When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the World Wide Web

by
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I. INTRODUCTION

Over the past decade, the emergence of electronic communication, Internet technology, and the World Wide Web has dramatically altered the lifestyles of many Americans and has affected the lives of us all. As a result of these technologies, society has experienced great transformation and has had to confront new opportunities and challenges and make many adjustments to accommodate these new developments.

American law has struggled to stay current with the new technology. In attempting to stay current and adapt to the new technology, the law has followed two lines of development. First, laws are passed to deal with new issues created specifically by the Internet. Examples of such laws are the Digital Millennium Copyright Act of 1998 ("DMCA")[1] and the Digital Signature Act of 2000.[2] These new laws deal with complicated issues that are far-reaching and controversial, but completely new Internet-specific laws pale in complexity when compared to the other task faced by the legal system. That second task is to somehow apply the existing body of law to the current electronic age.

The legal system in the United States is a complex creature. With the interplay between federal and state law, statutes and court decisions, and arguably conflicting provisions, it is rare to find anything approaching unanimity in the expert legal community on any difficult or novel point. For example, expert tax accountants, using the same information, routinely reach different bottom line numbers when preparing tax returns. Considering the additional need to apply existing laws—ranging from criminal law to patent law to civil rights law—to cyberspace, the complexity sharply increases.[3]

The process of applying current law to the Internet is further complicated by the rapid change in communications technology. Electronic mail

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1. The Digital Millennium Copyright Act of 1998, 17 U.S.C. § 117(c) (2000).

2. The Electronic Signatures in Global and National Commerce Act of 2000, 15 U.S.C. § 7001 (2000).

3. *See* Tara E. Thompson, *Locating Discrimination: Interactive Web Sites As Public Accommodations Under Title II Of The Civil Rights Act*, 2002 U. CHI. LEGAL F. 409, 445 (2002).

("e-mail") spam, for example, has become a major issue as people grapple with the potential of existing privacy laws or new criminal laws to control it. Yet, without a technology that allows people to send endless millions of messages to recipients around the world in a cost and time efficient manner, social and legal issues associated with spam would not exist. Likewise, if an effective technological defense emerges, spam, as a legal issue, could largely disappear.

Against this background, this article analyzes and answers the critical question: Does the Americans with Disabilities Act[4] ("ADA") apply to commercial and other private sector websites, and if so, what does it require?

Much of the discussion surrounding this question seems to be conducted without careful attention to the case law or other authorities that have already addressed it. Initially, this article begins with a brief discussion of electronic communication's role in our lives. It continues by describing the placement of the ADA in the context of current technology and computer usage in our country. Also, though many people are familiar with the term "digital divide," the article suggests that we should focus on the opportunities offered by the digital future.

The next section contains an analysis of the ADA's legal background and the Internet access issue, pointing out authorities and scholarship on both sides of the question and identifying, as carefully and precisely as possible, what these authorities actually say. Through this process, the narrow legal issues bearing primarily upon the definition of the word "place" in Title III of the ADA are brought into focus. This article analyzes the meaning and application of this term, in light of the ADA's legislative history, and court decisions applying this term in non-technology based settings.

Many authorities, including those who are opposed to the view that the ADA should apply to e-commerce, are cited and discussed. But based on all the authorities, the paper reaches the conclusion that the law clearly contemplates Internet coverage by Title III of the ADA. Finally, the article explains the practical and economic arguments that should guide those called upon to apply the law, suggesting strategies that can broadly implement the accessibility principle without disruption, while providing benefit to consumers and businesses alike, and pointing out the chaos and uncertainty likely to arise if broad-based web accessibility is not achieved.

II. Barriers to Digital Equality

While information-age technology has changed life for everyone, it has created unimaginable opportunities, and in some cases cruel frustrations, for Americans with disabilities. Naturally, most people initially think that the potential for distance learning, telework, e-commerce, telemedicine, media access, online voting, and other online opportunities, are available to everyone, including people with disabilities. But unfortunately for many Ameri-

4. Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (2000).

cans with disabilities, as well as others facing a variety of barriers, access to this technology involves more effort than simply calling Dell or driving down to Radio Shack. Many barriers exist to equal access, and sometimes to any access, to these electronic resources for people with various disabilities in various settings.

Some of the electronic and information technology barriers faced by people with disabilities can be traced to the multitude of other challenges to their equal opportunity and independent living. Because people with disabilities are not typically affluent, they are likely to have limited access to a wide variety of society's benefits, including technology and its related impact.[5] Lack of access is self-reinforcing and contributes to further disparity. This continuing disparity includes the degree to which people with disabilities have lower levels of education, lesser choices in accessible housing, and fewer options in transportation; face other structural barriers such as minority status; and have residences in rural or inner-city areas that lack advanced telecommunications access such as broadband.[6]

But one must understand more than the circle of poverty and lack of opportunity in order to grasp the barriers faced by those Americans with disabilities who attempt to use the Internet. Even when economic resources, skill level, access to broadband in one's neighborhood, and all the other dividing variables are taken into account, disabled Americans' access to the Internet is still limited by website design and management (in other words, by factors over which the individual with a disability can have no direct control). Some websites and pages are so badly designed, so unattractive, so difficult to use or so uninteresting that they would not appeal to anyone, with or without a disability, for very long. Some are so poorly designed that even interested Internet surfers have trouble navigating. But we are not referring to these subjective variables when addressing website accessibility and usability for Americans with disabilities. Rather, we are addressing the extent to which sites incorporate certain objective features or design principles, thus allowing people who use the web in different ways, typically with assistive technology, to have access to their content.

No one would be surprised to learn that people who only speak and read another language cannot readily access English-only websites. Nor should it be a surprise to learn that while people who are blind can access the Internet with synthetic speech or Braille output, they cannot do so if the website only offers graphics lacking textual accompaniment that describe or explain what

5. *See generally* U.S. Dept. of Commerce, *Falling Through The Net: Toward Digital Inclusion, A Report On Americans' Access To Technology Tools*, (Oct. 2000), *available at* http://www.ntia.doc.gov/ntiahome/digitaldivide/ (last accessed Jan. 29, 2004) (providing an explanation and documentation of the digital divide).

6. *Id.*

the pictures represent.[7] Similarly, those familiar with TV closed-captioning would not be shocked to learn that people who are deaf cannot access webcast audio content unless captioning is available.[8]

Although discussion of web access and disability often focuses on people with sensory disabilities, particularly those who are blind, and the barriers they face, others with different disabilities also encounter barriers to web access and use. Examples include people with speech impediments, motor limitations, cognitive disabilities, seizures, and other disabilities. The key point in responding to their concerns (and assuring website operators of maintaining the largest possible audience) is to understand that while considerable technology exists for use by web-surfers and customers to facilitate interface with the World Wide Web for people with various disabilities, such user-based technology cannot by itself suffice to bring about full access. There are many key respects in which the ability of people with disabilities to access information and services, and participate in commerce, education or other activities online, is conditioned upon design decisions made by those who own, design, and operate websites.

The proper allocation of responsibility for access, and indeed the need to ensure access, has long been a controversial issue. In the physical realm, over the past generation, many of these issues have been settled. For example, no one would dare to suggest that it is the responsibility of a person using a wheelchair to figure out a way to get up a flight of stairs to a restaurant, store, or other public accommodation.[9] Instead, we require that such facilities and resources be accessible to people using wheelchairs, meaning that it must be readily possible for the person using the wheelchair to enter, leave and navigate appropriately within the buildings.[10] We do not expect people with physical disabilities to drag around their own portable ramps. We do not deem it safe or appropriate to require a person with a disability to submit to being carried into public buildings, let alone require that such an individual recruit his or her own carriers.

The day may come when advances in mobility technology will yield light, universally operable, low-cost chairs or similar devices that can hover, maneuver in any space, and otherwise stretch the envelope of human performance capabilities. If that day comes, technology may well demand a reassessment of our laws. Until that time, however, and until such halcyon technology is available to all who want or need it, the obligation for those

7. *See* Cynthia Waddell, *The Growing Digital Divide in Access for People with Disabilities: Overcoming Barriers to Participation*, (May 1999), *available at* http://www.icdri.org/CynthiaW/the-digital-divide.htm (last accessed Jan. 29, 2004).

8. *Id.*

9. *See* 42 U.S.C. § 12182 (2000).

10. *Id.*

who deal with the public to make their facilities available to everyone will continue to be a central feature of our laws and values.

As time passes, similar debates regarding allocations of responsibility for online access and awareness of people with disabilities in accessing online services are unfolding. In time, we are certain to reach the same level of awareness and to allocate responsibility in the same way as we have in the in-person, physical realm. The path to this parallel level of awareness in cyberspace is a slow and tortuous one, however, and recognition of the analogy is complicated by many factors. Yet it is precisely at the intersection of our awareness of the physical and the virtual worlds that the meaning and destiny of the ADA are brought most sharply and inescapably into focus.

Much of the argument, both for and against applicability of the ADA to the Internet, appears to involve people talking past one another, as shall be seen later in this discussion. Those who support the law's application in cyberspace cite the enormous and increasingly central role played by the Internet in education, employment, commerce, and even social and family life.[11] They essentially argue that in light of these changes to our society, denial of access to the Internet, whether deliberate or through ignorance or indifference, condemns Americans with disabilities to fewer opportunities and second-class citizenship. A statute with the broad ameliorative purposes of the ADA, if it is not to be rendered a mockery, must possess the capacity and flexibility to cover those functions, services, and activities on the web that are identical in purpose and effect to those that are expressly covered when provided in person.[12]

Such an argument is highly compelling, but from the standpoint of those who oppose a broad interpretation of the law's mandate, they are probably irrelevant. Opponents are surely aware of the implications of the Internet for opportunity and quality of life and, in some cases, are cognizant of access issues pertaining to people with disabilities or other digitally disenfranchised groups. They believe, however, that there are strong countervailing policy

11. *See* Amicus Brief, Access Now, Inc. v. Southwest Airlines, Inc., (No. 02-16163-BB) (11th Cir. 2003), *available at* http://www.icdri.org/legal/swa_amicus_brief.htm (last accessed Jan. 29, 2004).

12. For legal analyses concluding that Title III does extend to the Internet, s*ee* Jonathon Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 206-08 (2000); Matthew A. Stowe, Note, *Interpreting "Place of Public Accommodation" under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 298-99, 327-28 (2000); Jeffrey Scott Ranen, Note, *Was Blind but Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 389-91 (2000); 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, 199-200 (2001); Adam M. Schloss, *Web-sight For Visually-abled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?*, 35 COLUM. J.L. & SOC. PROBS. 35, 49-50 (2001).

arguments against construing the law any more broadly than its literal, pre-Internet language absolutely requires.[13]

There is also a third group in this debate. Among those who believe that the Internet should come within the ADA Title III definition of "public accommodations," there are those who believe that congressional action amending the current law is necessary to achieve this result, or in the case of those who oppose such an application of the law, that congressional action is necessary to prevent it.[14] A congressional oversight hearing held four years ago still affords an interesting and informative glimpse into a broad range of views on the subject of the ADA's applicability to the Internet.[15]

III. KEY ADA PRINCIPLES

For any reader who is not thoroughly familiar with the ADA or who has not followed its interpretation by the courts, the National Council on Disability's (NCD) series of ADA policy briefs, "Righting the ADA," is highly recommended.[16]

13. For legal analyses finding that Title III does not extend to the Internet, *see* 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, 723-24, 726-27 (2001); 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, 191-92, 204 (2000). For analyses taking no position on the answer, *see* Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 26-27, 50-51 (2001).

14. *The Applicability of the Americans with Disabilities Act to Private Internet Sites: Hearings before the House Judiciary Committee*, 106th Cong. 2d Sess. (Feb. 17, 2000) (written submission by Marcia Bristo, Chair, National Council on Disability), *available at* http://www.ncd.gov/newsroom/testimony/bristo_2-17-00.html (last accessed Jan. 29, 2004).

15. *The Applicability of the Americans with Disabilities Act to Private Internet Sites: Hearings before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Cong. 2d Sess. (Feb. 9, 2000), *available at* http://www.house.gov/judiciary/constitution.htm/na020800 (last accessed Jan. 29, 2004).

16. National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA*, Nos. 1-16, *available at* www.ncd.gov/newsroom/publications/ (last accessed Jan. 29, 2004). NCD's *Policy Brief Series, Righting the ADA*, includes 16 important background papers thus far. These are: Policy Brief No. 1, *Introductory Paper: The Americans with Disabilities Act* (Oct. 16, 2002); No. 2, *A Carefully Constructed Law* (Oct. 30, 2002); No. 3, *Significance of the ADA Finding That Some 43 Million Americans Have Disabilities* (Nov. 15, 2002); No. 4, *Broad Or Narrow Construction of the ADA* (Dec. 16, 2002); No. 5, *Negative Media Portrayals of the ADA* (Feb. 20, 2003); No. 6, *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*

In light of the existence of these policy papers and many other excellent resources,[17] this article will concentrate on only those provisions and implications of the ADA bearing upon its application to the Internet and to other forms of electronic communication and commerce in cyberspace. In doing so, three questions must be asked and answered: First, is there anything in the ADA, in its implementing regulations, or in its authoritative interpretation by the Supreme Court that would in any way bar its application in online settings? Second, if the ADA applies in cyberspace, what are the criteria for determining whether or when it has been violated? And third, if the ADA applies in the virtual economy and virtual world, are there proactive measures that covered entities can or should take to assure the adequacy of their compliance efforts, or must required actions be determined on a case-by-case basis?

Our formulation of the first of the three questions in the previous paragraph may seem strange initially. Typically, this inquiry is posed as: Does the ADA apply to the Internet? The answer, as discussed below, is an unqualified yes. Only in certain key areas, most notably in Title III (public accommodations), do some material disputes exist in regard to this threshold question. As to Title I (employment) and Title II (state and local government), the applicability of the law to the Internet is not seriously disputed.

For the sake of reference, the major civil rights provisions of the ADA are contained in three titles: Title I, dealing with employment;[18] Title II, concerning the services and programs of state and local governments;[19] and Title

(Feb. 13, 2003); No. 7, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities* (Feb. 25, 2003); No. 8, *The Americans with Disabilities Act: The Implications of the Supreme Court's Decision in Board of Trustees of the University of Alabama v. Garrett* (Feb. 26, 2003); No. 9, *Chevron v. Echazabal: The ADA's "Direct Threat to Self" Defense* (Feb. 27, 2003); No. 10, *Reasonable Accommodation After* Barnett (Mar. 5, 2003); No. 11, *The Role of Mitigating Measures in the Narrowing of the ADA'S Coverage* (Mar. 17, 2003); No. 12, *The Supreme Court's ADA Decisions and Per Se Disabilities* (Mar. 19, 2003); No. 13, *The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities* (Apr. 29, 2003); No. 14, *The Supreme Court's ADA Decisions Regarding the Not-Just-One-Job Standard* (May 20, 2003); No. 15, *The Supreme Court's Decisions Discussing The "Regarded As" Prong Of The ADA Definition Of Disability* (May 21, 2003); No. 16*, The Supreme Court's Decisions Regarding Validity And Influence of ADA Regulations* (June 4, 2003).

17. *See, e.g.*, *infra* note 122.

18. 42 U.S.C. §§ 12111-12117 (2000); *see also* 29 C.F.R. §§ 1630.1-16 (2003) (implementing regulations of the equal employment provisions of the ADA).

19. 42 U.S.C. §§ 12131-12134; *see also*, 28 C.F.R. pt. 35 (2003) (administering the DOJ guidelines for nondiscrimination in state and local services).

III, dealing with the goods and services of public accommodations and commercial facilities.[20]

A. Title I: Employment

Because the ADA was enacted in 1990 before the public Internet existed, Title I does not refer to the Internet.[21] The anti-discrimination scheme embodied in Title I and the role it envisions for technology, however, leaves no doubt that new technology, such as the Internet, and should be taken into consideration in determining the occurrence of discrimination.

Title I requires covered employers[22] to treat both job applicants and employees with disabilities equally with respect to all terms, benefits and conditions of employment, including the opportunity to work.[23] No one has ever suggested that the requirements of the law are tempered or eliminated when the performance of "essential functions"[24] requires that the employee access a website or communicate with others through e-mail, access to bulletin boards, or through the use of Internet or Intranet capabilities. No case or legal argument has been found to support the proposition that when a job's functions involve electronic communication, employers are relieved of the obligation to consider reasonable accommodations or other measures aimed at facilitating equal access to the tools of the trade.

As of yet, however, courts have not required that websites be made accessible according to some legal standard or that particular disputes be resolved by the acquisition of hardware and software designed to facilitate access. Indeed, there are cases holding that a computer access strategy sought by an employee is not required by law, either because the cost would impose an "undue hardship" on the employer,[25] no technology could be found to facilitate competitive performance,[26] or the employer would restruc-

20. 42 U.S.C. §§ 12181-12189; *see also* 28 C.F.R. pt. 36 (administering the DOJ guidelines for nondiscrimination by public accommodations).

21. 42 U.S.C. § 12101.

22. § 12111(2), (5); *see also* 29 C.F.R. §1630.2(e) (defining the term employer).

23. §1630.4 (outlining the scope on nondiscrimination as it relates to employment).

24. §1630.2(n) (defining essential functions).

25. 42 U.S.C. §12111(10); *see generally* Mary L. Dispenza, Note, *Overcoming A New Digital Divide: Technology Accommodations and The Undue Hardship Defense Under The Americans with Disabilities Act*, 52 SYRACUSE L. REV. 159 (2002) (reviewing technology accommodations and the undue hardship defense in case law).

26. *See* Cathcart v. Flagstar Corp., No. 97-1977, 1998 U.S. App. LEXIS 14496, at *40-45, 49-52 (4th Cir. June 29, 1998).

ture the worker's job so as to remove the need for Internet or telecommunications device access.[27]

For the most part, the courts have not been friendly toward ADA plaintiffs alleging job discrimination,[28] and of the cases upholding the employer's right to refuse a job or an accommodation, many are harsh. But nowhere in the litany of reasons advanced in these decisions is there a suggestion that Internet-related, web-based performance issues or work settings are *per se* off-limits to the "reasonable accommodation"[29] and non-discrimination requirements of the law.

A number of key federal agencies with responsibility for enforcement of Title I have also acknowledged the applicability of the law to cyberspace. In December of 2002, the federal government, as part of President George W. Bush's New Freedom Initiative ("NFI"), issued proposals for enhancing telework programs for persons with disabilities.[30] More recently, in February 2003, the Equal Employment Opportunity Commission ("EEOC"), in applying Title I of the ADA, issued a major new guidance on telework.[31] Today, most telework is carried out with the use of computers, so it is not very likely that either of these initiatives would have been forthcoming if there were doubts that non-discrimination in employment applies online with as much force as in person.

To the contrary, the recent initiatives aimed at both federal and private sector work settings reflect a pervasive awareness that employment opportunities must be made available to people with disabilities and discrimination on the Internet must be eradicated. If Title I does not protect workers with disabilities from discrimination in the use of and access to electronic resources necessary to perform their jobs, there could be no legal issue of discrimination against them, and consequently no occasion for issuance of the EEOC guidance. At the very least, had the EEOC intended that its guidelines *not* encompass the Internet, it could have explicitly confined its definition of telework to exclude web-based or other computer-based jobs.

Additionally, it should be noted that apart from the ADA, the law already guarantees several categories of employees' equal access to the In-

27. *See generally* Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136-37 (8th Cir. 1998) (holding that employee failed to establish an ADA reasonable accommodation claim based on employer's refusal to provide a telecommunications hearing device for the deaf and instead restructuring the position).

28. *See* Dan R. Gallipeau & Jeffrey A. Van Detta, *Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 508 (2000).

29. 29 C.F.R. §1630.2(o) (2003) (defining reasonable accommodation).

30. 67 Fed. Reg. 78,790 (December 26, 2002).

31. U.S. Equal Employment Opportunity Comm'n, *Fact Sheet: Work at Home: Telework as a Reasonable Accommodation*, (Feb. 3, 2003) *available at* http://www.eeoc.gov/facts/telework.html (last accessed Jan. 29, 2004).

ternet. These categories of employees include: federal government employees whose work requires access to electronic and information technology ("E&IT") (by virtue of Section 508 of the Rehabilitation Act Amendments of 1998);[32] employees of governmental and private entities that are recipients of "federal financial assistance" (through the operation of Section 504 of the Rehabilitation Act);[33] and employees or contractors of state or local governments covered by state information technology accessibility and civil rights laws in several jurisdictions.[34]

B. TITLE II and the Web

Title II of the ADA bans state and local government discrimination based on disability. While Title II is not generally believed to apply to employment, which is governed by Title I,[35] it does apply broadly to all the other activities of these entities.

Title II is inclusive in its terms, referring and applying generally to all state and local governmental programs and activities. The statutory language is simple, brief and comprehensive: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[36] Among the means by which these requirements can be met, the statute lists: "reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services."[37]

The test for determining who is protected by these requirements is also broad. Title II applies to any "qualified individual with a disability" who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[38] Eligibility for many programs, ranging from vocational rehabilitation to paratransit services, is based on individualized determinations as to whether a

32. 29 U.S.C. § 794d (2000).

33. § 794a.

34. *See, e.g.*, CAL. GOV'T CODE § 11135(d) (West 1992) (stating there shall be no denial of benefits, nor shall a person be subjected to discrimination, under any program or activity that is funded directly by the State of California, based upon a person's disability). For a discussion of state disability discrimination laws that go beyond the ADA, *see* National Council on Disability Policy Brief No. 6, *supra* note 16.

35. 28 C.F.R. § 35.140(b)(1); *see also* Zimmerman v. Or. Dept. of Justice, 170 F.3d 1169, 1176-78 (9th Cir. 1998).

36. 42 U.S.C. § 12132 (2000).

37. § 12131(2).

38. *Id.*

person meets the legal test for having a disability. Whether or not an individual is eligible for goods, services or benefits under any particular program, all government services and programs offered to the public are subject to the nondiscrimination requirements of the law. Requirements such as the removal of barriers or modification of policies and procedures come into play as elements of the programs, services, and facilities that state and local government offer to all members of the public.

Once again, drawing an analogy to the realm of physical access may help to put this point into context for electronic communication. Leaving aside the legalities, renovation of a public building without incorporating appropriate accessibility design features would be absurd. Imagine a city defending such a decision on the ground that it would accommodate any individual's needs with *ad hoc* measures when such person sought access. Economic and practical considerations would quickly demonstrate the folly of such a course. Essentially the same economic and practical considerations also come into play with regard to electronic communications.

For a variety of reasons, all levels of government have opted to make increasing use of electronic communications, ranging from information kiosks to online forms and agency websites, in their communications with the public. On balance, policymakers appear almost unanimous in the belief that substitution of electronic communications and decentralization for in-person and facility-based citizen-government contact results in reduced public sector costs as well as increased citizen participation and compliance. It is not the purpose of this article to evaluate these assumptions. Rather, this discussion is concerned with their implications for citizens with disabilities and with the law's ability to encompass them.

If these kinds of public websites that have increased with such fervor over the past five years are not designed and implemented with accessibility and inclusivity in mind, they run the risk of not broadening, but rather narrowing, the participation of many people. This would be the case especially if migration to on-line services were accompanied by cutbacks in facility-based, telephone-based, postal-based, and other traditional service types. Ironically, although benefit to people with disabilities is a frequent, almost automatic, rhetorical justification for putting public services online, it is often these very citizens with disabilities, already facing barriers to access through conventional means who find themselves further excluded and disadvantaged by online applications that do not take accessibility into consideration. Although administrative agency and court rulings on the subject are very few in number, those that have addressed the topic of Internet accessibility point strongly and consistently to the conclusion that Title II of the ADA applies to governmental websites, just as it applies to public buildings and physical facilities.

1. Effective Communication

In fulfillment of its responsibility to oversee public education under both Title II of the ADA and Section 504 of the Rehabilitation Act, the U.S.

Department of Education, through its Region IX Office of Civil Rights ("OCR"), undertook eight investigations during the period 1994 through 1999. These investigations were conducted largely in response to complaints by students at California public colleges and universities and also included proactive investigations into the California Community College System.[39] In each of these cases, the complaints and settlements centered on the question of whether the schools had met the law's requirements for effective communication and equal access.

Investigation of each of the campuses involved ensuring access to class and course-related materials and media, including campus computer labs, curricular materials, libraries, class schedules, and specifically, in the San Jose State University case, to the Internet.[40]

39. *See* U.S. Department of Education, Office for Civil Rights, Region IX, Letter to Loyola Marymount University (Docket No. 09-91-2157, Jan. 15, 1992); Letter to Los Rios Community College (Docket Nos. 09-93-2214-I, 09-93-2215-I, 09-93-2216-I, Apr. 21, 1994); Letters to CSU, San Jose (Docket No. 09-95-2206, Jan. 25, 1996) *and* (Docket No. 09-96-2056, Feb. 7, 1997); Letter to CSU, Los Angeles (Case Docket No. 09-97-2002, Apr. 7, 1997); Letter to CSU, Long Beach (Docket No. 09-99-2041, Apr. 20, 1999). *Compare*, OCR Region II, Letter to Patricia Bromberger (Case No. 02-95-2145, Mar. 29, 1996) (findings in regard to complaint against Brooklyn College) *available at* http://www.rit.edu/~easi/law (last accessed on Jan. 29, 2004).

40. Letters to CSU, San Jose, *supra* note 39. Because this complaint was adjudicated prior to the emergence of the concept of web accessibility, it involved the responsibility of the college to provide technology to the user that would facilitate independent access to the Internet. Lest it be argued today that readers or other human assistants are equal or superior methods for obtaining access to the web, the following observations of the OCR in its findings letter are worth noting:

> "OCR notes that the 'information superhighway' is fast becoming a fundamental tool in post-secondary research. Rather than implementing adaptive software, some institutions have attempted to utilize personal reader attendants as the exclusive or primary way of making this form of computer information accessible to persons with visual impairments. In most cases, this approach should be reconsidered. One of the most important aims in choosing the appropriate auxiliary aid has been to foster independence and autonomy in the person with a disability. When reasonably priced technology is available that will enable the visually impaired computer user to access the computer, including the World Wide Web, during approximately the same number of hours with the same spontaneous flexibility that is enjoyed by other non-disabled computer users, there are many reasons why the objectives of Title II will most effectively and less expensively be achieved by obtaining the appropriate software programs." ". . . Although there may be limited circumstances when a personal reader is needed to bridge the gap in accessibility provided by adaptive software programs, this gap is continually being narrowed and post-secondary institutions are expected to stay apprised of recent advances."

Although all of these OCR decisions were issued from one of the U.S. Department of Education's regions (Region IX covers several western states), their impact has been national in scope. In addition to applying the "effective communication" and equal access provisions of the law to electronic communications, they create clear and replicable standards for evaluating whether the measures adopted by institutions are sufficient. In determining the effectiveness of communication strategies and the adequacy of the "auxiliary aids and services" used to accomplish the communicating, the OCR decisions set forth a three-prong test: accuracy, timeliness, and appropriateness. As stated in the OCR's California State University-Long Beach findings letter:

> "OCR has repeatedly held that the terms 'communication' in this context means the transfer of information, including (but not limited to) the verbal presentation of a lecturer, the printed text of a book, and the resources of the Internet. In construing the conditions under which communication is 'as effective as' that provided to non-disabled persons, on several occasions OCR has held that the three basic components of effectiveness are timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability."[41]

This standard has been broadly applied and oft-quoted in settings outside of education and far beyond Title II. The meaning of the accuracy and timeliness prongs should be self-evident. It is not timely to give a student who is blind access to a textbook after the semester has ended. Furthermore, it serves absolutely no purpose to provide a sign-language interpreter to explain the risks of surgery to a deaf person in a medical consultation if the interpreter does not have the vocabulary skills or experience to render the physician's explanation or answers with any skill or accuracy.

The third prong, which is generally referred to as the appropriateness requirement, is more complex and could provoke more disagreement as to whether the prong has been met. Take the case of a deaf individual being informed of medical test results that prove the existence of a serious or embarrassing condition. Would it be appropriate or effective for this information to be rendered by a highly competent sign-language interpreter who is then dismissed by the physician before the patient has had the opportunity to pose any questions? Likewise, if a blind individual is being informed of a long list of figures pertinent to a large bill, would it be sufficient for someone to recite these aloud without repeating or providing them in some accessible, more permanent form? In these cases, technically the information has been provided, but not in an accessible or effective manner.

41. Letter to CSU, Long Beach, *supra* note 39.

Application of the effective communications standard to the Internet raises a unique and complex set of issues. Once we have thoroughly reviewed the question of the applicability of the ADA to electronic settings, we will return to this issue in Section V, which will bring us face to face with the problem of what exactly the ADA requires in these settings, assuming it applies to them at all.

2. Transportation

Perhaps the area in which the accessibility of public sector websites has received most attention is that of public transportation. Virtually every metropolitan regional or municipal transportation authority or district now maintains a web presence as a means of providing schedule, route, fare, and other information to customers. Public transit systems must comply with a variety of accessibility requirements. These include the more familiar ones relating to the accessibility of their vehicles to persons using wheelchairs. They also include information accessibility requirements as well, ranging from requirements for the announcement of transit stops by vehicle operators to provisions bearing upon the accessibility and usability of ticket and fare machines.[42]

Because public transit is so important, and perhaps because these other requirements have sensitized people to the access issues surrounding them, many have wondered whether the law requires public transit websites to be accessible to all members of the riding public. In 1999, in *Tamez v. San Francisco Metropolitan Transportation Commission*,[43] a complaint filed under the ADA due to the inaccessibility of such a website became the most tangible product of such discussion and concern. While that complaint never resulted in a judicial decision, in a later case in 2002, a public transit website became the occasion for the first known reported federal court opinion on the applicability of Title II of the ADA to the Internet. In *Martin v. Metropolitan Atlanta Rapid Transit Authority* ("MARTA"), a number of individuals with disabilities filed suit against the Atlanta public transit agency under both the ADA and the Rehabilitation Act, alleging numerous violations in various areas, including accessibility of information.[44] The court relied on the provisions of Part B of Title II dealing specifically with the obligations of transit systems and on the provisions of Part A dealing generally with all activities

42. *Americans with Disabilities Act Accessibility Guidelines*, § 4.34, *available at* http://www.access-board.gov/adaag/html/adaag.htm#4.34 (last accessed Jan. 29, 2004).

43. Complaint filed with the Federal Transit Administration by Randy Tamez against the San Francisco Metropolitan Transportation Commission (Nov. 1998). *See* Patrick Riley, *Disabled Web Surfer's Case May Prove a Bellweather for Accessibility Standards*, (Nov. 20, 1998) *available at* http://ncam.wgbh.org/news/Webnews7.html (last accessed Jan. 29, 2004).

44. Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, 1364 (N.D. Ga. 2002).

of state and local government to find MARTA in violation of the ADA due to the inaccessibility of scheduling, route, and other key information on its website.[45] Thus, the opinion should not be read as limited to websites maintained by transportation agencies, but as applicable to state and local agencies and entities of all kinds.

In granting the plaintiffs' motion for a preliminary injunction, the court stated: "the entity shall make available to individuals with disabilities adequate information concerning transportation services. This obligation includes making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service."[46] The court further noted:

> MARTA makes schedule and route information freely available to the general public. This information is contained in maps and brochures available at MARTA stations. The information is also accessible to the general public on MARTA's website. The information is not equally accessible to disabled persons, particularly the visually impaired. Although particular route and schedule information is available by telephone, this is not the equivalent to what MARTA provides to the general public. MARTA can do a better job of making information available in accessible formats to the visually impaired. This Court holds that the Plaintiffs have met their burden to show a likelihood of success on the merits for Defendants' failure to make available to individuals with disabilities adequate information concerning transportation services through accessible formats and technology to enable users to obtain information and schedule service. A disabled transit user cannot adequately use the bus system if schedule and route information is not available in a form he or she can use.[47]

The court did not conclude that alternative means of providing information, such as over the telephone, could never be adequate, but the court did not have to address that question since the evidence showed that they were not equal or timely here, and because MARTA, which admitted that its website was inaccessible, indicated it was endeavoring to upgrade it to make it more accessible. Likewise, because MARTA was actively engaged in such an effort, the court had no need to specify exactly what steps MARTA needed to take in order for its site to comply with the law. Only when MARTA claims that it has achieved enough accessibility, will the court examine the precise standards and methods used:

> MARTA representatives also concede that the system's web page is not formatted in such a way that it can be read by persons who

45. *Id.* at 1374.

46. *Id.* at 1375 (quoting 49 C.F.R. § 37.167(f) (2003)).

47. *Id.* at 1377.

> are blind but who are capable of using text reader computer software for the visually impaired. . . . However, it now appears that MARTA is attempting to correct this problem. Until these deficiencies are corrected, Marta is violating the ADA mandate of 'making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service.'[48]

The next question logically following from this case is whether the law would exempt MARTA from web accessibility requirements if it could provide the necessary information by alternative means. Put another way, this question is: Would the concept of "equivalent facilitation" come into play to allow the transit agency to avoid web accessibility requirements? This, however, is largely an academic question since there is no practical way for this to be achieved. There is no feasible way, at any remotely acceptable cost, that the information could be provided in an instantaneous and continuous fashion. The interactive capacity afforded by a transit agency's web page cannot be replicated or equaled via a telephone assistance system, let alone by the mailing out of hard-copy documents.

The key point to remember is that the ADA requires "equal" access, not just some minimal level of access that is deemed "adequate." Moreover, even if some minimal, though not equal, standard were all that the law required, what conceivable adequacy could be attributed to a system that gave schedule or route information hours, days, or weeks after it was needed and requested, that gave users with disabilities no opportunity to interact with the information as other riders can, and that provided no opportunity for verification of information conveyed quickly over a phone line? By deciding what information it will offer to the general public, a public transit agency or other governmental entity likewise decides what information it will give to those members of the general public who have disabilities.

As of this writing, the outcome of MARTA's efforts to make its website accessible are not yet known, but as we shall see in Section V of this paper, currently available technology and widely accepted standards should result in success without much difficulty or delay.

It is important to note, though, that whatever the resolution of this and the other issues in the MARTA case, application of the ADA to these or other websites in no way implies any new federal oversight over the contents of those websites. There are a great number of informational elements that people with various disabilities might wish a transit operator to include on its website. For example, riders with visual disabilities might like to know whether the bus that runs down Main stops on the north or the south side of Fourth, and how many feet from the corner. People with mobility impairments might like to know whether particular bus stops are on hills. Any number of people, with and without disabilities, might like to know whether

48. *Id.* at 1377 (quoting 49 C.F.R. § 37.167(f) (2003)).

particular light rail stops are in well lighted and heavily traveled or dark, lonely areas. All of these and many other concerns are entirely legitimate, and a transit agency with a commitment to customer service should collect and make this information available. But neither the ADA nor any other federal law obliges these agencies to provide such data. All that the ADA requires is that whatever information the agency does elect to provide is as available to people with disabilities as to everyone else.

IV. Public Accommodations

A. The Problem

Title III of the ADA differs from Title II in several significant ways. Most relevant to this discussion are the differences in how it addresses the question of what activities, performed or carried out by what entities, are covered by the law. Whereas Title II covers almost all state and local government entities and activities, there are important limits on the range of private entities and the types of their activities that are covered by the law under Title III.

Title III bars discrimination on the basis of disability by "places of public accommodations" and commercial facilities engaged in commerce.[49] As a result, in order to get Title III to apply in a particular situation, it is necessary not only to demonstrate that the entity in question is a public accommodation or commercial facility engaged in commerce, but also, that it is a "place" where, or in connection with which, the alleged discrimination occurred.

As the statute states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[50] The statute goes on to list at great length the types of private entities covered[51] The websites that people use for shopping, research, or entertainment readily come within the scope of entities deemed public accommodations. They provide goods and services to the public reminiscent of stores or shops; on-line versions of games and entertainment that people otherwise witness or participate in firsthand; information that one, in a less hectic and more personal way, might obtain across the desk from a doctor; and access to both the resources of the world's greatest libraries and the library down the street. In many cases, the websites of companies or institutions are connected with their earthbound locations and activities; in other cases, they are not. No one seriously disputes that the Internet plays a large and rapidly growing role in commerce, recreation, education, and employment. In addition, no one disputes that most commercial web-

49. 42 U.S.C. § 12182 (2000).

50. §12182(a).

51. §12181(7).

sites are engaged in commerce by reason of the role they play in commerce and the difficulty or impossibility of designing a public website available only to users in a single state that reaches those users solely through within-state telecommunications. Despite these characteristics, many people continue to doubt that a website can be a "place" of public accommodation or a commercial "facility" as required for coverage of the law.

B. The Department of Justice

In probing the meaning of any federal law, the views of the agency charged with primary responsibility for interpreting and enforcing that law are entitled to considerable weight and thus represent the natural starting place. In 1996, the Department of Justice ("DOJ") made its view clear when public entities covered under Title II or public accommodations covered by Title III of the ADA choose to communicate with the public, their information must be made available to all members of the public, irrespective of disability. According to the DOJ, this is as true of information distributed via computers and the Internet as it is of information disseminated through more traditional methods.[52]As explained by the DOJ in its letter to Senator Harkin:

> Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well. Mr. [name omitted by DOJ] suggests compatibility with the Lynx browser as a means of assuring accessibility of the Internet. Lynx is, however, only one of many available options. Other examples include providing the web page information in text format, rather than exclusively in graphic format. Such text is accessible to screen reading devices used by people with visual impairments. Instead of providing full accessibility through the Internet directly, covered entities may also offer other alternate accessible formats, such as Braille, large print, and/or audio materials, to communicate the information contained in Web pages to people with visual impairments. The availability of such materials should be noted in a text (i.e., screen-readable) format on the Web page, along with instructions for obtaining the materials, so that people with disabilities using the Internet will know how to obtain the accessible formats. . . The Internet is an excellent source of information and, of course, people with disabilities

52. Letter from the Assistant Attorney-General for Civil Rights to Senator Tom Harkin, 10 NDLR 240, *available at* http://www.usdoj.gov/crt/foia/cltr204.txt (last accessed Jan. 29, 2004).

> should have access to it as effectively as people without disabilities.[53]

As this letter demonstrates, the DOJ does not focus on the accessibility of the web page, but instead on the availability of the information, goods, and services it conveys. Also, as the reference to the Lynx browser implies, the methods available for making websites accessible in 1996 were extremely limited and would often have required major alterations by website designers and operators.

In the intervening years, the DOJ has argued for coverage of the Internet under Title III of the ADA in several amicus briefs.[54] It has also negotiated or approved several complaint settlements supporting access in cases that involve non-physical location issues, such as the accessibility of brokerage or credit card statements.[55]

Thus, even if grounds exist for believing that the department would countenance strategies other than website accessibility, the DOJ has been consistent both in upholding the right of people with disabilities to access the information provided on the Internet and in asserting the belief that electronic communication is subject to Title III.[56] Put more broadly, the DOJ has not accepted the restrictive position that actionable discrimination must occur "at" or "in" a "place" of public accommodation or that the right to information-access is tightly tied to where the information is provided.

As a practical matter, any applicable entity faced with the choice of methods for making web-based information accessible is likely to conclude that doing so via that website is the best, if not the sole, feasible way. Given the speed of electronic communication, the frequency with which many websites are updated and changed, the cost and delays of providing alternative formats, and the low price and straightforwardness of making websites acces-

53. *Id*.

54. *See* Amicus Brief of the U.S. Dept. of Justice, Hooks v. OKBridge, (No. 99-50891), *available at* http://www.usdoj.gov/crt/briefs/hooks.htm (last accessed Jan. 29, 2004); Amicus Brief for U.S. Dept. of Justice, Rendon v. Valleycrest Prod., (No. 01-111197), *available at* http://www.usdoj.gov:80/crt/briefs/rendon.pdf (last accessed Jan. 29, 2004).

55. *See, e.g.,* U.S. Dept. Of Justice Civil Rights Div., *Enforcing the ADA: A Status Report From the Department of Justice* (2002), *available at* http://www.ada.gov/aprjun02.htm (discussing a credit card statement in large print for accessibility, and recognizing the value of effective communication with customers, and noting that numerous public utilities and financial services companies have proactively offered or responded to requests to make statements, bills and inserts available to clients prevented by disability from reading print).

56. *See generally* Hooks v. OK Bridge, Inc., 232 F.3d 208 (5th Cir. 2000) (affirming district court without opinion); Rendon v. Valleycrest Prods., 294 F.3d 1279 (11th Cir. 2002), *reh'g denied en banc* (2002 U.S. App. LEXIS 27593 (Oct. 25, 2002).

sible, it is hard to imagine that any entity would opt for an approach other than accessibility. Even if the entity did choose another method, timeliness, accuracy, and appropriateness would likely not be achievable.

Nor is it likely that the DOJ would conclude as a factual or legal matter that off-line alternative methods could provide anything remotely resembling "full and equal access" to the information and resources of a commercial website. With effective communication as the ultimate requirement, there exists almost no conceivable situation in which a strategy other than equal Internet accessibility would make business or legal sense. The very reasons people use the Internet are the same reasons why other methods of information dissemination cannot be equivalent.

C. Internet and Telephone Access Cases

The reported ADA litigation on electronic access provides only scant guidance on these issues. Moreover, because computer technology has changed so rapidly, many of the key issues that courts must face are best described as moving targets. Nevertheless, a review of what has been alleged, settled, and decided to date will be useful in ferreting out some recurrent analytical principles employed by the parties and the courts. With these principles in hand, some predictions and guidance for the future may be forthcoming.

In 1995, a complaint was lodged with the city of San Jose, California by a blind city commissioner who was unable to access the minutes of City Council meetings contained on the municipality's website. This resulted in the promulgation of the San Jose Web Page Disability Access Design Standards in 1996.[57] These standards were important for two reasons: first, they constituted an acknowledgment of the legitimacy of claims made by people with disabilities for access to the web; and second, they demonstrated that objective and workable criteria for vindicating these rights could be devised.

The next major development following the San Jose standards was the National Federation of the Blind's ("NFB") lawsuit against America On-line ("AOL") in 1999.[58] In this first precedent web access civil rights lawsuit, NFB charged that AOL'S proprietary web browser interfered with the ability of blind people to use screen-reader software to access the AOL system.[59] The complaint also alleged a variety of specific ways in which features and capabilities of the site enjoyed by other users or subscribers were inaccessi-

57. *See generally* Cynthia Waddel, *U.S. Accessibility Law in Constructing Accessible Websites*, ¶13, (June 1998), *available at* http://www.icdri.org/city-of-san-jose-world-wide-Web.htm (last accessed Jan. 29, 2004); *see also infra* note 122.

58. Plaintiff's Complaint, Nat'l Fed'n of the Blind, Inc v. America On-Line, Inc., No. 99-12303 (D. Mass. Nov. 16, 1999), *available at* http://www.education-rights.org/nomenfbvaol.html (last accessed Jan. 29, 2004).

59. *Id.*

ble to or unusable by blind people.[60] Issues included text concealed within graphics; commands that should have been executable from the keyboard, but required the use of the mouse on the AOL system; inability to identify the precise timing or location for entry of data required to carry-out various searches; and a host of related functional barriers.[61] In addition to the assertion that AOL's system constituted a failure of effective communication, the suit also alleged that the barriers violated users' access rights to shopping, recreation, entertainment, and other categories of public accommodation.[62]

Although the complaint broke legal ground, its resolution was inconclusive. On July 26, 2000, the complaint was voluntarily dismissed, and the parties entered into an agreement.[63] While acknowledging no wrongdoing, AOL undertook a number of voluntary measures, including establishment of an accessibility policy and consulting on accessibility with the disability community.[64] For its part, NFB reserved the right to refile its suit if it deemed fit.[65]

Meanwhile, another Title III Internet case was making its way from San Antonio's federal district court to the U.S. Court of Appeals for the Fifth Circuit. *Hooks v. OKBridge, Inc.*[66] raised the question of the applicability of Title III to the web, but in a very different manner. In *Hooks*, there was no issue of technical barriers to Internet access. Rather, the plaintiff claimed that he had been barred from the defendant's online bridge tournaments and associated bulletin boards because of his disability. If Title III of the ADA did not apply to the bridge club's website, then this alleged discrimination, if it indeed occurred, would be legal, and the plaintiff must certainly lose.

The trial court granted summary judgment to the defendant bridge club, dismissing the complaint on a number of grounds. One is particularly important here: the district court held that the website was not a "place of public accommodation."[67] The Fifth Circuit affirmed the lower court's judgment, but declined to follow its reasoning. Instead, the court held that since the defendant had not been aware of Hooks' disabilities, it could not possibly

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* Hiawatha Bray, *Group Behind Blind-Access Suit Resolves Suit with AOL*, BOSTON GLOBE, July 27, 2000, at E4.

64. America On-line, Inc., "Accessibility Policy," *available at* http://www.corp.aol.com/access_policy.html (last accessed Jan. 29, 2004).

65. *See* Cynthia D. Waddell, *Will the National Federation of the Blind Renew Their ADA Web Complaint Against AOL?*, NAT'L DISABILITY LAW REP. HIGHLIGHTS, Aug. 24, 2000, at 9.

66. Hooks v. OKBridge, Inc., 232 F.3d 208 (5th Cir. 2000) (affirming district court without opinion).

67. Amicus Brief, *Hooks*, *supra* note 54, Statement of the Case.

have intended to discriminate against him.[68] Given the basis for its decision, the case added little to the law, but it is important for other reasons. “”’’: ’The DOJ filed an amicus brief in the Hooks appeal, powerfully setting out many of the reasons why the law should not be construed as narrowly as the lower court had done.[69] The DOJ pointed out that reading Title III to exclude the Internet, which neither existed nor was considered by Congress when the ADA was enacted, would be analogous to holding that freedom of speech and freedom of the press do not extend to electronic communications over the Internet since such communications were not mentioned in the First Amendment, or that the Fourth Amendment could not apply to the privacy of telephone conversations because telephone wires do not come within the ordinary meaning of the words “persons, papers and effects” used in the Fourth Amendment.[70] The amicus brief reinforced this logic by citing cases in which higher courts rejected comparably strained readings of the Civil Rights Act of 1964.[71] In one such case, for example, the Fifth Circuit concluded that the omission of any reference to “trailer parks” from a long list of types of rental housing covered by the law did not mean that somehow Congress had intended to exclude them.[72] In another case, the trial court reasoned that because the list of entertainment venues covered by the Civil Rights Act were all places where the public attended as spectators, the law had to be read to exclude places of participatory entertainment such as amusement parks from coverage.[73] Again, it was the clear purpose of the law, coupled with the lack of any indication in the legislative history that Congress intended such eccentric results, which supported the appellate rulings in favor of coverage. This question of statutory interpretation will be discussed more fully in Section V, below.

The DOJ’s amicus brief in *Hooks* made the case for a key distinction: “The statute covers the services “of” a place of public accommodation, not “at” the place of public accommodation.”[74] In support of this point, the brief cited numerous examples of the absurd results that would flow from limiting the law’s protection only to acts and forms of discrimination that occur “at” the place of public accommodation.[75] As DOJ summarized it:

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68. *Id*.

69. Amicus Brief, *Hooks*, *supra* note 54.

70. *Id*. at § I.A.3. As the brief points out, the Supreme Court initially made this mistake by concluding that the Fourth Amendment did not apply to telephone conversations, but later corrected itself as the telephone became more central to our lives.

71. *See id*.

72. Dean v. Ashling, 409 F.2d 754, 755 (5th Cir. 1969).

73. Miller v. Amusement Ctrs., Inc., 394 F.2d 342, 348 (5th Cir. 1968).

74. Amicus Brief, *Hooks*, *supra* note 54, at § I.A.1.

75. *See id*.

> A company that offers services both on-site and through other means (such as a travel service that arranges reservations both over the phone and at a walk-in office) would be required to offer non-discriminatory services on-site, but be free to discriminate over the phone or the internet. Neither the language of the statute, nor the underlying purposes of the Act, require or permit such an absurd result.[76]

It would be two years before the next key development occurred. On June 18, 2002, the Eleventh Circuit decided *Rendon v. Valleycrest Productions Ltd.*, a decision extremely important both for its result and its rationale. *Rendon* did not deal with web access as such.[77] Rather the case concerned an alleged violation of the ADA in connection with access by telephone, but the approach that the court adopted seems likely to find application and favor in many of the Internet cases that will probably come before the courts over the next few years.

In *Rendon*, people with hearing and mobility disabilities sued the producers of the TV quiz show, "Who Wants to be a Millionaire," charging that the "fast finger" contestant selection process used for the show tended to screen-out applicants with disabilities in violation of the law.[78] People competed for the chance to appear on "Millionaire" by calling a telephone number and answering a series of questions rapidly by entering responses with the keypad.[79] But since the producers had no Telecommunications Device for the Deaf ("TDD") available, people with hearing-impairments could not hear the questions.[80] Moreover, because speed was required, people with several different mobility disabilities were physically unable to enter the responses with the requisite speed or to enter them with the pushbuttons effectively at all.[81]

The case was appealed after the lower court dismissed the complaint.[82] The lower court held that because the alleged act of discrimination was a process that had not occurred at a *place* of public accommodation, it was not covered under Title III of the ADA.[83] The district court reasoned that while the TV show itself occurred at a "place," a studio where contestants and audience were admitted, the alleged discrimination, which occurred over the

76. *Id*. at Summary of Argument.

77. Rendon v. Valleycrest Prods., 294 F.3d 1279, 1280 (11th Cir. 2002), *reh'g denied en banc*, 2002 U.S. App. LEXIS 27593 (Oct. 25, 2002).

78. *See id*. at 1280-81.

79. *Id*. at 1280.

80. *Id*. at 1281.

81. *Id*. at 1280-81.

82. Rendon v. Valleycrest Prods., 119 F. Supp. 2d 1344 (S.D. Fla. 2000).

83. *See id*. at 1346-47 (emphasis in the original).

telephone, could not be said to have occurred at any place of public accommodation.[84] After all, the public was not admitted where or when the phone calls were answered.[85]

Using several different formulations to reflect its analysis and express its views, the Eleventh Circuit Court of Appeals reversed the district court's ruling and concluded that where the practice at issue unquestionably operated to screen-out people with disabilities, the location where the practice took place was less important than what the results of the practice were. Because the "fast finger" system ultimately prevented people with disabilities from entering the studio as contestants, that practice had to be understood as a denial of access to a public accommodation.

The Court of Appeals held that the plaintiffs had a valid claim under Title III based on their allegations that the contestant hotline was a discriminatory procedure because it unfairly excluded disabled persons from the opportunity to compete on Millionaire, a place of public accommodation.[86] The ADA defines the term "discrimination" in Section 12182(b)(2)(A)(i) as any act that ""prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered."[87] The issue on appeal in *Rendon* was whether Title III encompasses a claim involving telephonic procedures that "tend to screen out disabled persons from participation in a competition held in a tangible public accommodation."[88] The defendants admitted that the plaintiffs are disabled, that the Millionaire show takes place at a public accommodation, that the telephonic procedure used to choose contestants tends to "screen out" disabled persons, and that the opportunity to be a contestant on Millionaire is a privilege as defined by the ADA.[89] Despite these admissions, the defendants insisted that the claim should be dismissed because the plaintiffs could not show that the defendants constructed any "barriers" preventing disabled persons from entering the studio in which the show is taped.[90] Consequently, the defendants argued that the Millionaire contestant hotline does not violate Title III because it is not itself a "public accommodation or a physical barrier to entry erected at a

84. *See id*. at 1346.

85. *See id*.

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

87. *Id*. at 1282.

88. *Id*.

89. *Id*. at 1283.

90. *Id*.

public accommodation."[91] The court of appeals, however, disagreed with this argument, stating,

> Defendants urge us to hold, in effect, that so long as discrimination occurs off site, it does not offend Title III. We do not believe this is a tenable reading of Title III; indeed, off-site screening appears to be the paradigmatic example contemplated in the statute's prohibition of "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability."[92]

The Eleventh Circuit's *Rendon* decision makes an important central point: where there is a nexus between the challenged off-site, nonphysical actions and procedures and the premises of the public accommodation, potential for a violation of Title III exists.[93] If the screening mechanism or practice has a connection to the public accommodation, that is, if it actually constitutes a barrier to access by people with disabilities, it will be covered by Title III, at least in the Eleventh Circuit. In various ways, other circuits have arrived at the same conclusion, as will be discussed below.

The *Rendon* decision answers the question of whether off-site, nonphysical actions and procedures can constitute barriers to public access under Title III, but it also raises new questions. For example, would it have made a difference if the fast finger selection process had been one of several alternative ways of becoming a contestant rather than the only way? What if there had ultimately been no physical public accommodation, like a TV studio, involved? If the end result of the selection process had been competition in an online Quiz Show only, would there have been enough of a nexus with a public accommodation to justify the jurisdiction of Title III? Another case now pending in the very same Eleventh Circuit should answer at least one of these questions.

In October 2002, four months after *Rendon* was decided by the Court of Appeals, the U.S. District Court for the Southern District of Florida decided the case of *Access Now, Inc. v. Southwest Airlines, Co*.[94] In *Southwest Airlines*, the plaintiffs alleged that due to the lack of alternative text ("alt text") for graphic information presented on the computer screen and other features of its design, Southwest Airlines' website was inaccessible to blind persons.[95] Thus, they claimed that the website was in violation of Title III of the ADA because, inter alia, it denied blind persons access to the public accommoda-

91. *Id.*

92. *Id.* at 1285 (citing 42 U.S.C. 12182(b)(2)(A)(i) (2000)).

93. *Id.* at 1285, n.8.

94. 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

95. *Id.* at 1316.

tion of the website.[96] More specifically, the plaintiffs contended that the website "violate[d] the communication barriers removal provision of the ADA (Count I), violate[d] the auxiliary aids and services provision of the ADA (Count II), violate[d] the reasonable modifications provisions of the ADA (Count III), and violate[d] the full and equal enjoyment and participation provisions of the ADA (Count IV)."[97]

The trial court granted summary judgment to the defendants, dismissing the case and writing the first published and reported federal court opinion directly addressing the status of websites under Title III of the ADA.[98] The court began by saying that to fall within the meaning of the ADA, "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."[99] Further, the court found that no nexus existed between Southwest Airlines' website and a physical, concrete place of public accommodation.[100] Unwilling to expand the ADA's application into cyberspace, the district court distinguished the present case from *Rendon* by pointing out that "the Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in *Rendon*."[101] The court continued that "because the Internet website, Southwest.com, does not exist in any particular geographical location, plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency."[102]

The Southwest decision is currently on appeal to the Eleventh Circuit. The analysis put forward by one of the amicus briefs filed in support of the appeal is particularly instructive. It suggests how the trial court might have analyzed the case had it actually followed the approach set out in *Rendon*.[103]

Had it adhered to the *Rendon* analysis, the trial court first would have asked whether there was a nexus between the website and some physical,

96. *Id.*

97. *Id.*

98. *Id.* at 1314.

99. *Id.* at 1318.

100. *Id.* at 1319.

101. *Id.* at 1321.

102. *Id.*

103. *See* Amicus Brief filed in support of the Appellants by the American Association Of People With Disabilities, American Council Of The Blind, American Foundation For The Blind, Bazelon Center For Mental Health Law, Disability Rights Advocates, Disability Rights Education And Defense Fund, National Association Of The Deaf, National Association Of Protection And Advocacy Systems, And National Federation Of The Blind, Access Now, Inc. v. Southwest Airlines, Inc., (No. 02-16163-B6) (11th Cir. 2003).

public accommodation, such as a travel agency, an airport ticket counter, or an aircraft. They would have concluded that, unlike the fast finger process in *Rendon*, Southwest's website is not the only means to buy a ticket. Customers can go to physical locations, such as Southwest's many ticket counters in airports and other locations around the country. Presumably, by establishing the website, Southwest Airlines sought to make ticket buying and the other activities noted by the court easier for their customers. If this were so, then customers systematically denied the use of the website would, by definition, be denied the opportunity to benefit and to enjoy equally the services of the airline. Also, the inaccessible website arguably would have amounted to a denial of the right to effective communication.

If this inaccessibility did indeed translate to such a denial, the court should have asked whether the disadvantages of being prevented from buying a ticket online due to a disability (such as having to buy the ticket in person, having to travel long distances during specified business hours to make the purchase, or being denied the discount available only on the website) are significant enough to warrant the finding that the website violates the law. Put another way, do the higher cost, greater difficulty, and increased inconvenience imposed upon ticket buyers with disabilities who are excluded from the website constitute a barrier to access to air travel or a policy or procedure that tends to screen out customers with disabilities?

The court in *Southwest*, however, did not engage in such an analysis or ask any of these questions. In part, this may be a result of the manner in which the plaintiffs presented their case. Judging from the opinion and the complaint, it appears that the plaintiffs focused not on the right to accessible information, nor upon the harm and inequality that resulted from denial of such access, but rather on access to the website as an end and a right in itself.

If the court had followed the *Rendon* mode of analysis, it also would have had to ask, assuming the inaccessible website deprived the plaintiffs of equal access to the services of a covered entity, what "place" might provide the necessary connection. In the *Rendon case,* it was clearly the television studio in which Millionaire was recorded. Here, however, we do not know whether it was the airport, the ticket itself, the airplane, or something else.

Does the inaccessibility of the website restrict or deny access to the airport? Arguably, yes, because, without access to the website, one cannot purchase a ticket online and therefore cannot print out one's boarding pass before going to the airport. This typically means that time spent in the airport lining up to get a boarding pass will be much longer.

Needless to say, since almost all commercial airlines offer lower fares on their websites than in person or over the phone, people with disabilities, who are denied access to the Internet, would be forced to pay higher fares than their fellow passengers without disabilities. By failing to suggest the possibility of "equivalent facilitation" or adoption by the air carrier of "alternative methods" for affording the benefits and advantages of web access, including lower ticket prices and probably superior frequent flyer benefits, to these travelers with disabilities, it can be inferred that the *Southwest* court

found charging higher fares to passengers with disabilities to be permissible. As of this writing, no airline had yet to offer concessionary web fares to people with disabilities who, because they are unable to access the website, are precluded from obtaining those fares.

Turning to the question of access to the airplane (which inaccessibility of the website unquestionably inhibits, if not ultimately prevents), there is an additional problem, which arguably renders the Southwest decision largely irrelevant to the ADA debate. Commercial aircraft are not public accommodations under Title III because accessibility to commercial aircraft is governed by another statute.[104]

Had the district court applied the *Rendon* approach, it might have considered this issue. Instead, it assumed, rather than determined, that there was no nexus between the website and any other aspect of the airline's services and that the status of the website as a place of public accommodation had to be considered in isolation. But even in its analysis of the website in isolation, the court appears to have made a serious error.

Here, our discussion of the critical difference between the statutory words "of" and the all too easily substituted "at" a place of public accommodations must be recalled. In this case, the court uses the preposition "in" where it should have used ""some other preposition. In introducing its conclusion that the statute's plain meaning is sufficient to resolve the case, the court stated: "Title III of the ADA sets forth the following general rule against discrimination *in* places of public accommodation."[105]

Until or unless the Eleventh Circuit reverses the *Southwest* decision and remands the case to the district court for further proceedings, it cannot be known for certain whether and to what extent a nexus exists between this website and a recognized place of public accommodation. What if the discrimination was just as palpable and just as indisputable, but no nexus could be found? Say for example that the airline sold no tickets over the counter anywhere, but dealt with its customers only through websites? Given the apparent limits of the *Rendon* analysis, do we face a situation where Title III applies to those websites that are in some way connected to physical places of public accommodation, but it does not cover those that engage in the same commerce with the same customers, but operate only online? To answer this question we must take what initially might appear to be a detour by visiting a group of cases that deal with the ADA and insurance.

104. H.R. REP. NO. 101-485, pt. 2 at 87 (1990). *Cf.* Squire v. United Airlines, Inc., 973 F. Supp. 1004, 1009 (D. Colo. 1997), *aff'd.*, 194 F.3d 1321 (10th Cir. 1999); All Hawaii Tours, Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 651 (D. Haw. 1987), *rev'd. on other grounds*, 855 F.2d 860 (9th Cir. 1998).

105. *Access Now, Inc.,* 227 F. Supp. 2d at 1317 (emphasis added).

D. The Insurance Precedent

It is said that life abhors a vacuum. So do the courts. When authorities and precedent answering a question faced by the court are not numerous or self-evident, the court will look to whatever is closest and most analogous. Because the issue of Title III's applicability to nonphysical places and things has come to the courts first and still most often in the context of alleged insurance discrimination, these are the cases on which many Internet commentators and some advocates have relied.

A number of individuals believing that their employers' health insurance discriminated against them have attempted to bring suit against the insurers under Title III of the ADA.[106] Some of the cases have involved benefit caps on certain diagnoses, such as HIV-AIDS, but not on other physical diagnoses or caps on treatment for mental illness that do not likewise apply to physical conditions.[107] Although there is considerable reason to believe that claims of this nature come under the jurisdiction of Title I and should have been brought by the workers directly against their employers,[108] at least one of the leading cases involved a claim of discrimination by a couple who sought to buy life insurance directly from an insurance company with no involvement of an employer or any other third-party.[109]

Title III states, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services . . . or accommodations of any place of public accommodation . . . [.]"[110] Courts, when hearing insurance discrimination cases under Title III, are generally asked to determine the threshold question of whether Title III's use of the phrase "place of public accommodation" restricts ADA coverage to the denial of access to actual physical structures with definite boundaries, or whether the phrase extends coverage beyond physical impediments to public accommodations for the disabled.[111] One of the most frequently cited cases

106. Karen Volkman, *The Limits of Coverage: Do Insurance Policies Obtained Through an Employer and Administered by Insurance Companies Fall Within the Scope of Title III of the Americans with Disabilities Act?,* 43 ST. LOUIS U. L.J. 249, 257 (1999).

107. *Id.*

108. *Id.*; *see also* Jill L. Schultz, *The Impact of Title III of the Americans with Disabilities Act on Employer-Provided Insurance Plans: Is the Insurance Company Subject to Liability?,* 56 WASH. & LEE L. REV. 343, 364 (1999).

109. *Cf.* Morgan v. Joint Admin. Bd, 268 F.3d 456, 457-59 (7th Cir. 2001) (stating that because employee received her insurance through employer, it was a private offering rather than a public accommodation); Parker v. Metro Life Ins. Co., 121 F.3d 1006, 1011-12 (6th Cir. 1997) (insurance sold only to employer not a public accommodation).

110. 42 U.S.C. § 12182(a) (West 2000 & Supp. 2003).

111. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32-33 (2d Cir. 1999) (finding that "an entity covered by Title III is not only obligated by the statute to

for application of Title III to events that do not occur at or in close connection to any physical location is *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc*. In reaching its conclusion that the ADA applied to an actual insurance policy, the First Circuit Court of Appeals found that the ambiguous nature of the phrase "public accommodation" considered together with agency regulations and public policy concerns did not limit the statute only to physical structures.[112] Another leading insurance

provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability"); Ford v. Schering-Plough Corp., 145 F.3d 601, 612-14 (3d Cir. 1998) (restricting "public accommodation" to places); *Parker*, 121 F.3d at 1011-14 (finding that Title III's use of the term "place of public accommodation" is limited to a physical place and does not regulate the contents of goods and services offered by the public accommodation); Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19-20 (1st Cir. 1994) (finding that "place of public accommodation" is not limited to actual physical structures, but extends to individuals who buy the same services over the telephone or by mail); Walker v. Carnival Cruise Lines, 63 F. Supp. 2d 1083, 1093 (N.D. Cal. 1999) (stating that the language of Title III does not restrict coverage to denial of physical access to a facility); Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 563 (D. Minn. 1998) (finding Title III applicable to insurance policies); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1165 (E.D. Va. 1997) (concluding "that Title III prohibits an insurer from discriminating on the basis of disability in the insurance policies that it offers, whether these policies are purchased directly by an insured or made available to him by his employer"), *vacated on other grounds*, 180 F.3d 166 (4th Cir. 1999); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 302 (N.D. Cal. 1997) (determining that Title III is not limited to access to a physical location); Doukas v. Metro. Life Ins. Co., 950 F. Supp. 422, 425-26 (D. N.H. 1996) (holding that Title III extends to the substance or contents of an insurance policy); Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (defining "place of public accommodation" as going beyond actual physical structures); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (holding that although Kotev was not denied access to any facilities, his claim is covered by Title III because the scope of the statute goes beyond the mere denial of access to places of public accommodation); Baker v. Hartford Life Ins. Co., No. 94-C-4416, 1995 U.S. Dist. LEXIS 14103, at *9 (N.D. Ill. Sept. 27, 1995) (finding that a person does not need to be physically present at the place of public accommodation to be entitled to nondiscriminatory treatment); Schaaf v. Ass'n of Educ. Therapists, No. C 94-03315 CW, 1995 U.S. Dist. LEXIS 21806, at *3-6 (N.D. Cal. June 13, 1995) (finding that an organization must be connected to a structural facility in order for Title III to apply).

112. *Carparts Distribution Ctr., Inc*., 37 F.3d at 19 (stating also, "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.").

case favoring the application of the ADA to the Internet is *Doe v. Mut. of Omaha Ins. Co*. Interpreting the meaning of "place of public accommodation," the court stated, "The core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, website, 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 non-disabled do."[113] Although there are many cases that hold Title III extends beyond physical structures, there are also cases that hold that Title III is strictly limited to the denial of access to physical structures.[114]

No precedent exists that treats access to insurance (as distinguished from the content of the coverage) as going beyond the scope of Title III, if the insurance were ordinarily accessible to the public through a physical facility. Even the leading case for the proposition that Title III does not apply to insurance policies, *Parker v. Metro. Life Ins. Co*., may not be as opposed to Title III coverage as it is often portrayed. The language in the opinion suggests that insurance sold to employers could not be viewed as a denial of a public accommodation regardless of where the policy was sold.[115] If the insurance policy was not a public accommodation, regardless of where it was sold, how could the question of where it was sold be a meaningful issue in the case?

Among the cases that treat the nexus between insurance and a physical facility as decisive, there appears to be little effort to explain why Congress intended such a distinction between discrimination cases that the law covers and cases it does not, especially where what constitutes a sufficient connection is unclear and imprecise. The "no" cases have little to say about why they work so hard to justify a reading of the law that leads to a strained result instead of the alternative interpretation that would be practical to implement and sensible to apply.

V. The Meaning of "Place"

Although the weight of the authority and the necessity of effective civil rights enforcement argue in favor of doing away with the requirement of a physical location, current judicial attitudes towards the ADA suggest that such an interpretation of the law is unlikely to be adopted in most courts,

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

114. *See Ford*, 145 F.3d at 612-14 (restricting "public accommodation" to places); *Parker*, 121 F.3d at 1011-14 (finding that Title III's use of the term "place of public accommodation" is limited to a physical place and does not regulate the contents of goods and services offered by the public accommodation); *Schaaf*, 1995 U.S. Dist. LEXIS 21806, at *3-6 (finding that an organization must be connected to a structural facility in order for Title III to apply).

115. *Parker*, 121 F.3d at 1010-14.

including the Supreme Court. This solution of eliminating the need for a physical place may not find general favor and acceptance due to the problems surrounding the word "place," coupled with widespread aversion to extension of civil rights protection and further regulation of the Internet.

Faced with these realities and desiring to find an approach that both promotes consensus among analysts and fosters a reading of the statute that gives meaning to all its words and intentions, much may be gained by looking at the issue of place from a new perspective. Accordingly, it is important to determine what the meaning of "place" is. If some connection to a location or facility is going to be required for Title III to come into play, it is important to also determine what the terms "location" or "facility" ultimately mean.

In its regulations implementing Title III of the ADA, the DOJ defines the term "facility" as follows: "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."[116]

Here the word "equipment" is particularly intriguing. Website servers may well be "equipment" within the meaning of the regulation. These servers are located at a place or places. These are not places where the public goes. But, if we remember the critical distinctions among prepositions and bear in mind that the public need not be "at" or "in" the facility, then it may not be too far-fetched to propose that websites providing their goods and services to the public from equipment in physical locations qualify as places of public accommodation.

Another approach that should be considered involves redefining what "place" means. Just as the computer age has led to the realignment of so many of our basic concepts, it may be appropriate to consider how cyberspace has altered our notion of place. Here, Judge Posner's characterization of the term in the *Doe v. Mutual of Omaha* case—"whether in physical space or in electronic space"—is worth remembering and exploring.[117]

With the passage of time, as more and more goods, services, informational resources, recreation, communication, and social and interactive activities of all kinds migrate to the Internet, the maintenance of legal distinctions among websites based on their degree of connection to a physical facility will become increasingly untenable and incoherent. If there were no nexus doctrine and if all websites were to be *per se* excluded from coverage, the law would at least be clear. But now that we see the direction the law is moving, the effort to define what a sufficient nexus is and to determine whether it exists in each particular case will surely continue. Use of the nexus approach may result in far more havoc than even the most sweeping

116. 28 C.F.R. § 36.104 (2003).

117. *Doe*, 179 F.3d at 557.

requirement for across-the-board commercial website accessibility ever could.

Consider the impracticality of the situation. One online grocery company operates in conjunction with local collection points where customers go several hours after transmitting their orders electronically to pick up their items. Another online grocery company delivers. Since access to the goods and services of the first purveyor involves going to a physical location and the goods cannot be obtained without first going to the firm's website, there exists a tight nexus at least as strong as that shown in *Rendon*.[118] The website of the first company, therefore, must be accessible. Meanwhile, the second company appears to be totally exempt from the law, since the customer never goes to any physical location. Also, what if a third company gives its customers several alternatives including pick up or delivery? Does its website have a sufficient nexus with a physical location to be covered by the law or is the existence of a no-visit option sufficient to render it exempt? Or could it be that the third company's website is subject to accessibility requirements for those users who elect to collect their groceries, but need not be accessible to customers who opt for home delivery? Could it be that even a firm that delivers all orders becomes subject to accessibility requirements because, as the place where its employees and the customer interact, the purchaser's home becomes a place of public accommodation for the time required to make the delivery? In sum, is such a system tolerable? Is it workable for the customers, fair to the merchants, or enforceable by the administrative agencies or the courts?

It should also be remembered that more hinges on the answer to the Internet access question than might at first appear. For if the Internet is excluded from coverage under Title III because it is not a physical location, or if Internet-only commerce is excluded from coverage for lack of a nexus, then under what logic can Title III cover telephone, postal or any other form of interaction or commerce which doesn't take place face-to-face? The individual with a disability no more travels to the public accommodation's post office box or call center than to its web server. The person with a disability who takes on-line courses does not go to the campus of the private university. Similarly, the individual with a disability who sends a medical home-test kit to a laboratory for analysis never goes anywhere near the laboratory's premises. Yet, if Internet-based transactions were excluded from coverage under Title III because of no nexus, the same outcome would logically follow for all these and many other interactions.

Our laws have already moved too far for categorical exclusion of the Internet from the scope of Title III to be reasonable. But the alternative nexus approach that the courts have employed so far is not a satisfactory solution either. Only a clear recognition of the seamlessness of commerce, entertainment, education, and health care makes any legal, economic, or administrative sense. Even assuming that online information or opportunities could be

118. *Rendon*, 294 F.3d at 1279.

made available and accessible to people through the use of some alternative methods, it should be remembered that if the website is not deemed a place of public accommodation and thus is not required to be accessible, then there is no legal basis for requiring that its contents or opportunities be provided by any means. If accessibility is not required of a website, then nothing is required of it. Its owners and operators could refuse to serve people with disabilities. They could, in an effort to avoid having demands for accessibility made upon them, take active measures to identify and exclude users with disabilities. They could do these things with total impunity, so far as civil rights laws are concerned.

Faced with fear and unease over perceived attacks on their civil rights and recently-won gains in quality of life, this added burden of disillusionment and doubt is not something that Americans with disabilities need. And during this time of persisting national peril, with our need for unity and for galvanizing the positive energies of all our citizens, such effects are the last thing that America needs. Not only is cyberspace a place, it is the place where some of the most dynamic and far-reaching initiatives in our society are occurring. It is a place from which the law should countenance the exclusion of no one.

VI. Implementing Accessibility Standards

A. The Context

The debate over whether private, commercial websites should be subject to accessibility requirements is ultimately a debate about far more than the ADA. It is a debate over the role of government and over the proper way to regulate the Internet. Bearing in mind, as we shall discuss later in this section, that the measures involved would be unobtrusive, inexpensive and easily accomplished, the small amount of additional regulation implicated in web access would not dramatically alter the environment of cyberspace. It may once have been that the Internet existed in an environment of total legal freedom, regulated only by the shared values and customs of its users,[119] but that day has long passed. Today, as an integral part of the economy and society, the Internet is subject to all the laws, strains, and contradictions of other major institutions. It struggles to accommodate user freedom, on the one hand, with intellectual property rights and decency on the other. Considering the efforts that are required to balance its accessibility with its security

119. *Compare* Richard W. Millar, *Cyberspace—Is There a There There, and the ADA*, Orange County Lawyer, Feb. 2003 (arguing that the Internet cannot be a place because you cannot go there), *and* Patricia F. First & Yolanda Y. Hart, *Access to Cyberspace: The New Issue in Educational Justice*, 31 J.L. & Educ. 385, 390 (2002) (summarizing arguments against regulation of the Internet), *with* Peter D. Blanck & Lennard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24 Mental & Physical Disability L. Rep. 855 (2000) (refuting free speech arguments against web accessibility). *See also* National Council on Disability Policy Brief No. 5, *supra* note 16.

and privacy, to determine its liability to taxation, and to evaluate its role and responsibility in the dissemination of news, the Internet possesses much in common with other large institutions. It is not some largely mythic world of anarchic self-regulation by a small group of elite and like-minded techno and academic users.

In this light, the need for accessibility and inclusion of people with disabilities should come as no surprise. What may still come as something of a surprise to some, however, is that accessibility can be implemented in ways that are not financially burdensome to the providers or users of web-based services, that do not impose rigid or restrictive design requirements on operators, and that do not subject companies to perpetual fear of some regulatory bureaucrat swooping down on them for serious or trivial violations. Judging from one of the footnotes in the *Southwest Airlines* opinion, fear of such administrative burdens appears to have played a role in the court's decision.[120]

Despite the unfounded nature of these and other concerns, such fear will continue to exist unless there is serious re-thinking on the issue of the ADA's application to the Internet. Some of this fear undoubtedly results from genuine ignorance, misunderstanding, or reflexive distrust of all government, but it could also reflect political and economic agendas. Lest policymakers, commercial entities engaged in commerce via the Internet, webmasters, or others be unduly influenced by the fears that abound, several key facts should be noted. First, other major industrial nations, operating under disability rights laws modeled on the ADA, have adopted web accessibility guidelines.[121] In England and Australia, for example, such guidelines have been extended to the private sector.[122] We have found no indications that the adoption of such requirements in any of the European or in several Asian nations has resulted in difficulty or disruption.

Second, while it may be argued that the experience and conditions of other nations cannot predict results in this country, our own experience should provide powerful reassurance. A host of private sector entities have voluntarily adopted the web content accessibility guidelines developed by the

120. Access Now, Inc. v. Southwest Airlines, 227 F. Supp. 2d. 1312, 1315 n. 1 (S.D. Fla. 2002).

121. *See* JIM THATCHER, ET AL., CONSTRUCTING ACCESSIBLE WEB SITES (Glasshaus Publ'g 2002).

122. *See* The Worldwide Web Consortium, *Web Accessibility Initiative*, *at* http://www.w3c.org/wai/ (last accessed Jan. 29, 2004); The International Center for Disability, *Internet Access Primer*, *at* http://www.icdri.org/accprim.htm (last accessed Jan. 29, 2004); The ADA Disability Business and Technical Assistance Center, *ADA Technical Assistance Program*, *at* http://www.adata.org/ (last accessed Jan. 29, 2004); U.S. General Serv. Admin., *Section 508: the Road to Accessibility*, *at* http://www.section508.gov (last accessed Jan. 29, 2004); Bobby, *Welcome to Bobby Online Free Portal*, *at* http://bobby.watchfire.com/bobby/html/en/index.jsp(last accessed Jan. 29, 2004).

Web Accessibility Initiative ("WAI") of the World Wide Web Consortium ("W3C").[123] Additionally, many federal government websites, as well as some private sector sites, have been designed or redesigned to comply with the web accessibility standards of Section 508 of the Rehabilitation Act Amendments of 1998.[124] At the same time, the availability of technical assistance resources for understanding and implementing accessible design principles, the existence of software tools for identifying accessibility shortcomings in web pages, and the ability of major operating systems to support access software and peripherals have all continued to increase and improve.[125]

Some have expressed concern that because of differences between the W3C guidelines and the Section 508 web accessibility standards, imposition of any requirements on the private sector would be confusing or unfair. But, there is no reason why, if the DOJ exercises the necessary leadership in the matter, any confusion need surround the question of what accessibility standards ought to apply. By contrast, in the vacuum that would be created by a failure of federal leadership, vagueness caused by a host of contradictory standards would cause much greater chaos, incoherence and unpredictably than a national standard would. To prevent an impractical, wasteful, and intolerably confusing situation for industry and the public, key sectors of commerce may be better-served by working together to establish clear and appropriate national standards than by short-sightedly resisting them or seeing them as the thin edge of some mysterious and giant wedge. Without

123. World Wide Web Consortium, *Web Accessibility Initiative*, *at* http://www.w3c.org/wai/ (last accessed Jan. 29, 2004).

124. Many websites now proudly proclaim their accessibility. Recently, as an indication of the perceived market value of accessibility, disability-oriented organizations such as the National Federation of the Blind ("NFB") has begun certifying websites as in conformance with accessibility standards. *See* Nat'l Fed'n of the Blind, *Non-visual Accessibility Web Application Certification*, *at* http://www.nfb.org/seal/intro.htm (last accessed Jan. 29, 2004).

125. For useful online sources for technical assistance and information on the extent and application of accessibility requirements and guidelines, on the means for achieving success, on methods for evaluating accessibility, and on other matters related to accessibility education, *see* ADA Technical Assistance Centers, *About Accessible Web Sites*, *at* http://www.adata.org/aboutaccessWeb.html (last accessed Jan. 29, 2004); Bobby, *Welcome to Bobby Online Free Portal*, *at* http://bobby.watchfire.com/bobby/html/en/index.jsp (last accessed Jan. 29, 2004); Int'l Cetr. for Disability's Internet Access Primer, *Accessibility Primer Page*, *at* http://www.icdri.org/accprim.htm (last accessed Jan. 29, 2004); Int'l Ctr. for Disability's Internet Access Primer, *Test Your Site For Accessibility with Cynithia Says*, *at* http://www.icdri.org/Press/CynthiaSays.htm (last accessed Jan. 29, 2004); U.S. General Services Administration, *Section 508; The Road to Accessability*, *at* http://www.section508.gov (last accessed Jan. 29, 2004); W3C, *Web Accessibility Initiative*, *at* http://www.w3c.org/wai/# resources (last accessed Jan. 29, 2004).

appropriate standards, litigation and uncertainty will only grow, and only if the courts or Congress solve the nexus problem by placing web access totally outside the purview of disability rights would that growing tide be stemmed. The question then becomes: by what standards do we solve the nexus problem?

There are ample resources for giving web accessibility an objective, verifiable, and readily understandable meaning. The W3C is a consortium of enlightened entities and individuals, including a number of technology and other private sector firms, who understand both the importance of accessibility and the necessity for widely applicable, consensus standards. These guidelines and the standards adopted for federal agency websites under Section 508 have already demonstrated their value and effectiveness in informing the courts in articulating suitable standards.

B. What is Required

The Americans with Disabilities Act Accessibility Guidelines ("ADAAG") contain the specific scoping, measurement, and design requirements applicable to achieving and to documenting physical accessibility and barrier removal, as required by the law. The Section 508 electronic and information technology access standards, while not embodied in the ADAAG or promulgated under the authority of the ADA, demonstrate that a similar approach is possible with web access, as the W3C content accessibility and similar guidelines have shown. It is not the purpose of this paper to suggest what standards or combination of guidelines and standards should be adopted from among the several excellent and proven models already in use. It is enough to say that prospective adoption of either the W3C guidelines or the 508 accessibility standards by the operators of commercial websites engaged in commerce could be accomplished in the context of regular upgrades and revisions of their websites at little add-on cost and with little or no disruption or downtime. Use of a reasonable grace period at the outset of the implementation of the guidelines, during which time violations would be subject to remedy in lieu of punishment, would further serve to ensure a smooth and effective transition.

C. Jurisdictional Approach

Based on its experience overseeing and evaluating the existing 508 regulations, and its jurisdiction over the ADAAG, the DOJ is in an ideal position to take the lead role in implementing national website accessibility. Ideally, the web access guidelines should be incorporated into the ADAAG, where these information access provisions will parallel those bearing on physical access and where they have long belonged. Like the requirements bearing on the removal of physical barriers, they would be subject to periodic update, and to the degree that changes in computer technology may alter the equation or definition of access, they could be updated as frequently as such advances warrant.

Because of its experience in developing technology access guidelines,[126] we believe the DOJ should work with the Access Board in selecting or refining the appropriate standards. Although no one can be certain that the courts would uphold such an exercise of rule-making authority,[127] we believe that the DOJ has the authority to take these steps, or could be empowered to do so by presidential executive order. If its own analysis of the matter leads the DOJ to conclude that the administration lacks this authority, then the administration should immediately seek the necessary approval from Congress.[128] Such legislation need not and should not be the occasion for any other amendments to the ADA. The administration should make its position clear and firm on this point because attempts to "open-up" the ADA to unrelated amendment would generate so much contention that public and administration attention would almost certainly be massively diverted away from implementation of the goals of the New Freedom Initiative.

Utilization of the ADAAG to incorporate web accessibility requirements into Title III of the ADA would have one additional advantage that would considerably benefit business, government, and individuals with disabilities. In addition to clarifying the standards, this approach would resolve the question of whether web access and associated effective communication is an issue that must be approached, as the accessibility of facilities is approached, in the planning of commercial websites or whether accessibility obligations are triggered by individual requests. If accessibility issues are dealt with in situation-by-situation responses to individual requests, web access becomes much more complicated and confusing. If the determination of coverage has to await an individual's request for access or accommodations, website operators will never be certain what is expected of them, people with disabilities will have to wait for websites to be modified before they can use them, and enforcement agencies may have to address standards issues in relation to the needs of a particular complainant. It would be as if the physical-accessibility requirements for a building were determined and applied only on the basis of the access needs of the particular person seeking to gain entry or use. As it would be foolish in the physical realm to define accessibility

126. 36 C.F.R. § 1194.1 (2003). (Adoption of Section 508 guidelines); *see also Information Technology and People with Disabilities: The Current State of Federal Accessibility, available at* http://www.usdoj.gov/crt/508/report/content.htm (last accessed Jan. 29, 2004) (Report Presented by the Attorney-General to the President April 2000).

127. *See* National Council on Disability Policy Brief No. 16, *supra* note 16.

128. *See* Letter from the Equal Employment Opportunity Commission, (responding to an inquiry from a member of the public) (Feb. 4, 2003), 25 NDLR 257 (the letter notes the proactive role played by EEOC in connection with web accessibility under Title I of the ADA, and also raises the possible interplay between Titles I and III when job applications are made available to the public over the web)

requirements on a case-by-case basis, it would be no less so in the online world.

VII. CONCLUSION

What could be more emblematic of freedom in this era, than an orderly, consensus-driven and inclusive process resulting in the incorporation in our law of demonstrated and effective standards for ensuring that the Internet, that singular engine of progress and change, will not leave millions of Americans, adults and children alike, behind? Today we have the technology, the experience, and the technical assistance to bring this about in an orderly, cost-effective, and non-coercive way. In light of the path already taken by the law, it is clear that many commercial websites will be subject to accessibility requirements. The question, therefore, is not whether the ADA applies to the Internet, but whether its application is going to be managed in an orderly way to minimize costs and maximize benefits for all or whether, under the pretext of de-regulation, we are going to leave the process subject to inconsistency, chaos, and fear.

Only by taking the lead in addressing the parallels between physical and information access can the federal government hope to achieve the goals of inclusion and access central to the New Freedom Initiative. Given its own determination seven years ago that information access rights are not waived or abrogated simply because information is provided online, it is past time for the DOJ to implement that conclusion in a manner that American business and consumers can understand and use.

In the past, there has been much discussion about the digital divide. The time has come to rephrase our inquiry, and to embrace the digital future for Americans with disabilities as fully as we have sought to grasp it for the population as a whole.