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## Disability Law - Welcome to the New Town Square of Today's Global Village: Website Accessibility for Individuals with Disabilities after Target and the 2008 Amendments to the Americans with Disabilities Act

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DISABILITY LAW—WELCOME TO THE NEW TOWN SQUARE OF TODAY'S  
GLOBAL VILLAGE: WEBSITE ACCESSIBILITY FOR INDIVIDUALS WITH  
DISABILITIES AFTER *TARGET* AND THE 2008 AMENDMENTS TO THE  
AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

Because the Internet has become a necessity of life in our society, businesses and individuals wishing to promote their company, merchandise, or information on the Internet must make changes to ensure that their websites are accessible to those with disabilities. The President's Committee on Employment of People with Disabilities estimates that 48.9 million people in the United States suffer from some physical or mental impairment.<sup>1</sup> Courts have heard cases addressing the issue of accessibility of Internet websites by individuals with disabilities but have not reached a consensus on whether privately run websites are places of public accommodation under Title III of the Americans with Disabilities Act of 1990 (ADA).

Under section 508 of the Rehabilitation Act, websites maintained, developed, procured, or used by the federal government must be accessible to individuals with disabilities.<sup>2</sup> Section 508 does not regulate private e-commerce websites or websites run by private individuals unless the private entity is covered under the Rehabilitation Act pursuant to sections 503 or 504.<sup>3</sup> The accessibility requirements for federal government websites should be expanded to the private sector because the use of the Internet is becoming a necessity to living and conducting business in our society. Over 220 million people in the United States use the Internet, and from 2000 to 2008 Internet usage increased by 130%.<sup>4</sup> In recognition of this undisputed broad use of the Internet, many national and global companies are already making their websites more accessible to those with disabilities. To ensure universal accessibility, websites should be considered places of public accommodation under Title III of the ADA.

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1. Katherine Rengel, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUTER & INFO. L. 543, 573 n.222 (2008). When Congress enacted the Americans with Disabilities Act in 1990, it found that forty-three million Americans "have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(1), 1990 U.S.C.C.A.N. (104 Stat.) 327, 328 (codified as amended at 42 U.S.C. § 12101(a)(1) (2006)).

2. Diane Murley, *Web Site Accessibility*, 100 LAW LIBR. J. 401, 402-03 (2008).

3. Private entities are covered under section 503 of the Rehabilitation Act if they are federal contractors and under section 504 if they receive federal funding. 29 U.S.C. §§ 793-794 (2006).

4. Internet World Stats, Internet Usage and Population in North America, <http://www.internetworldstats.com/stats14.htm#north> (last visited Jan. 25, 2009).

This note addresses the controversy over including the Internet as a place of public accommodation in the context of Title III of the ADA. The purposes of the ADA and Title III are examined as well as the relationship between the ADA and the Internet.<sup>5</sup> Further, the current state of the law and recent cases are explored.<sup>6</sup> Finally, this note proposes that in order to accomplish the goals and purposes of the ADA, websites should be considered places of public accommodation and subject to accessibility requirements under Title III.<sup>7</sup>

## II. BACKGROUND

This section provides an understanding of the purposes of the ADA, an explanation of the term “public accommodation” under Title III of the Act, and an examination of the scope and interpretation of the Act.<sup>8</sup> Further, the importance of the relationship between the ADA and the Internet is presented, including a discussion of the online barriers hindering individuals with disabilities and the options available to private websites for eliminating those barriers.<sup>9</sup> Finally, the section concludes by presenting the state of the law in terms of how different jurisdictions treat places of public accommodation and the Internet within the ADA.<sup>10</sup>

### A. The Purpose of the ADA and Public Accommodations Under Title III

As previously mentioned, there are an estimated 48.9 million individuals in the United States suffering from some physical or mental disability.<sup>11</sup> One of the most revolutionary pieces of legislation to protect this growing class of individuals is the ADA.<sup>12</sup> The ADA set out to create equal opportunities for individuals with disabilities and to aid them in their access to and participation in day-to-day activities.<sup>13</sup> The ADA’s purposes include:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

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5. See *infra* Part II.A–B.

6. See *infra* Part II.C–D.

7. See *infra* Part III.

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part II.C–D.

11. See Rengel, *supra* note 1, at 573.

12. 42 U.S.C. §§ 12101–12300 (2006).

13. *Id.* § 12101(b).

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>14</sup>

Title III of the ADA specifically addresses public accommodations.<sup>15</sup> Title III prohibits discrimination of individuals with disabilities “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>16</sup> Therefore, public and private operators and owners of public accommodations cannot discriminate against individuals with disabilities by failing to provide full and equal access to their goods or services.<sup>17</sup> Under Title III, owners and operators of public accommodations engage in discrimination if individuals or a class of individuals are denied participation, given unequal benefits, or given separate benefits that are not as effective as the benefits afforded to others.<sup>18</sup> Equal participation and benefits must be provided for individuals with disabilities if the entity offering the service, goods, or accommodation is covered under the ADA, the individual is a qualified individual under the ADA, and the accommodation is readily achievable.<sup>19</sup>

Historically courts have strictly interpreted the provisions of the ADA, but in the 2008 amendments to the ADA, Congress clearly stated its intent for the Act to have a much broader application.<sup>20</sup>

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14. *Id.*

15. *Id.* §§ 12181–12189. The regulations implementing Title III of the ADA define a public accommodation as “a facility, operated by a private entity, whose operations affect commerce and fall within at least one of” twelve categories. 28 C.F.R. § 36.104 (2009). The twelve general categories are places of lodging, establishments serving food or drink, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishments, stations used for specified public transportation, places of public display or collection, places of recreation, places of education, social service center establishments, and places of exercise or recreation. *Id.* See also 42 U.S.C. § 12181(7)(A)–(L).

16. 42 U.S.C. § 12182(a).

17. *Id.*

18. *Id.* § 12182(b)(1)(A)(i)–(iii).

19. *Id.* § 12181(7)–(9). “Readily achievable” is defined by the regulations implementing Title III of the ADA as “easily accomplishable and able to be carried out without much difficulty or expense.” 28 C.F.R. § 36.104 (2009).

20. The ADA amendments of 2008 state that, “in enacting the [ADA], Congress intended that the Act ‘provide a clear and comprehensive national mandate for the elimination

## B. The ADA and the Internet

This section begins with a general discussion of the relationship between the ADA and the Internet.<sup>21</sup> The relationship between the Rehabilitation Act of 1973 and the ADA is explored within the context of accessibility standards for government websites.<sup>22</sup> Finally, examples of online barriers are presented followed by a discussion of what can be done by private entities to make websites accessible to individuals with disabilities.<sup>23</sup>

### 1. *The Accessibility Issue*

The ADA does not contain any specific provisions addressing Internet access to individuals with disabilities because, at the time of the ADA's enactment, Internet technology did not exist in the pervasive manner that it does today.<sup>24</sup> However, the Department of Justice has recognized the growing use of the Internet in today's society and has made public statements regarding Internet communications of entities covered under the ADA.<sup>25</sup> As early as 1996, the Assistant Attorney General of the Civil Rights Division recognized the need for Internet access stating that,

Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.<sup>26</sup>

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of discrimination against individuals with disabilities' and provide broad coverage." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 2008 U.S.C.C.A.N. (122 Stat.) 3553, 3553 [hereinafter ADA Amendments of 2008].

21. See *infra* Part II.B.1.

22. See *infra* Part II.B.2.

23. See *infra* Part II.B.3.

24. Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. ENT. & TECH. L. 363, 387 (2008).

25. See United States Department of Justice, Civil Rights Division, Disability Rights Section, Accessibility of State and Local Government Websites to People with Disabilities (June 2003), available at [http://www.usdoj.gov/crt/ada/websites2\\_scrn.pdf](http://www.usdoj.gov/crt/ada/websites2_scrn.pdf) (discussing Internet accessibility of government websites) [hereinafter DOJ Newsletter].

26. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to the Honorable Tom Harkin, United States Senator (Sept. 9, 1996), available at <http://www.usdoj.gov/crt/foia/cltr204.txt>.

The Department of Justice has also specifically addressed this important issue in a published newsletter providing state and local governments covered under the ADA with guidelines for making their websites more accessible to those with disabilities.<sup>27</sup> In addition, state and local governments and private entities are generally required to provide equal access to their programs, services, goods, activities, privileges, or accommodations under the ADA<sup>28</sup> and the Rehabilitation Act of 1973.<sup>29</sup>

## 2. *The Rehabilitation Act of 1973 and the ADA*

The Rehabilitation Act of 1973 has addressed web accessibility for individuals with disabilities by providing that all federal government websites and websites covered under other sections of the Rehabilitation Act must be handicap-accessible.<sup>30</sup> One important fact to remember is that the ADA was meant to be interpreted in conjunction with the Rehabilitation Act of 1973.<sup>31</sup> Further, under the September 2008 ADA Amendments, it is clear that the Rehabilitation Act and the statements made by the Assistant Attorney General of the Civil Rights Division of the United States Department of Justice are consistent with the intended broader interpretation of the ADA.<sup>32</sup> The Rehabilitation Act has typically been interpreted more broadly than the ADA, and in the new amendments to the ADA, Congress stated that there should be a broader interpretation of the ADA.<sup>33</sup> This may suggest an interpretation by the courts more in line with the Rehabilitation Act because there is a strong relationship between the two statutes such as a shared purpose and similar language.<sup>34</sup>

The ADA's silence on whether the Internet is a place of public accommodation has caused a split in the courts on the issue of whether to classify the websites of certain private corporations and small businesses as places of public accommodation under Title III of the ADA.<sup>35</sup> This split has

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27. DOJ Newsletter, *supra* note 25.

28. 42 U.S.C. § 12182(a) (2006).

29. 29 U.S.C. §§ 701–797 (2006).

30. *Id.* Federal websites must be accessible under section 508 of the Rehabilitation Act. 29 U.S.C. § 794(d). *See also* Karen E. Klein, *Is Your Web Site Handicap-Accessible?*, BUS. WK. ONLINE, Dec. 18, 2007.

31. The relationship between the ADA and the Rehabilitation Act is highlighted by the use of similar language, the borrowing of terms such as “undue burden,” and the sharing of similar purposes and goals. *See* Leah Poynter, *Setting the Standard: Section 508 Could Have an Impact on Private Sector Web Sites Through the Americans with Disabilities Act*, 19 GA. ST. U. L. REV. 1197, 1198–99 (2003).

32. ADA Amendments of 2008, *supra* note 20.

33. *Id.*

34. Poynter, *supra* note 31, at 1222.

35. Nikki D. Kessling, *Why the Target “Nexus Test” Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites are*

left the law unclear on how these entities should deal with Internet accessibility for individuals with disabilities and has resulted in companies dealing with this issue in differing ways.<sup>36</sup>

### 3. *Online Barriers and Ways to Overcome Them*

The graphic-rich environment of the Internet and poorly designed websites have created a challenge for individuals who are visually impaired and other individuals with disabilities.<sup>37</sup> Most discourse on the subject of accessibility of websites focuses on the blind; however, many other types of disabilities are also affected by the inaccessibility of websites.<sup>38</sup> For instance, individuals with color-blindness, cognitive barriers, dyslexia, paralysis, Parkinson's disease, problems with dexterity, deafness, and seizure disorders also face accessibility issues when trying to use the Internet.<sup>39</sup> Many individuals with these disabilities use special assistive technological devices, such as verbal screen readers often used by blind individuals.<sup>40</sup> Special software also exists to help disabled individuals navigate through websites or within programs on their computers.<sup>41</sup>

In order for special assistive devices or software, such as screen readers, to effectively aid users, websites must be coded in the proper way.<sup>42</sup> The webpage must contain "alternative text tags that describe images appearing on the page."<sup>43</sup> For instance, a specific barrier that might occur on a page is a picture that does not have any identifying text.<sup>44</sup> Unless there is text associated with the photograph, a verbal screen reader cannot interpret the image.<sup>45</sup> Without some type of identifying text, the screen reader is unable to distinguish whether the "image is an unidentified photo or logo, art-

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"Places of Public Accommodation," 45 Hous. L. Rev. 991, 1012 (2008).

36. Klein, *supra* note 30. Target settled its lawsuit by creating its own policy and standards of Internet accessibility. Priceline and Ramada have done the same. Neither Congress nor the courts have set out specified standards for private websites. Consumer Affairs, Priceline, Ramada Agree to Make Web Sites More Accessible, (Aug. 20, 2004), [http://consumeraffairs.com/news04/ada\\_webs.html](http://consumeraffairs.com/news04/ada_webs.html).

37. DOJ Newsletter, *supra* note 25. See also Sandra Edelman & Steven S. Fang, *Americans with Disabilities in Cyberspace. How Far Does the ADA Reach?*, N.Y. L.J., Jan. 29, 2007, at S2, available at [http://www.dorsey.com/files/upload/Disabilities\\_Cyberspace\\_NYLJ012907.pdf](http://www.dorsey.com/files/upload/Disabilities_Cyberspace_NYLJ012907.pdf).

38. Kel Smith, *The Missing Link: Understanding Web Accessibility*, PRAC. LAW., June 2007, at 31.

39. *Id.* See also Golden, *supra* note 24, at 392.

40. Smith, *supra* note 38, at 32-33.

41. *Id.* at 33.

42. Edelman & Fang, *supra* note 37, at S2.

43. *Id.*

44. *Id.*

45. DOJ Newsletter, *supra* note 25.

work, a link to another page, or something else.”<sup>46</sup> According to the Department of Justice, “simply adding a line of simple hidden computer code to label the photograph . . . will allow the blind user to make sense of the image.”<sup>47</sup>

As Internet technology emerged, web content was “primarily textual” and, therefore, relatively simple to make accessible to those with disabilities.<sup>48</sup> Individuals using screen readers were able to translate HTML text<sup>49</sup> to audio easily.<sup>50</sup> However, over time problems arose when web developers began using images in place of text and using HTML in ways for which it was not created.<sup>51</sup> By making sure that websites have the proper alternative text tags, the problems caused by these text images may be resolved.<sup>52</sup> This issue was addressed in *National Federation of the Blind v. Target Corp.*<sup>53</sup> In *Target*, the plaintiffs alleged that Target.com lacked alternative text tags which prevented screen reader users from accessing the website.<sup>54</sup> “Instead of product names and prices, a screen reader was only able to read ‘an indecipherable list of random numbers with no context or explanation.’”<sup>55</sup>

Other barriers that impede individuals with disabilities could be resolved by agencies or entities providing captioning for video on their websites, providing alternative websites, or offering programs or services over the telephone.<sup>56</sup> Entities can revamp their websites to include alternative text tags that are compatible with assistive technologies or include these provisions when building a website from scratch.<sup>57</sup> In addition to assisting those with disabilities, revamping a website makes good business sense because it permits access to new customers and demographics.<sup>58</sup> The tech-

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46. *Id.*

47. *Id.*

48. Murley, *supra* note 2, at 404.

49. “HTML is the lingua franca for publishing hypertext on the World Wide Web. It is a non-proprietary format based upon SGML, and can be created and processed by a wide range of tools, from simple plain text editors—you type it in from scratch—to sophisticated WYSIWYG [“what you see is what you get”] authoring tools. HTML uses tags such as <h1> and </h1> to structure text into headings, paragraphs, lists, hypertext links etc.” W3C “World Wide Web Consortium,” available at <http://www.w3.org/MarkUp/> (last visited Jan. 26, 2009).

50. Murley, *supra* note 2, at 404.

51. *Id.*

52. *Id.* at 405.

53. 452 F. Supp. 2d 946 (N.D. Cal. 2006).

54. *Id.* at 950.

55. Murley, *supra* note 2, at 405 (quoting Smith, *supra* note 38, at 33).

56. DOJ Newsletter, *supra* note 25.

57. Klein, *supra* note 30. (“Having a large site revamped for disability access could cost \$5,000 to \$15,000. . . . And if you’re having your site designed from the ground up, it should not be prohibitively more expensive to have the designers make it compliant with disability guidelines from the start.”). *Id.*

58. *Id.*



nology exists to make the Internet more accessible to individuals with disabilities in a relatively easy and inexpensive way.<sup>59</sup>

### C. The State of the Law

There is a circuit split on the issue of whether a place of public accommodation must be a physical space to be covered under Title III of the ADA. More specifically, the courts are split on whether websites are considered places of public accommodation. Two views are expressed by the courts on these issues. The first view takes a plain-meaning approach in determining that a place of public accommodation under Title III does not include nonphysical spaces.<sup>60</sup> The second view is that a place of public accommodation does not necessarily have to be a physical place to be covered under Title III.<sup>61</sup>

#### 1. *Places of Public Accommodation Must Be Physical Spaces*

Courts that have interpreted Title III to require that places of public accommodation be physical spaces have relied on a plain-meaning interpretation of the ADA. For example, in *Access Now, Inc. v. Southwest Airlines, Co.*,<sup>62</sup> one of the first cases to consider the issue of whether a company's website was a place of public accommodation, the court reasoned that because the ADA's twelve categories of places that fall within the coverage of Title III's "place of public accommodation" were all physical spaces, "[t]o expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."<sup>63</sup>

Further, the court in *Access Now* determined that there was no nexus between the Southwest Airlines' website and a physical space because the website was neither a physical place "nor a means to accessing a concrete space."<sup>64</sup> The court stated that "because . . . southwest.com does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency."<sup>65</sup>

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59. Edelman & Fang, *supra* note 37. See also William D. Goren, *Is your University or College's Homepage Accessible to Prospective Students with Visual Impairments?*, 21 J. DuPAGE COUNTY B. ASS'N 8 (Nov. 2008), available at <http://www.dcbabrief.org/vol211108art1.html>.

60. See *infra* Part II.C.1.

61. See *infra* Part II.C.2.

62. 227 F. Supp. 2d 1312, 1319 (S.D. Fla. 2002).

63. *Id.* at 1318.

64. *Id.* at 1321.

65. *Id.* See also *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997) ("[T]he good that plaintiff seeks is not offered by a place of public accommodation.

## 2. *Places of Public Accommodation Do Not Have To Be Physical Spaces*

The second approach taken by courts represents a much broader interpretation of the ADA. In one of the earliest decisions on the issue of whether only physical structures were places of public accommodation under the ADA, the court in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.* determined that the language of the ADA does not require that a place of public accommodation be a physical structure.<sup>66</sup> The court reasoned that because the ADA listed "travel service" as a place of public accommodation, it was evident that "Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure."<sup>67</sup> The court noted that it would not make sense to exclude individuals who purchased goods without entering a physical store while providing ADA protection to individuals who purchased the same goods by entering an office or store.<sup>68</sup>

In one of the most recent decisions addressing this issue, the court in *National Federation of the Blind v. Target Corp.* followed the reasoning in *Carparts* and determined that there was enough of a nexus between Target.com and the Target "brick-and-mortar" retail store to consider the website a place of public accommodation.<sup>69</sup> The court stated that "it is clear from the face of the complaint that many of the benefits and privileges of the website are services of the Target stores."<sup>70</sup> Commentators note that since the *Target* decision, "the current state of the law suggests that the reach of Title III of the ADA with respect to retail Web sites varies accord-

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The public cannot enter the office of MetLife or Schering-Plough and obtain the long-term disability policy that plaintiff obtained.") Because plaintiff Parker could not actually access a physical space to obtain the good, the court held there was insufficient nexus to consider the insurance benefit plan in question as a public accommodation. *Id.*

66. 37 F.3d 12, 19 (1st Cir. 1994). See also John Grady & Jane Boyd Ohlin, *The Application of Title III of the ADA to Sport Web Sites*, 14 J. LEGAL ASPECTS SPORT 145, 150-51 (2004).

67. *Carparts*, 37 F.3d at 19.

68. *Id.* The *Carparts* court specifically mentioned the use of mail or telephone as another means to access the same goods or services as one would by entering a physical office or store. The court reasoned that the unintended result would be that individuals entering a building to purchase goods or services would be covered under the ADA, yet individuals who choose to make the same purchases by telephone or mail would not be covered. *Id.*

69. 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006). The *Target* court cited the following dictum from the Seventh Circuit: "a 'place of public accommodation' encompasses facilities open to the public in both physical and electronic space, including websites." *Id.* at 952 (citing *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999)).

70. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006).

ing to the extent to which such websites are integrated with their brick-and-mortar counterparts.”<sup>71</sup>

#### D. Settled Cases

Even without a clear determination that websites are a place of public accommodation under Title III of the ADA, several large companies have settled lawsuits brought by individuals with disabilities alleging that their websites were not accessible. Target, Ramada, and Priceline have all settled lawsuits filed against them and have agreed to make their websites more accessible to those with visual impairments.<sup>72</sup>

At the urging of the New York Attorney General, Ramada and Priceline, two large travel companies, have decided to make their websites more accessible to individuals with visual impairments by “implement[ing] a range of accessibility standards authored by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C).”<sup>73</sup> After the New York Attorney General launched an investigation into these websites, it was determined that both Priceline.com and Ramada.com did not comply with the assistive technologies used by those with visual impairments and were therefore not accessible to those individuals.<sup>74</sup>

In 2008, Target became the most recent company to settle a lawsuit involving lack of access to their website.<sup>75</sup> In *National Federation of the Blind v. Target Corp.*, the visually impaired plaintiffs alleged that they were unable to access certain online features of Target.com.<sup>76</sup> Like the Priceline and the Ramada cases, Target settled its suit, agreeing to make certain changes to its website to permit access to individuals with visual impairments.<sup>77</sup>

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71. Edelman & Fang, *supra* note 37.

72. Consumer Affairs, Priceline, Ramada Agree to Make Web Sites More Accessible, (Aug. 20, 2004), [http://consumeraffairs.com/news04/ada\\_webs.html](http://consumeraffairs.com/news04/ada_webs.html).

73. *Id.* W3C is an organization that recommends Internet standards and guidelines. *Id.*

74. *Id.*

75. Nat'l Fed'n of the Blind v. Target Corp., No. C 06-01802, 2009 WL 2390261, at \*1 (N.D. Cal. Aug. 3, 2009).

76. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006).

77. See NFB Target Lawsuit Main Page, <http://www.nfbtargetlawsuit.com/> (last visited Jan. 25, 2009) (providing specifics of the settlement). Section 6 of the settlement agreement, titled “Accessibility of Target.com,” states:

1. Target shall ensure that the Target.com website meets the Target Online Assistive Technology Guidelines, attached at Exhibit C, and that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use.

2. To achieve [National Federation of the Blind] nonvisual accessibility certification, Target shall make the changes to Target.com listed and described in Exhibit D. . . . Target expects to implement these changes by February 2009.

Unlike the Priceline and Ramada settlements, the Target case provides clear and strong precedent for courts to find that websites are covered by Title III; before the settlement, the National Federation of the Blind received a ruling favoring the inclusion of websites under Title III of the ADA.<sup>78</sup> However, because companies continue to settle without a court's determination on whether websites are places of public accommodation or a determination on the level of accessibility websites must offer to individuals with certain disabilities, individuals with disabilities will continue to face obstacles in accessing information, service, goods, and programs available on the Internet.<sup>79</sup>

### III. PROPOSAL

One of the main purposes of the ADA is to help integrate individuals with disabilities into mainstream society.<sup>80</sup> The ADA has mandated that physical structures be accessible to individuals with disabilities, so that they may participate within mainstream society in day-to-day activities and tasks.<sup>81</sup> With society's increasing dependence on the Internet, it would be wrong to exempt it from access mandates under the ADA. Without a determination by the courts or by Congress that the Internet is a place of public accommodation, individuals with disabilities will continue to face barriers when participating in normal day-to-day activities. In the past, courts have interpreted the ADA to require accommodations to help individuals with disabilities access other technological devices, such as the telephone and television, as they became a critical component of day-to-day life due to society's growing use and dependence on those devices.<sup>82</sup> Therefore, because one of the main goals of the ADA is to provide equal access to individuals with disabilities, and other accommodations have been made in the past to aid individuals with disabilities in using similar technologies, courts should recognize that the Internet is a place of public accommodation.

This section will first discuss the implications of declining to view the Internet as a place of public accommodation in today's world.<sup>83</sup> Then, it will

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The changes described in Exhibit D involve alternative text tags, keyboard navigation access, and other specific modifications to problem areas. *Id.*

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

79. Evgenia Fkias, *Liability Under the Americans with Disabilities Act for Private Web Site Operators*, 2 SHIDLER J. L. COM. & TECH. 6 (2005).

80. Rengel, *supra* note 1, at 545–46.

81. 42 U.S.C. § 12182(b)(2)(A)(iv) (2006).

82. See Rengel, *supra* note 1, at 581–82 (discussing telephone regulations). See also 47 U.S.C. §§ 151–615b (2006).

83. See *infra* Part III.A.

look at similar technological advances that have been made accessible to individuals with disabilities.<sup>84</sup>

A. Adverse Impact on Individuals with Disabilities as a Result of Inaccessible Websites

The Internet is a virtual world that offers information and services to individuals, as well as a place to connect people from all over the world. In today's society, it is hard to imagine a world without the Internet. Many companies, organizations, and individuals create and use websites to advertise their products and services and offer them for sale, to purchase goods and services, to share information about their company, to educate people about their products and demonstrate how they work, to post employment openings and submit applications for employment, to take educational classes and earn degrees, and to do many other things too numerous to mention. Because the Internet continues to have a growing presence in society, it makes sense to make websites accessible to everyone, including those with disabilities.

If websites are not compatible with screen readers and other adaptive devices that make websites accessible for those with disabilities, a significant class of individuals will be excluded from mainstream society. Many retail stores with websites have special Internet offers and products available exclusively on their websites. "In 1999 . . . online retail spending was only \$12.3 billion, or 16.3[%] of total retail spending. By 2005, online retail spending rose to almost \$81 billion, representing 39.7[%] of total retail spending."<sup>85</sup> Therefore, it is clear that the retail industry relies a great deal on its websites. Individuals denied access to these sites due to the websites' noncompliance with adaptive devices are excluded from the services offered by these companies to nondisabled customers. This disparate treatment of individuals with disabilities is precisely what the ADA prohibits.<sup>86</sup>

Lack-of-access problems exist beyond the context of e-commerce sites like Target's website. An inability to access employment, educational, and general informational websites also poses significant barriers to individuals with disabilities. Many employers have online employment application processes that might ultimately exclude some individuals with disabilities, and many employers are using the Internet at an increasing rate to recruit employees. Similarly, some websites that exist to educate the public on a topic might exclude some individuals with disabilities. Educational institu-

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84. See *infra* Part III.B.

85. Kenneth Kronstadt, Note, *Looking Behind the Curtain: Applying Title III of the Americans with Disabilities Act to the Businesses Behind Commercial Websites*, 81 S. CAL. L. REV. 111, 134 (2007).

86. 42 U.S.C. § 12182 (2006).

tions are offering more and more classes online as well as utilizing online application processes. It is anticipated that, in the next ten years, enrollment in online education will greatly increase.<sup>87</sup> Prospective law students, for example, engage in an online application process through a required subscription to the Law School Admission Council (LSAC) website. A law school candidate is required to register with the LSAC via its website and submit all application information electronically.<sup>88</sup> This process of requiring a prospective student to register with a third-party website raises a possible access issue for individuals with disabilities.

Many companies have made the choice to make their websites accessible to individuals with disabilities, and Google, one of the most widely-used search engines,<sup>89</sup> released a prototype that ranks websites based on their accessibility.<sup>90</sup> Many companies, however, are unaware of the lack of accessibility to their websites.<sup>91</sup> As mentioned in a previous section, access is needed by more than just individuals with visual impairments. Some individuals with mobility disabilities rely on adaptive devices to help them navigate the Internet. Because the technology exists to create websites that are accessible to individuals with disabilities at a reasonable price, websites should be made available for all to access freely and equally.

To comply with the congressional intent behind the ADA, courts should recognize that a place of public accommodation does not have to be a physical space and that the Internet is certainly a "place" visited by millions of people every hour to engage in many important day-to-day activities and to gather information needed by members of present-day society. Instead of allowing companies to continue to make their own accessibility guidelines for individuals with disabilities, Congress should mandate universal guidelines to produce a more congruent system like the regulations set up for government entities under the Rehabilitation Act.

#### B. Technologies Adapted to Permit Access

Historically, technological advances analogous to the Internet have evolved to permit access to individuals with disabilities. The television, telephone, and radio have presented similar issues of access to goods and

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87. Kronstadt, *supra* note 85, at 135 (predicting that the number of students taking all of their classes online will increase from seven to twenty-five percent in the next ten years).

88. This is not to imply that the LSAC's website is inaccessible to individuals with disabilities. It is only one example of the many instances in which applicants are required to register with a website to apply to an educational institution.

89. Alexa Top 500 Global Sites, <http://www.alexa.com/topsites> (last visited Dec. 29, 2009).

90. Smith, *supra* note 38, at 33.

91. Klein, *supra* note 30.

services for individuals with disabilities. Telecommunications devices for the deaf (TDD), also known as telephone typewriters or teletypewriters (TTY), have been made available to those with hearing impairments.<sup>92</sup> Television and films are now accessible to those with hearing impairments through closed captioning.

Courts have ruled that the use of a telephone to access some programs or services is included in the ADA because it is a means to which an individual with a disability may access a public accommodation.<sup>93</sup> In *Rendon v. Valleycrest Productions, Ltd.*, the plaintiffs wished to participate in the television game show *Who Wants to Be a Millionaire*, but they were not able to use the television show's "fast finger" process via the telephone due to hearing impairments or upper-body mobility disabilities.<sup>94</sup> In *Rendon*, the court held that the plaintiffs "stated a valid claim under Title III by alleging that the fast finger telephone selection process is a discriminatory screening mechanism, policy[,] or procedure, which deprives them of the opportunity to compete for the privilege of being a contestant on the Millionaire program."<sup>95</sup> The court pointed out that the ADA prohibits not only on-site discriminatory screening of participants in the game show but also off-site discrimination as well.<sup>96</sup> The court further stated that to construe the ADA in any other way would be a misreading of the statute.<sup>97</sup> This ruling clearly shows that courts have found certain communication devices, such as the telephone, to be included under Title III of the ADA as a public accommodation when used to access services or programs.

Although Congress has not deemed all of these technologies public accommodations, Congress has addressed the accessibility issue through the implementation of very strict guidelines and regulation of services by the Federal Communications Commission.<sup>98</sup> Section 613 of the Telecommuni-

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92. Bonnie Poitras Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 Hous. L. Rev. 1101, 1132 (2000). When using a TDD, a telephone receiver is placed into a machine that looks like a typewriter. Depending on the type of TDD being used, there is either a video screen or a paper print-out that relays information. The TDD user types what he or she wants to say and that message is relayed to the other user. The conversation continues in this manner of typing out responses with the typewriter and reading the message on a screen or print-out. *Id.* at 1103 n.6. Users also can use a relay service to communicate with people who do not have a TDD on the other end of the line. In this instance, the disabled individual calls the relay service and types what he or she wants the operator from the relay service to say to the person on the other line. The operator then relays the message from the person on the other line to the individual with the disability. *Id.* at 1134.

93. *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1285 (11th Cir. 2002).

94. *Id.* at 1280-81.

95. *Id.* at 1286.

96. *Id.* at 1285.

97. *Id.*

98. 47 U.S.C. §§ 151-615b (2006).

cations Act encourages an increase in television programming with closed-captioned access to individuals who are deaf or hearing impaired.<sup>99</sup>

Just as lawmakers have made these technologies more accessible to individuals with disabilities, the Internet should also be made more accessible. All of these technologies are a large part of our society, and excluding individuals with disabilities from accessing the goods and services that these technologies offer would be incongruent with one of the main goals of the ADA: to eliminate discrimination of individuals with disabilities by helping foster access to everyday activities.

#### IV. CONCLUSION

Website accessibility is an issue that the courts cannot ignore. Based on the fact that Internet use is on the rise and will more than likely continue to become more and more prevalent in today's society, websites must be accessible to individuals with disabilities. To fulfill the purpose and goals of the ADA, courts must interpret Title III of the ADA to include websites as places of public accommodation. The rapidly increasing pace of technological advancement in present-day society demands that Title III be interpreted by courts to be applicable to websites.

The ADA Amendments of 2008, enacted in January 2009, call for a broad interpretation of the ADA which should more readily permit courts to find that Congress intends for websites to be included in the list of public accommodations. If recognized as places of public accommodation, websites will be subject to accessibility standards with which they must comply. Entities will no longer be able to deny access to a class of individuals in the United States based on their disability; rather, entities will help to include individuals with disabilities in mainstream society while their websites broaden the demographics that they reach and open their doors to a new group of customers. It is a win-win situation.

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99. *Id.* § 613.

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