<sup>124</sup> Individuals with hearing disabilities and mobility impairments were not able to participate in the contestant selection process because either they could not hear the questions over the telephone, or they could not move their fingers fast enough to enter their answers on the keypad.<sup>125</sup> These individuals filed a complaint against the producers of the show alleging that the selection process violated Title III.<sup>126</sup>

The Eleventh Circuit began by establishing that the game show itself took place in a place of public accommodation that would be subject to regulation under Title III. The court recognized that this case did not involve a *physical* barrier that prevented access to a place of public accommodation but involved an “intangible” barrier that prevented the plaintiffs from having the same access to the opportunity to be a contestant that individuals without disabilities had.<sup>127</sup> The court found that the plain language of Title III covered both tangible and intangible barriers to places of public accommodation such as eligibility criteria, policies, or procedures that screen out individuals with disabilities.<sup>128</sup> The court held in favor of the plaintiffs, reasoning that, although the automated telephone screening process discriminated against individuals offsite, it had a direct nexus to the studio.<sup>129</sup>

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123. 294 F.3d 1279 (11th Cir. 2002).

124. *Id.* at 1280.

125. *Id.* at 1280–81.

126. *Id.* at 1281.

127. *Id.* at 1283.

128. *Id.*; see 42 U.S.C. § 12182(b)(2)(A)(i)–(ii) (2006).

129. *Rendon*, 294 F.3d at 1285 n.8. The Eleventh Circuit never explicitly stated that the automated telephone system itself was not a place of public accommodation, however, the court’s use of the nexus test to find a connection between the studio and the automated telephone system strongly suggests that the court would not have found the telephone system itself a place of public accommodation. Accordingly, most commentators place the Eleventh Circuit on the narrow side of the split. See, e.g., Michael P. Anderson, *Ensuring Equal Access to the Internet for the Elderly: The Need to Amend Title III of the ADA*, 19 ELDER L.J. 159, 176–78 (2011);

*2. Websites under Title III and the nexus test*

The Eleventh Circuit became the first—and so far only—circuit to face the question of whether a website itself can be a place of public accommodation in *Access Now, Inc. v. Southwest Airlines Co.*<sup>130</sup> The court also faced the direct question of whether an individual can recover under Title III when they allege a nexus between a discriminatory website and a physical place.<sup>131</sup> However, the Eleventh Circuit disposed of this case without deciding these issues.<sup>132</sup>

*Access Now* involved a website operated by Southwest Airlines that offered booking specials exclusively through its website. One of the plaintiffs, a visually impaired individual, was unable to navigate Southwest's website and brought suit alleging that Southwest.com's inaccessibility violated Title III.<sup>133</sup> At the district court level, the plaintiffs simply stated that Southwest.com *itself* was a place of public accommodation without alleging a nexus between the website and a physical facility.<sup>134</sup> The district court dismissed the case based on its belief that—contrary to the plaintiffs' assumption—Southwest.com, as a standalone entity, was not a place of public accommodation and that the plaintiffs failed to establish a nexus between the website and a physical facility.<sup>135</sup>

On appeal, the plaintiffs apparently ditched the argument—or assumption—that Southwest.com was a place of public accommodation and “presented [the Eleventh Circuit] with a case that [was] wholly different from the one they brought to the district

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Stephanie Khouri, *Disability Law—Welcome to the New Town Square of Today's Global Village: Website Accessibility for Individuals with Disabilities After Target and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331, 343 (2010).

130. 385 F.3d 1324 (11th Cir. 2004).

131. *Id.* at 1329.

132. *Id.*

133. *Id.* at 1325–26. The plaintiff tried to access the website and take advantage of its online deals through a screen reader, but the individual was not able to gain access to the deals offered through the website. Southwest.com did not label its graphics or make its online forms navigable. *Id.*

134. *Id.* at 1326–27.

135. *Id.* at 1328. The district court found that “the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of ‘places of public accommodation,’” and that to fall within the scope of the ADA, “a public accommodation must be a physical, concrete structure.” *Id.* (quoting *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002)).

court.”<sup>136</sup> On appeal the plaintiffs argued that Southwest’s website had a nexus to the physical facility of Southwest Airlines.<sup>137</sup> This gave the Eleventh Circuit an opportunity to avoid both issues because 1) the plaintiffs did not argue that the website itself was a place of public accommodation as they had at the district court level and 2) they brought a new legal theory to the appellate court that they did not bring before the district court. The court was reluctant to “wad[e] into the thicket of a circuit split on th[e] issue,”<sup>138</sup> and stated that it should wait to address these important issues until they are *properly* brought before them.<sup>139</sup> Accordingly, the court dismissed the appeal.<sup>140</sup>

*Access Now* is important because even though the Eleventh Circuit did not state an opinion about whether Title III applies to websites, the district court’s decision that a website itself is not a place of public accommodation, and suggestion that a plaintiff may be able to allege a nexus between a website and a physical place of public accommodation, was not reversed. Recently, an Eleventh Circuit district court held that an exchange network website for timeshares existed only in “cyberspace” and was not a place of public accommodation.<sup>141</sup> Another district court used some creativity to put together a string cite that attributed the following proposition to the Eleventh Circuit: “[T]he Eleventh Circuit has recognized Congress’ clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation.”<sup>142</sup> It appears that courts within the Eleventh Circuit continue to hold that websites are not places of public accommodation.<sup>143</sup>

In *National Federation of the Blind v. Target Corp.*, a district court in the Ninth circuit became the first federal court to apply the nexus

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136. *Id.* at 1326.

137. *Id.* at 1328.

138. *Id.* at 1334.

139. *Id.* at 1334–35.

140. *Id.* at 1335.

141. *Steelman v. Florida*, No. 6:13-cv-123-Orl-36DAB, 2013 WL 1104746, at \*3 (M.D. Fla. Feb. 19, 2013).

142. *Petrano v. Nationwide Mut. Fire Ins. Co.*, No. 1:12-cv-86-SPM-GRJ, 2013 WL 1325045, at \*7 (N.D. Fla. Jan. 24, 2013).

143. It is interesting, though, that the court in *Steelman* cited to *Young v. Facebook*, 790 F. Supp. 2d 1110 (N.D. Cal 2011), a Ninth Circuit district court case, for the proposition that a website is not a place of public accommodation. *Steelman*, 2013 WL 1104746, at \*3.

test to a website.<sup>144</sup> In *Target*, the plaintiffs brought a Title III suit alleging that Target's website was not accessible to individuals with visual impairments. The plaintiffs claimed that the website was not designed in a way that a screen reader could make sense of the graphics, making it impracticable for a blind individual to navigate the website.<sup>145</sup>

Target filed a motion to dismiss for failure to state a claim arguing that Title III only applies to physical places.<sup>146</sup> The plaintiffs argued that there was a nexus between Target.com and Target stores.<sup>147</sup> The court started by laying out the Ninth Circuit's position in *Weyer* that places of public accommodation under Title III are limited to physical places.<sup>148</sup> The court then recognized that other courts have allowed plaintiffs to allege a nexus between a good or service and a place of public accommodation.<sup>149</sup> After laying this foundation, the court disagreed with Target's argument that Title III only applies to *onsite* physical access, stating that Title III specifically requires the removal of intangible and communication barriers that limit access to goods and services *of* a place of public accommodation, not *in* a place of public accommodation.<sup>150</sup> The court distinguished *Target* from *Stoutenborough* by pointing out that Target's website was "heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores."<sup>151</sup> After comparing Target's case to *Rendon*, the court found that, as in *Rendon*, Target's website prevented individuals with disabilities from accessing the goods and services of a place of public accommodation.<sup>152</sup>

Because the plaintiffs successfully asserted a nexus between Target.com and Target's physical stores, the court denied Target's

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144. 452 F. Supp. 2d 946 (N.D. Cal. 2006).

145. *Id.* at 949–50; *see also supra* text accompanying notes 54–56.

146. *Id.*

147. *Id.* at 952. The plaintiffs argued that unequal access to the website denied them equal access to the goods and services offered at Target stores. This appears to be the nexus argument, but it is not clear if the plaintiffs actually alleged a connection between the website and a physical store or if the court helped out the plaintiffs by assuming the argument.

148. *Id.*

149. *Id.* at 953.

150. *Id.* at 951, 953–55.

151. *Id.* at 954–55.

152. *Id.* at 955–56.

motion to dismiss.<sup>153</sup> However, the court placed a substantial limitation on this seemingly favorable ruling. The court granted Target's motion to dismiss plaintiffs' Title III violation claims "[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."<sup>154</sup> Thus, the court limited Title III's coverage from reaching anything that was not directly offered inside a store, including goods or services sold exclusively online. The court ended up dismissing the claims of plaintiffs who preferred to shop online<sup>155</sup> and even dismissed the original plaintiff's claim because he only used the website to "pre-shop" before he went to an actual Target store.<sup>156</sup>

To successfully assert a Title III violation under *Target*, a plaintiff must first assert a nexus between the website and a physical store that offers the same exact goods or services to the public. Under *Target's* nexus test, online-only retailers who do not have facilities open to the public, such as Amazon, are outside of the reach of the ADA.

Several subsequent cases in Ninth Circuit district courts have dealt with the issue of whether Title III applies to websites. *Young v. Facebook, Inc.* involved a Title III claim where the plaintiff alleged that Facebook's failure to provide her with customer service accommodations discriminated against individuals with mental disabilities.<sup>157</sup> The district court conceded that Facebook's headquarters were in a physical space, but found that Facebook's services were only offered to the public in cyberspace and not at the headquarters.<sup>158</sup> Accordingly, the plaintiff's argument that Facebook.com, as a standalone entity, was a place of public accommodation failed and the claim was dismissed.<sup>159</sup> In another Ninth Circuit district court case, *Ouellette v. Viacom*, a plaintiff

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153. *Id.* at 956.

154. *Id.*

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

156. *Id.* at 17.

157. 790 F. Supp. 2d 1110, 1114 (N.D. Cal. 2011).

158. *Id.* at 1115.

159. *Id.* at 1116-17, 1119. The plaintiff also claimed a nexus between Facebook.com and gift cards that Facebook sells in actual physical retail outlets; this argument failed because Title III is limited to entities that own, lease, or operate a place of public accommodation, and Facebook did not own or operate any of these retail outlets. *Id.* at 1116-17.

brought suit alleging that the removal of his videos from the Internet violated Title III.<sup>160</sup> It is not clear what the plaintiff's disability was or why removal of the videos violated the ADA, but the district court dismissed the claim on grounds that "neither a website nor its servers are 'actual, physical places where goods or services are open to the public,' putting them within the ambit of the ADA."<sup>161</sup>

Finally, a Ninth Circuit district court decided a case regarding Netflix accessibility the same summer as the First Circuit district court decided *Netflix II*. In *Cullen v. Netflix, Inc.* ("*Netflix I*"), a hearing impaired individual brought a claim against Netflix alleging a Title III violation that was nearly identical to the claim brought before the First Circuit district court in *Netflix II*.<sup>162</sup> The plaintiff in *Netflix I* alleged that Netflix's limited selection of shows with closed captioning in its "Watch Instantly" service denied him equal access to the titles.<sup>163</sup> The court acknowledged the decision in *Netflix II* earlier that summer, but stated that under Ninth Circuit law a website itself is not a place of public accommodation unless there is a nexus between the website and a physical place.<sup>164</sup> Applying this rule, the court held that Netflix's "Watch Instantly" website was not subject to Title III and dismissed the plaintiff's ADA claim.<sup>165</sup>

These district court decisions, along with the *Netflix II* court's decision, have resulted in a clear split on the issue of whether the ADA applies to websites, albeit at the district court level only. Although the circuit split is not as clearly or deeply entrenched at the circuit court level, it is clear that a plaintiff may successfully bring a Title III claim against a website in one court, and completely fail in another. This discrepancy between the courts urges the need for a clear, consistent, and workable guideline that provides ADA protection in an intuitive way while staying within the bounds of the text of the ADA.

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160. No. CV-10-133-M-DWM-JCL., 2011 WL 1883190 (D. Mont. May 17, 2011).

161. *Id.* at \*1 (quoting *Weyer v. Twentieth Cent. Fox Film Corp.*, 198 F.3d 1104, 1114 (9<sup>th</sup> Cir. 2000)).

162. 880 F. Supp. 2d 1017 (N.D. Cal. 2012); *see supra*, Part III.A.2.

163. *Netflix I*, 880 F. Supp. 2d at 1020-22.

164. *Id.* at 1023.

165. *Id.* at 1024.

*C. Reconciling the Circuit Split*

Several commentators and court opinions have discussed the split between the circuits on the issue of whether Title III applies to

websites.<sup>166</sup> I believe, however, that the split between the courts is reconcilable at the circuit court level.

In *Netflix II*, The United States District Court for the District of Massachusetts held that a website—as a standalone entity<sup>167</sup>—is a place of public accommodation while citing to First Circuit precedent in *Carparts*.<sup>168</sup> However, it is not certain that the First Circuit would have upheld the district court’s judgment on appeal if the case had not settled. Although the language in *Carparts* plainly states that a place of public accommodation is not limited to actual physical structures, the actual analysis in the case focuses on access of services or goods offered from a physical place through nonphysical mediums like phone or mail.<sup>169</sup> It is possible that instead of standing for the proposition that a place of public accommodation can be a virtual place, the decision of the court in *Carparts* may have simply lacked focus in its holding.<sup>170</sup> The First Circuit’s decision may more precisely stand for the proposition that Title III requires access to goods and services of a place of public accommodation.

The decisions in *Doe* and *Pallozzi* focus on nonphysical *access* of a good or service rather than the physical or nonphysical *nature* of the place of public accommodation offering the good or service. Even the language in *Doe* about websites falling under Title III does not state that a website itself is a place of public accommodation, rather, the

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166. See, e.g., *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1334 (11th Cir. 2004); Anderson, *supra* note 129, at 170–81; Burgdorf, Jr., *supra* note 9, at 280; Michael O. Finnigan Jr., Brian C. Griffith & Heather M. Lutz, *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 U. CIN. L. REV. 1795, 1812 (2007).

167. See *supra* note 95.

168. *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200–02 (D. Mass. 2012).

169. *Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (“Congress clearly contemplated that ‘service establishments’ include providers of services which do not require a person to physically enter an actual physical structure.”).

170. This lack of focus would be understandable because, even though the World Wide Web was somewhat developed by 1994, it is unlikely that the First Circuit contemplated a nonphysical entity (such as a website) offering access to a good (such as a movie) through nonphysical means.

court's statement that "[t]he core meaning of this provision . . . is that the owner or operator of a . . . Web site . . . cannot exclude persons from entering the *facility* and, once in, from using the *facility* in the same way the nondisabled do,"<sup>171</sup> refers to a website as a means of access to a facility. *Pallozzi* also limited its holding of Title III regulation to "the sale of insurance policies in *insurance offices*," stating that Title III does not merely regulate access to the office itself, but the goods and services inside the office, no matter how they are accessed.<sup>172</sup> This language does not clearly lead to the proposition that a service offered in a nonphysical place—i.e., cyberspace—is a place of public accommodation. In light of *Doe* and *Pallozzi's* more focused decisions, it is possible that the First Circuit might clarify and narrow the scope of its decision in *Carparts* to focus on access of a physical place through a nonphysical medium if given the opportunity.<sup>173</sup>

The Second and Seventh Circuits' focus on Title III's application to nonphysical access of a physical place is nearly identical to the Eleventh Circuit's holding that Title III forbids "intangible barriers" to physical places.<sup>174</sup> *Doe* and *Pallozzi* involved plaintiffs who were allegedly denied equal enjoyment of insurance plans offered by an insurance office through *policies*, which had the disparate impact of discriminating against individuals with certain disabilities.<sup>175</sup> Likewise, *Rendon* involved plaintiffs who were allegedly denied equal access to an opportunity to be on a game show through *procedures* that had the disparate impact of screening out individuals with certain disabilities. In these three cases the three courts held that such procedures violated Title III.

The split becomes more reconcilable upon observation that the Sixth, Third, and Ninth Circuits' holdings in *Parker*, *Ford*, and *Weyer* (respectively) were based on the reasoning that the insurance

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171. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (emphasis added).

172. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32–33 (2d Cir. 1999) (emphasis added).

173. In fact, a district court within the Seventh Circuit recently declined to answer the question of whether Title III applies to non-physical entities. *Illinois ex rel. Madigan v. Ill. High Sch. Assoc.*, No. 12 C 3758, 2012 WL 3581174, at \*5 (N.D. Ill. Aug. 17, 2012). The court did not even cite to *Doe*, instead citing to the Third Circuit *Ford* case and a district court case decided prior to *Doe*. *Id.* Perhaps district courts within the Seventh Circuit will continue to step away from the broad interpretation of Title III that is often attributed to the Seventh Circuit.

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

175. *See supra*, Part III.A.1.

policies were not actually offered *from* the insurance office.<sup>176</sup> Although these circuits may have explicitly disagreed with decisions by circuits on the broad side of the split, the disagreement actually was about whether the policies were offered from the insurance office itself, rather than a difference in Title III interpretation. Thus, the holdings did not turn on a broad or narrow interpretation of Title III but on the application of Title III to the facts. The analysis in the decisions by the courts on both sides of the split actually appears very similar: First, they recognize that the insurance is a good or service. Next, they ask whether the policies of the insurance plan prevent access to a good offered at a place of public accommodation, which is essentially the nexus test. Finally, their decisions differ on whether the place the plans allegedly deny access to is a good or service of the insurance office itself or a product of an agreement that is not offered from the insurance office.

In summary, the circuits involved in this split do not explicitly differ on the question of whether Title III applies to a nonphysical entity.<sup>177</sup> The “narrow” circuits have explicitly held that Title III does not apply to a nonphysical entity while the “broad” circuits have not held otherwise. The circuit courts involved in this issue seem to agree that Title III prevents discrimination through intangible barriers to a physical place, whether onsite or offsite, and the only difference is that the “narrow” courts call this the nexus test while the “broad” circuits do not have a name for it. The circuit courts even employ similar analysis to determine whether the alleged discriminatory goods or services are covered under Title III.<sup>178</sup> Although the split between the circuits is reconcilable, a workable solution is needed, as this split has manifested itself in an irreconcilable way at the district court level.

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176. See *supra* Part III.B.

177. It is also important to note that the First Circuit did not hold that the Wholesalers Association of New England and the health plan’s administrating trust was a place of public accommodation in *Carparts*. *Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass’n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994); see also *supra* Part III.A.1. This means that *Carparts* is not in direct conflict with *Stoutenborough*, which held that an organization—i.e., the NFL and its club teams—was not a place of public accommodation. *Stoutenborough v. Nat’l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir.1995).

178. Even the First Circuit, which stated that Title III is “not so limited” to actual physical structures, followed this pattern of analysis in *Carparts*, stating that Title III regulates goods and services offered through intangible means—over the phone for example—even if they do not deny actual physical access to a place. *Carparts*, 37 F.3d at 20.

#### IV. THE STOREFRONT APPROACH: CONSTRUING THE ADA BROADLY WHILE STAYING WITHIN THE PLAIN LANGUAGE OF THE STATUTE

The storefront test is a new solution, which has not been previously considered, to the problem of applying Title III protection to websites. The storefront test proposes the following:

Any website that acts as a storefront for an entity that offers a substantial amount of its goods or services from a physical facility may be subject to Title III if the facility and the website together form an entity that would otherwise fall under one of the enumerated places of public accommodation.

The storefront test builds upon the nexus test to extend Title III coverage to a variety of websites, including online-only retailers, while remaining true to the text of the statute.

The first section of this Part establishes the textual boundaries of Title III and concludes that Title III does not cover websites as standalone entities<sup>179</sup> but may cover websites operated by places of public accommodation. The second section of this Part explains the storefront test in depth and illustrates its utility as a workable standard for a wide variety of websites.

##### *A. The Plain Text of Title III Does Not Apply to Websites as Standalone Entities*

Any solution that applies Title III to websites must stay within the textual bounds of the ADA. In order to provide the maximum amount of Title III protection it is necessary to establish the boundaries of the text of the ADA. The plain text of Title III does not support a solution that applies Title III to nonphysical places, but the text is able to extend coverage to goods or services offered by a physical place *through* nonphysical means.

It is well established that “the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”<sup>180</sup> The plain text of Title III, as discussed in Part II.B, clearly does not list a website as a place of

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179. See *supra* note 95.

180. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); see also *United States v. Am. Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940).

public accommodation.<sup>181</sup> Although Congress has stated its intent that the entities listed within the categories be illustrative and that liberal interpretation be given to the categories,<sup>182</sup> none of the entities listed within the categories is sufficiently analogous to a virtual place to allow a website to fall under one of the “catchall” terms at the end of the categories.<sup>183</sup> It does not matter that a website offers the same goods or services as those listed in the categories; the website itself is an entirely different entity that is not covered under the plain language of Title III. Outside of the statute, the DOJ’s regulations do not contain any language that extends the ADA to cover nonphysical virtual places. The regulations define a place of public accommodation as a facility, and define a facility by listing characteristics that are clearly physical in nature.<sup>184</sup> The courts and the DOJ are barred from creating a new category that might be analogous to virtual places because Congress has stated that the categories enumerated within Title III are exhaustive.<sup>185</sup>

Furthermore, the legislative history of the ADA does not indicate that Congress intended the ADA to apply to websites. Early drafts of Title III simply referred to “any public accommodation” rather than “place of public accommodation.”<sup>186</sup> The term “place of public accommodation” was inserted into later drafts of the ADA, apparently—according to one of the original drafters of the ADA—because Congress wanted the ADA’s coverage to be similar to the Civil Rights Act of 1964.<sup>187</sup> This addition suggests that Congress intended to limit Title III to physical places. As the Third Circuit pointed out in *Ford*, the Civil Rights Act has clearly been limited to

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181. See Finnigan, *supra* note 166, at 1826 (concluding that “the language of the ADA does not allow Title III to apply to the Internet”).

182. H.R. REP. NO. 101-485 pt. 2, at 100 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 383; *see also* S. REP. NO. 101-16, at 59 (1989).

183. *See* 42 U.S.C. § 12181(7) (2006).

184. *See* 28 C.F.R. § 36.104 (“Facility means 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.”); *see also supra* Part II.B.

185. H.R. REP. NO. 101-485, at 100; *see also* S. REP. NO. 101-16, at 59.

186. *On the Threshold of Independence*, NAT’L COUNCIL ON DISABILITY, <http://www.ncd.gov/publications/1988/Jan1988#9a2> (last visited Sept. 12, 2013) (emphasis added) (providing the first draft of the ADA as proposed by the National Council on Disability); *see also* H.R. 4498, 100th Cong. § 4(a)(3) (2d Sess. 1988); 134 CONG. REC. 5110 (1988); 134 CONG. REC. 1307 (1988).

187. *See* Burgdorf, Jr., *supra* note 9, at 285.

actual physical places and has been held not to cover such nonphysical entities as memberships in organizations.<sup>188</sup>

General statements of legislative intent, such as the intent codified in section 12101(b) of the ADA, which states that the ADA is intended to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,”<sup>189</sup> certainly lend *support* to an argument that Title III should apply to private websites as standalone entities. Unfortunately, these general statements fail to *clearly* indicate that Congress intended (or would intend) Title III to apply to websites.

One indication of legislative intent may be found in Congress’s failure to amend Title III of the ADA to clearly apply to websites when Congress amended the ADA in 2008.<sup>190</sup> As the question of whether Title III applies to private websites was well established by the time of the amendments, Congress’s silence on the issue may speak louder than any statements of general legislative intent that the ADA should be interpreted broadly.<sup>191</sup>

As neither the plain text nor the legislative history indicate that a website is a place of public accommodation, a solution that applies the ADA to private websites would be inappropriate if it simply stated that any private website is subject to Title III. As the district court in *Access Now* stated, “[t]o expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards.”<sup>192</sup>

Despite Title III’s textual limitations, the ADA may still be used

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188. *Ford v. Schering Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998).

189. *See, e.g.*, H.R. REP. NO. 101-485 pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382 (explaining that Congress intends for the ADA to “bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner”).

190. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, §2, *reprinted in* 2008 U.S.C.C.A.N. 3553; *see also supra* Part II.A.

191. *See supra* text accompanying notes 41–44. Some commentators have suggested that if Congress were to regulate private website accessibility for individuals with disabilities, Congress might not even do it through Title III of the ADA. *See* Finnigan, *supra* note 166, at 1820-21; Kelly E. Konkright, *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713 (2001); *see also supra* Part II.A (noting that claims that a website violates the ADA are not brought under Title IV as the FCC has no authority to regulate the Internet).

192. *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1328 (11th Cir. 2004) (quoting *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1317 (S.D. Fla. 2002)).

to reach private websites. Title III clearly prohibits places of public accommodation from denying access to their facilities through intangible barriers. The statute prohibits eligibility criteria; policies, practices, or procedures; and communication barriers that prevent access to a facility's goods or services.<sup>193</sup> Websites operated by places of public accommodation may fall under any one of such barriers—especially “communication barriers”—that prevent access to a facility's goods or services; it appears that every circuit court that has addressed this issue would agree that a website can be a barrier within the meaning of Title III.<sup>194</sup> Therefore, Title III may be used by courts to regulate certain websites without falling outside of the bounds of the ADA.

The nexus test is likely the best way to reach private websites through the ADA, after some modifications. Although some courts have limited the scope of the nexus test—to wit, *Target*—the nexus test can be modified in a way that provides Title III protection to individuals with disabilities and reaches online-only retail establishments through the “storefront” test.

*B. The Storefront Test: A Broader Version of the Nexus Test, Which Protects Individuals with Disabilities While Conforming to the Text of the Americans with Disabilities Act*

The storefront test builds upon the nexus test, which has been criticized for being overly narrow,<sup>195</sup> and expands on the nexus test to include any website that serves as an access point to goods or services of an enumerated place of public accommodation. The storefront test (or rule) is as follows:

Any website that acts as a storefront for an entity that offers a substantial amount of its goods or services from a physical facility may be subject to Title III if the facility and the website together form an entity that would otherwise fall under one of the enumerated places of public accommodation.

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193. 42 U.S.C. § 12182(b)(2)(i)–(iv) (2006).

194. *E.g.*, *Rendon v. Valleycrest Prods. Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002) (“Title III covers both tangible barriers, that is, physical and architectural barriers . . . and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person’s ability to enjoy the defendant entity’s goods, services and privileges.”); *see also supra* Part III.

195. *See Abrar, supra* note 97, at 184.

This approach will enable courts to reach online-only retail establishments without overstepping the boundaries of the text of the ADA.

The nexus test distinguishes between websites that provide *access* to a place of public accommodation from websites that are standalone entities. A website that is a standalone entity, offering goods and services through a nonphysical virtual place, is not subject to Title III. A website that merely provides access to a good or service of a physical facility may be covered under Title III. Using the *Target* court's narrow application of the nexus test, the nexus test applies to websites operated by sales and rental establishments that have physical facilities open to the public, such as Wal-Mart, Blockbuster, Best Buy, or even smaller specialized retail stores such as the Apple Retail Store. However, under *Target*, coverage of the ADA only extends to goods or services on the website that are offered in the retail stores themselves, precluding online-only products, specials, and offers.<sup>196</sup> The nexus test likewise extends to any other entity listed in 42 U.S.C. § 12181(7), such as a hotel, movie theater, or insurance office, as long as the products and prices offered online are the same as those offered inside the facilities themselves. So while the nexus test does extend Title III to some websites, plaintiffs will not be able to state a Title III claim if the good or service they are attempting to access is not actually offered in a physical facility that is open to the public.

The storefront test expands on the nexus test by extending Title III to any website that acts as a mere storefront to an entity that offers a substantial amount of its goods or services from a physical facility, if together the website and the facility would fall under one of the enumerated places of public accommodation. Under the storefront test it does not matter whether the facility is open to the public. If the website provides access to goods or services offered from a physical facility, such as a warehouse, then the website acts as a storefront to the warehouse and together they are considered a sales facility. The storefront approach considers the website as an extension of the physical facility. If the goods and services are offered from a physical facility and the website is merely a means of accessing the goods or services of that facility, and if considered together the website and the facility form an entity that is

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196. See *supra* Part III.B.2.

enumerated in 42 U.S.C. § 12181(7), the website will be subject to Title III. It is necessary, however, that the goods or services must be offered *from* the physical facility, and not solely from the website, such as a software download or a social networking service that takes place exclusively over the Internet. The storefront test would also extend to goods or services that are online-only offers of an establishment that *is* open to the public, such as Target, because the goods or services are still offered *from a physical facility* via the website.

To illustrate the storefront test, consider Amazon, an online-only retailer that does not offer products to the public from a physical facility except through its website. Amazon has warehouses and distribution centers located throughout the world.<sup>197</sup> When a customer orders a product from Amazon.com, the product, which is located inside one of Amazon's warehouses or distribution centers, is pulled from the shelf and shipped to the customer.<sup>198</sup> Amazon's website is merely a means of accessing the goods offered from the warehouses, a tool that allows customers to browse the "aisles," put items into their "shopping carts," and pay for the goods. This is essentially the same thing a customer does when patronizing Wal-Mart—the goods come from a distribution center, are stored somewhere within the store, stocked on the shelves, and the customers browse around, place items in their shopping carts, and pay for the items at a checkout lane—except Amazon's customer does not physically enter a facility to shop. Under the storefront test, if goods or services are offered *from* a physical facility—that is, if you were to visit one of the facilities for which the website serves as a storefront and find the goods or services that are offered online there—then the facility is the place where the online goods or services are offered to the public and the website merely serves as the means by which customers access the products offered from that place. Thus, under the storefront test, Amazon and other online-only sales establishments that offer their products from a physical facility

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197. *Global Locations*, AMAZON.COM, <http://www.amazon.com/b/?node=239366011> (last visited Sept. 12, 2013).

198. Spencer Soper, *Inside Amazon's Warehouse*, MORNING CALL (Sept. 18, 2011), [http://articles.mcall.com/2011-09-18/news/mc-allentown-amazon-complaints-20110917\\_1\\_warehouse-workers-heat-stress-brutal-heat](http://articles.mcall.com/2011-09-18/news/mc-allentown-amazon-complaints-20110917_1_warehouse-workers-heat-stress-brutal-heat); Matt Stopera, *What it Looks Like Inside Amazon.com*, BUZZFEED (NOV. 28, 2011), <http://www.buzzfeed.com/mjs538/what-it-looks-like-inside-amazoncom>.

would be subject to Title III.

The storefront test borrows language from *Young v. Facebook*, where the same Ninth Circuit district court, which narrowly applied the nexus test in *Target*, found that Facebook.com was not subject to Title III because, “Facebook only operates in *cyberspace*” and “[w]hile Facebook’s physical headquarters obviously is a physical space, *it is not a place where the online services to which [the plaintiff] claims she was denied access are offered to the public.*”<sup>199</sup> Under the storefront test, Facebook.com would not be subject to Title III because Facebook’s online social networking services take place in cyberspace. A visitor of Facebook’s facilities might find web designers and programmers, and may even find the servers from which Facebook operates, but it will be impossible for a visitor to see or interact with his or her social network simply by visiting the facility (unless, of course, the visitor is on a computer or smartphone). Thus, while Facebook may be developed from a physical place, its services are offered exclusively from its website. This distinguishes Facebook from Amazon, which offers the goods from a warehouse that the website provides access to. Thus, while Amazon’s website is merely the way that customers access the goods and services that are offered from a physical facility—a storefront—Facebook’s website *is* the location where services are offered.

To be successful in a Title III claim under the storefront test, a plaintiff alleging a Title III violation by a website will have to make the same showings he or she would have to show under a typical Title III claim.<sup>200</sup> The biggest difference under the storefront test is that a covered entity, such as a sales or rental establishment, would be subject to Title III whether it has a physical storefront or a virtual storefront that is open to the public. Under Title III, covered entities would not be required to make accommodations to their websites if they are not readily achievable, would result in undue burden, or

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199. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal 2011) (emphasis added); see also *Ouellette v. Viacom*, No. CV-10-133-M-DWM-JCL, 2011 WL 1883190, at \*1 (D. Mont. May 17, 2011) (“[N]either a website nor its servers are actual, physical places where goods or services are open to the public, putting them within the ambit of the ADA.” (internal quotations and citations omitted)).

200. To be successful in a Title III claim the plaintiff must show: 1) the plaintiff has a disability and is subject to discrimination; 2) the accused party is a private entity that affects commerce; 3) the party owns, operates or leases a place of public accommodation as enumerated in 42 U.S.C. § 12181(7) and; 4) the plaintiff was denied full and equal enjoyment of the goods or services on the basis of a disability. See 42 U.S.C. § 12182(a) (2006).

would fundamentally alter the nature of their goods or services.<sup>201</sup> Additionally, a facility that operates a website may be able to make alternative methods of accessing the goods available through the auxiliary aids such as a phone number where an individual can call

to access the goods or services, or an alternate text-based website for individuals who use a screen reader.<sup>202</sup>

As the storefront test is subject to the textual limitations of Title III, there would be several websites that offer goods or services online that would not be covered. Facebook is one example of such a website; another example would be a small company that offers computer software for download. Although the company may have a headquarters somewhere where the products are developed, the products are only *offered* from a virtual space. Thus, the website is not a mere storefront for the product, but is the whole store. Another important limitation would be a small online-only boutique that offers only a few homemade goods out of an individual's home. The storefront approach determines what type of "place" the entity is by viewing the website as an extension of the facility that offers the goods or services. Whereas a warehouse that offers a variety of goods to the public through a website (acting as the storefront to the warehouse) would be a "sales establishment" under Title III,<sup>203</sup> an individual that offers a limited selection of goods out of their *home* through a website would not qualify as a sales establishment. While the website might serve as a means of accessing the goods, the individual offering the goods out of his or her home would not be subject to Title III any more than individuals selling homemade goods to the public directly out of their home (not through a website) or offering piano lessons from their home. These limitations assure that the storefront test is in compliance with the text of the ADA and prevents the storefront test from becoming over-inclusive and burdensome.

The requirement that a facility operating a website must offer a *substantial* amount of its goods or services from the physical facility is an important element of the storefront test. This serves both limiting

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201. 42 U.S.C. § 12182(b)(2)(i)-(iv).

202. *See id.* 12182(b)(2)(iii), (v); Anderson, *supra* note 129, at 183.

203. *See* 42 U.S.C. § 12181(7)(E).

and expansive functions. It limits Title III from reaching an online-only entity, such as Facebook, that may also sell T-shirts online. Even if Facebook's T-shirts sold well, no one would consider Facebook a T-shirt company. Therefore, a substantial portion of Facebook's goods or services are only offered from a virtual location. This would place Facebook outside of the reach of Title III even if Facebook offered a few goods from a physical location. On the other hand, Amazon offers books for digital download from its virtual website. While such a good, standing alone, would not be subject to Title III under the storefront test, Amazon offers a substantial amount of its goods from a physical facility. Because Amazon offers a substantial amount of its goods from a physical location, its digital goods would also be subject to Title III.

The analysis of the "substantial amount of goods or services" element of the storefront test would be more nuanced if it were determined that Amazon devotes a significant portion of its business operations to digital book sales, or that customers make as much use of the digital goods as the physical goods. Netflix is a great example of such a business. Netflix offers both a "Watch Instantly" service and a mail order DVD service from the same website. It would be difficult to decide which of Netflix's services is more "substantial," as both services are so widely used that Netflix had at one-time considered splitting the two services into separate businesses.<sup>204</sup> Netflix's mail order DVD service would clearly fall under Title III based on the storefront test, as the goods and services are offered through a physical rental establishment via the Internet; Netflix's "Watch Instantly" service, however, would not be covered by Title III under the storefront test, as its services are offered exclusively through a virtual, nonphysical website. Under the storefront test, Netflix's website would be regulated similarly to wholesale establishments that make goods available to the public.

The wholesale establishment exception was promulgated by the DOJ to preclude wholesale establishments that sell goods exclusively to other business from Title III coverage.<sup>205</sup> If the wholesale

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204. Brad Tuttle, *Qwikster Split: The Real Reason Netflix Broke in Two*, TIME BUS. & MONEY (Sept. 20, 2011), <http://business.time.com/2011/09/20/qwikster-split-the-real-reason-netflix-broke-in-two>; see also Stu Woo, *Under Fire, Netflix Rewinds DVD Plan*, WALL ST. J. (Oct. 11, 2011), <http://online.wsj.com/article/SB10001424052970203499704576622674082410578.html>.

205. 28 C.F.R. Pt. 36, App. C at 206.

establishment decides to make some goods available to the public, then only the portion of the wholesale establishment that is made open to the public would be subject to Title III.<sup>206</sup> Similar to the wholesale establishment exception, Netflix's streaming service

would not be subject to Title III while Netflix's online mail order service would be covered by Title III.<sup>207</sup>

Although there will be some websites that will be outside of the reach of the ADA under the storefront test, this limitation is necessitated by the plain text of the statute. The storefront test pushes the ADA to its textual limits, providing Title III protection to

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206. *Id.*

207. *Cf. Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011–12 (6th Cir. 1997) (analogizing the wholesale establishment exception and carve-out provision to an insurance plan offered solely through a business's employee health insurance program and an insurance plan offered to the public).

An interesting question arises when considering how the storefront test would apply to the service that Amazon offers between vendors and individuals putting up items for sale on Amazon, and how Amazon, the vendors, and the individuals would be dealt with under the storefront test. Note that this service is offered on the same website that Amazon uses for its own sale of goods. First, a determination would be made about whether Amazon's service between vendors constitutes a substantial amount of Amazon's overall goods or services. If this service was only minor, as in the example of Facebook's T-shirts, then Amazon's service between vendors would be subject to the ADA to the extent that Amazon as a whole would be subject to the ADA under the storefront test. But if Amazon's service between vendors was determined to be substantial, as I believe it would be, then Amazon's service between vendors and individual sellers would be analyzed separately from Amazon's own retail services. This service, which connects vendors and individual sellers to buyers, is offered entirely through cyberspace, with no actual connection to a physical location. Thus, Amazon's exchange service would not be subject to the ADA under the storefront test. A district court located in the Eleventh Circuit actually addressed the question of whether an online timeshare exchange network was subject to the ADA and found that the exchange network was not subject to the ADA because “[p]laintiff has sued an entity that is service-based, rather than property-based, and exists in ‘cyberspace,’ but is not ‘a place of public accommodation.’” *Steelman v. Florida*, No. 6:13-cv-123-Orl-36DAB, 2013 WL 1104746, at \*3 (M.D. Fla. Feb. 19, 2013). As for the individuals selling goods through Amazon's exchange service, the individuals would not be subject to the ADA as noted *supra* text accompanying notes 198–200. Whether vendors would be subject to the ADA under the storefront test is a much more interesting question. If a vendor selling items through Amazon's exchange service is an actual retail establishment with a physical location where they either sell goods to the public from that location or store and ship out goods to customers through online sales, it would appear that Amazon's exchange service is the storefront for that vendor. The storefront test requires, however, that “the facility and the website *together* form an entity that would otherwise fall under one of the enumerated places of public accommodation.” The vendor and Amazon's exchange service, together, do not form an entity that would subject the *vendor* to the ADA under the storefront test any more than a vendor at a flea market would be responsible for the hosting facility's ADA compliance.

many more websites than the current nexus test (as applied by the *Target* court) while staying within the bounds of the statute. The storefront test also reconciles the split between the circuits without favoring one circuit's decisions over the others'. While the storefront test is not a substitute for legislation, it would allow the courts to ensure that individuals with disabilities are provided with equal access to websites that offer goods or services from a physical facility while adhering to judicial principles of prudence.

## V. CONCLUSION

This Comment has examined the problem presented by websites that are inaccessible to individuals with disabilities and offered a new solution that would place many websites within the ambit of the ADA. A circuit split has clearly manifested itself at the district court level on the issue of whether Title III of the ADA covers websites. Although the plain text of Title III does not provide protection for individuals against discrimination by private websites, the storefront test would enable courts to extend Title III protection to websites while staying within the bounds of the text of the statute. The storefront test builds upon the narrow nexus test by considering the function of the website together with the nature of the physical facility offering the goods, expanding Title III coverage to online-only retailers, among other websites. Although there are websites that would still be outside the reach of Title III, a judicial rule cannot fully regulate the new and vast frontier of the World Wide Web. New legislation is needed. In the meantime, the storefront test is a practical and workable solution that logically extends Title III coverage to websites without overstepping judicial bounds.

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