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WAS BLIND BUT NOW I SEE: THE ARGUMENT FOR ADA APPLICABILITY TO THE INTERNET

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Abstract: This Note argues that the "public accommodations" provision of Title III of the Americans with Disabilities Act applies to the Internet. A broad reading of the public accommodation clause in Title III in conjunction with the supporting case law and the statute's legislative history suggests that public accommodations are not limited to physical structures. Therefore, Internet companies that do not provide software compatible with the technology that visually disabled people use to access the Internet are liable for violating the ADA. The Note concludes with a summary of the first litigation on this issue between the National Federation of the Blind and America Online which was settled in July of 2000.

The shameful wall of exclusion must finally come tumbling down and make way for a bright new era of equality, independence and freedom.

—President George Bush, 1990[1]

INTRODUCTION

On July 26, 1990, in front of a gathering of more than three thousand onlookers, President George Bush signed into law the Americans with Disabilities Act (ADA).[2] The chief Senate sponsor of the bill, Senator Tom Harkin, later wrote that "the ADA has taken its place among the great civil rights laws in our country's history."[3] Senator Edward Kennedy called the bill "an emancipation proclamation for people with disabilities."[4] The ADA is a federal remedial statute whose purpose is to provide a clear and comprehensive national

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[1] Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245, 246 (1994).

[2] *See* MARC D. STOLMAN, A GUIDE TO LEGAL RIGHTS FOR PEOPLE WITH DISABILITIES 2 (1994).

[3] *See* Senator Tom Harkin, *The Americans with Disabilities Act Ten Years Later: A Framework for the Future*, 85 IOWA L. REV. 1575 (2000).

[4] *See* STOLMAN, *supra* note 2, at 2.

mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life.[5] This Note will argue that just as the ADA has helped many disabled Americans in areas of public accommodations, it is also applicable to help the visually disabled access private commercial Internet sites.

There are now approximately one billion web pages on the Internet.[6] A CNET special report found that ninety-eight percent of these websites are to some extent inaccessible to the visually disabled.[7] Yet even in the face of such adversity, approximately seventy-six percent of disabled Americans have general access to the Internet, as compared with the approximately fifty percent of non-disabled Americans.[8] Unfortunately, even though much of the disabled community has general access to the Internet, visually disabled people often cannot effectively access most websites.[9]

There are various reasons why the vast majority of websites are inaccessible to the visually disabled. Until recently, website designers largely ignored the plight of the visually disabled.[10] As web design has become more graphically sophisticated, websites have become less accessible to the blind.[11] The accessibility problem is largely due to the fact that technology utilized by the visually disabled relies strictly on textual data from websites.[12] The blind currently use two main technologies in conjunction with the Internet: screen readers that convert text to voice and refreshable Braille displays that convert scanned documents into Braille on a Braille pad.[13] The mechanical aspects of how these technologies work are discussed in the last section of this Note.

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[5] *See id.* at 6; Mary Gannon, *The Americans with Disabilities Act of 1990 and its Effect upon Employment Law,* 16 J. CORP. L. 315, 316 (1991); Dana Whitehead McKee & Deborah Fleischaker, *ADA and the Internet: Must Websites Be Accessible,* 33 MD. BAR J. 34, 35 (2000).

[6] *See* Patrick Maroney, *The Wrong Tool for the Right Job,* 2 VAND. J. ENT. L. & PRAC. 191, 195 (2000).

[7] *See* Sally McGrane, *Is the Web Truly Accessible to the Disabled?, at* http://home.cnet.com/specialreports/0-6014-7-1530073.html (Jan. 26, 2000). CNET Networks, Inc. (Nasdaq: CNET), is the global source of information and commerce services for the technology industry.

[8] *See id.*; Maroney, *supra* note 6, at 192.

[9] *See* Maroney, *supra* note 6, at 192; McGrane, *supra* note 7.

[10] *See* McGrane, *supra* note 7.

[11] *See id.*

[12] *See* Curtis Chong, *Making Your Website Accessible to the Blind, at* http://www.nfb.org/tech/webacc.htm (Oct. 17, 2000).

[13] *See id.*

The disabled community is now organizing its efforts to make the Internet more accessible.[14] "We Media" launched the website "wemedia.com" in December of 1999, becoming the first commercial website dedicated to the disabled population.[15] The website provides the disabled community with targeted information and resources in such areas as news, sports, and technology, all in a manner that is easily accessible to the visually disabled.[16] The creators of wemedia.com are aware that, according to the 1990 U.S. Census, the collective purchasing power of the disabled community is growing, and that spending power will eventually put the computer industry on notice.[17]

In November 1999, the National Federation of the Blind (NFB), the leading advocacy group for the visually disabled, sued American Online (AOL), the nation's largest Internet provider.[18] The suit alleged that the AOL proprietary software was not compatible with the software required to translate computer signals into Braille or synthesized speech.[19] In July 2000, the two groups settled the suit to allow AOL to create software with available screen-reader technologies.[20]

A broad reading of the public accommodations clause in Title III[21] of the ADA suggests that public accommodations are not limited to strictly physical structures; therefore, nonphysical entities like the Internet also fall within the statute's purview.[22] This interpretation of

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[14] *See About WeMedia Inc., at* http://www.wemedia.com/wehome (last visited Mar.. 13, 2002).

[15] *See id.*

[16] *See id.*

[17] *See* Joshua Harris Prager, *People with Disabilities Are Next Consumer Niche, available at* http://www.wemedia.com/wehome (Dec. 15, 1999).

[18] *See* Complaint of National Federation of the Blind against America Online, *available at* http://www.libertyresources.org/ news/aol_1.html (last visited Apr. 12, 2002) [hereinafter Complaint]; Barbara Pierce, *NFB Sues AOL, at* http://204.245.133.32/bm/bm99/bm99 1201.htm (last visited Apr. 12, 2002).

[19] *See* Jonathan Bick, *Americans with Disabilities Act and the Internet,* 10 ALB. L.J. SCI. & TECH. 205, 217 (2000); Pierce, *supra* note 18.

[20] *See National Federation of the Blind/America Online Accessibility Agreement, available at* http://www.nfb.org/Tech/accessibility.htm (Jul. 26, 2000) [hereinafter *Online Accessibility Agreement*]; Bick, *supra* note 19, at 222.

[21] *See* 42 U.S.C. § 12181 (1990). The ADA is broken up into five areas: Title I concerns employment practices by units of state and local government; Title II addresses programs, services, and activities of state and local government; Title III deals with public accommodations and commercial facilities; Title IV addresses telecommunication services; and Title V deals with miscellaneous provisions like construction, state immunity, attorney's fees, etc. *Id. See* Bick, *supra* note 19, at 222 n.1.

[22] 42 U.S.C. § 12181. *See generally* Bick, *supra* note 19; Karen Volkman, *The Limits of Coverage: Do Insurance Policies Obtained Through an Employer and Administered by Insurance Compa-*

Title III, in conjunction with supporting case law and the statute's legislative history, implies that a broad reading of the ADA and its applicability to the Internet is appropriate.[23] Part I of this Note briefly summarizes the disability rights movement. Part II analyzes Title III of the ADA, including the statute's text, agency guidelines, and the legislative history and purpose of the statute. Finally, Part III evaluates the *National Federation of the Blind v. America Online, Inc.* litigation, the first of potentially many lawsuits regarding Internet accessibility. This Note concludes that most barriers to accessibility on the Internet violate Title III of the Americans with Disabilities Act.

I. Background on Disability Rights

A. *Historical Background*

For most of American history, disabled citizens have been the "hidden minority" in our society.[24] The breadth of discrimination against the disabled is staggering in America. Experts estimate that between forty-three and fifty-four million Americans have some form of significant handicap.[25] Whether due to lagging medical and technological progress or societal stigma, the United States government has ignored the plight of disabled Americans for many generations.[26] In fact, disability advocates heralded the passage of the ADA as the beginning of the "Third Reconstruction" due to its sweeping nature in remedying civil rights violations faced by the disabled.[27]

The disability rights movement was virtually nonexistent until the second half of the twentieth century.[28] Before then, society treated disabled people poorly, and placed most groups of disabled people in almshouses with criminals, the mentally challenged, and individuals

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nies Fall Within the Scope of Title III of the Americans with Disabilities Act?, 43 St. Louis U. L.J. 249 (1999).

[23] *See* Bick, *supra* note 19, at 207.

[24] *See* Stephen Percy, *Disability, Civil Rights and Public Policy* (1989) (quoting Power, Privilege, and Law: A Civil Rights Reader 423 (Leslie Bender ed., 1995)).

[25] *See* McKee & Fleischaker, *supra* note 5, at 35. *See generally* 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 (2000).

[26] *See* Percy, *supra* note 24, at 423–25.

[27] *See* Jeffrey A. Van Detta & Dr. Dan R. Gallipeau, *Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, And Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 Rev. Litig. 505, 507 (2000).

[28] *See* Stolman, *supra* note 2, at 3.

with emotional problems.[29] Dorothea Dix, an advocate for the disabled throughout most of the nineteenth century, found people with mental illnesses and retardation in "cages, closets, cellars, and stalls . . . chained, naked, beaten with rods, and lashed into obedience."[30] Although some members of Congress during the 1850s discussed legislation providing federal funding and facilities for the disabled, especially the blind and deaf, President Franklin Pierce and subsequent politicians dismissed such federal intervention.[31] Later, aid and charity to the disabled focused on disabled veterans returning from World War I.[32]

The modern disability rights movement originated in the Civil Rights Movement of the 1960s.[33] Disabled citizens began to compare their situation with that of blacks in America.[34] It was not until the 1970s, however, that Congress passed the first significant piece of remedial legislation addressing disability rights.[35] This legislation, Section 504 of the Rehabilitation Act of 1973, adopted much of its language directly from the Civil Rights Act of 1964.[36] The Rehabilitation Act of 1973 prohibited discrimination against persons with certain disabilities by recipients of federal financial assistance, including federal agencies.[37] The Act had jurisdiction over only the federal government and private employers who received federal contracts.[38] Although this was the first federal legislation that directly protected people with disabilities from discrimination, it did not cover private employers who did not receive federal funding, therefore limiting its scope and effectiveness.[39] However, much of the language of the ADA evolved from the earlier language and principles of the Rehabilitation Act.[40]

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[29] *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 59 (1993).

[30] *See id.*

[31] *See id.* at 60.

[32] *See id.* at 61.

[33] *See* STOLMAN, *supra* note 2, at 3.

[34] *See id.*

[35] *See id.* at 4.

[36] 29 U.S.C. § 704; 42 U.S.C. §§ 2000 *et. seq*; *see* SHAPIRO, *supra* note 29, at 65; Bick, *supra* note 19, at 212; Gannon, *supra* note 5, at 318.

[37] *See* Gannon, *supra* note 5, at 317.

[38] *See id.* at 320–21.

[39] *See* Allison Duncan, *Defining Disability in the ADA:* Sutton v. United Airlines, Inc., 60 LA. L. REV. 967, 968 (2000); Gannon, *supra* note 5, at 321.

[40] *See* Gannon, *supra* note 5, at 321. The definition of disability in § 3(2) of the ADA is very similar to § 7(8)(B) of the Rehabilitation Act of 1973. 42 U.S.C. § 12101 (1990); 29

B. *The Americans with Disabilities Act*

Seventeen years later, Congress passed the ADA to broaden the protections first set forth in the Rehabilitation Act of 1973 to persons with disabilities in private sector employment (Title I), to those who use public services (Title II), to enable access to public accommodations (Title III), and to telecommunications (Title IV).[41] The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[42]

Title III of the ADA is the most relevant section for this discussion.[43] Title III focuses on the ADA's definition of and the rules behind public accommodations.[44] The main purpose of this section was to extend the protections provided in Section 504 of the Rehabilitation Act of 1973 to the private sector, bringing a larger percentage of individuals with disabilities into the "economic and social mainstream" of society.[45] Through Title III, Congress attempted to accomplish this goal by providing "equal access to the array of establishments," i.e. "public accommodations," available to the non-disabled members of society.[46] To this end, Title III prohibits any private entity from discriminating against an individual on the basis of a disability in the individual's "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation" owned, leased, or operated by that entity.[47] Circuit courts are currently split as to what constitutes a "service" and a

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U.S.C. § 706 (8)(b) (1988). *See id.* The definition of handicap in § 7(8)(B) of the Rehabilitation Act of 1973 is as follows:

> any person who:
> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,
> (ii) has a record of such an impairment, or
> (iii) is regarded as having such an impairment.

29 U.S.C. § 706 (8)(b); *see* Gannon, *supra* note 5, at 321 n.64.

[41] 42 U.S.C. § 12101 *et seq.*; *see* Bick, *supra* note 19, at 213.

[42] *See* 42 U.S.C. § 12102; Senator Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product, and Performance*, 35 IDAHO L. REV. 205, 210 (1999).

[43] 42 U.S.C. §§ 12181–12189.

[44] *See* Volkman, *supra* note 22, at 254.

[45] *See* H.R. REP. No. 485, pt. 2, at 99 (1990); Volkman, *supra* note 22, at 253.

[46] *See* S. REP. No. 116, at 59 (1990); Volkman, *supra* note 22, at 253.

[47] 42 U.S.C. § 12182(a); *see* Craig, *supra* note 42, at 211.

"place of public accommodation."[48] Title III further requires private entities to remove discriminatory barriers to the disabled if such removal is "readily achievable."[49] However, entities do not have to remove such barriers if "making such modifications would fundamentally alter the nature of such goods, services, facilities, or accommodations."[50]

II. Analysis of Title III

The central question in analyzing the applicability of Title III to the Internet is whether the term "place of public accommodation" is narrowly limited to physical places/structures or whether it encompasses something more.[51] An examination of the plain language of Title III's text, the applicability of the Department of Justice's (DOJ) guidelines on the subject, legislative history, and case law and dicta on the subject support a broad reading of the public accommodation provision.[52] In particular, two important court of appeals cases, the First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.* and Judge Posner's decision from the Seventh Circuit in *Doe v. Mutual of Omaha Insurance Co.*, address the above factors critical to determining the contours of Title III protection.[53]

A. *Statutory Text*

An analysis of Title III, like any other statute, begins with examining the "plain language of the statute."[54] In broad language, Title III of the Americans with Disabilities Act states that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the ... services, ... privileges, advantages, or accommodations of any place of public accommodation."[55] Thus, in order to argue that Internet sites must be made accessible to the blind under

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[48] *See* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997); Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994).

[49] 42 U.S.C. § 12182(b)(2)(A)(ii); *see* Craig, *supra* note 42, at 211.

[50] 42 U.S.C. § 12182(b)(2)(A)(ii); *see* Craig, *supra* note 42, at 211.

[51] *See* Stowe, *supra* note 25, at 298.

[52] *See generally* Bick, *supra* note 19.

[53] *See* Doe v. Mutual of Omaha, 179 F.3d 557, 559 (7th Cir. 1999); Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994).

[54] *See* BankAmerica Corp. v. United States, 462 U.S. 122, 128 (1983); *Carparts*, 37 F.3d at 19; Maroney, *supra* note 6, at 195.

[55] *See* 42 U.S.C. § 12182(a) (1990); Bick, *supra* note 19, at 219.

the ADA, one must first establish that the Internet is a place of public accommodation under Title III.[56] Title III defines private entities as public accommodations for the purposes of Title III "if the operations of such entities affect commerce."[57] The statute then lists several private entity-public accommodations, including places of "exhibition and entertainment, a sales and rental establishment . . . a service establishment . . . and a place of recreation."[58]

The language of Title III's public accommodation terms—"travel service," an "insurance office," and "other service establishments"—suggest that the plain meaning of the statute is not solely limited to physical structures.[59] Nothing in Title III explicitly states that public accommodations are solely physical entities which a person must be able to enter or "brick and mortar businesses" and facilities, as one commentator has suggested.[60] Furthermore, the First Circuit in *Carparts* concluded that "the plain meaning of the terms" do not require public accommodations to be physical structures.[61] The *Carparts* court found the language of the statute ambiguous and suggested looking to agency regulations, the legislative history of the ADA, and public policy concerns surrounding the passage of the ADA to determine its plain meaning.[62]

The First Circuit took a pragmatic approach in explaining why Title III is not strictly limited to physical structures.[63] Instead of stating only physical entities, the public accommodations definition lists services such as "travel services" that imply a broader set of entities.[64] The First Circuit highlighted that travel services often conduct business by telephone or correspondence without requiring their customers to physically enter an office to obtain such services.[65] The court noted that "Congress [must have] clearly contemplated" such a service.[66] The Court reasoned that 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

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[56] *See* Bick, *supra* note 19, at 219; McKee & Fleischaker, *supra* note 5, at 35.
[57] *See Carparts*, 37 F.3d at 19.
[58] 42 U.S.C. § 12181(7); *see* Bick, *supra* note 19, at 220.
[59] 42 U.S.C. § 12181(7)(f); *see Carparts*, 37 F.3d at 19.
[60] *See Carparts*, 37 F.3d at 19; Maroney, *supra* note 6, at 194.
[61] *See* 37 F.3d at 19.
[62] *See id.*
[63] *See id.*
[64] *See id.*
[65] *See id.*
[66] *See Carparts*, 37 F.3d at 19.

or by mail are not."[67] The court went as far as to state that "Congress could not have intended such an absurd result."[68]

Judge Posner, writing for the Seventh Circuit, in dicta, took an even stronger position that the plain meaning of the statute favors not limiting Title III of the ADA to physical structures.[69] Posner reasoned that the "core meaning [of public accommodation], plainly enough, is that the owner or operator of a store . . . , travel agency, Web site, or other facility (whether in physical space or in electronic space), that is open to the public cannot exclude disabled persons from entering the facility."[70] In dicta, the Seventh Circuit is the first appellate court to explicitly state that the public accommodations definition in Title III of the ADA applies to the Internet.[71]

In contrast to the First and Seventh Circuits' findings that the plain language of Title III does not require public accommodations to be physical structures, the Sixth Circuit Court of Appeals in *Parker v. Metropolitan Life Insurance* utilized the canons of *noscitur a sociis* and *ejusdem generis* to hold otherwise.[72] The Sixth Circuit's divided en banc decision in *Parker* represents the most critical attack on *Carparts'* textual analysis of Title III of the ADA and provides the framework for the argument that public accommodations are limited to physical structures.[73]

Parker addressed whether a benefit plan provided by an employer's insurance company falls under Title III's public accommodations provision.[74] The Sixth Circuit answered in the negative, concluding that Title III applies only to the clients and customers of public accommodations and that public accommodations are only physical

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[67] *See id.*

[68] *See id.* The Second Circuit Court of Appeals and numerous district courts have also followed the approach of *Carparts* in broadly interpreting Title III of the ADA. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 31–33 (2d Cir. 1999) (noting that "Title III's mandate that the disabled be accorded 'full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation,' suggests to us that the statute was meant to guarantee them more than mere physical access."); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 302 (N.D. Cal. 1997); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321–22 (C.D. Cal. 1996); Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 561–63 (D. Minn. 1988).

[69] *See Mutual of Omaha,* 179 F.3d at 559.

[70] *See id.*

[71] *See id.*

[72] *See* 121 F.3d 1006, 1014 (6th Cir. 1997); Maroney, *supra* note 6, at 195, 198.

[73] *See* Maroney, *supra* note 6, at 195. The Sixth Circuit's en banc decision contained two different dissents which were joined by three other judges. *See* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1006 (6th Cir. 1997).

[74] *See Parker,* 121 F.3d at 1010–14.

places.[75] In making this determination, the Sixth Circuit majority invoked the canon of *noscitur a sociis* to reject the expansion of Title III.[76] *Noscitur a sociis* means that "a term is interpreted within the context of the accompanying words to avoid the giving of unintended breadth to the Acts of Congress."[77] In applying this canon to Title III, the Sixth Circuit highlighted that "every term listed in § 12181(7) and subsection (F) is a physical place open to public access."[78] Thus, the court reasoned that although the term public accommodations itself is vague, the fact that every other term in the statute represented a physical structure means that public accommodations are limited to physical structures.[79]

The Sixth Circuit also attacked the First Circuit's reasoning in interpreting Title III's "other service establishments" as meaning both physical and nonphysical places.[80] One commentator used the canon of *ejusdem generis* to explain the Sixth Circuit's rationale.[81] This canon states that "when general words follow an enumeration of specific words, the general words are to be read as applying only to the same general kind or class as the specific words."[82] According to this logic, the fact that each term listed in Section 12181(7)(F) is a physical place means that the more vague catch-all term, "other service establishments" also refers to physical places.[83] The *Parker* majority found that the plain meaning of the statute could be construed from "the clear connotation of the words in Section 12181(7) that a public accommodation is a physical place open to public access."[84]

The *Parker* decision created a split in the circuits concerning the definition of Title III's public accommodations clause.[85] However, the Supreme Court has yet to grant a writ of certiorari to a case on this issue as one of the dissenting judges in *Parker* suggested.[86] Since the

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[75] *See id.* at 1010–11; Volkman, *supra* note 22, at 267.

[76] *See Parker*, 121 F.3d at 1014.

[77] *See* Maroney, *supra* note 6, at 195–96.

[78] *See Parker*, 121 F.3d at 1014; Maroney, *supra* note 6, at 196.

[79] *See Parker*, 121 F.3d at 1014; Maroney, *supra* note 6, at 196.

[80] *See* 42 U.S.C. §§ 12181–12189 (1990); *Carparts.*, 37 F.3d at 19; Maroney, *supra* note 6, at 198.

[81] *See* Maroney, *supra* note 6, at 198.

[82] *See id.*

[83] *See id.*

[84] *See* 42 U.S.C. § 12181(7); Volkman, *supra* note 22, at 268.

[85] *See* 121 F.3d at 1014; Volkman, *supra* note 22, at 269.

[86] *See* 121 F.3d at 1022 (Merrit, J., dissenting); Volkman, *supra* note 22, at 270–71. Judge Merritt, in a caustic dissent, writes:

Parker decision, lower courts have aligned themselves with either the First or the Sixth Circuit's differing views on the definition of public accommodation.[87] Thus, the plain language of the statute, the starting point for any statutory analysis, does not provide a clear definition of public accommodation in Title III of the ADA.[88]

In a literal reading, the statute is at best ambiguous.[89] However, the simple reasoning and logic of both the First and Seventh Circuits support the conclusion that Congress likely meant for the public accommodations provision to be defined broadly, rather than strictly limited to physical structures.[90] The plain meaning of Title III, as viewed by the First and Seventh Circuit, is that the disabled cannot be excluded from certain goods, services, and facilities.[91] The Sixth Circuit instead found meaning in an ambiguous statute through legal canons without placing any weight on the purpose of the statute.[92] This narrow approach ignores other important methods of statutory interpretation such as administrative agency review and legislative history.

> The Court limits [public accommodation] to physical access to an office, rejecting the contrary view of the other circuit and district courts that have decided the issue, as well rejecting the Department of Justice and the EEOC view that employer group health insurance is covered. In the end, the unnecessary conflict between these two views will now have to be resolved by the Supreme Court.

See id. at 1021. However, the Supreme Court has yet to grant a writ of certiorari to such a test case.

[87] *See Pallozzi*, 198 F.3d at 31–33; Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3rd Cir. 1998) (finding that Title III restricts public accommodations to physical places); *Cloutier*, 964 F. Supp. at 302 (rejecting the insurer's argument that applicant lacked standing for an ADA claim because it only prohibited discrimination in providing physical access to public accommodations); *Kotev*, 927 F. Supp. at 1321–22 (finding that plaintiffs are not required to be physically present in a physical accommodation to proceed with a disability claim); *Winslow*, 29 F. Supp. 2d at 561–63 (finding that an insurance office is a public accommodation according to Title III of the ADA); *see also* Volkman, *supra* note 22, at 271.

[88] *See Carparts*, 37 F.3d at 19; Bick, *supra* note 19, at 215.

[89] *See Carparts*, 37 F.3d at 19.

[90] *See Mutual of Omaha*, 179 F.3d at 559; *Carparts*, 37 F.3d at 19.

[91] *See Mutual of Omaha*, 179 F.3d at 559; *Carparts*, 37 F.3d at 19.

[92] *See Parker*, 121 F.3d at 1010–14.

B. *Department of Justice and Other Federal Agency Guidelines*

1. Department of Justice's Advisory Letter

The ADA provides the Attorney General with the power to issue regulations interpreting Title III.[93] Specifically, Section 12186(b) states "the Attorney General shall issue regulations in an accessible format to carry out the provisions of this Title . . . that include standards applicable to facilities."[94] In 1996, the Department of Justice (DOJ) issued a statement in the form of an advisory letter to Senator Tom Harkin explaining that the ADA will cover entities on the Internet whose services are deemed to be public accommodations.[95] In the letter, the DOJ stated that "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."[96] Deval Patrick, the Assistant Attorney General who wrote the advisory opinion, specifically mentioned providing the "web page information in text format" as one available option to assist in ensuring accessibility for the visually disabled.[97] The letter, although suggesting that the Internet is a covered entity applicable to the public accommodation clause of Title III, does not explicitly state that the Internet is a public accommodation, nor does it mention the current debate on whether public accommodations are limited to physical structures.[98]

Regulations and advisory opinions by federal agencies deserve to be accorded the proper weight.[99] The Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* held that when analyzing the importance of administrative interpretations of legislation, the respective agency must yield to the "unambiguous congressional intent of the statute."[100] However, if the text is ambiguous, courts must

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[93] 42 U.S.C. § 12186(b) (1990); *see* Maroney, *supra* note 6, at 201.

[94] 42 U.S.C. § 12186(b) (1990); *see* Maroney, *supra* note 6, at 201.

[95] *See* Bick, *supra* note 19, at 206; Letter from Deval L. Patrick, Assistant Attorney General, to Senator Tom Harkin, *at* http://www.usdoj.gov./crt/foia/cltr204.txt (Sept. 9, 1996) [hereinafter DOJ Letter]. This letter, #204, was written by Deval L. Patrick, Assistant Attorney General of the Civil Rights Division. The letter was in response to a constituent inquiry regarding accessibility of "web pages" on the Internet to people with visual disabilities. *See id.*

[96] *See* DOJ Letter, *supra* note 95.

[97] *See id.*

[98] *See id;* Maroney, *supra* note 6, at 201.

[99] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[100] *See id;* Maroney, *supra* note 6, at 201.

defer to agency interpretations of a statute.[101] As previously determined, the plain language of Title III is ambiguous on whether the definition of public accommodation is limited to a physical structure.[102] The public policy behind the *Chevron* instruction is that when the statutory text is unintentionally vague, the decision of the respective agency deserves deference because of the agency's expertise in its particular field.[103]

2. Section 508 of the Rehabilitation Act Amendments of 1998

The federal government took a major step towards instituting mandatory technological accessibility to the visually disabled when Congress passed Section 508 of the Rehabilitation Act Amendments of 1998 (Section 508).[104] Section 508 aims to make the federal government's technologies more accessible to the disabled.[105] Section 508, borrowing language from the ADA, requires that when a federal agency uses electronic and information technology, it must ensure that this electronic and information technology is accessible to all.[106] Specifically, Section 508(a)(2)(A) mandates that the Architectural and Transportation Barriers Compliance Board (Access Board) publish standards setting forth a definition of electronic and information technology, and the technical and functional performance criteria necessary for accessibility for such technology.[107] One commentator noted that the implementation of Section 508 will likely "spur innovation through the e-commerce industry."[108] Although Section 508 does not require private companies to make their technologies accessible to the disabled, the statute is a step in the right direction and a sign that Federal agencies are serious about the accessibility of the Internet for the disabled.[109]

The Section 508 guidelines will likely cause the Supreme Court to soon become involved in resolving the conflict over the applicability

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[101] *See Chevron*, 467 U.S. at 865; Maroney, *supra* note 6, at 201.

[102] *See Carparts*, 37 F.3d at 19.

[103] *See Chevron*, 467 U.S. at 842–43.

[104] 29 U.S.C. § 794d (1998); *see* Bick, *supra* note 19, at 222.

[105] *See* Bick, *supra* note 19, at 222.

[106] *See id.* Section 508 adopts the "undue burden" standard which is found in Title III of the ADA and is equivalent to the term "undue hardship" in Title I of the ADA. 42 U.S.C. § 12182(b)(2)(A)(iii) (1990); *see* Bick, *supra* note 19, at 223.

[107] 29 U.S.C. § 794d; *see* Bick, *supra* note 19, at 222.

[108] *See* Peter David Blanck & Leonard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24 MENTAL AND PHYSICAL DISABILITY L. REP. 855, 857 (2000).

[109] 29 U.S.C. § 794d; *see* Bick, *supra* note 19, at 222–24.

of the ADA to the Internet.[110] According to one commentator, the Access Board's proposed accessibility requirements will set a standard for ADA compliance in electronic and information technology.[111] More importantly, it will create a perception that a standard good enough for the government should also apply to the private sector.[112]

3. National Council on Disability

In February 2000, the chair of another federal agency, the National Council on Disability (NCD), testified before the House Judiciary Committee, Subcommittee on the Constitution, that Title III of the ADA applies to the Internet.[113] The NCD is an independent federal agency that makes recommendations to both the President and Congress on issues affecting Americans with disabilities.[114] The NCD was an integral force in the legislative struggle to draft and enact the ADA, and still monitors its enforcement and effectiveness today.[115] In its presentation before the Subcommittee, the NCD conceded that nowhere in the statute or legislative history is the applicability to the Internet explicitly mentioned; however, the NCD highlighted that the list of entities described as public accommodations in Title III "is broad, and includes . . . almost the entire range of entities, activities, goods, and services with which average individuals may come into contact . . . in the course of their daily lives."[116] In addition, the NCD argued that coupled with the proliferation of the Internet will be the decline of more traditional "places of public accommodations."[117] For example, people may shop less frequently at department stores if they can purchase similar items more conveniently online.[118] This change will lead to even more traditional services being denied to the disabled if the Internet remains inaccessible.[119]

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[110] *See* Bick, *supra* note 19, at 209.

[111] 29 U.S.C. § 794d; *see* Bick, *supra* note 19, at 210.

[112] *See* Bick, *supra* note 19, at 210.

[113] *See* Marca Bristo, *The Applicability of the Americans with Disabilities Act to Private Internet Sites, at* http://www.ncd.gov/newsroom/testimony/bristo_2-17-00.html (Feb. 17, 2000).

[114] *See* National Council on Disability, *at* http://www.ncd.gov/index.html (last visited Mar. 17, 2002).

[115] *See* HOUSE COMM. ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF PUBLIC LAW 101–336 THE AMERICANS WITH DISABILTIES ACT, H. REP. NO. 102-A, at 630 (1990) [hereinafter LEGISLATIVE HISTORY]; National Council on Disability, *supra*, note 114.

[116] *See* Bristo, *supra* note 113.

[117] *See id.*

[118] *See id.*

[119] *See id.*

The NCD directly attacked the logic of those who believe that a "place of public accommodation" must be a physical structure.[120] Expanding on the First Circuit's example in *Carparts,* the NCD created a hypothetical situation in which there are two travel agencies, both of which explicitly state that they will not take people with disabilities as customers.[121] One travel agency does business in an office, the other agency conducts business strictly over the phone.[122] The Sixth Circuit's interpretation of "place of public accommodation" would unintentionally legitimatize the discrimination of the travel agency that conducts business over the phone.[123] It would be "absurd" to think that Congress would impose such a heavy burden on some businesses while leaving similar businesses unregulated by the ADA.[124]

There are many federal agencies that believe the time has come for Title III of the ADA to regulate the Internet.[125] In light of *Chevron,* when the plain meaning of a statute is vague or ambiguous, the courts must give proper weight and deference to governmental agency opinions.[126] The advisory letter by the DOJ, the passage of Section 508 and consequently the creation of the Access Board, and finally the testimony from the NCD all support the argument that Title III governs private Internet sites.[127]

C. *Legislative History and Purpose of the ADA*

Considering Congress drafted the ADA in the late 1980s, it is obvious that very few, if any, legislators or their staffs contemplated that the language in Title III would include the Internet as a public accommodation.[128] Nevertheless, most legal scholars would agree that legislative intent and legislative history contribute significantly to a court's interpretation of the statute.[129] The extent and weight that

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[120] *See id.*

[121] *See* Bristo, *supra* note 116.

[122] *See id.*

[123] *See Parker,* 121 F.3d at 1010–11; Bristo, *supra* note 113.

[124] *See Parker,* 121 F.3d at 1021 (Merrit, J., dissenting); *Carparts,* 37 F.3d at 19; Bristo, *supra* note 116.

[125] *See* Bristo, *supra* note 113; DOJ Letter, *supra* note 95.

[126] *See* 467 U.S. 837, 842–43 (1984).

[127] 29 U.S.C. § 794d (1998); *see* DOJ Letter, *supra* note 95; Bristo, *supra* note 113.

[128] 42 U.S.C. § 12181 (1990); The World Wide Web was created in 1991. *See PBS Life on the Internet, at* http://www.pbs.org/internet/timeline (last visited Mar. 17, 2002).

[129] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 743 (2d ed. 1995); Ryan P. Healy, *Mitigating Measures and the Definition of Disability Under the Americans with Disabilities*

courts should give legislative histories, however, is an academic debate that is still unresolved by the Supreme Court.[130] The First Circuit in *Carparts* utilized the legislative intent and history of the ADA to justify their broad interpretation of the public accommodation clause.[131] The Sixth Circuit in *Parker*, however, chose not to evaluate the legislative history of Title III of the ADA.[132] Instead, the court held that the plain meaning of the statute is clear through the use of the *noscitur a sociis* doctrine and therefore no assessment of the legislative history was warranted.[133] Thus, not only is there a debate between the use of legislative histories in statutory interpretation, but there is also a debate concerning the true legislative intent of the ADA.[134] An examination of this subject reveals that legislative history is very relevant to statutory interpretation, and more specifically, that a broad reading of the legislative history of the ADA supports the theory that the Internet is a public accommodation and subject to Title III of the ADA.[135]

1. Legislative History as a Tool of Statutory Interpretation

The legislative history of a statute is documented through the evolution of a bill as it passes through Congress.[136] Some of the materials that make up a legislative history are floor debate, prepared statements by interests groups and members of Congress upon submission of a bill on the floor or in committee hearings, committee reports, transcripts of committee hearings, and recorded votes.[137] Courts, however, attribute varying levels of significance to different legislative history materials.[138] Most courts recognize committee reports as authoritative legislative history and give them the greatest weight as representing the intent of Congress.[139] The rationale of the courts is that legislation is mainly drafted in congressional commit-

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Act of 1990—A Case of Judicial Myopia? Sutton v. United Air Lines, *119 S.Ct. 2139* (1999), 35 LAND & WATER L. REV. 211, 227 (2000).

[130] *See* ESKRIDGE & FRICKEY, *supra* note 129, at 733.

[131] *See* 37 F.3d at 19-20.

[132] *See* 121 F.3d at 1014 n.10.

[133] *See id.* Note, however, that Justice Meritt in his dissent argues that the majority ignores the legislative intent of the ADA. *See id.* at 1021 (Meritt, J., dissenting).

[134] *See Parker*, 121 F.3d at 1014 n.10; *Carparts*, 37 F.3d at 19–20; ESKRIDGE & FRICKEY, *supra* note 129, at 733.

[135] 42 U.S.C. § 12181 (1990); *see Carparts*, 37 F.3d at 19–20; ESKRIDGE & FRICKEY, *supra* note 129, at 733.

[136] *See* ESKRIDGE & FRICKEY, *supra* note 129, at 733.

[137] *See id;* OTTO HETZEL, LEGISLATIVE LAW AND PROCESS 202 (1980).

[138] *See* ESKRIDGE & FRICKEY, *supra* note 129, at 733.

[139] *See id.* at 743.

tees, and therefore the committee members and their staffs are the people most able to articulate the purpose of a bill.[140] Courts also give lesser weight to statements made in committee hearings and floor debates.[141] The courts usually give credence only to individual members of Congress when he or she is a bill's main sponsor; assuming that places them in a better position to understand and represent the purpose and intent of the legislation, as opposed to another member of Congress who is only one voice out of 535.[142]

Although most courts find legislative history useful in ascertaining the purpose and congressional intent of statutes, the recent movement among jurists, led by Justice Scalia, challenges the traditional reliance on legislative history and relies instead on a textualist philosophy.[143] Like the court in *Parker,* strict textualists argue that one needs only to examine the plain meaning of the statute.[144] Textualists also warn of the interpretative dangers of legislative history due to growing influence of congressional staffs and lobbyists involved in the actual drafting of the statutes.[145]

Justice Breyer, one of the leading jurists opposing the textualist movement, and many other legal scholars believe that legislative histories are very useful in interpreting statutes that contain ambiguous language.[146] One advocate of the use of legislative histories, District of Columbia Circuit Judge Patricia Wald, appropriately points out that one obvious reason Congress makes legislative histories available through committee reports is so that judges can use them when in-

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[140] *See id.* Experts in this field report that over a forty-year period, over 60% of the Supreme Court's citations to legislative history were references to committee reports. ESKRIDGE & FRICKEY, *supra* note 129, at 743; Jorge L. Carro & Andrew Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis,* 22 JURIMETERICS J. 294, 304 (1982).

[141] *See* ESKRIDGE & FRICKEY, *supra* note 129, at 773.

[142] *See id.*

[143] *See* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., dissenting); Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation,* 8 ADMIN. L.J. AM. U. 755, 758 (1995).

[144] *See* 121 F.3d at 1010–11; Gellhorn, *supra* note 143, at 758.

[145] *See* ESKRIDGE & FRICKEY, *supra* note 129, at 743–44; Gellhorn, *supra* note 143, at 758. In a recent opinion, Justice Scalia quoted another judge who described the use of legislative history as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[146] *See* Gellhorn, *supra* note 143, at 758–59.

terpreting the respective statutes.[147] Notable jurists such as the late Judge Learned Hand and Judge Richard Posner support the principle of "imaginative reconstruction" in which judges act as "congressional agents" when confronted with an ambiguous statute in order to "think his way as best he can into the mind of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[148]

The language and explicit intent of Title III of the ADA as applied to the Internet is ambiguous on at least two levels: the unclear definition of "public accommodation" and the fact that the Internet was not a readily available social and economic outlet in 1990.[149] Without completely ignoring the criticism of the textualist approach, a broad reading of the legislative history of Title III as supported by Justice Breyer and Judge Posner's "imaginative reconstruction" will help the courts better ascertain whether the 101st Congress would have defined the Internet as a public accommodation.[150]

2. Legislative History of Title III

The first sentence of the voluminous legislative history of the ADA, beginning with the purpose of the statute "to establish a *clear* and *comprehensive* prohibition of discrimination on the basis of disability," is neither clear nor comprehensive as the courts have struggled with the statute's ambiguities and cut back on its scope.[151] The "[p]urpose" of the ADA sets the tone for the intent of Congress throughout the entire statute.[152] Section 2(b)(1) calls for a "*national mandate* for the *elimination* of discrimination against individuals with disabilities"; (2) to provide *clear, strong, consistent* . . . standards addressing discrimination . . . . (4) to invoke the *sweep of congressional authority* . . . and to *regulate commerce,* in order to address the major areas of discrimination."[153] Congress articulated its commitment to ending discrimination with powerful words to send a message that dis-

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[147] *See* Edward Heath, *How Federal Judges Use Legislative History,* 25 J. LEGIS. 95, 102 (1999); Patricia M. Wald, *The Sizzling Sleep: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court,* 39 AM. U. L. REV. 277, 286 (1990).

[148] *See* Heath, *supra* note 147, at 98; Richard Posner, *Statutory Interpretation—in the Classroom and in the Courtroom,* 50 U. CHI. L. REV. 800, 817–22 (1983).

[149] 42 U.S.C. § 12181(7) (1990); *see PBS Life on the Internet, supra* note 128.

[150] 42 U.S.C. § 12181; *see* Heath, *supra* note 147, at 98; Posner, *supra* note 148, at 817.

[151] 42 U.S.C. § 12101 (emphasis added).

[152] *Id.*

[153] *Id.* § 12101(b)(1)–(4) (emphasis added).

crimination in America would no longer be tolerated.[154] The First Circuit reiterated this message in *Carparts*.[155] The court quoted the above general purpose and more specifically the explicit purpose of Title III which is "to bring individuals with disabilities into the economic and social mainstream of American life."[156] Since mainstream America uses the Internet for both economic and recreational purposes, the above goal of Title III cannot be met without ensuring access to the Internet for all Americans.[157]

In approaching the interpretation of the committee reports in a broad and expansive manner as advocated by Justice Breyer and his followers, there is substantial evidence that the Senate Committee on Labor and Human Resources intended for Title III of the ADA to be expansive enough to apply to services such as the Internet.[158] The Committee heard much testimony from various interest groups, people with disabilities, members of Congress, and groups associated with businesses.[159] The Senate Committee was well informed of the plight of disabled Americans, including the particular challenges faced by the visually disabled.[160] The Committee Report provided detailed explanations of the various provisions of the ADA and noted that the section describing public accommodations only lists a "few examples" of entities, and that the Committee "intend[ed]" for the catch-all phrase "other similar" entities to be "construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities."[161]

A critic of this thesis might argue that the word "establishments" refers to "physical entities;" however, proponents would counter that the use of "imaginative reconstruction" would be more appropriate in this case because Congress was not aware that the Internet would become such an integral part of mainstream American society.[162] The

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[154] *Id.*

[155] *See* 37 F.3d 12, 19 (1st Cir. 1994).

[156] *See id.*; LEGISLATIVE HISTORY, *supra* note 115, at 100.

[157] *See* Bick, *supra* note 19, at 207.

[158] *See* LEGISLATIVE HISTORY, *supra* note 115, at 99–116; Bick, *supra* note 19, at 207; Gellhorn, *supra* note 146, at 758–59. On August 2, 1989, the Committee on Labor and Human Resources voted favorably 16–0 on S. 933 which was sponsored by Senator Tom Harkin (D–Iowa). *See* LEGISLATIVE HISTORY, *supra* note 115, at 99–100.

[159] *See* LEGISLATIVE HISTORY, *supra* note 115, at 102.

[160] *See id.* On May 9, 1989, Mr. Joseph Danowsky, an attorney who is blind, spoke before the Committee. *See id.*

[161] *See id.* at 157.

[162] *See id*; Posner, *supra* note 148, at 817.

Committee further elaborated on the "intent of the legislation" only one page later in specifying that it is "discriminatory to subject an individual or class of individuals on the basis of [a] disability . . . to a denial of the opportunity of the class to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of an entity."[163] "Construed liberally," with the use of "imaginative reconstruction," courts can reasonably interpret the intent of Congress to prevent discrimination towards the visually disabled on the Internet, even if one strictly defines the Internet as a means to access "goods, services, privileges, advantages, or accommodations."[164]

Section 302(b)(2)(A)(i) of Title III defines "discrimination" as including the application of eligibility criteria that "tend to screen out . . . any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, and advantages, and accommodations . . . unless such criteria can be shown to be necessary."[165] In explaining what constitutes violations of Title III, the Committee presented a hypothetical in which it would be a violation for a grocery store to create a rule barring blind persons from the store.[166] Ten years after the passage of the ADA, on-line grocery store services are effectively "screening out" a "class of individuals," the visually disabled, by not making their websites accessible to screen reader software. Although e-commerce sites are not creating per se "rules" that prohibit blind people from utilizing their services, they are constructively banning them from their services by not making reasonable modifications to their websites.[167]

The Committee Report further supports such a liberal interpretation in prohibiting the "imposition of criteria that 'tend to' screen out an individual with a disability . . . by imposing policies that diminish such individuals' chances of participation."[168] The same section of Title III expands the definition of "discrimination" by including the "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services . . . because of the absence of auxiliary aids and services, unless the entity can demon-

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[163] *See* LEGISLATIVE HISTORY, *supra* note 115, at 158.

[164] 42 U.S.C. § 12181(7) (1990). *See generally* Bick, *supra* note 19.

[165] *See* LEGISLATIVE HISTORY, *supra* note 115, at 160.

[166] *See id.*

[167] 42 U.S.C. § 12182(b)(2)(ii).

[168] *See* LEGISLATIVE HISTORY, *supra* note 115, at 160.

strate that taking such steps would fundamentally alter the nature of the . . . services being offered or would result in an undue burden."[169]

As explained in the next section of this Note, it is certainly not an undue burden for service-based websites to become accessible to the visually disabled.[170] More significantly, the ambiguous nature of the term "entity" in combination with more specific terms like "auxiliary aids" can be liberally construed to cover access to the Internet for the visually disabled.[171]

One example used by the Committee to describe how entities can provide auxiliary aids is the acquisition or modification of equipment or devices used in museums such as audio tapes and brailled materials.[172] Eleven years later, it is only a small step to equate these types of auxiliary aids with websites that provide services with an option to read the text in Braille or listen to an audio recording.[173] More significantly, the Committee even suggested the possibility of technological advances affecting the disabled community.[174] Using strong language, the Committee expressed its wish "to make it clear that technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities . . . . Such advances may enable covered entities to provide auxiliary aids and services."[175] The above language illustrates that the Committee was aware that technological advances could indeed affect the disabled, and the Committee wanted to encourage entities to adapt to such advances.[176]

As discussed earlier, although remarks by individual members of Congress are not as authoritative as committee reports, they can still signify the intent of the voting bodies.[177] Obviously, no legislators explicitly mentioned ADA applicability to the Internet, but a cursory examination of the floor debates of the statute reveals a belief in the ADA's expansive scope.[178] It is also important to note that members of the 101st Congress heard testimony by witnesses describing why dis-

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[169] *See id.* at 161.

[170] *See* Bick, *supra* note 19, at 217; Chong, *supra* note 12; *see also infra* Part III.

[171] *See* LEGISLATIVE HISTORY, *supra* note 115, at 161.

[172] *See id.* at 162.

[173] *See* Chong, *supra* note 12.

[174] *See* LEGISLATIVE HISTORY, *supra* note 115, at 162–63.

[175] *See id.*

[176] *See id.*

[177] *See* ESKRIDGE & FRICKEY, *supra* note 129, at 773.

[178] *See* LEGISLATIVE HISTORY, *supra* note 115, at 619–30; Bick, *supra* note 19, at 216.

abled individuals do not frequent places of public accommodation.[179] One commentator noted that witnesses identified the major areas of discrimination faced by disabled people—not all concerning physical access—and thus Congress was aware of discrimination beyond merely the lack of access to physical places of public accommodation.[180]

In a speech on the House floor, Congresswoman Jolene Unsoeld railed against society depriving the disabled of "access to [the] marketplace as a waste of human resources."[181] She focused on the visually disabled's spending power that would contribute to the Internet's marketplace.[182] More specifically, Congressman Edward Markey defined public accommodation as "businesses open to the public."[183] He viewed the passage of the ADA as "an extraordinary opportunity to bring [the forty-three million Americans with disabilities] into the mainstream of American life."[184] A portion of those forty-three million disabled Americans include the visually disabled, and eleven years after the passage of the ADA, most people would agree that the Internet is incorporated into the mainstream of American life.[185] Thus "businesses open to the public" on the Internet must be accessible to the visually disabled.

Senator Tom Harkin expressed another sign of the future flexibility of the ADA when discussing the role of the National Council on Disability (NCD) in shaping the effectiveness of the ADA.[186] Senator Harkin articulated that the NCD has a particular "expertise" that should be shared with the Attorney General so that the "covered entities are assisted in understanding their roles and responsibilities under the law."[187] Following Senator Harkin's remarks, Senator Daniel Inouye concurred and stated that the NCD has "a unique perspective to bring to the debate and we want to make clear that we fully intend that the Attorney General consult them in this capacity."[188] As men-

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[179] *See* LEGISLATIVE HISTORY, *supra* note 115, at 102–03.

[180] *See* Jill L. Schultz, *The Impact of Title III of the Americans with Disabilities Act on Employer-Provided Insurance Plans: Is the Insurance Company Subject to Liability?*, 56 WASH. & LEE L. REV. 343, 372 (1999).

[181] *See* LEGISLATIVE HISTORY, *supra* note 115, at 623.

[182] *See* Prager, *supra* note 17.

[183] *See* LEGISLATIVE HISTORY , *supra* note 115, at 624.

[184] *See id.*

[185] *See* Bick, *supra* note 19, at 207.

[186] *See* LEGISLATIVE HISTORY, *supra* note 115, at 630.

[187] *See id.*

[188] *See id.*

tioned previously, the Chair of the NCD in February 2000 testified before the House Judiciary Committee advocating that the ADA was indeed applicable to the Internet.[189]

On February 9, 2000, the House Subcommittee on the Constitution of the Committee on the Judiciary added to the post-legislative history of the ADA by conducting a hearing entitled, "Applicability of the Americans with Disabilities Act To Private Internet Sites."[190] Members of two panels spoke at length regarding both the technical aspects of web accessibility to the disabled and the legal and policy questions concerning ADA applicability to the Internet.[191] The chairperson of the subcommittee invited speakers representing both sides of the issue and unfortunately no consensus formed.[192] In any event, even if the applicability of the ADA to the Internet was not on the minds of the legislators who drafted the statute in 1990, it is undoubtedly on their minds now.

III. Case Study: *National Federation for the Blind v. America Online, Inc.*

A. *The Lawsuit*

One of the first major tests of the ADA's applicability to the Internet began in November, 1999 when the National Federation for the Blind (NFB) filed suit in Boston against America Online, Inc. (AOL), the nation's largest Internet provider.[193] The NFB is a nonprofit organization devoted to protecting the rights of the visually disabled and has over 50,000 members nationwide.[194] The Title III issues raised in this lawsuit, such as communication barrier removal, the auxiliary aids and services provision, and the "readily achievable" and "undue burden" language, will no doubt apply to future lawsuits involving Title III applicability to the Internet.[195] This lawsuit represented the first battle of two Goliaths—the leading national organiza-

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[189] *See* Bristo, *supra* note 113.

[190] *See generally Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites, 2000: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong (2000).

[191] *See id.*

[192] *See id.*

[193] *See* Bick, *supra* note 19, at 217; Blanck & Sandler, *supra* note 108, at 855.

[194] *Law Suit Filed Against AOL by the National Federation for the Blind, at* http://www.libertyresources.org/news/news_17.html (Nov. 11, 1999) [hereinafter NFB Lawsuit].

[195] 42 U.S.C. § 12182(b)(2) (1990).

tion of blind persons versus an e-commerce company that describes itself as "the world's leader in interactive services."[196] Although the parties have settled upon the release of the more accessible AOL version 6.0, the settlement marks only the beginning of the inevitable litigation between the visually disabled and private Internet sites over the scope of the ADA.[197]

In the class action lawsuit,[198] the NFB declared that AOL violated the ADA because its services were inaccessible to the blind and therefore did not comply with the accessibility requirements of Title III.[199] The plaintiffs claimed that AOL "designed its service so that it is incompatible with screen access software programs for the blind."[200] Specifically, the NFB charged AOL with violating the ADA's communications barriers removal provision, the auxiliary aids and services provision, the reasonable modifications provisions, and the full and equal enjoyment and participation provision.[201] The Plaintiffs brought the lawsuit for injunctive and declaratory relief, seeking both to enjoin AOL from continued violations and an order requiring AOL to redesign its services so blind people can have independent access through screen access software.[202]

According to the NFB, because of AOL's insistence that users run proprietary AOL software to access its services, visually disabled people are effectively "shut out" from AOL because the AOL proprietary software is incompatible with screen reading technology.[203] Screen reading software has three main components.[204] First, the software provides keyboard equivalents for many commands that are normally performed with a mouse.[205] Second, most screen reader programs are compatible with and rely on generic Windows controls like "file, edit,

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[196] *See* Complaint, *supra* note 18.

[197] *Online Accessibility Agreement*, *supra* note 20.

[198] *See* Complaint, *supra* note 18. The suit was filed in Federal District Court. *See* NFB Lawsuit, *supra* note 194. The plaintiffs included the National Federation of the Blind, Inc., the National Federation of the Blind of Massachusetts, Inc., and nine blind citizens of Massachusetts who all faced some level of inaccessibility to America Online. *See id.*

[199] *See id.*; Blanck & Sandler, *supra* note 108, at 855.

[200] *See* Complaint, *supra* note 18; Pierce, *supra* note 18.

[201] 42 U.S.C. § 12182(a); § 12182(b)(2)(A)(ii-iii) (1990); *see* Complaint, *supra* note 18.

[202] *See* Complaint, *supra* note 18; Pierce, *supra* note 18.

[203] *See* Richard Ring, *America Online: Stonewalling Responsibility and Ignoring Access for the Blind*, *at* http://www.nfb.org/bm/bm00/bm0001/bm000107.htm (last visited Mar. 17, 2002). The lawsuit was filed before AOL 6.0 was released. *See Welcome to AOL Anywhere*, *at* http://www.aol.com (last visited Mar. 17, 2002).

[204] *See* Ring, *supra* note 203.

[205] *See id.*

view insert, etc."[206] Third, and very much relevant to private Internet sites, screen reader technology will display a textual message in place of a picture on the screen.[207] For example, many web sites today make use of elaborate visual graphics—although the blind obviously cannot see such a display, screen reader technology will offer the reader a textual explanation if one is provided by the website.[208]

The pre-6.0 AOL proprietary software did not meet many of the requirements necessary to effectively run a screen reader program.[209] The most formidable obstacle to the visually disabled is the sign-up and installation process.[210] Screen reader technologies cannot detect the location of the button that tells AOL whether one is a new or existing user and is not compatible with the online forms required to enter in personal information.[211] In addition, the AOL welcome screen presents a complex and confusing layout to the blind due to unlabeled visual icons and is often preceded by on-screen advertisements in an unpredictable fashion.[212] Two other major features of the AOL software, the "Channels" service and "Headline News," are also inaccessible to the visually disabled.[213]

B. *Readily Achievable and Not an Undue Burden*

The first two counts of the complaint allege that AOL violated the ADA by not eliminating major obstacles in accessibility to the visually disabled.[214] These counts focus on Section 302 of the ADA that prohibit discrimination by public accommodations.[215] Count I deals with the Communication Barriers Removal Mandate, addressing the illegality of AOL's failure to remove any communication barriers "where such removal is readily achievable."[216] The ADA defines readily

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[206] *See id.*

[207] *See* Chong, *supra* note 12.

[208] *See id.*

[209] *See generally* Ring, *supra* note 203. In fairness to AOL, while the majority of AOL services are largely inaccessible to the blind, AOL's electronic mail service is "minimally usable." *See id.*

[210] *See id.*

[211] *See id.*

[212] *See id.*

[213] *See* Ring, *supra* note 203. Channels provides AOL users with a convenient way to browse through numerous subjects such as news, weather, sports, and shopping, etc. *See id.* Headline News presents the AOL user with current events headlines in an animated news-ticker-like display. *See id.*

[214] *See* Complaint, *supra* note 18.

[215] 42 U.S.C. § 12182 (1990).

[216] *Id.* § 12182(2)(A)(iv); *see* Complaint, *supra* note 18.

achievable as "easily accomplishable and able to be carried out without much difficulty or expense."[217] Some factors to considered when making this evaluation are "the nature and cost of the action; the overall financial resources of the facility . . . involved in the action; the number of persons employed at such facility; the effect on expenses and resources . . . and the overall size of the business of a covered entity."[218] In the fiscal year 1999, AOL's total assets were in excess of 5.3 billion dollars, and the service had approximately 17.6 million customers worldwide.[219] In 2000, AOL's net income growth was an astounding 51.2%, and the company employed approximately fifteen thousand people.[220] Given these figures, it is apparent that AOL has the resources to undertake the removal of accessibility barriers to the visually disabled.[221]

The Department of Justice advises that what is readily achievable will be determined on a case-by-case basis and provides several examples of readily achievable modifications to existing facilities.[222] Some of these examples include "making curb cuts at sidewalks, rearranging display racks . . . and adding raised letters or Braille to elevator control buttons."[223] The NFB asked AOL to input comparatively similar changes that are readily achievable.[224] AOL only needs to "rearrange" their information which would act as "Braille" for the blind.[225] With the resources of AOL, this type of barrier removal is certainly "easily accomplishable."[226]

The NFB, in Count II, states that AOL's failure to redesign its Internet service to permit the blind to use it through screen access programs violates the auxiliary aids and services provisions of Title III because it constitutes a failure to take steps to ensure that individuals who are blind are not denied access to the service.[227] The provision of the statute finds such failure to be discriminatory unless taking such steps would "fundamentally alter the nature of the service or would

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[217] 42 U.S.C. § 12181(9).

[218] *Id.* § 12181(9)(A)-(D).

[219] *See* Complaint, *supra* note 18.

[220] *See America Online, Inc., Capsule, at* http://www.hoovers.com/co/ (last visited Mar. 17, 2002).

[221] *See id.*

[222] *See* U.S. DEPARTMENT OF JUSTICE, TITLE III HIGHLIGHTS, *at* http://www.usdoj.gov/crt/ada/t3hilght.htm (2002) [hereinafter DOJ, TITLE III HIGHLIGHTS].

[223] *See id.*

[224] *See* Complaint, *supra* note 18.

[225] *See* DOJ, TITLE III HIGHLIGHTS, *supra* note 222.

[226] *See America Online, Inc., Capsule, supra* note 220.

[227] 42 U.S.C. § 12182(b)(2)(A)(iii) (1990); *see* Complaint, *supra* note 18.

result in an undue burden."[228] Like the readily achievable standard, an "undue burden" is defined as a "significant difficulty or expense."[229] Again, it is clear that expense will not be a problem for AOL, and the technology required to implement a more accessible version is not complex.[230]

As mentioned previously, screen access software assists the visually disabled in utilizing the Internet.[231] This technology translates information on the screen into synthesized speech, or more commonly, Braille.[232] The screen access software normally moves from Internet hypertext link to link when a user is logged onto a web page.[233] A blind person using the software can read the text from the hypertext links through Braille in order to navigate through the Internet.[234] The screen access program also converts ASCII[235] text from the website screen into Braille or voice so the reader can receive the information.[236] Instead of using a mouse, visually disabled people often use the tab key to move around the screen.[237]

Modifying a private website or Internet service like AOL in order to make it more accessible to the visually disabled is a simple task and thus not an undue burden.[238] For example, an analysis of Harvard University's web system found that three-quarters of their sites are either already accessible to screen readers or can be made accessible with relatively minor modifications.[239] When creating a more accessible website, it is essential for the designer to input as much textual information as possible.[240] Screen access software cannot interpret pictures—it can only convert text into Braille.[241] It is not necessary for web designers to compromise the visual creativity of their websites when creating a web page; however, it is important to describe graph-

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[228] 42 U.S.C. § 12182(b)(2)(A)(iii).

[229] *See* DOJ, TITLE III HIGHLIGHTS, *supra* note 222.

[230] *See* Chong, *supra* note 12; *America Online, Inc., Capsule, supra* note 220.

[231] *See* Chong, *supra* note 12.

[232] *See id.*

[233] *See id.*

[234] *See id.*

[235] *See* Encyclopedia Britannica, *at* http://www.britannica.com/ (2001). This acronym stands for American Standard Code for Information Interchange. *See id.*

[236] *See* Chong, *supra* note 12.

[237] *See id.*

[238] 42 U.S.C. § 12182(2)(A)(iii) (1990); *see Fact Sheets for "Web Content Accessibility Guidelines 1.0," available at* http://www.w3.org/1999/05/WCAG-REC-fact (May 5, 1999).

[239] Alvin Powell, *Making Web Access a Reality,* HARV. U. GAZETTE, June 14, 2001, at 18.

[240] *See* Chong, *supra* note 12.

[241] *See id.*

ics with textual icons to inform the reader about what is on the screen.[242]

There are many ways in which web designers can make their websites more accessible to the blind.[243] First, as mentioned before, websites should utilize ASCII text wherever possible—in hypertext links, document content, menus, and labeling graphics.[244] Although ASCII text is not always the most aesthetically pleasing visual display, it is necessary when using screen access software.[245] Second, navigating through the many links on a complex web page is easier for visually disabled people if the designer provides contextual ASCII hypertext labels.[246] Oftentimes hyperlinks will be labeled "click here" as opposed to a more meaningful label that provides the content of the link and would therefore aid the visually impaired.[247] Third, web designers should always label the visual images on the website.[248] Instead of labeling graphics with arbitrary filenames or merely the word "picture" or "graphic," the web designer should provide an ASCII textual icon describing the picture and use a more descriptive word in labeling the filename of the graphic.[249] The webmaster for Harvard University, Elaine Benfatto, remarked that "It's appalling how many people don't name their images . . . all the careful planning they put into a navigation screen is meaningless to a visually impaired person using a screen reader."[250]

Finally, web designers should develop more simple web-based forms.[251] For example, in their complaint, the NFB cites to the sign-up form as one of AOL's many ADA violations.[252] Specifically, the NFB points out that the method AOL uses to display the text from its sign-up screen does not provide screen access programs with sufficient information to tell the blind user which piece of data is being requested in each blank field.[253] Web designers also either need to scale back or

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[242] *See id.*

[243] *See id.* Although I explicitly mention five methods in this Note, this list is certainly not exclusive. *See id.*

[244] *See* Chong, *supra* note 12.

[245] *See id.*

[246] *See id.*

[247] *See id.*

[248] *See id.*

[249] *See* Chong, *supra* note 12.

[250] *See* Powell, *supra* note 239.

[251] *See* Chong, *supra* note 12.

[252] *See* Complaint, *supra* note 18.

[253] *See id.*

eliminate "splash screens."[254] When a splash screen appears, the focus of the screen access software is pulled back to the top of the web page, which can be extremely frustrating when reading a long document.[255]

Operators of public accommodations must provide auxiliary aids and services unless such operators can prove that such modifications would "fundamentally alter" the nature of such goods and services or result in an "undue burden."[256] As one commentator noted, requiring Internet services like AOL to be compatible with screen reader technology is similar to requiring a bookstore to offer ramps and bathrooms for the disabled, efforts that are not considered undue burdens.[257] Organizations like the NFB are not asking AOL to provide a Braille version of their services; rather, they are only asking for access to such content.[258] However, there is evidence that suggests that Title III requires such existing public accommodations to provide Brailled materials.[259] In 1994, BAR/BRI, a bar review course company, settled a lawsuit with the DOJ who alleged that BAR/BRI violated Title III by failing to provide Braille materials to a blind student.[260] If providing Brailled information does not constitute an undue burden, then certainly the request of better access to information does not breach the Title III exception.[261]

CONCLUSION

The statutory language and federal agency guidelines combined with the persuasive legislative history of Title III compels a broad reading of the public accommodation provisions and therefore the applicability of the ADA to the Internet. Although courts have recently begun to scale back on the power of the ADA, the relative novelty of the Internet has presented a new challenge.[262] A case directly

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[254] *See* Chong, *supra* note 12. A "splash screen" is an "initial website page used to capture the user's attention for a short time as a promotion or lead-in to the site home page or to tell the user what kind of browser and other software they need to view the site. *See Whatis.com: IT-Specific Encyclopedia, at* http://whatis.techtarget.com/ (2002).

[255] *See* Chong, *supra* note 12.

[256] *See* Paul V. Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1185 (1995).

[257] *See* Bick, *supra* note 19, at 217.

[258] *See id.*

[259] *See* Sullivan, *supra* note 256, at 1186 n.95.

[260] *See id.* at 1186.

[261] *See* Bick, *supra* note 19, at 217; Sullivan, *supra* note 256, at 1186.

[262] *See generally* Toyota Motor Mfg. v. Williams, 534 U.S. 134 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

dealing with the ADA and the Internet has yet to reach the appellate courts; however, future courts will certainly pay heed to Judge Posner's dicta describing public accommodations occupying electronic space.[263]

In an era in which it is more convenient for a blind person to participate in activities like shopping via the Internet than in a more traditional manner, it is unfortunate that commercial Internet sites resist complying with ADA public accommodation standards. As the Internet becomes a more integral part of mainstream American life, the courts should recognize that the Internet is as much a public accommodation as a shopping mall and act appropriately in ordering the removal of communication barriers to the visually disabled.[264] The DOJ's 1996 advisory letter and the Congressional subcommittee hearings on this issue were the first steps in the government's recognition of the broadening frontier of public accommodations.[265] The NFB/AOL litigation was a manifestation of this public debate and their settlement is a strong sign that commercial Internet companies will eventually concede to the public interest of the ADA.[266] The battle for accessibility to the Internet is far from over, but the disabled's fight to eliminate another piece of the "shameful wall of exclusion" is becoming a reality.[267]

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[263] *See* Doe v.Mutual of Omaha, 179 F.3d 557, 559 (7th Cir. 1999).

[264] 42 U.S.C. § 12181 (1990). *See generally,* Bick, *supra* note 19.

[265] *See* DOJ Letter, *supra* note 95.

[266] *See* Complaint, *supra* note 18; *Online Accessibility Agreement, supra* note 20.

[267] *See* Stein, *supra* note 1, at 246.