ENDING THE DISCONNECT FOR THE DEAF COMMUNITY: HOW AMENDMENTS TO THE FEDERAL REGULATIONS CAN REALIGN THE ADA WITH ITS PURPOSE♦

INTRODUCTION

For far too long, individuals with disabilities were not afforded protection under the law. These individuals were forgotten members of society and were severely limited in their ability to engage in activities as simple as going to the grocery store. On March 8, 1990, a deaf chaplain gave the Senate invocation where he stated, "we ask Your blessing on people with disabling conditions. We pray that they receive not pity but respect; not shame but dignity; not neglect but inclusion."[1] That was the day that the Senate passed the Americans with Disabilities Act ("ADA"), the first legislative scheme devoted exclusively to providing equality for individuals with disabilities.[2] At the time of its passage, the ADA sought to include the then forty-three million Americans with disabilities into mainstream society and to require the nation to support the "talents, skills and abilities of a minority group which had up until [then] been on the sidelines."[3]

The purpose of the ADA was to provide the means for disabled, specifically Deaf[4] and hard of hearing, individuals[5] to integrate into

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[1] 136 CONG. REC. S9684-03, S9684 (daily ed. July 13, 1990) (testimony of Sen. McCain), 1990 WL 97306 (Senator McCain testified to fact that the deaf chaplain gave the invocation).

[2] *See* Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(a)(4) (2009).

[3] 136 CONG. REC. S9684-03, S9695 (daily ed. July 13, 1990) (testimony of Sen. Dole), 1990 WL 97306.

[4] The word "Deaf" is intentionally capitalized. In the Deaf and hard of hearing community, there are many ways to label deafness, and different individuals have different personal preferences. Generally, the word "deaf" with a lowercase "d" refers to the audiological condition of not being able to hear. CAROL PADDEN & TOM HUMPHRIES, DEAF IN AMERICA: VOICES FROM A CULTURE 2 (1988). The term "Deaf" on the other hand refers to a community of individuals who use American Sign Language ("ASL") as their primary means of communication. *See id.* Although the term "Deaf" has been a defining label for this community, the Deaf community is filled with individuals who have a varying range of hearing abilities. *See id.* at 4. These individuals consider themselves to be a part of the culturally Deaf community. *See id.* at 25. The term "hard of hearing" is used to describe individuals who identify based on their level of hearing loss. *See id.* at 50. Hard of hearing individuals often identify somewhere in between the Deaf and the hearing world. *See id.* at 50-51. Although many mistakenly use the term "hearing impaired" to refer to the Deaf community, this term is not preferred by the culturally Deaf community. *See id.* at 43. The term "hearing impaired" is often considered offensive by the Deaf community, as it focuses on the individual's inability to hear, rather than on the individual's cultural and linguistic identity. *See id.*

[5] This Note will focus on Deaf and hard of hearing issues. Many student notes and articles have been previously written about how blind and low vision individuals struggle to access websites and the Internet. *See e.g.*, Nikki D. Kessling, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation*," 45 HOUS. L. REV. 991 (2008); Ryan Campbell Richards, *Reconciling the Americans with Disabilities Act and Commercial Websites: A Feasible Solution?*, 7 RUTGERS J. L. & PUB. POL'Y 520 (2010); Stephanie Khouri, *Disability Law—Welcome to the New Town Square of Today's Global Village: Website Accessibility for Individuals with Disabilities After Target and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331 (2010); Eve Hill & Peter Blanck, *Future of Disability Rights Advocacy and "The Right to Live in the World*," 5 TEX. J. C.L. & C.R. 1 (2009); Judith Stilz Ogden & Lawrence Menter, *Inaccessible School Webpages: Are Remedies Available?*, 38 J.L. & EDUC. 393 (2009); Ali Abrar & Kerry J. Dingle, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133 (2009). Since very little has been written to address the particular struggles and issues faced in the Deaf

society.[6] The statute explicitly states that

> physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination . . . . [H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations . . . .[7]

The ADA requires that private businesses provide methods for communication for Deaf and hard of hearing individuals.[8] This creates the opportunity for Deaf and hard of hearing individuals to go to doctors, lawyers, banks, financial advisors, and other similar professionals and request the aid of interpreters or assistive technology.[9] Additionally, the ADA has improved communication access for Deaf and hard of hearing individuals through the mandate of a telecommunications system.[10] Prior to this, Deaf and hard of hearing individuals were effectively eliminated from communicating through the phone system. Furthermore, in places of public accommodation, the ADA requires visually presented materials to be accessible to Deaf and hard of hearing individuals through captioning.[11] These are all

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and hard of hearing community, this Note will address and analyze the ADA and its regulations in relation to those issues.

[6] Individuals who identify as culturally Deaf do not consider themselves to be disabled. PADDEN, *supra* note 4, at 44. Padden and Humphries explain that

> "[d]isabled" is a label that historically has not belonged to Deaf people. It suggests political self-representations and goals unfamiliar to the group. When Deaf people discuss their deafness, they use terms deeply related to their language, their past, and their community. Their enduring concerns have been the preservation of their languages, policies for educating deaf children and maintenance of their social and political organizations. The modern language of "access" and "civil rights," as unfamiliar as it is to Deaf people, has been used by Deaf leaders because the public understands these concerns more readily than ones specific to the Deaf community. Knowing well the special benefits, economic and otherwise, of calling themselves disabled, Deaf people have a history, albeit an uneasy one, of alignment with other disabled groups. But . . . "disabled" is not a primary term of self-identification, indeed it is one that requires a disclaimer.

Id. This Note does not seek to identify Deaf individuals as disabled. As Deaf and hard of hearing individuals are included in the protections of the ADA, and this Note discusses the need for further amendments to the federal regulation associated with the ADA, this Note by necessity must acknowledge that Deaf and hard of hearing individuals are within the category of "disabled" *as defined by the law*.

[7] ADA § 2, 42 U.S.C. § 12101(a)(1)-(3) (1990).

[8] ADA § 302, 42 U.S.C. § 12182 (1990).

[9] This is only presumptive, however, because while the law does affirmatively require that these private businesses provide accessibility, businesses often fail to do so. *See, e.g.*, David M. Stokes & Mark Cody, *Communication Breakdown*, MICH. B.J., Aug. 2010, at 46-47 (describing through an anecdote a common scenario that Deaf and hard of hearing individuals face). This is an illustration of how the ADA provisions are not met without difficulty.

[10] *See* ADA, tit. 4 § 401, 47 U.S.C. § 225 (2006).

[11] ADA Title III requires the use of auxiliary aids and services in places of public accommodation. *See* ADA § 301(2)(A), 42 U.S.C. § 12181(2)(A) (2006). The corresponding federal regulation includes captioning as a type of auxiliary aid and service. *See* Auxiliary Aids

examples of how the ADA has enhanced access to mainstream society for the Deaf and hard of hearing community.

Congress passed the ADA before the Internet became a commonly used medium. Today, the Internet is used for entertainment, shopping, advertising, and media, and consequently plays a central role in everyday life for most Americans.[12] In many respects, the Internet replaces other traditional means of public accommodation by providing individuals with access to various resources without ever having to leave one's home.[13] Additionally, a growing number of businesses are utilizing the Internet to provide goods and services to the general public.[14] The problem is that the ADA and its corresponding federal regulations do not require places of public accommodation to make their Internet websites accessible to individuals with disabilities.[15] The proliferation of technology has expanded the means for accessibility, but because private websites are not mandated to require accessibility under the ADA, this technology is being underutilized by website providers at the expense of individuals with disabilities.[16] Overall, the

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and Services, 28 C.F.R. § 36.303(b)(1) (2011).

[12] *See* Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002) ("Today, millions of people across the globe utilize the Internet on a regular basis for communication, news gathering, and commerce.").

[13] *See generally*, JOHN PALFREY & URS GASSER, BORN DIGITAL (Basic Books 2008) (providing information about how Internet usage affects society today in the United States). The Internet has changed the way individuals socialize through social networks such as Facebook, MySpace, and personal blogs. *See id.* at 19, 112. "The use of new technologies by [those born during the digital age] . . . is leading to changes in our understanding of identity." *Id.* at 21. The Internet has also changed methods of commerce, by adding a convenience for

> consumers to buy more things they want . . . voters to participate in civic life more easily, bureaucracies to offer shorter lines for the provision of services or payment of bills, employers to squeeze greater productivity out of their employees, doctors to provide better health care to their patients, and so forth.

Id. at 39. The use of online media is increasingly prevalent, particularly through media outlets such as YouTube. *See id.* at 111. The Internet has become such a common ground for creativity because of its ability to reach millions of people at a cheap cost, which has additionally contributed to an increase in online media. *See id.* at 122. These facts demonstrate the pervasive role that the Internet plays in American life.

[14] *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36).

[15] *See* ADA § 302, 42 U.S.C. §12182 (2006), *et seq.*; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 36.101 (2011), *et seq*.

[16] For example, while individuals can enjoy television entertainment through the Internet, many websites preclude Deaf individuals from such enjoyment. *See e.g.*, NETFLIX, www.netflix.com (last visited Aug. 22, 2011). Indeed there are currently two lawsuits pending against Netflix. *See* Complaint, Cullen v. Netflix, Inc., No. 5:11-Civ-01199 (N.D. Cal. filed Mar. 11, 2011); Complaint, Nat'l Ass'n of the Deaf ("NAD") v. Netflix, Inc., No. 3:11-CV-30168 (D.Mass filed June 6, 2011) [*hereinafter NAD v. Netflix D.Mass. Compl.*]. According to the plaintiffs in NAD v. Netflix,

> With over 60% of the industry market share, Netflix is the leading provider of streamed television and movies on the Internet through its on-demand service, known as "Watch Instantly. . . ." Netflix's Watch Instantly site was recently named the "biggest source of Internet traffic in the US" according to the 2011 Sandvine Global Internet Phenomena Report. Sandvine also reports that streaming of video and audio now accounts for nearly 50 percent of peak time traffic in the U.S., with Netflix alone accounting for nearly 30 percent of peak time traffic.

lack of accessibility on the Internet has kept Deaf and hard of hearing individuals from the use and enjoyment of many important resources, in contravention of what the ADA was enacted to combat in the first place.

As technology has emerged throughout the last century, it has enhanced life for most Americans, but for Deaf and hard of hearing individuals these technological improvements have proved isolating.[17] First it was the telephone, then television, and now the Internet that has created barriers for the Deaf community and Web providers exclude Deaf and hard of hearing individuals from the enjoyment of video material that they fail to caption.[18] Additionally, Deaf and hard of hearing individuals cannot book an ADA accessible room through major travel search engines.[19] Further, more educational institutions utilize the Internet for online classes, which creates barriers for Deaf and hard of hearing individuals as well. These examples demonstrate the need for a change in the standard for Web accessibility for individuals with disabilities.

Under the current ADA and its accompanying regulations, courts are left to police the standards of Web accessibility. In the last decade, the Department of Justice ("DOJ") has taken the position that the ADA as it currently stands includes Internet accessibility.[20] Based on this position, the DOJ has never issued a regulation discussing Internet

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Id. at 1-2. This demonstrates the disadvantage that the Deaf and hard of hearing community faces by not having access to captioning on Netflix instant streaming.

[17] *See* Karen Peltz Strauss, *Past and Present: Making the Case for a Regulatory Approach to Addressing Disability Discrimination in the Provision of Emerging Broadband and Cable Technologies*, 994 PRAC. L. INST./PAT. 941, 943 (2010).

[18] *See id.*

> Approximately 36 million Americans are deaf or hard of hearing. Many of these individuals require captioning to meaningfully access the audio component of television and video content. Just as buildings without ramps bar people who use wheelchairs, video content without captions excludes deaf and hard of hearing individuals. Closed captioning is a viewer activated system that displays text on, for instance, television programming, or DVD movies. This is different from open captioning or subtitles, which are burned into the video file and automatically displayed for everyone to see, such as subtitles in foreign language movies. With closed captioning, deaf and hard of hearing individuals have the opportunity to enjoy movies and television shows by reading the captioned text. With closed captioning, these individuals can also watch videos with hearing family members and friends.

NAD v. Netflix D.Mass. Compl., *supra* note 16, at 2.

[19] Web users can save money using Websites such as Bookit, Expedia, Hotels.com, Hotwire, Kayak, Priceline, and Travelocity, but these Websites do not provide an option to search for ADA accessible hotel rooms. *See* BOOKIT, http://www.bookit.com (last visited Sept. 6, 2011); EXPEDIA, http://www.expedia.com (last visited Sept. 6, 2011); HOTELS.COM, http://www.hotels.com (last visited Sept. 6, 2011); HOTWIRE, http://www.hotwire.com (last visited Sept. 6, 2011); KAYAK, http://www.kayak.com (last visited Feb. Sept. 6, 2011); PRICELINE, http://www.priceline.com (last visited Sept. 6, 2011); TRAVELOCITY, http://www.travelocity.com (last visited Sept. 6, 2011).

[20] "[I]t is the opinion of the Department of Justice that the accessibility requirements of the Americans With Disabilities Act already apply to private Internet Web sites and services." *The Applicability of the Americans With Disabilities Act on Private Internet Sites, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Charles T. Canady, Chairman, Subcomm. on the Constitution), 2000 WL 145888. *See also* Brief for the United States as Amicus Curiae Supporting Appellant, Hooks v. OKBridge, Inc., 232 F.3d 208 (5th Cir. 1999) (No. 99-50891), 1999 WL 33806215, at * 4-6.

accessibility and has left individuals who could not access a website with litigation as their only recourse. Courts, however, have struggled to provide adequate recourse. The fact that the Internet is not explicitly included in the plain language of the statute forces the courts to utilize too narrow a reading of the statute. In addition, the circuit courts of appeals disagree in reference to whether Title III applies only to physical places, which would exclude Internet sites from being covered by the ADA.[21] Overall, the courts have failed to provide a consistent doctrine to improve access on a systemic level, necessitating statutory or regulatory amendments to realign the ADA with its original intention.

There are other significant barriers to relying on the court system for relief. Litigation is time consuming and costly, which immediately creates a stifling effect on individuals who do not have the resources to bring an action in court. Further, the cases that are litigated are often settled out of court.[22] In these settlements, the private entity generally agrees to make its individual website accessible and pay out money damages.[23] While this is a positive result for the individual litigant, it fails to set any judicial precedent and create change on a systemic level. For systemic change to occur, the law must explicitly mandate that public accommodations make their websites accessible. After frustration with the judiciary's stance on the issue, the DOJ issued an Advance Notice of Proposed Rulemaking ("ANPRM") to solicit comments regarding what issues and language a Notice of Proposed Rulemaking ("NPRM") about Web accessibility should address. [24] This

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[21] *Compare* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000) (physical place is required), *with* Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, 37 F.3d 12, 19 (1st Cir. 1994) (not limited to physical structures).

[22] *See e.g.*, Cynthia D. Waddell, *The National Federation of the Blind Sues AOL*, AM. B. ASS'N. (last visited Nov. 7, 2010), http://www.abanet.org/irr/hr/winter00humanrights/waddell2.html; S. Kathleen Krach &
Milan Jelenic, *The Other Technological Divide: K-12 Web Accessibility*, 24 J. SPEC. ED. TECH., no. 2, 2009, at 31, *available at* 2009 WLNR 14034043; Matthew Haggman, *New ADA Fight: Making Web Sites Accessible for the Blind*, LEGAL TIMES at 18, Oct. 14, 2002,

> There have been previous lawsuits alleging that the ADA applies to the Internet, but all have settled without a ruling on the merits . . . .
> . . . .
> Over the past two years, Access Now has sued bookseller Barnes & Noble and retailer Claire's Stores for maintaining Web sites that allegedly violated the ADA. Both cases settled.

Id.; Order Approving Settlement Agreement, Access Now v. Claire's Stores, Inc., No. 00-14017-CIV (S.D. Fla. May 7, 2002), 2002 WL 1162422; Larry D. Hatfield, *Disabled at S.F. State Granted Major Victory University Settles Suit, Pledges to Improve Access at Campus*, S.F. EXAMINER (CAL.), Nov. 5, 1999, at A7, *available at* 1999 WLNR 10183.

[23] *See* sources cited *supra* note 22.

[24] In administrative law cases where the organic statute, in this case the ADA, provides for the agency to engage in rulemaking without a requirement of a "hearing on the record," the basic procedure is known as "notice and comment rulemaking." *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY, 493 (6th ed. 2006). For notice and comment rulemaking, the Administrative Procedures Act ("APA") requires notice in the federal register of the proposed rule (a notice of proposed rulemaking or NPRM) and an opportunity for interested persons to comment. *See* Administrative Procedure Act, 5 U.S.C. § 553(b)-(c) (1966). Based on

is the first step toward mandating accessibility for Internet materials provided by public accommodations under Title III.

This Note will address the current state of the law regarding the Internet as a public accommodation. Specifically, it will focus on how the narrow reading of the ADA's public accommodations provision has an impractical effect on accessibility for the Deaf and hard of hearing. Ultimately this Note will provide suggestions and comments in response to the ANPRM, and will address how appropriate amendments to the applicable federal regulations can help improve access for Deaf and hard of hearing individuals consistent with the purpose of the ADA. Part I will provide background on the ADA, including legislative history and intent, along with information about Title III. Part II will discuss relevant caselaw, the current circuit split regarding places of public accommodation and how the district courts are applying the relevant circuit court decisions. Part III will discuss the practical effect of the current jurisprudence and the DOJ's stance regarding the development of the caselaw. Finally, Part IV will propose comments and provisions in response to the current ANPRM, specifically stating how mandating Web accessibility for operators of public accommodations will improve access to resources for the Deaf and hard of hearing community.

I. THE ADA

A. *Congressional Intent Behind ADA Title III*

The ADA was enacted in order to remove barriers, to bring equality to individuals with disabilities and to give them the opportunity to fully participate in society.[25] Largely because individuals with

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an increase in the number of rules that have being challenged in court, agencies have increasingly implemented the use of the ANPRM. *See* BREYER ET AL., *supra* at 565. The agencies implement the ANPRM to get a sense of what the regulated community would and would not like to see in the proposed rule. Generally, it can take between eighteen and twenty months to analyze the issues raised in the ANPRM before promulgating an NPRM. *See id*. Because the proposed rule at bar is only at the advanced stage, any action could take a number of years. *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36) [hereinafter *ANPRM*].

[25] The House Report stated:

> The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

H.R. REP. NO. 101-485, pt. 2, at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304, 1990 WL 125563. "The story of America is one of ever growing inclusiveness, as more and more Americans have become able to participate in the great mainstream of American life. Persons with disabilities, no less than other Americans, are entitled to an equal opportunity to participate in the American dream." 135 CONG. REC. S10617-02 (daily ed. Sept. 6, 1989) (testimony of Sen. Hatch), 1989 WL 194250.

disabilities are in the minority, businesses and private companies were not inclined to spend resources to provide proper access for these individuals.[26] This discrimination was well documented in Congress, through testimony and committee reports in the bill-making process, which provide extensive information about the legislature's intent at the time of the bill's passage.[27] Further, U.S. Attorney General Dick Thornburgh, on behalf of President Bush, testified in favor of the ADA, noting that individuals with disabilities continued to live their lives in dependence and isolation despite prior efforts by the government and private citizens to encourage inclusion of these individuals.[28] Ultimately, Congress was concerned with providing individuals with disabilities the ability to enjoy any and all resources that were widely available to the general public.[29]

Title III of the ADA mandates that places of public accommodation provide accessibility to goods and services for all individuals with disabilities.[30] Places of public accommodation refer to private entities whose operation affects commerce within one of the specifically enumerated categories in the statute.[31] The public

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[26] The House Report also stated:

> Discrimination against people with disabilities includes segregation, exclusion, or other denial of benefits, services, or opportunities to people with disabilities that are as effective and meaningful as those provided to others. Discrimination against people with disabilities results from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from the construction of transportation, architectural, and communication barriers or the adoption or application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference—that discrimination resulting from benign neglect.

H.R. REP. NO. 101-485, pt. 2, at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304, 1990 WL 125563.

[27] *See* H.R. REP. NO. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 1990 WL 125563.

[28] "Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence." *Id.* at 32 (citation omitted).

[29] *See id.* at 31-32.

[30] "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." *See* ADA § 302(a), 42 U.S.C. § 12182(a) (2006).

[31] The enumerated categories refer to:

> (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

accommodations provision was vital for the statute to remain consistent with its legislative intent. Before the passage of the ADA, individuals with disabilities rarely frequented places of public accommodation because of the barriers that previously existed.[32] One of the main goals of Title III and the ADA in general was to bring individuals with disabilities into mainstream life, and to cease shutting them out from activities that other Americans so easily enjoy.[33] By mandating accessibility in public accommodations, Congress sought to help disabled individuals escape dependent and isolated lifestyles.[34]

Congress was so intent on expanding rights for disabled individuals that it provided even more protections than the Civil Rights Act of 1964 ("Civil Rights Act").[35] While much of the ADA was modeled after the Civil Rights Act, Congress purposefully provided a more expansive scope in Title III, as compared to the more restrictive approach of the Civil Rights Act.[36] Indeed, Congress noted that discrimination against people with disabilities pervaded every place open to the public; thus full accessibility required more than the Civil Rights Act's limited spectrum.[37] This demonstrates Congress's clear intent on expanding accessibility for individuals with disabilities.

> 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.

ADA § 301(7), 42 U.S.C. § 12181(7) (2006).

[32] H.R. REP. NO. 101-485, pt. 2, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304, 1990 WL 125563.

[33] "The Attorney General has stated that we must bring Americans with disabilities into the mainstream of society 'in other words, full participation in and access to all aspects of society.'" *Id.* (citation omitted). Further, upon signing the bill, President Bush stated:

> Many of our young people, who have benefited from the equal educational opportunity guaranteed under the Rehabilitation Act and the Education of the Handicapped Act, have found themselves on graduation day still shut out of the mainstream of American life. They have faced persistent discrimination in the workplace and barriers posed by inaccessible public transportation, public accommodations, and telecommunications.

Americans with Disabilities Act of 1990 Statement by the President of the United States, 1990 U.S.C.C.A.N. 601, 1990 WL 285753.

[34] The House Report stated:

> The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue . . . . The extent of non-participation of individuals with disabilities in social and recreational activities is alarming.

H.R. REP. NO. 101-485, pt. 2, at 35 (1990).

[35] 42 U.S.C. § 2000a (2006).

[36] The House Report stated:

> It is critical to define places of public accommodations to include all places open to the public, not simply restaurants, hotels, and places of entertainment (which are the types of establishments covered by title II of the Civil Rights Act of 1964) because discrimination against people with disabilities is not limited to specific categories of public accommodations.

H.R. REP. NO. 101-485, pt. 2, at 35 (1990). In other words, the enumerated categories under Title III are more expansive than the coverage under the Civil Rights Act.

[37] *Id.*

B. *"Places" of Public Accommodation According to Title III*

Title III's usage of the words "place of public accommodation" is ambiguous in scope. Title III reads, in part: "[n]o 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."[38] There are different plausible textual readings of Title III's place of public accommodation provision. One interpretation holds that "place" encompasses only physical places because the ADA's enumeration of examples of places of public accommodation lists only physical places.[39] An opposing view holds that while the examples listed are physical places, the enumeration is not exhaustive and contains merely examples, but is not meant to exclude virtual places.[40] Yet another interpretation holds that public accommodations must have at least a connection or nexus to a physical structure.[41] This debate has led to many varying interpretations that would each provide a different degree of accessibility.[42]

Legislative history is informative in determining congressional intent in passing Title III. While most legislation provides a general guide as to which entities are covered, the ADA is more unique in that it provides an explicit list of categories of accommodations. The House of Representatives committee report indicated that the list of categories of public accommodations[43] is exhaustive.[44] Similarly, some courts have held that because the list of categories is exhaustive, and enumerates only physical places, Title III coverage does not extend to the Internet.[45] However, there is a plausible argument that if, for example, a company owns an online store that the online store could fall under the larger category of stores. 42 U.S.C. § 12181(7)(E) includes "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." While this statute was created before online shopping existed, there is no indication that these

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[38] ADA § 302(a), 42 U.S.C. § 12182(a) (2006).
[39] *See, e.g.*, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (citing to the examples enumerated in ADA § 301(7), 42 U.S.C. § 12181(7)). *See also infra* Part II.A.
[40] *See, e.g.*, Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, 37 F.3d 12, 19 (1st Cir. 1994). *See also infra* Part II.C.
[41] *See, e.g.*, Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283-84 (11th Cir. 2002). *See also infra* Part II.B.
[42] The way the statute defines "place" is extremely significant, as it determines whether or not the Internet and other virtual spaces are included under the statute.
[43] *See* ADA § 301(7), 42 U.S.C. § 12181(7) (2006).
[44] H.R. REP. NO. 101-485, pt. 3 at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 1990 WL 121680. "An example of an entity excluded from this list, and therefore not considered a public accommodation, would be a construction job site . . . [and] [r]eligious institutions or entities controlled by religious institutions." H.R. REP. NO. 101-485, pt. 1, at 36-37 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 280-81, 1990 WL 121684.
[45] *See infra* Part II.A.

stores must be brick and mortar establishments. Presumably then, a company that owns a place of public accommodation and fails to provide captioned video or other means of accessibility on its website could be in violation of Title III. This contention however, has not been accepted in the relevant judicial decisions.

II. HOW THE COURTS HAVE INTERPRETED THE ADA

A. *The Narrow Interpretation*

The circuit courts of appeals are split in regard to whether a "place of public accommodation" under the ADA must be a physical place. The Third, Sixth and Ninth Circuits have taken a narrow view, concluding that a place of public accommodation must be a physical place.[46] The Sixth Circuit, in *Parker v. Metropolitan Life Insurance Co.*,[47] held that the defendant insurance company could legally provide superior benefits for individuals with physical disabilities as compared to individuals with mental disabilities.[48] This decision is significant to the discussion of public accommodations because it discusses Title III applicability to non-physical places. The Court in *Parker*[49] based its conclusion on the fact that the insurance provider was not a "place" of public accommodation.[50] The *Parker* court relied primarily on the doctrine of *noscitur a sociis*;[51] thus, since the examples listed in the statute were, according to the court, associated with physical places, extending Title III to insurance policies would be beyond the purview of

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[46] *See, e.g.*, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114-15 (9th Cir. 2000).
[47] Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1084 (1998). *Parker* has significant procedural history. At the district level, the court determined that Title III does not cover insurance companies because the Title covers only physical places. *See* Parker v. Metropolitan Life Ins. Co., 875 F.Supp. 1321, 1327 (W.D. Tenn. 1995). Under this interpretation, the plaintiff would only be covered if she was denied access into one of Met Life's physical offices. *Id.* However, the Sixth Circuit reversed based on the notion that the statutory language is sufficiently broad to prohibit discrimination in the provision of insurance. Parker, v. Metropolitan Life Ins. Co., 99 F.3d 181, 183-84 (6th Cir. 1996). The Sixth Circuit noted that the legislative history and the DOJ's interpretation of the statute indicate that the ADA prohibits discrimination in the provision of insurance. *Id.* The court then granted en banc review over the Title III contention, and the court vacated the prior judgment and affirmed the district court's conclusion that places of public accommodations are limited to physical places. *Parker*, 121 F.3d at 1009. This procedural history illustrates the lack of clarity in the law.
[48] *See Parker*, 121 F.3d at 1010-11 ("A benefit plan offered by an employer is not a good offered by a place of public accommodation. As is evident by § 12187(7), a public accommodation is a physical place and this Court has previously so held."). The *Parker* court also relied on the precedent of Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) (holding that "plaintiffs' argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute.").
[49] *Parker* refers to the most recent Sixth Circuit en banc decision. *See Parker*, 121 F.3d 1006 (6th Cir. 1997).
[50] *See id.* at 1011.
[51] "The meaning of a word is or may be known for the accompanying words. Under the doctrine . . . the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it." *Parker*, 121 F.3d at 1014 (citation omitted).

the statute.[52]

The Third Circuit, in *Ford v. Schering-Plough Corp.*,[53] adopted the Sixth Circuit reasoning and held that "the disability benefits that Ford challenge[d] d[id] not qualify as a public accommodation and thus d[id] not fall within the rubric of Title III."[54] The *Ford* court determined that the plain meaning of Title III leads to the conclusion that places of public accommodation must be physical places.[55] The *Ford* court based its decision on its view that the list of examples provided in the ADA refer to physical places.[56] Thus, like the Sixth Circuit, the Third Circuit determined that the protections of Title III extend only to actual physical places that provide goods and services at a physical location.[57]

In *Weyer v. Twentieth Century Fox Corp.*,[58] the Ninth Circuit also adopted the Sixth Circuit's *Parker* decision.[59] In *Weyer*, employees brought an action under Title III based on the fact that their employer's benefits program provided benefits to individuals with physical disabilities that were superior to the plans provided to individuals with mental disabilities.[60] There, the court concluded that while an actual insurance office is a place of public accommodation, the insurance provider's policy is not because there is no physical structure associated with the particular insurance policy.[61]

The Third, Sixth and Ninth Circuits based their determinations on a narrow reading of Title III. This approach, however, has adverse impacts on litigants, as it can leave a disabled individual with no cognizable claim. For example, in *Stoutenborough v. National Football League, Inc.*,[62] plaintiffs sued the National Football League (NFL), the

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[52] *Id.*

[53] Ford v. Schering-Plough Corp., 145. F.3d 601 (3d Cir. 1998).

[54] *Id.* at 612.

[55] *See id.* at 612-13.

[56] *See id.* at 612 & n.3.

[57] *See id.* at 612-13.

> [T]he "goods, services, facilities, privileges, advantages, or accommodations" concerning which a disabled person cannot suffer discrimination are not free-standing concepts but rather all refer to the statutory term "public accommodation" and thus to what these places of public accommodation provide. Ford cannot point to these terms as providing protection from discrimination unrelated to places.

Id. at 613.

[58] Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000).

[59] *See id.* at 1115.

[60] *See id.* at 1107-08.

[61] The court in *Weyer* stated:

> Title III provides an extensive list of "public accommodations" in § 12181(7), including such a wide variety of things as an inn, a restaurant, a theater, an auditorium, a bakery, a laundromat, a depot, a museum, a zoo, a nursery, a day care center, and a gymnasium. All the items on this list, however, have something in common. They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services. The principle of noscitur a sociis requires that the term, "place of public accommodation," be interpreted within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an actual physical place is required.

Id. The *Weyer* court otherwise fails to cite to any legislative intent. *See id.* at 1114.

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

Cleveland Browns Football Club, Inc., and various media outlets[63] alleging that the NFL "blackout rule"[64] violated Title III because Deaf and hard of hearing individuals had no alternative means to enjoy the football games (such as listening to them on the radio).[65] Consistent with its decision in *Parker*, the Sixth Circuit determined that none of the defendants were a place of public accommodation, thus they were not regulated under Title III.[66] Because the only physical place associated with the football game was the stadium itself, and the stadium had no connection to the television broadcast, the court affirmed the district court's dismissal of plaintiffs' claims for failure to state a cause of action under Title III.[67] The practical effect of this decision was that the plaintiffs were left with no legal recourse under the ADA. This illustrates the larger systemic difficulty that the Deaf and hard of hearing community faces in jurisdictions where the courts fail to recognize virtual places as places of public accommodation.[68]

B. *The Nexus Interpretation*

The Second and Eleventh Circuits have taken a slightly broader approach than the Third, Sixth and Ninth Circuits in interpreting Title III.[69] These courts generally have found that any entity that owns, leases or operates a place of public accommodation must provide equal access to all goods and services, even if said goods and services are not directly connected to a physical structure.[70] In other words, if a public accommodation has a nexus to a physical place, it falls within the bounds of the ADA. For example, in *Pallozzi v. Allstate Life Insurance Co.*,[71] Allstate Insurance Company refused to sell a life insurance policy to both plaintiffs on the basis of their mental disabilities.[72] The plaintiffs asserted that this denial was discriminatory under Title III.[73] The Second Circuit held that the plain meaning of Title III covers any goods and services offered by a place of public accommodation if there is a nexus to a physical place.[74] Thus, the insurance policy, offered by an insurance office, which is a place of public accommodation under the statute, was covered under Title III.[75]

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[63] Nat'l Broadcasting Company, Inc., American Broadcasting Company, Inc., Columbia Broadcasting Systems, Inc., W.K.Y.C.-T.V. 3, W.J.W.-T.V. 8, and W.E.W.S.-T.V. 5.
[64] The blackout rule "prohibits the live local broadcast of home football games that are not sold out seventy-two hours before game-time . . . ." *Stoutenborough*, 39 F.3d at 582.
[65] *See id.*
[66] *Id.* at 582-83.
[67] *Id.* at 583-84.
[68] Overall the strict approach provides an adverse practical effect.
[69] *See supra* Part II.A.
[70] *See e.g.*, Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283-84 (11th Cir. 2002).
[71] Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999).
[72] *Id.* at 30.
[73] *Id.*
[74] *Id.* at 31.
[75] "[T]he prohibition imposed on a place of public accommodation from discriminating against a disabled customer in the enjoyment of its goods and services appears to prohibit an insurance

The Eleventh Circuit similarly took the nexus approach to interpreting Title III. In *Rendon v. Valleycrest Productions Ltd.*,[76] plaintiffs,[77] in a class action lawsuit, sued Valleycrest Productions Limited ("Valleycrest") and the American Broadcasting Network, Inc. ("ABC") ("Defendants") for violation of Title III, alleging discrimination based on the use of a telephone-based selection process for those who wanted to be contestants on the show "Who Wants to be a Millionaire" ("Millionaire").[78] Plaintiffs contended that the telephone process[79] excluded participation of Deaf and hard of hearing, as well as mobility impaired, individuals.[80] Defendants did not provide other communication options for Deaf and hard of hearing individuals, specifically a Teletypewriter (TTY).[81] The Defendants relied on *Parker*,[82] *Weyer*,[83] *Stoutenborough*,[84] and *Ford*[85] to support their argument that the telephone contestant hotline is not a place of public accommodation; thus they were not in violation of Title III.[86] The Eleventh Circuit rejected this assertion, holding that since the television studio was a physical place,[87] the contestant hotline had a "nexus" to the studio and therefore, because the discrimination occurred over the hotline, the defendants were responsible for providing accommodations under Title III.[88]

C. *The Broad Interpretation*

The broad interpretation, adopted by the First and Seventh Circuits, asserts that Title III encompasses more than just physical structures, even without a nexus to a brick and mortar establishment. For example, in *Carparts Distribution Center, Inc. v. Automotive*

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office from discriminatorily refusing to offer its policies to disabled persons . . . ." *Id.*

[76] Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002).

[77] On appeal, the DOJ intervened as plaintiffs, demonstrating its support for Title III to include non-physical places. *See id.* at 1281.

[78] *Id.* at 1280.

[79] Contestants can call a telephone number where they are asked a series of questions and are prompted to answer the questions quickly by dialing the appropriate number on the telephone keypad. *See id.* Callers that answer first are then put into a pool and names are drawn at random to proceed on to the next round. *See id.* The next round again requires the contestant to answer trivia questions by dialing a number on a key pad. *See id.*

[80] *See id.* at 1280.

[81] *See id.* A TTY (also referred to as a Telephonic Device for the Deaf, or TDD) is a device that provides telephone access to Deaf and hard of hearing individuals. *See id.* at 1281 n.1.

[82] Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) (en banc).

[83] Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

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

[85] Ford v. Schering-Plough Corp., 145. F.3d 601 (3d Cir. 1998).

[86] *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283-84 (11th Cir. 2002).

[87] *See id.* at 1285.

[88] *See id.* "To contend that Title III allows discriminatory screening as long as it is off site requires not only misreading the relevant statutory language, but also contradicting numerous judicial opinions that have considered comparable suits dealing with discrimination perpetrated 'at a distance.'" *Id.* The court cited to examples of Title II (public entities) jurisprudence where courts addressed the issue of offsite discrimination. *See id.*

Wholesalers Ass'n of New England, Inc.,[89] plaintiffs alleged that Defendant health insurance provider's plan, which put a cap on benefits for individuals with AIDS, violated Title III.[90] The First Circuit, in *Carparts*, looked closely into the plain meaning and intent of the statute and determined that the statute did not require places to be physical structures.[91] Further, when looking into legislative history, the court acknowledged that Congress intended for the ADA to provide equal access to goods and services for individuals with disabilities.[92] Therefore, it reasoned that limiting Title III to physical places was not consistent with congressional intent.[93] The court determined that denying access to benefits based on the need for a physical place would be like denying accessibility where goods are bought over the phone or by mail.[94] The court held that this 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."[95]

The Seventh Circuit has similarly interpreted Title III broadly. In *Doe v. Mutual of Omaha Insurance Co.*,[96] plaintiffs sued insurance providers for capping insurance benefits for individuals with AIDS.[97] The insurance provider argued that insurance policies are not governed under Title III because the insurance provider is not a physical place.[98] Chief Justice Posner, writing for the court, rejected this argument, stating that "[t]he core meaning of this provision, plainly enough, is that the owner or operator of a . . . facility (whether in physical space or in electronic space . . .) that is open to the public cannot exclude disabled persons from . . . using the facility in the same way that the nondisabled do."[99] Any form of electronic place, under this broad interpretation,

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[89] Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, 37 F.3d 12 (1st Cir. 1994).
[90] *See id.* at 14.
[91] *See id.* at 19. The First Circuit noted that the definition of public accommodation includes insurance offices, healthcare providers, and other service establishments. *Id.* (*citing* 42 U.S.C. § 12181(7)(F)). The court held that "[t]he plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter. 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." *Id.*
[92] *See id.* at 20.
[93] *See id.*
[94] *Id.* at 19.
[95] *Id*.
[96] Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999) (Posner, C.J.).
[97] *See id.* at 558.
[98] *Id*.
[99] *Id.* at 559. In other words, Chief Justice Posner plainly stated that places and facilities under the ADA include electronic spaces. *Id.* at 558-59. This particular case, however, was dismissed on other grounds. *See id.* at 559

> Mutual of Omaha does not refuse to sell insurance policies to such persons-it was happy to sell health insurance policies to the two plaintiffs. But because of the AIDS caps, the policies have less value to persons with AIDS than they would have to

would be subject to the ADA's requirements. The Seventh Circuit's decision in *Doe* was the most instructive in terms of how the courts should treat websites because it affirmatively stated that Title III covers electronic spaces. Nonetheless, the lower courts, where this issue has been litigated, have failed to adopt this view when addressing issues of Web accessibility under Title III.[100]

D. *Applying the Circuit Decisions to Internet Accessibility Cases*

Whether a place of public accommodation must be a physical place or can be a non-physical place is critical to determining whether websites are covered under Title III of the ADA. Since the aforementioned courts made their disparate determinations regarding virtual places under Title III, some district courts have applied these rulings to Web-related cases. The circuit split has led different district courts to apply different standards and has resulted in a lack of uniformity among the courts.

The Southern District of Florida addressed the issue of Web accessibility in *Access Now, Inc. v. Southwest Airlines Co*.[101] There, the plaintiffs contended that they were excluded from goods and services offered by Southwest.com, in violation of Title III, because of their disability.[102] The court in *Access Now* considered this question to be one of first impression because although the court was bound by the Eleventh Circuit's decision in *Rendon*,[103] no court in the circuit had addressed whether or not Internet websites fell within Title III.[104] *Access Now* differed from previous cases because the plaintiffs asserted that Southwest.com fell within the enumerated categories of Title III,

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> persons with other, equally expensive diseases or disabilities. This does not make the offer to sell illusory, for people with AIDS have medical needs unrelated to AIDS, and the policies give such people as much coverage for those needs as the policies give people who don't have AIDS.

Id.

100 While this issue has not been litigated within the *Doe* jurisdiction, the lower courts that have decided cases of Web accessibility under Title III have treated the cases as ones of first impression. *See infra* Part II.D. Thus, those district courts could have potentially adopted this reasoning.

101 227 F. Supp. 2d 1312, 1317 (S.D. Fla. 2002), *appeal dismissed on procedural grounds*, 385 F.3d 1324 (11th Cir. 2004) (plaintiff could not raise, for first time on appeal, the theory that the airline's travel service was a place of public accommodation to which website was connection).

102 *See id.* at 1314. Plaintiffs, who are blind, alleged that they were unable to access Southwest.com with their screen reader software, rendering the website inaccessible. *See id.* at 1316.

103 *Rendon* stated that non-physical places may be covered under Title III, but must have a nexus to a physical place that is covered under the statute. *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283-84 (11th Cir. 2002). For a full discussion see *supra*, Part II.B.

104 *See Access Now*, 227 F. Supp. 2d at 1315.

> Because no court within this Circuit has squarely addressed this issue, the Court is faced with a question of first impression, namely, whether Southwest's Internet Website, southwest.com, is a place of public accommodation as defined by the ADA, and if so, whether Title III of the ADA requires Southwest to make the goods and services available at its "virtual ticket counters" accessible to visually impaired persons.

Id.

specifically, a place of "exhibition, display and a sales establishment."[105] The district court, however, rejected this argument because "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated."[106] Thus, because the corresponding specifically enumerated examples of public accommodations were what the court perceived as physical places, the court could not extend Title III requirements to Southwest.com.[107] The court in *Access Now* distinguished its facts from *Rendon* because the defendants in *Rendon* owned and operated a physical place that had a nexus to the virtual location of the discriminatory act unlike Southwest.com.[108] The plaintiffs in *Access Now* did not argue under the nexus theory and did not contend that Southwest.com had a nexus to Southwest Airlines' physical location.[109] Consequently, the plaintiffs were denied recovery.

The Northern District of California also addressed the issue of Web accessibility in *National Federation of the Blind v. Target, Corp.*[110] ("*Target*"), where the court found that Target.com was inaccessible to blind individuals in violation of Title III.[111] The plaintiffs here, however, did not attempt to allege that Target.com was a place of public accommodation; rather, they alleged that Target.com's failure to provide equal access to blind individuals denied plaintiff equal access to goods and services at Target stores.[112] The court applied the

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[105] *See id.* at 1318.

> Plaintiffs created their definition from the following italicized language in three subsections of 42 U.S.C. § 12181(7): "a motion picture house, theater, concert hall, stadium, or other place of *exhibition* or entertainment," 42 U.S.C. § 12181(7)(C); "a museum, library, gallery, or other place of public *display* or collection," 42 U.S.C. § 12181(7)(H); and "a bakery, grocery store, clothing store, hardware store, shopping center, or other *sales* or rental *establishment*," 42 U.S.C. § 12181(7)(E).

Id. at n.6.

[106] *Id.* at 1318 (citations omitted).

[107] *Id.* at 1319.

> Here, the general terms, "exhibition," "display," and "sales establishment," are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely: "motion picture house, theater, concert hall, stadium"; "museum, library, gallery"; and "bakery, grocery store, clothing store, hardware store, shopping center," respectively. 42 U.S.C. §§ 12181(7)(C), (H) & (E). Thus, this Court cannot properly construe "a place of public accommodation" to include Southwest's Internet Website, southwest.com.

Id.

[108] The court in *Rendon* found in favor of the plaintiffs. *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283-84 (11th Cir. 2002). "[T]he Internet Website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in *Rendon.*" *Access Now*, 227 F. Supp. 2d at 1321.

[109] The plaintiffs attempted to bring up the nexus argument on appeal, but the Eleventh Circuit dismissed. *See* Access Now, Inc. v. Southwest Airlines, Co., 385 F.3d 1324 (11th Cir. 2004) (plaintiff could not raise, for first time on appeal, the theory that the airline's travel service was a place of public accommodation to which website was connection).

[110] Nat'l Fed'n of the Blind v. Target, Corp., 452 F.Supp. 2d 946 (N.D. Cal. 2006).

[111] *See id.* at 949.

[112] *See id.* at 952.

nexus approach and concluded that Target.com performed functions sufficiently related to Target's brick and mortar stores and, thus, were covered under Title III.[113] In *Target*, the District Court was bound by Ninth Circuit precedent determining that a "place of public accommodation within meaning of Title III, is a physical place."[114] While the *Target* court was bound by this precedent, it did not determine that the discrimination must occur on the premises of the public accommodation, which gave the plaintiffs a legitimate claim, despite the fact that the discrimination was outside of the physical Target store. [115] These types of cases continue to be filed in federal courts.[116]

III. THE PRACTICAL EFFECT OF THE CURRENT CASELAW AND THE DOJ'S STANCE

A. *Why the Narrow and Nexus Approaches Are Antithetical the Purpose of the ADA*

Failing to provide Title III protections to electronic markets puts individuals with disabilities at a great disadvantage, as the Internet provides "unprecedented access to information."[117] Deaf and hard of hearing individuals are precluded from or at least limited in protecting their rights if they are denied access to information and entertainment from websites that are not connected to a brick and mortar establishment.[118] The DOJ states that

> [t]he ADA's promise to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be achieved in today's technologically advanced society only if it is clear to . . . public

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113 *See id.*

114 *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000). *See supra* Part II.A. This is significant because the *Target* court unilaterally applied the nexus interpretation despite the fact that *Weyer* adopted the strict approach. *See id.*

115 *Target*, 452 F.Supp. 2d at 953. The *Target* decision was never appealed to the Ninth Circuit. *See id.* (see case history).

116 *See* cases cited in *supra* note 16. As with other cases, Netflix relied on the Ninth Circuit precedent that places of public accommodation under Title III must be physical places. *See* Motion to Dismiss at 14, Cullen v. Netflix, Inc., No. 5:11-Civ-01199 (N.D. Cal. filed Mar. 11, 2011) ("[T]he Ninth Circuit explained that § 12181 (defining a 'place of public accommodation') precludes non-physical abstractions — such as Netflix streaming videos — from the realm of 'actual, physical places' the ADA covers . . . ."). Netflix's argument was successful because the plaintiff amended his complaint and his complaint no longer discusses the ADA. *See* First Amended Complaint, Cullen v. Netflix, Inc., 5:11-Civ-01199 (N.D. Cal. filed Mar. 11, 2011). A similar case, National Association of the Deaf ("NAD") v. Netflix is pending in the District of Massachusetts. *See generally, NAD v. Netflix D.Mass. Compl. supra* note 16. Netflix has moved to dismiss based on procedural grounds or in the alternative transferred to the Northern District of California, or further in the alternative, stayed pending FCC regulations of the 21st Century Communications and Video Accessibility Act of 2010. *See* Motion to Dismiss at 4-5, Nat'l Ass'n of the Deaf v. Netflix, Inc., No. 3:11-Civ-30168 (D.Mass. filed June 16, 2011).

117 ANPRM, 75 Fed. Reg. 43,460, 43,461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36).

118 *See id.*

accommodations that their Web sites must be accessible."[119]

Ultimately, court decisions requiring that public accommodations must have at the very least a nexus to a physical place create an impractical result. For example, as a practical effect, the defendants in *Rendon* and *Stoutenborough* equally discriminated against the plaintiffs.[120] In pure legal terms, in *Rendon*, the television studio was a physical place, which allowed the court to make its determination in favor of the plaintiffs. In reality, however, the situation in *Stoutenborough* was no less discriminatory than what occurred in *Rendon*. The courts were constrained by the plain language of Title III and were forced to make an arbitrary distinction that is inconsistent with the spirit and intent of the ADA.

The circuit courts that declined to extend a broad reading of Title III failed to account for legislative intent in their decisions.[121] While, admittedly, the legislative history does not explicitly speak to the issue of Internet accessibility, it does call for a broad, sweeping regulation to make public accommodations accessible.[122] Congress meant to regulate private business in an effort to bring equality to and remove barriers for individuals with disabilities.[123] The ADA committee report provides extensive information about the legislature's intent at the time of the bill's passage.[124] Title III, and the ADA in general, sought to include individuals with disabilities into mainstream society.[125] Ultimately, Congress was concerned with mandating accessibility and inclusion for individuals with disabilities to enjoy any and all resources that were

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[119] *Id.* at 43,462.

[120] *See supra* Part II.B.

[121] *See e.g.*, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1004; Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006; Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580; Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998). The Third Circuit in *Ford* stated that the plain meaning of the term "public accommodation" and the language of the statute was clear; thus the court did not look into legislative intent. *See Ford*, 145 F.3d at 613. This argument is without merit. The mere fact that the circuits cannot agree on this issue and that so many authorities interpret the statute and the meaning of public accommodation differently demonstrates how unclear the plain reading of the statute is. Courts that have taken the broad approach, on the other hand, have explicitly accounted for legislative intent. *See* Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, 37 F.3d 12, 19 (1st Cir. 1994) (noting that Congress did not mean to make such an arbitrary distinction between physical and nonphysical places). *Parker*, 121 F.3d at 1020 (Martin, C.J., dissent) ("By limiting Title III's applicability to physical structures, the majority interprets Title III in a manner completely at odds with clear congressional intent."); Parker v. Metropolitan Life Ins. Co., 99 F. 3d 181, 187-88 (noting that the court's holding falls more within the stated legislative intent than the defendant's contention that Title III applies only to physical places); Rendon v. Valleycrest Prods., LTD., 294 F.3d 1279, 1285 (discussing that the ADA did not intend to limit its provisions to services provided at physical structures); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999) (Posner, C.J.) (stating that the legislative intent was consistent with the court's determination.).

[122] *See supra* Part II.B.

[123] *See supra* note 25.

[124] *See id. See also supra* Part I.A.

[125] *See* Americans with Disabilities Act of 1990 Statement by the President of the United States, *supra* note 33.

widely available to the general public.[126] As stated in *Carparts*, "[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."[127] Yet, increasingly schools are offering online degrees and classes through the Internet, and other university resources are available either solely, or at a significantly higher convenience, through the Internet.[128] The Internet has created a new medium for socialization and entertainment through social networking websites.[129] Finally, the use of the Internet by the job search market, insurance companies and health care providers has increased, creating another major disadvantage to those individuals who cannot use the Internet.[130] Indeed, the creation of the Internet and proliferation of other non-physical places has left the courts in a difficult position because they are not fully authorized to mandate accessibility.

B. *The Plain Reading of Title III – Why the Courts Cannot Provide Relief*

Courts are forced to make judgments primarily based on the plain language of the statute.[131] The plain language of the ADA provides only some insight into whether or not websites are places of public accommodation. First, the statute never explicitly addresses the issue of virtual places.[132] Second, it is unclear whether the general enumerated categories encompass virtual places. [133] Third, the statutory language, as interpreted by both the courts and the DOJ, does not interpret Title III to protect access only to physical locations.[134] For example, the ADA is

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126 *See* H.R. REP. NO. 101-485, pt. 2, *supra* note 123, at 31-32.

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

128 *See* ANPRM, 75 Fed. Reg. 43,460, 43,461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36). *See also e.g.*, *Spanish 277 - Reading, Grammar, and Composition*, Open Michigan, (Sept. 2, 2011), http://open.umich.edu/education/lsa/spanish277/fall2011/materials (University of Michigan provides open online courses in the form of audio clips with no captioning or written narrative).

129 For example, a new television series will be airing only on Facebook, which is not required to caption its video. *See* Melissa Bell, *Advocates for Deaf Press Video Producers to Include Closed Captions*, WASH. POST (July 1, 2011), http://www.washingtonpost.com/lifestyle/style/advocates-for-deaf-press-video-producers-to-include-closed-captions/2011/06/27/AGg5oytH_story.html?wprss=rss_homepage.

130 *See* ANPRM, 75 Fed. Reg. 43,460, 43,462 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36).

131 The Constitution requires separation of powers, which implies that the judiciary can only interpret the laws as Congress has written them and cannot expand them. *See generally* U.S. CONST. arts. I-III. *See also* The FEDERALIST NO. 47 (James Madison).

132 *See* ADA § 301, 42 U.S.C. § 12181 (1990), *et seq*.

133 *See* ADA § 301(7), 42 U.S.C. § 12181(7). For example, it was unclear whether the website for Claire's Stores would fall under the overall category of "a clothing store" or "other sales or rental establishment." *See generally* Order Approving Settlement Agreement, Access Now v. Claire's Stores, Inc. (No. 00-14017-CIV), 2002 WL 1162422; 42 U.S.C. § 12181(5).

134 *See* ANPRM, 75 Fed. Reg. 43,460, 43,463 (proposed July 26, 2010) (to be codified at 28

not limited to protecting only those with mobility impairments from gaining entry into a physical public accommodation; those with sensory disabilities who require the assistance of auxiliary aids and services are protected as well.[135] In *Target*, for example, the court extended protections only where there was a nexus to a physical location because the court believed it was limited by the plain language of the ADA. There, the court stated that "the ADA does not explicitly mention Websites" and thus, the court "declin[ed] to draw an inference from the absence of congressional action."[136]

In *Access Now*, the court acknowledged the problematic result that it was forced to render, and urged legislative action, stating

> in light of the rapidly developing technology at issue, and the lack of well-defined standards for bringing a virtually infinite number of Internet Websites into compliance with the ADA, a precondition for taking the ADA into "virtual" space is a meaningful input from all interested parties via the legislative process. As Congress has created the statutorily defined rights under the ADA, it is the role of Congress, and not this Court, to specifically expand the ADA's definition of "public accommodation" beyond physical, concrete places of public accommodation, to include "virtual" places of public accommodation.[137]

The court in *Access Now* was on point with its determination that courts cannot make these decisions. The decision to expand the scope of the ADA must be made by the political branches of government, and the courts may only apply the applicable law. While the *Access Now* court sought action from Congress, action from the DOJ would be sufficient since Congress has delegated authority to the Attorney General to carry out the provisions of Title III.[138]

C. *The DOJ's Stance*

Title III authorizes the Attorney General to promulgate regulations to carry out and clarify relevant sections of the ADA.[139] Like the ADA

C.F.R. pts. 35 and 36). "The plain language of the statutory provisions applies to discrimination in offering the goods and services 'of' a place of public accommodation . . . rather than being limited to those goods and services 'at' or 'in' a place of public accommodation . . . ." *Id. See also* Nat'l Fed'n of the Blind v. Target, Corp.,, 452 F.Supp. 2d 946, 952 (N.D. Cal. 2006); Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1285 (11th Cir. 2002).

[135] *See* ANPRM, 75 Fed. Reg. at 43,463.

[136] *Target*, 452 F.Supp. 2d at 952 n.2.

[137] Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 n.13. (S.D. Fla. 2002).

[138] *See* 42 U.S.C. § 12186(b) (1990). The main distinction is that the DOJ will not go as far as extending ADA coverage to the Internet itself. *See infra* Part IV.C. The DOJ can, however, extend coverage beyond the physical places mentioned in the statute, which it purports to do in the ANPRM.

[139] The statute provides:

> Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

itself, the current federal regulation provides little guidance for the courts in terms of whether Websites are covered under Title III because it does not address accessibility of virtual places. Further, guidance from the DOJ has been limited to amicus briefs filed on behalf of plaintiffs in Title III lawsuits.[140] This type of guidance is not binding, and the courts often ignore the DOJ's position on the issue.[141] Thus, the DOJ issued an ANPRM to codify its current position on Internet accessibility.

In *Hooks v. OKbridge*,[142] the DOJ filed an amicus curiae brief in which they took the position that a place of public accommodation is not restricted to a physical location.[143] The DOJ asserted that restricting Title III to physical places "excludes from coverage the wide, and growing, range of services provided over the Internet – from shopping to online banking and brokerage services to university degree courses – at a time when such modes of commerce are beginning to replace reliance on physical business locations."[144] The DOJ further argued that "[t]he point of the [ADA] is to require a company that provides a service to the public at large, to provide that service in a non-discriminatory manner to those with disabilities as well."[145] The DOJ took the position that "there is no reasonable explanation" as to why Congress would arbitrarily limit the scope of the ADA by making Title III apply only to physical places.[146]

The DOJ's stance is even further evident from its April 2010 Congressional Oversight Hearing.[147] The Deputy Assistant Attorney General for Civil Rights addressed the Subcommittee on the Constitution, Civil Rights, and Civil Liberties regarding how technology affects individuals with disabilities.[148] At the hearing, he stated that "[m]aking Websites accessible is neither difficult nor especially costly, and in most cases providing accessibility will not result in changes to the format or appearance of a site."[149] The DOJ

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42 U.S.C. § 12186(b). The DOJ later promulgated 28 C.F.R. § 36.101 (2011).

140 *See e.g.*, Brief for DOJ as Amicus Curiae Supporting Appellant at 9, Hooks v. OKBridge, 232 F.3d 208 (5th Cir. 2000) (No. SA-99-CV-214-EP), 1999 WL 33806215 [hereinafter *DOJ Amicus Brief*].

141 Hooks v. OKBridge, 232 F.3d 208 (5th Cir. 2000) (unpublished table decision), 2000 WL 1272847, at *1 (summary judgment granted to defendant company that ran a private website on the grounds that the plaintiff did not meet his burden to show that he requested a reasonable modification, thus the court did not reach the issue of whether Title III applies to virtual places).

142 *Id.*

143 *See* DOJ Amicus Brief, *supra* note 140, at * 4-6.

144 *Id.*

145 *Id.* at 11.

146 *Id.* at 12.

147 *See Statement Concerning Emerging Technologies and the Rights of Individuals with Disabilities: Before H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. On the Judiciary*, 111th Cong. 4 (2010) (statement of Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights, Department of Justice), *available at* http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf.

148 *See id.*

149 *See id.* at 4.

then announced that it is considering a plan to issue guidance to private businesses covered under Title III, which either operate under a website or have a website to accompany their business.[150] Subsequently, the DOJ issued the ANPRM in order to take steps toward codifying its position on Web accessibility under the ADA.

IV. A RESPONSE TO THE ANPRM AND LEGAL RIGHTS OF THE DEAF AND HARD OF HEARING COMMUNITY

In the ANPRM, the DOJ discussed different aspects of the proposed rule and asked for responses to certain questions.[151] The ANPRM requested that the public submit comments and answer questions in order to provide the DOJ with a comprehensive understanding of how this proposed rule would affect the regulated community.[152]

A. *Cost-Benefit Analysis on the Government and the Private Sector*

Pursuant to Executive Order No. 12866, agencies are required to conduct a cost benefit analysis of all proposed regulations.[153] The formal cost benefit analysis must include both quantitative and qualitative costs.[154] Cost benefit analysis is not required at the ANPRM level, as it would be for a NPRM, but the DOJ nonetheless requested this information in the ANPRM.[155] The cost-benefit analysis is especially crucial for this regulation because Title III carves out two widely used affirmative defenses in the Internet context. Public accommodations are excused from providing goods and services to individuals with disabilities if: (1) it would result in an undue burden,[156] or (2) the accommodations would materially alter the nature of the goods and services provided.[157] If the DOJ amends the regulations to

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[150] *Id.* at 5-6.

[151] *See* ANPRM, 75 Fed. Reg. 43,460, 43,465-67 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36).

[152] *See id.* This section will address the questions raised in the ANPRM as they relate to legal issues that may be faced by the Deaf and hard of hearing community. The ANPRM requests responses to nineteen questions. *See id.* This section does not address the questions in any particular order (specifically, not in the order in which they are asked) and does not address every question. As some questions are more technical, this Note will only address the questions that raise possible legal issues for the Deaf and hard of hearing community.

[153] *See id.* at 43,466.

[154] *See id.*

[155] *See id.*

[156] Title III provides that discrimination includes

> 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.*

ADA § 302(2)(A)(iii), 42 U.S.C. § 12182(2)(A)(iii) (2006) (emphasis added).

[157] Title III also provides for discrimination where there is

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges,

include Internet websites, the amendments must allow for requirements strict enough to ensure accessibility without creating requirements that are too strict or costly. Implementing requirements that are too burdensome will allow businesses to utilize one of the affirmative defenses too easily, making it more likely that these businesses could prevail in court and would be able to avoid making proper accommodations. This would frustrate the purpose of amending the regulation. The cost-benefit analysis will help determine which areas should be more strictly regulated without creating too high a burden.

The benefits felt by the Deaf and hard of hearing community are mostly qualitative.[158] One major benefit is that Deaf and hard of hearing individuals would enjoy access to Internet video. Deaf and hard of hearing individuals rely on auxiliary aids such as captioning to understand video.[159] Precluding those individuals from watching video on the Internet contradicts the precise meaning behind Title III.[160] Additionally, allowing Deaf individuals to have access to commercials on websites that provide access to television programming[161] may give Deaf individuals more incentive to spend money in the market and may spur economic growth. Nonetheless, Deaf and hard of hearing individuals currently lack the ability to make choices based on this commercially disseminated information, but the proposed regulation could implement this benefit. Another major benefit would be that businesses would have to account for the Deaf and hard of hearing community in creating search options on their web pages. For example, travel searches engines that provide the user with cheaper travel options do not enable search for Deaf-accessible hotel rooms.[162] A new

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> advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.*

ADA § 302(2)(A)(ii), 42 U.S.C. § 12182(2)(A)(ii) (2006) (emphasis added). There are other affirmative defenses in Title III, but for the purposes of providing for Internet accessibility, these are the two relevant ones.

158 Qualitative benefits cannot be quantified into monetary terms but nonetheless add unquantifiable benefit to individuals and groups.

159 Congress recently passed a bill that will require captioning on all material that is broadcast on television and then posted on the Internet. *See* Twenty–First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (codified as amended in scattered sections of 47 U.S.C.). This statute, however, does not cover material that is placed directly on the Web. *See id. See also* Melissa Bell, *supra* note 129. The DOJ's regulation would close that loophole.

160 *See supra* Part I.B.

161 For example, at this juncture, only some television programming on Hulu is captioned, *see generally* HULU, http://www.hulu.com/support/article/166516 (last visited Sept. 8, 2011) (in addition to a significant number of its programming, commercials are not capitioned on Hulu). Additionally, there is no way to search for which programming is captioned. *See id.*

162 *See* sources cited *supra* note 19. Deaf-accessible hotel rooms are equipped with a visual doorbell, a visual smoke alarm, a visual or vibrating alarm clock, and possibly a telecommunication device such as a TTY or a videophone. At best, Priceline and Travelocity allow the user to narrow his or her search for rooms that are disability-accessible, but they do not have any option to search for deaf-accessible rooms. *See* PRICELINE, www.priceline.com (last visited Sept. 6, 2011); TRAVELOCITY, www.travelocity.com (last visited Sept. 6, 2011). Expedia and Hotwire are the most user-friendly for Deaf and hard of hearing individuals as they allow the

regulation would enable Deaf and hard of hearing people to take full advantage of these services in the way that hearing people do. Generally, even benefits with possible monetary gain and economic stimulation are difficult to quantify. Ultimately, the largest benefit the amended regulation would have is that the Deaf and hard of hearing community would be given access to mainstream society – a benefit that is difficult to quantify.

In addition to the aforementioned benefits, there will also be costs associated with this regulation for both the government and the private sector, but these costs should not deter the DOJ from promulgating this regulation. The government will endure costs in enforcing the requirements, specifically in making sure entities are providing accessibility on their websites.[163] Private sector businesses will have the costs associated with changing and updating their websites to provide accessibility. These costs are similar to the costs associated with the implementation of the ADA in other capacities, such as requiring businesses to construct new facilities or equipment or to provide auxiliary aids and services. These costs were hardly enough to prevent the ADA from being implemented in the first place, and since business can rely on the undue burden defense[164] to protect themselves from exorbitant costs, the minimal costs imposed here would not impose significant hardship on businesses. This regulation would likely impact larger companies such as Netflix, Hulu, or CNN because the undue hardship defense would likely not be available to them in light of their expansive resources. Overall, based on Congress's stated interest in mandating equal access for individuals with disabilities,[165] the benefits greatly outweigh the costs.

B. *Accessibility Standards to Apply to Websites of Covered Title III Entities*[166]

Another issue raised by the DOJ in the ANPRM is which accessibility standard the DOJ should adopt in the NPRM.[167] There are two Web accessibility standards that currently exist. The Web

user to narrow his or her search by deaf-accessible rooms. *See* EXPEDIA, http://www.expedia.com (last visited Sept. 6, 2011); HOTELS.COM, http://www.hotels.com (last visited Sept. 6, 2011). However, the fact that some hotels do not offer lower priced options for their deaf-accessible rooms demonstrates the wider problem of lack of accessibility. *See id.* Finally, Bookit, Hotels.com, Hotwire, and Kayak do not have any search options for deaf-accessible rooms. *See* BOOKIT, www.bookit.com (last visited Sept. 6, 2011); HOTELS.COM, www.hotels.com (last visited Sept. 6, 2011); HOTWIRE, www.hotwire.com (last visited Sept. 6, 2011); KAYAK, www.kayak.com (last visited Sept. 6, 2011).

163 The DOJ may see an increase in adjudications related to ADA accessibility.

164 The undue burden defense is codified in 42 U.S.C. § 12182(2)(A)(iii) (2006).

165 *See supra* Part I.A.

166 The ANPRM also addresses Title II, Public Entities. *See* ANPRM, 75 Fed. Reg. 43,460, 43,465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36). This Note addresses only Title III issues.

167 *See id.*

Accessibility Initiative ("WAI") created voluntary Web accessibility standards, namely the Web Content Accessibility Guidelines ("WCAG"), which provides standards for accessibility for various disabilities. [168] The WAI is part of the World Wide Web Consortium ("W3C"), which "is an international community that develops open standards to ensure the long-term growth of the Web."[169] Additionally, there is the standard under Section 508 of the Rehabilitation Act.[170] In the ANPRM, the DOJ asks whether they should adopt the WCAG 2.0 Level AA Standard of criteria for Web accessibility under Title III, as opposed to one of the other levels, or the Section 508 standard.[171]

The WCAG provide three levels of compliance – A, AA, and AAA, A being the minimum level.[172] The WCAG guidelines for video and audio illustrate the different levels of accessibility.[173] Level A guidelines require an alternative time based media or an audio track to supplement prerecorded video-only or audio-only material.[174] Level A also requires captioning on all prerecorded video material.[175] Level AA requires captioning for both prerecorded and live video and audio.[176] Level AAA would mandate sign language interpretation for all prerecorded video.[177] When creating the regulation, the DOJ should not look to implement guidelines that are so invasive that compliance would likely result in an undue burden.[178] The regulated community would likely argue for Level A criteria, as it would impose the lowest burden, while the disabled community would prefer AAA criteria. The WAI does not recommend that Level AAA guidelines be mandated, as they are too difficult for regulated entities to satisfy.[179] Level AAA

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168 *Web Content Accessibility Guidelines (WCAG) 2.0*, WORLD WIDE WEB CONSORTIUM (Dec. 11, 2008), http://www.w3.org/TR/WCAG20/ [hereinafter *WCAG Guidelines*]. These standards focus on physical, mental, and sensory disabilities. *See id.* at "Introduction."

169 WORLD WIDE WEB CONSORTIUM, http://www.w3.org (last visited Sept. 1, 2011).

170 *See* ANPRM, 75 Fed. Reg. at 43,465.

171 *Id.*

172 *WCAG Guidelines*, *supra* note 168.

173 *See id.* § 1.2. This section provides for requirements to achieve accessibility for varying disabilities. *See id.* For the purpose of clarity and conciseness, this example focuses on the sections dedicated to accessibility for Deaf and hard of hearing individuals.

174 *See id.* § 1.2.1. This section applies to material that is video without any audio, such as a silent movie, or audio without any video, such as a podcast. *See Audio-Only and Video-Only (Prerecorded)*, WORLD WIDE WEB CONSORTIUM, http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv-av-only-alt.html (last visited Sept. 1, 2011). The level A requirements provide that any audio-only material must have a text document describing any dialogue and other sounds that occur in the audio-only material. *See G159: Providing an Alternative for Time-Based Media for Video-Only Content*, WORLD WIDE WEB CONSORTIUM, http://www.w3.org/TR/2010/NOTE-WCAG20-TECHS-20101014/G159 (last visited Sept. 1, 2011). For blind individuals, the Level A requirements provide that video-only media must have an audio supplement describing the video and any dialogue that appears on screen. *See id.* This audio supplement is not considered as regular audio-only material because it is a supplement for video-only material. *See id.*

175 *WCAG Guidelines*, *supra* note168, § 1.2.2.

176 *Id.* at §§ 1.2.1-1.2.6.

177 *Id.* at §§ 1.2.7-1.2.9.

178 *See supra* Part IV.A.

179 *WCAG Guidelines*, *supra* note 168 ("It is not recommended that Level AAA conformance be

compliance may be too burdensome, as it would be very expensive to provide on a general or a widespread basis.[180] Such a regulation would be too easy to escape based on the undue hardship defense, which would frustrate the purpose of amending the regulation. Mandating Level AA compliance would be far easier, as technology provides available means to caption video.[181] The Level AA criteria is the best compromise between cost effectiveness and providing the best resources for the Deaf and hard of hearing community.

The DOJ should not implement the Section 508 standards.[182] The Section 508 standards are outdated, given the number of technological advancements since its last update in 2000.[183] The WCAG standard, on the other hand, reflects changes in technology between 2000 and 2008.[184] In terms of accessibility for Deaf and hard of hearing individuals the Section 508 standard is simply not high enough. The Section 508 standard does not even directly address captioned video on the Internet.[185] If the DOJ is serious about providing equal access for Deaf and hard of hearing individuals, then the WCAG standard should be adopted. Additionally, because the WCAG guidelines provide the three levels of compliance, public accommodations will have the guidelines to implement the Level AAA standard if they choose to do so.[186] This may encourage socially conscious businesses to go beyond what is required. Moreover the WCAG guidelines are more user-

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required as a general policy for entire sites because it is not possible to satisfy all Level AAA Success Criteria for some content."). The Level AAA guidelines are suggested for businesses that want to achieve the highest level of accessibility. *See id.*

180 Sign language interpreters alone can cost $250 per day. *See Court Interpreting Services*, NEW YORK STATE UNIFIED COURT SYSTEM, http://www.courts.state.ny.us/courtinterpreter/opportunities.shtml (last updated Aug. 17, 2009). This price is conservative, as it reflects public sector interpreting and does not reflect the needed expertise from members of the Deaf community to provide proper input into the translation. Additionally that does not account for the cost to make and produce video.

181 The W3C provides for support and information on how to caption video and best practices for captioning. *See*
G87: Providing Closed Captions, WORLD WIDE WEB CONSORTIUM, http://www.w3.org/TR/2010/NOTE-WCAG20-TECHS-20101014/G87.html (last visited Sept. 1, 2011). Companies can provide captioning in-house, especially if there is a Web designer or technology specialist. ASL interpreters must be hired as an additional cost.

182 The alternate set of guidelines is promulgated under section 508 of the Rehabilitation Act of 1973 ("section 508"). 36 C.F.R. § 1194 (2000), *available at* http://www.access-board.gov/sec508/508standards.pdf. The "Access Board is currently revising the section 508 standards, in part to harmonize the standards with model guidelines, such as the WCAG." *See* ANPRM, *supra*. Section 508 of the Rehabilitation Act, which provides for standards of accessibility in the public sector, can be found at Rehabilitation Act of 1973, § 508, 29 U.S.C. § 794d (2000).

183 The Section 508 standard were last updated in 2000. 36 C.F.R. § 1194 (2000), *available at* http://www.access-board.gov/sec508/508standards.pdf.

184 *See WCAG Guidelines*, *supra* note 168.

185 *See* 36 C.F.R. § 1194.24. Subsection (d) provides for captioning in "[a]ll training and informational video and multimedia productions which support the agency's mission, regardless of format, that contain visual information necessary for the comprehension of the content, shall be audio described," but this does not specify video on the Internet and does not include all video. *See* 36 C.F.R. § 1194.24(d).

186 While the Level AAA guidelines should not be mandated, they are a good standard for businesses that want to achieve the highest level of accessibility.

friendly for the regulated community, as they provide links to information about how to understand and meet the guidelines.[187]

Finally, the DOJ requested feedback on how to handle updates to the Web accessibility standard.[188] While it is important for websites to remain current with updates to the WCAG, the DOJ cannot hold entities to the newest updated standards without first giving the regulated community a chance to comment on the updates through the notice and comment procedures.[189] Thus, the DOJ should issue a new proposed rule and allow for comments anytime the WCAG makes updates to its accessibility standards.[190] While this process seems tedious and time consuming, it is necessary to remain in compliance with the Administrative Procedures Act.[191]

C. *Coverage Limitations*

The ANPRM requests feedback on certain proposed coverage limitations. First, it seeks to extend coverage only to those entities that are included in the enumerated categories of Title III.[192] The DOJ chose not to address the issue as to whether the Internet itself is a place of public accommodation.[193] Limiting coverage to only those businesses that are under one of the twelve enumerated categories is reasonable as long as it does not require a nexus to a brick and mortar establishment. In practice, most private entities will still be covered because any entity, even a non-physical entity, that provides one of the enumerated goods and services would be covered.[194] If the DOJ requires a nexus to a brick and mortar establishment, then it will render the regulation superfluous in some jurisdictions[195] and would create a major loophole for businesses that operate solely on the Internet.[196] For example, if the situation from *Stoutenborough v. National Football League, Inc.*[197]

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187 *See generally WCAG Guidelines*, *supra* note 168.

188 The World Wide Web Consortium is constantly updating its WCAG standards. The DOJ requests feedback on how to handle these updates – specifically, whether the regulated community should be required to make updates consistent with the changes in the WCAG standard. *See* ANPRM, 75 Fed. Reg. 43,460, 43,465 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36). Since its creation, the WCAG has had two versions, and within those two versions there have been constant updates. *See WCAG Guidelines*, *supra* note 168.

189 *See* APA, 5 U.S.C. § 553 (2006).

190 *See id.*

191 *See id.*

192 *See* ANPRM, 75 Fed. Reg. 43,460,at 43,465 (proposed July 26, 2010) (to be codified at 28 CFRC.F.R. Parts 35 and 36). *See also* ADA § 301(7), 42 U.S.C. § 12181(7) (19902006). The DOJ will regulate only those public accommodations as defined by the 12 twelve enumerated categories. *See id.* Extending further coverage may go beyond the purview of the DOJ and is better addressed by the legislature.

193 *See* ANPRM, 75 Fed. Reg. at 43,465.

194 The enumerated categories can be found at ADA § 301(7), 42 U.S.C. § 12181(7) (2006). Examples of entities that will not be covered include religious websites and websites for private clubs. These entities, however, are not otherwise covered under Title III. *See id.*

195 Namely, the Eleventh and Second Circuits.

196 For example, Netflix would still not be required to caption because it has no nexus to a physical place.

197 Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580 (6th Cir. 1995). For a full

were to occur after this proposed regulation became effective, the plaintiffs would have the opportunity to sue the television stations because they provide entertainment, which is a service covered under Title III.[198] The purpose behind the amended regulation is to increase accessibility for disabled individuals, and with the proliferation of Internet-only businesses, a nexus approach is outdated.

Another proposed limitation would not hold covered entities responsible for the accessibility of Web-related content that they merely link to if the covered entity does not control the content of the link.[199] This limitation would apply as long as those links are not necessary to take part in goods and services on the entity's own website.[200] For example, if a website sells goods or services and links to an external website for the user to submit payment for those goods and services, the linked website must be accessible.[201] This limitation is reasonable because it would avoid holding a Web provider accountable for material that it does not control.

Next, the DOJ seeks to explicitly exempt personal, noncommercial Web-users, namely "individual participa[nts] in popular online communities, forums, or networks in which people upload personal videos or photos or engage in exchanges with other users."[202] This exemption is also reasonable. The ADA currently does not impose any mandate on individuals in their personal capacities, and it would be beyond the purview of the DOJ to impose a mandate on personal Web use. [203] To apply such a mandate would cause a great deal of controversy, which is evidenced by the fact that many of the negative comments associated with the ANPRM are in regard to how this regulation may negatively affect individuals, especially in the social networking capacity.[204]

Another proposed exception would exempt the operator of a commercial website who has no control over the content that individual users place on the website, "as long as they provide their Web site users the ability to make their posts accessible."[205] While individuals should

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discussion see *supra*, Part II.A.

198 "The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce . . . a motion picture house, theater, concert hall, stadium, or other *place of* exhibition or *entertainment*." 42 U.S.C. § 12181(7)(C) (emphasis added).

199 *See* ANPRM, 75 Fed. Reg. at 43,465.

200 *See id.*

201 *See id.*

202 *See id.* For example, Facebook account holders will not have to caption personal videos that the users post on their individual pages.

203 For example, nowhere in the ADA does the law require individuals to provide accessibility in their home.

204 *See* REGULATIONS.GOV, http://www.regulations.gov (search "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations"; then follow "Public Submissions" checkbox) (last visited, Sept. 2, 2011).

205 *See* ANPRM, 75 Fed. Reg. at 43,465. For example, if an individual posts a non-captioned

not be personally regulated, it is important that social networking websites and online selling, trading, and bartering websites provide users with the ability to make their content accessible. Such a mandate may encourage individuals to make their content accessible without putting the responsibility on the individual. Further, website providers that allow for individual postings would not be held responsible for individual users who do not choose to make their content accessible.

A similar proposal would not require accessibility for online marketplace transactions in a private capacity, such as trading, selling, or bartering goods.[206] This exception extends only to individual users and not to private businesses covered under Title III.[207] In order for the amended regulation to be successful, the DOJ will have to clearly define the difference between individual users and private companies. The DOJ will need to establish factors that help determine whether someone is acting in an individual and private capacity or as a business in a commercial capacity. One factor can be how the business or individual identifies him or herself. For example, if there are established articles of incorporation, this could be prima facie evidence of the company acting as a public accommodation under the law.[208] This factor would help the DOJ easily establish a violation if a company fails to make its Web-based material accessible.[209] Another factor could be the number of sales made on a website, and there could be a maximum for an individual acting in a private capacity. This factor should only be instructive though, because while individuals tend to sell a lower volume of goods, there can certainly be exceptions. The DOJ could also consider whether an individual is selling merchandise of a similar category, much like a commercial seller. If the DOJ chooses to implement specific factors to aid in its determination as to whether an individual is acting as a business, it is vital that any factors are explicitly included in the NPRM so as to avoid confusion in applying the law to challenges in court.[210] Further the DOJ should articulate its reasoning for those factors so commentators have the opportunity to respond.

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video on Facebook, the operators of facebook.com are not responsible under the ADA based on the individual user's inaccessible posting.

[206] *See id.* Examples include Amazon.com and eBay.com.

[207] *See id.*

[208] Similarly, other means of establishing a business could serve the same function, e.g., LLPs and LLCs. Making this factor dispositive could take some of the burden off of the DOJ. The DOJ in that case would simply have to prove that the individual is adhering to a formal business structure to show that the individual is acting in a business capacity.

[209] As mentioned earlier, small businesses have the undue burden defense, so they will not be held in violation of the regulation if compliance would be too burdensome.

[210] For example, if a user is selling only electronic devices, this may be evidence that the individual is really acting as a business as businesses tend to sell a certain category of merchandise. Explicitly stating these factors will help the DOJ avoid an arbitrary and capricious challenge to the rule in court.

D. *Effective Date*

The DOJ stated in the ANPRM that it is considering a number of options for determining a date for the regulation to take effect. First, the DOJ is seeking to require accessibility for any new Web material published online for the first time within six months of the final rule taking effect.[211] Existing websites would be required to provide accessibility within two years after the final rule takes effect.[212] The DOJ stated that it considers the two year period of time necessary because some websites have a significant number of pages that will need to be altered.[213]

Some commentators have expressed concern about this incremental approach.[214] Specifically, there have been concerns that mandating new content to be accessible before the entire website is accessible is problematic because it will not provide the user with a consistent experience.[215] This concern is not as relevant for Deaf and hard of hearing individuals as it is for the other disabled communities, because Deaf and hard of hearing individuals are mostly concerned with video and captioning. If a website has some of its videos captioned and not others, Deaf individuals would not face the same problems as a blind individual would face if only certain parts of the website were accessible for screen readers. The DOJ should take this into consideration when adopting an effective date because the DOJ could create different effective dates for the implementation of different technology.[216]

Another issue the DOJ addresses is whether or not there should be a "safe harbor" provision that would allow an entity to keep inaccessible material on its website if the entity would otherwise remove it due to accessibility requirements.[217] The safe harbor is a poor idea because it would encourage companies to find excuses not to modify their Web content. Creating this extra layer of protection may even increase costs for the DOJ in policing the regulation because it would allow parties to utilize the safe harbor defense in many cases and would be an additional

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211 *See* ANPRM, 75 Fed. Reg. 43,460, 43,466 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36). Additionally, newly created pages on existing websites will have to comply within the six month period only to the maximum extent feasible. *See id.* These pages are treated differently than pages that are completely new, because "certain features on existing Web sites . . . cannot be completely altered or replaced without a complete redesign of the entire site." *Id.*

212 *See id.*

213 *See id.*

214 *See* REGULATIONS.GOV, www.regulations.gov (search "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations"; then follow "Public Submissions" checkbox) (last visited, Sept. 2, 2011).

215 *See id.*

216 Specifically, because this problem would not affect captioned material, the DOJ could require captioning on all new video before requiring the use of screen reader technology.

217 *See* ANPRM, 75 Fed. Reg. at 43,466. The safe harbor would be contingent on the material not being updated or modified. *See id.*

barrier for the DOJ in hearings and in court.

E. *Other Issues with the ANPRM - Clarifying the Definitions*

The DOJ requested comments on any issues not otherwise addressed by its questions. The DOJ should redefine the term "place of public accommodation." As it now stands, a "[p]lace of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within" one of the enumerated categories.[218] A facility is defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."[219] This language is problematic because it wrongfully implies that a place of public accommodation must be a physical place. While the DOJ may not go as far as defining the Internet itself as a public accommodation, the definition of "place of public accommodation" nonetheless must be amended to include non-physical places that fall within the enumerated categories. The amended language should read: "place of public accommodation means a facility or *Web material* that is operated by a private entity, whose operations affect commerce and fall within one of the enumerated categories," then the enumerated categories should be listed as they currently stand.[220] This new language would not mandate accessibility to the Internet as a whole, but rather accessibility to Web materials owned or operated by public accommodations. Even if this exact wording is not adopted, the definition of "place" must be amended to remain consistent with the other proposed amendments. Additionally, where the statute uses the word "place" in other capacities,[221] it should be made clear that it does not refer only to physical places.[222]

CONCLUSION

The Americans with Disabilities Act was enacted to provide equal rights and privileges to the disabled community. While the popularization of the Internet has significantly improved life, it has also served to isolate Deaf and hard of hearing individuals. The Internet provides individuals with entertainment, media, information, social networking, education, international markets and more. Without mandated accessibility for Deaf and hard of hearing individuals to these

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[218] 28 C.F.R. § 36.104 (2011).
[219] *Id.*
[220] This is suggested modified language.
[221] For example, "a motion picture house, theater, concert hall, stadium, or other *place* of exhibition or entertainment." ADA § 301(7)(C), 42 U.S.C. § 12181(7)(C) (2006). It must be clear that "place" in this context may also refer to websites that provides these services.
[222] Overall, it should be understood that public accommodations are not limited to physical places.

services, many private businesses have failed to provide accessibility leaving these individuals with no recourse. However, a solution to this problem is if the DOJ adopts the aforementioned suggestions in drafting and passing a proposed rule mandating Web accessibility under Title III. Anything short of this would fail to provide Deaf and hard of hearing individuals with the accessibility that they deserve, and are entitled to as Americans, and would render the ADA ineffective in providing equality to Americans with disabilities.

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