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# The Applicability of the ADA to Private Internet Web Sites

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INTERNET WEB SITES

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#### I. INTRODUCTION

At first, Guido Corona thought he should change.<sup>1</sup> As a programmer at an IBM research lab, each day he followed the same “get ready” and “go to work” routine as everyone else.<sup>2</sup> But things changed when it was time for him to use his computer. Corona was progressively losing his ability to see due to a degenerative disease called retinitis pigmentosa,<sup>3</sup> which can cause a previously sighted person to become blind within a few months. When Corona first started squinting, he temporarily

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<sup>1</sup>Andrew Park, *Disabled Find Many Barriers Online // Most Web Sites Lack Coding that Makes Data Accessible // Accessibility Efforts Often Losing Ground as Internet Evolves*, AUSTIN AMERICAN-STATESMAN, Sept. 3, 2000, at A1.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* See *Yahoo! Health*, available at <http://health.yahoo.com/health/dc/001029/0.html> (Defined as a “progressive degeneration of the *retina* that affects night vision and *peripheral* vision.” Alternately known as “night blindness.” The cause of this disorder is unknown, but it may be an inherited disorder. “The cells controlling night vision, called rods, are primarily affected.... Dark pigmentation may be present on the *retina*. As the disease progresses, *peripheral* vision is lost as well and may lead to *blindness*. Signs and symptoms often first appear in childhood, but visual incapacity does not develop until early adulthood. The risk factor is a family history of retinitis pigmentosa.” It is a rare condition), at \*1.

exchanged his small computer monitor with a nineteen inch television.<sup>4</sup> As his vision worsened and edges blurred on text beyond recognition, Corona placed a cardboard box over his head and the computer monitor to block outside light.<sup>5</sup> After light continued to seep in, he used black paper to keep the light from entering his "makeshift hood."<sup>6</sup> Still not enabling Corona to see effectively, the box was exchanged for a rigged computer that talked to him.<sup>7</sup> Corona was then forced to soundproof his office to avoid bothering his colleagues.<sup>8</sup>

In a time where efficiency equals increased dollars, whether related to accessing learning materials, business quotes, stocks or e-commerce, with the clicking of a mouse, people exit the physical world and enter a lucrative virtual world lying right at their fingertips. Not so for millions of people with disabilities; for them a much different scenario exists. Envision those who have no fingers; no use of their hands to click a mouse? Consider those who have no vision to see the flashy graphics designed to entice a user to buy or use a service? For people with disabilities, who are also fiercely competing in the same workforce, before they can click "go" on their computer everything comes to a screeching halt. "For many of the one out of five people in the United States who are disabled ... the ... Internet can be more akin to crawling."<sup>9</sup> As the law currently stands today, private commercial web sites are not legally required to make their sites accessible to people with disabilities.<sup>10</sup> Without being able to access the Internet superhighway, the disabled fall into the valley of the great "digital divide."<sup>11</sup> Instead of advancing, valuable opportunities for business, employment, and education are forsaken.<sup>12</sup> In a world where presentation and vanity are everything, who should be required to change – the Internet site or the person using it? According to Adam Weinroth, a web developer who won first place in a contest for having an accessible web site, "When the issue of accessibility comes up, that's not the No. 1 priority. The No. 1 priority is to have a nice-looking product."<sup>13</sup>

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<sup>4</sup>See Park, *supra* note 1, at A1.

<sup>5</sup>*Id.* at A2.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>Jonathan Quinn, *Making Sites Accessible To The Whole Wide World*, THE NATIONAL LAW JOURNAL, Nov. 8, 1999, at B14.

<sup>10</sup>See Park, *supra* note 1; See also Jonathan Bick, *Does the ADA Apply?*, THE NATIONAL LAW JOURNAL, May 15, 2000, at B5.

<sup>11</sup>See Cynthia D. Waddell, "Electronic Curbcuts": *The ADA in Cyberspace*, 27 WTR HUM. RTS. 22. (2000); See also Kevin Coughlin, *Disabled Get Left Behind For Some With Impaired Function, Internet is Simply E-Frustration*, THE PLAIN DEALER, Aug. 10, 2000, at 1C (On halftheplanet.com, a site focusing on disability issues, it is estimated that ninety-five percent of web sites are not accessible to ten million visually impaired Americans).

<sup>12</sup>See generally Judy Heim, *Locking Out the Disabled*, PC WORLD, Sept. 1, 2000, at 181.

<sup>13</sup>Park, *supra* note 1, at A2.

Rather than have one employee wear a black cardboard box to benefit only himself, it makes more sense for a private Internet company to make its site accessible to benefit millions. Although several private Internet companies believe that the government should not regulate<sup>14</sup> an area that affects so few people,<sup>15</sup> a recent Harris Poll indicates that "Adults with disabilities spend, on average, twice as much time online as adults without disabilities ... - twenty hours per week compared to ten hours per week."<sup>16</sup> Likewise, there are nearly forty-nine million Americans with disabilities, which translates into one out of every five people who will be affected by a disability in their lifetime.<sup>17</sup> Furthermore, ninety-five percent of web sites today are inaccessible to ten million visually impaired Americans.<sup>18</sup>

Moreover, private Internet companies could be missing out on the buying power of people with disabilities expected to be worth over \$300 billion.<sup>19</sup> For example, for computer users who are blind, shopping online at the Gap equals no sale.<sup>20</sup> Screen reading software on the site will read out loud, "Link: shorts\_men.asp?wdid+300" and "Map: wdid=301."<sup>21</sup> The Gap's web site graphics may look great, but with no alternative text, the spoken form does not make sense.<sup>22</sup>

Compare shopping at Hewlett-Packard's web page.<sup>23</sup> Here the user's screen reading software interprets the graphics into usable words such as, "Investor Information," "HP Store," and "Building Trust in an Internet Economy."<sup>24</sup> While the Gap claims that making its site accessible is not in their strategy,<sup>25</sup> companies like Hewlett-Packard are completing the sale.

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<sup>14</sup>*Applicability of Americans with Disabilities Act on Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. at \*2 (2000) (testimony of Walter Olson).

<sup>15</sup>See Heim, *supra* note 12, at 181. (PC World interviewed several companies about their interest in making their sites accessible and several responded that it either was not something they were interested in, was not a part of their strategy, or companies did not see the market big enough to spend the money).

<sup>16</sup>See Humphrey Taylor, *Harris Interactive Poll: How the Internet is Improving the Lives of Americans with Disabilities* (July 7, 2000), available at [http://www.harrisinteratctive.com/harris\\_poll](http://www.harrisinteratctive.com/harris_poll) (last visited Oct. 14, 2000) (participants surveyed online consisted of 535 adults with disabilities and 614 without disabilities between March 22nd and April 5th).

<sup>17</sup>Presidents Committee on People with Disabilities: Basic Facts, at \*3, available at <http://www.pcepd.gov/pubs/ek97/facts.htm> (last visited Oct. 14, 2000) (according to U.S. Census Bureau's 1992 SIPP).

<sup>18</sup>See Coughlin, *supra* note 11, at 1C.

<sup>19</sup>See Park, *supra* note 1, at A2.

<sup>20</sup>See Heim, *supra* note 12, at 181.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>See Heim, *supra* note 12, at 181.

Whether it is a clothing retailer or computer store, the main question private entities are wrestling with today is whether to apply the definition of a public accommodation under Title III of the Americans with Disabilities Act (hereinafter ADA) to private Internet sites.<sup>26</sup> Despite the lack of case law directly on point,<sup>27</sup> recent federal technology regulations mandating accessible government web sites suggest that the law is moving towards characterizing web sites as places of public accommodation.<sup>28</sup>

This article proposes that private commercial web sites are considered places of public accommodation; consequently, private Internet web sites must be accessible to people with disabilities under the Americans with Disabilities Act. Part I introduces the thesis of this article. Part II sets out the historical inception of the legal rights of accessibility for people with disabilities in public and private entities. Additionally, Part II describes recent federal actions mandating accessibility of government related web sites. Part III addresses the question of whether Internet web sites are considered places of public accommodation under the ADA, including an analysis of supporting and defensive arguments. Part IV addresses the National Federation for the Blind v. America On Line class action lawsuit. Part V evaluates concerns related to the First Amendment. Finally, Part VI states the conclusion of the article summarizing significant points and advocating that private Internet web sites should be legally required to make their sites accessible to people with disabilities.

## II: HISTORICAL BACKGROUND OF ACCESSIBILITY RIGHTS OF THE DISABLED: FROM PHYSICAL PLACES TO THE INTERNET

### A. *No Civil Rights Protection For The Disabled*

It seems almost implausible for the average able-bodied person living in society today to walk into a post office or other public building and not see a ramp at the entrance. Surprisingly, only twenty-seven years ago people who used wheelchairs either had to be carried up the steps or had to rely on someone else to conduct their business because they were denied access to most buildings.<sup>29</sup> Likewise, today it would be inconceivable to see a blind person turned away from entering a restaurant or theatre because of the use of a guide dog. But only a decade ago it was legally permissible for an owner of a private establishment to turn away a blind person using an assistance dog.<sup>30</sup>

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<sup>26</sup>See generally Hearings, *supra* note 14 (testimony of Walter Olson).

<sup>27</sup>*Applicability of the Americans with Disabilities Act to Private Internet Sites: House Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Congress at \*7 (2000) (testimony of Marca Bristo).

<sup>28</sup>See Workforce Investment Act of 1998, § 508 (codified as Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(d) (1994 & Supp. 2000)).

<sup>29</sup>See Rehabilitation Act of 1973, 29 U.S.C. 794 (1994) (prior to passage).

<sup>30</sup>See Americans with Disabilities Act of 1990, 42 U.S.C. § 12182 (1994 & Supp. 2000) (prior to passage).

Before the Rehabilitation Act of 1973,<sup>31</sup> it was lawful to discriminate against a person with a disability in a broad range of community and employment activities. Even in the federal government, job applicants who were otherwise qualified could be refused a job offer because they were blind or deaf.<sup>32</sup> Similarly, prior to passage of the Americans with Disabilities Act of 1990,<sup>33</sup> people who used wheelchairs were refused access to restaurants, theaters, or services due to architectural barriers. Thus, until 1990, the historical examples show that people with disabilities often had to rely on others, were denied employment, and were denied access to recreational services. Federal laws mandating accessibility served as the impetus for wide-sweeping civil rights protection for people with disabilities.

### 1. Beginning of Legal Rights for Accessibility of the Disabled in the Federal Government

While the historical exclusion of people with disabilities from mainstream society remained constant, civil rights movements began to lay a foundation for future opportunities for access. Despite the colossal movement to eliminate discrimination based on race that once divided a nation, people with disabilities were not included when civil rights were originally considered. However, since the passage of recent federal legislation, people with disabilities can no longer be discriminated against in public or private entities, with the exception of religious organizations and private clubs, which are expressly exempted.<sup>34</sup> Specifically, civil rights for people with disabilities first began with Section 504 of the Rehabilitation Act of 1973 (hereinafter Rehab. Act), “[w]hich prohibits discrimination on the basis of a disability in Federal programs and activities.”<sup>35</sup> Furthermore, as such activities relate to technology, a 1986 amendment to Section 508 of the Rehab. Act mandates compliance for all federal agencies purchasing technology to follow accessibility guidelines.<sup>36</sup> Until 1998, it was not clear whether “technology” also applied to the Web; however, this question was answered in the affirmative by a 1998 Amendment to Section 508 which stated that federal web sites must also be accessible.<sup>37</sup> Moreover, the Telecommunications Act of 1996<sup>38</sup> and the Assistive Technology Act

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<sup>31</sup>See 29 U.S.C. § 794(a) (1994).

<sup>32</sup>*Id.* (prior to passage) (Rehabilitation Act of 1973 states that “No otherwise qualified individual with a disability... shall, solely by reason of ... disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity...”).

<sup>33</sup>See 42 U.S.C. § 12182 (1994) (prior to passage).

<sup>34</sup>See 42 U.S.C. § 12182(a) (“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.”).

<sup>35</sup>29 U.S.C. § 701 (1994).

<sup>36</sup>Rehabilitation Act Amendment of 1996 P.L. 106-259, 8/9/00. 29 USC §794d.

<sup>37</sup>29 U.S.C. § 794(d) (1994 & Supp. 2000).

<sup>38</sup>See Telecommunications Act of 1996, 47 U.S.C. § 255 (1994 & Supp. 2000).

of 1998<sup>39</sup> also support access for people with disabilities. With the passage of several important laws, the Federal government set a foundation for the rest of the country to follow.

## 2. Expansion of Accessibility Rights of the Disabled to Public and Private Entities

Although much of recent legislation was limited to the Federal government or entities receiving funds from the Federal government, it was an important goal of the Rehabilitation Act to set an example for the rest of America to follow.<sup>40</sup> In 1990, this model Act soon became mandated by the most wide sweeping disability rights legislation in history – the Americans with Disabilities Act [hereinafter ADA].<sup>41</sup> Enacted in 1990, the ADA prohibits private, county, and local employers from discriminating against qualified individuals with disabilities in employment; bars discrimination in the provision of state and local government services; and bars discrimination in the participation and enjoyment in public accommodations.<sup>42</sup> Under the ADA, there are three categories in the definition of a person with a disability.<sup>43</sup> Specifically, a person must have “[a] physical or mental impairment that substantially limits one or more major life activities... a record of such an impairment... or is regarded as having such an impairment.”<sup>44</sup> According to the American Foundation for the Blind, the ADA “[w]as designed to end a legacy of discrimination, to defeat past practices and attitudes that had grown up long before our society embraced equality for people with disabilities.”<sup>45</sup>

For the first time ever, the ADA significantly closed the loophole of discrimination for public and private commercial entities.<sup>46</sup> Specifically, Title III of the ADA prohibits operators of places of public accommodation from discriminating against a person based on a disability in the “full and equal enjoyment of goods and services.”<sup>47</sup> Thus, for the first time in America, public and *private* entities were legally required to join with the Federal government to provide equal access to people with disabilities.

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<sup>39</sup>See Assistive Technology Act of 1998, 29 U.S.C. § 3001 (1994 & Supp. 2000).

<sup>40</sup>See President’s Memorandum for the Heads of Executive Departments and Agencies, Renewing the Commitment to Ensure that Federal Programs are Free from Disability-Based Discrimination, 36 WEEKLY COMP. PRES. DOC. 1663 (July 26, 2000).

<sup>41</sup>42 U.S.C. § 12182.

<sup>42</sup>*Id.*; See also The U.S. Equal Employment Opportunity Commission, *Facts about the ADA*, available at <http://www.eeoc.gov/facts/fs-ada.html> (last visited Feb. 12, 2001).

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at \*1.

<sup>45</sup>*Applicability of the Americans with Disabilities Act to the Internet: House Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary 106th Cong. at \*2 (2002) available at <http://www.afb.org/grg.2-9adawebstst.html>.*

<sup>46</sup>42 U.S.C. § 12182.

<sup>47</sup>42 U.S.C. § 12182(a).



*B. Federal Government Mandates Access for the Disabled on Government Web Sites*

Just as public and private entities started implementing greater access to physical places of public accommodation, the rapid development of the Internet provided a new frontier for creating equal access. In keeping with the pace of rapidly changing technology, where civil rights legislation for people with disabilities once lagged far behind – it is now about to take the lead with the commencement of new federal legislation mandating Internet access.<sup>48</sup>

With the recent passage of the Work Force Investment Act of 1998 (hereinafter WIA),<sup>49</sup> overcoming barriers for people with disabilities has gone from the steps of a post office to the newest challenge – gaining access to Internet web sites. Specifically, WIA requires federal agencies to make their web sites accessible to federal employees with disabilities and to members of the public who have disabilities.<sup>50</sup> WIA includes the 1998 amendments to Section 508 of the Rehabilitation Act of 1973, which requires that electronic and information technology used, maintained, procured, and developed by the Federal government be accessible to employees of the Federal government and the public.<sup>51</sup> As of August 7, 2000, this also applies to vendors doing business with the Federal government.<sup>52</sup> The

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<sup>48</sup>See 29 U.S.C. § 794.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at § 508 (a)(1)(A)(i)(ii) (“When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, ... shall ensure ... that the electronic and information technology allows, regardless of the type of medium of the technology – individuals with disabilities who are Federal employees to have access to and use of information ... [and] individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of information and data by such members of the public who are not individuals with disabilities.”).

<sup>51</sup>Board Issues Standards for Electronic and Information Technology, (last visited Feb. 12, 2001) <http://www.access-board.gov/news/508-final.htm>. (“Section 508 is a part of the Rehabilitation Act of 1973 which requires that electronic and information technology ... [for] the Federal government be accessible to people with disabilities. Section 508 was originally added in the Rehabilitation Act of 1986; the 1998 amendments significantly expand and strengthen the technology access requirements in Section 508”. Electronic and Information Technology is defined consistent with the Clinger-Cohen Act of 1996. Information technology includes “any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.” Computer hardware, software, peripherals, networks and commonly used office electronic and communication devices are included in the definition.)

<sup>52</sup>See Adam Clayton Powell III, *New U.S. Law Requires Websites to Become ‘handicapped accessible’*, FREEDOM FORUM ONLINE (April 30, 1999), at \*1, available at <http://www.freedomforum.org/technology/1999/4/30handicapaccess.asp> (last visited Oct. 14, 2000).

previous amendments relating to information technology were not binding; however, the 1998 amendments create enforceable standards.<sup>53</sup>

On December 21, 2000, the Architectural and Transportation Barriers Compliance Board issued guidelines mandating that government web sites must be redesigned and fully accessible to people with disabilities by June 21, 2001.<sup>54</sup> Web sites dealing with national security issues such as military command, intelligence, cryptologic activities, and weaponry are exempted from this mandate.<sup>55</sup> Although private entities are not addressed, Section 508 applies to private companies who contract with the Federal government to perform web technology related services.<sup>56</sup> Remedies include the availability of filing complaints as well as private civil actions by individuals against a federal agency.<sup>57</sup> With the new Bush administration, one Internet lawyer commented that President Bush “[m]ay not be in favor of mandating the adoption of accessibility guidelines on a broader basis.”<sup>58</sup> In comparison, another Internet lawyer disagreed and stated, “I predict that the time is fast approaching when businesses will have to include accessibility into their website designs, or face the threat of legal action. The [new] federal guidelines ... reinforce the fact that no one is exempt from fully conforming to the Americans with Disabilities Act.”<sup>59</sup>

As one reporter noted, “Webmasters, Uncle Sam wants you to change your web site to make it more accessible to those who are blind, deaf and otherwise disabled. And for some, it’s not a suggestion. It’s the law.”<sup>60</sup> Furthermore, members of a federal committee charged with the development of accessibility guidelines asserted that the government has the power to regulate online information because it originally paid for development of the Internet.<sup>61</sup> Again, through recent legislation

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<sup>53</sup>See Board, *supra* note 51. (Federal agencies must ensure that the technology procured, developed, maintained or used is accessible to people with disabilities, unless it would pose an undue burden on the federal agency to do so).

<sup>54</sup>Marc Glasstetter, *Fed Opens Web to Disabled*, ENABLEYOURSITE.COM NEWSLETTER, Jan. 15, 2001, at \*1, available at <http://www.enableyoursite.com>.

<sup>55</sup>*Id.* (This exemption does not apply to administrative systems and routine business used for other defense-related purposes or by defense personnel or defense agencies).

<sup>56</sup>See Board, *supra* note 51, at \*4. (Although not covered by the new regulations, chief executive officers of several leading companies pledged to develop a corporate-wide policy on accessibility. These companies include: eBay, Compaq, AT&T, AOL, Adobe, 3Com, Microsoft, NCR, PeoplePC, Qualcomm, Red Hat, Sun Microsystems, Global Crossing, Hewlett-Packard and Handspring); see also Chuck Moozakis, *New Disability Access Regulations Prompt [Internet Service Providers] to Make Changes on Their Own*, Tele.com, Jan. 22, 2001, at 41. (Even though the new regulations are only for federal agencies, Internet Service Providers such as AT&T WorldNet Service are taking action to make their sites accessible to people with disabilities. Some are doing this for the public good, others are doing this to avoid being sued as well as to get more subscribers).

<sup>57</sup>*Id.*

<sup>58</sup>See Glasstetter, *supra* note 54, at \*2 (quoting Harold Shapiro).

<sup>59</sup>*Id.* (quoting Randall Adams).

<sup>60</sup>See Powell, *supra* note 52, at \*1.

<sup>61</sup>*Id.*

the government has made it clear that accessibility for people with disabilities will move beyond a mere physical place to a non-physical place – an Internet web site.

*C. Expansion of Access Rights for the Disabled is Next for Private Web Sites*

1. Department of Justice States that the ADA Applies to the Internet

Beyond the clear statutory text that Federal government web sites must become accessible, there are three strong indicators that accessibility extends to private Internet sites.<sup>62</sup> First, in a 1996 memorandum to the Senate, the Department of Justice (hereinafter DOJ) concluded that the ADA applies to companies and government agencies providing services and products over the Internet.<sup>63</sup> In other words, providing services in the virtual world of cyberspace is not beyond the reach of ADA enforcement. Specifically, Assistant Attorney General Deval Patrick stated:

Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media, such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods or services must be prepared to offer those communications through accessible means as well.<sup>64</sup>

Under the DOJ opinion, only companies with fifteen or more employees are considered "covered entities."<sup>65</sup>

Moreover, according to the memo, the Internet and e-commerce services offered on web sites are considered places of public accommodation, and individuals with disabilities should have the same legal right to access as they would in commercial public places.<sup>66</sup> The rationale of the DOJ applies to entities under Title III (public accommodation section) of the ADA.<sup>67</sup> In review of the letter, the American Foundation for the Blind noted that the DOJ's opinion reflects the flexibility of the ADA.<sup>68</sup> Specifically, web sites which are not accessible to people with disabilities

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<sup>62</sup>See Bick, *supra* note 10, at B5.

<sup>63</sup>Ritchenya Shepherd, *Net Rights for the Disabled?* THE NATIONAL LAW JOURNAL, Nov. 22, 1999, at B08.

<sup>64</sup>See Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division to Tom Harkin, United States Senator (Sept. 9, 1996) (on file with author).

<sup>65</sup>See Quinn, *supra* note 9, at \*2.

<sup>66</sup>See Bick, *supra*, note 10, at B5; See also Taylor, *supra* note 16.

<sup>67</sup>See Waddell, *Electronic supra* note 11, at 22.

<sup>68</sup>See *Applicability of the Americans*, *supra* note 45, at \*4. ("The ADA's flexibility and business-sensitive protections are the ADA's genius. Regarding the ADA as applicable to web sites does not amount to an absolute right to thorough web site modification. Indeed, the ADA is merely interested in guaranteeing effective communication, meaning that public accommodations operating inaccessible web sites are permitted by the ADA to devise alternative methods that ensure equal access to the information made available on the site... [t]herefore, although the ADA is clearly applicable to places of public accommodation operated electronically, the ADA places no unique requirements on such entities or the web sites they operate that the ADA does not now ask of public accommodations generally.").

may not be in violation of the ADA if they offer alternative means to conduct the same transactions.<sup>69</sup> For example, in the letter Patrick states 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....”<sup>70</sup> The bottom line is that access, regardless of format, must be available to people with disabilities.

After enactment of WIA, in a memo to the heads of all federal agencies, Attorney General Janet Reno explained that accessible data, such as web pages, are included.<sup>71</sup> Furthermore, President Clinton directed agencies to “[m]ake all programs offered on their Internet and Intranet sites accessible to people with disabilities by July 27, 2001.”<sup>72</sup> Thus, the DOJ and the President of the United States unequivocally believe that the ADA should apply to Internet web sites.

## 2. Federal Communications Commission States that the ADA Should Apply to the Internet

In addition to the directives set forth by new federal statutes and the DOJ, the second indicator that private entities are included is from the chairman of the Federal Communications Commission (hereinafter FCC), William Kennard, who believes that the virtual world excludes too many people with disabilities.<sup>73</sup> Kennard stressed that the Internet has become an integral place of communication and business with forty percent of American homes having Internet access and with the online economy about to reach trillions of dollars by the year 2005.<sup>74</sup>

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<sup>69</sup>*Id.* (As noted by the American Foundation for the Blind, the legislative history of the ADA provides some helpful analogies. In House Report 101-485, Part 2, Committee on Education and Labor, May 5, 1990, the report states, “[A] bookstore need not braille its price tags, stock brailled books, or lower all its shelves so that a person who uses a wheelchair can reach all the books. Rather, a salesperson can tell the blind person how much an item costs, make a special order of brailled books, and reach the books that are out of the reach of the person who uses a wheelchair”).

<sup>70</sup>*Id.*

<sup>71</sup>Memorandum from Attorney General Janet Reno for the Heads of All Federal Agencies, on Electronic and Information Technology, (April 2, 1999) (on file with author) (“Computer technology can now be found in almost all workplaces and is an integral part of much of the equipment that surrounds us. Adaptive technology, such as computer screen-reading software and braille display units, enable people with disabilities to use this modern technology. Whenever our agencies buy new computer programs or electronic equipment for our workplaces, we run the risk that these new purchases will not work with adaptive technology.”).

<sup>72</sup>See President’s Memorandum for The Heads of Executive Departments and Agencies Renewing The Commitment to Ensure That Federal Programs are Free from Disability-Based Discrimination, 36 WEEKLY COMP. PRES. DOC. 1663 (July 26, 2000).

<sup>73</sup>Jenn Abelson, *AOL Opens Internet to the Blind/In Response to Movement to Make the Web Accessible to the Disabled*, NEWSDAY, July 31, 2000, at A16.

<sup>74</sup>See Board, *supra* note 51, at \*2.

Despite the lack of authority the FCC has over the Internet directly, the FCC may be able to impact companies through their connections to the Internet.<sup>75</sup> Specifically, the FCC may adopt new regulations to mandate accessibility for companies who connect people to the Internet through wire, cable, and fiber optic lines.<sup>76</sup> According to Kennard, "No one wants to regulate the Internet, but with freedom comes responsibility. The industry must meet its responsibility in the digital age."<sup>77</sup> If statutory guidance of the DOJ, and the FCC's position are not enough, the Federal government will entice people through multi-million dollar grant initiatives which support the creation of access to the Internet for people with disabilities.<sup>78</sup>

3. The First Class Action Lawsuit Against a Private Internet Site:  
*National Federation of the Blind v. America On Line*

The third indicator that web site accessibility applies to private sites is the National Federation of the Blind's (hereinafter NFB) lawsuit against America On Line (hereinafter AOL).<sup>79</sup> The NFB's complaint stated that the Internet is a place of public accommodation, and therefore, AOL must make its site and services accessible to people with disabilities.<sup>80</sup> On the tenth anniversary of the Americans with Disabilities Act, the NFB lawsuit was settled out of court on the condition that AOL had one year to make its site accessible or the complaint could be renewed.<sup>81</sup> For the first time, the lawsuit put "[s]quarely before a federal court the question of whether an Internet-based service is a public accommodation and therefore, ... required to provide access to people with disabilities."<sup>82</sup> Thus, with the force of new federal legislation, the DOJ and the FCC support, and the class action lawsuit, it appears that it will only be a matter of time until the web site accessibility mandate fully extends to private commercial web sites.

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<sup>75</sup>See Abelson, *supra* note 73, at A16.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>Remarks by President on Digital Opportunities for Americans with Disabilities, M2 PRESSWIRE. Sept. 22, 2000. (The Department of Education will provide grants totaling \$4 million to the Web Accessibility Initiative and the National Center for Accessible Media); See also Fact Sheet: Public and Private Entities to Create Digital Opportunity for People with Disabilities, M2 PRESSWIRE. Sept. 21, 2000. (National Institute on Disability and Rehabilitation Research will invest \$2.5 million to expand partnerships with industry to make the world wide web accessible for people with disabilities).

<sup>79</sup>Deborah Kendrick, *Alive and Well; ISP Improving Access; AOL Lawsuit Led to Changes For the Blind*, CINCINNATI ENQUIRER, Oct. 1, 2000, at E08.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*; See also Press Release, National Federation of the Blind and America Online Reach Agreement on Accessibility (July 26, 2000) (on file with Stanton Communications).

<sup>82</sup>See Shepherd, *supra* note 63, at B08.

## III. THE INTERNET: A PLACE OF PUBLIC ACCOMMODATION

A. *Supporting Cases: Place is not Limited to Physical Structures*

Despite disagreement as to the answer, there is overwhelming agreement on the controlling issue of this debate; whether the Internet is a place of public accommodation.<sup>83</sup> For Marlaina Lieberg, the answer is yes.<sup>84</sup> For Lieberg, the Internet is the place where she operates her consulting firm; where she accesses client information; and where she shops for her groceries.<sup>85</sup> If she was not blind, Lieberg would be able to drive to the physical places to do these same activities, where it is undisputed that these places would need to be accessible.<sup>86</sup>

Consider Rose Combs, a blind medical transcriptionist in Arizona, who faced a different challenge.<sup>87</sup> Arizona, proud to be the first state to offer cyberballots for online voting, failed to make its site accessible and Combs could not vote without assistance.<sup>88</sup> Clearly supermarkets, stores, and voting booths require accessibility to the disabled because they fall within the statutory language of the ADA.<sup>89</sup> Covered entities include a broad range of places, such as: hotels, restaurants, theaters, museums, zoos, day care centers, and health spas.<sup>90</sup> Within the statutory language of the ADA, only religious organizations and private clubs are expressly exempted from the requirements of Title III of the ADA.<sup>91</sup>

Interestingly, it is this same statutory language that has created a division between various federal district courts.<sup>92</sup> Although there is no authoritative case law

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<sup>83</sup>See Hearings, *supra* note 27, at \*3 (testimony of Marca Bristo).

<sup>84</sup>See Heim, *supra* note 12, at \*1.

<sup>85</sup>*Id.*; See also Kevin Coughlin, *Web Brings Gains, Pains to Those with Disabilities Tech Firms Prodded to Foster Accessibility*, THE TIMES-PICAYUNE, Nov. 5, 2000, at 20. (For Yvonne Singer the web has been a godsend. Although limited by cerebral palsy, she uses a pointer strapped to her forehead to peck words and commands. She has not only posted poetry and edited web pages for a pharmaceutical company, but she is also using the web to search for a full-time job and to complete her masters degree online).

<sup>86</sup>*Id.*; See also Hearings, *supra* note 27, at \*3 (testimony of Marca Bristo).

<sup>87</sup>See Heim, *supra* note 12, at \*2.

<sup>88</sup>*Id.*

<sup>89</sup>42 U.S.C. § 12182 (7)(A)-(L) (1994); See also Hearings, *supra* note 27, at \*3, 13 (testimony of Marca Bristo) (Almost the entire range of private entities and products are covered under ADA. Only religious organizations and private clubs are exempted from the law).

<sup>90</sup>*Id.*

<sup>91</sup>42 U.S.C. § 12187 (1994).

<sup>92</sup>*Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) (New Hampshire case finding that a public accommodation can be a non-physical place). *But see Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (Tennessee case stating that a place of public accommodation is limited to physical locations only).

directly answering the question about the Internet as a public accommodation,<sup>93</sup> there is a growing body of case law which supports this proposition.<sup>94</sup> Recognized as the premier guidepost case,<sup>95</sup> the United States court of appeals in *Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n of New England*<sup>96</sup> held that defendants who provide medical benefit plans could be considered a public accommodation under Title III by finding that establishments of public accommodation are not limited to actual physical structures. In *Carparts* the co-executors of the deceased plaintiff sued the Automotive Wholesalers Association of New England (hereinafter AWANE) and its trust "AWANE Plan" for illegal discrimination on the basis of the plaintiff's AIDS condition.<sup>97</sup> Specifically, a lifetime cap on medical expenses was instituted *after* AWANE became aware of plaintiff's HIV status.<sup>98</sup> The plaintiff claimed that Title III included AWANE as a covered entity even though the service of an insurance plan was not a physical place.<sup>99</sup> The court based its holding on the plain meaning of the law, which included "travel service" in the list of covered private entities.<sup>100</sup> The court stated that, like travel services, which do not require a

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<sup>93</sup>See Hearings, *supra* note 27, at \*7 (testimony of Marca Bristo).

<sup>94</sup>See *Carparts*, 37 F.3d at 12; See also *Walker v. Carnival Cruise Lines*, 63 F. Supp. 2d 1083 (N.D. Cal. 1999) (holding that, apart from physical access to the travel agent's office, the ADA also covers the services travel agents provide); See also *Connors v. Me. Med. Ctr.*, 42 F. Supp. 2d 34, (D. Me. 1999) (finding that Title III applies to the substance and access to services, such as employee benefit plans); See also *Winslow v. IDS Life Ins. Co.*, 29 F. Supp. 2d 557 (D. Minn. 1998) (basing their decision that Title III is not limited to actual physical structures and is applicable to insurance policies on the legislative history, the DOJ interpretation of Title III, and the reasoning adopted by a growing number of district courts); See *Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185 (N.D. Cal. 1998) (applying Title III of the ADA to insurance underwriting policies and refusing to limit the ADA to physical places); See *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422 (D.N.H. 1996)(same); See *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996); See also *Schultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222 (C.D. Cal. 1996) (granting summary judgment to plaintiff where a youth baseball league excluded him based upon having cerebral palsy); See also *Baker v. Hartford Life Ins. Co.*, No. 94C 4416, 1995 WL 573430 (N.D. Ill. 1995) (stating contrary to defendant's argument, the plaintiff does not have to be physically present to be entitled to non-discriminatory treatment).

<sup>95</sup>Carl Kaplan, *Is Cyberspace a Public Accommodation?* N.Y. TIMES, (Nov. 12, 1999), at \*1.

<sup>96</sup>See *Carparts*, 37 F.3d at 19.

<sup>97</sup>*Id.* at 14.

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* at 19; See also 42 U.S.C. § 12181(7)(A)-(L) (1994) (covered entities include an inn, hotel, other places of lodging, restaurant, bar, motion picture house, theater, concert hall, stadium, auditorium, convention center, lecture hall, bakery, grocery store, clothing store, hardware store, shopping center, 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, hospital, a terminal or depot used for transportation, museum, gallery, library, park, zoo, amusement park, nursery, elementary, secondary, undergraduate or postgraduate private school, day care center, senior citizen center,

person to physically enter a structure, there are other businesses operating by mail and phone without facilities.<sup>101</sup> The *Carparts* court stated that, “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or mail are not. Congress would not have intended such an absurd result.”<sup>102</sup> Applying *Carparts* to the present issue, with forty-five percent of businesses going to online services by 2001,<sup>103</sup> it is easy to imagine the immense growth of services provided on the Internet and not in physical structures such as on-site company retail stores.

The explicit purpose of Title III of the ADA is, “to bring individuals with disabilities into the economic and social mainstream of American life... in a clear, balanced, and reasonable manner.”<sup>104</sup> In addition to the plain meaning of the ADA, the legislative history supports the view of inclusion in all places of accommodation.<sup>105</sup>

Extending *Carparts*, the district court in *Kotev v. First Colony Life Ins. Co.* held that the “plain language of Title III covers [the plaintiff’s] claim because its scope is not limited to the mere denial of physical access to places of public accommodation.”<sup>106</sup> In *Kotev*, the plaintiff alleged that his insurance company discriminated against him when they denied a life insurance plan based on his association with his HIV-positive wife.<sup>107</sup> The defendant argued that Title III did not apply to their insurance “services” even though the ADA expressly lists an insurance “office” as a place of public accommodation.<sup>108</sup> Furthermore, requiring a physical location would render useless the protection of a person who is discriminated against based on his or her association with a person with a disability.<sup>109</sup> The court also relied on the DOJ’s interpretation that the ADA applies to the Internet to support its conclusion.<sup>110</sup>

Thus, based on case authority, the intent of ADA, and statutory language it is evident that there is strong support for the view that a place of public

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homeless shelter, food bank, adoption agency, gymnasium, health spa, bowling alley, and golf course).

<sup>101</sup>See *Carparts*, 37 F.3d at 19.

<sup>102</sup>*Id.* at 22.

<sup>103</sup>See Robert D. Atkinson & Randolph H. Court, *Foundations for Future Growth, Progress Towards Digital Transformation, More Businesses on the Net, THE NEW ECONOMY INDEX*, available at [http://www.neweconomyindex.org/section3\\_page04.html](http://www.neweconomyindex.org/section3_page04.html) (last visited Nov. 30, 2000).

<sup>104</sup>See H.R. Rep. No. 485, 101<sup>st</sup> Cong., 2d Sess., pt. 2 at 99 (1990); See also *Carparts*, 37 F.3d at 23.

<sup>105</sup>*Id.* (quoting H.R. Rep. No. 485, 101<sup>st</sup> Cong., 2d Sess., pt. 2 at 99 (1990)).

<sup>106</sup>*Kotev*, 927 F. Supp. at 1321.

<sup>107</sup>*Id.* at 1318.

<sup>108</sup>*Id.* at 1320.

<sup>109</sup>*Id.* at 1322.

<sup>110</sup>*Id.*; See also *Winslow v. IDS Life Ins. Co.*, 29 F. Supp. 2d 557 (D. Minn. 1998).



accommodation extends beyond a mere physical location, and thus could also apply to a non-physical location such as an Internet web site.

*B. Opposing Cases: Place Must be an Actual Physical Structure*

Whereas the First and Third Circuit courts found that the statutory language supported the extension of public accommodations to non-physical locations, other Circuits disagreed with these decisions.<sup>111</sup> In *Parker v. Metropolitan Life Ins. Co.*,<sup>112</sup> the plaintiff filed a complaint against the insurer for failure to provide a policy based on her disability. The court conceded that under Title III an insurance "office" was a place of public accommodation; however, they refused to extend the ADA protection to an insurance benefit "plan" offered by an employer.<sup>113</sup> In *Parker*, the employer offered their employees long term disability plans which provided mental health coverage for twenty-four months and coverage for physical disorders until age sixty-five.<sup>114</sup> When Parker became disabled due to severe depression, her benefits ceased after twenty-four months.<sup>115</sup> The plaintiff filed suit under the ADA alleging that the disability plan was discriminatory because of the shorter length of coverage for mental health disorders.<sup>116</sup> The court restricted its definition of places of accommodation to the twelve accommodation categories.<sup>117</sup> These categories include: lodging establishments, eating and drinking establishments, places of exhibition and entertainment, places of public gathering, sales or rental establishments, professional offices and health centers, places of transportation, places of public display or collection, parks, places of education, social services, and places of recreation and exercise.<sup>118</sup>

Similarly, in *Ford v. Schering-Plough Corp.*<sup>119</sup> the court found absolutely no nexus between alleged discrimination for failure to receive health coverage due to a disability and any public accommodation. In *Ford*, a former employee alleged that disparity between insurance disability benefits for physical and mental disorders was a violation of the ADA.<sup>120</sup> The court held that disability benefits offered by an employer are not considered public accommodations and that, "disparity in benefits for mental and physical disabilities does not violate portions of the ADA prohibiting

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<sup>111</sup>*Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6<sup>th</sup> Cir. 1997); *Accord Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *See also Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994).

<sup>112</sup>*Parker*, 121 F.3d at 1006.

<sup>113</sup>*Id.* at 1010.

<sup>114</sup>*Id.* at 1008.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Parker*, 121 F.3d at 1011.

<sup>118</sup>42 U.S.C. § 12181(7)(A)-(L) (1994).

<sup>119</sup>*Ford*, 145 F.3d 601 (3d Cir. 1998); *Accord Pappas*, 861 F. Supp. at 616.

<sup>120</sup>*Ford*, 145 F.3d at 603.

discrimination in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation."<sup>121</sup>

In response to the court's argument in *Parker*, the court in *Kotev* disagreed with the narrow interpretation of the plain language of the statute.<sup>122</sup> Although federal circuit courts have split on the application of Title III to non-physical locations, legal experts are now, "convinced that commercial Web sites easily fall within the law's grasp."<sup>123</sup> Furthermore, Joseph P. Davis, counsel for the NFB, finds that many circuit court decisions show a trend of expanding the coverage of Title III of the ADA to include non physical places.<sup>124</sup> Moreover, Davis stated that, "The provision of services over the Internet is a natural extension of the court's logic."<sup>125</sup> Accordingly, cases which restrict the plain language to actual physical locations can be dismissed as being too narrow and for not furthering the intent of the ADA to provide equal access for the disabled to all services, such as Internet web sites.

*C. The ADA's Public Accommodation Categories: Most "Places"  
Already Exist on the Internet*

As debate continues in the circuit courts about whether the Internet is a place of public accommodation, a closer examination of the twelve categories reveals that a majority of the examples identified in the law already exist on the web.<sup>126</sup> At the Senate Judiciary Hearing on the Applicability of the ADA to private Internet web sites, opponents against those who claim a public accommodation must be a physical place identified that all but three of the examples listed in Title III are already available on the Internet today.<sup>127</sup> Specifically, physical presence is only required for places of lodging, food establishments, and public transportation places, such as terminals and bus depots.<sup>128</sup>

Setting these three aside, the four categories dealing with exhibition and entertainment are available in various formats on the Internet.<sup>129</sup> These categories include: places of entertainment (movie theaters and concert halls), places of exhibition (stadiums), places of public display (libraries and museums), places of

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<sup>121</sup>*Id.*; See also 42 U.S.C. §§ 12182(7), 12182(a).

<sup>122</sup>*Kotev*, 927 F. Supp. at 1321.

<sup>123</sup>See Aaron Pressman, *Carrot and Stick: Activists for the Disabled Want Web Sites to be Easier to Access. The Americans with Disabilities Act May Prove a Useful Weapon.* THE INDUSTRY STANDARD, May 8, 2000, at \*2.

<sup>124</sup>Cynthia D. Waddell, *The National Federation of the Blind Sues AOL*, HUM. RTS. 22, 23 (Winter, 2000).

<sup>125</sup>*Id.* at 23.

<sup>126</sup>Proposed Addition to the Record: House Judiciary Committee Oversight Hearing on "The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Web Sites," available at [http://www.trace.wisc.edu/docs/ada\\_internet\\_hearing/](http://www.trace.wisc.edu/docs/ada_internet_hearing/), at \*5, (last visited Sept. 2, 2000).

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

recreation (zoos) and places of exercise (gyms or health spas).<sup>130</sup> Most of these services are available on the Internet by viewing movies and listening to concerts; while others, which typically require a physical presence, are increasingly available through virtual reality sites.<sup>131</sup> In addition to entertainment based categories, Title III activities including auditoriums, convention centers, and places of public gatherings are commonly available on the web through chat rooms, remote lecture halls, and video conferencing.<sup>132</sup> Additionally, the public accommodation categories which include schools and social programs are accessible and available on the web through services such as distance education where students connect to classrooms through the web.<sup>133</sup>

Finally, it is well established that the Internet is a place of tremendous e-commerce activity.<sup>134</sup> In 1998, nearly eight percent of the United States' economy was accounted for by the \$663 billion dollar Internet market.<sup>135</sup> With the growth of the virtual marketplace, it is becoming highly recognizable that the Internet clearly offers the last two public accommodation categories: sales establishments, such as clothing stores, and offices of accountants and lawyers.<sup>136</sup>

Thus, upon closer examination of the twelve examples of public accommodations expressly identified in Title III of the ADA, the virtual Internet community itself offers little resistance to the provision of services on the Web. It is the person interpreting the services who creates the virtual barriers and exclusions to Internet accessibility.

#### IV. IMPLICATIONS OF THE NATIONAL FEDERATION OF THE BLIND V. AMERICA ON LINE CLASS ACTION LAWSUIT

Raising awareness of the inaccessibility of Internet web sites was not garnering enough attention to cause change until the NFB carefully selected their first opponent to sue – AOL – the world's largest Internet Service Provider with nearly eighteen million customers world wide.<sup>137</sup> This was the only class action lawsuit filed on behalf of 600,000 – 800,000 people with visual impairments.<sup>138</sup> This suit was also filed in the First Circuit, where courts, such as *Carparts Distribution Center*, have already held that non-physical places are considered public accommodations under the ADA.<sup>139</sup>

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<sup>130</sup>*Id.*

<sup>131</sup>*See* Addition, *supra* note 126.

<sup>132</sup>*See id.*

<sup>133</sup>*Id.*

<sup>134</sup>*See* Hearing, *supra* note 45.

<sup>135</sup>*See* Addition, *supra* note 126.

<sup>136</sup>*Id.*

<sup>137</sup>*See* Kendrick, *supra* note 79, at E08.

<sup>138</sup>Liberty Resources, *Is the Internet a Public Accommodation?* available at [http://www.libertyresources.org/news/news\\_22.html](http://www.libertyresources.org/news/news_22.html) (last visited Oct. 14, 2000).

<sup>139</sup>*See* Shepherd, *supra* note 63, at B08.

The complaint charged that AOL, "is incompatible with screen access software programs for the blind."<sup>140</sup> Furthermore, the complaint alleges that AOL satisfies the definition of a public accommodation because it is, "a place of exhibition and entertainment, a place of public gathering, a sales and rental establishment, a service establishment, a place of public display, a place of education, and a place of recreation."<sup>141</sup>

In July 2000, on the tenth anniversary of the ADA, the NFB dropped its complaint in exchange for AOL agreeing to make its 6.0 version accessible by the end of the year.<sup>142</sup> With this agreement NFB President, Marc Maurer, stated, "[t]he willingness of AOL to cooperate ... is clear indication that [AOL] values equality and opportunity for all."<sup>143</sup> Likewise, AOL President, Barry Schuler, stated, "[w]e are committed to meeting the specialized needs of AOL's increasingly diverse membership."<sup>144</sup>

In January 2001, a critically acclaimed technology journal called *AccessWorld* evaluated AOL's new 6.0 version for accessibility.<sup>145</sup> Overall, there were significant improvements in key deficit areas such as access to e-mail, keyboard only access, and screen reading software's ability to communicate with the browser.<sup>146</sup> The American Foundation for the Blind's director of web operations, Crista Earl, noted several major improvements for blind and visually impaired users.<sup>147</sup> Specifically, AOL uses a set of code referred to as Microsoft Active Accessibility (MSAA) to assist screen reading software to convert text into synthesized speech.<sup>148</sup> Additionally, AOL 5.0 used to require mouse only access for some items, while

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<sup>140</sup>Press Release, *supra* note 81; *See also* Waddell, National *supra* note 124, at 22-23. "[B]arriers in the complaint include: (1) an inaccessible online AOL service sign-up form that is not designed to inform the user as to the content requested for each blank field; (2) a 'welcome' with features such as 'favorites,' 'parental controls,' and 'chat rooms' where the text is hidden within graphics and cannot be read by the screen reader; and (3) a browser software designed to operate in such a way that screen readers do not know when the browser is running, causing great difficulty in the ability for blind users to enter a keyword search or a Web address or even to tab through links."

<sup>141</sup>*See* Waddell, *supra* note 124, at 23.

<sup>142</sup>*See* Kendrick, *supra* note 79, at E08.

<sup>143</sup>Press Release, *supra* note 81.

<sup>144</sup>*Id.*

<sup>145</sup>*See AccessWorld Evaluates AOL 6.0: Significant Improvements Made for Blind Users But Problems Remain*, Jan. 25, 2001, ASCRIBE NEWS, at \*1. (*AccessWorld* is a journal published by the American Foundation for the Blind. In March 2000 and August 1998, *AccessWorld* reported on previous evaluations of AOL and noted that they were extraordinarily inaccessible).

<sup>146</sup>*Id.*

<sup>147</sup>*Id.*

<sup>148</sup>*Id.* (MSAA is a set of programming codes which allows blind users who have screen reading software to communicate with the program for speech synthesis).

version 6.0 has expanded keyboard only access.<sup>149</sup> Moreover, the greatest improvement for 6.0 is the improved use of e-mail with screen reading software.<sup>150</sup>

Despite these significant advances, problems remain with AOL version 6.0.<sup>151</sup> For example, following conversation while using the chat window is still difficult to navigate with screen reading software.<sup>152</sup> Furthermore, the browser froze repeatedly during testing making it necessary to do several adjustments for speech output.<sup>153</sup> And one of AOL's most popular features, Instant Messaging, is nearly impossible to use because it does not contain a cursor for the screen reading software to follow.<sup>154</sup> In conclusion, Earl stated that, "AOL is still far from the best choice for blind users."<sup>155</sup> At this time it is uncertain if the new version of AOL is adequate to meet the disability needs of its users or if the NFB will renew its complaint as stipulated in the settlement agreement with AOL.<sup>156</sup>

Even though precedent was not set, the after effects of the NFB lawsuit show more voluntary efforts by companies to make their sites accessible.<sup>157</sup> Companies such as IBM, Microsoft, Lotus Development Corp., and Sun Microsystems are already designing disabled-friendly versions of their products.<sup>158</sup> Furthermore, Curtis Chong, NFB director of technology, who is also a blind user, believes that the NFB met its goal of raising awareness with software developers and with other computer users across the technology community.<sup>159</sup> Chong calls this result a surprising by-product of the lawsuit.<sup>160</sup> Thus, despite the fact that the first lawsuit to test the question of whether a web site is a public accommodation settled out of court, the world's largest Internet provider has agreed to set an example for other companies to follow.

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<sup>149</sup>*Id.* (In AOL version 5.0 it was difficult for a blind user to use a keyboard instead of a mouse. Keyboard commands are essential for blind users so buttons and other controls must be labeled for the screen reading software to identify them. AOL 6.0 has buttons and many items labeled).

<sup>150</sup>*See*, AccessWorld, *supra* note 145.

<sup>151</sup>*Id.*

<sup>152</sup>*Id.*

<sup>153</sup>*Id.*

<sup>154</sup>*Id.*

<sup>155</sup>*Id.*

<sup>156</sup>*See* AccessWorld *supra* note 145.

<sup>157</sup>*See* Kendrick, *supra* note 79, at E08.

<sup>158</sup>Carrie Johnson, *Giving the Disabled Increased E-Access: Firms Helping Agencies Obey New Rules*, THE WASHINGTON POST, Aug. 24, 2000, at E02.

<sup>159</sup>Jennifer Jones, *Users with Disabilities Push High-Tech Lawsuits, Legislation may Improve Internet Use and Products for Disabled Users*, INFOWORLD, Sept. 4, 2000, at \*2, available at 2000 WL 20918059.

<sup>160</sup>*Id.*

## V. INTERNATIONAL SUPPORT FOR ACCESSIBLE WEB SITES

A. *Olympic Web Site Provider Found Guilty for Inaccessible Site*

Although the *NFB v. AOL* lawsuit settled out of court, leaving no American case law precedent, there has been an international legal ruling in response to an event the entire world watched – the 2000 Sydney, Australia Olympics.<sup>161</sup> According to Graeme Innes, Equal Opportunity Commissioner, the government claimed the Olympics, “[w]ere everyone’s games .. but they weren’t” thanks to an inaccessible web site.<sup>162</sup> Moreover, the Olympic site was promoted to be the largest site in history.<sup>163</sup> It was this site that was tested under an Australian law which states that all web sites must be accessible to people with disabilities; however, the law is only enforced when a complaint is filed.<sup>164</sup>

Undesired international history was set with a highly publicized complaint against the Sydney Organizing Committee for the Olympic Games (hereinafter SOCOG).<sup>165</sup> Specifically, when Bruce McGuire, who is blind, claimed he was discriminated against because his screen reading software was unable to access the Olympic web site, one would have thought that with the force of the law and with the world watching, that the site would have been immediately corrected.<sup>166</sup> On the contrary, the SOCOG attempted to defend the indefensible and it refused to make its site accessible for blind people claiming it would take five hundred days of work to add alternate text for images and to provide result tables accessible for blind users.<sup>167</sup> The site relied heavily on graphics and images without adding alternative tags with text labels which enable screen reading software to navigate the web.<sup>168</sup> The SOCOG continued to defy the Human Rights and Equal Opportunity Commission’s order in August 2000 to make its site as fully accessible as possible and by November they only had fifteen percent of the site in compliance.<sup>169</sup> In the end, the SOCOG was ordered to pay McGuire \$20,000 in damages for breaching the Disability Discrimination Act.<sup>170</sup>

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<sup>161</sup>See Jenny Sinclair, *Discrimination Blast on Games Site*, THE AGE, Nov. 21, 2000, at \*2, available at 2000 WL 27338212.

<sup>162</sup>*Id.*

<sup>163</sup>See Christina Ho, *SOCOG Makes Unflattering History*, SYDNEY MORNING HERALD, Nov. 21, 2000, at \*3, available at 2000 WL 28718212.

<sup>164</sup>*Id.* (noting that Australia has 398,000 vision-impaired people); see also Sinclair, *supra* note 161; see also Ho, *supra* note 163.

<sup>165</sup>See Larry Stillman, *Guide for an “Accessible” Web*, AUSTRALASIAN BUSINESS INTELLIGENCE: AGE, Nov. 20, 2000, at \*1, available at 2000 WL 29605534.

<sup>166</sup>See Ho, *supra* note 163, at \*3.

<sup>167</sup>See Sinclair, *supra* note 161, at \*2.

<sup>168</sup>See Ho, *supra* note 163, at \*3.

<sup>169</sup>See Sinclair, *supra* note 161, at \*3.

<sup>170</sup>*Id.*

According to Innes, there is general support in the computer industry to create accessible sites, “[i]t’s just organizations like SOCOG that choose to exclude people like Bruce Maguire, and I find it surprising that SOCOG took the position [it] did. More often, sites don’t comply with the guidelines through lack of awareness. SOCOG ... just took a very intransigent position.”<sup>171</sup> Furthermore, an accessibility specialist reminds people that blindness is not the only disability web developers need to consider.<sup>172</sup> People with hearing impairments may struggle with technical jargon if their first language was sign language and people who are color blind cannot take action on a button that reads, “[c]lick on the red button.”<sup>173</sup> Additionally, people with dyslexia may have difficulty wading through irrelevant material in order to get to the real content of the page.<sup>174</sup> Thus, with an event presumed to bring the world together, the Olympics will be memorable for its attempt to exclude people with disabilities and for creating the first international precedent that web sites must be accessible to people with disabilities.

*B. International Benefits and Resources for Accessible Sites: The World Wide Web Consortium and Web Access Initiative*

1. Access Benefits All: Not Just The Disabled

Often when a web site is inaccessible, the designers had a choice during development to create an accessible site.<sup>175</sup> Unlike ten years ago when technology was unavailable, today the technology exists; therefore, when web designers do not use it, they are making a conscious choice.<sup>176</sup> For instance, designers can choose to rely on graphics alone or they can add alternative tags for screen reading software.<sup>177</sup> Like the Sydney Olympic Committee, the problem is no longer a lack of awareness – instead, a choice is made to exclude people with disabilities based on a myth that only a minimal number of people will be negatively affected.<sup>178</sup> Despite the fact that the goal of most web designers is to create a site which attracts the highest number of visitors as possible, inaccessible sites exclude hundreds of millions of people with and without disabilities around the world.<sup>179</sup> For example, accessible design can promote device independence for the mobile-phone industry.<sup>180</sup> In other words, a

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<sup>171</sup>See Ho, *supra* note 163, at \*3.

<sup>172</sup>*Id.*

<sup>173</sup>*Id.*

<sup>174</sup>*Id.*

<sup>175</sup>*Id.*

<sup>176</sup>See Ho, *supra* note 163, at \*3.

<sup>177</sup>Laura Wonnacott, *Site Savvy: WAI Guidelines Yield Highest Probability of True Web Access*, INFOWORLD, Oct. 23, 2000, at \*1, available at 2000 WL 26551895.

<sup>178</sup>Glyn Moody, *How Not to Lose Customers*, COMPUTER WEEKLY, at 94, Nov. 30, 2000, available at 2000 WL 30366231.

<sup>179</sup>*Id.*

<sup>180</sup>Beckey Bright, *Disabled Have Champion for Accessible Web Sites*, THE ASIAN WALL STREET JOURNAL, Jan. 8, 2001, at n.7, available at 2001 WL-WSJA 2769685.

single set of information can be designed to be flexible for several different modalities: audio or visual, or tactilely.<sup>181</sup> “When you’re designing for accessibility you’re designing with a multimodality that enables you to repurpose content ... for a whole range of different kinds of devices.”<sup>182</sup> For instance, accessible web sites enable mobile devices such as personal organizers and mobile phones to access text web data.<sup>183</sup> Additionally, accessible sites allow those who do not have the latest equipment and software to effectively utilize the web site.<sup>184</sup> Furthermore, closed captioning is not just for people who are deaf; closed captioning on the Internet is now used at gyms and bars and accessible sites with text alternatives allow for more efficient downloading.<sup>185</sup>

## 2. Raising International Awareness through the World Wide Web Consortium

Recognizing that accessible web sites are good practice for more than just people with disabilities, industry, government and software companies from around the world formed the World Wide Web Consortium (hereinafter W3C).<sup>186</sup> The W3C is an international industry consortium consisting of four hundred and eighty members who share the mission of developing cheap and simple ways to ensure all people have access to the Internet, with a special emphasis on ensuring usability for people with disabilities.<sup>187</sup> The W3C was formed to lead the Web to its full potential by ensuring interoperability through developing common protocols.<sup>188</sup> It is jointly run by organizations and universities in France, Japan and the United States.<sup>189</sup>

## 3. Universal Guidelines for Web Accessibility

Raising awareness is one thing; putting access into action is another.<sup>190</sup> With an international project of the W3C called the Web Access Initiative (hereinafter WAI), excuses like the Sydney Olympic Committee’s “it will take 500 days,” or other designers statements, such as “I do not have the knowledge to make a site

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<sup>181</sup>*Id.*

<sup>182</sup>*Id.*

<sup>183</sup>See Moody, *supra* note 178, at 94.

<sup>184</sup>See Ho, *supra* note 163, at 3.

<sup>185</sup>Dugie Standeford, *Government Web Accessibility Rules Could Extend to All Streaming Media*, COMMUNICATIONS DAILY, Dec. 29, 2000, at \*1, available at 2000 WL 4696948.

<sup>186</sup>Laura Ramsay, *Glitter May not be Gold: New Design Guidelines Make Sites More Accessible*, THE GLOBE AND MAIL, Nov. 10, 2000, at E14.

<sup>187</sup>See Bright, *supra* note 180, at n.7.

<sup>188</sup>World Wide Web Consortium Works to Bridge “Digital Divide”; Web Accessibility Initiative Director Presenting at White House “Digital Divide” Event, M2 PRESSWIRE. Sept. 21, 2000.

<sup>189</sup>*Id.* (W3C is jointly run by MIT Laboratory for Computer Science in the USA, the Keio University in Japan and the National Institute for Research in Computer Science and Control in France.).

<sup>190</sup>David Chamalian, *You’ve Got Access*, THE EXCEPTIONAL PARENT, Nov. 1, 2000, at 4650.



accessible” become inexcusable.<sup>191</sup> WAI’s purpose is to increase Web accessibility through five major areas of work: tools, education and outreach, technology, research, and development.<sup>192</sup> The WAI has set the international standard for web site accessibility. Specifically, in May 1999, the WAI released the Web Content Accessibility Guidelines, which contain universal accessibility solutions available for any web developer to use – private and public alike.<sup>193</sup> According to Judy Brewer, Director of WAI the “[g]uidelines are considered by many governments of the world as the definitive resource on how to make a web site accessible for different types of disabilities.”<sup>194</sup> The WAI guidelines are strict and if enforced today, 99.99% of web sites would be in violation.<sup>195</sup> Examples of the guidelines include providing equivalent text alternatives to images and auditory content, using contrast instead of colors alone, creating graceful transformations for tables, and using headings for documents.<sup>196</sup>

In February 2000, a lesser known set of guidelines called the Authoring Tool Accessibility Guidelines was released by the WAI and is believed to have the greatest impact on accessibility.<sup>197</sup> These guidelines provide uncomplicated suggestions for software developers to ensure that the html they produce prompts web site authors to do accessibility checking automatically.<sup>198</sup> Additionally, the guidelines were meant to help design software that will simply walk a person through the steps of setting up an accessible site while it is actually being made rather than force the author to rely on a long list of guidelines.<sup>199</sup> This will help prevent forgetfulness on the part of web site developers who often fail to include text alternatives for the blind or captioning for the deaf.<sup>200</sup>

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<sup>191</sup>See Sinclair, *supra* note 161, at 3.

<sup>192</sup>See World, *supra* note 188, at \*1.

<sup>193</sup>See Bright, *supra* note 180, at n.8.

<sup>194</sup>*Id.*

<sup>195</sup>See, Wonnacott *supra* note 177, at \*1.

<sup>196</sup>*Id.* (Wonnacott listed the WAI guidelines as follows: “1) Provide equivalent alternatives to auditory and visual contents ..., 2) [d]on’t rely on color alone [instead] focus on contrast, 3) [u]se markup and style sheets and do so properly ..., 4) [c]larify natural-language usage ..., 5) [c]reate tables that transform gracefully..., 6) [e]nsure that pages featuring new technologies transform gracefully ..., 7) [e]nsure user control of time-sensitive content changes ..., 8) [e]nsure direct accessibility of embedded user interfaces ..., 9) [d]esign for device-independence ..., 10) [u]se interim solutions ..., 11) [u]se W3C technologies and guidelines ..., 12) [p]rovide context and orientation information ..., 13) [p]rovide clear navigation mechanisms ... mak[ing] sure [that] all navigation tools are consistent, search works, and don’t forget the site map, 14) [e]nsure that documents are clear and simple ... by using headings and by avoiding the use of jargon, and 15) check the web page for accessibility at [www.cast/org/bobby](http://www.cast/org/bobby).”).

<sup>197</sup>See Bright, *supra* note 180, at n.8.

<sup>198</sup>*Id.*

<sup>199</sup>*Id.*

<sup>200</sup>*Id.*

#### 4. Web Accessibility Guidelines Impact Public and Private Sector

The impact of the WAI guidelines is growing as more companies and government entities incorporate the guidelines as the foundation for regulations and new technology. For example, the latest version of Microsoft Network ("MSN") Explorer browser software that is used to access the world wide web has been specially designed to allow people with visual and hearing impairments to navigate the Internet.<sup>201</sup> This version of MSN Explorer supports many of the WAI guidelines and plans to work towards greater compliance in future versions.<sup>202</sup> For now, the browser includes keyboard-only support for people unable to use a mouse and accessibility technology for screen magnifiers, screen readers, and speech input devices.<sup>203</sup> Likewise, Sears Canada implemented the guidelines on its web site in 1997 and it has received positive feedback.<sup>204</sup> A Sears spokesman stated that, "[n]early 70 major North American companies, ranging from farm-equipment maker Deere & Co. to major computer companies such as Microsoft Corp, a W3C sponsor, have followed suit."<sup>205</sup>

Furthermore, new United States federal rules issued December 21, 2000, by the independent federal agency called the Access Board, charged with ensuring accessibility, used the WAI guidelines for defining specific criteria for Internet and Intranet information.<sup>206</sup> This has particular significance for Internet streamed programming through closed captioning.<sup>207</sup> As the law stands now, the government has already required closed captioning for television broadcasts and it is yet to be determined if the federal government will also require this for the Internet.<sup>208</sup> For government sites in Canada, the federal government's Common Look and Feel Initiative for web sites has incorporated the W3C guidelines.<sup>209</sup> A member of the original W3C working group, Chuck Letourneau, runs an accessibility checking company for Canada.<sup>210</sup> He states that contrary to popular belief, following the

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<sup>201</sup>Steven Bonisteel, *Microsoft Says MSN Browser Ideal for Disabled Surfers*, NEWSBYTES, Oct. 9, 2000, at \*1. (MSN Explorer was formerly called "Next Generation MSN." This browser includes web based e-mail and instant messaging. Microsoft used the assistance of Lighthouse for the Blind for beta testing.)

<sup>202</sup>*Id.*

<sup>203</sup>*See* Bright, *supra* note 180.

<sup>204</sup>*See* Ramsay, *supra* note 186, at E14.

<sup>205</sup>*Id.* at E15.

<sup>206</sup>*See* Standeford, *supra* note 185, at \*1.

<sup>207</sup>*Id.*

<sup>208</sup>*Id.*

<sup>209</sup>*See* Ramsay, *supra* note 186, at E15. (The goal of the Common Look and Feel Initiative is to ensure that by 2002 all federal web sites conform to a common look to allow for disabled users to easily navigate the web sites. Specifically, the sites will all have similar fonts, standard formats for navigation buttons, and menu bars at the top of each page. In addition, all web sites will have a "real" person available to call. One in seven Canadians reports having some type of disability.)

<sup>210</sup>*Id.*

guidelines is neither costly nor time consuming.<sup>211</sup> It is more expensive to develop a complicated site than to use accessible formats.<sup>212</sup> In fact, he states that it takes only one-tenth of the time it would take to do complicated things.<sup>213</sup> He states that he, "has no sympathy for companies that suggest they can't afford to make their sites accessible. When people say they don't have the resources to do Web accessibility, my point is you don't have the resources to do the fun stuff either, but you're doing it."<sup>214</sup>

Even with the power that the World Wide Web Consortium has to raise awareness and the growing use of the accessibility guidelines, WAI Director, Judy Brewer, believes there are four motivators as to why people decide to take action beyond the point of awareness and embark on creating an accessible site.<sup>215</sup> First, she views marketplace demographics as a key reason.<sup>216</sup> Specifically, ten to twenty percent of the population in most countries have disabilities and in the United States the number is around fifty-four million.<sup>217</sup> Ignoring numbers like these does not make good business sense in today's competitive marketplace.<sup>218</sup> Second, is the carry over effects of having a universal design.<sup>219</sup> Accessible sites are not just for people with disabilities; other participation is impacted.<sup>220</sup> Third, both the Federal government and many state governments are requiring sites to be accessible by law.<sup>221</sup> Lastly, having an accessible site creates opportunities for companies to gain visibility and leadership, such as Verizon, Microsoft, and IBM.<sup>222</sup>

Thus, not only do the international benefits to providing accessible sites extend beyond just people with disabilities, but there are universal guidelines available to every web developer in the world to simplify the process of making a site user friendly for all. The world wide resources available strip the unwilling web site company of any reasonable excuse as to why its web site should not be accessible.

#### VI. MANDATING ACCESSIBILITY: FIRST AMENDMENT CONCERNS

Imbedded within the decision of whether the ADA applies to the Internet are concerns about First Amendment rights related to free speech.<sup>223</sup> The First

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<sup>211</sup>*Id.*

<sup>212</sup>*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>*See* Ramsay, *supra* note 186, at E15.

<sup>215</sup>*See* Bright, *supra* note 180, at n.9.

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>*Id.*

<sup>220</sup>*See* Bright, *supra* note 180.

<sup>221</sup>*Id.*

<sup>222</sup>*Id.*

<sup>223</sup>*See* Hearings, *supra* note 27, at \*11 (testimony of Marca Bristo).

Amendment to the United States Constitution states that “[c]ongress shall make no law ... prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press....”<sup>224</sup> When interpreting statutory language to determine if a fundamental right may be adversely affected, the statute is subject to a test of “strict scrutiny.”<sup>225</sup> This test requires the showing of a compelling interest to justify the law and that “distinctions created by law are necessary to further some governmental purpose.”<sup>226</sup>

Those in favor of application of the ADA to private Internet sites contend that infringement on free speech is a misconception; requiring accessibility does not alter the content of the speech, require additions to context, or restrict online publisher’s editorial discretion.<sup>227</sup> Testifying before the Senate for the NFB, Charles Cooper asserted that the ADA does not violate the First Amendment because accessibility does not require Internet companies to engage in speech that is not their own.<sup>228</sup> Similarly, Daniel F. Goldstein, lawyer for the NFB, defended his view that AOL should be legally obligated to make its site accessible because it does not restrict First Amendment rights.<sup>229</sup> Moreover, places such as public forums, where the government cannot restrict debates, illustrate that cyberspace is another non-physical location where it is safe from First Amendment restrictions.<sup>230</sup>

Opponents who believe that mandating accessibility is unconstitutional often rely on the Supreme Court’s decision in *Miami Herald Pub. Co. v. Tornillo*<sup>231</sup> where the Court struck down a Florida statute requiring editors to give equal space in newspapers to candidates running for public office. However, this case has no relevance to the web site accessibility issue.<sup>232</sup> On the contrary, accessibility on web sites does not require the addition of any new editorial information or information that is adverse to the editor’s opinions.<sup>233</sup> Furthermore, with complete knowledge of the true demands of accessibility, private web sites will not lose valuable space on servers or reduce system speed,<sup>234</sup> such as its ability to download by Internet users.

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<sup>224</sup>U.S. CONST. amend. I.

<sup>225</sup>See BLACK’S LAW DICTIONARY 992 (6th ed. 1991).

<sup>226</sup>*Id.*

<sup>227</sup>Glenda Watson Hyatt, US Government Explores Applying ADA to Private Web Sites, Suite 101, (March 2, 2000) available at [http://www.suite101.com/article.cfm/accessible\\_web\\_design/34668](http://www.suite101.com/article.cfm/accessible_web_design/34668) (last visited Oct. 14, 2000).

<sup>228</sup>Sean Lindsay, *Regulating Access: The Congressional Hearing on the ADA and the Internet*, DISABILITY TIMES, Feb. 11, 2000, at 7.

<sup>229</sup>See Kaplan, *supra* note 95, at \*3.

<sup>230</sup>*Id.*

<sup>231</sup>See Hearings, *supra* note 27, at \*12 (Statement of Marca Bristo). See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional a Florida law requiring newspapers to give candidates equal space in the paper to respond to criticisms made about them).

<sup>232</sup>See Hearings, *supra* note 27, at \*12 (Statement of Marca Bristo).

<sup>233</sup>See *id.*

<sup>234</sup>*Id.*

Cited in congressional testimony as a more applicable case is *Turner Broadcasting System v. FCC*.<sup>235</sup> The Supreme Court rejected a claim that “must carry” provisions of the Cable Television Act were unconstitutional.<sup>236</sup> In this case, cable stations were required to carry several free local stations.<sup>237</sup> The Court concluded that this mandate did not involve any preferences regarding content and that they were ensuring that people still had access to free broadcast television stations.<sup>238</sup> Without this mandate, “[p]eople who have no cable availability in their areas would have no access to the information and entertainment that these commercial stations provided.”<sup>239</sup> Although cable TV and the web may seem like remote entities, consider that the web is a growing place for access to information and services that may be available only online.<sup>240</sup> For instance, TV and radio stations often refer the audience to their web sites for more “detailed information.”<sup>241</sup> Similarly, many shoppers can only find discounts for services online.<sup>242</sup> Not requiring sites to be accessible is the same thing as saying these services are not available to people with disabilities.<sup>243</sup> As one leader in the disability field noted, “[t]o say that these resources are not required to be accessible is to say that such unavailability is tolerable in this society, good for the economy and worth tolerating for the sake of some greater but wholly conjectural good.”<sup>244</sup> As noted in the legislative history of the ADA, unavailability is intolerable in today’s society and companies who restrict their sites do this in direct opposition to the law’s intent.<sup>245</sup>

Thus, First Amendment challenges to making web sites accessible fail because accessibility does not alter the speech or content of the sites. Furthermore, companies who rely on the Internet as a sole source of access to information will reach their widest audience by making their sites accessible for all.

## VI. CONCLUSION

Civil rights legislation for people with disabilities has made enormous progress in the past decade – yet opponents against making web sites accessible believe access has gone far enough. Like the Gap, it is either not in their strategy or they argue that

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<sup>235</sup>*Id.*; See also *Turner Broadcasting System Inc., v. Federal Communications Commission*, 512 U.S. 622 (1994) (stating that must carry provisions are not unconstitutional because they do not affect content, just as making sites accessible does not affect content).

<sup>236</sup>See *Turner*, 512 U.S. 622.

<sup>237</sup>*Id.*

<sup>238</sup>*Id.*

<sup>239</sup>See Hearings, *supra* note 27, at \*12 (Statement of Marca Bristo).

<sup>240</sup>*Id.* at \*13.

<sup>241</sup>*Id.*

<sup>242</sup>*Id.*

<sup>243</sup>*Id.*

<sup>244</sup>*Id.*

<sup>245</sup>See Hearings, *supra* note 27, at \*13 (Statement of Marca Bristo).

there are not enough people affected to make it worthwhile.<sup>246</sup> Or, like the Sydney Olympic Committee, they would rather waste time defending an inexcusable position that it would be too time consuming to make their site accessible. Even a highly sensitive First Amendment challenge falters when one fully understands that content is unaffected.<sup>247</sup> With the ADA, speech is safe on web sites. In fact, application of the ADA to web sites actually encourages more free speech by creating access and opportunity for all.

What will one out of every five opponents believe when they develop a disabling condition which prevents them from accessing an online job bank or from completing research for a project with a deadline looming? Private Internet web sites are merely one small step ahead of a law which is gaining powerful momentum behind them. The ADA is real. All one has to do is look outside a window to see sidewalk curbcuts, ramps, and accessible buses on the streets. Thanks to the NFB lawsuit, all people have to do now is look at the computer screen and greet the world's most recognizable and accessible Internet site, AOL, to see change staring them in the face. In today's technologically advanced world, to participate in creating a society tolerable of exclusion is to help erase opportunity for people with disabilities and to foster dependency. No law needs to be written. The tool to make accessibility happen is here. In the spirit of the ADA, voluntary change is welcome, but without movement, the law's effect will overcome even the grandest opponent. Under the ADA, private Internet web sites must be accessible to people with disabilities.

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<sup>246</sup>See Heim, *supra* note 12, at \*3.

<sup>247</sup>See Hearings, *supra* note 27, at \*12 (Statement of Marca Bristo).