

January 2001

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Cassandra Burke Robertson

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### Recommended Citation

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 (2001).

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## Providing Access to the Future: How the Americans with Disabilities Act Can Remove Barriers in Cyberspace

# PROVIDING ACCESS TO THE FUTURE: HOW THE AMERICANS WITH DISABILITIES ACT CAN REMOVE BARRIERS IN CYBERSPACE

CASSANDRA BURKE ROBERTSON\*

The United States' ability to remain strong and prosperous in the increasingly technological, increasingly competitive global marketplace will be determined . . . by our success in harnessing the energy, creativity, and talent of all our citizens. A great many of those among the estimated 43 million Americans who have disabilities are both eager and able to help our country meet the challenges of our rapidly changing world. Recognizing this rich source of human potential and providing these individuals with greater opportunities to bring their knowledge, ideas, and commitment to the workplace is, therefore, not only a moral imperative, but also a crucial investment in our Nation's future.

--President George Bush, October 12, 1990<sup>1</sup>

## INTRODUCTION

When President Bush signed the Americans with Disabilities Act (“ADA”) into law in 1990, the new law was highly controversial. The law intends to present “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>2</sup> The document also presents a finding that the nation as a whole has an interest in “assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>3</sup> Although few people disagree with the intended purpose of the law,<sup>4</sup> many people worry about its expense and its potential lack of efficacy.<sup>5</sup> While some business owners worry that they will be forced to undertake massive expenditures for little gain, others remain unaware of the law’s

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\*. B.A. 1993, University of Washington; M.P.Aff. 1998, LBJ School of Public Affairs, The University of Texas;p J.D. candidate 2002, The University of Texas School of Law. I would like to thank Professor Elizabeth Ozmun for her guidance and assistance in producing this article. Of course, the opinions expressed in this article – and any mistakes – are mine alone. I would also like to thank the editorial staff of the Denver University Law Review for their diligent and thoughtful editing. Finally, I would like to thank my husband, Thom, for his constant love and encouragement.

1. President’s Proclamation for National Disability Employment Awareness Month, 26 WEEKLY COMP. PRES. DOC. 1582 (Oct. 12, 1990) [hereinafter “Presidential Proclamation”].

2. 42 U.S.C. § 12101(b)(1) (2001).

3. 42 U.S.C. § 12101(a)(8).

4. Bill Day, *Businesses Find Disabilities Act Has Been a Plus*, SAN ANTONIO EXPRESS-NEWS, July 23, 2000, at 21A, available at LEXIS, News Library, News Group File.

5. *Id.*

provisions until they are sued. In the intervening decade, however, great progress has been made to improve access to public and commercial buildings. While accessibility remains far from perfect in the physical world, most commentators, even those critical of the law, agree that vast strides have been made in the area of accessibility;<sup>6</sup> however, the improvement in the physical world's accessibility has not been matched in the virtual world.

The Internet plays a vital role in modern life, allowing people with and without disabilities to shop for gifts and groceries, renew their professional licenses, and take classes online. Millions of people use the Internet every day, including many people with disabilities. Current estimates show that at least one out of every fourteen blind people in America uses a computer, and the number is continuing to grow.<sup>7</sup> However, only approximately 1 in 10 websites is accessible to screen readers used by the blind, seriously limiting the ability of the visually impaired, or otherwise disabled computer users, to access information on the Internet.<sup>8</sup>

This paper examines how the disabled can use the ADA to achieve access to services provided on the Internet and the World Wide Web. In Part One, the paper analyzes the scope of the problem and looks at the case history of a recent lawsuit brought by the National Federation of the Blind against America Online ("AOL").<sup>9</sup> Part Two looks at the statutory language of the ADA and at court opinions interpreting the scope of the act. It suggests four ways in which potential plaintiffs can bring a claim against inaccessible websites under the ADA. These claims include arguments that:

- (1) Commercial websites constitute "places of public accommodation" under Title III of the ADA;
- (2) Even in circuits requiring places of public accommodation to maintain a physical facility, many commercial websites have a sufficient "nexus" to a place of public accommodation to be covered under the public accommodation provision;
- (3) State and local governmental websites are required to be accessible under Title II in the same manner as any other governmental service; and

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6. See, e.g., Bill Frezza, *The ADA Stalks the Internet: Is Your Web Page Illegal?*, INTERNET WEEK ONLINE, Feb. 28, 2000 at <http://www.internetweek.com/columns00/frezz022800.htm> (calling the elimination of architectural barriers "commonsense accommodations . . . enriching the lives of many people previously living on the fringes of society" but nevertheless referring to the ADA as "an act of charity that has become a swelling tithes, enriching class-action lawyers quick to feast on vague legislation promoting poster-child plaintiffs.").

7. Ritchenya A. Shepherd, *Net Rights for the Disabled?* at <http://204.245.133.32/bm/bm99/bm991201.htm> (last visited Dec. 4, 2000).

8. Andrew Park, *Disabled Find Many Barriers Online*, AUSTIN AMERICAN-STATESMAN, Sept. 3, 2000, at A1, available at LEXIS, News Library, News Group File.

9. See *infra* pp. 6-9.

(4) Educational and credentialing websites must be accessible under a specific provision in Title III.

Part Two also examines two frequently invoked exceptions to the Act, undue burden and fundamental alteration, and shows that these exceptions are unlikely to prevent the Act from requiring online access.<sup>10</sup> Finally, Part Three examines some of the policy implications of applying the ADA to the Internet. Such policy concerns include fulfilling legislative intent, providing access to economic opportunity, minimizing the economic and regulatory burden on a growing sector of the economy, avoiding frivolous litigation, and correcting market failure.<sup>11</sup>

### I. THE SCOPE OF THE PROBLEM

Website designer Yvonne Singer knows how much recent advances in technology have done to create opportunities for the disabled. Cerebral palsy has severely constrained her freedom of movement and made it difficult for her to speak.<sup>12</sup> Because she is able to type commands into her keyboard through a pointer strapped to her forehead, she has consequently been able to edit web pages for a pharmaceutical company and pursue a master's degree online.<sup>13</sup> Kelly Ford, a webmaster from Gresham, Oregon, has also found the Internet to be a useful tool in her daily life. A Congressional research memorandum quoted her account of the Internet's utility: "Sighted people don't know how difficult it is for a blind person to use services that everyone else takes for granted, like looking up a phone directory. . . . Now that a lot is on line, I feel so liberated."<sup>14</sup>

Singer and Ford also illustrate the need for accessible web design. While accessibility in the physical world generally means providing access to wheelchairs, access in the virtual world often means creating keyboard controls in addition to the mouse, and providing text labels for graphics. Singer's keyboard pointer would be useless on a site that required mouse manipulation. Similarly, without tags on graphics, Ford's screen reader would not be able to make sense of the screen.<sup>15</sup> Most web-

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10. See *infra* pp. 9-36.

11. See *infra* at pp. 36-37.

12. Kevin Coughlin, *Disabled Get Left Behind: For Some with Impaired Function, Internet is Simply E-Frustration*, THE PLAIN DEALER, August 10, 2000, at 1C, available at LEXIS, News Library, News Group File.

13. *Id.*

14. Memorandum from Paul B. Taylor, Counsel, Subcommittee on the Constitution to Congressman Charles Canady, House Judiciary Comm. (Dec. 16, 1999) at <http://lists.w3.org/Archives/Public/w3c-wai-ig/2000JanMar/0114.html>.

15. Screen reading devices generally use a voice synthesizer which then reads the text and allows the visually impaired user to aurally surf the web. Other devices may make a Braille printout of the information on the screen. One device even contains a shifting Braille display controlled by magnets. Braille printers and displays have the added advantage that they can make the Internet accessible to persons who may have both visual and hearing disabilities. See *Hardware/Software*

sites present information visually, but for those that present information aurally through the use of video broadcasts, or “streaming video,” accessibility guidelines, developed for the federal government, recommend including a textual description or closed captioning, similar to the closed captioning provided for television broadcasts.<sup>16</sup> According to the Access Board, an organization that developed web accessibility guidelines used by the federal government, these measures are likely to be enough to ensure accessibility.<sup>17</sup> Other accessibility initiatives have recommended similar measures.<sup>18</sup>

Both Singer and Ford have jobs in the information technology sector. They are also part of the larger cyberspace market—a market that may be more willing to buy online due to other barriers. After all, a non-disabled customer may be able to drive herself to the store to make the purchase, while a similar customer with a visual disability may have greater difficulty in arranging efficient transportation. Presumably, commercial Internet sites would be thrilled to add to their customer base, and would be willing to make their sites accessible in order to increase profits. However, the commercial sector has been surprisingly slow to take advantage of this market. Gary Wunder, a blind computer programmer who works for the University of Missouri, explained the “Catch-22” he has faced in arguing for accessibility: “When we go to a company which is trying to develop a new product . . . we are told that we need to wait and see whether the product will be accepted by the public. We’re told that . . . our needs will be addressed as soon as the technology demonstrates its viability.”<sup>19</sup> Once the product has proved its viability, however, Mr. Wunder notes that “[W]e’re told that it is difficult and time consuming to modify the existing product. It may not be the next release or the one after that, but be assured that eventually our needs will be considered.”<sup>20</sup> In the meantime, however, “the product is selling like hot cakes and we’re losing access to jobs and information.”<sup>21</sup> Wunder’s de-

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*Eases the Burden*, THE EDMONTON SUN, Mar. 10, 1999, at 57, available at LEXIS, News Library, News Group File.

16. Access Board, *Proposed Access Standards for Electronic and Information Technology: An Overview*, at <http://www.access-board.gov/sec508/overview.htm> (last visited Dec. 4, 2000).

17. *Id.*

18. See, e.g., Web Accessibility Initiative, *Guidelines and Techniques* at <http://www.w3.org/WAI> (last visited Dec. 4, 2000); Web Accessibility Initiative, *Web Content Accessibility Guidelines, W3C Recommendation* at <http://www.w3.org/TR/1999/WAI-WEBCONTENT-19990505> (last visited Dec. 4, 2000). See also CAST, *Bobby 3.2* at <http://www.cast.org/bobby> (offering a free, web-based application that allows website developers and others to check the accessibility of a webpage simply by typing the website address into a form; providing extensive analysis of potential accessibility problems and suggestions for how to ensure the accessibility of individual websites).

19. *Hearing on the ADA and Private Internet Sites: Testimony Before the House Judiciary Comm., Subcomm. on the Const.* (Feb. 9, 2000) (statement of Gary Wunder, Programmer-Analyst Expert for the University of Missouri).

20. *Id.*

21. *Id.*

scription of the commercial sector's resistance to voluntary accessibility policies is borne out by the lengthy difficulties the National Federation of the Blind had in gaining accessibility to a popular Internet access service, America Online ("AOL").

### *The Case of AOL*

In the summer of 1996, an employee of America Online ("AOL") posted a message to an Internet mailing list focused on promoting access to the World Wide Web. The message read in part: "Through an interesting series of coincidences it has become clear to me that our service is not at all friendly to the visually impaired."<sup>22</sup> The message further requested assistance in preparing "a summary of the difficulties faced by the visually impaired members of our service."<sup>23</sup> Curtis Chong, president of the National Federation of the Blind ("NFB") in Computer Science, issued a reply in which he explained that screen reading software used by the blind was not compatible with AOL. Three examples that illustrate this are first, even logging on to AOL required use of a mouse, rather than keyboard controls; second, graphics were not labeled with text tags that could be read by a screen reader; and third, menus and other program functions did not operate through standard programming protocols that could be understood by a screen reading system.<sup>24</sup> In fact, the accessibility problem with AOL's use of unlabeled graphics was fairly common knowledge at the time of the exchange, and had been documented in the mainstream press.<sup>25</sup> Nonetheless, this email exchange was the first contact between AOL and the NFB, and Mr. Chong wrote in a followup email that it "represent[ed] potentially a good beginning."<sup>26</sup>

Accessibility was not quickly forthcoming, however. Several months later, at the end of 1996, AOL released "AOL 3.0"—a new version of the Internet access program. It was no more accessible than version 2.0. By the end of 1997, AOL had reached ten million users—twice as many as it had in 1996. It released another version of its software at that time. Bob Pittman, the company's then-CEO and President, reported that the new version—AOL 4.0—was the product of a complete examination of "the entire AOL interface from top to bottom" and that the new

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22. Posting of Jeff Crowe, JKCrowe@AOL.com to GUI SPEAK@LISTSERV.NODAK.EDU (July 23, 1996, 09:44:10) available at <http://www.nfbcal.org/nfb-rd/1096.html>.

23. *Id.*

24. Email from Curtis Chong, President of the Nat'l Fed'n of the Blind, to Jeff Crowe (July 23, 1996, 23:27:37 EDT) available at <http://www.nfbcal.org/nfb-rd/1096.html>.

25. See Mike George, *Who Needs Braille When A Keyboard Can Do The Talking?*, THE INDEP. (LONDON), June 10, 1996, available at LEXIS, News Library, News Group File. (Stating that Delphi's text-based service could be used by blind people, while AOL and Compuserve were less accessible); See also Joseph J. Lazzaro, *On-Line-Access Services Inconsistent for the Blind*, BYTE, Jan. 1995 (describing the technical issues behind AOL's incompatibility with screen readers).

26. Posting of Curtis Chong, Chong99@cris.com, to GUI SPEAK@LISTSERV.NODAK.EDU (July 23, 1996, 20:29:38 PDT) available at <http://www.nfbcal.org/nfb-rd/1096.html>.

version was "more convenient, dynamic, and relevant."<sup>27</sup> It was still not accessible to screenreaders, however. In 1998 Curtis Chong sent a letter to Rob Jennings, AOL's Vice President of Programming and Development; the letter reiterated the accessibility problems with AOL and again noted that "[t]he software does not provide enough access to its functions via the keyboard, and it does not display information on the screen using standard Windows controls."<sup>28</sup> Mr. Jennings replied to the letter with a phone call, but AOL took no further action.<sup>29</sup> Chong wrote again to AOL, this time to the corporation's president, but received no reply.<sup>30</sup> In November of 1999, AOL—having reached more than nineteen million users—launched version 5.0.<sup>31</sup> Version 5.0 had the same compatibility problems with screen readers. On November 4, 1999, the NFB sued AOL under the Americans with Disabilities Act ("ADA"), asking the court to compel the company to make its services accessible to people with disabilities. Ten months later, AOL agreed to make its next version fully compatible with screen reader technology, though AOL continued to deny that its services were subject to the ADA.<sup>32</sup> The NFB dismissed its suit, but left open the possibility of renewing the suit should AOL fail to make its services accessible.<sup>33</sup>

## II. STATUTORY LANGUAGE AND INTERPRETIVE COURT DECISIONS

For four years, AOL delayed adding accessibility features to its Internet-access software. After an ADA suit was filed against the company, however, company officials moved quickly to implement an accessibility policy. Even though there has been no reported verdict against a website operator, several settlements of ADA claims have resulted in companies agreeing to make their web sites accessible. Several tax-preparations software companies recently settled a claim brought by the Connecticut Attorney General's Office and the National Federation of the Blind.<sup>34</sup> Additionally, several California banks have entered into a

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27. *AOL Networks to Introduce "The Next AOL" With Unveiling of New AOL Channel Line-Up*, BUS. WIRE, Oct. 6, 1997, available at LEXIS, News Library, News Group File.

28. Letter from Curtis Chong, Director of the Nat'l Fed'n of the Blind Tech. Dep't., to Rob Jennings, Vice President of Programming and Dev., America Online, Inc. (Oct. 26, 1998) available at <http://204.245.133.32/bm/bm99/bm991201.htm>.

29. Barbara Pierce, *NFB Sues AOL* (on file at the National Federation of the Blind's website at <http://204.245.133.32/bm/bm99/bm991201.htm>).

30. *Id.*

31. *New AOL Search Service Grows More Than Seventy Percent Since Launch*, BUS. WIRE, Nov. 10, 1999, available at LEXIS, News Library, News Group File.

32. National Federation of the Blind/America Online Accessibility Agreement (July 26, 2000) (on file at <http://204.245.133.32/Tech/accessibility.htm>).

33. Cynthia D. Waddell, *Will National Federation of the Blind Renew their ADA Web Complaint Against AOL?*, 18 DISABILITY COMPLIANCE BULL. 5, Aug. 25, 2000, available at LEXIS, News Library, News Group File.

34. Cynthia D. Waddell and Mark D. Urban, *An Overview Of Law & Policy For IT Accessibility: A Resource for State and Local IT Policy Makers*, (June 8, 2000), available at <http://www.icdri.org/SL508overview.html>.



settlement with the California Council of the Blind that requires the banks to make their websites accessible to screenreaders.<sup>35</sup>

Part Two of this paper examines the statutory framework of the ADA as it relates to Internet accessibility, and examines ways in which the statute can apply to commercial websites, governmental websites, and educational and credentialing websites. Within each of these categories, the paper focuses on arguments that plaintiffs can use in developing a claim. Part Two also looks at some of the arguments available to defendants faced with an ADA claim, including the defenses of fundamental alteration and undue burden.

#### A. *Commercial Websites*

One of the major points of disagreement between the NFB and AOL was whether AOL was a “public accommodation” as defined by the ADA. Title III of the ADA requires places of public accommodation to be accessible to persons with disabilities.<sup>36</sup> The statute defines “public accommodation” as an entity whose operations affect commerce and whose function falls into one of the following twelve categories:

- (a) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (b) a restaurant, bar, or other establishment serving food or drink;
- (c) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (d) an auditorium, convention center, lecture hall, or other place of public gathering;
- (e) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (f) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (g) a terminal, depot, or other station used for specified public transportation;
- (h) a museum, library, gallery, or other place of public display or collection;

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35. *Id.*

36. 42 U.S.C. § 12182(a) (1994).

- (i) a park, zoo, amusement park, or other place of recreation;
- (j) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (k) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (l) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.<sup>37</sup>

Given the sheer dollar amount of shopping done on the Internet, there is little doubt that commercial websites do, in fact, affect commerce. An argument can also be made that many commercial websites also fit into at least one of the categories enumerated in the statute. Amazon.com,<sup>38</sup> for example, could fit into (E) as a "sales or rental establishment;"<sup>39</sup> Concord University School of Law,<sup>40</sup> a law school offering classes exclusively over the Internet, could fit into (J) as a "postgraduate private school."<sup>41</sup> In their complaint against AOL, the NFB alleged that the Internet content provider fell into a large number of these categories; the complaint stated that AOL "is a place of exhibition and entertainment, a place of public gathering, a sales and rental establishment, a service establishment, a place of public display, a place of education, and a place of recreation."<sup>42</sup>

The Department of Justice (DOJ) has also interpreted the ADA to mean that commercial websites fitting into any of the twelve categories should be considered a place of public accommodation.<sup>43</sup> Although the DOJ did not participate in the AOL case, it did file an *amicus* brief in *Hooks v. OKBridge*, a case before the Fifth Circuit Court of Appeals, alleging that a website providing on-line bridge games discriminated against a disabled individual when it banned him from participating in the site's games and other activities.<sup>44</sup> The District Court for the Western

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37. 42 U.S.C. § 12181(7) (while the examples listed are non-exclusive, the number of categories are limited to those enumerated in the statute).

38. See *Amazon.com – Earth's Biggest Selection* (visited Oct. 18, 2000), available at <http://www.amazon.com> (Amazon.com is a commercial website that sells books and other products).

39. 42 U.S.C. § 12181(7)(E).

40. See *Concord University School of Law* (visited Oct. 18, 2000), available at <http://www.concordlawschool.com>. Concord University School of Law is a division of Kaplan, Inc. *Id.* The school offers a Juris Doctorate (J.D.) degree to students who successfully complete its course of study over the Internet, and bills itself as "[t]he nation's premier online law school." *Id.*

41. 42 U.S.C. § 12181(7)(J).

42. Complaint for Plaintiffs at 19, *Nat'l Fed'n of the Blind, Inc. v. Am. Online, Inc.*, available at <http://www.education-rights.org/homenfbvaol.html> (visited Dec. 2, 2000).

43. Brief of Amicus Curiae United States Department of Justice, *Hooks v. OKBridge, Inc.*, No. 99-50891, 2000 U.S.App. LEXIS 23035, at \*1 (5th Cir., Aug. 21, 2000) available at <http://www.usdoj.gov/crt/briefs/hooks.htm>.

44. *Id.*

District of Texas had found that the website was not a place of public accommodation.<sup>45</sup> In its brief, the DOJ stated that OKBridge was a “commercial business offering services for a fee to the general public and easily falls within the ADA’s definition of a public accommodation as a ‘private entity’ that operates a ‘service establishment,’ place of ‘entertainment,’ or place of ‘recreation.’ . . . It delivers those services . . . through the internet to its customers.”<sup>46</sup> The DOJ added that OKBridge’s “computerized bridge tournaments are the ‘services . . . of [that] place of public accommodation.”<sup>47</sup>

### B. Commercial Websites as Places of Public Accommodation

Not all courts have accepted the idea that a place of public accommodation can exist without a physical facility, however. The ADA does not explicitly state that a physical structure is required; however, some courts have found such an implied requirement based on the types of entities enumerated in the statute.<sup>48</sup> The circuits have split on the issue of whether a physical structure is required; the Third and Sixth Circuits have held that it is required,<sup>49</sup> while the First Circuit has held that it is not.<sup>50</sup>

Many of the public accommodation cases examining the issue of physical presence arose in the context of insurance. In *Ford v. Schering-Plough Corp.*, for example, the issue before the Third Circuit was “the purely legal question of whether a disparity between disability benefits for mental and physical disabilities violates the Americans with Disabilities Act of 1990 (ADA).”<sup>51</sup> In finding that such disparity did not violate the ADA, the Third Circuit compared the ADA’s public accommodation

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45. *Id.* The facts of this case appear somewhat less sympathetic than the facts in the AOL case. The District Court’s opinion was not published and was not archived in either Lexis or Westlaw. However, the DOJ’s amicus brief noted that the District Court had dismissed Mr. Hook’s complaint on several alternate grounds, including some not addressed in the DOJ’s brief. The brief also noted that “OKBridge claimed that it terminated Hooks because of his persistent posting of obscene and abusive messages on the site’s discussion forum and because he cheated during a bridge tournament. . . . Hooks claimed that these allegations were false and a pretext for terminating him because he suffers from Bi-Polar disorder and other disabilities.” *Id.* The Fifth Circuit affirmed the grant of summary judgment on August 21, 2000, without comment. *See* *Hooks v. OKBridge, Inc.*, 99-50891, 2000 U.S. App. LEXIS 23035, at \*1 (5th Cir., Aug. 21, 2000).

46. *Id.*

47. *Id.*

48. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3rd Cir. 1998), *cert. denied* 525 U.S. 1093 (1999) (“The litany of terms, including ‘auditorium,’ ‘bakery,’ ‘laundromat,’ ‘museum,’ ‘park,’ ‘nursery,’ ‘food bank,’ and ‘gymnasium’ refer to places with resources utilized by physical access. . . . [W]e do not find the term ‘public accommodation’ or the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning.”).

49. *See* *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (en banc), *cert. denied* 522 U.S. 1084 (1998); *Ford*, 145 F.3d at 614.

50. *Carpenter Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.* 37 F.3d 12, 19 (1st Cir. 1994).

51. *Ford*, 145 F.3d at 603.

provision with Title II of the Civil Rights Act of 1964, which "proscribes racial and religious discrimination in 'the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . .'"<sup>52</sup> The court noted that the Civil Rights Act provision had been previously determined to apply only to places of public accommodation, and had not been extended to cover membership in an organization or other organizational activities.<sup>53</sup> By analogy, the court held that the ADA should also be limited to physical structures.<sup>54</sup>

The Sixth Circuit ruled similarly in *Stoutenborough v. National Football League, Inc.*<sup>55</sup> In *Stoutenborough*, hearing-impaired plaintiffs challenged a "blackout rule" prohibiting local televising of certain football games, arguing that such a rule was illegally discriminatory under the ADA.<sup>56</sup> The plaintiffs argued that non-hearing-impaired individuals could follow the games through radio broadcasts, but that hearing-impaired individuals could not follow the games without a television broadcast.<sup>57</sup> The appeals court upheld the district court's dismissal of the case, stating "the 'service' that *Stoutenborough* and Self-Help for Hearing Impaired Persons seek to obtain—the televised broadcast of 'blacked-out' home football games--does not involve a 'place of public accommodation.'"<sup>58</sup> The court concluded that "[a]lthough a game is played in a 'place of public accommodation' and may be viewed on television in another 'place of public accommodation,' that does not suffice."<sup>59</sup> The court relied upon the Justice Department's definition of "public accommodation" from the Code of Federal Regulations, where a place of public accommodation is limited to "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."<sup>60</sup>

The Sixth Circuit reaffirmed its commitment to the need for a physical location in *Parker v. Metropolitan Life Insurance Company*,<sup>61</sup> where it affirmed the district court's dismissal of a Title III claim based on a difference in insurance benefits depending on whether the policy

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52. *Id.* at 613 (quoting 42 U.S.C. § 2000a(a) (1994)).

53. *Id.* at 613 (citing *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269-75 (7th Cir. 1993), *cert. denied* 510 U.S. 1012 (1993); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755-56 (9th Cir. 1994)).

54. *Id.*

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

56. *Stoutenborough*, 59 F.3d at 582.

57. *Id.*

58. *Id.* at 583.

59. *Id.*

60. *Id.* (quoting 28 C.F.R. § 36.104). Interestingly, the definition contained in the Code of Federal Regulations does not appear to be consistent with the DOJ's assertion that the OKBridge website is a place of public accommodation. *See supra* text accompanying note 45.

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

holder develops a mental or physical disability.<sup>62</sup> The court noted that the “plaintiff did not seek the goods and services of an insurance office,” thus focusing on the physical structure of the accommodation and not on the service offered.<sup>63</sup>

Chief Judge Boyce F. Martin, Jr. dissented, writing that the court wrongly applied *Stoutenborough* to the case. He felt the true problem with *Stoutenborough* was that the defendants did not fall into one of the twelve enumerated categories of places of public accommodation, rather than the absence of a physical structure.<sup>64</sup> In his dissent in *Parker*, Judge Martin noted that the statute “specifically identifies” an insurance office as a public accommodation; therefore, he argued, the court’s reliance on the need for a physical office space was misguided, and the “public accommodation” analysis should have been affirmatively decided once it was determined that the defendant fit into one of the enumerated categories.<sup>65</sup> Judge Martin also criticized the policy implications of requiring a physical structure, pointing out that “[a]n increasing array of products and services are becoming available for purchase by telephone order, through the mail, via the Internet, and other communications media,” and lamented the fact that the majority’s decision could “operate to deprive them of rights that Title III would otherwise guarantee.”<sup>66</sup> Judge Merritt also wrote a dissenting opinion, pointing out that “according to the express language of the Court’s opinion, Parker is not covered because she got her coverage from MetLife through the employer instead of walking into a MetLife office and buying it.”<sup>67</sup>

The First Circuit, in contrast to the Third and Sixth Circuits, has ruled that a place of public accommodation need not be a physical place.<sup>68</sup> The plaintiff in *Car Parts Distribution Center* claimed that an insurance plan with a cap on benefits for persons with AIDS illegally discriminated on the basis of disability.<sup>69</sup> The district court dismissed the claims and the appellate court remanded the case.<sup>70</sup> The appeals court disagreed with the district court’s ruling that a place of public accommodation is “limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein.”<sup>71</sup> The appeals court noted that Congress had not chosen to include an express limitation of physical

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62. *Parker*, 121 F.3d at 1008.

63. *Id.* at 1010.

64. *Id.* at 1019.

65. *Id.*

66. *Id.* at 1020.

67. *Id.*

68. *Car Parts Distrib. Ctr. v. Auto. Wholesaler’s Ass’n*, 37 F.3d 12 (1st Cir. 1994).

69. *Car Parts*, 37 F.3d at 14.

70. *Id.* at 21.

71. *Id.* at 18 (quoting *Carparts Distrib. Ctr. v. Auto. Wholesaler’s Ass’n*, 826 F. Supp. 583, 586 (D.N.H. 1993)).

facilities.<sup>72</sup> In the absence of such a limiting clause, the court looked for other evidence of Congressional intent with regard to physical structures, and found that “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.”<sup>73</sup> The court further considered other potential forms that a public accommodation might take, and specifically noted that an Internet site could be a way of accessing goods and services: “Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services.”<sup>74</sup> The court concluded that “exclud[ing] this broad category of businesses from the reach of Title III . . . would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.”<sup>75</sup>

A district court in California adopted the *Car Parts* rule and added further that basic principles of statutory construction required the court to apply the ADA beyond the physical facility.<sup>76</sup> The court noted that the ADA required businesses to make reasonable modifications to policies or procedures when “such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”<sup>77</sup> The court noted that “[i]t is axiomatic that courts must interpret statutes so as to avoid rendering superfluous any parts thereof . . . Finding that Title III applies only to physical barriers to entry would render meaningless the provisions providing for equal access to goods and services.”<sup>78</sup>

It is important to note that most of the cases examining the requirement for a physical structure occur in the insurance context. Several of these cases look at the actual insurance product itself, and focus on whether the benefits offered can differ based on disability alone. While a number of courts have been reluctant to apply a Title III analysis to the insurance product itself, cases arising in the Internet context might be treated differently. Logging on to a website can be seen as analogous to traveling to a store; browsing the pages is much like browsing the shelves. In *Ford*, the court differentiated between an insurance office and an insurance policy by analogy to “a bookstore [that] must be accessible to the disabled but need not treat the disabled equally in terms of books

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72. *Id.* at 20 (“Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry.”).

73. *Id.* at 19.

74. *Id.* at 20.

75. *Id.*

76. *Chabner v. United of Omaha Life Ins. Co.*, 994 F.Supp. 1185 (N.D. Cal. 1998).

77. *Chabner*, 994 F.Supp at 1190.

78. *Id.*

the store stocks.”<sup>79</sup> The issue with websites, unlike the issue with insurance policies, is providing access to the bookstore itself – Amazon.com, for instance – and not about changing the nature of the products offered.

The Court of Appeals for the Seventh Circuit stated in dicta that a facility can in fact exist in cyberspace; in *Doe v. Mutual of Omaha Insurance Company*, the court categorized websites alongside physical facilities.<sup>80</sup> Chief Judge Richard Posner wrote that “[t]he core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space . . .) that is open to the public cannot exclude disabled persons . . . .”<sup>81</sup> While Judge Posner was willing to explicitly include websites in his definition of “facility,” not every court has agreed. A federal district court in Texas recently ruled that Title III does not apply to a company that “provides its services over the internet rather than at a physical place,”<sup>82</sup> even though the Fifth Circuit has clear precedent that places of public accommodation must make all goods and services available to the disabled.<sup>83</sup>

### C. Websites Created by Entities with a Physical Presence

If courts are unwilling to consider Internet sites as places of public accommodation, such websites may still fall under Title III if they are owned or operated by a “brick and mortar” company. In *Parker*, the Court of Appeals for the Sixth Circuit noted that it had “expressed no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation.”<sup>84</sup> Using reasoning similar to the Fifth Circuit’s decision in *McNeil v. Time Insurance Company*,<sup>85</sup> the Court of Appeals for the Third Circuit also stated in dicta that a public accommodation may need to make its services accessible, regardless of whether those services are offered in the facility or elsewhere. In *Doe v. Board of Medical Examiners*, a medical student alleged that the score reporting system for the medical board violated the ADA by distinguishing the scores of students taking the test

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79. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3rd Cir. 1998), *cert. denied* 525 U.S. 1093 (1999).

80. *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (citing *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)).

81. *Doe*, 179 F.3d at 559 (citing *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)).

82. Brief of Amicus Curiae United States Department of Justice, *Hooks v. OKBridge, Inc.*, 232 F.3d 208, 2000 U.S. App. LEXIS 23035 (5th Cir. 2000) (No. 99-50891).

83. *McNeil v. Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000) (holding that the content of an insurance policy was not covered by Title III, but stating nonetheless that Title III “assures that the disabled have access to all goods and services offered by the business.”).

84. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 n3. (6th Cir. 1997) (en banc).

85. See 205 F.3d 179 (5th Cir. 2000).

with and without accommodation.<sup>86</sup> The Board argued that the relationship between the score reporting system and the test facility was too attenuated for the ADA to apply; the lawsuit did not allege that the facility itself was inaccessible.<sup>87</sup> However, the court wrote that the “plain meaning of Title III is that a public accommodation is a place, leading to the conclusion that it is all of the services which the public accommodation offers . . . which fall within the scope of Title III.”<sup>88</sup> The court added that the important question was whether there was a sufficient nexus between the facility and the service offered, “We look for . . . some nexus between the services or privileges denied and the physical place of the . . . public accommodation.”<sup>89</sup> The court decided against the plaintiff on other grounds, but found that there was a “forceful argument” for finding a sufficient nexus in *Doe*, as “no one would take the exam except to obtain a score.”<sup>90</sup>

Plaintiffs seeking to file an ADA claim against a commercial website in the Third or Sixth Circuits may be able to rely on this type of nexus argument. Many corporations and retail establishments utilizing on-line selling on the Internet also operate stores that have a physical presence and fall into one of the twelve enumerated categories.<sup>91</sup> Some Internet sites allow users to order goods or services directly from a particular store; PapaJohns.com, for example, directs users to their nearest Papa John’s pizza restaurant and allows them to order online. Users may have a strong nexus argument that “but for” the existence of the physical facility (i.e., restaurant) they would have no reason to attempt to order pizza from the website. Further bolstering such an argument, the Department of Justice has issued an opinion that Internet communications from entities already covered by Title III would need to be made in an accessible format.<sup>92</sup> The letter recommends methods for ensuring that Internet content is compatible with screen-readers used by the blind.<sup>93</sup>

#### D. School and Educational Institution Websites

Private schools are specifically included as places of public accommodation under 42 U.S.C. § 12181(J).<sup>94</sup> However, there is an additional provision in the ADA --§12189,<sup>95</sup> which further specifies that all examinations and courses offered for “licensing, certification, or credentialing”

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86. *Doe*, 199 F.3d at 146.

87. *Id.* at 157.

88. *Id.* (quoting *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3rd Cir. 1998)).

89. *Id.* (quoting *Menkowitz v. Pottstown Mem’l Med. Ctr.*, 154 F.3d 113, 122 (3rd Cir. 1998)).

90. *Id.* at 157 n.4.

91. *See, e.g.*, Gap.com, Toysrus.com, target.com and bankofamerica.com.

92. Letter from Deval L. Patrick, Asst. Attorney Gen., Civil Rights Div., to Senator Harkin (Sept. 9, 1996), available at <http://www.usdoj.gov/crt/foia/cltr204.txt> (Sept. 9, 1996).

93. *Id.*

94. 42 U.S.C. §12181 (1994).

95. 42 U.S.C. §12189.



must be offered in an accessible format.<sup>96</sup> The Department of Justice has been especially active in enforcing educational accessibility; the DOJ filed suits against various companies offering preparation courses for the bar exam, the CPA exam, and college entrance exams.<sup>97</sup> The DOJ reached settlements with such companies only after they agreed to provide auxiliary aids such as qualified sign language interpreters, assistive listening devices, and materials in Braille.<sup>98</sup>

Section 12189 may be interpreted as requiring a heightened standard of accessibility for educational providers, for it requires examinations and courses to be offered “in a place *and manner* accessible to persons with disabilities.”<sup>99</sup> (emphasis added). Therefore, it is not just the physical location that must be made accessible, but also the educational services themselves. The ADA prohibits a place of public accommodation from “exclud[ing], den[ying] services, segregat[ing] or otherwise treat[ing] differently” persons with disabilities “because of the absence of auxiliary aids and services.”<sup>100</sup> The statutory definition of “auxiliary aids and services” offers examples such as “qualified interpreters,” “qualified readers,” and “taped texts.”<sup>101</sup>

Today, many schools require students to take tests and/or courses over the Internet. Farleigh Dickinson University, for example, adopted a policy requiring students to take at least one online course.<sup>102</sup> Credentialing bodies also offer license renewals online—in Texas; air conditioning contractors can renew their licenses over the Internet.<sup>103</sup> Many other educational and credentialing organizations are offering online services to participants in conjunction with more traditional programs; the University of Texas undergraduate program has launched “Web-based, password-protected class sites . . . associated with all academic courses” for the spring semester 2001.<sup>104</sup> These websites will include activities such as

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96. See ADA Title III Technical Assistance Manual, § III-4.6000 available at <http://www.usdoj.gov/crt/ada/taman3.html> (last visited Nov. 12, 2000).

97. See U.S. Department of Justice, *Enforcing the ADA: Looking back at a Decade of Progress* (July 2000) available at <http://www.usdoj.gov/crt/ada/pubs/10thrpt.htm> (last visited Oct. 19, 2000).

98. *Id.*

99. 42 U.S.C. § 12189.

100. *Id.* at § 12182(b)(2)(A)(iii).

101. *Id.* at § 12102 (1).

102. See Associated Press, *University to Require Online Class* (Oct. 15, 2000), available at [http://dailynews.yahoo.com/h/ap/20001014/us/online\\_course.html](http://dailynews.yahoo.com/h/ap/20001014/us/online_course.html) (last visited Oct. 15, 2000). See also Farleigh Dickinson University: *FDU in the news*, at <http://www.fdu.edu/newspubs/fduinthenews.html> (describing Farleigh Dickinson as “the first traditional university to recognize the global importance of the Internet by requiring every full-time undergraduate to take at least one distance-learning course each year.”).

103. The Texas Dep’t of Licensing and Regulation: Air Conditioning and Refrigeration Contractors On-line Renewal Application at <http://www.license.state.tx.us/eProcessing/ACRrenewInit.asp> (last visited Nov. 25, 2000).

104. Spring 2001 Course Schedule, The University of Texas at Austin at <http://www.utexas.edu/student/registrar/schedules/spring/fr-whnew.html> (last visited Dec. 5, 2000).

“exchanging e-mail, engaging in class discussions and chats, and exchanging files.”<sup>105</sup>

Under § 12189, educational courses and licensing requirements need to be accessible to the disabled. The section does allow organizations providing such services to “offer alternative accessible arrangements” in lieu of making the general program accessible.<sup>106</sup> However, alternative arrangements might be easier in some cases than others. Allowing air conditioning repair technicians the chance to renew their applications by mail might preclude the necessity of making the renewal web page accessible. For the universities, on the other hand, it might be easiest to make sure that the class web sites are accessible. Since all undergraduate classes at the University of Texas are expected to have a web-based component, it would probably be more difficult to find a viable alternative for disabled students than it would be to simply ensure that the websites are capable of including all students. Likewise, since Farleigh Dickinson University is choosing to require all students to take a course through the Internet, it is difficult to imagine any viable option other than developing accessible websites. The university could employ assistants to click through inaccessible websites and read the text aloud to any student who is visually impaired or physically unable to manipulate a mouse. However, this option would probably be so costly as to appear ridiculous when compared to the option of simply adding text tags and keyboard controls into the original programming code.

#### E. *Government Websites*

The ADA creates requirements for state and local governments that are also stronger than the Title III requirements for commercial entities. Section 12132 states “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.”<sup>107</sup> This standard is broader than Title III, and its inclusion of “services, programs, or activities” does not tie the statute to any kind of physical facility.<sup>108</sup>

Unlike the bookstore in the analogy raised by the *Ford* court,<sup>109</sup> where the bookstore had to be physically accessible, but need not stock Braille books, governmental entities have an affirmative responsibility to make *all* “services, programs, and activities” accessible to the disabled.<sup>110</sup> This responsibility includes providing appropriate auxiliary aids such as Braille materials, to ensure that the government provides equal commu-

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105. *Id.*

106. 42 U.S.C. § 12189 (1994).

107. 42 U.S.C. § 12132.

108. *Id.*

109. *See supra* text accompanying note 79.

110. 42 U.S.C. § 12132.

nication to all of its citizens, regardless of disability.<sup>111</sup> While the Department of Justice's published guidelines to state and local governments have thus far focused on printed matter, it is no great leap of logic to say that state governments have the same obligation to provide their electronic communications in an accessible format as they have with their paper communications.

Federal government websites must also follow accessibility guidelines. However, while the ADA covers state and local entities, Section 508 of the Rehabilitation Act, passed in 1998, governs the accessibility standards for federal government information systems, which includes websites.<sup>112</sup> This section contains quite rigorous standards. The Act requires the federal government to ensure that persons with disabilities have the same access to electronic information and data as persons without disabilities.<sup>113</sup>

The Rehabilitation Act charged the Access Board, an independent federal agency, with developing standards to govern the implementation of Section 508.<sup>114</sup> The law's enforcement provisions were originally scheduled to become effective on August 7, 2000.<sup>115</sup> However, in July of 2000 the president signed a law to delay implementation until six months after the Access Board passed its final standards.<sup>116</sup>

The proposed standards would affect website design in several basic ways. First, the standards would require that all graphics be given a text label.<sup>117</sup> Second, animations would be required to flash at a rate of two Hertz or less, to prevent seizures in people with epilepsy.<sup>118</sup> Third, color could not be the only means of identifying visual elements.<sup>119</sup> Finally, web-based applications would be required to allow keyboard input, an

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111. U.S. Department of Justice, *The ADA and City Governments: Common Problems*, (May 9, 2000), available at <http://www.usdoj.gov/crt/ada/comprob.htm> (last visited Nov. 30, 2000).

112. 29 U.S.C. § 794d (2001).

113. 29 U.S.C. § 794d (a)(1)(A)(i)-(ii) ("When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology . . . individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities."). See also ACCESS BOARD, QUESTIONS & ANSWERS ABOUT SECTION 508 OF THE REHABILITATION ACT AMENDMENTS OF 1998, available at <http://216.218.205.189/sec508/brochure.htm> (last visited Nov. 5, 2000).

114. 29 U.S.C. § 794d (a)(2)(A)(iii).

115. *Id.* at § 794(d) (f)(1)(B) (amended 2000).

116. Pub. L. No. 106-246 Stat. 555 (signed by President Clinton on July 13, 2000). See also Federal IT Accessibility Initiative, Bill to Change 508 Enforcement Date Signed by the President at <http://www.section508.gov/docs/updateinfo.html> (last visited Nov. 5, 2000).

117. Access Board, *supra* note 16.

118. *Id.*

119. *Id.*

issue important both to users with visual impairments and users with certain mobility impairments.<sup>120</sup>

The law as written would apply only to federal government agencies.<sup>121</sup> Unlike some other Rehabilitation Act provisions, it would not apply generally to state or local agencies receiving federal funds.<sup>122</sup> Nonetheless, Section 508 could still apply to the states through a grant distributed by the Department of Education. The Technology-Related Assistance for Individuals with Disabilities Act of 1998 ("Tech Act") and the Assistive Technology Act of 1998 ("AT Act") both require agencies receiving grant funds to comply with Section 508.<sup>123</sup> Currently, all fifty states receive funding under Section 101(e)(3) of the AT Act, and will therefore be required to comply with Section 508.<sup>124</sup> Therefore, while the law itself does not require states to comply with Section 508, the acceptance of AT Act funds requires states to comply voluntarily or risk losing federal funding for assistive technology.

States could choose to forgo the AT grants in order to avoid complying with section 508.<sup>125</sup> However, as noted above, the ADA would still apply to state services—including those services that are provided through the Internet. Even if the Supreme Court were to rule that the ADA cannot be applied against state governments<sup>126</sup> and the states chose to forgo the AT grants, some states would still be required under state law to make their websites accessible. In Texas, for example, the state legislature passed a law requiring all state agencies to maintain a website and to ensure the websites "conform[ ] to generally acceptable standards for Internet accessibility for people with disabilities."<sup>127</sup>

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120. *Id.*

121. U.S. Department of Education, *Q&A: Title IV—Rehabilitation Act Amendments of 1998*, Section 508: Electronic and Information Technology at <http://www.usdoj.gov/crt/508/archive/deptofed.html> (last visited Nov. 5, 2000).

122. *Id.*

123. *Id.*

124. Carol Boyer, *Rehabilitation Engineering and Assistive Technology Society of North America*, TECHNICAL ASSISTANCE PROJECT: LIBRARIES AND SECTION 508 OF THE REHABILITATION ACT, at <http://www.resna.org/taproject/policy/initiatives/508/boyer.html> (last visited Nov. 5, 2000).

125. While all fifty states currently receive funding from the AT Act, the amount of funding is relatively small compared to the size of most state budgets. Massachusetts, for example, receives only \$400,000 from this source, and New York receives only \$500,000. The small size of the grant relative to the entire state budget may "make[] the likelihood of state attention to - and compliance with - Section 508 fairly remote." Carol Menton, Comments by the Massachusetts Assistive Technology Partnership, available at <http://www.access-board.gov/sec508/comments-nprm/61.htm> (last visited Nov. 11, 2000).

126. See *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 529 U.S. 1065 (2000).

127. S.B. 801, 1999 Leg., 76th Sess. (Tx. 1999). Notably, the fiscal note attached to the bill stated that the legislation would have "[n]o significant fiscal impact" on state agency resources.

#### F. *Exceptions to the ADA*

Assuming that a website operator was subject to the ADA under one of the above categories, what kind of changes to the website would the law require? The ADA defines discrimination, in part, as:

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;<sup>128</sup>

The ADA further defines “auxiliary aids or services” to include “methods of making aurally delivered materials available to individuals with hearing impairments” and “methods of making visually delivered materials available to individuals with visual impairments.”<sup>129</sup> Most of the programming techniques discussed above in Part One are designed to accomplish exactly those objectives; adding textual tags can make visual information accessible to screenreading equipment, for example, and captioning video segments allow persons with hearing impairments to make sense of aurally delivered information.

This prohibition on discrimination, however, contains two very important exceptions. First, exclusion of persons with disabilities is not considered discriminatory if creating accessibility would “fundamentally alter” the nature of the good or service.<sup>130</sup> Secondly, accessibility is not required if it would result in an “undue burden.”<sup>131</sup>

#### G. *Fundamental Alteration*

Critics of the ADA’s application to the Internet have charged that such application would fundamentally alter online services.<sup>132</sup> The statute provides an exemption of accessibility standards that would require “a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.”<sup>133</sup> Courts have generally tried to determine the impact that such alterations would have on the non-disabled; if creating an accessible service would significantly impair others’ enjoyment of the activity,

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128. 42 U.S.C. § 12182(b)(2)(A)(iii) (2001).

129. 42 U.S.C. § 12102(1).

130. *Id.* at § 12182(b)(2)(A)(iii).

131. *Id.*

132. See *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 106th Cong. (2000) (statements of Elizabeth K. Dorminey and Walter Olson).

133. U.S. Department of Justice, ADA Title III Technical Assistance Manual, § III-4.3600 at <http://www.usdoj.gov/crt/ada/taman3.html> (last visited Nov. 12, 2000).

courts are less likely to require accessibility. For instance, a California court did not require a karate studio to offer low-impact karate classes to accommodate an HIV-positive karate student, as the court found that the studio's "unique niche in the martial arts market was its adherence to traditional, 'hard-style' Japanese karate" and that "contact between participants, which causes the bloody injuries and creates the risk of HIV transmission, was an integral aspect of such a program."<sup>134</sup>

Similarly, two circuit courts of appeal have reached different conclusions about whether allowing people with disabilities to participate in golf tournaments with the aid of golf carts would fundamentally alter the game.<sup>135</sup> Both courts looked to see whether non-disabled golfers' enjoyment would be seriously impaired. However, the courts reached different factual conclusions on the impact that such an accommodation would have on the non-disabled players. In *Olinger v. United States Golf Association*,<sup>136</sup> the Seventh Circuit found that fatigue from walking was an "integral part" of the competition.<sup>137</sup> The court took note of testimony describing a man who won the U.S. Open in 1964 by walking in 100 degree heat while battling dehydration, and found "[this] testimony . . . by itself, supports [the requirement] that all players play all tournaments under the same conditions and rules."<sup>138</sup> In *Martin v. PGA Tour, Inc.*,<sup>139</sup> by contrast, the Ninth Circuit found the "fatigue factor" from walking was insignificant, and noted that some golfers chose to walk the course even in competitions where carts were allowed.<sup>140</sup> The Ninth Circuit also noted that there was no handicap penalty attached to using a golf cart in other competitions, thus suggesting that no actual advantage was gained by using such a cart.<sup>141</sup> However, the result would have been different had the trial court found the accommodation gave Martin an "unfair advantage" over other competitors, like using a "golf ball that carried farther than others."<sup>142</sup>

Following the direction of these courts, it seems likely that website accommodations would not be required if they would impair others' enjoyment or use of the site. Some commentators have argued that accessible websites would limit their usefulness to the non-disabled population. In her testimony before Congress, lawyer Elizabeth Dorminey warned that applying the ADA to the Internet would mean that "[p]ictures and

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134. *Montalvo v. Radcliffe*, 167 F.3d 873, 879 (4th Cir. 1999).

135. See *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000); but see *Martin v. PGA Tour*, 204 F.3d 994 (9th Cir. 2000).

136. *Olinger*, 205 F.3d 1001.

137. *Id.* at 1006.

138. *Id.*

139. *Martin*, 204 F.3d 994.

140. *Id.* at 1000.

141. *Id.*

142. *Id.* at 1001.

graphics would be prohibited, and most games would be banned.”<sup>143</sup> Certainly, a complete prohibition on graphics would cause the Internet to be less enjoyable for many people.<sup>144</sup> A lack of games might cause a revolt among teenagers; one recent news article reported that “as many as 70 percent of the country’s online teenagers utiliz[e] the internet to play games.”<sup>145</sup>

As noted above, however, guidelines for website accessibility do not require eliminating graphics; rather, they simply require that a text tag be attached to the graphic in the programming code, so that screen readers can work around the graphics.<sup>146</sup> According to Dr. Steven Lucas, an Internet professional who helped develop standardized programming guidelines, “[a]ccessibility techniques are not designed to limit the creativity of the designer.”<sup>147</sup> In fact, the pages will have the same look and feel to the non-disabled user, complete with fancy graphics. Lucas explains, “[t]he artistic nature of the site will not be affected if the site is created with text-only pages first. Once the text version is created and tested for accessibility, the images and other artistic design features can be added.”<sup>148</sup> Even when the graphical site is created first, text tags can still be added to the programming code at a later time. Therefore, it is unlikely that ADA compliance would require removing any graphics from the webpage.

Games are equally unlikely to be banned. Many video games test the player’s visual reflexes and manual dexterity. Assuming that most courts would find such testing to be an “integral aspect” of the games, the *Montalvo* court’s analysis would apply, and the games--like the karate studio in *Montalvo*--would not be required to “abandon [their] essential mission” in pursuit of accessibility.<sup>149</sup> While the games themselves might not have to be accessible, however, their exemption does not mean that a commercial website offering some games as part of the mix of

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143. See Dorminey, *supra* note 132.

144. See Erik Sherman, *Speeding up Internet Graphics*, SMART COMPUTING, (Nov. 1998), available at <http://www.smartcomputing.com/editorial/article.asp?article=articles%2Farchive%2Fworktheweb%2Fwtw30%2Fwtw30%2Easp> (last visited Oct. 19, 2001) (“Web pages are as much about graphics as text.”). *Id.*

145. See Gamers News, *New Adventure, Strategy Game Island Odyssey*, (Dec. 19, 1999), at <http://www.seriousgamers.com/sgnews12-19-99.shtml> (last visited Oct. 19, 2001).

146. See *supra* text accompanying note 15. Additionally, persons with epilepsy or others who may be bothered by flashing animations can simply turn the graphics option off; the text tags attached to the graphics would still permit the user to navigate through the website without the use of graphics. This function would be limited to the individual’s workstation, so that other people who may desire to see the graphics would be entirely unaffected.

147. *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearings Before the House Subcomm. on The Const. of the House Comm. on the Judiciary*, (2000) (statement of Dr. Steven Lucas, Senior Vice President, Industry Government Relations & Chief Executive Officer, PrivaSeek, Inc.)

148. *Id.*

149. *Montalvo v. Radcliffe*, 167 F.3d 873, 879 (4th Cir. 1999).

products on its website should be exempt from the ADA. Similar to the bookstore in the analogy developed by the *Ford* court,<sup>150</sup> the site itself could be accessible even though it might offer some products that could not be used by all persons.

#### H. *Undue Burden*

Accommodations that would create an undue burden are also not required by the ADA. Federal regulation defines "undue burden" as "significant difficulty or expense."<sup>151</sup> The regulation lists several factors to determine when an individual action would create an undue burden. These factors include:

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.<sup>152</sup>

However, the "undue burden" defense is unlikely to provide a refuge for very many website operators. First, cost estimates show that most website operators will incur only a minimal cost to add accessibility features.<sup>153</sup> Second, when a particular accommodation might result in a high cost, there are usually lower-cost alternatives for providing access. Some website operators are concerned, for example, that providing

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150. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3rd Cir. 1998) ("a bookstore must be accessible to the disabled but need not treat the disabled equally in terms of books the store stocks.").

151. 28 CFR § 36.104 (1991).

152. 28 CFR § 36.104. These factors are substantially similar to the factors listed in Title I, used to determine when an employment accommodation would result in an undue hardship. 42 U.S.C. § 12111 (10)(B)(2001).

153. See United States Architectural and Transportation Barriers Compliance Board, Electronic and Information Technology Accessibility Standards Section 508 of the Rehabilitation Act Amendments of 1998: Economic Assessment at <http://www.section508.gov/docs/508-reg-assess.html#ES.4> (last visited Dec. 5, 2000) (estimating that building accessible web sites will result in "minimal incremental costs"); see also Boyer, *supra* note 124 (noting that creating accessible web pages for Texas state agencies was estimated to have "[n]o significant fiscal impact.").



closed-captioning for video broadcasts over the Internet could be quite expensive.<sup>154</sup> However, a transcript of the video might be easier to produce and still provide access to the hearing impaired. The Department of Justice provides similar alternatives in the context of guided tours, noting that while “[i]t may be an undue burden for a small private historic house museum on a shoestring budget to provide a sign language interpreter for a deaf individual wishing to participate in a tour. . . a written script of the tour. . . would be an alternative that would be unlikely to result in an undue burden.”<sup>155</sup>

Some commentators are skeptical that offering website accessibility could really be a low-cost option. If such a requirement were truly not burdensome, they argue, then surely more websites would be compliant. Walter Olson, Senior Fellow at the Manhattan Institute, noted that “[a]lthough we are often told that it is easy to design these features into a website, it is worth remarking that even many of the websites that you might visit in the course of educating yourself about disability rights are themselves out of compliance.”<sup>156</sup> However, the burden seems to lie in simple attention to the issue, not in the implementation of programming changes. For example, AOL was able to make changes quickly and easily once their management made the decision to make its next version accessible. In fact, when a consultant hired by AOL to advise the company on accessibility issues was asked why AOL did not implement accessibility guidelines as soon as its technicians became aware of AOL’s deficiencies, he blamed internal communications problems and the size of the company.<sup>157</sup> Furthermore, the media’s attention to the AOL case served to educate many website designers about the importance of accessible design and, according to the report of one technology journal, has “effectively raised awareness about making technology user-friendly to disabled computer users across the technology community.”<sup>158</sup> Evidence of this awareness can be seen through “Bobby”, a popular tool for gaug-

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154. See generally Cynthia D. Waddell, *The Growing Digital Divide In Access For People With Disabilities: Overcoming Barriers To Participation In The Digital Economy*, paper presented at U.S. Dep’t of Commerce Conference “Understanding the Digital Economy: Data, Tools, and Research,” (May 25-26, 1999) available at [http://www.icdri.org/the\\_digital\\_divide.htm](http://www.icdri.org/the_digital_divide.htm) (last visited Oct. 25, 2001).

155. U.S. Department of Justice, ADA Title III Technical Assistance Manual, § III-4.3600 at <http://www.usdoj.gov/crt/ada/taman3.html> (last visited Nov. 12, 2000).

156. *The ADA and It’s Application to World Wide Web Sites: Hearing before the Subcomm. on the Const. of the House Comm. on the Judiciary Comm.*, 107th Cong. (2000) (statement of Senior Fellow, Manhattan Institute, Walter Olson) (citing non-complying websites such as <http://www.whitehouse.gov> and <http://www.civil-rights.org>, the website of the Leadership Conference on Civil Rights).

157. Lisa Vaas, *Courts, Uncle Sam Begins To Clamp Down On Disabled-Unfriendly Web Sites*, PC WEEK, April 10, 2000, available at LEXIS, News Library, News Group File.

158. Jennifer Jones, *Users With Disabilities Push High-Tech Limits*, INFOWORLD, Sept. 4, 2000, available at LEXIS, News Library, News Group File.

ing website accessibility, which as of November 2000, has examined over three million websites each month.<sup>159</sup>

### III. POLICY CONCERNS

As noted above in Part Two, there are many cases in which a valid ADA claim can be brought against an online content provider with a reasonable probability of success.<sup>160</sup> However, many commentators address the issue of Internet accessibility and the ADA, often with very strong, and sometimes diametrically opposing, points of view as to whether the ADA should apply to the Internet.<sup>161</sup> Any future decision on the role of the ADA in Internet regulation, whether it be legislative or judicial, will have to take into account the inherent tensions between various legal, regulatory, and public policy goals. This section will examine some of the most widely discussed issues, including: (A) discerning (and following) legislative intent; (B) providing access to economic opportunity; (C) minimizing the economic and regulatory burden on a growing sector of the economy; (D) avoiding a flood of litigation; and (E) correcting market failure.

#### A. Legislative Intent

The Internet itself is not listed as one of the twelve places of public accommodation. Some commentators argue that this omission means that websites should be categorically excluded from the public accommodation umbrella. "The principle of 'inclusio unius est exclusio alterius', the inclusion of some assumes the intentional exclusion of others, supports excluding the Internet from the definition of public accommodation."<sup>162</sup> However, the Internet in its current form did not exist in 1990, so it cannot be said that Congress meant to exclude it. Furthermore, the Supreme Court has held that the ADA covers areas that Congress might not have envisioned, such as state prison programs and that such an extension of the law demonstrates the Act's breadth, not ambiguity.<sup>163</sup>

In fact, it makes logical sense that Congress intended more than permitting the disabled access to the physical structure of a bank or a grocery store. Rather, Congress was concerned about the ability of persons with disabilities to meet basic needs, such as banking or grocery

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159. See <http://www.cast.org/bobby/What'sNew321.cfm> (last visited Nov. 30, 2000).

160. See *supra* Part Two.

161. See, e.g., Frezza, *supra* note 6 (arguing that applying the ADA to the Internet would cause a regulatory burden) and Waddell, *supra* note 154 (arguing that applying the ADA to the Internet would improve commerce and employment opportunities).

162. See Dorminey, *supra* note 132.

163. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 212-13 (1998) ("[i]n the context of an unambiguous statutory text [whether or not Congress envisioned a specific application] is irrelevant. As we have said before, the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (citing *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

shopping. Today, banks and grocery stores have a complete range of services available over the Internet and it makes little sense to assume that Congress would have allowed such entities to discriminate against the disabled simply because the online businesses subscribe to a different business model. Even the most strict reading of the text would argue for the inclusion of at least some online businesses. As mentioned above, grocery stores are explicitly covered by the statute, and Grocery-Works.Com is no less of a grocery store than Food Lion.

Furthermore, the question of legislative intent arises primarily when determining whether commercial websites fit under the rubric of places of public accommodation. In other areas, such as governmental programs or educational services, the statute is written broadly enough that it is difficult to argue that websites in these two categories would not be covered. The statute, after all, covers governmental "services", and this category is broad enough under the statute's plain text to include all services offered by the governmental entity, not just those services offered in 1990, when the ADA was enacted.

#### B. *Economic Opportunity*

President Bush described the ADA as a way to provide the disabled "with greater opportunities to bring their knowledge, ideas, and commitment to the workplace" and a "crucial investment in our Nation's future."<sup>164</sup> Continuing to provide these opportunities means providing access to the Internet, because many economic opportunities in today's world are available only online. Use of the Internet has become important, for example, in maintaining employment. Gary Wunder reports, "in my job, electronic mail conducted via the Internet is the standard way we communicate. Our meeting calendars are maintained electronically and shared [on the Internet]. Even the list I use to telephone my colleague . . . [is] accessible only by using the tools of the Internet."<sup>165</sup>

Critics have suggested that applying the ADA to the Internet might actually result in decreased access to economic activity as website operators may simply "learn to do no more than the rules force them to do, avoiding changes that could improve their products or services."<sup>166</sup> This argument would hold more weight, however, if companies were creating accessible sites on their own. The four-year struggle to gain accessibility from AOL, along with the dearth of accessible sites, demonstrates that a

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164. President's Proclamation, *supra* note 1.

165. *Hearing on the ADA and Private Internet Sites, Testimony Before the House Comm. on the Judiciary, Subcomm. on the Const.*, 106th Cong. (2000) (statement of Gary Wunder, University of Missouri).

166. *Hearing on the ADA and Private Internet Sites, Testimony Before the House Comm. on the Judiciary, Subcomm. on the Const.*, 106th Cong. (2000) (statement of Elizabeth Dorminey, Lawson, Steckel, Nelson & Schneider).

company providing even minimum accessibility is still preferable to a company providing no accessibility.

### C. *Minimizing the Regulatory Burden*

Other people have argued that the Internet is a special case: a technology and an industry still in its infancy that could be irreparably harmed through over-regulation. Critics have warned, for example, that “regulations that prescribe burdensome formats for U.S.-based websites could easily – and at little cost – drive site owners offshore, beyond the reach of these regulations, making the U.S. less competitive in this dynamic sector of the economy.”<sup>167</sup> This argument has some merit. If regulations are so burdensome that website operators choose to move offshore, then the economy would lose that business and people with disabilities would still be left with inaccessible websites.

Since the ADA provides an exception for actions that would cause “undue burden,” the risk in this case is that the regulations provide enough of a burden to entice a company off-shore, but not so much of a burden as to exempt them from the ADA’s requirements. This scenario is unlikely to occur, however. First, the federal government’s experience has shown us that the cost of creating accessibility is likely to be very low; the federal government did not experience any measurable cost to bring its sites into compliance with strict federal standards.<sup>168</sup> Other estimates for private websites have shown the increase in cost to be about one to two percent over what entities were currently spending on their websites.<sup>169</sup> Second, even small businesses with fewer resources than the federal government have made their websites accessible. Instead of making the sites more expensive, they have found that it has actually increased their business. Finally, many corporations cannot simply move their websites offshore to avoid complying with U.S. law. Websites run by corporations headquartered in the U.S. still have an obligation to comply generally with American laws.

### D. *Fear of a Flood of Litigation*

Critics also warn that applying the ADA to the Internet will result in a flood of litigation. Walter Olson warns that “if it is easy pickings to walk down a town’s main shopping street and find stores that you can hit with an ADA suit over their physical facilities, then it is even easier to browse the web and find websites that are arguably out of ADA compli-

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167. *Id.*

168. *See supra* note 152.

169. *But see* Bill Day, *Businesses Find Disabilities Act Has Been A Plus*, SAN ANTONIO EXPRESS-NEWS, July 23, 2000, available at LEXIS, News Library, News Group File.

ance.”<sup>170</sup> Congressional counsel Paul Taylor agrees that applying the ADA to the Internet could “make most anyone who offers goods or services over the Internet a potential defendant in an ADA lawsuit.”<sup>171</sup> Many of these critics object to the ADA as it is currently written and would prefer to see the elimination of recovery for attorney’s fees and the addition of a provision requiring plaintiffs to provide businesses with some time to comply before a suit may be instituted.<sup>172</sup>

Other people, however, worry that reducing people’s ability to sue for access will result in fewer companies taking action to create accessibility. As one newspaper article reported, “the law is largely reactive. It is driven by complaints and lawsuits rather than aggressive enforcement through regular inspection.”<sup>173</sup> Furthermore, private individuals who bring suit against an inaccessible public accommodation cannot recover monetary damages, but can recover only injunctive relief and “reasonable” attorney’s fees—thus limiting the incentive to file frivolous lawsuits.<sup>174</sup>

### E. Market Failure

Economic theory tells us that we should expect to see companies rushing to fill pent-up consumer demand as new markets are identified. One of the lessons learned over the last ten years is that companies can actually improve profitability by making their services accessible to the disabled. Greyhound Bus Lines, for example, told federal regulators shortly after the passage of the ADA that complying with the act would “bankrupt them and put them out of business.”<sup>175</sup> The company was ordered to comply with the law, however, and reported shortly thereafter that overall ridership had increased as a result of the increase in disabled passengers.<sup>176</sup>

Internet businesses that have made their websites accessible have reported similar results. A recent PC World article described how one small coffee business, owned by a husband and wife team by the name of

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170. *Hearing on the ADA and Private Internet Sites: Testimony Before the House Comm. on the Judiciary, Subcomm. on the Const.*, 106th Cong. (2000) (statement of Walter Olson, Manhattan Institute).

171. Memorandum from Paul B. Taylor, Counsel, Subcomm. on the Constitution, to Congressman Charles Canady, House Comm. on the Judiciary (Dec. 16, 1999) available at <http://lists.w3.org/Archives/Public/w3c-wai-ig/2000JanMar/0114.html>.

172. Janelle Carter, *Eastwood Criticizes ADA Suits*, AP NEWSWIRE, May 19, 2000, available at LEXIS, News Library, News Group File.

173. Jennifer Lafleur and Lorraine Kee, *Ten Years After Landmark Law, Gains are Made, Barriers Remain*, ST. LOUIS POST-DISPATCH, Sept. 3, 2000, available at LEXIS, News Library, News Group File.

174. 42 U.S.C. §§ 12188(a), 12188(b)(4) (1994).

175. Day, *supra* note 4.

176. *Id.*

Belssner, gained new customers after revising their website.<sup>177</sup> The article quoted Mr. Belssner as saying that “creating accessibility in a brick-and-mortar environment is far more challenging than adding accessibility to your Web site.”<sup>178</sup> The couple saw their profitability increase after communicating with their customers and learning that simply labeling their graphics would make their site accessible to a wider audience.<sup>179</sup>

The potential of an increased market share has not motivated many companies to make their web sites accessible, however. PC World surveyed “more than 30 major shopping, search, auction, news, and financial Web sites” and found that few had implemented accessibility guidelines.<sup>180</sup> Companies’ stated reasons for non-accessibility had more to do with apathy than with perceived cost; one company stated that people with disabilities were simply “not a market we’ve thought about pursuing.”<sup>181</sup> A spokesperson for the Gap clothing store stated that she was aware of accessibility guidelines for websites, but commented that the retailer “[had] no plans to implement them” citing simply “strategy.”<sup>182</sup>

Such a lack of interest in pursuing profitability through an expansion of the customer base is highly suggestive of market failure. Economic literature reports that prejudice and discrimination can lead to such market failure; in fact, discrimination-based market failure has been cited as one of the motivating factors behind the enactment of the ADA.<sup>183</sup> If such market failure is at work on the Internet, increased enforcement of the ADA online may have the dual effect of both increasing accessibility and stimulating the economy through increased online sales.

#### IV. CONCLUSION

As it is written, the ADA can encompass Internet accessibility. The language regarding governmental and educational websites is broad enough to include Internet services in a plain text reading of the statute. The language of Title III, dealing with places of public accommodation, is slightly more ambiguous; some circuits have been reluctant to apply it outside of physical facilities. However, even in these circuits some websites may still be covered if they have a sufficient nexus to a physical place of public accommodation, as in the case of a website run by a brick-and-mortar store.

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177. Judy Heim, *Locking Out the Disabled*, PC WORLD, Sept. 2000, available at <http://www.pcworld.com/hereshow/article.asp?aid=17690> (last visited Dec. 3, 2000).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Susan Schwochau and Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?* 21 BERKELEY J. OF EMP. & LAB. L. 271, 275 (2000). (“In enacting the ADA, Congress focused on this explanation for the differentials in employment and wages between disabled and nondisabled individuals.”).

Examining the possibility of increased enforcement of online accessibility raises questions about the tension between increasing access for the disabled and minimizing the burden placed on a newly emerging sector of the economy. On balance, however, these policy concerns tilt more towards increasing access than to protecting online businesses. First, the past five years have not shown self-regulation of websites to be very effective in promoting access. Second, cost estimates have shown that mandating online accessibility is not expected to result in more than minimal cost increases. Finally, it appears that the natural tendency to increase market share is hindered by continuing discrimination-based market failure. These factors lend support to the notion that increased enforcement of the ADA in cyberspace could benefit the disabled at the same time as it increases the commercial potential of the Internet.

The Internet plays a vital role in the world today, and will continue to do so for the foreseeable future. When President Bush signed the ADA into law in 1990, he spoke of the need to “[harness] the energy, creativity, and talent of all our citizens” in the “increasingly technological, increasingly competitive global marketplace.”<sup>184</sup> In the year 2000, achieving this goal requires that we provide effective, accessible access to the Internet to all persons regardless of disability.

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184. President’s Proclamation, *supra* note 1.

