The Americans With Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites

by Richard E. Moberly*

I. INTRODUCTION

In recent years, the increasing importance of the Internet has drawn attention to the exclusion of certain parts of society from participating fully in the advantages brought about by the Internet's technological advances. This "digital divide," as some have labeled it,[1] particularly excludes some individuals with disabilities, such as those with visual, auditory, or muscular impairments, who are unable to access many features of today's Internet.[2] Although private efforts encourage

* Associate in the firm of McKenna Long & Aldridge LLP, Atlanta, Georgia. Emory University (B.A., summa cum laude, 1991); Harvard Law School (J.D., magna cum laude, 1998). The Author would like to thank his wife, Laura McLeod, for her unending patience and support during the writing of this Article. Also, the Author greatly appreciates Elizabeth Wilson, Professor Adam Milani, and the editors of the Mercer Law Review for inviting him to participate in the Law Review Symposium on "The Internet: Place, Property, or Thing—All or None of the Above?" The views contained in this Article are those of the Author and not necessarily the Firm.

1. *See, e.g.*, Andrew G. Celli, Jr. & Kenneth M. Dreifach, *Postcards from the Edge: Surveying the Digital Divide*, 20 CARDOZO ARTS & ENT. L.J. 53, 53-54 (2002) (noting the use of the term "digital divide" in nearly 150 articles appearing in the New York Times from 1998 to 2001, a government commission report, and a Presidential address "denouncing it"); Hastings Communications and Entertainment Law Journal's Fourteenth Annual Hastings Computer Law Symposium, "Digital Divide, Digital Opportunities" (2002).

2. *See* Jeffrey Scott Ranen, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 390 (2002) (noting that 98% of websites "are to some extent inaccessible to the visually disabled"); *Applicability of the Americans With Disabilities Act (ADA) to Private Internet Sites: Hearings Before the House*

websites to adopt voluntary standards to make the Internet more accessible to these individuals,[3] no clear governmental directive specifically aimed at privately-owned websites currently requires broad accessibility for the disabled.[4]

As a result, advocates for the disabled assert that Title III of the Americans With Disabilities Act of 1990 ("ADA")[5] should be interpreted to apply to private websites, requiring a website to be fully accessible unless the website can demonstrate that providing accessible information would be an undue burden.[6] Other commentators agree that Internet accessibility for the disabled is an important and worthy aim, but argue that the ADA is not the proper means to accomplish that goal.[7] In 2000, the United States House of Representatives heard from advocates of the disabled, industry representatives, and legal experts regarding this very issue,[8] but ultimately Congress has not responded to the questions raised by that hearing.

Until recently this debate regarding whether the ADA should apply to private Internet websites was relatively theoretical.[9] In the last year,

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Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. 31-32 (2000) [hereinafter *Hearings*] (testimony of Steven Lucas, Vice President and Chief Technology Officer, Privasak, Inc.), *available at* http://www.house.gov/judiciary/2.htm; Justin D. Petruzzelli, *Adjust Your Font Size: Websites are Public Accommodations Under the Americans with Disabilities Act*, 53 RUTGERS L. REV. 1063, 1066, 1091 (2001); Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 226 (2000) (noting that the needs of blind, deaf, mobility-impaired, and learning disabled individuals need to be considered with regard to accessibility issues on the Internet). Accessibility to the Internet is possible for disabled individuals; however, it may require that owners, operators, and designers of websites create or redesign websites by, among other things, adding text descriptions to pictures and graphics to make them readable by computerized screen readers, adding closed captioning for audio streaming, and simplifying web layouts. *See infra* Part IV.

3. The most comprehensive of these efforts may be the accessibility guidelines developed by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C). *See* http://www.w3c.org/WAI/about.html.

4. The federal government has mandated that all government websites must be accessible to the disabled, and it has developed comprehensive guidelines to accomplish this mandate. 29 U.S.C. § 794(d) (2000).

5. 42 U.S.C. §§ 12181-12189 (2000).

6. *See, e.g.*, Petruzzelli, *supra* note 2, at 1088-91; Ranen, *supra* note 2, at 415-17.

7. *See, e.g.*, Kelly E. Konkright, *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713, 743-46 (2001); Patrick Maroney, *The Wrong Tool for the Right Job*, 2 VAND. J. ENT. L. & PRAC. 191, 191-92 (2000).

8. *See generally Hearings*, *supra* note 2.

9. After the hearing, no Congressional action appeared forthcoming, and only two lawsuits had been filed against Internet-related entities requesting relief under the ADA. The first lawsuit, brought by the National Federation of the Blind against America Online

however, this discussion moved from academic theory to real-world practicality because two events highlighted the questions surrounding this unresolved debate.

First, in *Access Now, Inc. v. Southwest Airlines Co.*,[10] a federal district court in Florida dismissed a lawsuit filed against Southwest Airlines and its website, southwest.com, because the court explicitly determined that the ADA did not apply to any private website.[11] The issue at the heart of the case concerned Title III's requirement that its nondiscrimination provisions apply only to "places of public accommodation."[12] Relying upon a narrow reading of the statutory and regulatory language, the court in *Access Now* determined that a "place of public accommodation" must be a physical facility, and because a website is not a physical place, the ADA did not apply.[13]

Second, the National Council on Disability ("NCD"), an independent federal agency charged with making recommendations to the President and Congress on issues affecting individuals with disabilities,[14] released a position paper in which it advocated that the ADA should apply to all private websites engaged in commercial activity.[15] The NCD and other advocates for the disabled base their argument on the ADA's broad remedial scope and the Internet's increasingly important role in accessing goods and services in today's economy.[16]

This Article takes a position between these two extremes by advocating that the ADA applies to some, but not all, Internet websites.

("AOL"), was settled without resolving these issues. *See* Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 32 (2001). The second lawsuit resulted in an unpublished opinion without precedential value. Brief of the United States as Amicus Curiae in Support of Appellant, at 7, Hooks v. OKBridge, Inc., No. 99-214, slip op. at 7 (W.D. Tex. Aug. 4, 1999) (No. 99-50891), *available at* http://www.usdoj.gov/crt/briefs/hooks.htm.

10. 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

11. *Id.* at 1321. At the time of the writing of this Article, an appeal of this decision was pending before the Eleventh Circuit Court of Appeals. *See* Brief for Appellants, Access Now, Inc. v. Southwest Airlines Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (No. 02-16163-BB).

12. *Access Now*, 227 F. Supp. at 1314; 42 U.S.C. § 12182(a) (2000).

13. 227 F. Supp. 2d at 1318.

14. *See* National Council on Disability Home Page, *available at* http://www.ncd.gov (last updated Nov. 5, 2003).

15. *See* Position Paper, National Council on Disability, at 1 (July 10, 2003), *available at* http://www.ncd.gov/newsroom/publications/pdf/adaInternet.pdf [hereinafter Position Paper].

16. *Id.*; Bick, *supra* note 2, at 213-14; Matthew A. Stowe, *Interpreting "Place of Public Accommodation" Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 323-25 (2000); Petruzzelli, *supra* note 2, at 1082-83.

Specifically, this Article advocates broader use of the nexus approach, which some courts use in analogous contexts to apply the ADA's accessibility standards to intangible services connected to physical places of public accommodation.[17] Under the nexus approach, the ADA should apply only to websites that have a connection, or nexus, to a physical place of public accommodation. For such websites, the ADA may require alterations to become accessible to individuals with disabilities.[18] The ADA, however, should not apply generally to the rest of the Internet because remaining websites do not have a connection with a physical place of public accommodation.[19] As set forth below, this approach more accurately reflects the statutory language of the ADA while it appropriately recognizes the nature of the Internet and its use in the commercial context.

Interestingly, each of the positions articulated by *Access Now* and the NCD recognizes the ADA's nexus requirement, but each misconstrues it. Although the court in *Access Now* accurately held that the ADA applies only to physical places of public accommodation,[20] the court improperly failed to recognize that under the nexus approach, the ADA's application to such places may include regulation of both "tangible and intangible" barriers to access those places.[21] These barriers arguably include an inaccessible website in which only nondisabled individuals can access the goods and services of a place of public accommodation.[22] Thus the Internet's lack of physicality should not necessarily prevent application of the ADA to a website connected to a physical place of public accommodation. Moreover, although the NCD position paper recognized the existence of the nexus approach, it ultimately advocated a broader application of the ADA to the entire Internet. The NCD objected to the distinction required by the nexus approach between those websites that are connected to a physical place of public accommodation and those that are not.[23] However, the NCD exaggerated the problems that might result from this distinction and failed to recognize the important policy reasons supporting this distinction.[24]

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17. *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1284 n.8 (11th Cir. 2002); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).
18. *See* discussion *infra* Part IV.
19. *See* discussion *infra* Part III(A).
20. *Access Now, Inc.*, 227 F. Supp. 2d at 1319-21.
21. *See Rendon*, 294 F.3d at 1283.
22. *See id.* at 1284.
23. *See* Position Paper, *supra* note 15, at 25-27.
24. *See* discussion *infra* Part III(D).

Although the nexus approach presents the best alternative to applying the ADA to a situation not contemplated by Congress,[25] by relying on it, this Article makes value judgments and draws conscious conclusions regarding the nature of the Internet and how (and whether) our laws should be interpreted to accommodate the Internet's unique role in our society. For example, this Article asserts that the ADA cannot apply to all Internet websites because the statute applies only to physical places of public accommodation. A judgment regarding the essence of the Internet is, of course, imbedded in this conclusion. The Internet is something other than a physical "place."[26] Additionally, relying on the nexus approach recognizes that although the Internet is not a place, it provides critical communication services and accessibility to goods and services sold by places of public accommodation. Therefore, the ADA should regulate the manner in which these physical places of public accommodation use their website to communicate with the public and to permit access to their goods and services because those types of roles should qualify as having a nexus to the place of public accommodation.[27] Finally, reliance on the nexus approach to conclude that the ADA plays only a limited role with regard to private websites reflects a value judgment regarding the applicability of statutory regulation to unforeseen, yet transformative, technological advancements such as the Internet. Applying the nexus approach involves a conscious decision that Congress, not the judiciary, is in the best position to regulate the Internet because Congress can, and should, balance the needs of the Internet industry with the requirements of individuals with disabilities.[28] All of these broader issues are inherently contained in any discussion of whether the ADA applies generally to Internet websites; this Article addresses them within that context.

Part II of this Article provides a brief overview of the ADA's requirements as well as an examination of the analyses used by the court in *Access Now* and the NCD in arriving at contradictory conclusions regarding the ADA's application to the Internet. Part III sets forth the nexus approach and its application to the Internet. Specifically, Part III analyzes both the ADA's statutory language and the nature of the Internet for support regarding application of the nexus approach. The

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25. The statute's plain language does not include any direct or indirect reference to Internet websites. *See Access Now*, 227 F. Supp. 2d at 1318 (emphasizing that the "plain and unambiguous language of the statute . . . does not include Internet websites among the definitions of 'places of public accommodation'").

26. *See infra* Part III(C)(1).

27. *See infra* Part III(C)(2).

28. *See infra* Part III(D)(2).

final section of Part III provides normative justifications for the application of the nexus approach rather than either of the more extreme alternatives. Finally, Part IV briefly discusses the practical requirements for a website that may be regulated by the ADA.

II. A BRIEF OVERVIEW

A. The ADA

When the ADA became law in 1990, it mandated sweeping protections for individuals with disabilities with regard to employment (under Title I of the Act),[29] contacts with state and local governments (under Title II of the Act),[30] and interactions with private entities (under Title III of the Act).[31] Title III is the part of the ADA most relevant to private Internet websites; therefore, this Article focuses solely on Title III.

Title III of the ADA applies only to "places of public accommodation."[32] Places of public accommodation must affect commerce and fall within twelve specified categories of types of places.[33] Some statutory

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29. *See* 42 U.S.C. §§ 12111-12117 (2000).

30. *See* 42 U.S.C. §§ 12131-12165 (2000).

31. *See* 42 U.S.C. §§ 12181-12189 (2000). Another part of the ADA provides certain requirements for telecommunications companies. *See* 47 U.S.C. § 225(a)(2) (2000).

32. 42 U.S.C. § 12182(a) (2000).

33. *Id.* § 12181(7). The definition, in its entirety, is as follows:

> (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;
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> (B) a restaurant, bar, or other establishment serving food or drink;
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> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
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> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
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> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
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> (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;
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> (G) a terminal, depot, or other station used for specified public transportation;
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> (H) a museum, library, gallery, or other place of public display or collection;
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> (I) a park, zoo, amusement park, or other place of recreation;
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> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
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> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

examples of places of public accommodation are inns, motels, restaurants, theaters, lecture halls, dry cleaners, banks, zoos, schools, homeless shelters, and golf courses.[34] If a private entity is a place of public accommodation, then the "general prohibition" clause of the ADA mandates that any person who owns, leases (or leases to), or operates the entity cannot discriminate against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of the entity.[35] Moreover, in certain instances the ADA also prohibits specific types of discrimination and mandates explicit affirmative actions on the part of the place of public accommodation.[36] For example, places of public accommodation have an affirmative duty to make reasonable modifications to their policies, practices, or procedures and to provide auxiliary aids and services, if necessary, to accommodate the needs of individuals with disabilities.[37] Also, places of public accommodation must not impose requirements tending to exclude individuals with disabilities from the full enjoyment of the public accomodation's goods, services, facilities, privileges, advantages, or accommodations.[38] The affirmative responsibilities of a place of public accommodation are typically limited by a "reasonableness" standard; that is, an action does not need to be taken if it would cause an undue burden or fundamentally alter the nature of the good or service offered by the entity.[39]

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id.

34. *Id.*

35. 42 U.S.C. § 12182(a). The full provision reads: "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." *Id.*

36. *See* 42 U.S.C. § 12182(b).

37. 42 U.S.C. § 12182(b)(2)(A)(ii), (iii).

38. 42 U.S.C. § 12182(b)(2)(A)(i). Also included in the statutory examples of specific types of discrimination is that places of public accommodation cannot erect architectural, communication, and transportation barriers. 42 U.S.C. § 12182(b)(2)(A)(iv). Although the prohibition on communication barriers may apply to the Internet (an argument asserted by the National Federation of the Blind in its lawsuit against AOL, *see* Taylor, *supra* note 9, at 32), this Article does not assert that this prohibition applies, because the provision limits its application to communication barriers "that are structural in nature." 42 U.S.C. § 12182(b)(2)(A)(iv).

39. *See* 42 U.S.C. § 12182(b)(2)(A)(ii), (iii).

B. Access Now, Inc. v. Southwest Airlines Co.

Prior to 2002, at least two lawsuits alleged ADA claims based upon the Internet. The first was brought by the National Federation for the Blind, which alleged that America Online ("AOL"), an Internet service provider, was a place of public accommodation that did not make itself accessible to blind people.[40] This lawsuit was settled by AOL shortly after it was initiated, with AOL agreeing to make the next version of its Internet software accessible to the blind.[41] The second lawsuit was filed against a company operating a website that provided an online bridge tournament.[42] In that case, the plaintiff alleged that the website cancelled his membership because the plaintiff was disabled.[43] In an unpublished opinion, the district court held that Title III of the ADA did not apply to the company because it provided its services over the Internet rather than at a physical place.[44] On appeal the Fifth Circuit upheld the district court's dismissal of the case but upon grounds that did not address whether Title III applied to Internet websites.[45] Thus neither of these cases provides much assistance in resolving whether Title III applies to the Internet.

In October 2002, however, the Southern District of Florida directly addressed this issue. In *Access Now*, plaintiffs contended that the Internet website for Southwest Airlines, southwest.com, violated the ADA because it was inaccessible to blind persons. Southwest's website provided consumers with a variety of services, including checking airline fares and schedules and booking airline, hotel, and car reservations.[46] The website, however, was alleged to be inaccessible to blind persons using a screen reader because the site "fails to provide 'alternative text' which would provide a 'screen reader' program the ability to communicate via synthesized speech what is visually displayed on the website."[47] Plaintiffs in *Access Now* asserted that Title III of the ADA

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40. *See* Taylor, *supra* note 9, at 32.

41. *Id.*

42. Brief of the United States as Amicus Curiae in Support of Appellant, at 7, Hooks v. OKBridge, Inc., No. 99-214, slip op. at 7 (W.D. Tex. June 28, 1999) (No. 99-50891), *available at* http://www.usdoj.gov/crt/briefs/hooks.htm.

43. *Id.*

44. *Id.* at 7-8.

45. *See* Hooks v. OKBridge, 232 F.3d 208 (5th Cir. 2000); Position Paper, *supra* note 15, at 16 (noting that "the case added little to the law," because the Fifth Circuit declined to follow the district court's reasoning regarding the scope of Title III).

46. 227 F. Supp. 2d at 1314-15.

47. *Id.* at 1316 (quoting Complaint ¶ 11). The issues raised in the court's opinion were brought before the court by Southwest's motion to dismiss for failure to state a claim,

should apply to southwest.com because it is a place of "'exhibition, display and a sales establishment.'"[48] As the court acknowledged, this argument is based on "language from three separate statutory subsections"[49] within the definition of "place of public accommodation" set forth in Title III.[50] Moreover, based upon a decision from the First Circuit that applied Title III to a health-benefit plan, plaintiffs argued that the ADA should not be limited to physical structures.[51]

The court, however, determined that Title III did not apply to Internet websites.[52] First, the court examined the plain language of the ADA and found that it does not include Internet websites among the definitions of "places of public accommodation."[53] Thus, the court utilized a strict, textualist approach to reject plaintiffs' attempt to combine terms from separate parts of the definition because, as the court asserted, it "must view these general terms in the specific context in which Congress placed each of them."[54] Second, the court determined that the ADA required a physical structure, and the Internet was not a physical place.[55] Third, the court attempted to utilize the nexus approach by determining that plaintiffs did not establish a nexus between the travel service provided on southwest.com and a physical concrete place of public accommodation.[56] Although this Article agrees with the first two holdings of the court in *Access Now*, as discussed below, this Article disagrees with its application of the nexus approach.

C. The National Council on Disability Position Paper

In July 2003, the NCD released a position paper in which it analyzed the question of whether Title III of the ADA applies to the Internet.[57] The NCD concluded that the ADA should apply to Internet websites generally, regardless of whether a particular website has a connection to a physical place, because the Internet has become an integral part of society.[58] Individuals with disabilities should not be excluded from

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which meant that the court accepted plaintiffs' allegations as true. *Id.*

48. *Id.* at 1318 (quoting Complaint ¶ 9).

49. *Id.*

50. *Id.* (citing 42 U.S.C. § 12181(7)(C), (H), & (E)).

51. *See id.* at 1319 (citing Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Assoc. of New England, 37 F.3d 12, 19 (1st Cir. 1994)).

52. *Id.* at 1321.

53. *Id.* at 1318.

54. *Id.*

55. *Id.* at 1321.

56. *Id.* at 1319.

57. *See generally* Position Paper, *supra* note 15, at 11-26.

58. *Id.*

fully participating in the benefits brought by this new technology.[59] In reaching this conclusion, the NCD identified the broad remedial purpose of the ADA as a "compelling" reason to apply the ADA to the Internet.[60] The NCD also examined and ultimately rejected the nexus approach and its possible application to the Internet.[61] The NCD asserted:

> With the passage of time, as more and more goods, services, informational resources, recreation, communication, social and interactive activities of all kind migrate, wholly or partly, to the Net, maintenance of legal distinctions among otherwise similar Web sites, based on their connection or lack of connection to a physical facility, will become increasingly untenable and incoherent.[62]

The NCD addressed several hypothetical situations to argue that the nexus approach would lead to inconsistent results.[63] For example, the NCD noted that, under the nexus approach, an online grocery store with customer pickup points may be regulated by the ADA, but an online grocery store that delivers directly to a customer's home might not.[64] Even more threatening to the NCD, if Internet-only websites are excluded from coverage under Title III because they lack a nexus to a physical place, then it may logically follow that "telephone, postal or any other form of nonface-to-face interaction or commerce" might not be covered.[65] Furthermore, the NCD asserted broadly that requiring a nexus to a physical place is not a satisfactory resolution of this issue because "[o]nly a clear recognition of the seamlessness of commerce, entertainment, education and health care makes any legal, economic or administrative sense."[66]

In other words, the NCD rejected both the court's restrictive textual approach in *Access Now* as well as the nexus approach proposed by this Article.[67] In so doing the NCD relied on both "purposivism" arguments, relating to the broad purpose of the ADA, as well as practical arguments

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59. *Id.*

60. *Id.* at 4 ("A statute with the broad ameliorative purposes of the ADA, if it is not to be rendered a mockery, must possess the capacity and flexibility to cover those functions, services and activities on the Web that are identical in purpose and outcome to those that are expressly covered when provided in person.").

61. *See id.* at 25-26.

62. *Id.* at 25.

63. *Id.* at 24-26.

64. *Id.* at 25 (noting that the nexus approach may "result in far more havoc than even the most sweeping and inclusive requirement for across-the-board commercial Web site accessibility ever could.").

65. *Id.* at 25-26.

66. *Id.* at 26.

67. *See Id.* at 19-22, 24-26.

regarding the extensive role of the Internet in society's economic life and the apparent inconsistency of applying the ADA to some businesses on the Internet (those with physical facilities) but not others.[68] Ultimately the NCD called for the term "place" to be reconceptualized, because cyberspace is not only recognized as a place but a place "where some of the most dynamic and far-reaching initiatives in our society are taking place. It is a place from which the law should countenance the exclusion of no one."[69]

Although NCD's goal is admirable and worthy, as discussed below, it does not justify ignoring the ADA's statutory language and minimizing Congress's role in regulating new technologies. Moreover, the NCD's characterization of the potential inconsistencies of the nexus approach neither fairly recognized the state of the law today nor properly acknowledged the potential benefits of applying the ADA only to Internet websites connected to a physical place of public accommodation.

III. THE ADA APPLIES TO WEBSITES THAT HAVE A NEXUS TO A PHYSICAL PLACE OF PUBLIC ACCOMMODATION

Under the nexus approach, the ADA applies to some, but not all, websites on the Internet. Contrary to the NCD position, this approach accepts the court's conclusion in *Access Now, Inc. v. Southwest Airlines Co.,*[70] that places of public accommodation must be physical places, which excludes Internet websites in general from coverage under the ADA. Contrary to the court's ultimate holding in *Access Now*, however, under the nexus analysis not all websites should be excluded from the ADA's reach. A website having a nexus to a physical place of public accommodation should be regulated by the ADA because it provides access to the goods and services of that place of public accommodation. Unlike the more extreme positions of the court in *Access Now* and the NCD, this conclusion best reflects the statutory language of the ADA and demonstrates a better practical understanding of the nature of the Internet.

A. The Nexus Approach

In contexts other than the Internet, courts have articulated a nexus approach when discussing whether the ADA regulates a certain activity or service. Under this analysis the ADA might apply to an activity or service if a nexus exists between the challenged service and a physical

68. *See id.*
69. *Id.* at 26.
70. 227 F. Supp. 2d 1312 (S.D. Fla. 2000).

place of public accommodation.[71] Until Congress determines whether to amend the ADA to clarify its applicability to the Internet, this limited application of the ADA provides an appropriate solution to the debate.

1. The General Theory. In *Rendon v. Valleycrest Products, Ltd.*[72] the Eleventh Circuit Court of Appeals recognized the nexus approach when addressing intangible forms of access to physical places of public accommodation.[73] In *Rendon,* hearing-impaired and mobility-impaired individuals brought a class action complaint against the producers of the television quiz show "Who Wants To Be A Millionaire." Plaintiffs alleged that the show's process for choosing contestants unfairly screened out individuals with hearing and mobility impairments because it relied upon the speed with which a contestant could answer questions over the telephone by pressing keys on a telephone keypad to indicate answers.[74] Defendants moved to dismiss the claims on the basis that the ADA did not apply to the contestant hotline because the hotline was not a physical barrier to entry erected by a public accommodation.[75] The Eleventh Circuit determined that this argument was "entirely unpersuasive"[76] because the court considered the hotline an intangible barrier to access to a public accommodation—the movie studio.[77] According to the court, the ADA covers:

> both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, and intangible barriers, such as eligibility requirements and screening rules or

71. *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1284 n.8 (11th Cir. 2002).

72. 294 F.3d 1279 (11th Cir. 2002).

73. *Id.* at 1284 n.8; *see also* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

74. The contestants for the show are selected through an automated telephone answering system, whereby potential contestants call a toll-free number and answer a series of questions. The potential contestants' answers are recorded by pressing the appropriate keys on their telephone keypads, which must be done quickly in order to qualify. Callers who answer all of the questions correctly are then placed in a random drawing for a second round, in which they answer another series of questions. *Rendon*, 294 F.3d at 1280. Plaintiffs in *Rendon* claimed this process was discriminatory "either because they were deaf and could not hear the questions on the automated system, or because they [were mobility impaired and] could not move their fingers rapidly enough to record their answers on the telephone key pads." *Id.* at 1280-81.

75. *Id.* at 1281, 1283. Defendants also asserted that the hotline itself was not a place of public accommodation, an argument the Eleventh Circuit apparently did not reach. *See id.*

76. *Id.* at 1283.

77. *Id.*

> discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.[78]

Thus the Eleventh Circuit concluded that the ADA provides protection from discrimination that occurs off-site or over the telephone as long as there is some connection, or nexus, between the activity and the premises of a place of public accommodation.[79] As summarized by the NCD:

> If asked to state the central point of the Eleventh Circuit's *Rendon* decision, it would have to be that "nexus" is the test of Title III's application to off-site, nonphysical actions and procedures. If the screening mechanism or practice has a connection to the public accommodation, that is, if it actually constitutes a barrier to access by people with disabilities, it will be covered by Title III . . . .[80]

Courts have utilized the nexus concept in various contexts. For example the Third, Sixth, and Ninth Circuits have required a nexus between insurance sold to individuals and a physical insurance office.[81] Other courts have determined that a private membership organization can constitute a place of public accommodation only if it has a "close nexus" to a specific facility.[82] Indeed the NCAA was found to be a place of public accommodation because of its close connection to stadiums and arenas,[83] but the Boy Scouts was not because it only conducted meetings of small groups, primarily in private homes.[84] Similarly in *Clegg v. Cult Awareness Network*,[85] a case brought under comparable

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78. *Id.* (citations omitted).

79. *Id.* at 1284 n.8.

80. Position Paper, *supra* note 15, at 18.

81. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998); Parker v. MetroLife Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000). In *Ford*, *Parker*, and *Weyer*, the nexus requirement was not satisfied because the insurance was provided through the plaintiffs' employer, not directly through the insurance company. *Ford*, 145 F.3d at 613; *Parker*, 121 F.3d at 1011; *Weyer*, 198 F.3d at 1115.

82. Ganden v. Nat'l Collegiate Athletic Ass'n, No. 96 C 6953, 1996 WL 680000 at *10 (N.D. Ill. Nov. 21, 1996) (citing two part nexus test: (1) the organization is affiliated with a particular facility, and (2) membership in the organization acts as a necessary predicate to use of that particular facility); Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1270 (7th Cir. 1993) (finding that the Boy Scouts did not have sufficient nexus to a place of public accommodation under a similar provision of Title II of the Civil Rights Act of 1964); Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996).

83. *See, e.g.*, *Ganden*, 1996 WL 680000, at *10; *see also* Matthews v. Nat'l Collegiate Athletic Ass'n, 179 F. Supp. 2d 1209, 1223 (E.D. Wash. 2001); Tatum v. Nat'l Collegiate Athletic Ass'n, 992 F. Supp. 1114, 1119-21 (E.D. Mo. 1998).

84. *Ganden*, 1996 WL 680000, at *10 (citing *Welsh*, 993 F.2d at 1274).

85. 18 F.3d 752 (9th Cir. 1994).

language in Title II of the Civil Rights Act of 1964, the Ninth Circuit determined a nonprofit organization that provided information to the public concerning cults was not a place of public accommodation because plaintiff did not allege facts establishing that the organization sold goods and services from any public facility.[86] Finally, the Third Circuit recognized that denial of hospital privileges to a doctor because of the doctor's disability might violate the ADA because of the "nexus between the services or privileges denied and the physical place of the hospital as a public accommodation."[87] Thus courts have used the nexus approach to link the types of discrimination prohibited by the ADA with the places of public accommodation regulated by the statute.

2. Application of the Nexus Approach to the Internet. When courts and commentators have examined whether to apply the ADA to Internet websites, the nexus approach was either misapplied,[88] unfairly criticized,[89] or simply overlooked.[90] This treatment is undeserved because the nexus requirement provides a solution to this issue that not only fairly treats the language and purpose of the ADA but also realistically recognizes the nature of the Internet.

The nexus approach requires Internet websites of physical places of public accommodation to be accessible to disabled individuals because of a website's close connection to the business of a place of public accommodation. Under this analysis, the Internet is best viewed as a means for a place of public accommodation to provide access to its goods and services for, and to communicate with, its customers and clients. Websites are an integral part of a business's communication, advertising, and sales efforts, and if an entity is covered by the ADA as a place of public accommodation, the ADA regulates how that covered entity conducts its business and communicates with its customers. In the words of the statute itself, the ADA regulates the covered entity's "goods, services, . . . privileges, [or] advantages,"[91] a listing of activities in which it seems reasonable to include communications and sales through

86. *Id.* at 756; *see also* Schaaf v. Ass'n Educ. Therapists, No. C 94-03315 CW, 1995 WL 381979, at *2 (N.D. Cal. June 13, 1995) (holding that organization must have connection to a particular place of public accommodation).

87. Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 122 (3d Cir. 1998) (quoting *Ford*, 145 F.3d at 613) (internal quotation marks omitted).

88. *See Access Now*, 227 F. Supp. 2d at 1319-21.

89. *See* Position Paper, *supra* note 15, at 24-26.

90. *See Hearings, supra* note 2, at 97 (testimony of Elizabeth K. Dorminey) (arguing that ADA does not apply to private websites but not discussing whether the nexus requirement could make the ADA applicable).

91. 42 U.S.C. § 12182(a) (2000).

an entity's website. Moreover, the statute and the regulations specifically mandate that places of public accommodation furnish "auxiliary aids and services" when necessary to ensure effective communication with individuals with disabilities, unless doing so would result in a fundamental alteration to the program or service or an undue burden.[92] The regulations recognize that auxiliary aids can include qualified interpreters, videotext displays, computer-aided transcription services, written materials, braille materials, audio recordings, or large print materials.[93] Given such a broad range of aids and services, it is reasonable to conclude that auxiliary aids should include alternative manners of reading a website provided by a place of public accommodation.[94] Simply put, if a place is a covered entity—a physical place of public accommodation—then under the nexus analysis, the ADA requires that the entity provide its goods, services, and communications, which likely include Internet communications, in a nondiscriminatory and accessible manner.

An example of the type of analysis that should be used when applying the nexus approach to an Internet website can be found in *Walker v. Carnival Cruise Lines*.[95] In *Walker* a travel agency sold disabled customers tickets on a cruise that was not disabled accessible. The customers filed a claim under Title III against the travel agency for failing to adequately research and for misrepresenting the accessibility of the cruise line.[96] The court viewed the claim based upon the travel agency's failure to modify or adjust its services to meet the needs of the disabled customers it serves.[97] As framed by the court: "Travel agents fall squarely within the ADA's definition of public accommodations. The question is whether, quite apart from the physical accessibility of the Travel Agent's office, the ADA also covers the disabled accessibility of the services these agents provide."[98] The court answered this question affirmatively, because providing travel information is the primary

92. *Id.* § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303 (2003); 28 C.F.R. § 35.160 (2003).

93. 28 C.F.R. § 36.303(b).

94. Indeed, this position was taken in 1996 by Deval Patrick, then the Assistant Attorney General of the Civil Rights Division of the Department of Justice, in an opinion letter issued to Senator Tom Harkin. Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division, to Tom Harkin, Senator (Sept. 9, 1996), *at* http://www.usdoj.gov/crt/foia/tal712.txt [hereinafter Letter]. Mr. Patrick did not discuss whether a covered entity would be limited to physical places or could be interpreted to include websites with no connection to a physical place of public accommodation. *Id.*

95. 63 F. Supp. 2d 1083 (N.D. Cal. 1999).

96. *Id.* at 1086, 1091. Plaintiffs filed claims against the cruise line as well. *Id.* at 1086.

97. *Id.* at 1092.

98. *Id.*

"service" offered by travel agents: "[I]nadequate or inaccurate information regarding the disabled accessibility of travel accommodations for disabled travelers deprives them of equal access to or 'full and equal enjoyment of' travel information services."[99] Similar to the travel services provided by the agency in *Walker*, the information provided on websites of places of public accommodation also can be deemed a service required to be provided in a nondiscriminatory manner by places of public accommodation.[100] Providing accessible websites is simply another means of providing individuals with disabilities equal access to the goods and services of places of public accommodation.[101]

At the same time, however, the nexus approach would not apply to websites without a connection to a physical place of public accommodation because the fairest reading of the statutory and regulatory language of the ADA is that a place of public accommodation must be a physical place. Given the "virtual" nature of the Internet, websites in general would not qualify on their own as places of public accommodation unless they were connected to a physical facility. The distinction between websites connected to a physical place of public accommodation and those not connected is best explained by an examination of the statutory language of the ADA.

B. The Nexus Approach Best Reflects the Language of the ADA

Two different statutory provisions of the ADA justify the nexus approach. First, the argument that places of public accommodation must be "physical" places is based on the statutory and regulatory definitions of "place of public accommodation," which provide a specific listing of covered places that are all physical locations. Second, the argument that websites of those physical places are regulated by the ADA is based upon the broad definitions of "discrimination" found in the statute. Thus the first aspect of the nexus approach is based upon a narrow interpretation of which entities must comply with the ADA, and the second part involves a broad understanding of the type of activity prohibited by the statute. The statutory authority for each of these parts of the nexus approach will be discussed in turn.

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99. *Id.*

100. *Id.*

101. *See* Carparts Dist. Ctr. v. Automotive Wholesaler's of New England Inc., 37 F.3d 12, 19 (1st Cir. 1994) (noting that by drafting Title III of the ADA, "Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities.").

1. Internet Websites Are Not Places of Public Accommodation. In order for the ADA to apply generally to all websites on the Internet, either the websites or the Internet must be considered places of public accommodation.[102] An analysis of this issue should begin with the language of the statute itself.[103] The term "place of public accommodation" is specifically defined by the ADA to include limited types of private entities if the operation of such entities affects commerce.[104] Notably, neither the ADA nor its regulations specifically refer to the Internet or websites.[105] The Internet barely existed when Congress enacted the ADA in 1990. Thus any Congressional intent to apply the ADA specifically to the Internet seems speculative at best.[106]

Moreover the types of examples set forth in the ADA's definition of place of public accommodation—places such as museums, libraries, theaters, bakeries, and bowling alleys[107]—indicate that Congress intended Title III of the ADA to apply only to actual physical concrete structures, not virtual places such as websites.[108] This conclusion results from the application of two canons of statutory construction.

First, pursuant to the doctrine of *noscitur a sociis*, any ambiguous words in the statute should be interpreted by reference to the accompanying words of the statute in order "'to avoid the giving of unintended breadth to the Acts of Congress.'"[109] Accordingly, to the extent terms in the definition of public accommodation such as "travel service"[110] or

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102. *See* 42 U.S.C. § 12182 (2000).

103. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

104. *See* 42 U.S.C. § 12181(7) (2000); 28 C.F.R. § 36.102 (2003).

105. *See Access Now*, 227 F. Supp. 2d at 1318.

106. *See* Konkright, *supra* note 7, at 714-15; Maroney, *supra* note 7, at 198-99 ("[T]he Internet was simply not a part of mainstream life in 1990. Its rapid growth was unforeseen by lawmakers even a decade ago. The Internet's absence from the original debate over the ADA thus raises serious issues of statutory interpretation.").

107. 42 U.S.C. § 12181(7) (2000).

108. *See, e.g.*, *Weyer* 198 F.3d at 1114-16; *Parker*, 121 F.3d at 1014 (holding that "[t]he clear connotation of the words in § 12181(7) is that a public accommodation is a physical place," because "[e]very term listed in § 12181(7) . . . is a physical place open to public access"); *Access Now*, 227 F. Supp. 2d at 1318. *But see Carparts*, 37 F.3d at 18-20 (holding that trade association that administers a health insurance program can be a place of public accommodation even if it does not have any connection to a physical facility).

109. *Ford*, 145 F.3d at 614 (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307, (1961)); *see also Weyer*, 198 F.3d at 1114 (utilizing the principle of *noscitur a sociis* to interpret the statutory definition of "place of public accommodation").

110. 42 U.S.C. § 12181(7)(F) (2000).

"public display"[111] are thought to be ambiguous (and therefore could arguably include Internet websites), these terms should be examined in light of the other types of words in the statute. For example, "travel service" is listed along with other plainly physical structures, such as a laundromat, dry-cleaner, barber and beauty shops, funeral parlor, gas station, and offices of various professionals.[112] Similarly the term "public display" is listed along with buildings such as a museum and a library.[113] Therefore, under this doctrine, the context of the words in the statutory definition of place of public accommodation suggests that "an actual physical place is required."[114]

Second, the rule of *ejusdem generis* requires that "where the 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."[115] The court in *Access Now* specifically relied on this canon of statutory interpretation to reject plaintiffs' argument that Internet websites could be included in such general terms as "'other place of exhibition or entertainment,'"[116] "'other place of public display or collection,'"[117] and "'other sales or rental establishment.'"[118] As acknowledged by the court, these general terms "are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely: 'motion picture house, theater, concert hall, stadium,' [and] 'museum, library, gallery,' and 'bakery, grocery store, clothing store, hardware store, shopping center,' respectively."[119] Of the examples cited by the statute as places of public accommodation, none reasonably can be said, on their face, to include establishments that offer goods and services to the public solely through nonphysical means, such as a mail order magazine business, over-the-phone operations, or Internet websites.[120] Although the examples do contain some general, catch-all terms that may encompass these entities, the statute makes clear that Congress either did not contemplate nonphysical establishments as places of public accommodation or consciously

111. *Id.* § 12181(7)(H).
112. *Id.* § 12181(7)(F).
113. *Id.* § 12181(7)(H).
114. *Weyer*, 198 F.3d at 1114.
115. *Access Now*, 227 F. Supp. 2d at 1318 (quoting Allen v. A.G. Thomas, 161 F.3d 667, 671 (11th Cir. 1998)) (citation omitted).
116. *Id.* at 1317 (quoting 42 U.S.C. § 12181(7)(C) (2000)).
117. *Id.* (quoting 42 U.S.C. § 12181(7)(H)).
118. *Id.* (quoting 42 U.S.C. § 12181(7)(E)).
119. *Id.* at 1319 (quoting 42 U.S.C. § 12181(7)(C), (H), & (E)).
120. *See* Konkright, *supra* note 7, at 723.

chose to exclude nonphysical facilities from its list.[121] Indeed, applying well-founded canons of statutory interpretation such as *noscitur a sociis* and *ejusdem generis* permits the judiciary to rely on the language actually used by Congress rather than extrapolating what Congress may have meant had Congress thought about the Internet.[122] Therefore, a court that limits itself to the plain wording of the ADA would find it difficult to conclude that Congress intended for virtual places, such as Internet websites, to be included along with the physical structures specifically set out in the statute.

In addition to the limitations of the statutory language, the regulations promulgated by the attorney general shed further light on the types of entities covered by the ADA.[123] The ADA's regulations define a place of public accommodation as a "*facility*, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve enumerated categories set forth in 42 U.S.C. § 12181-(7)[124]]."[125] The regulations subsequently use concrete, physical terms to define "facility" 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."[126] As noted by several courts and commentators, this regulatory language supports an interpretation of the ADA's statutory language to limit places of public accommodation to actual, physical structures.[127] Moreover, given the direct statutory authority of the

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121. *See Carparts*, 37 F.3d at 19-20 (stating that "[o]ne who simply reads the Committee Report describing the operations of Title III could easily come away with the impression that it is primarily concerned with access in the sense of . . . physical access . . . .").

122. *See* Konkright, *supra* note 7, at 723-34. One commentator notes that the legislative history also indicates that Congress did not intend for a broad interpretation of a place of public accommodation because in the version of Title III submitted by the Senate, the definition of "public accommodation" included "other similar places" to those enumerated, but that "this language was written out by the House of Representatives before adopting the current definition." *Id.* at 723 (citing H.R. CONF. REP. No. 101-596, at 20 (1990)). Konkright also notes that the House stated that the enumerated categories of public accommodations are "intended to be exhaustive and that an entity excluded from this list . . . is not considered a place of public accommodation." *Id.* at 723-24.

123. *See* 28 C.F.R. § 36.104 (2003).

124. 42 U.S.C. § 12181(7) (2000).

125. 28 C.F.R. § 36.104 (emphasis added).

126. *Id.*

127. *Access Now*, 227 F. Supp. 2d at 1318; Torres v. AT&T Broadband, LLC, 158 F. Supp. 2d 1035, 1038 (N.D. Cal. 2001) (finding that a digital cable system was not a place of public accommodation); Brown v. 1995 Tenet ParaAm. Bicycle Challenge, 959 F. Supp. 496, 498 (N.D. Ill. 1997) (holding that operators of a bicycle tour were not a place of public

Attorney General to issue regulations interpreting the ADA,[128] this regulatory language should be given deference.[129] Notably, the Department of Justice has not attempted to issue new regulations to alter its definition of place of public accommodation or to unambiguously apply the ADA to private Internet websites.[130]

Courts have used the type of strict statutory construction set forth above to hold that a broad range of nonphysical entities should not be considered places of public accommodation because of their lack of physicality, such as television broadcasts,[131] digital cable systems,[132] insurance policies,[133] membership organizations,[134] youth hockey leagues,[135] and newspaper columns.[136] Similarly, in response to plaintiffs' assertion seeking "equal access to Southwest's virtual 'ticket counters' as they exist on-line,"[137] the court in *Access Now* determined that the Internet was not a physical place of public accommodation.[138] The court first relied substantially upon the statutory and regulatory language of the ADA to conclude that a public accommodation must be a physical, concrete structure.[139] Then, the court held that the Internet was not a physical place because, citing to the Supreme Court and the Eleventh Circuit, the court determined the Internet to be "a unique

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accommodation and noting that most courts "have read the word 'facility' literally, concluding that the focus of a claim under Title III of the ADA must be 'the place of public accommodation.'" (citing Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995))); Konkright, *supra* note 7, at 717; Maroney, *supra* note 7, at 197-98.

128. 42 U.S.C. § 12186(b) (2000).

129. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (holding that courts must give deference to formal agency regulations construing statutory provisions, unless those regulations constitute an impermissible interpretation of the statute).

130. Interestingly, though, the Department of Justice has taken the position in court pleadings that the ADA should apply to private Internet websites. *See* Brief of the United States as Amicus Curiae in Support of Appellant, Hooks v. OKBridge, Inc., No. 99-214, slip op. at 7 (W.D. Tex. Aug. 4, 1999) (No. 99-50891), *available at* www.usdoj.gov/crt/briefs/hooks.htm.

131. *See* Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995).

132. *See Torres*, 158 F. Supp. 2d at 1038.

133. *See, e.g.*, *Ford*, 145 F.3d at 612-13; Parker, 121 F.3d at 1010-11.

134. *See Brown*, 959 F. Supp. at 498.

135. *See* Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996).

136. Treanor v. Wash. Post Co., 826 F. Supp. 568, 569 (D.D.C. 1993).

137. *Access Now*, 227 F. Supp. 2d at 1321 (citations omitted).

138. *Id.*

139. *Id.* at 1318 (rejecting plaintiffs' argument that southwest.com falls within the plain language of 42 U.S.C. § 12181(7) because it is a place of "exhibition, display and a sales establishment"). The court also determined that no "'nexus' [existed] between southwest.com and a physical, concrete place of public accommodation." *Id.* at 1321; *see infra* Part III(D)(1).

medium—known to its users as 'cyberspace'—*located in no particular geographical location* but available to anyone, anywhere in the world, with access to the Internet."[140] Because the website did not exist in "any particular geographic location,"[141] plaintiffs were not impeded from access to "a specific, physical, concrete space such as a particular airline ticket counter or travel agency."[142] Thus the court in *Access Now* rejected plaintiffs' claim that the ADA applied to Southwest's Internet website.

In *Noah v. AOL Time Warner, Inc.*,[143] this same issue was addressed but in the context of Title II of the Civil Rights Act of 1964.[144] Title II of the Civil Rights Act contains a definition of "place of public accommodation" analogous to the definition under the ADA.[145] In *Noah*, a Muslim subscriber to America Online's Internet service asserted a claim that AOL permitted harassing language based upon his religion to be displayed in one of AOL's "chat rooms."[146] A chat room, as described by the court in *Noah*, permits participants to engage in real-time electronic conversations over the Internet.[147] In determining whether such chat rooms were places of public accommodation, the court followed the logic set forth above and determined, after a lengthy discussion of statutory interpretation and case law from both the Civil Rights Act and the ADA, that a place of public accommodation must be a physical place.[148] Following this detailed analysis, the court held that, because it is "firmly established" that places of public accommodation must be "actual physical facilities . . . it is clear that AOL's online chat rooms cannot be construed as 'places of public accommodation'

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140. *Id.* at 1321 (quoting Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001) (citation omitted)).

141. *Id.*

142. *Id.*

143. 261 F. Supp. 2d 532 (E.D. Va. 2003).

144. *Id.* at 534; 42 U.S.C. § 2000a (2000).

145. 42 U.S.C. § 2000a(a).

146. 261 F. Supp. 2d at 534-35.

147. *Id.* at 535, 536. As noted by the court:

> Chat room participants type in their comments or observations, which are then read by other chat room participants, who may then type in their responses. Conversations in a chat room unfold in real time; the submitted comments appear transiently on participants' screens and then scroll off the screen as the conversation progresses. AOL chat rooms are typically set up for the discussion of a particular topic or area of interest, and any AOL member who wishes to join a conversation in a public chat room may do so.

Id.

148. *Id.* at 541-46.

under Title II."[149] Like the court in *Access Now*, the court in *Noah* relied upon the Internet's virtual nature and the conclusion that, unlike a theater, concert hall, or arena, an Internet chat room "does not exist in a particular physical location[;] indeed it can be accessed almost anywhere, including from homes, schools, cybercafes and libraries."[150] According to the court, this lack of permanent location belies metaphorical references to an Internet forum as a "location" or "place" and requires the conclusion that an Internet chat room is not a place of public accommodation.[151]

Therefore, requiring a place of public accommodation to be a physical place disqualifies the Internet generally. As discussed below, however, physical places of public accommodation communicate with, and provide access to their goods and services through, their Internet website. This connection between the website and a physical place of public accommodation permits regulation by the ADA of these specific websites.

2. Prohibited Discrimination Under the ADA Includes Lack of Accessibility to the Websites of Places of Public Accommodation. Although limited to physical places, the ADA prohibits more than barriers to physical *access* to those places. Indeed the ADA has both general and specific prohibitions on discrimination by covered entities, and both prohibitions support the nexus approach and its application to nonphysical barriers to access physical places.[152] First, the ADA broadly prohibits discrimination in "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of* any place of public accommodation. . . ."[153] This prohibition is intricately connected to the business of the place of public accommodation; indeed, the "goods, services, facilities, privileges, advantages, or accommodations"[154] referenced in the general rule 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."[155]

Second, in addition to the general definition of discrimination, the ADA specifically defines "discrimination" to prohibit several different

149. *Id.* at 544.
150. *Id.*
151. *Id.* at 544-45.
152. *See Weyer*, 198 F.3d at 1114 (noting that the context of the statutory language "suggests that some connection between the good or service complained of and an actual physical place is required").
153. 42 U.S.C. § 12182(a) (2000) (emphasis added).
154. *Id.*
155. *Ford*, 145 F.3d at 613.

types of nonphysical activity and behavior, including, among other things: (1) imposing eligibility criteria that screen out an individual with a disability; (2) failing to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities; and (3) failing to provide auxiliary aids and services when they are necessary for an individual with a disability to realize the full benefit of a place of public accommodation.[156] As noted by the Eleventh Circuit in *Rendon*, the ADA's specific examples of discrimination cover both physical architectural barriers[157] and intangible barriers, such as eligibility requirements, discriminatory policies and procedures, or a failure to provide "a reasonable auxiliary service that would permit the disabled to gain access to or use its goods and services."[158] Of particular importance in the Internet context, the ADA regulations mandate that public accommodations shall furnish appropriate auxiliary aids and services to ensure "[e]ffective communication . . . with individuals with disabilities,"[159] a requirement that does not rely only upon physical access.[160]

In addition to the language of the discrimination provisions, Congress specifically meant for the ADA to apply to more than physical barriers. In the ADA's Findings of Fact, Congress noted that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, [and] the discriminatory effects of architectural, transportation, and communication barriers. . . ."[161] Congress also meant for the ADA to cover more than individuals with physical impairments; protecting only physical access ignores that the ADA protects people with mental impairments, individuals with records of impairments, and people "regarded as" having an impairment.[162] Failing to address intangible barriers to access would result in a situation in which, for example, protections of individuals with mental impairments would be "virtually negated."[163] Thus the language of the

156. 42 U.S.C. § 12182(b)(2)(A)(i)-(iii).

157. 294 F.3d at 1283 (citing 42 U.S.C. § 12182(b)(2)(A)(iv)).

158. *Id.* at 1283 n.7 (citing 42 U.S.C. § 12182(b)(2)(A)(i), (ii), (iii)).

159. 28 C.F.R. § 36.303(c) (2003).

160. *Id.*

161. *Rendon*, 294 F.3d at 1286 (quoting 42 U.S.C. § 12101(a)(5) (2000)).

162. *See* 42 U.S.C. § 12102(2)(A)-(B) (2000) (defining "disability" to include a "physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment").

163. Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 562-63 (D. Minn. 1998); *see also* Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321-22 (C.D. Cal. 1996).

ADA does not limit the definition of "discrimination" only to physical barriers inhibiting physical access to a place of public accommodation.[164]

Under the nexus approach, then, a connection must exist between a physical place of public accommodation and the discriminatory action or inaccessible service. This connection, however, is not limited only to whether an individual with a disability can physically access a place of public accommodation. By referencing discriminatory actions taken with regard to a broad range of activities of a public accommodation, in addition to the accommodation's facilities, the statutory text indicates that the connection simply must be toward some aspect of the place of public accommodation's offerings to the public. The nexus can involve both tangible and intangible discriminatory actions, including refusing to provide auxiliary aids to ensure effective communication or failing to make reasonable modifications in policies or procedures to provide an individual with a disability full use of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.[165] In other words, the ADA will not countenance discrimination, as defined both generally and specifically by the statute and the regulations, even if it occurs off-site and away from the actual physical place of public accommodation.[166] This broad definition of discrimination is the essence of the nexus approach because it prevents discrimination in a variety of aspects of a covered entity's business.[167]

Reliance on the broad definition of discrimination, however, should not be taken too far by asserting that the ADA ought to apply to all websites on the Internet, regardless of their connection to a physical place of public accommodation. Applying the ADA to the Internet generally would bring a new group of entities under the auspices of the ADA—Internet websites with no connection to a physical place of public accommodation—with little statutory authority. By applying the ADA only to the websites of physical places of public accommodation, the nexus approach ensures that entities already covered by the statute

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164. *See Walker*, 63 F. Supp. 2d at 1093.

165. *See Rendon*, 294 F.3d at 1283.

166. *See id.* at 1285; *see also* Petruzzelli, *supra* note 2, at 1080 n.112. Although Petruzzelli argued for broad applicability of the ADA to the Internet, he also recognized that even if a place of public accommodation was interpreted only to include physical places, "it does not necessarily mean that Title III only applies to physical access to these places. Not being able to effectively get into a store is not the only form of discrimination." Petruzzelli, *supra* note 2, at 1080 n.112.

167. In *Rendon*, for example, the off-site telephone hotline was considered an intangible barrier to entry to the physical studio, which was a place of public accommodation itself. 294 F.3d at 1283.

simply comply with their current obligations, regardless of the medium in which they communicate with the public.

In summary, the narrow language of the definition of "place of public accommodation" justifies a limitation of places of public accommodation to physical places. At the same time, the broad language of the antidiscrimination provisions of the ADA requires these covered entities to ensure the accessibility of their websites.[168] The nexus approach, then, most accurately reflects the ADA's broad application to a specifically defined group of covered entities.

C. The Nexus Approach Best Reflects the Nature of the Internet

The nexus approach also provides the best interpretation of the ADA when considering the nature of the Internet. As set forth below, the Internet should not be considered a place, either physically or metaphorically. Moreover, the nexus approach best addresses the unique medium of the Internet in that not only can a website provide access to goods or services but also, in many cases, a website actually *is* the good or service delivered to the public by a company.

1. The Internet is Not a Physical or Metaphoric Place. In response to the assertion that the ADA applies only to physical places of public accommodation, commentators assert that the Internet should qualify as an actual physical place.[169] One version of this argument focuses on the word "equipment" in the regulatory definition of "facility."[170] Under this rationale, the servers on which websites run may be regarded as equipment, and those servers are located at physical places.[171] Thus because websites provide their goods and services from equipment in places that are owned or leased by public accommodations, the websites themselves should qualify as places of public accommodation.[172] Another version of the argument is that websites should be construed as their name implies—as "sites"—and therefore should be considered facilities as defined by the regulations.[173] The website, a

168. *Compare* 42 U.S.C. § 12181(7) (2000) (providing definition of "public accommodation"), *with* 42 U.S.C. § 12182(a) (2000) (providing general rule against discrimination "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").

169. *See* Position Paper, *supra* note 15, at 24-25; Dana Whitehead McKee & Deborah T. Fleishaker, *ADA and the Internet: Must Websites Be Accessible*, 33 MD. BAR J. 34, 35 (Nov.-Dec. 2000).

170. *See* Position Paper, *supra* note 15, at 24-25 (citing 28 C.F.R. § 36.104 (2003)).

171. *Id.*

172. *Id.*

173. McKee & Fleishaker, *supra* note 169, at 34.

group of related documents sharing the same address on the Web,[174] is stored in a physical place that is either owned or leased by an entity.[175]

Both versions of this "physical place" argument, however, are undermined by the analysis in two cases addressing intangible forms of communication analogous to the Internet: A digital cable system and a television broadcast. First, in *Torres v. AT&T Broadband, LLC*,[176] a district court held that a digital cable system cannot be considered a place of public accommodation because viewing the system's images did not require access to "any actual physical public place."[177] In *Torres*, plaintiff asserted (much like the argument set forth above) that the digital cable system's equipment should be considered a facility.[178] This assertion, however, was flatly rejected by the district court because viewing the images from the system did not require gaining access to a physical public place.[179] The court in *Torres* noted:

> The defendants' digital cable system is installed in the plaintiff's home. The plaintiff does not have to travel to some physical place, open to the public, in order to experience the benefits of the defendants' digital cable system. He simply turns on his television set and has automatic access to the sounds and images provided by the defendants' service.[180]

Second, in *Stoutenborough v National Football League, Inc.*,[181] the Sixth Circuit concluded that the television broadcast of a professional football game could not be considered a place of public accommodation because it was not a physical place.[182] In that case an association of hearing impaired individuals sought to overturn the National Football League's "blackout rule" prohibiting the live local broadcast of home football games that are not sold out seventy-two hours before game time. Plaintiffs contended that the rule discriminated against them because they had no other means of accessing the football game "via telecommu-

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174. *Id.* at 35 (citing Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 459 n.2 (D. Mass 1997)).

175. *Id.*

176. 158 F. Supp. 2d 1035 (N.D. Cal. 2001).

177. *Id.* at 1038. Plaintiff in *Torres* claimed that defendants' cable system was required by the ADA to make the channel on which defendants provide a list of available programs (i.e., the channel menu) accessible to the visually impaired. *Id.* at 1036-37.

178. *See id.* at 1038.

179. *See id.*

180. *Id.*

181. 59 F.3d 580 (6th Cir. 1995).

182. *Id.* at 583.

nication technology."[183] The Sixth Circuit rejected this assertion and held that the television service did not involve a place of public accommodation.[184]

Thus, the courts in *Torres* and *Stoutenborough* neatly addressed the NCD's argument by holding that the ADA applies directly to physical places that are open to the public.[185] Rather than merely being associated with some physical facility, the physical facility itself must be open to the public.[186] Neither the Internet, a digital cable system, nor a television broadcast involve, as a general matter, physical places open to the public; they all use physical facilities that are necessary to provide services, but none of these facilities are open to the public in the same way museums, motion picture houses, theaters, concert halls, and stadiums identified by the ADA's definition of place of public accommodation are physically accessible to the public.[187] In short, the Internet should not be considered a physical place of public accommodation simply because physical facilities (not open to the public) are used to maintain the servers utilized by the Internet.

Metaphoric arguments also can be made to support the conclusion that Title III should apply to Internet websites because we conceptualize the Internet as a place.[188] Lawrence Lessig, a well-regarded commentator on the law's applicability to the Internet, notes plainly that "[c]yberspace is a place. People live there. They experience all the sorts of things that they experience in real space, there."[189] As another commentator described the phenomenon, "[T]he language that we use to discuss cyberspace is shot through with physical references and implications . . . . The physical world of stores, places, and roads was translated online into an abstract space that shared all the spatial characteristics

183. *Id.*

184. *Id.*

185. *Torres*, 158 F. Supp. at 1038; *Stoutenborough*, 59 F.3d at 583.

186. *See, e.g., id.*; Jankey v. Twentieth Century Fox Film Corp., 212 F.3d 1159, 1161 (9th Cir. 2000) (holding that a commissary, studio store, and automatic teller machine (ATM) located on a movie studio's production lot were not "public accommodations" subject to the ADA, even if they fell within the ADA's listed categories of private entities that would be considered public accommodations, because the lot was not open to the public and was restricted to employees and authorized business guests).

187. *See* 42 U.S.C. § 12181(7) (2000); *see* Maroney, *supra* note 7, at 194 (noting that websites differ "dramatically" from the examples listed in the statute, because "websites do not have tangible facilities").

188. *See* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 441, 445 (2003) (detailing different Internet-related legal domains, "where judges, legislators, and practitioners have adopted the CYBERSPACE AS PLACE metaphor, whether they realize it or not").

189. Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996).

of the physical world."[190] People use words connoting physicality to discuss navigating and utilizing the Internet, such as "surfing" the web, "moving" from one "site" to the next, and "entering" a website.[191] Such metaphors and analogies pervade judicial opinions as well: In the same case in which the Supreme Court implied that the Internet was not a physical place because it did not have a particular geographic location, the Court also analogized the Internet "to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[192] Of course a library and a mall would be prototypical examples of places of public accommodation.[193]

Nevertheless, as several commentators note, the metaphor of the Internet as a physical place has several weaknesses even though we sometimes speak and think of the Internet in physical or spatial terms.[194] The Internet "is merely a simple computer protocol, a piece of code that permits computer users to transmit data between their computers using existing communications networks."[195] Although it may be obvious, Internet users do not physically travel to various websites.[196] The user sends a request for information to a provider of a website, and the provider sends back the data that makes up the web page itself.[197] Moreover, Internet users do not actually experience events as they would in a physical place; the Internet is mainly text,

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190. Hunter, *supra* note 188, at 458. As noted by one commentator:

> [T]he Internet is often described in tangible "brick and mortar" terms. We now commonly speak of chat *rooms*, an information *super-highway*, Internet *architectures*, and web pages being *"under construction*." All of these real-world metaphors draw on the parallels between electronic space and the tangible world, each capturing how similar e-space and real space can be.

Maroney, *supra* note 7, at 194.

191. *See* Hunter, *supra* note 188, at 453-54 (citing dozens of examples of "physical vocabulary" used when describing online events and occurrences).

192. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 853 (1997).

193. 42 U.S.C. § 12181(7)(E) & (H) (2000).

194. *See* Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 523 (2003) ("As a technical matter, of course, the idea that the Internet is literally a place in which people travel is not only wrong but faintly ludicrous."); Andrew L. Shapiro, *The Disappearance of Cyberspace and the Rise of Code*, 8 SETON HALL CONST. L.J. 703, 704-11 (1998); Timothy Wu, *When Law & the Internet First Met*, 3 GREEN BAG 2D 171, 171 (1999-2000) (noting that the idea of cyberspace as a place "must count as among recent legal history's more quixotic episodes").

195. Lemley, *supra* note 194, at 523; *see also Reno*, 521 U.S. at 849 ("The Internet is an international network of interconnected computers.").

196. Lemley, *supra* note 194, at 542.

197. *Id.*

images, and sound.[198] When viewed from this perspective, the Internet seems more analogous to other communications systems—such as mail, telephone calls, television, cable, and radio—than to a physical place.[199] As noted by one commentator, when we receive such correspondence, we do not think that "we magically enter a store or a friend's house."[200] Ultimately metaphors should not trump statutory language that limits applicability of the ADA to physical places and that pre-dated the increased importance of the Internet.

Thus the very make-up of the Internet demonstrates that it is not a physical place that can be visited by the public, even though we often speak of the Internet in such metaphoric terms. It is likely that courts will determine that a website, standing alone, is not a place of public accommodation as defined by the ADA because it is not a physical place. The analyses in *Access Now*, *Noah*, *Stoutenborough*, and *Torres* are based upon the recognition that non-physical, communicative services such as the Internet, a cable system, and a television broadcast are not the types of activities generally regulated by the ADA.[201]

2. The Nexus Approach Reflects a Nuanced Understanding of the Internet's Simultaneous Substantive and Communicative Roles. The ADA's regulations make clear that the ADA requires *access* to a place of public accommodation, but it does not require that the public accommodation change the *content* of goods or services it provides.[202] The example in the regulations that explains this distinction is that a bookstore is required to provide access to, and sell books to, a blind person, but is not required to stock a braille version of every book in its inventory.[203] This distinction between accessibility and

198. *Id.* at 524-25; *Hearings*, *supra* note 2, at 67 (testimony of Susyn Conway) ("The Internet is not a physical structure, a 'facility' for which some general disability-serving standards might be conceivable and applicable across the board—it is [an] assortment of sometimes conflicting technologies, and business models in the trial-and-error mode."); *Hearings*, *supra* note 2, at 72 (testimony of Dennis Hayes) ("The Internet is an evolving media, not a physical structure.").

199. *See Hearings*, *supra* note 2, at 90, 96 (testimony of Elizabeth K. Dorminey).

200. Lemley, *supra* note 194, at 525.

201. *Access Now*, 227 F. Supp. 2d at 1321; *Noah,* 261 F. Supp. 2d at 544-45; *Stoutenborough*, 59 F.3d at 583; *Torres*, 158 F. Supp. at 1038.

202. *See* Konkright, *supra* note 7, at 736 n.170 (citing 28 C.F.R. § 36.307(a) (2003)) ("This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities."); *see also* Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (finding that ADA did not require insurance company to alter type of insurance it offered).

203. *See, e.g.*, 28 C.F.R. pt. 36, app. B at § 36.307 (2003); *Doe*, 179 F.3d at 559 ("[I]t is apparent that a store is not required to alter its inventory in order to stock goods such as

content reflects the ADA's delicate balance between requiring accommodation of disabilities and protecting the essence of a company's goods and services.[204]

The nexus approach with regard to Internet websites addresses the ADA's crucial distinction between *access* and *content* better than either of the more extreme positions. Applying the ADA to all Internet websites regardless of their connection to a physical place would ignore this distinction, it can be argued, because some entities, particularly Internet-only sites, might rightfully assert that the website itself *is* the "good or service" being provided.[205] These websites would argue that accessibility alterations should not be required because requiring changes to the website would require changes to the actual good or service provided by the site.[206] For example, an Internet search engine, such as Google or Yahoo!, might assert that it should not be required to make its website accessible to individuals with disabilities because such a requirement would fundamentally alter the Internet searching product it provides on its website.[207] By contrast, the more restrictive *Access Now* approach, which does not recognize any accessibility rights to websites, ignores the role of the Internet in permitting access to the goods and services of places of public accommodation.

The nexus requirement, however, may largely avoid this debate because it generally distinguishes between websites that are communica-

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Braille books that are especially designed for disabled people."); *Parker*, 121 F.3d at 1012.

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books.

28 C.F.R. pt. 36, app. B at § 36.307 (2003).

204. *See Doe*, 179 F.3d at 560 ("The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated.").

205. At least one critic has asserted that applying the ADA to the Internet may require companies to alter the substance of their goods and services, which he claims is not required by the ADA. *See* Konkright, *supra* note 7, at 739-44.

206. *See* Maroney, supra note 7, at 202-03 (arguing that access to goods and services could mean merely access to the Internet, which does not regulate content of websites).

207. An analogous argument was successful in *Cornilles v. Regal Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885 (D. Or. Jan. 3, 2002), in which deaf plaintiffs sought closed-captioning of movies displayed at the theater so that the plaintiffs could "enjoy the movies at the same level as hearing individuals." *Id.* at *2. The court determined that the ADA required the movie theater to provide access to all its movies to deaf patrons, but it did not require the theater to provide special closed-captioning of those movies, in part because such closed-captioned films had to be purchased by the theater as a separate product. *See id.* at *3-6.

tion devices and those that embody the very good or service offered by the controller of the site. For example, it seems more likely that a website connected to a physical place of public accommodation would be considered a "communication" service of that place (and therefore required to be accessible), rather than an actual good because, by definition, the physical place must sell some good other than the website from its physical location. Interpreting a website as a communication device leads more clearly to a conclusion that the ADA would apply to ensure the communications from places of public accommodation are provided to individuals in a nondiscriminatory manner.[208] Conversely, by not requiring ADA compliance of websites unconnected to any physical place of public accommodation, the nexus requirement avoids regulation of the very websites that are most likely to claim that their content is being improperly regulated by the ADA. Accepting ADA regulation of a website that can be viewed as a communications vehicle for physical places of public accommodation, whether used merely to advertise or to sell goods and services directly, is less problematic than if the website itself provides the only business outlet for a company. Accordingly, unlike the more extreme positions, the nexus approach recognizes and accommodates the various functions served by the Internet.

D. The Nexus Approach is a Better Solution Than the Extreme Alternatives

In attempting to analyze the role, if any, the ADA should play with regard to Internet websites, the nexus approach provides an overlooked alternative to the extreme positions on either side of this debate. Contrary to the position of the court in *Access Now* and other strict constructionists, the nexus approach would require a place of public accommodation to make its website accessible. Contrary to the NCD's assertions, however, the approach does not recognize that *every* website must be accessible because the nexus approach requires that only places with physical facilities should be considered places of public accommodation.[209] As described below, the court in *Access Now* misapplied the nexus approach, while the NCD unfairly criticized it.

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208. *See Walker*, 63 F. Supp. 2d at 1094 (noting that the issue regarding modification of goods and services was not presented because "[t]he question is simply whether travel agents who provide information regarding accessibility must do so in a non-discriminatory manner").

209. Until now it appears that the debate has focused on two positions: Either the ADA does not apply to the Internet at all, or it applies to the entire Internet and requires substantial modification of current websites. *Compare supra* note 2 *with supra* note 7.

1. The Court in *Access Now* Misapplied the Nexus Approach. The only published decision that addresses the ADA in the context of Internet websites, *Access Now*, does not apply the nexus approach properly. Although the court in *Access Now* recognized the nexus approach as set forth by the court in *Rendon*, the court then misapplied it to conclude that the ADA did not regulate Southwest Airline's online website.[210] In *Access Now* the court determined no nexus existed between the website's selling of airline tickets and any particular airline ticket counter because the virtual ticket counters provided by southwest.com did not exist in any particular geographic location and, therefore, the website was not a specific, concrete space.[211] In essence, the court concluded that the "service or privilege" at issue was the selling of tickets, which had a connection only to a virtual website that was not a physical place of public accommodation.[212] Therefore, according to the court, no nexus existed between the selling of tickets and a physical place of public accommodation.[213]

The nexus analysis, however, should not be so limiting. Indeed, the result in *Access Now* identifies a shift in argument that must be made by those advocating for the ADA's applicability to a particular website. Rather than assert, as did plaintiffs in *Access Now*, that the ADA requires equal access to a company's website as a separate entity,[214] such advocates should reframe their argument to assert that a website is simply another means by which a covered entity communicates with and sells goods to the public.[215] Under this analysis, Southwest's physical ticket counters should be considered places of public accommodation;[216] thus any manner in which Southwest communicates with the

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210. 227 F. Supp. 2d at 1321.

211. *Id.*

212. *See id.*

213. *Id.*

214. *See id.*

215. In fact in their brief on appeal to the Eleventh Circuit, plaintiffs attempted to make exactly this argument. *See* Brief for the Appellants at 17-23, *Access Now* (No. 02-16163-BB). Southwest, however, criticized this argument as having not been asserted at the district court level because plaintiffs had alleged that the website itself was the discriminatory public accommodation. *See* Answer Brief for Appellee at 7, 27, 31-36, *Access Now* (No. 02-16163-BB).

216. On appeal, Southwest Airlines argued that the ADA should not apply to its ticket counters because discrimination by air carriers is addressed by a different statute, the Air Carrier Access Act, which according to Southwest, specifically covers an airline's ticketing, information, and reservation services. *See* Answer Brief for Appellee at 37-41, *Access Now* (No. 02-16163-BB). Although this argument may permit Southwest Airlines to prevail, it would not apply to most places of public accommodation.

public regarding its sale of tickets should be regulated by the ADA, similar to the manner in which the ADA regulated the communication of the travel agents in *Walker*.[217] In other words, rather than focusing on the website as the covered entity, advocates for the disabled should assert that the website is a means by which the public is able to enjoy the "goods, services, . . . privileges, [and] advantages"[218] of a physical place of public accommodation, such as the actual ticket counters of Southwest.

The ADA requires that individuals with disabilities have equal access to the goods, services, privileges, and advantages of covered entities.[219] Once an entity is subject to the ADA as a place of public accommodation, the ADA should not distinguish between the various manners in which that entity sells its goods and services to the public; rather, the ADA requires that the place of public accommodation not discriminate in any way in which it interacts with the public, whether by selling tickets at a physical ticket counter or over a virtual counter on the Internet.[220] The conclusion drawn by the court in *Access Now* focused on the wrong nexus connection: The connection is between the Internet website and the business of the ticket counters, not between the selling of tickets and the virtual ticket counter. The court should have looked at the website as the service or privilege and determined whether it had a connection to any physical place of public accommodation. By misconstruing the nexus approach, the court in *Access Now* improperly limited the ADA's application.

2. A Justified Distinction. Conversely, in arguing for the application of the ADA to all websites generally, the NCD unfairly criticized the nexus approach by disapproving of the distinction drawn by the nexus approach between companies that have physical facilities and companies that are open to the public only on the Internet.[221] The NCD asserted that the "maintenance of legal distinctions among otherwise similar Web sites, based on their connection or lack of connection to a physical facility, will become increasingly untenable and incoherent."[222] An obvious example of this distinction is that, under the nexus analysis, the website of a bookstore with a physical location

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217. *See supra* text accompanying notes 95-101.

218. 42 U.S.C. § 12182(a) (2000).

219. *See id.*

220. *See* Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001) ("An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.").

221. *See* Position Paper, *supra* note 15, at 25.

222. *Id.*

must be ADA compliant, while the website of Amazon.com, which also sells books but does not maintain physical facilities open to the public, does not.[223]

These distinctions, critics argue, are neither suggested by the language of the statute nor consistent with the purpose of the ADA.[224] First, despite the statutory arguments made in Section B of this Part, neither the statutory nor the regulatory language defining "place of public accommodation" contains any explicit limitation to physical places.[225] In fact, some courts have construed the ADA to apply to more than physical places.[226] Specifically, the First Circuit and several district courts have concluded that Title III applies to insurance policies provided either through an employer or sold over the phone, even though not sold directly out of a physical insurance office.[227] The First Circuit noted in the seminal case that interpreted the ADA to include more than physical places that

> by including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who

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223. *See* Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1165 (E.D. Va. 1997) ("[A]n insurer could freely discriminate in the provision of insurance without fear of ADA Title III simply by not maintaining a physical office or by marketing its policies via the U.S. mail."); *see also Carparts*, 37 F.3d at 19.

> [O]ne can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.

Id.

224. *See, e.g.*, *Carparts*, 37 F.3d at 19-20 (applying ADA to insurance policies); Bick, *supra* note 2, at 212-15; Stowe, *supra* note 16, at 323-25; Petruzzelli, *supra* note 2, at 1082-83.

225. *See, e.g.*, *Carparts*, 37 F.3d at 20 ("Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry.").

226. *See, e.g.*, *id.* at 19; *Lewis*, 982 F. Supp. at 1165.

227. *See, e.g.*, *Carparts*, 37 F.3d at 19; *Lewis*, 982 F. Supp. at 1165; Conners v. Maine Med. Ctr., 42 F. Supp. 2d 34, 45-46 (D. Me. 1999).

> purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.[228]

Courts, judges, and commentators extend the First Circuit's conclusion to assert that these distinctions argue in favor of applying the ADA to the Internet.[229] Most famously, in *Doe v. Mutual of Omaha Insurance Co.*,[230] Chief Judge Richard Posner of the Seventh Circuit Court of Appeals stated in dicta that the core meaning of the ADA's definition of discrimination is that the owner or operator of a facility, "whether in physical space or in electronic space"[231] that is open to the public, cannot exclude disabled persons from entering the facility and using it in the same manner as do nondisabled persons.[232] In *Morgan v. Joint Administrative Board*,[233] Judge Posner, again in dicta, expanded upon this language and stated that "[a]n insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store."[234]

Second, the purpose of the ADA is to "invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[235] The ADA was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[236] With regard to Title III specifically, its purpose is "to bring individuals with disabilities into the economic and social mainstream of American

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228. *Carparts*, 37 F.3d at 19. *Carparts* involved the question of whether a health insurance plan was a place of public accommodation in that it was prohibited by the ADA from discrimination with regard to the types of insurance policies it offered its members. *See id.* at 14-15.

229. *See, e.g.*, *Doe* 179 F.3d at 559; *Parker*, 121 F.3d at 1020 (en banc) (Martin, C.J., dissenting) (noting that commerce is being conducted through, among other things, the Internet, and under the majority's view, "the same technological advances that have offered disabled individuals unprecedented freedom may now operate to deprive them of rights that Title III would otherwise guarantee"); Petruzzelli, *supra* note 2, at 1083 (noting that a limitation to physical-only places "would mean that a mail order catalog company, that only accepts business via the phone or mail, would be able to flat out refuse to serve disabled individuals").

230. 179 F.3d 557 (7th Cir. 1999).

231. *Id.* at 559 (citing *Carparts*, 37 F.3d at 19).

232. *Id.*

233. 268 F.3d 456 (7th Cir. 2001).

234. *Id.* at 459. At least in the First and Seventh Circuits, then, courts may be more willing to look to the statute's remedial purpose to find that the ADA is not limited to actual, physical places, and therefore might apply to Internet websites generally.

235. 42 U.S.C. § 12101(b) (2000).

236. *Id.* § 12101(b)(1).

life . . . in a clear, balanced, and reasonable manner."[237] Application of the ADA to the Internet, based upon this broad statement of purpose, may be appealing on a superficial level in part because of the pervasiveness of the Internet in modern life. Intuitively we sense that if the ADA truly was meant to incorporate disabled individuals into the mainstream of America's economic life, then such incorporation is likely unattainable without access to the Internet.[238] Of the statutory examples of "places of public accommodation," most have websites attached directly to entities referenced by the statute.[239] Indeed commercial websites offer information and services similar to the examples listed in these parts of section 12181(7) of the ADA.[240] Along these lines, the NCD advocates "fundamentally redefining what place means,"[241] indicating that the

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237. H.R. REP. NO. 101-485 (II) at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382, *Carparts*, 37 F.3d at 19 (quoting H.R. Rep. No. 101-485(II), at 99; *see also* Maroney, *supra* note 7, at 199 (presenting examples from legislative history that would support a broad reading of the ADA).

238. *Hearings*, *supra* note 2, at 31 (testimony of Steven Lucas) (discussing ways in which the Internet "has become a place of public accommodation" because of the numerous governmental and private functions that have been shifted to the Internet); *Hearings*, *supra* note 2, at 54 (testimony of Judy Brewer) ("The Web is information; it is commerce, education, employment opportunity, and entertainment. It has more resources than the best research library in the world, and more jobs posted than any newspaper.").

239. *See, e.g.*, www.hotels.com (last visited Sept. 1, 2003); www.motel.com (last visited Sept. 1, 2003); www.lodging.com (last visited Sept. 1, 2003); www.restaurant.com (last visited Sept. 1, 2003); www.theater.com (which transfers the user automatically to www.broadway.com (last visited Sept. 1, 2003)); www.entertainment.com (last visited Sept. 1, 2003); www.conventioncenter.com (last visited Sept. 1, 2003); www.bakery.com (last visited Sept. 1, 2003); www.grocery.com (last visited Sept. 1, 2003); www.laundromat.com (last visited Sept. 1, 2003); www.bank.com (last visited Sept. 1, 2003); www.barbershop.com (last visited Sept. 1, 2003); www.shoerepair.com (last visited Sept. 1, 2003); www.museum .com (last visited Sept. 1, 2003); www.schools.com (last visited Sept. 1, 2003); www.daycare .com (last visited Sept. 1, 2003); www.bowling.com (last visited Sept. 1, 2003); *see also* Carrie L. Kiedrowski, *The Applicability of the ADA to Private Internet Web Sites*, 49 CLEV. ST. L. REV. 719, 735-36 (2001) (noting that all but three of the examples listed in Title III are already available on the Internet today).

240. *See* Maroney, *supra* note 7, at 194 (noting the existence of online pharmacies, clothing stores, and music sites); *see also* Position Paper, *supra* note 15, at 13. The NCD noted:

> The Web sites people will use for shopping, for research, or for entertainment readily come within the scope of the kinds of entities that are deemed public accommodations. They provide goods and services to the public like stores, online versions of games and entertainments that people might otherwise witness or participate in-person; information of the sort in a less hectic, more personal way might have obtained across the desk from one's doctor; and access to the resources of the world's greatest libraries or the library down the street.

Position Paper, *supra* note 15, at 13.

241. *Id.* at 25.

Internet should be considered a place because of the abundance of "goods, services, informational resources, recreation, communication, social and interactivities of all kind"[242] available on the Internet.[243]

Thus, the NCD argues that the computer age and cyberspace have "altered our notion of place"[244] and this new concept of place, when examined in light of the ADA's purpose, should not countenance a distinction among websites based upon their connection to a physical place of public accommodation.[245] By focusing on broader language in the ADA regarding its purpose and on the current pervasiveness of the Internet, critics assert that the nexus approach's distinction is unjust, and the ADA ought to apply broadly to all websites.

There are several responses to this criticism. First, the decision regarding which entities are covered by the ADA is a politically sensitive decision in which the costs and benefits of applying the statute to a particular entity must be carefully weighed. There may be great economic benefits to both disabled individuals and society at large in making the Internet accessible to individuals with disabilities.[246] Courts, however, are not equipped to balance the needs of the Internet industry generally with the requirements of disabled individuals.[247] Congress, not the judiciary, is the governmental branch best able to resolve whether, and how, disabled individuals should have a statutory right to access to the Internet because Congress is comprised of elected officials who can weigh, on a national scale, the costs and benefits of

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242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *See, e.g.*, Kiedrowski, *supra* note 239, at 740-41 (citing examples of benefits to society of an accessible Internet, including access to text data for mobile phone users); Petruzzelli, *supra* note 2, at 1092-93 (noting that accessibility would permit nondisabled users to have better access to the Internet, including low technology, illiterate, and older users).
247. *See Access Now*, 227 F. Supp. at 1321 n.13; *Hearings*, *supra* note 2, at 27 (testimony of Steven Lucas) ("There is a risk in applying the ADA to the Internet before industry has been given an opportunity to address the issues of accessibility in a commercial and a competitive environment."). The court in *Access Now* found that the ADA's comprehensive definition of public accommodation meant that "Congress has created specifically enumerated rights and expressed the intent of setting forth 'clear, strong, consistent, enforceable standards,'" meaning that courts must "follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights." 227 F. Supp. 2d at 1318. The court concluded that to fall within the scope of the ADA, a public accommodation must be "a physical, concrete structure. To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards." *Id.*

burdening businesses with additional regulation.[248] Therefore, it may be most appropriate for courts to refrain from acting unless Congress has passed clear legislation applying to the Internet.

Indeed, Congress has the ability to regulate the interaction of technology with individuals with disabilities when it deems such regulation appropriate.[249] For example, when Congress enacted the ADA, it provided for detailed regulation of telephones and the television system with regard to accessibility for disabled individuals.[250] Title IV of the ADA mandates that all telephone systems offer, as a standard service, Telecommunication Devices for the Deaf services ("TDD services"), thus permitting a deaf person to utilize the telephone.[251] The statutory and regulatory provisions for this section are lengthy and detailed,[252] indicating that if Congress intended for the ADA to apply to sophisticated technology such as the Internet or the telephone system, it had the ability to provide a comprehensive scheme to do so.[253] In the same year that Congress enacted the ADA, it also enacted the

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248. *See id.* at 1321 n.13. The court in *Access Now* noted that:

> [I]n 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.

Id.; *see also Hearings*, *supra* note 2, at 26-27, 45-46 (testimony of Steven Lucas) (asserting that premature application of the ADA to the Internet could slow development of technology that makes the Internet more accessible to the disabled because such an application now "could result in companies doing just what is necessary to comply with the law instead of furthering the advancement of technology" and arguing that the cost of potential litigation could discourage some Web sites from coming online); *Hearings*, *supra* note 2, at 66 (testimony of Susyn Conway) ("New regulations imposed on companies engaged in developing [the Internet] into a more reliable, better defined and manageable resource—able to best serve every segment of our society—will only serve to slow down the achievement of [high-performance] goals.").

249. *See* 47 U.S.C. §§ 225, 611 (2000).

250. *Id.*

251. *See id.* A TDD machine allows a deaf person to converse on the phone using a relay device that permits a deaf person to send and receive a text message over telephone lines. *See Rendon*, 294 F.3d at 1281 n.1. This function utilizes either a machine or a live operator to facilitate the conversation. *See id.*

252. 47 U.S.C. § 225(a)(2); 47 C.F.R. Part 64, Subpart F (2002).

253. *See* Konkright, *supra* note 7, at 75 (stating, "If the legislature determined that telecommunications were of such a nature as to be regulated separately from places of public accommodation, then the legislature would likely regard the Internet also to be of a nature requiring narrowly tailored regulation of its access providers.").

Television Decoder Circuitry Act,[254] which requires that television manufacturers install equipment enabling televisions to display closed-captioning signals to benefit hearing-impaired individuals.[255] Both of these examples are informative because they demonstrate that when Congress desires to speak directly to a technological issue, particularly regarding technology and the disabled, it does so with specific mandates.[256] Put another way, we would expect that a decision as monumental as applying the ADA generally to such far-reaching technology as the Internet would be made explicitly by Congress in such a manner that demonstrates a nuanced approach to the problem, as it did with telephones and televisions.[257]

Furthermore, Congress already may have implicitly determined that the ADA should not broadly apply to the Internet. Eight years after passage of the ADA, Congress considered the impact of the Internet on a law closely related to the ADA—the Rehabilitation Act[258]—which prohibits discrimination on the basis of a disability by federal contractors. In 1998, Congress amended section 508 of the Rehabilitation Act specifically to require that electronic and information technology of federal agencies be accessible to disabled individuals.[259] Section 508(a)(2)(A) requires the Architectural and Transportation Barriers Compliance Board to provide standards and performance guidelines for

254. Pub. L. No. 101-431, 104 Stat. 960 (1990).

255. *Id.*

256. The words of one legislator speaking to the Television Decoder Circuitry Act could apply just as well to the Internet today: "Undeniably, television is our most important source of news, information, and entertainment programming. And as technological breakthroughs involving fiber optics, high definition and digital television, and direct broadcast satellites occur, the role television plays in our homes, businesses, and communities will become even more pronounced." 136 Cong. Rec. H8541 (1990) (daily ed. Oct. 1, 1990) (statement of Rep. Markey). Interestingly, at least one commentator has used these technology-oriented statutes to assert that the ADA *should* apply to the Internet because such application would be "consistent with the attitudes of Congress towards the critical relationship between handicapped people and access to telecommunications media." Adam M. Schloss, *Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?*, 35 COLUMBIA J. L. & SOC. PROBS. 35, 47-48 (2001). The exact opposite conclusion from this evidence, however, is more persuasive: Congress is able to, and should be allowed to, impose direct regulations upon emerging technology with specific statutory provisions applying to the technology. *See* Konkright, *supra* note 7, at 725. An old statute should not be applied to new technology based upon implication and inference.

257. *See* Konkright, *supra* note 7, at 725 ("[T]he Internet is unfit for the general treatment of Title III.").

258. 29 U.S.C. §§ 701-96 (2000).

259. *Id.* § 794(d).

this technology.[260] Some commentators assert that this congressional action and the section 508 guidelines are persuasive evidence that the ADA should apply to private websites because it demonstrated "a sign that Federal agencies are serious about the accessibility of the Internet for the disabled."[261] A stronger interpretation of section 508, however, is that Congress did not intend for the ADA to require accessibility for all private Internet websites because Congress could have amended the ADA to so indicate at the same time it passed the Section 508 guidelines. Congress's decision *not* to amend the ADA explicitly to include Internet websites as places of public accommodation is evidence that Congress does not intend for the ADA to apply so broadly to the private sector.[262]

A second justification for the distinction criticized by the NCD is the need for clarity in application. A physical-only application provides a bright-line rule that not only informs companies whether they should be compliant but also provides jurisdictional certainty.[263] Broadly applying the ADA to the Internet is not feasible when a website is based in a foreign country but is accessible from the United States. For example it is unclear whether a foreign website is bound by United States laws if users can access the website from servers in the United States. Although the jurisdictional aspect of the Internet is too extensive a topic to be addressed here, this broad proposition seems unworkable and, quite frankly, unenforceable.[264] Applying the ADA

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260. *Id.*

261. Ranen, *supra* note 2, at 401-02; *see also* Bick, *supra* note 2, at 209-10, 222-24 (asserting that the Access Board's rules will set a standard for ADA compliance in electronic technology and "will result in the perception that if a standard is good for government it should also be applicable to the private sector"); Kiedrowski, *supra* note 239, at 723, 727-28.

262. *See* Maroney, *supra* note 7, at 200 (noting that with the passage of the Rehabilitation Act, "the issue of online accessibility was clearly addressed in the federal government context without similar efforts being made to remedy the problems of disability access in online commercial contexts.").

263. *But see* Position Paper, *supra* note 15, at 25 (arguing that the nexus requirement will cause "havoc"). The NCD attempts to argue that no bright line will develop and presents the example of two online grocer companies, one with local pickup points and one which only delivers. *Id.* The former will be subject to the ADA while the latter will not. *Id.* Rather than indict the nexus requirement, however, this example merely highlights that some companies are covered and some are not, which the statute itself already recognizes. Otherwise the ADA simply could have used broad terminology, such as requiring compliance by "any entity engaged in interstate commerce."

264. *See Hearings*, *supra* note 2, at 100-01 (testimony of Elizabeth K. Dorminey) (arguing that regulating U.S. based websites through the ADA might force site owners out of the country, "beyond the reach of these regulations, making the U.S. less competitive in this dynamic sector of the economy").

only to those websites related to entities that are physically located in the United States avoids this problem and clarifies which entities must comply with the ADA's requirements.

Third, it is not inconsistent to apply a statute applying only to businesses operating in a certain manner. Distinctions among businesses are made constantly in statutory regulation,[265] and in the ADA specifically.[266] For example Title I of the ADA (related to employment practices) applies only to businesses with fifteen or more employees;[267] although an arbitrary line, to be sure, it is one resulting in different burdens being placed on companies with fourteen as opposed to fifteen employees simply because of difference of one employee.[268] Furthermore, by limiting Title III only to places of public accommodation, Congress intentionally chose not to require general accessibility to places that are not open to the public.[269] Similarly it is doubtful that the ADA applies to companies that solely sell goods through catalogs and that do not have facilities open to the public, a distinction that already distinguishes between types of companies who sell similar products but differ in the manner in which they deal with the public.[270] Accordingly the entire Internet does not need to be a place of public accommodation for certain parts of the Internet to still be accessible to individuals with disabilities. Making a website ADA-compliant is simply another cost of doing business for companies that choose to operate physical locations open to the public.

Finally, but not insignificantly, the differing burdens placed on similar businesses, one that has a physical location and one that does not, may force Congress to address this issue definitively. Until that time comes,

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265. *See* Dominion Hotel Inc. v. Arizona, 249 U.S. 265, 269 (1919) ("[T]he inevitable result of drawing a line" is "distinctions [that] are distinctions of degree; and the constant business of the law is to draw such lines.").

266. 42 U.S.C. § 12111(5) (2000).

267. *Id.*

268. *See* Clackamus Gastroenterology Assocs. v. Wells, 538 U.S. 440 (2003) ("[T]he Congressional decision to limit the coverage of the legislation to firms with 15 or more employees has its own justification that must be respected—namely easing entry into the market and preserving the competition position of smaller firms.").

269. *See* Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1241 (11th Cir. 2000) (holding that the ADA only applied to the parts of cruise ships that fall within the statutory enumeration of public accommodations but not the parts that are not public accommodations, such as the crew's quarters or the engine room).

270. *Compare Hearings*, *supra* note 2, at 97 (testimony of Elizabeth K. Dominy) ("No one has successfully argued that catalogs or magazines are 'public accommodations' and should be made available in Braille or audio recordings . . . .") *with Hearings*, *supra* note 2, at 142-43 (testimony of Professor Peter David Blanck) (asserting that catalogs should be regulated by the ADA).

however, the ADA should apply to a great number of websites, which may result in a competitive advantage from a new flock of customers who can access their goods.[271] Indeed the economic benefits of ADA compliance for websites may become so clear that a market resolution is brought to this matter before Congress acts.[272] At the same time, this more limited application would avoid problems of overbreadth that would occur under the all inclusive solution of those advocating that the ADA apply broadly to the entire Internet. In other words, the nexus approach has the practical advantage of providing a test run at applying the ADA to the Internet without the downside of a judicially-imposed sweeping mandate regulating a new technology.

In summary, the nexus approach has practical policy advantages because it reflects Congress's unwillingness to amend the ADA to apply specifically to the Internet generally, and it provides Congress with the opportunity to carefully weigh the costs and benefits of such a sweeping statute.

IV. IF THE ADA DOES APPLY TO WEBSITES OF PLACES OF PUBLIC ACCOMMODATION, THEN WHAT DOES THE ADA REQUIRE?

The ADA is different than other antidiscrimination statutes because it requires a balance between the costs and benefits of making a public accommodation accessible.[273] Therefore even if the ADA applies to the website of a physical place of public accommodation, the question remains open regarding the type of alterations or modifications, if any, that would be required of a website in order to comply with the nondiscrimination provisions of the ADA. This Part attempts to address this final issue.

A place of public accommodation that does not make its website accessible to individuals with disabilities may be engaging in one or more of the three types of discrimination defined by the statute: (1) excluding individuals from the full and equal enjoyment of its services (the "exclusion" provision); (2) failing to make reasonable modifications

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271. Schloss, *supra* note 256, at 56-57 (proposing federal subsidies to make websites compliant because, in part, such subsidies would stimulate private market competition for the patronage of disabled online customers, forcing competitors to also become compliant).

272. *See Hearings*, *supra* note 2, at 20-21 (testimony of Gary Wunder); *Id.* at 27, 35 (testimony of Steven Lucas); *Id.* at 109-10 (testimony of Peter David Blanck).

273. *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (2000) (requiring "reasonable modifications in policies, practices, or procedures"); 42 U.S.C. § 12182(b)(2)(A)(iii) (requiring that a public accommodation "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").

in policies, practices or procedures, when such modifications are necessary to afford these goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities (the "reasonable modifications" provision); and (3) failing to provide auxiliary aids and services to ensure that no disabled individual is excluded, denied services, or treated differently (the "auxiliary aids and services" provision).[274] Each of these discrimination provisions has specific requirements and limitations. For example, under the reasonable modifications provision, a policy or practice must be modified unless the modification would "fundamentally alter the nature of [the] goods, services, facilities, privileges, advantages, or accommodations."[275] Similarly an auxiliary aid or service must be provided so long as the goods, services, facilities, privileges, advantages, or accommodations are not fundamentally altered or the provision does not result in an undue burden,[276] which is defined as a "significant difficulty or expense."[277] The ADA regulations further mandate that auxiliary aids and services include "[q]ualified interpreters . . . assistive listening devices [and] systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons . . . videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments."[278] The regulations also state that aids and services are "[q]ualified readers, taped texts, audio recordings, [b]raille materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments."[279] These aids and services must provide equivalent informa-

274. 42 U.S.C. § 12182(b)(2)(A)(i), (ii), & (iii). Indeed these are three of the four types of discrimination alleged by the National Federation for the Blind ("NFB") in its lawsuit against AOL, in which the NFB claimed that AOL's inaccessibility to the blind was in violation of the ADA. *See* Ranen, *supra* note 2, at 414-15. The fourth type, alleging a failure to remove communication barriers is likely not applicable because the statute requires such barriers to be structural. *See* 42 U.S.C. § 12182(b)(2)(A)(iv). Although under the nexus approach, as articulated by this Article, it is doubtful that AOL is required to comply with the ADA because it is not a physical place of public accommodation, AOL ultimately settled this litigation and agreed to make its Internet services accessible to disabled individuals. *See* Ranen, *supra* note 2, at 412.

275. 42 U.S.C. § 12182(b)(2)(A)(ii).

276. *Id.* § 12182(b)(2)(A)(iii).

277. 28 C.F.R. § 36.104 (2003). The Department of Justice considers several factors in determining whether an accommodation creates an undue burden on a place of public accommodation, including the "nature and cost of the action needed" and "the overall financial resources of the site." 28 C.F.R. § 36.104.

278. 28 C.F.R. § 36.303(b)(1) (2003).

279. *Id.* § 36.303(b)(2).

tion to a disabled individual as is provided to a nondisabled individual. These requirements of, and limitations to, a public accommodation's duties under the ADA will play a significant role in determining the ADA's effect on websites as places of public accommodation. Exactly how each of these standards would apply to an Internet website is open to considerable debate.

The ADA's applicability to websites of places of public accommodation may require extensive renovations of current websites in order to adequately communicate information to individuals with disabilities. A court in the Northern District of Georgia recently found that a public transportation authority likely did not meet its obligations under Title II of the ADA because it did not adequately provide information regarding maps and route schedules in accessible formats, including on its website.[280] Accessibility requirements could include making the website able to be read by screen access software that translates text information on a website into either synthesized speech or braille.[281] To make a website accessible by the screen access software, the design of the website should include text descriptions of the site's pictures and graphics in order for those aspects of the site to be understood and translated by the screen access software.[282] Moreover, according to some advocates for the disabled, hyperlinks should contain meaningful labels describing the content of the link, and web-based forms should be

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280. Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, 1377 (N.D. Ga. 2002). Title II of the ADA has more explicit regulations regarding technology than does Title III. *See id.* (quoting 49 C.F.R. § 37.167 (2002)) (requiring public entities to make "adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service"). Despite applying Title II rather than Title III standards, *Martin* does provide some insight into what, if any, communication formats might be available for a place of public accommodation to utilize instead of altering its website. *See id.* (discussing a 24-hour phone line and providing route information in braille).

281. *See, e.g.*, Ranen, *supra* note 2, at 415; Bick, *supra* note 2, at 216; Petruzzelli, *supra* note 2, at 1065-66. As explained by one commentator, the screen access software converts text from the website into braille or voice so a blind reader can receive the information. Ranen, *supra* note 2, at 415. Instead of using a mouse, visually disabled and individuals with muscular impairments may use the tab key to move around an accessible screen. *See id.*; *see also* Petruzzelli, *supra* note 2, at 1065-66.

282. *Hearings*, *supra* note 2, at 18-19 (testimony of Gary Wunder) (describing technology available for blind users to access the Internet); Ranen, *supra* note 2, at 415-16; Bick, *supra* note 2, at 217; McKee & Fleischaker, *supra* note 169, at 36; Petruzzelli, *supra* note 2, at 1090-91. Ranen notes that as much text as possible in the website should be in the "ASCII" text in order to make it easier for the software to read. Ranen, *supra* note 2, at 416. McKee and Fleischaker also assert that websites should be made navigable without the use of a mouse. McKee & Fleischaker, *supra* note 169, at 36.

simplified.[283] Additionally, websites should be accessible to more than the blind: Hearing disabled individuals cannot hear audio clips on websites, and individuals with learning disabilities may not be able to navigate websites with a complicated layout and design.[284]

Some commentators suggest that the regulations promulgated by the Access Board under section 508 of the Rehabilitation Act, which applies only to federal agencies, should be the standards utilized when applying the ADA to private entities.[285] These standards would "require simultaneous text to accompany all audio, video to be captioned, and color-keyed information to be restricted, among other things."[286] Other standardized accessibility requirements have been issued by the Web Accessibility Initiative ("WAI") International Program Office at the World Wide Web Consortium ("W3C"), which some commentators assert could be used by courts to provide standards for websites under the ADA.[287] Rather than provide any hard and fast financial estimates of the costs of either converting a noncompliant website or creating a new compliant website, many advocates for these changes simply state conclusively that these modifications are "a simple task"[288] that should not cause an undue burden.[289]

Of course opponents of applying the ADA to websites claim that the cost and effort of making a current website compliant would be extreme and debilitating to businesses that are growing increasingly more dependent upon the Internet.[290] For example, one group has estimated

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283. *See* Ranen, *supra* note 2, at 416.

284. *Hearings*, *supra* note 2, at 31-32 (testimony of Steven Lucas); Petruzzelli, *supra* note 2 at 1066, 1091.

285. *See* Bick, *supra* note 2, at 222-25.

286. *Id.* at 226. Bick also asserts that the ADA might also require labels for all icons that "pop up" and "have text labels for graphics that would help the visually impaired; offer captions for audio material that would help the hearing impaired; and enable Internet users to disable blinking or moving elements that would help the cognitive impaired." *Id.* at 226-27.

287. *Hearings*, *supra* note 2, at 20 (testimony of Gary Wunder); *Hearings, supra* note 2, at 55-56, 84-85 (testimony of Judy Brewer). Of course, nothing in the statute or the regulations authorizes such reliance on this purely private standard.

288. Ranen, *supra* note 2, at 415.

289. *See* Ranen, *supra* note 2, at 415; McKee & Fleischaker, *supra* note 169, at 36 (noting that various groups offer a free analysis of a website's accessibility); *Hearings*, *supra* note 2, at 52, 59 (testimony of Judy Brewer) ("Web accessibility solutions are generally inexpensive and easy to implement."); *but see* Petruzzelli, *supra* note 2, at 1091 (noting that the cost of conversion is "not trivial," but that the "statute does allow for a sliding scale approach so that accessibility can be prioritized depending upon the financial status of the website").

290. Many of these opponents seem to assert that the purported costs of making a website accessible provide a basis for the position that the ADA should not apply to any

"that modifying an existing website to make it accessible would cost on average approximately $160,000."[291] Others have predicted that "[h]undreds of millions of existing pages would be torn down,"[292] and the cost of publishing websites will increase because amateur publishers will not have the expertise to make a site compliant.[293] Revenue-generating graphics and advertisements may have to be discarded to provide space for accessible formatting.[294] The cost of accessibility on the Internet would also be a recurring cost because web pages are often built and modified every day as "[g]raphics and icons are constantly added and pages redesigned to remain competitive and up to date."[295] As one commentator noted, "While particular cost figures may be difficult to calculate, the reduction in the number of websites and the restriction on Internet growth as a whole could have a significant impact on the industry, and consequently, the overall economy."[296]

If not first addressed by Congress, resolution of this debate will most likely be done by a district court based upon the particular factual record before it; thus, it is difficult to determine what types of accessibility requirements might be considered reasonable. A defendant might utilize the undue burden and "readily achievable" defenses to assert that the

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Internet website. *Hearings*, *supra* note 2, at 116-17 (testimony of Walter Olson). That analysis, however, seems backwards because by definition, an Internet website would not be required to be accessible if the cost created an undue burden or was not readily achievable. Therefore the ADA theoretically would apply only to websites for which the cost of accessibility was not excessive. A valid point regarding the cost and applicability of the website, however, is that any court decision applying the ADA to a website would likely lead to further litigation and subsequent high litigation costs for any company defending whether its Internet site needed to be compliant. *See* Christopher G. McDonald, *Access to the Internet: Should the Americans With Disabilities Act ("ADA") Apply to Private Web Sites?*, LAW & THE INTERNET (Fall 2002), at 8, *available at* http://gsulaw.gsu.edu/law and/papers/fa02/mcdonald/) (noting high litigation costs and citing *Hearings*, *supra* note 2, at 116-17 (testimony of Walter Olson)).

291. *See* Brief of the Equal Employment Advisory Council and the Chamber of Commerce of the United States as *Amici Curiae* Supporting Defendant-Appellee and in Support of Affirmance at 31, *Access Now, Inc.* (No. 02-16163-BB) (citing Susan Kuchinskas, *Building a Barrier-Free Web*, NEW ARCHITECT, Dec. 2002, at 2, *available at* http://www .newarchitectmag.com/documents/s+7733/na1202c/index/html). In the same article cited by the *amicus* parties in their brief, however, the author noted that the cost of making a new website accessible can be almost nothing. *See* Susan Kuchinskas, *Building a Barrier-Free Web*, NEW ARCHITECT, Dec. 2002, at 2, *available at* http://www.newarchitectmag.com/ documents/s+7733/na1202c/index2/html.

292. *Hearings*, *supra* note 2, at 116-17 (testimony of Walter Olson).

293. *Id.*

294. *See* Taylor, *supra* note 9, at 42.

295. Maroney, *supra* note 7, at 203.

296. McDonald, *supra* note 290, at 8.

financial resources of the company simply do not permit an expensive overhaul of its website. Until such issues are resolved by the courts or by Congress, however, public accommodations can take steps short of implementing a full set of changes to comply with the W3C or section 508 requirements.[297] These steps may prove acceptable under the ADA to offer effective communication and to provide goods and services to disabled individuals on a level equivalent to nondisabled individuals.[298]

In a letter from the Department of Justice ("DOJ") to Senator Tom Harkin, for example, the DOJ recognized that "[i]nstead of providing full accessibility through the Internet directly, covered entities may also offer other alternate accessible formats, such as Braille, large print, and/or audio materials, to communicate the information contained in the web pages."[299] As suggested by the DOJ, the availability of such materials should be referenced in the website along with instructions for obtaining the materials.[300] Indeed, a text message on a website could reference a customer to a toll-free telephone helpline.[301] Although this may prove costly because it might require 24-hour staffing,[302] it may not add significant extra cost if such a line is already provided for other purposes. Moreover a company could provide the same information in print catalogs in braille format.[303] Other efforts short of full accessibil-

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297. *See* Kiedrowski, *supra* note 239, at 728-29.

298. *Hearings*, *supra* note 2, at 108 (testimony of Peter Blanck) ("As an alternative to providing full accessibility through the Internet, Title III covered entities may offer their services in other effective accessible formats.").

299. Letter, *supra* note 94, at 1.

300. *Id.*

301. *See* Peter D. Blanck & Leonard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 855, 856 (2000); *Hearings*, *supra* note 2, at 142-43 (testimony of Peter Blanck) (noting that a catalog distributed by a place of public accommodation could comply with the ADA by having "a phone number in the back saying, get somebody to call this number for you if you need help, and we will read it to you over the phone or will send a Braille version").

302. Blanck & Sandler, *supra* note 301, at 856. In *Martin*, the Northern District of Georgia stated that providing information promptly in alternative formats, such as braille and staffing a 24-hour phone line may satisfy the guidelines in the ADA if the procedures are followed correctly. *See* 225 F. Supp. 2d at 1377. The NCD, however, asserts:

> This is largely an academic question, however, since there is no practical way for this to be done. There is no feasible way, at any remotely acceptable cost, that the information provided in an instant, on-demand, 24-7, and the interactive capacity afforded by a transit agency's Web page, could be replicated or equaled via a telephone assistance system, let alone by the mailing out of hard-copy documents.

Position Paper, *supra* note 15, at 11.

303. *See* Blanck & Sandler, *supra* note 301, at 856; *Hearings*, *supra* note 2, at 142-43 (testimony of Peter Blanck). Questions might be raised, however, regarding the timeliness

ity arguably would satisfy the ADA, such as providing parallel web pages that have similar content but without graphics or other features that exclude disabled individuals.[304]

In sum, even if the ADA requires websites of public accommodations to be accessible, it does not necessarily follow that a public accommodation must implement the full regiment of accessibility changes suggested by section 508 or the W3C. The ADA requires that equivalent, but not necessarily equal, communication and access must be provided. If a public accommodation determines that modifying a website poses a significant expense, then it should consider providing identical information and services through alternative means to the Internet.

V. CONCLUSION

The nexus approach provides that an intangible means of providing access to goods or services is subject to the requirements of the ADA if it has some connection to a physical place of public accommodation. Because places of public accommodation use Internet websites to communicate with the public and to sell their goods and services, these websites have the necessary nexus and must comply with the ADA. In addition to being based on the statutory language of the ADA, the nexus requirement has the advantage of reflecting the virtual nature of a website and its ability to be both a point of access and an actual good or service itself. Moreover, the nexus approach avoids many of the practical difficulties posed by more extreme, "all-or-nothing" approaches. It provides some protection for individuals with disabilities, but it does not overwhelm a new technology with uncertain demands. Additionally, it provides a basis for Congress to determine whether to extend the requirements of the ADA more broadly to all Internet websites. In the face of the two extreme positions such as those presented in *Access Now* and by the NCD, the nexus approach provides a more reasonable and principled alternative.

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of such catalogs when compared to the instant accessibility of the Internet. Blanck & Sandler, *supra* note 301, at 856. Also the cost of printing braille catalogs might prove prohibitive compared to updating a website in an accessible format. *Id.*

304. *See* Maroney, *supra* note 7, at 203.