

Association of the Bar of the City of New York
Website Accessibility for People With Disabilities

Committee on Civil Rights
Committee on Information Technology Law
Committee on Legal Issues Affecting People with Disabilities

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1. Interest of the New York City Bar Association

This report examines the legal arguments that make the World Wide Web less than world wide for people with disabilities and demonstrates how those arguments do not withstand reasoned legal analysis. It is hoped that this report will benefit all concerned by promoting the integration of people with disabilities – and abilities – into mainstream society.

The New York City Bar Association (“the Association”), founded in 1870, has more than 22,000 members residing throughout the United States. Through its standing committees, in particular its Committee on Legal Issues Affecting People with Disabilities and its Committee on Civil Rights, the Association has long been an opponent of unlawful discrimination against people with disabilities and a proponent of their inclusion in society to the fullest extent possible. Through its Committee on Information Technology, it has encouraged the application of information technology to serve people with disabilities and more generally, to promote equality.

As lawyers, members of the Association represent clients who may find this analysis helpful in determining whether the websites they use or sponsor should be made more accessible. Moreover, many members of the Association, like the members of society at large, whether with statutorily defined disabilities or not, have vision, hearing, motor and other impairments that require accommodation to enable them to participate in the

age of technology. For instance, those with vision impairments or dyslexia know the difficulties of accessing websites with poor color contrast, tiny or ornate print, or without features necessary to use audible screen reading technology; those with hearing impairments know the frustration of trying to navigate a website that relies on audible cues and lacks accompanying textual cues; and those with limited manual dexterity know the hardship of trying to access computer functions designed to require more dexterity than these individuals possess. All of them know the isolation and discrimination of being unable to access factual and legal research tools, discounted on-line purchasing, and a myriad of other features available to their colleagues without disabilities – features that could be available to them, too, with appropriate website design.

2. Introduction and Summary

The Americans with Disabilities Act (ADA), passed in 1990, provides, among other things, that “public accommodations,” such as stores, museums and travel services, may not discriminate against people with disabilities. The World Wide Web, created in 1989, came into wide public use about 1995. In 1997 the U.S. Supreme Court described the Web as “both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers’ point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.”¹

¹ Reno v. ACLU, 521 U.S. 844, 853 (1997).

Many businesses with walk-in offices or stores have moved all or part of their transactions to the Web. As the Department of Justice has noted, there is “a wide, and growing, range of services provided over the [I]nternet – from shopping to online banking and brokerage services to university degree courses – [that] are beginning to replace reliance on physical business locations.”² Some businesses encourage Web-only transactions, charging more at their walk-in stores than for the same transaction over the Web.³

From the earliest days of general Internet use, the United States Department of Justice (DOJ) has stated that “The Internet is an excellent source of information and, of course, people with disabilities should have access to it as effectively as people without disabilities.”⁴ As technology for

² Hooks v. OKBridge, Inc., No. 99-50891, at 9 (5th Cir. 2000) (Brief of the United States as amicus curiae in support of Appellant, June 30, 2000) (“Hooks brief”), at www.usdoj.gov/crt/app/briefs_disright.htm. (challenging alleged discrimination by a Website that conducted online bridge tournaments). Hooks v. OKBridge, Inc., No. 99-214 (W.D. Tex. Aug 4, 1999), aff’d without opinion, 232 F.3d 208 (5th Cir. 2000) (holding that Title III does not apply to a Website because of lack of physical space (but see infra, Part 4)).

³ E.g., www.verizonwireless.com (“Online discounts (Instant Rebates) are ONLY available for website purchases and your account must be eligible to participate.”) (visited Feb. 16, 2006).

⁴ Letter from Deval L. Patrick, Ass’t Att’y General, Civil Rights Div., U.S. Dep’t of Justice, to Hon. Tom Harkin, U.S. Senate (Sept. 6, 1996), at www.cybertelecom.org/ada/adaletters.htm, National Disability Law Reporter, Vol. 10, Iss. 6, par. 240 (Sept. 11, 1997). See, generally, Hooks brief (arguing that the ADA requires that Websites of Title III entities not discriminate against people with disabilities).

accessibility has become more available (such as screen reader technology, which translates text to speech for people with visual disabilities) the DOJ has applied that principle by requiring sponsors of public events to create accessible Websites.⁵ State Attorneys General also have demanded accessibility for private Websites, most notably in two 2004 settlements by the New York Attorney General under which the Websites ramada.com and priceline.com agreed to implement assistive technology for people who are blind and visually impaired.⁶ State and local laws also cover Website accessibility.⁷

Tim Berners-Lee, inventor of the World Wide Web, states that “The power of the Web is its universality. Access by everyone regardless of disability is an essential aspect.”⁸ To encourage such universality, the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C),

⁵ E.g., Settlement Agreement between the United States and the New Orleans Jazz and Heritage Foundation, Inc., DOJ File No. 202-32-24 (Nov 1, 2001), at <http://www.usdoj.gov/crt/ada/nojazz.htm>, (requiring “home page and ADA page on the Foundation’s website” to be as accessible “as possible”).

⁶ See, e.g., In the Matter of Priceline.com Inc., Attorney General of the State of New York Internet Bureau (April 4, 2004). In a 2000 settlement with the Connecticut Attorney General, the tax-filing services HDVest, Intuit, H&R Block and Gilman & Ciocia agreed to make their Websites accessible. See <http://www.ct.gov/ag/cwp/view.asp?A=1775&Q=283012>.

⁷ Many state and local disability laws are worded more strongly and explicitly than the ADA. See, e.g., N.Y. Human Rights Law, Exec. §§ 290 et seq., N.Y. City Human Rights Law, Admin. Code §§ 8-101 - 8-703.

⁸ <http://www.w3.org/WAI/>

under the direction of Berners-Lee, has published guidelines for Website accessibility⁹ for people with disabilities, including blindness and other visual disabilities, motor limitations, hearing difficulties and cognitive disabilities. Those guidelines have been adopted by the federal Access Board¹⁰ and can serve as an appropriate standard to be followed under Title III.

Examples of accessibility features include:¹¹

Keyboard equivalents for mouse commands;

Text-to-speech capability;

Adequately labeled and/or descriptive text equivalents for non-text elements such as images;

Non-color equivalents for information conveyed with color;

Identifiable row and column headers for data tables;

Assistance for completing on-line forms;

Allowing users to extend the time for timed-response functions;

⁹ Id.; see also <http://www.accessweb.ucla.edu/dis-web.htm#blind>;

http://library.uwsp.edu/aschmetz/accessible/pub_resources.htm.

¹⁰ Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194.22, implementing Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d.

¹¹ See id.

Avoiding “streaming” content techniques for conveying material information;

Where input of letters or numbers (which may not be depicted as text) is required to set up an account, an easy telephone alternative for account formation.

The lack of such features in many “public accommodations” Websites leaves much of the Web “mall, library, bank and marketplace” inaccessible to many Americans.

As the better reasoned court opinions hold,¹² such inaccessibility violates Title III of the ADA.¹³ Unfortunately, some courts and commentators disagree, largely because they focus only on the aspect of Title III that requires physical, architectural accessibility to “places of public accommodation.”¹⁴ Such a focus assumes that “place” is defined in the ADA – as it is not -- as a location people can enter bodily to offer or to seek goods and/or services. It also assumes that Title III’s requirement of access

¹² See infra Section 4.

¹³ Accessibility of government and federally supported Websites is more clearly mandated under statute and regulation. Section 508 of the Rehabilitation Act (29 U.S.C. § 794d) requires that the federal government and companies with federal government contracts make their Websites accessible. Title II of the ADA, 42 U.S.C. §§12131 et seq. (and court cases construing it, e.g., Martin v. MARTA, 225 F. Supp. 2d 1362 (N.D. Ga. 2002)), mandates that the Websites of state and local governments, and other entities receiving federal funding, provide services through accessible Websites.

¹⁴ E.g., 42 U.S.C. § 12182(b)(2)(A)(iv) (“failure to remove architectural barriers, and communication barriers that are structural in nature”).

to “facilities” excludes Website “facilities.” These assumptions do not bear reasonable scrutiny under the ADA. However, confusion fostered by such assumptions has led to the legally hazardous inaccessibility of the Websites of many public accommodations.

The ever more vital role of the World Wide Web in American life makes it crucial to set forth, as we do here, an appropriate legal analysis that will secure the Web’s accessibility to millions of people with disabilities.

3. **Title III of the Americans with Disabilities Act Requires Opportunity for “Full and Equal Enjoyment” of “Public Accommodations”**

The operative section of Title III of the ADA, entitled “Prohibition of discrimination by public accommodations,” 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.¹⁵

The statute also sets forth categories of “public accommodations,” which include most private entities that offer goods and services to

¹⁵ 42 U.S.C. § 12182(a).

customers.¹⁶ As discussed below, there are two alternative conceptual frameworks under which a public accommodation's Website is subject to

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- ¹⁶ 42 U.S.C. § 12181(7): The following private entities are considered public accommodations for the purposes of this subchapter, if the operations of such entities affect commerce--
- (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;
 - (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.

Title III: (a) as a place of “public accommodation” in its own right, and/or (b) as one of the “goods, services, facilities, privileges, advantages, or accommodations of” a public accommodation.

a. A Website Is a Place of “Public Accommodation”

The statute does not define, nor set forth examples of, the term “place.” In trying to discern a meaning for “place,” some courts and commentators have made the twelve categories of “public accommodations” serve as limiting factors that define the sort of “place” to which Title III applies. The result is an assertion that a “place” is a physical “facility” and that the terms “place” and “facility” should be read to require a location people can enter bodily to offer or to seek goods and/or services. No such limitation appears in the ADA.¹⁷

¹⁷ The statute uses three different terms to describe the categories of covered “public accommodations”: “places” of lodging, exhibition or entertainment, of public gathering, of public display or collection, of recreation, of education and of exercise, 42 U.S.C.A. §§ 12181(7)(A),(C),(D),(H),(I),(J),(L); “establishments” serving food or drink, offering sales or rentals, offering services (such as travel service, shoe repair service, insurance, health care) and offering social services (such as day care or adoption), *id.* §§ 12181(7)(B),(E),(F),(K); and “station[s] used for specified public transportation.” *Id.* § 12181(7)(G). “The term ‘specified public transportation’ means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.” *Id.* § 12181(10). Any assertion that Congress intended to limit applicability of Title III to a certain size or type of “place” is even more absurd than would be a claim Congress excluded from coverage five of the twelve categories of “public accommodations” it described by using a term other than “place”.

To the contrary, when discussing public accommodations, Congress spoke in expansive – not restrictive -- terms. Thus, in the final list of twelve categories of entities, Title III lists a few examples, then adds “other place of lodging . . . other place of public gathering . . . other sales or rental establishment.” As the House Committee Report on the ADA points out, this ensures that a person alleging discrimination need not prove the discriminating entity is similar to one of the listed examples. “Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient that the jewelry store sells items to the public.”¹⁸ Thus, the key attribute of the public accommodation is the act of selling to the public, not the nature of the location where it does the selling.¹⁹

Furthermore, a Website is a “facility,” as defined by the DOJ regulations promulgated at the direction of the ADA.²⁰ A “facility” includes

¹⁸ H.R. Rep. No. 101-485, pt. 3, at 54 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 447.

¹⁹ See Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 562 (7th Cir. 1999) (Posner, J.) (“Both committee reports . . . give the example of refusing to sell an insurance policy to a blind person, as does the gloss placed . . . by the Department of Justice.”) (citing 28 C.F.R, Part 36, App. B § 36.212).

²⁰ 42 U.S.C. § 12186(b). Because they are expressly authorized by Congress, courts must give these regulations “legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.” United States v. Morton, 467 U.S. 822, 834 (1984); Martin, 225 F. Supp. 2d at 1374.

“all or any portion of . . . sites, . . . equipment, . . . or other . . . personal property . . .” of the public accommodation.²¹ Under this definition, a Website clearly has a “site” – a physical location on “equipment” such as a server. People enter this “site” using remote computers, accessing “goods, services, facilities, privileges, advantages, or accommodations”²² resident on that site or in another remote place in the same way people make a telephone call to a bricks-and-mortar store to place an order or walk into a library to read a book.

Although the cyberspace “place” of public accommodation may be smaller than a bricks-and-mortar counterpart (be it a huge department store or a small storefront), it is nonetheless a place. In this place, as in a walk-in place, people may view, evaluate, buy and sell, order, and even perform and

²¹ 28 C.F.R. § 36.104. That “site” is not limited to a plot of ground is emphasized by the continuing language of the definition: “including the site where the building, property, structure, or equipment is located.” The regulations further demonstrate that prohibitions against discrimination are not limited to a “place,” pointing out that a “health care provider” is a “public accommodation,” which must provide nondiscriminatory health care to people with or without disabilities: “A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition.” 28 C.F.R. § 36.202(b)(2). The same could be said of an “establishment” providing legal or other services, whether operating in a firm, office or from home. See *supra* n. 17, discussing 42 U.S.C. § 12181(7). There is no physical space “trigger” that activates the prohibition against discrimination.

²² 42 U.S.C. § 12182(a).

deliver goods and services; enjoy a wide variety of entertainment and exhibitions; borrow books, exhibit art and museum collections; pursue games and other recreation; enjoy entertainment; attend lectures and other forms of education; explore and obtain social services; and hold interactive conferences. It is, in short, a “public accommodation” under Title III of the ADA, with obligations not to discriminate,²³ and it must be accessible, whether attached to a bricks-and-mortar entity²⁴ or existing only in cyberspace.²⁵

²³ 42 U.S.C. § 12181(7). Although Congress did not directly contemplate the then nascent World Wide Web in enacting the ADA, coverage of the goods and services offered via Websites clearly was within Congressional intent. See infra Section 3.

²⁴ As the DOJ points out (Hooks brief at 9-10), “[Any other reading of the statute] permits discrimination by more traditional businesses that provide services in locations other than their premises. For example, many businesses provide services over the telephone or through the mail, including travel services, banks, insurance companies, catalog merchants, and pharmacies. Many other businesses provide services in the homes or offices of their customers, such as plumbers, pizza delivery and moving companies, cleaning services, business consulting firms, and auditors from accounting firms. . . . [T]hose selling car insurance over the telephone would be free to hang up on blind customers, Publisher’s Clearing House could refuse to sell magazines through the mail to people with HIV, and colleges could refuse to enroll the deaf in their correspondence courses.”

²⁵ See Doe, 179 F.3d at 559 (“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, Web site or other facility (whether in physical space or in electronic space . . .) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.”) (internal citation omitted). See also The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (2000) 104 (Testimony of Prof. Peter D. Blanck, U. of Iowa) (“My view is that Web-based activities of public accommodations that have an

b. A Website Is One of the “Goods, Services, Facilities, Privileges, Advantages, or Accommodations of” a Public Accommodation.”

Limiting “place” to a location large enough to accommodate human bodies ignores the rest of the section in which Congress uses the term “place”. First, discrimination is prohibited in the full and equal enjoyment of “the goods, services, . . . privileges, advantages, or accommodations,” as well as of the “facilities” of public accommodations.²⁶ Second, discrimination is prohibited “by” the covered entity – not the “place” -- in the enjoyment “of” -- not “at” or “in” -- the place of public accommodation.²⁷ Both terms necessarily extend the prohibition of discrimination to more than physical space. “At,” if used, might limit “full and equal enjoyment” to events “at” the physical place.²⁸ Instead, Congress chose “of.” Even if “of” were ambiguous and could mean “at,” interpretation of the ADA requires that any ambiguity be interpreted to

online presence, such as a bookstore, a travel agency that both has a store and an online presence, would be subject to title III provisions. And . . . I would similarly believe that exclusively Web based-service industries such as e-commerce retail sites would be considered title III entities simply offering goods and services to the public.”), at http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm

²⁶ 42 U.S.C. § 12182(a).

²⁷ *Id.*

²⁸ See *Hooks* brief at 8 (“The Services “Of” A Place Of Public Accommodation Need Not Be Provided “At” The Place Of Public Accommodation”).

confer more – rather than fewer – rights on the protected class of people.²⁹

The interpretation is reinforced by the subheading of the statutory section itself, “Prohibition of discrimination **by** [not at] public accommodations.”³⁰

A further illustration of the applicability of Title III both to non-physical elements associated with a physical entity and to pure-cyberspace entities is found in other prohibitions of Title III that clearly are not limited to physical matters. Thus, in Title III, “failure to remove architectural barriers, and communication barriers that are structural”³¹ is only one example of prohibited discrimination, listed only after many other prohibitions.³² These other prohibitions, not tied to physical places, but

²⁹ See Arnold v. United Parcel Service, Inc., 136 F.3d 854, 861 (1st Cir. 1998) (ADA is a “broad remedial statute” that should be “construed broadly to effectuate its purposes”) (internal citations omitted).

³⁰ 42 U.S.C. § 12182 (emphasis added). The expansive reading of “of” also is reinforced by the language of Title II of the ADA, which prohibits discrimination on the basis of disability in the “services, programs, or activities **of** a public entity.” 42 U.S.C. § 12132. This provision, along with its implementing regulations, has been found to require Website accessibility for public transit information. Martin, 225 F. Supp. 2d at 1377.

³¹ 42 U.S.C. § 12182(b)(2)(A)(iv).

³² These include: “Denial of participation . . . directly, or through commercial, licensing, or other arrangements,” id. § 12182(b)(1)(A)(i); “Participation in unequal benefits,” id. § 12182(b)(1)(A)(ii); “Separate benefit . . . [to provide] a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals,” id. § 12182(b)(1)(A)(iii); “the imposition or application of eligibility criteria that screen out or tend to screen out . . . individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations,” id. § 12182(b)(2)(A)(i); “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such

directed to policies, procedures and methods that reflect discriminatory attitudes and thoughtlessness, are as applicable to Websites as they are to bricks-and-mortar sites.

This reading of the statute is further encouraged by focusing on those entities that Congress designated “establishments” rather than “places,” such as stores and restaurants.³³ The listed “establishments” provide services that do not necessarily occur at a physical location. Some restaurants, for instance, provide take-out as well as eat-in service; a take-out restaurant cannot discriminate against a person with a disability. It must agree to read the take-out menu over the phone to a blind person; it could not refuse to deliver food to the home of a person with a mental disability. Similarly, a “store” is an “establishment” rather than a “place.” A store, such as the bookstore Barnes & Noble must not only make its physical store accessible, but its Website as well, so that people with disabilities can have equal

goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities,” *id.* § 12182(b)(2)(A)(ii); “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.” *Id.* § 12182(b)(2)(A)(iii).

³³ “Establishments” serving food or drink, offering sales or rentals, offering services (such as travel service, shoe repair service, insurance, health care) and offering social services (such as day care or adoption). *Id.*, §§ 12181(7)(B), (E), (F), (K).

enjoyment of the “services, . . . privileges, advantages, or accommodations” the “establishment” offers to those without disabilities via its Website.

As the Department of Justice has pointed out:³⁴

Being offered access to only those services of a public accommodation that are offered on-site, when the public at large is given access to additional services off-site, is hardly “full and equal enjoyment” of the accommodations’ services. And narrowly construing the statute to exclude major areas of discrimination faced by people with disabilities in their day-to-day encounters with commercial service providers – including services provided in a person’s home, over the telephone, through the mail, or via the internet – is inconsistent with Congress’s clearly expressed intent.

4. Website Accessibility Directly Serves Congressional Intent as Expressed in the ADA’s “Findings and Purposes” and its Legislative History.

Neither the ADA nor its legislative history discusses the Internet or the Web, and Congress did not anticipate the application of the ADA to the Internet. This is no barrier, however. The ADA is a “broad remedial statute that should be construed broadly to effectuate its purposes.”³⁵ As the Supreme Court has held, “that [Title III of the ADA] can be applied in situations not expressly anticipated by Congress does not demonstrate

³⁴ Hooks brief at 11.

³⁵ Arnold, 136 F.3d at 861.

ambiguity. It demonstrates breadth.”³⁶ In other contexts, the Supreme Court has continually held that Congressional statutes do not freeze time so as to apply only to situations available at the moment of the law’s passage. To the contrary, “[w]hen technological change has rendered its literal terms ambiguous, [an] Act must be construed in light of [its] basic purpose.”³⁷

All of Congress’ “Findings and Purposes”³⁸ regarding the aim of the ADA point toward Website accessibility. The ADA is “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³⁹ The statute’s purpose is to “invoke the sweep of Congressional authority . . . to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”⁴⁰ Congress found that “society has tended to isolate and segregate individuals with disabilities,” in “public accommodations” and

³⁶ PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001) (professional golfer with disability must be allowed to use golf cart, rather than walking, on the PGA tour) (internal citation omitted).

³⁷ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (broadcasting a copyrighted work via a restaurant radio does not constitute a separate “performance” of the work requiring additional royalty payment to the copyright holder) (citing Fortnightly Corp. v. United Artists, 392 U.S. 390, 395 (1968) (“Our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.”)).

³⁸ 42 U.S.C. § 12101.

³⁹ Id. § 12101 (b)(1).

⁴⁰ Id. § 12101 (b)(4).

“communications.”⁴¹ Discrimination arises through “communication barriers” and failure to modify existing “practices,” thereby relegating people with disabilities to “lesser services, programs, activities, benefits [and] other opportunities” and “inferior status in our society” as an “insular minority” that is denied “full participation” in American life.⁴²

Public accommodations Websites, although “not anticipated by Congress,” clearly must be subject to Title III. Without Website access to public accommodations, people with disabilities are “isolated and segregated” and relegated to “lesser services.” They are unable to order CDs from online bookstores, to download tunes from online music stores, to take virtual tours and make online reservations at hotels, to read and consider online restaurant menus, to order from online pharmacies and groceries. As more and more advertisements urge customers to visit a store or museum’s Website for goods, services and information, and even grant special deals to online consumers (and the convenience of avoiding long telephone queues), those who cannot access the Website are denied the “full participation” that

⁴¹ Id. § 12101 (a)(2), (3).

⁴² Id. § 12101 (a)(5), (6), (7), (8).

Congress intends. Website inaccessibility is thus a “communication barrier” that is “faced day-to-day by people with disabilities.”

Congressional intent also is evident from the legislative history of the ADA.⁴³ The legislative history (the Senate and House Reports on the ADA)⁴⁴ is explicit that Congress intended that the language of the ADA not be frozen in time, but that it adapt to changing needs and circumstances, specifically technological change. As the House Report says, “the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.”⁴⁵

Central to Title III is equal access, not to physical places, but to goods and services, with physical accessibility only a means to that end. “In drafting Title III, Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments

⁴³ See Carparts Distrib. Cntr., Inc. v. Automotive Wholesalers Ass’n of New England, 37 F.3d 12, 19 (1st Cir. 1994) (“Even if the meaning of ‘public accommodation’ is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.”); but see Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1014 & n.10 (6th Cir. 1997) (No need to visit legislative history, because Title III’s statutory language clearly and unambiguously means that “a public accommodation is a physical place”).

⁴⁴ S. Rep. No. 101-116 (1989), H.R. Rep. No. 101-485 (1990), reprinted in 1990 U.S.C.C.A.N. 267.

⁴⁵ H.R. Rep. No. 101-485, pt. 2, at 108, reprinted in 1990 U.S.C.C.A.N. 303, 391.

and made available to those who do not have disabilities.”⁴⁶ As one judge noted, unless Title III mandates accessible Websites, “[a]s the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted.”⁴⁷

5. Better Judicial Analysis Requires Website Accessibility

Despite the plain meaning of the statute, some courts and commentators insist that Title III’s obligations apply only to physical “places.” The courts that interpret the statutory duty narrowly demand a “nexus” between the service offered and a physical “place.” Other courts, arriving at a contrary reading, emphasize (correctly, we believe) that the duty is owed by the “public accommodation” itself. The latter interpretation is the only one that gives full meaning to the statute.

In one of the few cases dealing with “public accommodations” Websites, Access Now, Inc. v. Southwest Airlines Co.,⁴⁸ plaintiffs complained that the Website operated by Southwest Airlines – which offered

⁴⁶ S. Rep. No. 101-116, at 58, cited in Carparts, 37 F.3d at 19.

⁴⁷ Parker, 121 F.3d at 1020 (Martin, J., dissenting).

⁴⁸ 227 F. Supp. 2d 1312 (S.D. Fla. 2002), appeal dismissed, 385 F.3d 1324 (11th Cir. 2004).

schedules, information, ticketing and other services – was not accessible to blind people. In dismissing the complaint the court concluded that the Website, standing alone, was not a public accommodation and that “a public accommodation must be a physical, concrete structure.”⁴⁹ To reach this conclusion, however, the court incorrectly quoted the “statutorily created right” of Title III as a “prohibition against discrimination **in** places of public accommodation”⁵⁰ (ignoring the statutory language “**of** any place of public accommodation”) and mischaracterized the twelve statutory categories as “places of public accommodation,” rather than (correctly) as “public accommodations.”⁵¹

Other courts have rested holdings on similarly flawed reasoning even when reaching the correct conclusion. In Rendon v. Valleycrest Prods.,

⁴⁹ 227 F. Supp. 2d at 1318.

⁵⁰ Id. at 1313 (emphasis added)..

⁵¹ Id. at 1317. Southwest Airlines is troubling in additional ways. On appeal, the plaintiffs changed their legal theory to allege that, instead of constituting a place of public accommodation in itself, southwest.com is part of a larger Title III entity, i.e., Southwest Airlines (a “travel service”). The Eleventh Circuit dismissed this appeal on the grounds that plaintiffs had not raised this theory below. Additionally, the Eleventh Circuit noted that “airlines such as Southwest are largely not even covered by Title III of the ADA,” but by the Air Carriers Access Act, 49 U.S.C. § 41705. 385 F.3d at 1332. See 28 C.F.R. § 36.104 (aircraft are not covered by the ADA, but indicating no exclusion for other facilities, goods, or services of airlines).

Ltd.,⁵² the Eleventh Circuit held that the automated fast-finger telephone process used to select contestants for “Who Wants to Be a Millionaire” “is a discriminatory screening mechanism,” violating Title III.⁵³ In doing so, however, the court characterized the twelve Title III categories as “places of ‘public accommodation’,”⁵⁴ finding that the selection process deprived individuals with hearing and mobility impairments of the “privilege of competing in a contest held in a concrete space, [i.e.,] Defendants’ theater.”⁵⁵ Without such a physical “nexus,” the complaint might have failed.⁵⁶

In Parker v. Metropolitan Life Ins. Co.⁵⁷ and Ford v. Schering-Plough Corp.,⁵⁸ two circuit courts refused to extend Title III protection to cover

⁵² 294 F.3d 1279 (11th Cir. 2002).

⁵³ Id. at 1286.

⁵⁴ Id. at 1282. See id. at n.3 (misquoting 28 C.F.R. § 36.104 as “defining a public accommodation as a ‘place’ or ‘a facility.’ . . .” The regulation actually defines a “place of public accommodation” as a “facility” within one of the twelve statutory categories and defines “facility” as including a “site’ (not necessarily the location of a building), “equipment” and “other . . . personal property.”).

⁵⁵ 294 F.3d at 1284 & n.8.

⁵⁶ There might have been a clearer focus on whether there was a need for a bricks-and-mortar space had defendants not conceded the television studio was a “place of public accommodation.” Id. at 1283. Instead, the issue for decision was whether the telephone fast-finger screening process itself was a public accommodation. The court concluded that it was precisely the kind of communication barrier the ADA sought to remedy. Id. at 1286.

⁵⁷ 121 F.3d 1006 (6th Cir. 1997).

⁵⁸ 145 F.3d 601 (3d Cir. 1998).

insurance policies that paid lower benefits to people with physical and mental disabilities, because the policies were not offered at a “place,” i.e., a physical structure. The Parker court stated that an insurance plan “is not a good offered by a place of public accommodation,” because “a public accommodation is a physical place . . . defined by the applicable regulations [as] a facility.”⁵⁹

Most recently, the court in National Federation for the Blind v. Target Corp.⁶⁰ adopted similar reasoning, allowing a lawsuit that challenges the inaccessibility of Target stores’ Website to proceed only insofar as the complaint alleges a nexus between the Website and the physical stores.

Courts reaching the correct conclusion – that “public accommodations” are not limited to physical structures – do so by

⁵⁹ 121 F.3d at 1010-11 (ignoring that the statute requires non-discrimination both in “facilities” and in “goods, services, . . . privileges, advantages, or accommodations” – and that the regulation cited does not define “public accommodation,” but, rather, “place of public accommodation”, and defines “facility” to include “all or any portion of . . . sites, . . . equipment, . . . or other . . . personal property” 28 C.F.R. § 36.104). See Chabner v. United of Omaha Life Ins. Co., 225 F. 3d 1042, 1047 (9th Cir. 2000) (requiring a nexus between goods or service complained of and a physical space); Stoutenborough v. National Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) (TV broadcast does not involve a “public accommodation,” which must be a physical place); Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 541 (E.D. Va. 2003) (online chat room not a “place of public accommodation” under Title 2 of Civil Rights Act because not an actual physical structure) (NB: Civil Rights Act, Title II, unlike ADA Title III, specifically prohibits discrimination only in “physical” locations and “premises.” 42 U.S.C. § 2000a(a)).

⁶⁰ No. C 06-01802 MHP, 2006 WL 2578282, (N.D. Cal. Sept. 6, 2006).

emphasizing the list of “public accommodations” in the “definitions” section of the statute. This line of cases is led by the Supreme Court itself, which characterizes Title III as prohibiting discrimination “by public accommodations,” as opposed to the “places” they operate.⁶¹ In Carparts Distrib. Ctr. Inc. v. Auto Wholesalers of New England, Inc.,⁶² the First Circuit concluded that an “insurance office” (a “service establishment” under Title III) might be prevented from discriminating against a person with a disability in the insurance it offered, regardless of whether the insurance company occupied a physical space. (“Congress clearly contemplated that ‘service establishments’ include providers of services which do not require a person to physically enter an actual physical structure.”)

The definition of “public accommodation” . . . provides an illustrative list which includes a “travel service,” a “shoe repair service,” an “office of an accountant, or lawyer,” a “professional office of a healthcare provider,” and “other service establishments.” The plain meaning of the terms do not require “public accommodations” to have physical structures for people to enter. . . . Many

⁶¹ PGA Tour, Inc., 532 U.S. at 682, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 125 S. Ct. 2169, 2176 (2005) (“Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment **of public accommodations**”) (emphasis added).

⁶² 37 F.3d 12 (1st Cir. 1994).

travel services conduct business by telephone or correspondence without requiring a customer to enter an office Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter 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.”⁶³

In Doe v. Mutual of Omaha Ins. Co.,⁶⁴ challenging allegedly discriminatory insurance for AIDS patients the Seventh Circuit bypassed the “place” language entirely and concurred with the Carparts holding that public accommodations need not occupy physical space:

The core meaning of [Title III], 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 people from

⁶³ Id. at 19 (internal citation omitted). On remand, the District Court incorrectly asserted that the Regulations “define[] **a public accommodation** as ‘a facility’” 987 F. Supp. 77, 80 n.3 (D.N.H. 1997) (emphasis added), which is, to the contrary, how the Regulations define “a **place** of public accommodation.” 28 C.F.R. § 36.104 (emphasis added).

⁶⁴ 179 F.3d 557, 563 (7th Cir. 1999) (Posner, J.) (holding that Title III does not prevent an insurance company from capping its benefits for AIDS and other diseases, “some of which may also be disabilities”) (internal citation omitted).

entering the facility and, once in, from using the facility in the same way that the nondisabled do.⁶⁵

Using similar reasoning, the court in Walker v. Carnival Cruise Lines⁶⁶ held that “Travel agents fall squarely within the ADA’s definition of public accommodations,” and consequently owe their customers non-discriminatory treatment in the services they offer, “quite apart from the physical accessibility of the Travel Agent’s office.” Thus, to offer individuals with disabilities “inadequate or inaccurate information regarding the disabled accessibility of travel accommodations . . . deprives [travelers with disabilities] of ‘full and equal enjoyment’ of travel information services.”⁶⁷

The Carparts court (and courts following its reasoning) reached its conclusion by tracking the statutory language exactly as we suggest.⁶⁸ Thus, an “insurance office” or “travel service” is a “public accommodation” that

⁶⁵ Id. at 559.

⁶⁶ 63 F. Supp. 2d 1083 (N.D. Cal. 1999).

⁶⁷ Id. at 1092.

⁶⁸ See Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32-33 & n.3 (2d Cir. 1999) (insurance policy obtained directly from company was covered by ADA, noting that not just access to “offices” are covered, but also to goods/services off-site (also distinguishing Parker and Ford)); Morgan v. Joint Admin. Bd. Retirement Plan of Pillsbury Co., 268 F.3d 456, 459 (7th Cir. 2001) (“An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store. . . . The site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.”)

owes a duty of non-discrimination in its “goods” and “services.” Further, both are “service establishments,” with obligations beyond physical access to their “facilities.” Such reasoning easily extends to Websites operated by Title III entities and avoids the “absurd result” that Website non-accessibility invites.

Under a contrary reading of the statute, the accessibility requirement of a “travel service” – a travel agency, for instance -- applies only to its physical “facilities,” despite that the statute explicitly defines a “travel service” as a “service establishment” rather than as a “place”.⁶⁹ Its Website need not be accessible; it needs to be made available only to sighted people, ignoring the blind and visually impaired. So, although a sighted person could access the Website, retrieve schedules, buy tickets and hotel vouchers, a blind person could not. Instead, he would have to maneuver into accessible transportation, travel to the physically accessible office and buy his ticket there – encountering long lines and incurring additional fees for not using the Website. “Congress could not have intended such an absurd result.”⁷⁰

⁶⁹ 42 U.S.C. § 12181(7)(F).

⁷⁰ Carparts, 37 F.3d at 19.

6. Conclusion

Website access for people with disabilities is mandated both by the letter and spirit of Title III of the ADA. It also is mandated by simple fairness and the policy behind the ADA of removing barriers to “full participation” in American life. Quite apart from law and policy, Title III Website accessibility makes good business sense. American businesses should be eager to welcome to their Websites the 10,000,000 Americans with visual disabilities as well as the millions more with other disabilities their accessible Websites will attract.