

The Americans with Disabilities Act: Application to the Internet

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Summary

The Americans with Disabilities Act (ADA) provides broad nondiscrimination protection in employment, public services, public accommodations, and services operated by private entities, transportation, and telecommunications for individuals with disabilities. As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

However, the ADA, enacted on July 26, 1990, prior to widespread use of the Internet, does not specifically cover the Internet, and the issue of coverage has not been definitively resolved. The Supreme Court has not addressed this issue, although there are some lower court decisions. The cases that directly discuss the ADA's application to the Internet vary in their conclusions about coverage. On July 23, 2010, the Department of Justice issued an advanced notice of proposed rulemaking which would require Internet accessibility.

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Introduction

The Americans with Disabilities Act (ADA)[1] has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. It provides broad nondiscrimination protection in employment, public services, public accommodations, and services operated by private entities, transportation, and telecommunications[2] for individuals with disabilities. As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

However, the ADA, enacted on July 26, 1990, prior to widespread use of the Internet, does not specifically cover the Internet, and the issue of coverage has not been definitively resolved.[3] The Supreme Court has not addressed this issue, although there are some lower court decisions. Similarly, congressional action has been limited. The ADA was amended in 2008 to respond to a series of Supreme Court decisions that had interpreted the definition of disability narrowly but did not address the issue of Internet coverage.[4] On April 22, 2010, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee held a hearing on the ADA in the digital age.[5] On July 23, 2010, the Department of Justice issued an advanced notice of proposed rulemaking which would require Internet accessibility.[6]

On October 8, 2010, President Obama signed the Equal Access to 21st Century Communications Act, P.L. 111-260. Although this law does not amend the ADA, it requires, in part, certain access to Internet-based services and equipment for individuals with disabilities.

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[1] 42 U.S.C. §12101 *et seq.* For a more detailed discussion of the ADA see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

[2] Title IV of the ADA amends Title II of the Communications Act of 1934 to ensure that individuals with hearing impairments are able to use telephones. 47 U.S.C. §225. One commentator has argued that Congress should use Title IV of the ADA as a model for adding an amendment specifically applying the ADA to the Internet. See Katherine Rengel, "The Americans with Disabilities Act and Internet Accessibility for the Blind," 25 John Marshall HJ. Computer & Info. L. 543 (2008).

[3] For a discussion of this issue see National Council on Disability (NCD), "The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination," http://www.ncd.gov/newsroom/publications/2006/pdf/discrimination.pdf. See also National Council on Disability (NCD), "National Disability Policy: A Progress Report" March 31, 2009, http://www.ncd.gov/newsroom/publications/2009/pdf/ProgressReport.pdf. It should be noted that federal government websites are required to be accessible under a separate statute, Section 508 of the Rehabilitation Act, 29 U.S.C. §794(d), as amended by P.L. 105-220. Section 508 requires that the electronic and information technology used by federal agencies be accessible to individuals with disabilities, including employees and members of the public. Generally, Section 508 requires each federal department or agency and the U.S. Postal Service to ensure that individuals with disabilities who are federal employees have access to and use of electronic and information technology that is comparable to that of individuals who do not have disabilities. For more detailed information see http://www.section508.gov.

[4] The ADA Amendments Act, P.L. 110-325. For a more detailed discussion of P.L. 110-325, see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Nancy Lee Jones.

[5] Achieving the Promise of the Americans with Disabilities Act in the Digital Age – Current Issues, Challenges, and Opportunities: Hearing Before the H. Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong., 2d Sess. (2010), http://judiciary.house.gov/hearings/hear_100422_1.html. Ten years earlier, hearings had also been held on the applicability of the ADA to private Internet sites, Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the H. Subcommittee on the Constitution of the H. Comm. on the Judiciary, 106th Cong. (2000).

[6] http://www.ada.gov/anprm2010/web%20anprm_2010.htm.

The American Recovery and Reinvestment Act (ARRA)[7] did not specifically mention Internet accessibility, but did include the Health Information Technology for Economic and Clinical Health (HITECH) Act as part of P.L. 111-5,[8] and also directed the Federal Communications Commission (FCC) to develop a national broadband plan. The FCC released its plan on March 16, 2010.[9] One of the recommendations in this plan stated:

> The federal government should ensure the accessibility of digital content. The DOJ should amend its regulations to clarify the obligations of commercial establishments under Title III of the Americans with Disabilities Act with respect to commercial websites. The FCC should open a proceeding on the accessibility of video programming distributed over the Internet, the devices used to display such programming and related user interfaces, video programming guides and menus. Congress should consider clarifying the FCC's authority to adopt video description rules.[10]

The ADA contains various requirements depending on whether the discrimination prohibited is in the employment context (Title I), is related to the activities of state or local governments (Title II), or concerns public accommodations (Title III). Although most of the judicial decisions and discussion of ADA applicability to the Internet have arisen regarding public accommodations, it is helpful to briefly examine employment and state and local government requirements.

Employment

Statutory Language

Title I of the ADA, as amended by the ADA Amendments Act of 2008, provides that no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; or other terms, conditions, and privileges of employment.[11] The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees.[12] If the issue raised under the ADA is employment related, and the threshold issues of meeting the definition of an individual with a disability and involving an employer employing more than 15 individuals are met, the next step is to determine whether the individual is a

[7] P.L. 111-5.

[8] The HITECH Act is intended to promote the widespread adoption of health information technology (HIT) to support the electronic sharing of clinical data among hospitals, physicians, and other health care stakeholders. For a discussion of HITECH see CRS Report R40161, *The Health Information Technology for Economic and Clinical Health (HITECH) Act*, by C. Stephen Redhead.

[9] FCC, "Connecting America: The National Broadband Plan," http://www.broadband.gov/download-plan/.

[10] *Id.* at p. 182.

[11] 42 U.S.C. §12112(a), as amended by P.L. 110-325, §5. The ADA Amendments Act strikes the prohibition of discrimination against a qualified individual with a disability because of the disability of such individual and substitutes the prohibition of discrimination against a qualified individual "on the basis of disability." The Senate Managers' Statement noted that this change "ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" 153 CONG. REC. S8347 (Sept. 11, 2008)(Statement of Managers to Accompany S. 3406, the Americans with Disabilities Act Amendments Act of 2008).

[12] 42 U.S.C. §12111(5).

qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.

Title I defines a "qualified individual with a disability." Such an individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires."[13] The ADA requires the provision of reasonable accommodation unless the accommodation would pose an undue hardship on the operation of the business.[14]

"Reasonable accommodation" is defined in the ADA as including making existing facilities readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment of examinations or training materials or policies, provision of qualified readers or interpreters, or other similar accommodations.[15] "Undue hardship" is defined as "an action requiring significant difficulty or expense."[16] Factors to be considered in determining whether an action would create an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility, the overall financial resources of the covered entity, and the type of operation or operations of the covered entity.

Judicial and Regulatory Interpretations

The ADA's statutory language specifically prohibits discrimination in "other terms, conditions, and privileges of employment."[17] The National Council on Disability (NCD)[18] has observed that "[n]o case or serious scholarly or legal argument has ever been found to support the proposition that because a job's functions involve electronic communication, employers are relieved of the obligation to consider reasonable accommodations or other measures aimed at facilitating equal access to the tools of the trade."[19] However, no judicial cases were found that specifically mandated website accessibility in the employment context. Despite this dearth of case law, it could be argued that Equal Employment Opportunity Commission (EEOC) policies on telework,[20] which is generally performed using computers, indicate that employment discrimination can encompass the lack of access to the Internet.[21]

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[13] 42 U.S.C. §1211(8). The EEOC has stated that a function may be essential because (1) the position exists to perform the duty, (2) there are a limited number of employees available who could perform the function, or (3) the function is highly specialized. 29 C.F.R. §1630(n)(2).

[14] See 45 C.F.R. Part 84.

[15] 42 U.S.C. § 12111(9).

[16] 42 U.S.C. §12111(10).

[17] 42 U.S.C. §12112(a), as amended by P.L. 110-325, §5.

[18] NCD is an independent federal agency that provides advice to the President, Congress, and executive branch agencies to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities. See http://www.ncd.gov.

[19] National Council on Disability, "When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web," (July 10, 2003) http://www.ncd.gov/newsroom/publications/2003/adainternet.htm.

[20] EEOC, Fact Sheet: Work at Home: Telework as a Reasonable Accommodation (February 3, 2003), http://www.eeoc.gov/facts/telework.html.

[21] In addition, the National Federation of the Blind of Arkansas, the state of Arkansas, and the software provider SAP Public Services, Inc., entered into a settlement agreement in 2008 to resolve a suit by blind state employees who could (continued...)

State and Local Governments

Statutory Language

Title II of the ADA provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.[22] "Public entity" is defined as state and local governments, any department or other instrumentality of a state or local government and certain transportation authorities. The ADA does not apply to the executive branch of the federal government; the executive branch and the U.S. Postal Service are covered by Section 504 of the Rehabilitation Act of 1973.[23]

The Department of Justice (DOJ) regulations for Title II contain a specific section on program accessibility. Each service, program, or activity conducted by a public entity, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. However, a public entity is not required to make each of its existing facilities accessible.[24] Program accessibility is limited in certain situations involving historic preservation. In addition, in meeting the program accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens.[25]

Judicial Interpretations

Like Title I, the case law and regulatory interpretations regarding the application of the ADA to the Internet are sparse under Title II.[26] However, one district court has examined accessibility issues regarding the website of a public transit system. In *Martin v. Metropolitan Atlanta Rapid Transit Authority,*[27] the court addressed a number of accessibility issues involving the Atlanta transit authority, including information accessibility. Noting that the information was available in several forms, including a website, the court found that the information was not equally accessible to individuals with disabilities even though some information was available by telephone. The court stated the following:

> MARTA representatives also concede that the system's web page is not formatted in such a way that it can be read by persons who are blind but who are capable of using text reader computer software for the visually impaired.... However, it now appears that MARTA is attempting to correct this problem. Until these deficiencies are corrected, MARTA is violating the ADA mandate of "making adequate communications capacity available,

(...continued)

not access the Arkansas administrative statewide information system. See http://www.NFB.org.

[22] 42 U.S.C. §§12131-12133.

[23] 29 U.S.C. §794.

[24] 28 C.F.R. §35.150.

[25] *Id.*

[26] For a discussion of how Titles II and III of the ADA might apply to internet access by students see Judith Stilz Ogden and Lawrence Menter, "Inaccessible School Webpages: Are Remedies Available?" 38 J. L. & Educ. 393 (2009).

[27] 225 F.Supp.2d 1362 (N.D. Ga. 2002).

through accessible formats and technology, to enable users to obtain information and schedule service."[28]

Department of Justice and Department of Education Interpretations Regarding the Internet

On July 23, 2010, the Department of Justice issued an advanced notice of proposed rulemaking which would require Internet accessibility.[29] In the April 2010 hearings before the House Judiciary Committee, Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights at the Department of Justice, testified that "[t]here is no doubt that the Internet sites of State and local government entities are covered by Title II of the ADA."[30] He also noted that DOJ has published technical assistance, "Accessibility of State and Local Government Websites to People with Disabilities,"[31] which provides guidance for making government websites accessible.[32]

The concept of effective communications was also at issue in investigations by the Office of Civil Rights (OCR) at the Department of Education (ED). These OCR investigations involved access to various class and course related materials, including campus computer labs and the Internet, and generally resulted in required access.[33]

Public Accommodations

Statutory Provisions

Title III provides that 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.[34] Entities that are covered by the term "public accommodation" are listed, and include, among others, hotels, restaurants, theaters,

[28] *Id.* at 1377. Quoting from the Department of Transportation ADA regulations, 49 C.F.R. §37.167(f).

[29] http://www.ada.gov/anprm2010/web%20anprm_2010.htm.

[30] *Achieving the Promise of the Americans with Disabilities Act in the Digital Age – Current Issues, Challenges, and Opportunities: Hearing Before the H. Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 110th Cong., 2d Sess. (2010), http://judiciary.house.gov/hearings/hear_100422_1.html; testimony of Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights at the Department of Justice, http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf.

[31] See http://www.usdoj.gov/crt/ada/websites2.htm.

[32] *Achieving the Promise of the Americans with Disabilities Act in the Digital Age – Current Issues, Challenges, and Opportunities: Hearing Before the H. Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 110th Cong., 2d Sess. (2010), http://judiciary.house.gov/hearings/hear_100422_1.html; testimony of Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights at the Department of Justice, http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf.

[33] See http://people.rit.edu/easi/law.htm. For a more detailed discussion of this issue see National Council on Disability, "When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web," (July 10, 2003) http://www.ncd.gov/newsroom/publications/2003/adainternet.htm.

[34] 42 U.S.C. §12182.

auditoriums, laundromats, travel services, museums, parks, zoos, private schools, day care centers, professional offices of health care providers, and gymnasiums.[35] Religious institutions or entities controlled by religious institutions are not included on the list.

There are some limitations on the nondiscrimination requirements, and a failure to remove architectural barriers is not a violation unless such a removal is "readily achievable."[36] "Readily achievable" is defined as meaning "easily accomplishable and able to be carried out without much difficulty or expense."[37] Reasonable modifications in practices, policies, or procedures are required unless they would fundamentally alter the nature of the goods, services, facilities, or privileges or they would result in an undue burden.[38] An undue burden is defined as an action involving "significant difficulty or expense."[39]

Department of Justice Interpretations

The Department of Justice on July 23, 2010 issued an advanced notice of proposed rulemaking which would require Internet accessibility.[40] Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights at the Department of Justice, testified in the April 2010 hearings before the House Judiciary Committee that although case law has been limited, "the position of the Department of Justice has been clear: Title III applies to the Internet sites and services of private entities that meet the definition of public accommodations set forth in the statute and implementing regulations."[41] He also noted that DOJ is considering issuing guidance regarding the Internet sites of private businesses that are considered public accommodations under Title III of the ADA.[42] Mr. Bagenstos observed that the Department's position was first articulated in a response to a congressional inquiry. This response stated that "[c]overed 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."[43]

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[35] 42 U.S.C. §12181.

[36] 42 U.S.C. §12182(b)(2)(A)(iv).

[37] 42 U.S.C. §12181.

[38] 42 U.S.C. §12182(b)(2)(A).

[39] 28 C.F.R. §36.104.

[40] http://www.ada.gov/anprm2010/web%20anprm_2010.htm.

[41] Achieving the Promise of the Americans with Disabilities Act in the Digital Age – Current Issues, Challenges, and Opportunities: Hearing Before the H. Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong., 2d Sess. (2010), http://judiciary.house.gov/hearings/hear_100422_1.html; testimony of Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights at the Department of Justice, http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf. In his testimony, Mr. Bagenstos also observed that accessibility issues arise in other technologies as well, and he specifically noted the increased use of electronic book readers by schools. DOJ and the Department of Education sent a joint letter to college and university presidents expressing concern about the use of inaccessible readers. See http://www.ada.gov/kindle_ltr_eddoj.htm. In addition, DOJ has resolved complaints against several universities concerning the use of inaccessible readers. See e.g., http://www.ada.gov/case_western_univ.htm; http://www.ada.gov/reed_college.htm; http://www.ada.gov/pace_univ.htm; http://www.ada.gov/princeton.htm.

[42] *Id.*

[43] Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Tom Harkin, U.S. Senator (September 9, 1996) http://www.usdoj.gov/crt/foia/tal712.txt One commentator has argued that this letter is limited in its scope since it applies its requirements only to "covered entities" which the letter defined as state and local governments and places of public accommodation. See Katherine Rengel, "The Americans with Disabilities Act and Internet Accessibility for the Blind," 25 John Marshal J. of Computer & Information Law 543 (2008).

DOJ has also argued that the ADA covers the Internet in amicus briefs.[44] In its report on the activities of the House Judiciary Committee following the hearings on the ADA and Internet accessibility on February 9, 2000, the House Judiciary Committee stated that "[i]t is the opinion of the Department of Justice that the ADA's accessibility requirements do apply to private Internet web sites and services."[45]

Place of Public Accommodation

As discussed previously, Title III prohibits discrimination 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.[46] One of the relevant issues in resolving the matter of whether Title III of the ADA applies to the Internet is whether a place of public accommodation is limited to actual physical structures.

Public Accommodations are not Limited to Physical Structures

The courts have split on this issue with the First Circuit in *Carparts Distribution Center v. Automotive Wholesalers Association of New England Inc.,*[47] finding that public accommodations are not limited to actual physical structures. The court reasoned that

> [b]y including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.[48]

The First Circuit concluded that "to exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA."[49]

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[44] See e.g., Amicus Brief of the United States filed in the Fifth Circuit in Hooks v. OKBridge, Inc. (No 99-50891) "The language of the statute is broad enough to cover services provided over this new medium and courts are not reluctant to apply old words to new technology in a way that is consistent with modern usage and legislative intent." http://www.usdoj.gov/crt/briefs/hooks.htm.

[45] H.Rept. 106-1048, at 275 (2001). One commentator has argued that this statement, combined with the lack of congressional action, indicates that Congress is "deferring to the DOJ's authority to promulgate rules implementing Title III instead of amending Title III or drafting new legislation." Ali Abrar and Kerry J. Dingle, "From Madness to Method: the Americans with Disabilities Act Meets the Internet" 44 Harv. C.R.-C.L. L. Rev. 133, 155 (2009).

[46] 42 U.S.C. §12182 (emphasis added).

[47] *Carparts Distribution Center, Inc. v. Automotive Wholesalers' Association of New England, Inc.,* 37 F.3d 12 (1st Cir. 1994).

[48] *Id.* at 22.

[49] *Id.* at 26-27.

The Seventh Circuit in *Doe v. Mutual of Omaha Insurance Company*[50] agreed with the First Circuit. In *Doe,* Judge Posner discussed the nondiscrimination requirements of Title III in the context of a case involving a cap on insurance policies for AIDS and AIDS-related complications and found that "[t]he core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, website, or other facility (whether in physical space or in electronic space) ... that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do."[51] The court reasoned that "the owner or operator of, say, a camera store can neither bar the door to the disabled nor let them in but then refuse to sell its cameras to them on the same terms as to other customers."[52] However, Judge Posner found no violation of the ADA in this case and concluded that "Section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and nondisabled."[53]

The Second Circuit joined the First and Seventh Circuits in finding that the ADA is not limited to physical access. The court in *Pallozzi v. Allstate Life Insurance Co.,*[54] stated that "Title III's mandate that the disabled be accorded 'full and equal enjoyment of 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."

Public Accommodations are Limited to Physical Structures

In contrast to the cases discussed above, the Third, Sixth, Ninth, and Eleventh Circuits apparently restrict the concept of public accommodations to physical places.

In *Stoutenborough v. National Football League, Inc.,*[55] the Sixth Circuit dealt with a case brought by an association of individuals with hearing impairments who filed suit against the National Football League (NFL) and several television stations under Title III alleging that the NFL's blackout rule discriminated against them since they had no other way of accessing football games when live telecasts are prohibited. The Sixth Circuit rejected this allegation holding that the prohibitions of Title III are restricted to places of public accommodations. Similarly, in *Parker v. Metropolitan Life Insurance Co.,*[56] the Sixth Circuit held that the ADA's nondiscrimination prohibition relating to public accommodations did not prohibit an employer from providing employees a disability plan that provided longer benefits for employees disabled by physical illness than those disabled by mental illness. In arriving at this holding, the Sixth Circuit found that "a benefit plan offered by an employer is not a good offered by a place of public accommodation.... A public accommodation is a physical place."[57]

[50] 179 F.3d 557 (7th Cir. 1999), *cert. denied,* 528 U.S. 1106 (2000).

[51] *Id.* at 559 (emphasis added.)

[52] *Id.*

[53] *Id.* at 563.

[54] 198 F.3d 28 (2d Cir. 1999).

[55] 59 F.3d 580 (6th Cir. 1995), *cert. denied,* 516 U.S. 1028 (1995).

[56] 121 F.3d 1006 (6th Cir. 1997), *cert. denied,* 522 U.S. 1084 (1998).

[57] *Id.* At 1010. See also, *Lenox v. Healthwise of Kentucky,* 149 F.3d 453 (6th Cir. 1999).

In *Ford v. Schering-Plough Corp.*[58] and *Weyer v. Twentieth Century Fox Film Corp*.,[59] the Third and Ninth Circuits also found that a public accommodation must be a physical place. As the Third Circuit in *Ford* stated,

> [t]he plain meaning of Title III is that a public accommodation is a place.... This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places.... Since Ford received her disability benefits via her employment at Schering, she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation.[60]

The Eleventh Circuit used similar reasoning in *Access Now, Inc. v. Southwest Airlines*, a case directly involved the ADA and the Internet. [61]

Judicial Decisions on Title III and the Internet

As noted above, the precise issue of the ADA's application to the Internet arose in *Access Now, Inc., v. Southwest Airlines, Co*., where the district court held that the Southwest Airlines website was not a "place of public accommodation" and therefore was not covered by the ADA. The district court examined the ADA's statutory language, noting that all of the listed categories were concrete places, and that to expand the ADA to cover "virtual" spaces would be to create new rights.

Previously, on November 2, 1999, the National Federation of the Blind (NFB) filed a complaint against America Online (AOL) in federal district court alleging that AOL violated Title III of the ADA. NFB and other blind plaintiffs stated that they could only independently use computers by concurrently running screen access software programs for the blind that convert visual information into synthesized speech or braille. They alleged that AOL had designed its service so that it is incompatible with screen access software programs for the blind, failing "to remove communications barriers presented by its designs thus denying the blind independent access to this service, in violation of Title III of the ADA, 42 U.S.C. §12181, et seq."[62] The case was settled on July 26, 2000.[63]

The most recent judicial decision on the ADA application to the Internet is *National Federation of the Blind v. Target Corporation.*[64] In *National Federation of the Blind,* the district court, taking a more nuanced approach, denied Target's motion to dismiss to the extent it alleged that the

[58] 145 F.3d 601 (3rd Cir. 1998).

[59] 198 F.3d 1104 (9th Cir. 2000).

[60] 145 F.3d 601, 613 (3rd Cir. 1998).

[61] 227 F.Supp.2d 1312 (S.D. Fla. 2002), appeal dismissed on other grounds, 385 F.3d 1324 (11th Cir. 2004). But see Rendon v. Valleycrest Productions, 294 F.3rd 1279 (11th Cir. 2002), where the Eleventh Circuit found a violation of the ADA in the use of telephone selection process that tended to screen out individuals with disabilities.

[62] *National Federation of the Blind v. America Online*, Complaint, http://www.nfb.org/Images/nfb/Publications/bm/bm99/brlm9912.htm (November 2, 1999).

[63] The settlement agreement can be found at the National Federation of the Blind website, http://www.nfb.org.

[64] 452 F.Supp.2d 946 (N.D. Calif. 2006). The case was settled on August 27, 2008. See http://www.nfb.org. For a more detailed discussion of this case see Isabel Arana DuPree, "Websites as 'Places of Public Accommodation': Amending the Americans with Disabilities Act in the Wake of *National Federal of the Blind v. Target Corporation,*" NC J. L. & Tech. 273 (2007); Jeffrey Bashaw, "Applying the Americans with Disabilities Act to Private Websites after *National Federation of the Blind v. Target*," 4 Shidler J. L. Com. & Tech. 3 (2008).

inaccessibility of the retailer's website impeded the full and equal enjoyment of goods and services offered in the retailer's stores. The motion to dismiss was granted in part concerning the aspects of the website that offered information and services unconnected to the retailer's store. The court noted that the purpose of the ADA was "broader than mere physical access" and that "[t]o the extent defendant argues that plaintiffs' claims are not cognizable because they occur away from a 'place' of public accommodation, defendant's argument must fail." The court required that there be a "nexus" between the Internet services and the physical place in order to present an actionable ADA claim.

The use of the "nexus" approach to the ADA's applicability to the Internet would cover many places of business such as Target. However, stores such as Amazon.com that have no physical storefront may not be covered under such an approach. The nexus approach has been criticized by the National Council of Disability:

> With the passage of time, as more and more goods, services, informational resources, recreation, communication, social and interactive activities of all kind migrate, wholly or partly, to the Net, maintenance of legal distinctions among otherwise similar Web sites, based on their connection or lack of connection to a physical facility, will become increasingly untenable and incoherent. Were there no nexus doctrine, and were all Web sites to be per se excluded from coverage, the law, however unjust, would at least be clear. But now that we see the direction in which the law, even in the hands of its most cautious interlocutors, is moving, the effort to define what is a sufficient nexus and to determine whether it exists in each particular case will surely continue. Use of the nexus approach, preferable as it may be to civil rights advocates over an approach that categorically excludes the Web from coverage, may, however, result in far more havoc than even the most sweeping and inclusive requirement for across-the-board commercial Web site accessibility ever could.[65]

Conclusion

The ADA was enacted in 1990, prior to widespread use of the Internet and does not specifically cover the Internet. Similarly, the ADA regulations do not specifically mention the Internet. However, the Department of Justice, on July 23, 2010, issued an advanced notice of proposed rulemaking which would require Internet accessibility. There has been no Supreme Court decision on point, and there have been few lower court judicial decisions. The lower courts that have examined the issue have split, creating some uncertainty. In addition, the use of a "nexus" approach in *National Federation of the Blind v. Target Corporation*, requiring a connection between the Internet services and the physical place in order to present an actionable ADA claim, would limit the application of the ADA to online retailers. Despite this uncertainty, it would appear likely that the Department of Justice's position would prevail, especially in light of the ADA's broad nondiscrimination mandate.

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[65] National Council on Disability, "When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web," (July 10, 2003) http://www.ncd.gov/newsroom/publications/2003/adainternet.htm. See also Nikki D. Kessling, "Why the Target 'Nexus Test' Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites are 'Places of Public Accommodations,'" 45 Houston L. Rev. 991 (2008) where the author argued that the nexus test does not reflect statutory intent and that ADA coverage of a website should depend on the website's "commerciality and character;" Ali Abrar and Kerry J. Dingle, "From Madness to Method: The Americans with Disabilities Act Meets the Internet," 44 Harv. C.R.-C.L. L. Rev. 133 (2009), where is it argued that the nexus test is both under and over inclusive.

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