

6-1-2003

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Recommended Citation

Leah Poynter, *Setting the Standard: Section 508 Could Have an Impact on Private Sector Web Sites through the Americans with Disabilities Act*, 19 GA. ST. U. L. REV. (2003).

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SETTING THE STANDARD: SECTION 508 COULD HAVE AN IMPACT ON PRIVATE SECTOR WEB SITES THROUGH THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

A. Section 508 of the Rehabilitation Act

Federal regulations now require that federal government Web sites be accessible to people with disabilities.¹ In 1998, former President Bill Clinton signed the Workforce Investment Act, which strengthened Section 508 of the Rehabilitation Act² by requiring that electronic and information technology provided and used by federal agencies be accessible according to federal standards.³ The Architectural and Transportation Barriers Compliance Board (the Access Board) subsequently developed the Electronic and Information Technology Accessibility Standards (the Standards), which apply to federal agency Web pages and other forms of electronic and information technology used by federal agencies.⁴ The Standards require federal agencies that “develop, procure, maintain, or use electronic and information technology” to ensure that federal employees with disabilities “have access to and use of

1. Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194 (2002), available at <http://www.access-board.gov/sec508/508standards.htm>.

2. 29 U.S.C. § 794d (2000).

3. See Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 222 (2000); Latresa McLawhorn, *Recent Development: Leveling the Accessibility Playing Field: Section 508 of the Rehabilitation Act*, 3 N.C. J.L. & TECH. 63, 63-69 (2001); John J. Pavlick, Jr. & Rebecca Pearson, *Implementing the New 508 Accessibility Standards for the Disabled*, 36 PROCUREMENT LAW. 1, 18-19 (Spring 2001); Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 32-33 (2001); *The Rehabilitation Act Amendments (Section 508)*, ACCESS-BOARD.GOV, available at <http://www.access-board.gov/sec508/guide/act.htm> [hereinafter *Amendments*].

4. *Amendments*, supra note 3. “The Access Board is an independent [f]ederal agency devoted to accessibility for people with disabilities.” Standards for Electronic and Information Technology: An Overview, ACCESS-BOARD.GOV, at <http://www.access-board.gov/sec508/summary.htm> [hereinafter *Access-Board Overview*].

information” comparable to that of non-disabled federal employees.⁵ Section 508 also requires that disabled persons who seek information or services from a federal agency “have access to and use of information” comparable to that of non-disabled members of the public.⁶ The Access Board published these accessibility standards on December 21, 2000, and they became effective on June 25, 2001.⁷

B. Relationship to the Americans with Disabilities Act

The Standards apply only to Federal Internet sites, not to Web pages created in the private sector.⁸ However, federal government standards for Web site accessibility may become relevant to the private sector as courts begin to test the applicability of the Americans with Disabilities Act (ADA) to private Internet sites.⁹ In fact, the language of these federal regulations indicates a relationship with the ADA, borrowing terminology directly from the ADA and from ADA Regulations, including the “undue burden” defense.¹⁰ Forty-five states “have either passed legislation similar to Section 508, or are considering doing so.”¹¹ One expert testifying before a

5. Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.1 (2000).

6. *Id.*

7. See Pavlick & Pearson, *supra* note 3, at 1, 21; Taylor, *supra* note 3, at 26, 39.

8. See *Amendments*, *supra* note 3.

9. See Bick, *supra* note 3, at 209-10.

First, the Access Board’s pronouncements will set a standard for ADA compliance in “electronic and information technology,” thereby allowing people to compare a particular set of facts to a standard. Second, the Access Board’s pronouncements will result in the perception that if a standard is good for the government it should also be applicable to the private sector.

Id. at 210; see also Michelle Delio, *Fed Opens Web to Disabled*, WIREDNEWS (Dec. 21, 2000), at <http://www.wired.com/news/print/0,1294,40790,00.html>.

10. The Accessibility Standards require federal agency compliance “unless an undue burden would be imposed on the agency.” Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.1 (2000). Similarly, Title III of the ADA defines discrimination *inter alia* as:

[A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would . . . result in an undue burden.

42 U.S.C. § 12182(b)(2)(A)(iii). Additionally, the Department of Justice Regulations for Title III of the ADA define “undue burden” as “significant difficulty or expense.” 28 C.F.R. § 36.104. The Section 508 Accessibility Standards incorporate this same definition. 36 C.F.R. § 1194.4 (2002).

11. See John Williams, *Making Uncle Sam Accessible—and Accountable*, BUSINESSWEEK ONLINE (June 13, 2001), at http://www.businessweek.com/print/bwdaily/dnflash/jun2001/nf20010613_757.htm.

subcommittee of the U.S. House of Representatives explained: “[m]any state and local governments are transitioning to the Internet to process a variety of administrative services such as license renewals If we are making these transitions using taxpayer money, we must make sure that those who are paying for the transition can participate.”¹² With federal and state government leading the way, these accessibility guidelines are also likely to have a significant impact on commercial Web sites.¹³

C. Accessibility

“For [F]ederal Web page designers, ‘accessibility’ means government [W]eb pages must be usable by people who have vision or hearing disabilities, have limited use of their hands or suffer from a variety of other disabilities” such as colorblindness or epilepsy.¹⁴ People with disabilities can access an information technology system “if it can be used in a variety of ways and [does] not depend on a single sense or ability.”¹⁵ For example, those who have visual impairments can access the Internet by using “screen-reader software programs that convert visual information into synthesized speech or Braille.”¹⁶ However, screen-reader technology reads text and not graphics, therefore text labels must accompany online graphics for screen-reader programs to work.¹⁷ “While accessibility in the physical world generally means providing access to wheelchairs, access in the virtual world often means creating keyboard controls in

12. *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. (Feb. 9, 2000) (testimony of Steven Lucas, Sr. Vice President, Industry Government Relations, and Chief Information Officer of PrivaSeek, Inc.), available at <http://www.house.gov/judiciary/luca0209.htm> [hereinafter *Hearings*, Lucas Testimony].

13. *Id.*

14. See Daniel W. Uhlfelder, *An Overview of Federal Guidelines for Making Web Sites Accessible to the Disabled*, GIGALAW.COM (Mar. 2001), at <http://www.gigalaw.com/articles/2001-all/uhlfelder-2001-03-all.html>.

15. See *id.*; see also Delio, *supra* note 9.

16. See Bick, *supra* note 3, at 216-17; see also Doug Isenberg, *The Importance of Web Access for the Disabled*, GIGALAW.COM (Feb. 2001), at <http://www.gigalaw.com/articles/2001-all/isenberg-2001-02-all.html>.

17. See Isenberg, *supra* note 16.

addition to the mouse, and providing text labels for graphics.”¹⁸ Testifying before a Subcommittee of the U.S. House of Representatives, a blind computer programmer described a simple problem that created significant barriers to the visually impaired:

One of our biggest difficulties comes when we try to shop on-line using pages where the creator of the [W]eb site has failed to label the pictures [W]e must rely on the creator of the page we’re viewing to add a line of text [that] says, for example, ‘Swiss Army Knife’ or ‘Queen Size Electric Blanket.’ These explanations are easily added and are of tremendous benefit not only to the blind but also to people who see.¹⁹

Part I of this Note examines the purpose of Section 508 by looking at access problems faced by individuals with disabilities, and considering how the Standards address those issues. Part II explores the connection between Section 508 requirements and ongoing debates about whether similar standards should apply to private Internet sites under the ADA. Part III outlines the case law and the circuit split over whether the definition of a “place of public accommodation” within the meaning of Title III of the ADA reaches a business that offers its goods or services through a non-physical structure such as the Internet. This section looks at *National Federation of the Blind v. America Online*,²⁰ which raised the question of whether the Internet was a place of public accommodation but settled before the issue was decided. Part III also examines the more recent case *Access Now v. Southwest Airlines*,²¹ in which a federal district court held that an airline’s Web site was not a

18. Cassandra Burke Robertson, *Providing Access to the Future: How the Americans with Disabilities Act Can Remove Barriers in Cyberspace*, 79 DENV. U.L. REV. 199, 201 (2001).

19. *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong.* (Feb. 9, 2000) (testimony of Gary Wunder, Programmer-Analyst Expert for the University of Missouri and Board Member of the National Federation of the Blind), available at <http://www.house.gov/judiciary/wund0209.htm> [hereinafter *Hearings*, Wunder Testimony].

20. Nat’l Fed’n of the Blind v. Am. Online, Inc., (D. Mass. filed Nov. 4, 1999), complaint, at <http://www.education-rights.org/homenfbvaol.html>.

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

place of public accommodation. Part IV explores whether people with disabilities have a civil right to Internet access and describes the costs and benefits of this expansive view of the ADA. Part V concludes that, in light of the ADA's purpose, the statute should be interpreted broadly to encompass the Internet under Title III.

I. PURPOSE AND OVERVIEW OF SECTION 508

A. Accessibility Problems Facing the Disabled

People with disabilities face increasing barriers when using online technology.²² The Internet was primarily a text-based environment in its early years.²³ Text-recognition software allows access to blind users and enables the deaf to navigate the Web without running into sound barriers.²⁴ Increasingly, however, Web pages are rich in graphics and media displays but lacking in programming that allows disabled users to interpret Web sites with assistive devices.²⁵ "Consequently, an increasing percentage of information contained on [W]eb pages is inaccessible to the disabled Many disabled individuals experienced a unique sense of freedom on the early Net only to have it taken away by 'advances' in [W]eb page content and 'progress' in [W]eb page construction."²⁶ Accessibility barriers on the Web challenge many Americans, including those who are blind or are visually impaired, the deaf, people with epilepsy, those who have learning disabilities, and the elderly.²⁷

B. The Accessibility Standards

The Rehabilitation Act Amendments of 1998 directed the Access Board to develop accessibility standards for the federal government

22. See Patrick Maroney, *The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the Americans with Disabilities Act of 1990?*, 2 VAND. J. ENT. L. & PRAC. 191, 192 (2000); Dana Whitehead Mckee & Deborah T. Fleischaker, *ADA and the Internet: Must Websites Be Accessible*, 33 MD. B.J. 34, 34 (Nov./Dec. 2000); Taylor, *supra* note 3, at 28.

23. Maroney, *supra* note 22, at 192-93.

24. *Id.*

25. *Id.*; see also Robertson, *supra* note 18, at 201-03.

26. Maroney, *supra* note 22, at 193.

27. *Hearings*, Lucas Testimony, *supra* note 12; Robertson, *supra* note 18, at 201-03.

in the area of electronic and information technology.²⁸ These standards “are part of a congressional effort to improve the accessibility of digital information, online services and other electronic information to the fifty-four million people with disabilities living in the United States.”²⁹ The Access Board created the Electronic and Information Technology Access Advisory Committee (EITAAC), which included representatives from the information technology industry and from disability organizations, among others.³⁰ In March 2000, the Access Board made its proposed standards available, and more than 100 individuals and organizations submitted comments, including federal agencies, members of the information technology industry, disability groups, and persons with disabilities.³¹ The Access Board finalized the Standards and published them in the Federal Register in December 2000.³²

The Standards address more than Web sites.³³ “[They] cover the full range of electronic and information technologies in the [f]ederal sector, including those used for communication, duplication, computing, storage, presentation, control, transport and production.”³⁴ The Standards provide technical criteria “that spell out what makes these products accessible to people with disabilities,” and they are specific to various technologies such as software applications, operating systems, video products, and Web-based information.³⁵ The Standards also provide performance requirements, which focus on overall functionality.³⁶

28. See Pavlick & Pearson, *supra* note 3; *Access-Board Overview*, *supra* note 4.

29. McLawhorn, *supra* note 3, at 65 (citing Courtney Macavinta, W3C, *Others Seek Accessible Web* (May 4, 1999)).

30. See Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194, Supplementary Information: Background (2000); *Access-Board Overview*, *supra* note 4.

31. See Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194, Supplementary Information: Background (2000); *Access-Board Overview*, *supra* note 4.

32. See Pavlick & Pearson, *supra* note 3, at 1. The Electronic and Information Technology Accessibility Standards are available online at <http://www.access-board.gov/sec508/508standards.htm>.

33. See generally Pavlick & Pearson, *supra* note 3.

34. *Access-Board Overview*, *supra* note 4.

35. *Board Issues Standards for Electronic and Information Technology*, ACCESS-BOARD.GOV, available at <http://www.access-board.gov/news/508-final.htm>.

36. *Id.*

1. *World Wide Web Consortium*³⁷

The Access Board based Section 508's criteria for Web-based technology on guidelines developed by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C).³⁸ One of the W3C's primary goals is universal access: "[t]o make the Web accessible to all by promoting technologies that take into account the vast differences in culture, languages, education, ability, material resources, access devices and physical limitations of users on all continents."³⁹ The WAI is committed to removing barriers on the Web for people with disabilities.⁴⁰

WAI guidelines provide direction for Web-content developers (page authors and site designers) and for developers of authoring tools on "how to make Web-content accessible to people with disabilities."⁴¹ Although the primary goal of the guidelines is to promote accessibility, they also make Web content more available to all users.⁴² The WAI did not intend for the guidelines to discourage content developers from using images, video, and animation but instead wanted to explain how to make Web-content more accessible.⁴³ Many of the Web-based criteria outlined in the Standards and modeled on the WAI guidelines ensure access to visually impaired people who rely on screen readers and other assistive devices.⁴⁴

37. The W3C was created in 1994 to develop common protocols that promote the Web's evolution and ensure the Web's interoperability. See <http://www.w3.org/Consortium>. W3C has around 450 member organizations worldwide and has earned international recognition for its contributions to the growth of the Web. See *id.*

38. See Williams, *supra* note 11; *Web Content Accessibility Guidelines 1.0*, W3C, at <http://www.w3.org/TR/WAI-WEBCONTENT/> (last visited Jan. 4, 2003).

39. W3C's Goals, available at <http://www.w3.org/Consortium/>.

40. See Cynthia D. Waddell, *The Growing Digital Divide in Access for People with Disabilities: Overcoming Barriers to Participation*, UNDERSTANDING THE DIGITAL ECONOMY (May 1999), at <http://www.aasa.dshs.wa.gov/access/waddell.htm>.

41. *Web Content Accessibility Guidelines 1.0*, W3C, at <http://www.w3.org/TR/WAI-WEBCONTENT/> (last visited Jan. 4, 2003) (internal citation omitted).

42. *Id.*

43. *Id.*

44. See Williams, *supra* note 11; see also Gary H. Anthes, *Feds Publish Web Access Rules*, COMPUTERWORLD (Dec. 21, 2000), at <http://www.computerworld.com/printthis/2000/0,4814,55513,00.html>.

2. Overview of the Accessibility Standards⁴⁵

The Section 508 Standards define “[e]lectronic and information technology” as “includ[ing] information technology and any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, or duplication of data or information.”⁴⁶ The rules also provide, by example, that “electronic and information technology” includes, but is not limited to, “telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines.”⁴⁷ However, Section 508 does not apply to national security systems, intelligence activities, or weapons systems.⁴⁸ Additionally, the Standards do not apply to electronic and information technology acquired by a government contractor “incidental to a contract.”⁴⁹ For example, if a federal agency enters into a contract with a design firm to develop a Web site for the agency, the firm’s own Internet site and office system do not have to comply with the Standards because they are incidental to the contract.⁵⁰

a. Technical Standards

The Standards provide criteria for the following groups of technology: software applications and operating systems;⁵¹ Web-based intranet and Internet information and applications;⁵² telecommunications products;⁵³ video and multimedia products;⁵⁴ self-contained, closed products (products with embedded software that are designed so a user cannot easily attach assistive technology,

45. See Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.4 (2002); *Access-Board Overview*, *supra* note 4.

46. Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.4 (2002).

47. *Id.*

48. *Id.* § 1194.3.

49. See *id.* § 1194.3.

50. See Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194, Supplemental Information: Section-by-Section Analysis, Section 1194.3 General Exceptions (2002).

51. See Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.21 (2002).

52. See *id.* § 1194.22.

53. See *id.* § 1194.23.

54. See *id.* § 1194.24.

such as copiers and fax machines);⁵⁵ and desktop and portable computers.⁵⁶

In the area of Web-based information and application, the Standards provide a number of programming specifications to ensure that Federal Web pages either are accessible by assistive devices or provide alternative paths of information.⁵⁷ For example, the rules require that Web programmers provide “a text equivalent for every non-text element,” such as graphics or animation.⁵⁸ The rules also require that Web pages be designed “so that all information conveyed with color is also available without color, for example from context or markup.”⁵⁹ The Standards require that designers organize documents so that they “are readable without requiring an associated style sheet.”⁶⁰ Another provision requires that designers create electronic forms that allow people using assistive devices to access the information fields and to complete the forms online.⁶¹

b. Functional Performance Criteria

The functional criteria focus on the overall product and are “intended to ensure that the . . . components work together to create an accessible product.”⁶² This section requires that at least one operating mode and information retrieval system support assistive devices, or alternatively, do not require user vision.⁶³ Similar provisions require alternative modes of operation that do not rely on visual acuity greater than 20/70,⁶⁴ user hearing,⁶⁵ user speech,⁶⁶ fine motor control, or simultaneous actions.⁶⁷

55. *See id.* § 1194.25.

56. *See id.* § 1194.26.

57. *Board Issues Standards for Electronic and Information Technology*, ACCESS-BOARD.GOV, available at <http://www.access-board.gov/news/508-final.htm>.

58. *See* Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.22 (2000).

59. *See id.* § 1194.22(c).

60. *See id.* § 1194.22(d).

61. *See id.* § 1194.22(n).

62. *See* Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194, Supplemental Information, Section-by-Section Analysis, Section 1194.31(1) (2002).

63. *See id.*

64. *See* Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.31(b) (2002).

65. *See id.* § 1194.31(c),(d).

II. COMPLAINTS AND LITIGATION

A. Enforcement of Section 508

Section 508 “sets up an administrative process under which individuals with disabilities can file a complaint.”⁶⁸ The complaint process is the same as that established under Section 504 of the Rehabilitation Act, which covers federally funded programs and services.⁶⁹ Section 508 also permits individuals to file a civil action seeking injunctive relief and attorneys’ fees but does not allow for compensatory or punitive damages.⁷⁰

“[T]he enforcement provisions of section 508 apply only to electronic and information technology *procured on or after the effective date.*”⁷¹ The law does not authorize complaints or lawsuits to “retrofit” electronic and information technology procured before June 2001.⁷² However, the Access Board points out that the Standards “do[] require access to technology *developed, used or maintained* by a [f]ederal agency.”⁷³

Further, other sections of the Rehabilitation Act require access to [f]ederal programs (section 504) and accommodation of [f]ederal employees with disabilities (sections 501 and 504); it is possible that [f]ederal agencies will use the Board’s section 508 standards as a yardstick to measure compliance with these other sections of the law.⁷⁴

66. *See id.* § 1194.31(e).

67. *See id.* § 1194.31(f).

68. *Access-Board Overview, supra* note 4.

69. *See Id.*

70. *See Id.*; Pavlick & Pearson, *supra* note 3, at 21.

71. *Access-Board Overview, supra* note 4.

72. *Id.*

73. *Id.*

74. *Id.*

B. Undue Burden

The Standards build an “undue burden” defense into the language of the rules.⁷⁵ The Access Board defines “undue burden” using the same language the Department of Justice (DOJ) uses in its regulations for Title III of the ADA: “Undue burden means significant difficulty or expense.”⁷⁶ The Standards provide that, “[i]n determining whether an action would result in an undue burden, an agency shall consider all agency resources available to the program or component for which the product is being developed, procured, maintained, or used.”⁷⁷ This concept of “undue burden” is based upon judicial interpretation of section 504 of the Rehabilitation Act and is consistent with judicial interpretation of the language used in the ADA.⁷⁸ Although the Standards apply only to federal electronic and information technology, they set a standard that courts could apply on a broader basis.⁷⁹

III. APPLYING TITLE III OF THE AMERICANS WITH DISABILITIES ACT TO THE INTERNET

A. Places of Public Accommodation Under the ADA

The purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁸⁰ According to the text of the statute, the Act aims to “invoke the sweep of congressional authority, including the power to . . . regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”⁸¹ Title III of the ADA prohibits discrimination by “public accommodations,” which encompasses private entities that

75. See Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.2 (2002).

76. Compare Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.4 (2002), with ADA Title III, DOJ Regulations, 28 C.F.R. § 36.104 (2002).

77. Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.4 (2002).

78. See Bick, *supra* note 3, at 223; *Access-Board Overview*, *supra* note 4.

79. See Taylor, *supra* note 3, at 26-27. “Litigants who sue private providers of Internet sites and services under the Americans with Disabilities Act (‘ADA’) will likely use these federal standards as a model for Internet accessibility requirements.” *Id.*

80. 42 U.S.C. § 12101(b)(1) (2000).

81. *Id.* § 12101(b)(4).

“own[], lease[] (or lease[] to), or operate[] a place of public accommodation.”⁸² The statute lists twelve public accommodation categories, including a “place of exhibition or entertainment,” a “service establishment,” and a “place of education.”⁸³ While the twelve categories are exhaustive, the illustrative examples in each category are not.⁸⁴ Places of public accommodation must make “reasonable modifications in policies, practices, or procedures.”⁸⁵ A failure to make reasonable modifications is prohibited discrimination unless the entity can “show that taking such steps would fundamentally alter” the goods and services provided or “would result in an undue burden.”⁸⁶

82. 42 U.S.C. § 12182(a)(2002). Section 12182 of Title III outlines five specific prohibited actions including the “failure to make reasonable modifications” and the failure to provide “alternative methods” of providing a service where “removal of a barrier” is not “readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(2002); *see also* RUTH COLKER & BONNIE POITRAS TUCKER, *THE LAW OF DISABILITY DISCRIMINATION* 371-73 (3d ed. 2000); Taylor, *supra* note 3, at 29-30.

83. 42 U.S.C. § 12181(7)(C), (E), (F), (J).

The following private entities are considered public accommodations for purposes of [Title III], if the operations of such entities affect commerce —

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

42 U.S.C. § 12181(7).

84. COLKER & TUCKER, *supra* note 82, at 372.

85. 42 U.S.C. § 12182(b)(2)(A)(ii); *see also* Taylor, *supra* note 3, at 29-30.

86. 42 U.S.C. § 12182(b)(2)(A)(iii).

B. Whether the Internet Is a Place of Public Accommodation

Only one federal district court has addressed the question of whether the Internet is a “place of public accommodation” within the meaning of the ADA.⁸⁷

Unfortunately, Title III was enacted during a time when the Internet and World Wide Web were not as commonplace in society as they are today. As a result, the legislation does not directly address and probably did not contemplate whether, or to what extent, its provisions regulate this medium of communication.⁸⁸

Circuits are split over whether a “place of public accommodation” is limited within the meaning of Title III to actual physical structures.⁸⁹ Jurisdictions that interpret “public accommodation” as requiring a physical structure would most likely argue that the ADA cannot apply to the Internet.⁹⁰

The most relevant case law is in the area of insurance coverage.⁹¹ In this context, some courts have not limited Title III to physical structures.⁹² Finding the term “public accommodation” ambiguous,

87. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1315 (S.D. Fla. 2002); see generally Kelly E. Konkright, Comment, *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713, 714-15 (2001).

88. Konkright, *supra* note 87, at 714-15.

89. See also Taylor, *supra* note 3, at 42-45; Konkright, *supra* note 87, at 717. Compare *Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that the plain language of the statute does not limit places of public accommodation to physical structures and that a more expansive interpretation better meets the purpose of Title III, which is to bring individuals with disabilities into the mainstream), with *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (finding it textually “evident” that Title III limits a place of public accommodation to a physical place).

90. Compare Maroney, *supra* note 22, at 192 (arguing that the text of the ADA “dictate[s] that ‘places of public accommodation’ refer exclusively to physical facilities”), with Bick, *supra* note 3, at 220 (arguing that the ADA should be applicable to America Online’s Internet services because it provides a place of exhibition and entertainment, a place of public gathering, a service establishment, a place of public display, a place of education, and a place of recreation), and Mckee & Fleischaker, *supra* note 23, at 36 (arguing that “there is little doubt” that the Internet will ultimately be covered by Title III of the ADA).

91. See discussion *supra* note 89; see also Maroney, *supra* note 23, at 195-96; Taylor, *supra* note 3, at 42-45.

92. See COLKER & TUCKER, *supra* note 82, at ch. 8, 641. The DOJ argued in an amicus brief filed in the Ninth Circuit that Title III “guarantees more than mere physical access” but also “reaches disability-

these courts turned to legislative history and congressional intent to determine its meaning.⁹³ For example, in *Carparts Distribution Center v. Automotive Wholesaler's Association of New England*,⁹⁴ the First Circuit found Title III was applicable in the insurance context, even when a consumer purchases a health plan by mail or phone:

By including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure 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.⁹⁵

Some courts have expanded this rationale to interpret Title III as regulating not only *access* to goods and services but also the *content* of services offered.⁹⁶

Other jurisdictions have restricted Title III coverage in the insurance context to physical places of public accommodation.⁹⁷ For example, in *Parker v. Metropolitan Life Insurance*,⁹⁸ the Sixth Circuit refused to extend Title III coverage to insurance plans purchased through an employer:

based discrimination in the terms and conditions of insurance coverage." *Appeals Court Concludes that ADA Does Not Apply to Terms and Conditions of Life Insurance Policy*, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE, April-Sept. 2000, Issue 2, available at <http://www.usdoj.gov:80/crt/ada/aprsep00.htm> [hereinafter ENFORCING THE ADA]. See generally Konkright, *supra* note 87.

93. See, e.g., *Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

94. *Id.*

95. *Id.*

96. See Konkright, *supra* note 87, at 719.

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

98. *Id.*

While we agree that an insurance office is a public accommodation as expressly set forth in § 12181(7), plaintiff did not seek the goods and services of an insurance office. Rather, Parker accessed a benefit plan provided by her private employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation. As is evident by § 12187(7) [sic],⁹⁹ a public accommodation is a physical place¹⁰⁰

No court has directly ruled on whether Title III covers private sector commercial Web sites; however, in the Seventh Circuit, Judge Posner stated in dicta that Web sites were places of public accommodation.¹⁰¹ Citing *Carparts*, Judge Posner stated that:

The core meaning of [42 U.S.C. § 12182(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space . . .) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.¹⁰²

C. The Department of Justice's Position on Internet Coverage

In August 2000, the DOJ filed an amicus brief with the Fifth Circuit arguing that commercial businesses providing services via the Internet are subject to the ADA's prohibition against

99. The Sixth Circuit misquoted the relevant code provision, which is § 12182(7). *See id.*

100. *Id.* at 1010.

101. *See Doe v. Mutual of Ohama Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

102. *Id.* at 559 (citing *Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)); *see also Maroney*, *supra* note 22, at 195; *Mckee & Fleischaker*, *supra* note 22, at 35-36. However, Judge Posner also assented that "the content of the goods or services offered by a place of public accommodation is not regulated." *Doe*, 179 F.3d at 560 (emphasis added). By example, Judge Posner stated that "[a] camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons." *Id.* *See Konkright*, *supra* note 87, at 732-39 (holding that Title III does extend beyond physical structures but does not regulate the substance of goods or services offered, striking the best balance between the interests of the disabled and the commercial industry).

discrimination.¹⁰³ The defendant in *Hooks v. OKBridge*¹⁰⁴ operated a Web site where users purchased memberships to play in online bridge tournaments and participate in Internet-based discussion groups.¹⁰⁵ The plaintiff alleged that OKBridge terminated his membership because he suffered from bipolar disorder and other disabilities.¹⁰⁶ The District Court found that OKBridge's online services did not constitute a place of public accommodation within the meaning of the ADA because the Internet is not a physical place.¹⁰⁷ In its amicus brief, the DOJ argued that OKBridge's Internet services "easily [fell] within the ADA's definition of a public accommodation as a 'private entity' that operates a 'service establishment,' place of 'entertainment,' or place of 'recreation.'"¹⁰⁸ However, the Fifth Circuit did not reach the issue of Internet coverage under the ADA because it dismissed the suit on other grounds.¹⁰⁹

D. National Federation of the Blind v. America Online

In November 1999, the National Federation of the Blind (NFB) filed a complaint against America Online (AOL) alleging that AOL is

103. See Brief of the United States as Amicus Curiae in Support of Appellant, *Hooks v. OKBridge, Inc.*, No. 99-50891, 2000 U.S. App. LEXIS 23035 (5th Cir. Aug. 24, 2000), available at <http://www.usdoj.gov:80/crt/briefs/hooks.htm>; ENFORCING THE ADA, *supra* note 92; see also Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., to Sen. Tom Harkin (D, IA) (Sept. 9, 1996), at <http://www.usdoj.gov/crt/foia/tal712.txt> (stating that, under the ADA, "[c]overed entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well"); Taylor, *supra* note 3, at 30.

104. *Hooks v. OKBridge, Inc.*, No. 99-50891, 2000 U.S. App. LEXIS 23035 (5th Cir. Aug. 24, 2000).

105. Brief of the United States as Amicus Curiae in Support of Appellant, *Hooks v. OKBridge, Inc.*, No. 99-50891, 2000 U.S. App. LEXIS 23035, at *3 (5th Cir. Aug. 24, 2000), available at <http://www.usdoj.gov:80/crt/briefs/hooks.htm>.

106. *Id.* at *4.

107. *Id.*

108. *Id.* (citing 42 U.S.C. 12181(7)(C), (F), (L)). The DOJ argued that "[t]he statute covers the services 'of a place [of] public accommodation, not 'at' the place of public accommodation. The definition of a 'public accommodation' is intentionally broad and is not limited to those entities providing on-site services." *Id.* at *5. The Department of Education has also indicated that Web sites are places of public accommodation. See Cynthia D. Waddell, *The Growing Digital Divide in Access for People with Disabilities: Overcoming Barriers to Participation*, UNDERSTANDING THE DIGITAL ECONOMY (May 1999), at <http://www.aasa.dshs.wa.gov/access/waddell.htm>. "Access to the learning environment"—from library services to long-distance learning courses and Web-based assignments—is a "critical, front-line issue." *Id.*

109. ENFORCING THE ADA, *supra* note 92, at *2.

a public accommodation within the meaning of Title III of the ADA.¹¹⁰ The complaint listed various violations of the ADA and requested injunctive and declaratory relief to require AOL to bring its services into compliance.¹¹¹ “In short, this suit was an attempt to force AOL to make its software compatible with screen-reader technologies.”¹¹²

The parties settled in July 2000 without resolving whether the ADA applies to the Internet.¹¹³ AOL, without admitting that the ADA applies to its services, established a corporate policy regarding accessibility, created an accessibility checklist to guide its employees, entered into agreements with screen reader technology companies, and later released a new version of its software to be more compatible with screen-reader technology.¹¹⁴ The NFB retained the right to renew its claims after one year.¹¹⁵ In February 2001, *The Braille Monitor*, a NFB publication, reported on the progress made by AOL.¹¹⁶ It reported that AOL 6.0, the new software version mentioned in the settlement agreement, “can to some extent be used by the blind” and that future versions were promised to be even more accessible.¹¹⁷ The report acknowledged that AOL had made significant progress but expressed concern over upcoming AOL products that were not accessible.¹¹⁸ The NFB indicated no interest in renewing its suit, stating: “We would prefer to

110. Plaintiff's Complaint, *Nat'l Fed'n of the Blind v. Am. Online, Inc.* (filed but not heard in the D. Mass. Nov. 4, 1999), available at <http://www.education-rights.org/homenfbvaol.html>; see also Taylor, *supra* note 3, at 31-32; Bick, *supra* note 3, at 217-18.

111. Plaintiff's Complaint, *Nat'l Fed'n of the Blind v. Am. Online, Inc.* (filed but not heard in the D. Mass. Nov. 4, 1999). The complaint alleged, among other things, that AOL used unlabeled graphics, commands that users could not activate with the keyboard, and custom controls painted on the screen; therefore, blind users could not sign up for AOL Internet service, use the Welcome screen, locate the space for entering keywords, or operate the browser. *Id.* at no. 23. “Because the AOL service is not independently accessible to the individual Plaintiffs . . . they have been denied the opportunity to use the AOL service's many features. . . .” *Id.* at no. 24.

112. Bick, *supra* note 3, at 218.

113. See National Federation of the Blind/America Online Accessibility Agreement, at <http://www.nfb.org/Tech/accessibility.htm>; see also Bick, *supra* note 3, at 221-22.

114. *Id.*

115. *Id.*

116. See Marc Maurer, *AOL Progress Report*, THE BRAILLE MONITOR, Vol. 44, No. 2, Feb. 2001, available at <http://www.nfb.org/BM/BM01/BM0102/bm010203.htm>.

117. *Id.*

118. *Id.*

work in partnership with AOL to assist in bringing information to the blind.”¹¹⁹

E. Access Now v. Southwest Airlines

In October 2002, the United States District Court of the Southern District of Florida finally addressed the question of whether a Web site is a place of public accommodation within the meaning of the ADA.¹²⁰ Access Now, a nonprofit advocacy organization for disabled persons, and Robert Gumson, a blind individual, sued Southwest Airlines, claiming that its Web site excluded blind persons in violation of the ADA.¹²¹ The airline’s Web site provides a “virtual ticket counter[.]” where customers can check airfares and schedules, book tickets, and learn about sales and promotions.¹²² The plaintiffs argued that the defendant failed to provide in its Web site alternative text that would allow a screen reader program to interpret its online graphics.¹²³ The plaintiffs also argued that the site failed to provide online forms accessible to blind persons and lacked a “skip navigation link” to allow blind persons direct access to Web site content without the navigation bar.¹²⁴

Granting the defendant airline’s motion to dismiss for failure to state a claim upon which relief could be granted, the district court first concluded that “no well-defined, generally accepted standards” exist for Web site accessibility.¹²⁵ Without mentioning the Section 508 standards, and dismissing the W3C accessibility guidelines as inadequate guidance in a footnote, the court found a lack of coordination between Web site programmers and assistive technology manufacturers.¹²⁶

119. *Id.*

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

121. *Id.* at 1314.

122. *Id.* at 1314-15.

123. *Id.* at 1316.

124. *Id.*

125. *Id.* at 1314-15 n.1.

126. *Access Now, Inc. v. Southwest Airlines, Co.* 227 F. Supp. 2d 1312, 1314-15 n.1 (S.D. Fla. 2002).

The court held that the airline's Web site was not a place of public accommodation because the ADA's language was plain and unambiguous: "to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."¹²⁷ The court further found, under the rule of *ejusdem generis*, that a Web site was not a place of "exhibition, display [or] a sales establishment"—one of the twelve categories of public accommodations listed in the ADA.¹²⁸ The court found that the more specific enumerated terms, such as "motion picture house, theater, concert hall, [and] stadium," which are all physical, concrete structures limited the general terms "exhibition," "display," and "sales establishment."¹²⁹

The court also cited a recent Eleventh Circuit decision, *Rendon v. Valleycrest Productions*,¹³⁰ for the proposition that Congress clearly intended Title III of the ADA to govern only access to physical places of public accommodation.¹³¹ In *Rendon*, a group of individuals with hearing and upper-body mobility impairments sued the producers of the television game show "Who Wants to Be a Millionaire," alleging that the show's use of an automated "fast-finger" telephone selection process violated the ADA by excluding disabled individuals who wanted to be contestants.¹³² The Eleventh Circuit found that the plaintiffs stated a valid Title III claim because the screening process deprived them of the opportunity to compete to be a contestant on the game show.¹³³ However, the district court in *Access Now* distinguished *Rendon*, noting that the Eleventh Circuit allowed a Title III claim because the plaintiffs had demonstrated a *nexus* between the game show's "fast finger" selection process and

127. *Id.* at 1318.

128. *Id.* at 1318-19, Under this rule, "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." *Id.*

129. *Id.* at 1318-19.

130. 294 F.3d 1279 (11th Cir. 2002).

131. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (2002).

132. *Rendon*, 294 F.3d at 1280.

133. *Id.* at 1286.

the actual physical premises of the public accommodation—the television studio.¹³⁴ The court concluded that, unlike the game show's telephone selection process, Southwest Airline's Web site was not a means to access any particular concrete space or geographical location.¹³⁵ Therefore, the court held that the plaintiffs failed to demonstrate a nexus between the airline's Web site and any specific ticket counter or other physical place of public accommodation.¹³⁶

Therefore, the court's decision in *Access Now* fell in line with those decisions in the insurance context holding that the ADA's language plainly and unambiguously covers only physical places of accommodation.¹³⁷ It remains to be seen whether other courts will follow suit in the Internet context or will instead agree with decisions finding that Congress did not limit Title III to physical structures.¹³⁸

In fact, the court in *Rendon* found that Title III covers not only "tangible barriers" but also "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[s] goods, services and privileges."¹³⁹ Southwest Airline's virtual ticket counters could be viewed as placing discriminatory restrictions on a disabled person's ability to enjoy the airline's goods and services.¹⁴⁰ Southwest reported that its general Web site generated about forty-six percent of its passenger revenue for the first quarter of the year 2002, and more than 3.5 million people subscribed to the airline's "Click 'N Save" e-mail service.¹⁴¹ Moreover, in building its argument against finding the ADA applicable to Internet sites, the court in *Access Now* determined that there was a "lack of well-defined standards for bringing a virtually infinite number of

134. *Access Now*, 227 F. Supp. 2d at 1319-20.

135. *Id.* at 1321.

136. *Id.*

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

138. *See, e.g., Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12 (1st Cir. 1994).

139. *Rendon*, 294 F.3d at 1283.

140. *Id.* at 1315-16.

141. *Access Now*, 227 F. Supp. 2d at 1316.

Internet Web sites into compliance with the ADA.”¹⁴² However, Congress demanded that federal standards of Web site accessibility be established when it enacted the 1998 amendments to Section 508 of the Rehabilitation Act.¹⁴³ The resulting programming Standards may come to represent a minimum threshold requirement of online accessibility in the private sector.¹⁴⁴

IV. THE RIGHT TO INTERNET ACCESS

A. Disability Rights

The disability rights movement of the late 1960s and 1970s was based largely on the civil rights movement.¹⁴⁵ The evolution of disability rights law includes the Rehabilitation Act of 1973, the Education for All Handicapped Children Act of 1975 and its 1990 amendments, and the Americans with Disabilities Act of 1990.¹⁴⁶ These laws have fostered a general understanding that access to information and communication is a civil right for Americans.¹⁴⁷

“One of the ADA’s major goals is to remove architectural and communication barriers” so that people with disabilities can more fully participate in the social mainstream.¹⁴⁸ Therefore, “[a]s e-commerce . . . become[s] commonplace, Internet service providers, Internet portals and Internet sites are more likely to be recognized as public accommodations subject to the ADA.”¹⁴⁹

In February 2000, the U.S. House of Representatives conducted hearings on the “Applicability of the Americans with Disabilities Act to Private Internet Sites.”¹⁵⁰ One expert testified that an estimated

142. *Id.* at 1321.

143. *See supra* Part I.

144. *See supra* Part II & III.

145. *See Bick, supra* note 3, at 211.

146. *Hearings, Lucas Testimony, supra* note 12.

147. *Id.*

148. Peter David Blanck & Leonard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 855 (Sept./Oct. 2000).

149. Bick, *supra* note 3, at 214. “If the Internet is a new kind of public space, one can argue that rights of the disabled should include meaningful Internet accommodation.” *Id.*

150. *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. (Feb. 9, 2000), available at <http://www.house.gov/judiciary/con0209>.

48.9 million people in the United States have a disability.¹⁵¹ “[S]ome form of disability will affect approximately one out of five United States citizens in their lifetime.”¹⁵² At the hearings, a blind computer programmer and board member of the National Federation of the Blind described his “right” to accessibility as part of a social contract:

[O]ur society and its disabled people have entered into a contract in which society says to the disabled, we will give you training and we will provide opportunity if, in return, you will do what you can to join us in work, in community, and in taking responsibility for pulling your own weight. As blind people we have interpreted this contract to mean that we must be as self-reliant as we can, asking only from society those things we really need in order to compete.¹⁵³

B. Costs and Benefits of an Expansive View of Title III

Some experts believe that using federal regulations to set accessibility standards may have the effect of slowing down technology innovation.¹⁵⁴ “Significant costs” may arise from “applying the ADA accessibility requirements to this rapidly expanding segment of the economy.”¹⁵⁵ Incorporating accessibility [standards] thus becomes a recurring cost over the life of a Web site. As the site adds new pages, additional textual references must be

151. *Hearings*, Lucas Testimony, *supra* note 12.

152. *Id.*

153. *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. (Feb. 9, 2000) (testimony of Gary Wunder, Programmer-Analyst Expert for the University of Missouri and Board Member of the National Federation of the Blind), available at <http://www.house.gov/judiciary/wund0209.htm>.

154. *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. (testimony of Elizabeth K. Dorminey), available at <http://www.house.gov/judiciary/dorm0209.htm> [hereinafter *Hearings*, Dorminey Testimony] (“[H]istory demonstrates that regulation slows, rather than speeds, innovation. Although usually intended to create a floor or minimum standard, regulations more often tend to act as ceilings on compliance.”); *Hearings*, Lucas Testimony, *supra* note 12. (“Industry may become transfixed on addressing the requirements of compliance rather than ‘thinking out of the box.’”).

155. See Taylor, *supra* note 3, at 27.

added to ensure the site remains universally navigable. Add to this the millions of existing, popular, and rarely visited, commercial Web pages ADA-style regulation would force into compliance.¹⁵⁶ Moreover, the threat of litigation could deter Web development.¹⁵⁷

Some experts argue that instead of using the ADA to establish compliance with accessibility guidelines, incentives for early adopters would be a more effective way of setting the standard.¹⁵⁸ “[A]n economic motive would work better rather than the threat of legal action based on a legislative initiative.”¹⁵⁹ These commentators point out that industry is already moving toward making the Internet more accessible to Americans, as evidenced by the efforts of the W3C¹⁶⁰ and by other initiatives, such as “Bobby,” a free online tool that allows Web designers to test and improve their site accessibility.¹⁶¹

The W3C points out that accessibility strategies are “generally inexpensive and easy to implement.”¹⁶² “They represent, essentially, good Web design.”¹⁶³

Small and simple sites may require only a few words of alternative text for images On more complex commercial

156. *Id.*

157. *See Hearings, Dominey Testimony, supra* note 154.

158. *Hearings, Lucas Testimony, supra* note 12 (“Incentives for early adopters of accessible technology might increase the speed.”); *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong. (Feb. 9, 2000)* (testimony of Susyn Conway, independent consultant for Internet marketing, research, design and production), *available at* <http://www.house.gov/judiciary/conw0209.htm> [hereinafter *Hearings, Conway Testimony*] (“Funding [from Congress] might also be directed at establishing a special online community for disabled Americans, and incentivizing private companies to populate it with their content, products and services.”).

159. *Hearings, Lucas Testimony, supra* note 12.

160. *See supra* Part I(B)(1).

161. *See Hearings, Conway Testimony, supra* note 157. The nonprofit organization CAST (Center for Applied Special Technology) created “Bobby.” CAST’s mission is to expand opportunities for people with disabilities through innovative uses of computer technology. *See* <http://www.cast.org/Bobby/>.

162. *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong. (Feb. 9, 2000)* (testimony of Judy Brewer, Director of the Web Accessibility Initiative at W3C), *available at* <http://www.house.gov/judiciary/brew0209.htm>.

163. *Id.*

sites, content is frequently generated by scripts from a database, and these sites can be set up to generate accessible information [C]aptioning of audio and description of video involves minimal production cost compared to production of the multimedia itself Re-designs for accessibility of Web sites can typically be addressed within an organization's periodic site designs, absorbing the cost of retrofitting.¹⁶⁴

W3C argues against the myth that every Web page should have a text-only version and, in fact, strongly discourages text-only pages.¹⁶⁵ Alternative text for images is already considered good coding, and additional solutions, such as captioning work in conjunction with multimedia enhancements, already exist.¹⁶⁶

The benefits of accessibility extend beyond giving people with disabilities access to the Internet.¹⁶⁷ Web sites that meet the Standards may eliminate economic barriers faced by those who cannot afford new computers by allowing the use of inexpensive or older technology.¹⁶⁸ Accessible Web pages allow people who cannot read access to the Internet through the use of screen readers.¹⁶⁹ Accessibility provides older Americans easier access to the Web.¹⁷⁰ Additionally, accessible Web pages may benefit new technologies that provide alternative ways to access the Internet, such as Palm Pilots, cell phones, and Web TV.¹⁷¹

“Providing accessible sites is a way to add tens of millions of potential customers, as well as their friends, their relatives, and their employers.”¹⁷² Therefore, the cost of accessibility is likely to be offset by these benefits to both the disabled and other

164. *Id.*

165. *Id.*

166. *Id.*

167. *Hearings, Lucas Testimony, supra* note 12.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Hearings, Lucas Testimony, supra* note 12.

communities.¹⁷³ Moreover, the cost of isolating the disabled community might be the most expensive path of all.¹⁷⁴

V. INTERPRETATION OF THE AMERICANS WITH DISABILITIES ACT

Congress enacted the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁷⁵ The Act’s legislative history supports an expansive interpretation of “public accommodation” within the meaning of Title III:

The purpose of the ADA is to . . . bring persons with disabilities into the economic and social mainstream of American life[,] to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the [f]ederal government plays a central role in enforcing these standards on behalf of individuals with disabilities.¹⁷⁶

Mainstream American life and culture has shifted since the enactment of the ADA; increasingly goods and services are provided outside the physical confines of a traditional office building or store.¹⁷⁷ Congress enacted the ADA before the Internet was a part of our daily life activities.¹⁷⁸ “Since that time the convergence of technologies and the development of the Internet have transformed the way American[s] do business, learn and live.”¹⁷⁹

In May 2001, the U.S. Supreme Court took an expansive view of the meaning of “public accommodation” in *PGA Tour v. Martin*.¹⁸⁰ The Court held that Title III applies to professional golf association

173. *Id.*

174. *Hearings, Wunder Testimony, supra* note 19.

175. 42 U.S.C. § 12101(b)(1) (1990).

176. H.R. REP. NO. 101-485(II), at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

177. *See Bick, supra* note 3, at 207; *Konkright, supra* note 87, at 714.

178. *See Bick, supra* note 3, at 225.

179. *Bick, supra* note 3, at 225. *But see Maroney, supra* note 22, at 198-199 (arguing Congress and the President only intended the ADA to reach into areas of existing society, of which, the Internet was not yet a mainstream participant).

180. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

tournaments.¹⁸¹ In an opinion by Justice Stevens, the Court found that the ADA's legislative history indicated that the term "public accommodation" "should be construed liberally" to afford people with disabilities "equal access" to the wide variety of establishments available to the nondisabled."¹⁸² The Court decided that golf tournaments fit within the twelve enumerated categories as either a "golf course" or "place of exhibition or entertainment, and that the tournaments offered at least two privileges to the public—either watching a golf competition or competing in it."¹⁸³ "In consideration of the entry fee, any golfer with the requisite letters of recommendation acquires the opportunity to qualify for and compete in petitioner's tours."¹⁸⁴ The Court found that limiting Title III coverage to only the "customers" viewing the golf competition would be inconsistent with the Act's expansive purpose.¹⁸⁵

The new Standards, pursuant to Section 508 of the Rehabilitation Act, go a long way toward meeting the ADA's anti-discrimination goals.¹⁸⁶ "Section 508 is [a] far-reaching piece of legislation intended to generate a ripple effect that will spread throughout the public and private sectors."¹⁸⁷ This extension of accessibility requirements to federal government Web sites and information technology suggests that online access is part of the same purpose that the ADA addresses.¹⁸⁸ "A *judicial* extension of the ADA therefore would arguably align with the shared purpose of the two statutes."¹⁸⁹

President George W. Bush explicitly commented on the connection between the Federal Standards and the ADA's goals

181. *Id.* at 677.

182. *Id.* at 676-77 (citing S. Rep. No. 101-116, p. 59 (1989); H.R. No. 101-485, pt. 2, p. 100 (1990)).

183. *Id.* at 680.

184. *Id.*

185. *Id.*

186. See generally Uhlfelder, *supra* note 14.

187. Williams, *supra* note 12.

188. See Maroney, *supra* note 22, at 200.

189. *Id.*

when he visited the Pentagon's Captec Assistive Technology Center a week before Section 508's effective date:¹⁹⁰

[W]hen the Americans with Disabilities Act was signed in 1990, our nation made a promise we will no longer underestimate the abilities of Americans with disabilities. . . . Our nation has made progress in both attitude and law. Navigating through buildings and buses is far easier than it was just a decade ago. Now, the growth of new technologies creates new hopes and new obstacles [W]hen Section 508 of the Rehabilitation Act . . . becomes effective for all federal agencies . . . there will be more opportunities for people of all abilities to access government information.¹⁹¹

As the Internet and other electronic information technologies become part of our everyday life, a great need exists to continue interpreting the ADA broadly enough to meet these technological and social changes to include people with disabilities in all facets of these advancements.¹⁹²

Just as the ADA has become part of the fabric of America so has the Internet. The Internet has become the hub of business, commercial, civic, and even social interaction. In today's world, the ADA's application to the Internet is arguably as important and may be more important than access to parking spaces for the disabled.¹⁹³

Because the ADA is a remedial statute that courts should interpret broadly, and because the goals of Section 508 closely track the language and purpose of the ADA, courts should incorporate similar accessibility standards into the judicial interpretation of Title III.¹⁹⁴

190. The full text of the President's remarks are available online. *See President Bush Discusses His Commitment to Americans with Disabilities, at* <http://www.whitehouse.gov/news/releases/2001/06/print/20010619-1.html>.

191. *Id.*

192. *See Bick, supra* note 3, at 207.

193. *Id.*

194. *See generally Bick, supra* note 3.

CONCLUSION

Pursuant to Section 508 of the Rehabilitation Act, federal government Web sites are now required to be accessible to people with disabilities.¹⁹⁵ The Standards require that federal employees with disabilities and disabled members of the public have access to agency information comparable to that available to the non-disabled.¹⁹⁶ Federal Web pages and other information technologies must be usable by people who are blind, are deaf or hearing impaired, or have other disabilities such as epilepsy or dyslexia.¹⁹⁷

Unfortunately, people with disabilities face an increasing number of barriers when using the Internet.¹⁹⁸ While the early days of the Internet provided a text-based environment that presented few access difficulties, current Web development is rich in graphics and multimedia.¹⁹⁹ Navigational menus, content, and online forms are sometimes inaccessible to many Americans due to a single mode of operation, such as the use of color, unlabeled images, or sound elements.²⁰⁰ Congress designed the Section 508 Standards to ensure that (1) people with disabilities can use assistive devices to translate on-line information or (2) on-line information is available through alternative means.²⁰¹

Title III of the ADA prohibits discrimination in the provision of goods and services by “public accommodations.”²⁰² The ADA lists twelve public-accommodation categories and provides examples within each group.²⁰³ Federal courts are just beginning to test whether the Internet is a place of public accommodation within the meaning of the ADA and whether Internet site providers are subject to the discrimination prohibitions in Title III.²⁰⁴ The Seventh Circuit

195. *See supra* Introduction, A.

196. *Id.*

197. *See supra* Introduction, C.

198. *See supra* Part I.A.

199. *Id.*

200. *Id.*

201. *See supra* Part I.B.2.a.

202. *See supra* Part III.A.

203. *Id.*

204. *See supra* Part III.B, III.E.

has stated in dicta that places of public accommodation include those found in *electronic* space.²⁰⁵ Similarly, the DOJ has asserted that commercial businesses providing services online are subject to the ADA.²⁰⁶

The NFB's suit against America Online attempted to force AOL to take into account the needs of the disabled when designing its products and services.²⁰⁷ Because the parties settled, the court did not resolve the issue of whether the ADA applies to the Internet.²⁰⁸ Since then, only one federal district court has squarely addressed the issue, deciding that the Internet is not a place of public accommodation.²⁰⁹

How other federal courts will resolve this question remains to be seen. Nonetheless, a societal expectation exists that the disabled community has a right to information and communication tools.²¹⁰ A right to Internet access meets the ADA's primary goal—removing architectural and communication barriers so people with disabilities can participate in the social mainstream.²¹¹

Many of the standards set out in Section 508 are inexpensive and easy to implement.²¹² They essentially constitute good Web design strategies that have payoffs well beyond providing access to the disabled community.²¹³ Accessibility standards may allow economically disadvantaged communities using older or inexpensive computers access to the Internet.²¹⁴ The Standards may also provide the elderly population easier access.²¹⁵ The Standards also facilitate Internet access from new technologies, such as cell phones and Palm Pilots.²¹⁶ These benefits, along with a significantly increased

205. *Id.*

206. *See supra* Part III.C.

207. *See supra* Part III.D.

208. *Id.*

209. *See supra* Part III.E.

210. *See supra* Part IV.A.

211. *Id.*

212. *See supra* Part IV.B.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

consumer base that includes the disabled, outweigh the costs of incorporating accessibility into Web design.²¹⁷

The purpose of the ADA is to eliminate discrimination against people with disabilities.²¹⁸ It is a broad, remedial statute implemented before the Internet became an everyday part of American life.²¹⁹ Now that the Internet is an essential aspect of day-to-day business, communication, and social life, the ADA must expand to prevent discrimination against the disabled online.²²⁰ The Section 508 Standards share the same anti-discriminatory purpose as the ADA.²²¹ Courts should incorporate the Standards into judicial interpretation of the ADA.²²²

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217. *Id.*

218. *See supra* Part V.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*