

Special Feature

Websites as Places of Public Accommodation: Regulating Accessibility Under Title III of the ADA

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Since its advent over a decade ago, the Internet has served as a vital hub for information gathering, as well as for commercial and interpersonal activity, and in recent years has begun to take on an integral role in the daily lives of most Americans. As technology advances and user expectations concurrently grow, companies and website owners aim to fit their websites with the most visually attractive graphics and designs on the market. Unfortunately, however, visually impaired individuals have been prevented from availing themselves of all the resources available online.

Most visually impaired individuals navigate the Internet using screen-reading programs, which convert website text into speech and allow users optimal flexibility in browsing websites. Screen reading programs, however, are not equipped to recognize text embedded in images and other modifications that inhibit accessibility. For instance, these programs often cannot decipher online forms. Likewise, a cluttered or disorganized website layout proves detrimental to the programs' timely functionality, rendering it difficult, if not impossible, for visually impaired persons to navigate the website. Inaccessible websites unnecessarily inhibit visually impaired individuals' ability to engage in e-commerce and to participate in everyday online activities that sighted Internet users take for granted.¹

In the wake of the recently-settled litigation in *National Federation of the Blind v. Target Corp.*,² discussion of available legal mechanisms for regulating website accessibility has come to the forefront in the press, as well as in disability law scholarship, particularly the question of whether websites are "places of public accommodation" under Title III of the Americans with Disabilities Act (ADA).³

Title III

Title III prohibits denying the persons with disabilities "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."⁴ In so doing, it enumerates four specific categories of discrimination. First, "places of public accommodation" cannot institute policies that "screen out or tend to screen out" individuals with disabilities from full and equal enjoyment of their facilities.⁵ Second, these places must make "reasonable modifications" to their policies and procedures when necessary to make the services they provide available to individuals with disabilities, so long as the modifications would not fundamentally alter the nature of such services.⁶ Third, "places of public accommodation" must take necessary steps to ensure that individuals with disabilities are not "excluded, denied services, segregated or otherwise treated differently

than other individuals because of the absence of auxiliary aids and services," unless taking such action would fundamentally alter the nature of the accommodation or constitute an undue burden.⁷ Finally, these places must remove structural barriers to the use of the facility, whether architectural or communicational, or make substitutions that would be readily achievable.⁸

Title III lists 12 categories of private establishments that fall within "places of public accommodation," insofar as they "affect commerce."⁹ These categories include explicit references to physical locations, as well as a broad reference to "other sales or rental establishment[s]," but do not mention websites or the Internet.¹⁰

Defining "Place of Public Accommodation"

In the decade preceding the *Target* case, two opposing interpretations of "place of public accommodation" developed. Some courts found that the term encompassed non-physical places,¹¹ while other courts restricted the term to physical locations only.¹²

The Expansive View

*Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*¹³ was the first case to address how a "place of accommodation" should be interpreted. It involved a self-funded medical plan offered by the defendant. Several years after the company's president revealed that he had been diagnosed with AIDS, the defendant amended the plan to limit benefits for AIDS-related illnesses to \$25,000, while members not suffering from AIDS-related conditions could continue to avail themselves of \$1 million in lifetime benefits.

Notwithstanding the district court's dismissal of the plaintiffs' claim,¹⁴ the First Circuit concluded that "places of public accommodation" need not be limited to physical spaces.¹⁵ The court underscored the inclusion of travel services in the list of establishments considered public accommodations under the ADA, noting that many travel services conduct business only by phone or mail rather than require their customers to enter physical premises.¹⁶ In further support of an expansive interpretation of the "place of public accommodation" clause, the court referred to the explicitly-stated broad and remedial objectives that Congress had in mind when it passed the ADA,¹⁷ concluding that a more restrictive reading would "run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."¹⁸

Several years later, the Seventh Circuit, in *Doe v. Mutual of Omaha Insurance Co.*,¹⁹ reaffirmed, and implicitly expanded upon, the First Circuit's broad reading of "place of public accommodation." Notwithstanding the fact that an electronic space was not at issue in the case, Judge Posner restated the *Carparts* holding and added websites to the list of entities subject to the language governing

“places of public accommodation.” “The core meaning of [44 U.S.C. § 12182(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, Web site [sic], 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 [sic] do.”²⁰

The Eleventh Circuit in *Rendon v. Valleycrest Productions, Ltd.*,²¹ advocated a broad interpretation of the language of Title III, but explicitly rejected the hard-line approaches put forward by the First and Seventh Circuits. Viewers of ABC’s “Who Wants to Be a Millionaire” filed a class action, alleging that the network’s telephone selection process, which required potential contestants to answer a number of trivia questions in a limited amount of time using a telephone keypad, necessarily tended to “screen out” individuals with hearing and mobility impairments, who respectively were unable to hear the telephonic promptings or to navigate the keypad within the allotted time limit.

The district court dismissed the plaintiffs’ claim on the ground that the qualification test was “not administered at a palpable public accommodation,” and therefore did not violate Title III.²² The Eleventh Circuit reversed, emphasizing that no ADA provision limits claims for discrimination based on screening or eligibility requirements to on-site locations. The court found “off-site screening . . . to be the paradigmatic example contemplated in the statute’s prohibition of ‘the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability.’”²³ It was irrelevant that “plaintiffs were screened out by an automated telephone system, rather than by an admission policy administered at the studio door,” since “eligibility criteria are frequently implemented off site—for example, through the mail or over the telephone.”²⁴ The court equated the phone quiz to the “various forms of discrimination, including outright intentional exclusion [and] the discriminatory effects of architectural, transportation, and communication barriers” that the ADA explicitly enumerates.²⁵ The phone quiz was a means of access to the studio, the public accommodation.

The Narrow View

As the Seventh and Eleventh Circuits reaffirmed and expanded upon the line of reasoning first articulated by the First Circuit, a countervailing restrictive reading of “place of public accommodation” concurrently developed in the Third and Sixth Circuits. The Sixth Circuit, in *Stoutenborough v. National Football League, Inc.*,²⁶ dismissed a Title III suit challenging the National Football League’s “blackout rule,” which prevents the local television broadcast of football games that are not sold out three days in advance. Plaintiffs, a hearing-impaired individual and the hearing-impaired rights organization that he managed, alleged that the rule denied hearing-impaired individuals the ability to access such football games “‘via telecommunication technology.’”²⁷ Plaintiffs claimed that the services made available through the television broadcast constituted “services, benefits, or privileges in places of public accommodation,” and that

the withdrawal of these services constituted discrimination under Title III.²⁸

The Sixth Circuit reasoned that, because no one living in a given area had access to blacked out football games on television, the blackout rule applied equally to individuals with and without disabilities and, as such, did not constitute discrimination under Title III.²⁹ Citing the plain language of Title III, the court further maintained that its “prohibitions . . . are restricted to ‘places’ of public accommodation, disqualifying the National Football League, its member clubs, and the media defendants.”³⁰ Under 28 C.F.R. §36.104, a “place” is “‘a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve ‘public accommodation’ categories.’”³¹ A “facility” is “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”³² Although the stadiums where these games are played would constitute a “place of public accommodation,” the “televised broadcast of ‘blacked-out’ home football games . . . does not.”³³

Two years later, the Sixth Circuit, in *Parker v. Metropolitan Life Insurance Co.*,³⁴ expanded on its ruling in *Stoutenborough* and held that “places of public accommodation” are confined to physical locations. *Parker* presented a similar fact scenario to *Carparts*, which the First Circuit had adjudicated several years earlier. The plaintiff challenged her employer’s long-term disability policy, which provided longer benefits for employees who become disabled due to physical illness than for those who become disabled due to mental illness. The court emphasized the physical nature of each of the 12 categories of “places of public accommodation” as demonstrating Congress’s intent for a narrow reading of the term.³⁵ The court pointed out that plaintiff did not access the policy from MetLife’s office. Rather, her employer provided the policy. “There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office.”³⁶

The court contested the First Circuit’s assertion in *Carparts* that Congress’s inclusion of travel agencies paved the way for applying Title III to non-physical locations,³⁷ stating that Congress likely “simply had no better term than ‘service’ to describe an office where travel agents provide travel services.”³⁸

The Third Circuit echoed the *Parker* holding in *Ford v. Shering-Plough Corp.*,³⁹ another case concerning differing insurance policy benefits for individuals with physical and mental disabilities. Tracing the history of the connotations of “place of public accommodation” from its use in the Civil Rights Act of 1964 to Title III,⁴⁰ the court adopted the Sixth Circuit’s narrow reading in *Parker*,⁴¹ citing “no need to analyze the ADA’s legislative history” in light of the phrase’s “clear” and “plain meaning.”⁴²

Applying Title III to Websites

Only one pre-*Target* case involved the inaccessibility of websites under Title III: *Access Now v. Southwest Airlines, Co.*⁴³ The plaintiffs,

a blind individual and a non-profit organization advocating for increased accessibility for persons with disabilities, claimed that, due to the graphics in Southwest Airlines's website, visually impaired individuals who used screen-reading programs were unable to navigate the site, particularly the special offers and discounts on tickets that the airline made available exclusively via its "virtual ticket counters." Plaintiffs argued that these counters should be considered "places of public accommodation," as an extension of Title III's provisions affecting places of "exhibition, display and . . . sales establishment[s]."⁴⁴

Relying on the "plain and unambiguous language of the ADA," the Florida federal court dismissed plaintiffs' claim.⁴⁵ As the Sixth Circuit had done in *Parker*, the court underscored the apparently physical nature of the categories of "places of public accommodation" enumerated in Title III.⁴⁶ The district court concluded that websites, which are situated in virtual rather than physical space, should not fall into any of these categories.⁴⁷ Applying the Eleventh Circuit's nexus-based approach in *Rendon*, the court emphasized that plaintiffs had not demonstrated a nexus between the airline's "virtual ticket counters" and a brick-and-mortar location.⁴⁸ The court rejected plaintiffs' attempt to reconcile the facts of the case at hand with those of *Rendon*, stating that "the Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in *Rendon*."⁴⁹

The *Target* Decision

The question of whether Title III applies to websites reached a California federal court within the Ninth Circuit when a blind individual, along with the National Federation for the Blind, filed suit against Target, alleging that the design of its website prevented blind individuals from navigating it and, by extension, "denied [them] full and equal access to Target stores."⁵⁰ The district court denied Target's motion for summary judgment, concluding that applying Title III only "to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute."⁵¹ The court arguably endorsed a more inclusive reading of Title III than the First, Seventh, or Eleventh Circuits, stating that the purpose of Title III "is broader than mere physical access—seeking to bar actions or omissions which impair a disabled person's 'full enjoyment' of services or goods of a covered accommodation."⁵²

In formulating its opinion, the court took pains to compare and distinguish the present set of facts from those of prior cases in which the breadth of Title III had been called into question. The court affirmed the logic set forth in *Rendon* to establish a parallel between Target's website and the telephone-based contestant qualification test in *Rendon*; in each case, intangible barriers precluded the "full and equal enjoyment" among disabled individuals of the service at issue.⁵³ Notwithstanding Target's attempts to persuade it to do otherwise, the court distinguished the facts of the present case from those of *Stoutenborough*.⁵⁴ Whereas the radio broadcasts at issue in

Stoutenborough were not services of a public accommodation, the "heavily integrated" nexus between the services available from Target.com and those offered at brick-and-mortar Target stores rendered the website a service offered by Target and, by extension, a "place of public accommodation."⁵⁵ The court characterized Target's website as a "gateway" to its brick-and-mortar stores, insofar as many products and services are offered through both mediums.⁵⁶ The court similarly differentiated Access Now, in which the plaintiffs failed to allege a nexus between Southwest Airlines's "virtual" ticket counters and a physical place.⁵⁷

The Aftermath of *Target*

The district court's denial of Target's motion to dismiss represents a milestone in the interpretation of Title III. Never before has a claim subjecting a website to the purview of Title III survived dismissal. However, rather than resolving this issue, the *Target* decision and subsequent settlement are likely to widen the split among the circuits by emboldening visually impaired individuals and advocacy groups situated in circuits that have not yet considered the issue to file suit against companies that, like Target, utilize their websites as extensions of their stores. As litigation expands, so too will the transaction costs associated with it. Individuals with disabilities, advocacy organizations, and businesses alike will need to dedicate increasing levels of resources to conduct or fend off litigation, and courts will need to devote increasing amounts of time to adjudicating these claims.

A widening divide among the circuits could also result in an exodus of business from those circuits that support the expansive view. The *Target* court did not explicitly enumerate the level of integration that must exist to constitute a nexus between websites and physical spaces.⁵⁸ *Target*, interpreted broadly, could be read to apply to small businesses that do not sell products online, but offer specials, coupons, or merely general administrative information on their websites. As Isabel Dupree notes in her article on the subject, "Using Target as an example, a small retailer that offers coupons to customers through a website not accessible to the visually impaired could easily be seen as affecting the enjoyment of the goods and services of the brick-and-mortar store."⁵⁹

Furthermore, *Target*'s prerequisite that a nexus exist between a website and a physical space⁶⁰ would extend a potentially substantial advantage to retailers that operate exclusively online, such as Amazon. These retailers could choose to optimize the appearance of their websites at the expense of accessibility to individuals with disabilities. By contrast, retailers that have both websites and brick-and-mortar stores would be forced to make their websites accessible and would be necessarily restricted in the graphical modifications they could utilize. This would likely result in lost business, as consumers opt for more visually pleasing alternatives. Ultimately, however, visually impaired Internet users stand to lose the most. Absent a uniform approach to applying Title III to websites, their ability to enjoy all the benefits made available on the Internet will be restricted for years to come.

Resolving the Problem

A number of approaches exist for resolving this issue, but none comes without drawbacks. Leaving the question to the courts is seemingly favored at the present time. However, this approach would subject advocacy organizations, companies, and courts to the costs discussed earlier. Years will likely pass before the Supreme Court has the opportunity to decide the question, during which time the trend of website inaccessibility will likely expand in conjunction with improved graphical technology, rendering whatever solution the Court ultimately fashions all the more cumbersome for websites to implement. Additionally, and just as concerning, delegating the question to the courts would limit the degree of accommodations that visually impaired Internet users could hope to receive when the Supreme Court does pass judgment. Even if the Court were to adopt *Target's* nexus-based analysis—the most favorable interpretation of Title III for the visually impaired to date—businesses that exclusively operate online would be exempt from regulation.⁶¹

Another approach is for disability advocates to lobby state legislatures to enact measures that set accessibility standards for websites.⁶² Such a stratagem would likely prove more time-efficient on a state-by-state basis than waiting for the issue to find its way to the Supreme Court. If the states were not to develop a uniform legislative approach, however, the result would be no less problematic than the current interpretive morass surrounding Title III. Furthermore, although many state constitutions contain language more protective than that of the federal constitution,⁶³ it remains uncertain whether states are legally entitled to regulate the Internet under the Commerce Clause.⁶⁴

The final and most logical approach lies with Congress. Having adopted the ADA over a decade ago, Congress would prove the most natural source for a policy enumerating the rights of the disabled in the modern context of the Internet. Although drafting new legislation and garnering the support necessary to pass it would not be a speedy process, congressional action would bring with it the potential for full closure of the issue. By adopting new legislation on Internet accessibility or amending Title III to address the circumstances under which a website may be considered a “place of public accommodation,” Congress—unlike the courts—would be in a ready position to expand accessibility standards to all websites if it sees fit, not merely those meeting the Seventh Circuit’s nexus requirement. Likewise, Congress would be empowered to institute a “phase-in period” that would allow companies and webmasters a window in which they could research the most effective means of adapting their particular websites to any accommodation standards that its legislation makes necessary.⁶⁵ Such a provision would allow websites to “upgrade to be accessible over time,” instead of forcing speedy and panicked shutdowns.

In addition to mandating monetary penalties for failure to implement necessary accommodations, any statutory measures that Congress takes should set forth specific criteria for determining which websites would be subject to these standards. The amount of traffic a website receives—the best available measure of the likelihood that

blind users will avail themselves of the website—would seem the most equitable and reasonable criterion. Having passed Section 508 of the Rehabilitation Act, which sets forth accessibility standards for government websites,⁶⁶ Congress would be well-placed to model its definition of “inaccessibility” in the private sector on the criteria that it applied to public websites.

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ENDNOTES

1. For a discussion of the inaccessibility and consequent difficulty for visually impaired visitors to navigate many popular sports-related websites, *see, e.g.*, Super Bowl Time!—American Foundation for the Blind, <http://www.afb.org/section.asp?SectionID=57&DocumentID=3021>.
2. 452 F. Supp. 2d 946 (N.D. Cal. 2006). To read about the settlement, *see* Press Release, National Federation of the Blind, National Federation of the Blind and Target Agree to Class Action Settlement: Target Will Ensure That Web Site Remains Accessible to Guests Who Use Assistive Technologies (Aug. 27, 2008), *available at* <http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=357>.
3. 136 Cong. Rec. S9689 (daily ed. July 13, 1990).
4. 42 U.S.C. §12182(a).
5. *Id.* at §12182(b)(2)(A)(i).
6. *Id.* at §12182(b)(2)(A)(ii).
7. *Id.* at §12182(b)(2)(A)(iii).
8. *Id.* at §12182(b)(2)(A)(iv).
9. *Id.* at §12181(7)(A)-(L).
10. *Id.* at §12181(7)(E).
11. *See* *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999); *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).
12. *See* *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Ford v. Shering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004).
13. 37 F.3d 12.
14. 826 F. Supp. 583 (D.N.H. 1993).
15. *Carparts*, 37 F.3d at 19.
16. *Id.*
17. *Id.*
18. *Id.* at 20.
19. 179 F.3d 557.
20. *Id.* at 559.
21. 294 F.3d 1279.

22. 119 F. Supp. 2d 1344 (S.D. Fla. 2000).
23. 294 F.3d at 1285.
24. *Id.* at 1286.
25. *Id.* (citing 42 U.S.C. §12101(a)(5)).
26. 59 F.3d 580.
27. *Id.* at 582.
28. *Id.*
29. *Id.*
30. *Id.* at 583.
31. *Id.*
32. *Id.*
33. *Id.*
34. 121 F.3d 1006.
35. *Id.* at 1011.
36. *Id.*
37. *Id.* at 1013.
38. *Id.* at 1014.
39. 145 F.3d 601.
40. *Id.* at 613.
41. *Id.* at 613-14.
42. *Id.* at 613.
43. 227 F. Supp. 2d 1312.
44. *Id.* at 1318.
45. *Id.*
46. *Id.* at 1321.
47. *Id.*
48. *Id.*
49. *Id.*
50. 452 F. Supp. 2d 946, 950.
51. *Id.* at 953.
52. *Id.* at 954.
53. *Id.*
54. *Id.*
55. *Id.* at 954-55.
56. *Id.* at 955.
57. *Id.* at 954.
58. *Id.* at 954-55.
59. Isabel Arana DuPree, "Websites as 'Places of Public Accommodation': Amending the Americans with Disabilities Act in the Wake of National Federation of the Blind v. Target Corporation," 8 *N.C. J. L. & Tech.* 273, 293 (2007).
60. 452 F. Supp. 2d 946, 954-55.
61. See Michael Finnigan et al., "Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet," 75 *U. Cin. L. Rev.* 1795, 1826 (2007).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. See 29 U.S.C. §794d.

Commission on Mental and Physical Disability Law Website:

www.abanet.org/disability

- Recent Disability Law News
- Online National Directory of Disability Programs in Law Schools
- Commission Publications (Print & Online)
- 2009 National Conference on Employment of Lawyers with Disabilities
- 50-State Directory of Lawyers Practicing Disability Law
- Spotlight on Lawyers with Disabilities
- Projects of Subcommittee on Lawyers with Disabilities
- National Association of Law Students with Disabilities
- Mentor Program for Law Students and Lawyers with Disabilities
- Paul G. Hearne Award for Disability Rights
- ABA Goal III Report