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**AMERICA OFF-LINE:
A LOOK AT THE APPLICABILITY OF
THE AMERICANS WITH DISABILITIES ACT
ON STREAMING DIGITAL MEDIA
AND THE INTERNET**

*SEAN POPE**

In 2012, the National Association for the Deaf brought suit against Netflix for violating the Americans with Disabilities Act (“ADA”) by not captioning their streaming on-demand video content. The National Association for the Deaf won at the District Court level and Netflix has since settled the case. However, this case brought to the forefront the widening split between those Circuit Courts of Appeal which do not feel the ADA applies to online businesses, and those Circuits which believe that the ADA does apply to online businesses. One problem that complicates the analysis is the distinction and applicability of the ADA between commercial websites that also maintain brick and mortar storefronts and interactive websites that are exclusively online. As detailed in this Comment, the growing disparity between ADA-compliant websites and non-compliant websites necessitates a common approach by the courts in order to bring the Internet in line with the intent of the ADA, to give people with disabilities the same type of access to services and goods that is afforded everyone else.

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I. INTRODUCTION

“The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.”

President George H. W. Bush, July 26, 1990

To begin, a hypothetical: Trey is a blind individual on his way to attend a lecture series at a local private university. After his wife drives him to campus and parks in a handicapped parking space, Trey asks for directions from a security guard as he makes his way across campus to his business school. The lecture is on the fourth floor of the building, so Trey heads to the elevators, led by his guide dog. As he gets in, he feels the Braille lettering next to each floor to ensure that he is pushing the right number. Upon arrival to his floor, he once again asks for assistance to find the appropriate classroom and then settles into his seat, his guide dog lying down on the floor next to him.

All of these benefits — the Braille lettering, the handicapped parking spaces, and the guide dog accessibility — are available to Trey as a result of the passage of the Americans with Disabilities Act in 1990 (“ADA”).¹ However, at the time the ADA was envisioned, the Internet was not as ubiquitous as it is now. Let’s take Trey again, but instead of attending the lecture at his local private university, he enrolls in a class at an online university. This university does not have a physical campus, only an office to support its online operations. It independently contracts professors who teach courses from their homes. Students attend classes from wherever they have access to a computer. Would this university have to comply with ADA regulations, such as making the website accessible to screen-reading technology and captioning the video that it displays on the website within the class modules? The answer depends on the Circuit in which a potential lawsuit is initiated. Although it would be a case of first impression for any court in the United States, other cases involving ADA compliance with exclusively online businesses have not fared well.² The possibility that a physical university would be treated differently than an online university in terms of compliance with the ADA is at odds with the bill’s congressional

1. See 42 U.S.C. § 12101 (2012) (describing the findings and purpose of the Americans with Disabilities Act).

2. See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (noting that the Ninth Circuit has not given “a place of public accommodation” a more expansive meaning).

intent, namely, “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³ As the Internet has become such a large part of most Americans’ lives, the assertion that the ADA was passed to “address the *major areas of discrimination* faced day-to-day by people with disabilities” in the physical world alone can no longer stand.⁴

This Comment will first summarize the current ADA jurisprudence and decisions, especially pertaining to Title III, through a case study of the recent decision of *National Association of the Deaf vs. Netflix*.⁵ Next, it will examine the Circuit split that has resulted in two different readings and applications of the “public accommodations” language of Title III.⁶ Finally, it proposes a new reading and interpretation of the current standard of public accommodations in order to meet the current challenges facing the disabled now and in an increasingly Internet-based world. The dichotomy between traditional, physical businesses, and exclusively online businesses must be remedied to bring both under the purview of the ADA and to ensure that this historic legislation continues to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁷

II. A BRIEF HISTORY OF THE ADA AND TITLE III

The ADA was the result of two years of congressional wrangling, which ended with the comprehensive civil rights bill passing both Houses of Congress in overwhelming fashion in 1990.⁸ Title III of the ADA focuses on the definition of public accommodations⁹ and states that, “[n]o

3. 42 U.S.C. § 12101(b)(1).

4. 42 U.S.C. § 12101(b)(4) (emphasis added).

5. *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012).

6. 42 U.S.C. § 12181(7)(A)-(L) (2012).

7. 42 U.S.C. § 12101(b)(2).

8. Sara D. Watson, *A Study in Legislative Strategy: The Passage of the ADA*, in *IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS* 25, 25 (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

9. Jeffrey S. Ranen, Note, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 394 (2002).

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.”¹⁰ This was a pioneering triumph and a leap forward for disabled Americans who had long suffered from inadequate accommodations.¹¹

However, the basic foundations of Title III trace their origin back to Title II of the Civil Rights Act of 1964, which states that, “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”¹² Title III thus extended many of the same rights that were afforded to those who were discriminated against because of race to those who face discrimination due to disability, such as the physically handicapped.¹³ For example, Title III’s definition for a place of lodging as a place of public accommodation is almost identical to the Civil Rights Act’s definition.¹⁴ In fact, three of the four specific categories of public accommodations codified in the Civil Rights Act are replicated in Title III’s public accommodations list.¹⁵ However, Title III of the ADA was written to be

10. 42 U.S.C. § 12182(a) (2012).

11. Faye Kuo, Comment, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUTER & INFO. L. 159, 161-163 (2004); see also H.R. REP. NO. 101-485, pt. 3, at 23-26 (1990).

12. Wendy E. Parmet, *Title III—Public Accommodations*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 123, 123 (Lawrence O. Gostin & Henry A. Beyer eds., 1993); 42 U.S.C.A. § 2000a (2012).

13. *Id.* at 123-24.

14. Compare 42 U.S.C. § 12181(7)(A) (2012) (“an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor”), with 42 U.S.C.A. § 2000a(b)(1) (2012) (“any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.”).

15. Compare 42 U.S.C.A. § 2000a(b)(2) (“any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises”), with 42 U.S.C. § 12181(7)(B) (2012) (“a restaurant, bar, or other establishment serving food or drink”). Compare 42 U.S.C.A. § 2000a(b)(3) (“any motion picture house,

much more encompassing than the earlier Civil Rights Act, which “only applied to a select number of facilities, many of which were traditionally regulated for public benefit under common law.”¹⁶ Congress’s intent behind the ADA was to remove impediments and encompass almost all aspects of public life.¹⁷ In order to accomplish this, Congress wrote Title III to include twelve broad categories of public accommodations, in contrast to the Civil Rights Act’s four categories.¹⁸ In fact, Title III went even further with a provision embodying all “commercial facilities,” which meant facilities “that are intended for nonresidential use; and whose operations will affect commerce.”¹⁹ In effect, Title III covers essentially all entities in the physical public sphere, whereas its predecessor, the Civil Rights Act, was tailored to only incorporate a small number of entities.²⁰

The Department of Justice has stated that, “the ADA mandate for ‘full and equal enjoyment’ requires nondiscrimination by a place of public accommodation in the offering of all its goods and services, including those offered via Web sites,” but no formal rulemaking has been promulgated by any federal agency that would require online businesses and websites be ADA compliant.²¹

theater, concert hall, sports arena, stadium or other place of exhibition or entertainment”), with 42 U.S.C. § 12181(7)(C) (“a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment.”).

16. Parmet, *supra* note 13, at 123; 42 U.S.C.A § 2000a.

17. Hayley M. Koteen, Note, *Ending the Disconnect for the Deaf Community: How Amendments to the Federal Regulations Can Realign the ADA with Its Purpose*, 29 CARDOZO ARTS & ENT. L.J. 425, 431 (2011); *see also* H.R. REP. NO. 101-485, pt. 3, at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304 (“The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life.”).

18. *Compare* 42 U.S.C. § 12181(7)(A)-(L), with 42 U.S.C.A. § 2000a(b)(1)-(4) (2012).

19. Wendy E. Parmet, *Title III—Public Accommodations*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 123, 124 (Lawrence O. Gostin & Henry A. Beyer eds., 1993); 42 U.S.C. § 12181(2)(A)-(B) .

20. Wendy E. Parmet, *Title III—Public Accommodations*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 123, 123 (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

21. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 463 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35-36).

III. NATIONAL ASSOCIATION OF THE DEAF V. NETFLIX

The case *National Association of the Deaf vs. Netflix* illustrates a typical Title III analysis, and provides an example of the problems individuals and organizations face when bringing suits against online businesses.²² The case was brought by two non-profit organizations on behalf of both deaf and hearing-impaired individuals²³ in connection with the “Watch Instantly” service offered by Netflix.²⁴ “Watch Instantly” allows Netflix subscribers to stream thousands of movies and TV shows directly onto their computers, phones, or any other Internet-enabled devices.²⁵ However, the plaintiffs alleged that only a small portion of Netflix’s “Watch Instantly” library contained closed captioning.²⁶ Closed captioning provides for captioned text that is activated while watching television, which “allows deaf and hard of hearing individuals to view television shows and movies by reading” these captions.²⁷ “[B]y failing to provide closed captioning on most of its ‘Watch Instantly’” titles, the plaintiffs argued that Netflix was denying equal access to viewing for the deaf and hard of hearing.²⁸ Based on the lack of universal closed captioning, the plaintiffs brought a claim under Article III of the ADA alleging that Netflix’s failure to caption the entirety of its library was a form of disability discrimination.²⁹

22. Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 196 (D. Mass. 2012).

23. *Id.* at 199.

24. See generally *How Does Netflix Work?*, NETFLIX.COM, <https://help.netflix.com/en/node/412> (last visited April 19, 2014).

25. *Id.*

26. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 199.

27. *Id.*

28. *Federal District Court in Massachusetts First in Country to Hold That the Americans With Disabilities Act Applies to Website-Only Businesses*, NATIONAL ASS’N OF THE DEAF (June 19, 2012, 8:25 PM), <http://www.nad.org/news/2012/6/landmark- precedent- nad- vs- netflix>.

29. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d, at 199. The claim was brought specifically under 42 U.S.C. § 12182(a) (2012), which states in pertinent part, “[n]o 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.”

Defendant Netflix responded with a motion to dismiss on the basis that when Congress passed the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), it gave the Federal Communications Commission (“FCC”) primary jurisdiction over regulation of closed captioning by businesses that offered streaming video.³⁰ Netflix filed for a judgment on the pleadings based on four main arguments.³¹ First, it alleged that the plaintiffs had not successfully pled that Netflix was a “place of public accommodation,” a necessary component of any action claiming noncompliance with the ADA.³² Second, it argued that the plaintiffs had not successfully alleged that Netflix had control over the captioning, another necessary component of the action.³³ Third, it argued that the plaintiffs’ interpretation of the ADA was precluded by Congress’ subsequent passage of the CVAA, which gave primary jurisdiction over closed captioning in streaming video to the FCC.³⁴ Finally, Netflix alleged that the plaintiffs’ claim was moot because the FCC had already promulgated regulations about closed captioning on the Internet.³⁵ The District Court of Massachusetts addressed each of these claims in their opinion before finding for the plaintiffs.³⁶

A. Place of Public Accommodation

In order to state a claim under the ADA, a plaintiff must show that the discrimination occurred at or involved the services of a place of public accommodation.³⁷ Section 12181(7) of the ADA lists twelve categories of private entities that are considered “public accommodations” for purposes

30. *Id.*

31. *Id.* at 199-200.

32. *Id.*

33. *Id.* at 200.

34. *Id.*

35. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 200, 204.

36. *Id.* at 208.

37. *See id.* at 200.

of the ADA.³⁸ The plaintiffs in *National Association for the Deaf* maintained that Netflix's "Watch Instantly" service fell within the scope of at least four of the categories: "place of exhibition and entertainment,"³⁹ "place of . . . recreation,"⁴⁰ "sales or rental establishment,"⁴¹ and "service establishment."⁴² The plaintiffs analogized that Netflix's streaming service was the same as any physical video rental store or movie theater, and ought to be held to the same standards under the ADA.⁴³ They relied on the First Circuit's holding in *Carparts Distribution Center v. Auto Wholesaler's Association*, that a business must comply to ADA standards even if it does not have a physical location.⁴⁴ Netflix argued that *Carparts* was not relevant because it dealt with an entity that conducted its business over the phone and by mail, while the "Watch Instantly" feature was exclusively web-based.⁴⁵ Netflix also contended that 42 U.S.C. § 12181(7), which defines the twelve categories of places of public accommodations, does not specifically address online business, and thus the ADA was an inapplicable basis for a cause of action in that situation.⁴⁶

The court swiftly denied all of Netflix's contentions by reasoning that Congress intended for the ADA to grow and adapt to the times.⁴⁷ It

38. 42 U.S.C. § 12181(7) (2012).

39. 42 U.S.C. § 12181(7)(C) (stating "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment.").

40. 42 U.S.C. § 12181(7)(L) (stating "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.").

41. 42 U.S.C. § 12181(7)(E) (stating "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment.").

42. 42 U.S.C. § 12181(7)(F) (stating "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment"); *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 196, 200.

43. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200.

44. *Id.* (citing *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc.*, 37 F.3d 12, 19 (1st Cir. 1994)).

45. *Id.*

46. *Id.*

47. *Id.* at 200-01.

explained that the ADA made no mention of online businesses because those types of businesses were simply inconceivable at the time of the ADA's passage in 1990.⁴⁸ The court noted that the twelve categories of public accommodations were purposefully left open-ended after a few general examples so that it could keep pace with the changing times.⁴⁹ Netflix finally asserted that because the "Watch Instantly" service is accessed and viewed in private homes and not in public, the website could not be a place of public accommodation.⁵⁰ In support of its position, Netflix reasoned that the principle of *ejusdem generis*⁵¹ applies to the twelve categories of public accommodations, in that all of the listed places are only accessible outside of the home.⁵² The court found this line of reasoning unpersuasive and stated that, "[t]he ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation."⁵³ It followed the reasoning in *Carparts* and held that if the ADA applies to businesses that provide their products over the phone and via mail, then Netflix, which offers services over the Internet, should be bound by the ADA as well.⁵⁴

B. Control

In addition to showing that the discrimination occurred at or involved the services of a place of public accommodation, "a plaintiff must also show that a defendant 'owns, leases (or leases to), or operates' a place of public accommodation."⁵⁵ The relevant standard developed though ADA

48. *Id.*

49. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200-01.

50. *Id.* at 201.

51. *Id.* (citing *United States v. McKelvey*, 203 F.3d 66, 71 (1st Cir. 2000) and noting that the principle of *ejusdem generis* provides that "where general words...follow the enumeration of particular classes of things..., the general words will be construed as applying only to things of the same general class as those enumerated . . .").

52. *Id.*

53. *Id.* (quoting 42 U.S.C. § 12182(a) (2012)).

54. *Id.* at 201-02.

55. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 202 (quoting 42 U.S.C. § 12182(a)).

jurisprudence is whether the defendant “specifically controls the modification of the [things at issue] to improve their accessibility to the disabled.”⁵⁶ Netflix claimed that the company did not hold the copyrights to the content on its site, and that only the copyright holders have the exclusive ability to enable closed captioning.⁵⁷ Netflix also explained that in order to caption the content contained in its “Watch Instantly” library, it would have to get permission from the owners of each video, movie, or television show that it streams.⁵⁸

The court quickly dispatched this argument by stating that Netflix was a “Watch Instantly” website and service, therefore making it an “owner” and “operator” of a place of public accommodation for the purposes of the ADA.⁵⁹

C. *The CVAA*

Netflix’s next argument was that the passage of the CVAA supplanted the ADA because Congress subsequently passed it to deal with a handful of online-based activities.⁶⁰ By removing captioning of streaming video from the purview of the ADA, the CVAA became the final word on the subject, and any right of action for relief had to be established by the FCC.⁶¹ The CVAA thus created an exception for streaming video captioning from the larger, more general disability discrimination because, “[w]hen one statute speaks in general terms while the other is specific, conflicting provisions may be reconciled by carving out an exception from the more general enactment for the more specific statute.”⁶² Netflix alleged that under the CVAA and the subsequent rule promulgated by the FCC, the owners of the copyrighted video programming were responsible for captioning, not the distributor.⁶³ Accordingly, as a distributor, it did not have the

56. *Id.* (quoting *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995)).

57. *Id.*

58. *Id.*

59. *Id.* (citing 42 U.S.C. § 12182(a)).

60. *Id.* at 203.

61. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 203.

62. *Id.* (citing *Stewart v. Smith*, 673 F.2d 485, 492 (D.C. Cir. 1982)).

63. *Id.* at 204; *see also* 47 C.F.R. § 79.4(c)(1) (2012) (stating “[e]ach video programming

responsibility under the CVAA to provide closed captioning, even if it would have under the ADA.⁶⁴ Under the CVAA, Netflix explained that its only obligation was to provide the rendering of the captioning to anyone accessing its “Watch Instantly” service.⁶⁵

The court reasoned that even if Netflix had a duty under the ADA to provide captioning for their library of “Watch Instantly” programming, it would not be in direct conflict with any provision of the CVAA.⁶⁶ Indeed, the court also pointed out that the CVAA’s requirement that video *owners* supply the captioning would make it easier for Netflix and other video *distributors* to comply with their ADA duties.⁶⁷

Netflix also alleged that the CVAA barred any private right of action, and established an administrative complaint process that the plaintiffs were attempting to circumvent.⁶⁸ However, the court reasoned that the CVAA’s predecessor, the Telecommunications Act of 1996, allowed for separate administrative and judicial routes in order to remedy conflicts.⁶⁹ The court went on to state, “[t]here is no indication that the CVAA, unlike the Telecommunications Act, extinguishes private rights of action under the ADA for closed captioning of video programming on the Internet.”⁷⁰

Finally, Netflix argued that the CVAA permits the FCC to grant full

owner must: (i) Send program files to video programming distributors and providers with captions as required by this section, with at least the same quality as the television captions provided for the same programming . . .”).

64. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 204.

65. *See id.* at 203-06; *see also* 47 C.F.R. § 79.4(c)(1)(i)-(ii).

66. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 204.

67. *Id.*

68. *Id.*; *see* 47 U.S.C. § 79.4(e)-(f) (stating “(e) *Complaint procedures.* (1) Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed in writing with the Commission or with the video programming distributor or provider responsible for enabling the rendering or pass through of the closed captions for the video programming within sixty (60) days after the date the complainant experienced a problem with captioning . . . (f) *Private rights of action prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section”).

69. *Id.* at 204-05; *see also* *Zulauf v. Kentucky Educ. Television*, 28 F. Supp. 2d 1022, 1023-24 (E.D. Ky. 1988).

70. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 205.

or partial exemptions from the captioning requirement if an economic burden can be shown and that the plaintiffs were seeking to have them held liable under the ADA without considering these very exceptions.⁷¹ The court stated that the ADA also contains an economic burden exception, but declined to conduct the analysis.⁷²

In its decision, the court found that the CVAA overlapped the ADA and that it imposed some different requirements on video programming distributors.⁷³ However, there was nothing inherently contradictory between the two statutes that would prevent them from being given effect together.⁷⁴

The court next looked at the scope of the CVAA to see if it covered the entirety of the Netflix “Watch Instantly” service.⁷⁵ Netflix, in a narrow reading of the CVAA, argued that the CVAA only applied to programming that is shown: (1) on television, (2) with closed captioning, (3) after the date of the FCC rule promulgation.⁷⁶ It also stated that the FCC made a choice to include only certain types of video programming under the

71. *Id.*; see 47 C.F.R. § 79.4(d) (stating “(1) A video programming provider or owner may petition the Commission for a full or partial exemption from the closed captioning requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome . . . (2) . . . The Commission will consider the following factors when determining whether the requirements for closed captioning of Internet protocol-delivered video programming would be economically burdensome: (i) The nature and cost of the closed captions for the programming; (ii) The impact on the operation of the video programming provider or owner; (iii) The financial resources of the video programming provider or owner; and (iv) The type of operations of the video programming provider or owner.”).

72. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 205; see 42 U.S.C. § 12182(b)(2)(A)(iii) (2012) (stating “[discrimination includes the following], unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden . . .”).

73. *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 205.

74. *Id.* (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249 (1992)) (“Redundancies across statutes are not unusual events in drafting, and so long as there is no ‘positive repugnancy between two laws . . . a court must give effect to both.’” (internal citation omitted)).

75. See *id.* at 206.

76. *Id.* See also 47 C.F.R. § 79.4(b) (“All nonexempt full length video programming [47 U.S.C. § 79.4(a)(2): “Full-length video programming. Video programming that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol . . .] delivered using Internet protocol must be provided with closed captions if the programming is published or exhibited on television in the United States with captions on or after the following dates”)

CVAA.⁷⁷ The court held that although the CVAA only covered limited types of streaming video programming, Congress did not intend to limit the ADA in such a way as to leave the plaintiffs in this case without a remedy, and declined to allow the CVAA to limit the ADA in this situation.⁷⁸

D. Mootness

Netflix's last argument was that since the FCC had already promulgated regulations defining the responsibilities of distributors of Internet streaming video, the plaintiffs could no longer bring an action.⁷⁹ The court soundly rejected this because the CVAA did not cover all of the programming that the plaintiffs were alleging was in violation of the ADA, and because the CVAA did not carve out exceptions to the ADA.⁸⁰ The court further reiterated that because the plaintiffs had brought the action under the ADA, whether or not the FCC regulations had already gone into effect was immaterial to the outcome of the case.⁸¹

IV. CIRCUIT SPLIT ON "PLACE OF PUBLIC ACCOMMODATION"

The holding in *Netflix* was based in part on previous rulings that were binding upon the United States District Court for the District of Massachusetts as part of the First Circuit.⁸² The case hinged on a reading of "place of public accommodation" as interpreted by the First Circuit in *Carparts Distribution Center v. Automotive Wholesaler's Association of New England*.⁸³ The *Netflix* court followed the reasoning in *Carparts* that "places of public accommodation" are not merely limited to physical places.⁸⁴ In a case of first impression in the First Circuit,⁸⁵ the Court found

77. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 206.

78. *Id.* at 207-08.

79. *Id.* at 208.

80. *Id.*

81. *Id.*

82. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201-02 (D. Mass. 2012).

83. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 12 (1st Cir. 1994).

84. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200.

that the plain meaning of the entities discussed under the “public accommodations” section of Title III of the ADA,⁸⁶ such as a “travel service”⁸⁷ or a “service establishment,”⁸⁸ was, at worst, ambiguous.⁸⁹ The court went on to reason that the plain meaning of the terms did not require any of these entities to have physical structures.⁹⁰ It further stated:

[O]ne 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.⁹¹

This reasoning⁹² has been followed by several other Circuits over the years.⁹³ Chief Judge Richard Posner, writing for the Seventh Circuit in *Doe v. Mutual of Omaha Insurance Company*,⁹⁴ cited *Carparts*⁹⁵ when stating that “a place of public accommodation” could encompass a physical or electronic space.⁹⁶ The Second Circuit ruled similarly in finding that an insurance company was meant to be included in the spirit of the plain

85. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19.

86. 42 U.S.C. § 12181(7) (2012).

87. 42 U.S.C. § 12181(7)(F).

88. *Id.*

89. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19.

90. *Id.*

91. *Id.*

92. That Title III of the ADA applies not only to physical places of public accommodation, but also to non-physical locations.

93. *See, e.g., Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

94. *Id.*

95. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 12.

96. *Doe*, 179 F.3d at 559.

meaning of an “insurance office.”⁹⁷ By holding that “the statute was meant to guarantee [the disabled] more than mere physical access,”⁹⁸ the Court further opened the door for non-physical spaces to be included within the meaning of “public accommodations.”⁹⁹

Finally, the Eleventh Circuit tackled the “public accommodation” issue when five plaintiffs sued the producers of “Who Wants To Be A Millionaire.”¹⁰⁰ The show selected contestants by having aspiring participants call a toll-free automated telephone number to answer a series of trivia questions.¹⁰¹ Contestants who answered all of the questions correctly moved on to the second round.¹⁰² The plaintiffs were all either deaf or had limited finger mobility which prevented them from registering their answers on their telephone keypads.¹⁰³ The Court found that a plain and unambiguous reading of the language revealed that the “public accommodations” provision covered both “tangible barriers” and “intangible barriers.”¹⁰⁴ As such, it held that Title III of the ADA applied to the telephone selection process of contestants for “Who Wants To Be A Millionaire.”¹⁰⁵

However, as the First, Second, Seventh, and Eleventh Circuits found that “public accommodations” covered physical and non-physical entities,¹⁰⁶ other Circuits were meanwhile holding that “public

97. See *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32-33 (2d Cir. 1999); see also 42 U.S.C. § 12181(7)(F) (2012) (listing “insurance office” as a place of “public accommodation.”).

98. *Id.* at 32.

99. *Id.* at 33.

100. See generally *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

101. *Id.* at 1280.

102. *Id.* at 1280.

103. *Id.* at 1280-81.

104. *Id.* at 1283.

105. *Id.* at 1286.

106. See generally *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999); *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994).

accommodations” only consisted of physical locations.¹⁰⁷

Curiously, all four Circuits that found Title III applied only to physical entities dealt with similar facts involving insurance.¹⁰⁸ The Sixth Circuit found that Title III did not prevent an employer from providing different benefits for employees who became disabled due to physical illness, as opposed to those who became disabled due to mental illness.¹⁰⁹ It defined a “public accommodation” as “a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve ‘public accommodation’ categories.”¹¹⁰ In reasoning that it was not a “public accommodation,” the court cited two Sixth Circuit cases in which it had found that associations did not fall under the purview of Title III.¹¹¹ A dissenting opinion argued that the reasoning in favor of extending Article III to non-physical structures, as articulated by *Carparts*,¹¹² was more in tune with Congress’ intent.¹¹³

The Third Circuit, in dealing with the issue, also found that disparities in insurance benefits for mental and physical disabilities offered by employers did not violate the ADA.¹¹⁴ The court reasoned that since the employee had received her insurance from her employer, she had no nexus to the insurance company’s physical office.¹¹⁵ In addition, the court, when distinguishing *Carparts*, said that the First Circuit did not follow the doctrine of *noscitur a sociis*, “[a] canon of construction holding that the

107. See generally *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997).

108. *Id.*

109. *Parker*, 121 F.3d at 1008.

110. *Id.* at 1011 (citing *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995)).

111. See *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 463 (6th Cir. 1997); *Parker*, 121 F.3d at 1011 (citing *Sandison v. Mich. High Sch. Athletic Ass’n, Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995)).

112. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19.

113. *Parker*, 121 F.3d at 1019-20.

114. See *Ford*, 145 F.3d at 601.

115. *Id.* at 612-13.

meaning of an unclear word or phrase should be determined by the words immediately surrounding it,”¹¹⁶ in deciding the ambiguous nature of the examples under “public accommodations.”¹¹⁷ These terms, the Third Circuit reasoned, “should be interpreted by reference to the accompanying words of the statute ‘to avoid the giving of unintended breadth to the Acts of Congress.’”¹¹⁸ The court held that “public accommodations” did not encompass non-physical entities, and that the meaning of the terms was not ambiguous.¹¹⁹

The Fifth Circuit found that although Title III prohibited owners and lessees from preventing the disabled from being able to access a physical place, it could not be applied to regulate the goods and services offered.¹²⁰ It reasoned that, “in many, if not most, cases, the disabled simply will not have the capacity or ability to enjoy the goods and services of an establishment ‘fully’ and ‘equally’ compared to the non-disabled.”¹²¹ It inferred that some goods and services are inherent to the nature of the business, such as a movie theater or a tennis arena.¹²² The court reasoned that a blind individual may enjoy attending tennis matches, but it would be impossible to rectify the situation through the ADA where the blind person would be able to have the same experience as someone with their sight.¹²³ To go against this logic, “[r]estaurants would have to limit their menus to avoid discriminating against diabetics.”¹²⁴ The court argued that Title III had to be interpreted and construed with functional and practical boundaries.¹²⁵ In doing this, it explained it had to prevent Title III from

116. *Noscitur a sociis* is Latin for “it is known by its associates.” BLACK’S LAW DICTIONARY 1160-61 (9th ed. 2009).

117. *Ford*, 145 F.3d at 614.

118. *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

119. *Id.*

120. *McNeil*, 205 F.3d at 186.

121. *Id.* at 187

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

being applied to all goods and services, as there was no non-arbitrary way to distinguish goods that ought to be protected from goods that ought not to be protected.¹²⁶ The “good” being offered there was insurance, which is not protected under the “public accommodations” statute because the Fifth Circuit held that the owner of a place of public accommodation did not need to modify its goods and services in order to avoid a Title III violation.¹²⁷

Finally, the Ninth Circuit ruled that Title III only covered physical locations.¹²⁸ Following the Sixth¹²⁹ and Third¹³⁰ decisions, the court first determined that the principle of *noscitur a sociis* required that “public accommodation” be interpreted within the context of all of its qualifying words.¹³¹ After looking at all twelve categories of establishments under “public accommodation,”¹³² the court found that, “some connection between the good or service complained of and an actual physical place is required.”¹³³ As in all previous cases in which the various Circuits found that Title III did not apply to insurance companies,¹³⁴ the Ninth Circuit could not find a nexus between the benefit plan offered by an employer and a good offered by a place of public accommodation.¹³⁵

The Third,¹³⁶ Sixth,¹³⁷ and Ninth¹³⁸ Circuit decisions all dealt with

126. *McNeil*, 205 F.3d at 187.

127. *Id.* at 188.

128. *Weyer*, 198 F.3d at 1115.

129. *Parker*, 121 F.3d at 1014 (“To interpret these terms [of §12181(7) and subsection (F)] as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute and the principle of *noscitur a sociis*.”).

130. *Ford*, 145 F.3d at 614 (“Pursuant to the doctrine of *noscitur a sociis*, the terms that the First Circuit finds ambiguous should be interpreted by reference to the accompanying words of the statute ‘to avoid the giving of unintended breadth to the Acts of Congress.’”).

131. *Weyer*, 198 F.3d at 1114.

132. 42 U.S.C. § 12181(7)(A)-(L) (2012).

133. *Weyer*, 198 F.3d at 1114.

134. See *McNeil*, 205 F.3d at 182; *Ford*, 145 F.3d at 612-13; *Parker*, 121 F.3d at 1011.

135. *Weyer*, 198 F.3d at 1114-15.

136. *Ford*, 145 F.3d at 612-13.

insurance companies administering an employer-provided disability policy. All three found that the policy was not a place of “public accommodation.”¹³⁹ This directly contrasts the First,¹⁴⁰ Second,¹⁴¹ Seventh,¹⁴² and Eleventh Circuits’¹⁴³ findings that Title III was implicated by discrimination that might have occurred in non-physical locations. The facts of seven of the eight cases were remarkably similar in that they dealt with insurance companies.¹⁴⁴ The sides favoring a conservative approach to Title III — and finding that it did not apply to non-physical locations — tended to conclude that the companies were insurance companies, rather than insurance offices.¹⁴⁵ This is an important distinction because Title III only specifically mentions “insurance office[s]”¹⁴⁶ as being “public accommodations,” not insurance companies.¹⁴⁷ The Circuits that found the ADA could apply to non-physical entities¹⁴⁸ took the opposite approach and found that since Title III expressly provides for “insurance office[s],”¹⁴⁹ and the goods and services provided at insurance offices are mostly insurance policies, Title III is applicable to those policies as well.¹⁵⁰

137. *Parker*, 121 F.3d at 1010.

138. *Weyer*, 198 F.3d at 1114-15.

139. *See Parker*, 121 F.3d at 1010-11; *Ford*, 145 F.3d at 614; *Weyer*, 198 F.3d at 1115.

140. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19.

141. *Pallozzi*, 198 F.3d at 32-33.

142. *Doe*, 179 F.3d at 559.

143. *Rendon*, 294 F.3d at 1286.

144. The only one of the eight that did not deal with an insurance claim was *Rendon*, 294 F.3d 1279, which dealt with contestant screening for *Who Wants To Be A Millionaire*.

145. *See, e.g., Parker*, 121 F.3d at 1010.

146. 42 U.S.C. § 12181(7)(F) (2012).

147. *Id.* § 12181(7).

148. *See Carparts Distrib. Ctr., Inc.*, 37 F.3d at 20; *Doe*, 179 F.3d at 559; *Pallozzi*, 198 F.3d at 33.

149. 42 U.S.C. § 12181(7)(F).

150. *Pallozzi*, 198 F.3d at 31.

The Department of Justice has made it extremely clear that websites are considered “public accommodations” under Title III.¹⁵¹ The thrust of the Department of Justice’s argument is that Title III must be applicable to any activity or service offered by a “public accommodation” whether it is on or off site.¹⁵² This would appear to be out of line with the four Circuit Courts that have decided that Title III is only applicable to physical locations.¹⁵³ The issue of Title III and its applicability to the Internet is one that Circuits have not had to grapple with much. But based on the current Circuit divide between physical and non-physical locations, it will only be a matter of time before this issue is granted certiorari by the Supreme Court to clear up the division.

V. SOCIAL MEDIA AND STREAMING CONTENT: THE NEXT HORIZON

A. *The Target and Facebook Cases*

On Oct. 10, 2012, Netflix entered into a joint consent decree with the National Association for the Deaf.¹⁵⁴ As part of the decree, Netflix pledged to have closed captioning on 100% of its streaming video library within the next two years.¹⁵⁵ In addition, Netflix would seek to ensure that captioning would be available not only on computers, but also on devices that can access the streaming content.¹⁵⁶ This would seem to include the growing popularity of smartphones and tablet computers.

Netflix and other streaming video providers like Hulu are joining the fray of online businesses that are either voluntarily adopting these policies

151. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43, 460 (July 26, 2010) (to be codified at 28 C.F.R. pt. 35 and 36).

152. *Id.* at 464.

153. *See Parker*, 121 F.3d at 1010-11; *Ford*, 145 F.3d at 612; *McNeil*, 205 F.3d at 186; *Weyer*, 198 F.3d at 1114.

154. Press Release, Nat’l Ass’n of the Deaf, Netflix and Nat’l Ass’n of the Deaf Reach Historic Agreement to Provide 100% Closed Captions in On-Demand Streaming Content Within Two Years (Oct. 10, 2012) (on file with author).

155. *See id.*

156. *See id.*

or are being forced to conform to the ADA.¹⁵⁷ However, lawsuits alleging noncompliance with the ADA against social media sites such as Facebook have not fared well for disability rights groups.¹⁵⁸ There is a growing divide between online businesses that have adopted or are being forced to adopt the ADA provisions and those online businesses which have not.¹⁵⁹ This divide is most apparent between commercial sites, which tend to be supported by a brick and mortar business, and interactive sites, which tend to be exclusively online. In *National Federation of the Blind v. Target Corporation*, the United States District Court for the Northern District of California found that any aspect of Target.com which offered information and services about the physical location of stores and their offerings for sale had to be compliant with Title III, the failure of which would “impair a disabled person’s ‘full enjoyment’ of services or goods of a covered accommodation.”¹⁶⁰ However, the court also found that any part of Target.com that offered information and services that were unconnected to any physical Target store did not fall within the purview of Title III.¹⁶¹ The court thus required a nexus between the online services and the physical public accommodation in order to state a claim under Title III.¹⁶²

Five years later, the same court was asked whether the social networking site, Facebook, had violated Title III.¹⁶³ In *Young v. Facebook, Inc.*, a young woman’s profile was deactivated for “behavior identified as potentially harassing or threatening to other Facebook users.”¹⁶⁴ The woman, alleging that she suffered from bipolar disorder, filed suit against Facebook for unlawful discrimination by failing to provide reasonable

157. See, e.g., *id.*; Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 950 (N.D. Cal. 2006).

158. See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115-16 (N.D. Cal. 2011).

159. Compare *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 955, with *Young*, 790 F. Supp. 2d at 1115.

160. *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 954 (quoting 42 U.S.C. § 12182(a) (2012)).

161. *Id.* at 956.

162. *Id.* at 954.

163. See *Young*, 790 F. Supp. 2d at 1113.

164. *Id.* at 1114.

customer services to individuals suffering from mental disabilities.¹⁶⁵ The woman, rather than showing that Facebook was a place of public accommodation within the meaning of the ADA, instead relied on *Carparts* and *Doe*¹⁶⁶ to show that other Circuits had found that public accommodations encompassed more than physical structures and buildings.¹⁶⁷ However, the court stated that it was bound to follow Ninth Circuit precedent, which has not expanded the meaning of “place of public accommodation” to include more than physical structures and the services that encompass them.¹⁶⁸

The plaintiff also alleged that Facebook’s services met the *Target* nexus test as a physical place of public accommodation because it sold its own branded gift cards in stores all over the United States.¹⁶⁹ In return, “the alleged discrimination on Facebook’s website deprive[d] her of full and equal access to the goods and services provided by Facebook through physical retail stores.”¹⁷⁰ However, the court, in a strict reading of Title III, found that since Facebook does not “own, lease . . . or operate,” the stores where its gift cards are sold, its Internet services did not have a nexus to a physical place of public accommodation.¹⁷¹

B. The Explosion of Social Media

The skyrocketing use of social media websites such as Facebook, Twitter, Instagram, LinkedIn, and Pinterest requires Congress to reexamine the ADA to bring these online businesses into compliance with the ADA

165. *See id.* at 1114-15.

166. *Carparts Distrib. Ctr., Inc.*, 37 F.3d 12; *Doe*, 179 F.3d 557.

167. *Young*, 790 F. Supp. 2d at 1115; *See Carparts Distrib. Ctr. Inc.*, 37 F.3d at 19; *see also Doe*, 179 F.3d at 559.

168. *Young*, 790 F. Supp. 2d at 1115.

169. *See id.*

170. *Id.*

171. *Id.* at 1116 (citing 42 U.S.C. § 12182(a) (2012)) (“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.”) (emphasis added).

by amending its public accommodations language to include non-physical businesses.¹⁷² If Congress decides not to act, courts can and must insert themselves into the conversation by stating unequivocally that online businesses fall within the purview of the ADA. In general, the ADA prohibits discrimination against individuals enjoying public accommodations, such that “[n]o 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.*”¹⁷³ Importantly here, the language “operates” could be interpreted to mean that online businesses that have no nexus to physical businesses (such as Facebook) *operate* places of public accommodation. Such a finding, however, would still have to be based on one of the categories of public accommodations. The statute states:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

172. A recent estimate found that Facebook had 955 million users, Twitter had 500 million users, LinkedIn had 174 million users, Instagram had 40 million users, and Pinterest had 16.8 million users. Samantha Felix, *CHARTS: See How Massive Social Media Is Now, By Users And Dollars*, BUSINESS INSIDER (Sept. 27, 2012), <http://www.businessinsider.com/how-big-social-media-has-become-2012-9>.

173. 42 U.S.C. § 12182(a) (emphasis added).

- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.¹⁷⁴

A suit against a business such as Facebook could proceed under section (D) as a category of online business.¹⁷⁵ Many people sign up for a Facebook account in order to gather and discuss events, stories, pictures, and memories of events that are relevant or important to them.¹⁷⁶ It would be reasonable to view social media as a place of public gathering.¹⁷⁷ Even the online university discussed in the introductory hypothetical could fall under subsection (J)'s inclusion of all places of education.¹⁷⁸ The challenge in all of these cases would be to overcome the initial hurdle of establishing that an exclusively online business, with no connection or nexus to a physical business location, could be classified as a place of

174. 42 U.S.C. § 12181(7)(A)-(L) (2012).

175. 42 U.S.C. § 12181(7)(D).

176. For example, the New York Giants' official fan page on Facebook has over 3.1 million likes, with each post garnering hundreds of comments and thousands of likes. New York Giants, <http://www.facebook.com/newyorkgiants?fref=ts> (last visited Apr. 6, 2014).

177. *See Young*, 790 F. Supp. 2d at 1115.

178. 42 U.S.C. § 12181(7)(J).

public accommodation.¹⁷⁹

In order to prevail on a Title III discrimination claim, “[a] plaintiff must show that: (1) she is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of her disability.”¹⁸⁰ By categorizing online social media businesses as places of public accommodation, Title III claims could be brought against them.¹⁸¹ One big worry of those advocating against such an expansive view of the ADA is a flood of Title III lawsuits burying online businesses in tsunamis of litigation.¹⁸² However, when private individuals bring a claim against places of public accommodation, they may only seek injunctive relief¹⁸³ and reasonable attorney’s fees and costs.¹⁸⁴ This should prevent most, if not all, frivolous and irrelevant lawsuits because the people that are going to sue businesses like Facebook and Twitter are going to be people with disabilities. They only want to be able to have full access and enjoyment of these sites – not to be awarded massive damages. Only by interpreting public accommodations to include these exclusively online businesses will courts be able to once again satisfy the original purpose of the ADA.¹⁸⁵

Another important consideration for implementing these changes, whether by the courts or by Congress, is the costs that online businesses would incur in order to make their websites accessible.¹⁸⁶ Title III already

179. See *Young*, 790 F. Supp. 2d at 1115.

180. *Id.* (citing *Ariz. ex. rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666, 670 (9th Cir. 2010)).

181. See *id.*

182. See generally Faye Kuo, Comment, *Open and Closed: Captioning Technology as a Means to Equality*, 23 J. MARSHALL J. COMPUTER & INFO. L. 159, 203 (2004).

183. Basically ordering the public accommodation to bring the entity within ADA compliance.

184. *Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS*, U.S. DEPT. OF JUSTICE, http://www.ada.gov/aids/ada_q&a_aids.htm#public-accm (last visited Apr. 6, 2014).

185. See 42 U.S.C. § 12101(b)(1)–(4) (2012).

186. Hayley M. Koteen, Note, *Ending the Disconnect for the Deaf Community: How Amendments to the Federal Regulations Can Realign the ADA with Its Purpose*, 29 CARDOZO ARTS & ENT. L.J. 425, 448 (2011).

carves out an undue burden exception to Title III compliance if the public accommodation can show that compliance would, “[f]undamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”¹⁸⁷ Online businesses could use this exemption if such regulations would be too burdensome for them to comply, and would also prevent either the courts or Congress from implementing or promulgating requirements that would be too strict.¹⁸⁸ Any new requirements would have to be narrow enough to achieve the result of online accessibility by the disabled, but not so strict that most online businesses would rather claim that the new regulations would be an undue burden and take their chances in court.¹⁸⁹ This would likely require “a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.”¹⁹⁰ A case-by-case basis of individual websites may prompt fears of excessive and widespread litigation, as was the case with movie theaters when the ADA became law.¹⁹¹ However, during the implementation of the original ADA, the judicial system was more than able to handle these cases.¹⁹²

VI. CONCLUSION

The world is becoming more and more divided into groups of those who have access to the Internet and those who do not. We are continually evolving into a global society, both in business as well as in communication and socialization. A friend living in China or Bolivia is

187. 42 U.S.C. § 12182(b)(2)(A)(iii).

188. Koteen, *supra* note 186, at 447-48.

189. *See generally id.*

190. Charles D. Mockbee IV, Note, *Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses*, 28 S. ILL. U. L.J. 553, 573 (2004), quoting Anita Ramasastry, *Should Web-Only Businesses be Required to be Disabled-Accessible?*, CNN (Nov. 7, 2002), <http://archives.cnn.com/2002/LAW/11/07/findlaw.analysis.ramasastry.disabled/index.html>.

191. *See generally* Kuo, *supra* note 182, at 203.

192. *See* David M. Stokes, *Relief for the Deaf: The Michigan Handicappers' Civil Rights Act and the Americans with Disabilities Act*, 68 U. DET. L. REV. 513, 535 (1991).

only a few keystrokes away. The explosive popularity of smartphones has made online accessibility a 24-hour-per-day possibility.¹⁹³ Those who have access to the Internet every day and use it whenever they want may take it for granted, but universal access is far from reality, especially for those with disabilities. Unfortunately, the ADA was not written with the explosion of Internet usage in mind.¹⁹⁴ Some courts have started to rectify this problem by finding that businesses that maintain online and physical presences must make their sites pertaining to services available in their physical stores ADA compliant.¹⁹⁵ Additionally, online businesses started to take it upon themselves to voluntarily come within ADA compliance, as seen in the *Netflix* case and subsequent consent agreement.¹⁹⁶ However, there is still a significant swath of Americans who cannot enjoy free and unfettered access to the Internet, and that is why courts need to recognize that the Internet is as much a public accommodation as any brick and mortar storefront.¹⁹⁷

There is a circuit split as to whether online businesses with physical locations should even be viewed under the light of the ADA, with some saying non-physical entities should be covered under the ADA,¹⁹⁸ and others saying they should not.¹⁹⁹ However, there is also a growing

193. See generally *America's New Mobile Majority: A Look at Smartphone Owners in the U.S.*, NIELSEN (May 7, 2012), <http://blog.nielsen.com/nielsenwire/?p=31688>.

194. See Ryan C. Richards, *Reconciling the Americans with Disabilities Act and Commercial Websites: A Feasible Solution?*, 7 RUTGERS J. L. & PUB. POL'Y 520, 525 (2010).

195. See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

196. See generally *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012); Press Release, National Association of the Deaf, Netflix and the National Association of the Deaf Reach Historic Agreement to Provide 100% Closed Captions in On-Demand Streaming Content Within Two Years (Oct. 10, 2012) (on file with author).

197. Jeffrey S. Ranen, Note, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 418 (2002).

198. See *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc.*, 37 F.3d 12, 19 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999); *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002).

199. See *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613-14 (3d Cir. 1998); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

dichotomy between these *commercial* online businesses which have been found to fall under the purview of the ADA,²⁰⁰ and *interactive* online businesses which maintain no physical presence in which they provide goods or services, as their entire presence is online.²⁰¹ These interactive sites so far have escaped having to become ADA complaint. In the absence of congressional intent to change Title III, courts should begin to view online, non-physical entities as falling under the ADA's umbrella of public accommodations. Courts would still be able to use discretion when deciding whether businesses that would not have previously fallen under the traditional "place[s] of public gathering"²⁰² sub-heading from having to expend a lot of money to meet the demands of Title III.²⁰³ The key, at least at first, would be to give courts a high level of flexibility when dealing with these first cases, as this would be an entirely new area of applicability for the ADA.²⁰⁴ The courts must be able to strike a balance in leveling the playing field between disabled and nondisabled Internet users, while not being so onerous so as to prevent most online businesses and social media providers from being able to meet the requirements.²⁰⁵ In the long run, the application of Title III to non-physical entities, especially social media and online businesses, will benefit all of those who are disabled and cannot access these interactive websites now. It would seek to ensure that "all Americans will have an equal opportunity to connect with the goods, services, communities, and opportunities proliferating online everyday."²⁰⁶ This is the logical next step in the evolution of the ADA, and the restoration of the original goals and purposes of this historic piece of legislation.²⁰⁷ Judicial action must step up in the face of legislative

200. See *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 956 (N.D. Cal. 2006).

201. See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115-16 (N.D. Cal. 2011).

202. 42 U.S.C. § 12181(7)(D) (2012).

203. For instance, it may be perfectly reasonable for a court to hold that a small blog read by a few dozen people each week would not fall under a "place of public gathering."

204. See *Richards*, *supra* note 194, at 559.

205. See *id.*

206. 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 Accommodation"*, 45 HOUS. L. REV. 991, 1029 (2008).

207. See 42 U.S.C. § 12101(b) (2012).

inaction, especially to protect and preserve the rights of a minority class. In this case, making the Internet and interactive websites accessible to every American to use and enjoy, must be of the utmost priority.