

From Madness to Method: The Americans with Disabilities Act Meets the Internet

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I. INTRODUCTION

The Americans with Disabilities Act of 1990 (“ADA”) was intended “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹ In the context of the Internet, however, discrimination in the form of inaccessibility persists largely beyond the reach of the ADA. The ADA was passed at a time when the United States was on the threshold of a revolution in information technology that would change every aspect of American life. In 1991, just one year after the ADA was signed into law, researcher Tim Berners-Lee created the world’s first web server, web browser, and web site.² The subsequent proliferation of the Internet has left nothing untouched. For the individual, new means of communication, entertainment, and commerce have transformed daily life. For the firm, changes in methods of communication have reduced transaction, monitoring, and agency costs. For the retailer, a new venue for advertising has created opportunities to market and sell products without geographical restriction. For the academic, information-sharing has propelled new discoveries.

For the disabled, the Internet held a great deal of promise and a great deal of risk. Screen readers for the blind and other accessibility technology became widely available, allowing those with disabilities to access text-based web pages with relative ease.³ This put a plethora of previously difficult-to-obtain materials at the fingertips of disabled Americans for the first time. The risk, however, lay in the fact that the Internet economy was, and is, based on traffic. Online traffic generates advertising revenue and increased profits stemming from a greater number of completed transactions. In short, traffic means money. Traditional web advertising, however, is not as effective at reaching people with disabilities. In addition, because dis-

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¹ 42 U.S.C. § 12101(b)(1) (2000).

² See JAMES GILLIES & ROBERT CAILLIAU, *HOW THE WEB WAS BORN: THE STORY OF THE WORLD WIDE WEB* 180-203 (2000).

³ *Id.*

abled individuals comprise a small segment of the market, market mechanisms alone have failed to drive Internet accessibility. The result has been an economy-driven Internet that is not fully accessible to those with disabilities.

The problem, then, is whether and how the regulatory scheme heralded by the ADA should go about making the Internet more accessible to disabled individuals. By passing the ADA, the federal government appropriated a central role in “address[ing] the major areas of discrimination faced day-to-day by people with disabilities.”⁴ Title III of the ADA seeks to address discrimination in almost every physical venue that is central to American public life, including hotels, schools, shopping malls, professional offices, restaurants, theaters, parks, and public transportation. Because passage of the ADA predated the meteoric rise of the Internet, Congress could not have included web pages as “public accommodations”⁵ under Title III. The Internet has become equally central to American life as a tool for shopping, education, entertainment, and communication. Much of the Internet, however, is inaccessible to individuals with disabilities, particularly those with vision and hearing impairments.⁶ Therefore, if the federal government is to uphold the ADA and meet its obligation to ensure that the disabled can participate in American life on equal terms, it must address the problem of online inaccessibility for the deaf and blind.

This Note will describe how the ADA is currently applied to the Internet through the “nexus” test.⁷ We will argue that application of this test is both under- and over-inclusive. It is under-inclusive in that it fails to increase the accessibility of large-scale commercial websites. It is over-inclusive in that it fails to account for potentially high costs and First Amendment pitfalls that could have serious ramifications for Internet content providers. These problems have the potential to plague not only the “nexus” test, but any government regulation aimed at increasing the accessibility of Internet content. The goals of this Note are twofold. First, we hope to provide a foundation for legislative, regulatory, and entrepreneurial solutions to the problem of web accessibility. In order to do so, we will draw upon empirical research on the scope of modern Internet usage, the ability of individuals with disabilities to access the Internet, and the costs of implementing Internet accessibility. Second, we will suggest explicit standards tailored to the Internet’s features and special challenges that may be used to guide new regulation of some private Internet content.

Part II of this Note will begin by outlining the origin of the problem: the passage of major legislation, meant to impact all aspects of public life, just prior to a technological revolution that transformed many aspects of the

⁴ 42 U.S.C. § 12101(b)(4).

⁵ 42 U.S.C. § 12181(7) (2000).

⁶ MICHAEL G. PACIELLO, *WEB ACCESSIBILITY FOR PEOPLE WITH DISABILITIES* 5-6 (2000).

⁷ See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006); *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1319-21 (S.D. Fla. 2002).

public square. This section will begin by summarizing the contours of the ADA as passed by Congress in 1990. Next, it will provide an overview of the Internet's trajectory since 1990 in order to demonstrate why it was unanticipated by the drafters of the ADA. We will argue that the Internet's pre-eminence in the modern world justifies new regulation to further the ADA's central mission of ensuring equal access for the disabled.

Part III will show how actions taken by Congress, the Department of Justice ("DOJ"), and the courts have complicated, rather than clarified, the doctrine surrounding Title III's application to Internet accessibility. Congress held a hearing in 2000 to address the applicability of the ADA to private Internet websites.⁸ Though testimony at this hearing underscored both the need for, and problems with, mandating web accessibility, Congress has failed to take action in the intervening eight years. The DOJ, the agency responsible for implementing and interpreting the ADA, has given some indications that it reads Title III to require the accessibility of at least some Internet websites, but it has failed to initiate a formal notice-and-comment rulemaking to address this issue.⁹ Thus far, Congress and the DOJ have failed to address Internet accessibility head-on and instead have left the development of the law in this area to the courts. Courts, employing a "nexus" test, have generally found that the ADA's accessibility requirements apply to websites that either offer the same services as a physical place of public accommodation, or that offer services that affect access to the physical places and services traditionally covered by the Act.¹⁰ Debate continues to rage in the scholarly literature over whether Congress would have intended the Act to be interpreted in this manner.¹¹

Part IV will show that this reliance on courts is misplaced, because courts are structurally ill-equipped to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" on the Internet.¹² This Note will argue that the "nexus" test is both over- and under-inclusive in its ability to redress online discrimination against individuals with disabilities. Application of the test fails to cover a vast array of Internet-only businesses such as Amazon.com. At the same time, it risks chilling many forms of noncommercial online content, such as free content offered by individuals and non-profit institutions. There are two primary sources for these chilling effects. First, the cost of implementing accessibility, combined with the cost of anticipating possible accessibility claims under the courts' piecemeal approach, could make posting content too

⁸ See *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) [hereinafter *Hearing*].

⁹ See, e.g., *infra* note 152, and accompanying text.

¹⁰ See, e.g., *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d at 952; *Access Now*, 227 F. Supp. 2d at 1319-21.

¹¹ See, e.g., Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. Sci. & Tech. L. 26 (2001).

¹² 42 U.S.C. § 12101(b)(2).

cumbersome for many users to tolerate. We will argue that these costs could ultimately bar some content from being posted online. Second, because the Internet is principally a medium of expression,¹³ courts should be wary of imposing regulations that threaten to infringe on First Amendment rights. The “nexus” test amplifies these speech concerns, which are inherent in all government regulation of expressive activity, because it creates “new rights without well-defined standards.”¹⁴

Part V argues that the ADA’s commitment to mandating the elimination of discrimination against persons with disabilities can be achieved with regard to the Internet if Congress or the DOJ sets forth specific guidelines for accessibility. First Amendment and cost concerns are not exclusive to the “nexus” test, but should be considered before proceeding with any regulation of the Internet. This section will suggest reasonable routes to increasing Internet accessibility without running afoul of the First Amendment or dampening Internet productivity. Specifically, we recommend a bifurcated approach that draws a distinction between text-based content, which can be made accessible at little cost, and media-rich content, for which it would be futile to mandate accessibility. Congress or the regulating agency should draw additional distinctions within the realm of text-based content, by mandating accessibility for commercial services, such as the sale of goods, but not for non-commercial expressive content. Because accessibility costs are likely to be ongoing rather than discrete, government regulation focusing on commercial entities should incorporate cost-spreading mechanisms to ensure that the costs of accessibility fall on those who are profiting from online activity. This approach would diverge to some extent from the approach taken by the ADA, which focuses on maximizing the impact on disabled individuals.

II. THE ADA MEETS THE INTERNET

A. *The Scope of Title III of the ADA*

The Americans with Disabilities Act of 1990¹⁵ was passed by an overwhelming majority of Congress.¹⁶ In so doing, the legislators voted to invoke “the sweep of congressional authority”¹⁷ to guarantee that the federal government took on a central role¹⁸ in enforcing what it described as the

¹³ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849-53 (1997).

¹⁴ *Access Now*, 227 F. Supp. 2d at 1318.

¹⁵ 42 U.S.C. §§ 12101-12213 (2000).

¹⁶ The ADA passed by a vote of 91-6 in the Senate and 377-28 in the House. 136 CONG. REC. 17,376 (1990) (Senate); 136 CONG. REC. 17,296-97 (1990) (House). President George H. W. Bush signed it into law on July 26, 1990. Statement by President George Bush upon Signing the ADA into Law, 26 WEEKLY COMP. PRES. DOC. 1165 (July 26, 1990).

¹⁷ 42 U.S.C. § 12101(b)(4).

¹⁸ 42 U.S.C. § 12101(b)(3).

“clear, strong, consistent, enforceable standards”¹⁹ set forth in the Act. The Act sought to address discrimination against the disabled by regulating the actions of employers via Title I,²⁰ of state and local governments via Title II,²¹ and of private entities via Title III.²² The ADA codifies a number of congressional findings that support addressing discrimination against individuals with disabilities.²³ Significantly, its final finding linked “the continuing existence of unfair and unnecessary discrimination and prejudice” to problems of cost.²⁴ Congress asserted that such discrimination “denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.”²⁵ Additionally, Congress found that discrimination against individuals with disabilities “costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”²⁶ Although the cost of not addressing this discrimination was used as a justification for passing the ADA, the cost of ADA compliance has been the focus of much of the pushback against the Act.²⁷ It is perhaps, then, not surprising that the issue of cost has become the primary battleground of the war over Internet accessibility.

Title III of the ADA prohibits “places of public accommodation” from discriminating against the disabled.²⁸ Though Congress included a similar provision in Title II of the Civil Rights Act, the reach of that provision extends only to restaurants, hotels, and places of entertainment.²⁹ Title III, on the other hand, defines public accommodations as “those entities that affect commerce and fall within one of twelve enumerated categories” that cover a broad range of private facilities open to the public.³⁰ In addition to the places governed by the Civil Rights Act, Title III also applies to places of

¹⁹ 42 U.S.C. § 12101(b)(2).

²⁰ See 42 U.S.C. §§ 12111-12117.

²¹ See 42 U.S.C. §§ 12131-12165.

²² See 42 U.S.C. §§ 12181-12189.

²³ See 42 U.S.C. § 12101(a).

²⁴ 42 U.S.C. § 12101(a)(9).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See, e.g., Edward J. McGraw, Note, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521, 536 (1993); Ron A. Vassel, Note, *The Americans with Disabilities Act: The Cost, the Uncertainty, the Inefficiency*, 13 J.L. & COM. 397 (1994).

²⁸ 42 U.S.C. § 12182(a).

²⁹ 42 U.S.C. § 2000(a) (2000).

³⁰ 42 U.S.C. § 12181(7) provides: “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;

public gathering, sales or rental establishments, service establishments, stations used for public transportation, places of public display or collection, places of recreation, places of education, and social center service establishments.³¹ This expanded protection was deliberate. Prior to the ADA's passage, Senator Harkin, one of the bill's primary sponsors, noted that Congress had chosen to extend the reach of the ADA so broadly because "discrimination against people with disabilities is not limited to specific categories of public accommodations."³²

Discrimination under Title III means providing disabled individuals with goods, services, facilities, privileges, advantages, or accommodations that are not equal to those afforded to non-disabled individuals.³³ Entities covered under the ADA are required to ensure that the disabled have equal access to their goods and services by making reasonable modifications to their policies, practices, or procedures.³⁴ They are also required to provide "auxiliary aids and services" where "necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals."³⁵ These entities also have an affirmative duty to remove physical barriers that prevent the disabled from accessing facilities,³⁶ to remove structural barriers that prevent effective communica-

(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;

(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.

³¹ 42 U.S.C. § 12181(7)(d)-(l).

³² 135 CONG. REC. 19,802 (1989).

³³ 42 U.S.C. § 12182 (2000). The full provision reads: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

³⁴ 42 U.S.C. § 12182(b)(2)(A)(ii).

³⁵ 42 U.S.C. § 12182(b)(2)(A)(iii).

³⁶ 42 U.S.C. § 12182(b)(2)(A)(iv). An entity must only remove barriers to access if such removal is "readily achievable." *Id.* If removal is not readily achievable, an entity is expected to provide alternate methods to make goods, services, facilities, privileges, advantages, or accommodations available if such methods are readily achievable. 42 U.S.C. § 12182(b)(2)(A)(v).

tion with disabled individuals,³⁷ and to refrain from screening out disabled individuals with unreasonable entrance criteria.³⁸

Despite the broad language of Title III, compromises centering on the cost of the legislation figured prominently in the statute's drafting and serve to cabin its reach. For example, public accommodations are exempt from Title III's requirements to the extent that modifications are not "readily achievable"³⁹ or would present an "undue burden."⁴⁰ The statute also seeks to minimize the cost of implementing accessibility by drawing a distinction between alterations to existing buildings—which would require potentially costly construction—and the design and construction specifications of new facilities built after the ADA's passage, for which the primary cost is planning.⁴¹ Congress also sought to create incentives and reduce costs by amending the Internal Revenue Code to allow public accommodations to claim tax deductions for costs associated with removing architectural and transportation barriers in accordance with Title III.⁴² Thus, despite the fact that Title III extensively regulates private entities, the final statute reflects the conviction expressed by many individuals that increased accessibility should not come at too steep a price for businesses.⁴³

Beyond setting forth general guidelines for accessibility, Congress also directed the DOJ to promulgate regulations implementing the ADA.⁴⁴ The DOJ's final rule demonstrates that it proceeded with an eye toward cost as well. For example, the regulation expands upon the divergent standards set by Congress for retrofitting existing structures versus designing new structures, stating plainly that the difference was intended to "[strike] a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities."⁴⁵ In addition to making explicit the role of cost in applying accessibility standards to public accommodations, the DOJ regulation also clarifies the definition of what constitutes a "place of public accommodation." The rule inserts the requirement that such a place be "a facility," which is further defined as "all or any portion of buildings, structures, sites, complexes,

³⁷ 42 U.S.C. § 12182(b)(2)(A)(iv).

³⁸ 42 U.S.C. § 12182(b)(2)(A)(i).

³⁹ 42 U.S.C. § 12182(b)(2)(A)(iv).

⁴⁰ 42 U.S.C. § 12182(b)(2)(A)(iii). Public accommodations were also not required to perform any modifications that would fundamentally alter the nature of the goods and services provided. 42 U.S.C. § 12181(b)(2)(A)(iii).

⁴¹ 42 U.S.C. § 12183 (2000).

⁴² See 28 C.F.R. § 36.104 (2007).

⁴³ See Statement by President George Bush upon Signing the ADA into Law, 26 WEEKLY COMP. PRES. DOC. 1165 (July 26, 1990) (emphasizing that the Act was carefully crafted to minimize costs).

⁴⁴ 42 U.S.C. § 12186(b) (2000).

⁴⁵ 28 C.F.R. § 36.304. See also 28 C.F.R. § 36.403. The DOJ justified its method for determining whether a specific cost was disproportionate to the overall alteration by stating that "[t]his approach appropriately reflects the intent of Congress to provide access for individuals with disabilities without causing economic hardship for the covered public accommodations and commercial facilities." 28 C.F.R. 36 app. B (1991).

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.”⁴⁶ Like the statute itself, the DOJ regulation specifies twelve categories of public accommodations and further asserts that, “[w]hile the list of categories is exhaustive, the representative examples of facilities within each category are not.”⁴⁷

It would become apparent in the decade after the ADA’s passage that, although the categories of public accommodations set forth in Title III and explicated in the DOJ rule are broad, they are not exhaustive.⁴⁸ While these categories may have encompassed the vast majority of relevant public spaces in 1990, the subsequent proliferation of the Internet has significantly altered the perception of what constitutes a “place” and how individuals accomplish day-to-day tasks. The text of the statute itself, however, does not provide sufficient grounds to legitimate the application of Title III of the ADA to the Internet.

B. *The Creation of Online Public Space*

The Internet is conspicuously absent from the Act’s list of “places of public accommodation”—and for good reason. When Title III was passed in 1990, the Internet was still in its fledgling stages. The myriad problems the ADA has faced in its confrontation with the digital age should thus come as no surprise. The ADA was drafted on the eve of an information revolution that Congress did not foresee. While personal computers and networks certainly existed in 1990, their use was not nearly as ubiquitous as it is today, nor were their purposes so varied. While this historical timeline explains why the ADA does not specifically address the Internet, it does not explain congressional failure to modify the statute in light of subsequent developments. Congress has remained silent, allowing the courts to define the extent of one’s right to online accessibility under the ADA. This Section will chart the Internet’s meteoric rise, and in so doing demonstrate that it has become as integral a part of American life as the places of public accommodation enumerated in Title III.

J.C.R. Licklider, a former professor of psychoacoustics at Harvard, both predicted and sowed the seeds for the Internet as we know it today.

⁴⁶ 28 C.F.R. § 36.104.

⁴⁷ *Id.* The regulation defines places of public accommodation as: (1) places of lodging; (2) establishments serving food or drink; (3) places of exhibition or entertainment; (4) places of public gathering; (5) sales or rental establishments; (6) service establishments; (7) stations used for specified public transportation; (8) places of public display or collection; (9) places of recreation; (10) places of education; (11) social service center establishments; and (12) places of exercise or recreation. *See id.* The regulation also notes that “[i]n order to be a place of public accommodation, a facility must be operated by a private entity, its operations must affect commerce, and it must fall within one of these 12 categories. While the list of categories is exhaustive, the representative examples of facilities within each category are not.” *Id.*

⁴⁸ *See generally* Hearing, *supra* note 8.

While creating a government network of linked radar installations in the late 1960s, Licklider prophesied that a revolution in the way people communicated both with machines and with each other was on the horizon.⁴⁹ Licklider believed that clunky research computers—programmable to complete only one discrete task at a time—would be replaced by an interactive model, capable not only of multitasking, but of communicating directly with the user.⁵⁰ This vision was fully realized in 1991, when Tim Berners-Lee, a research fellow at CERN⁵¹ in Switzerland, invented the World Wide Web.⁵² Berners-Lee also created the world's first web server, web browser, and web site that same year.⁵³ By 1993, “[c]ompanies, individuals, and government institutions were all putting up Web sites. By the end of the year even the White House had one”⁵⁴ By 1995, dial-up Internet service providers like America Online had become household names, and the Internet had roughly sixteen million users worldwide.⁵⁵ Growth continued at an exponential rate, with the number of users doubling in 1996, and again in 1997.⁵⁶ By the year 2000, the Internet had more than 300 million users,⁵⁷ and the number of web servers had grown a thousandfold.⁵⁸

| Year | Growth | Number of Users ⁵⁹ |
|------|--------|-------------------------------|
| 1995 | - | 16,000,000 |
| 1996 | 125% | 36,000,000 |
| 1997 | 94% | 70,000,000 |
| 1998 | 110% | 147,000,000 |
| 1999 | 69% | 248,000,000 |
| 2000 | 46% | 361,000,000 |
| 2001 | 42% | 513,000,000 |
| 2002 | 14% | 587,000,000 |
| 2003 | 22% | 719,000,000 |
| 2004 | 14% | 817,000,000 |
| 2005 | 25% | 1,018,000,000 |
| 2006 | 7% | 1,093,000,000 |
| 2007 | 21% | 1,319,000,000 |

Fig. 1. The Growth of the World Wide Web

⁴⁹ J.C.R. Licklider, *Man-Computer Symbiosis*, 1 IRE TRANSACTIONS ON HUMAN FACTORS IN ELECTRONICS 4, 4-11 (1960).

⁵⁰ *Id.*

⁵¹ CERN is an acronym for *Conseil Européen pour la Recherche Nucléaire* (European Council for Nuclear Research).

⁵² See GILLIES & CAILLIAU, *supra* note 2.

⁵³ *Id.* at 230-35.

⁵⁴ *Id.* at 264.

⁵⁵ Internet World Stats: Internet Growth Statistics, <http://www.internetworldstats.com/emarketing.htm> (last visited Aug. 23, 2008).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ GILLIES & CAILLIAU, *supra* note 2, at 306.

⁵⁹ See Internet World Stats, *supra* note 55.

These usage trends did not go unnoticed. From the earliest days of the World Wide Web, enterprising individuals and established businesses sought to leverage its new opportunities for profit. The Internet opened new avenues for marketing, sale of goods and services, and business-to-business transactions, in addition to creating entirely new “digital” industries. Marketers were keenly aware of the growing number of Internet users. They sought to place banner advertisements on popular websites that would lead users to client websites. The typical compensation arrangement was similar to the fee scale for ratings-based television advertisements; the amount paid to the website’s operator was based on the number of people who viewed the website, and thus the advertisement. This model demonstrates that the Internet’s commercial growth was based in part on its ability to generate high traffic at a low cost.

Advances in computing and data transfer technology allowed the Internet to grow in ways that cannot be measured by simple user counts. Faster modems, and, later, the availability of inexpensive broadband, significantly reduced web page load times. This not only allowed users to browse more sites, but also allowed Internet developers to create sites that were richer in content,⁶⁰ containing much more than simple text, images, and links.⁶¹ Since broadband users did not access the Internet through the standard telephone line, they were no longer forced to log on and log off, but could maintain a permanent connection.⁶² This, in turn, allowed “response-time-sensitive” applications to thrive: electronic mail clients and instant messaging applications became mainstays on most personal computers.⁶³ Additionally, faster connections meant that audio and video could now be delivered over the Internet without excessive loading times or diminished image quality.⁶⁴

The increased speeds that allowed real-time audio and video to be transmitted from user to user also allowed recorded audio and video to be transmitted quickly. As a result, the Internet has changed the way millions of Americans acquire music, first through the popular MP3 format,⁶⁵ and, more recently, through digital download services.⁶⁶ As of the time of this writing, digital music sales comprise 15% of total music sales, accounting for \$2.9 billion in revenue.⁶⁷ For every track sold by the music industry, at least twenty are downloaded without payment through peer-to-peer file shar-

⁶⁰ NAT’L RESEARCH COUNCIL, BROADBAND: BRINGING HOME THE BITS 84 (2002).

⁶¹ *Id.* at 82-83.

⁶² *Id.* at 85.

⁶³ *Id.* at 85, 87.

⁶⁴ *Id.* at 89, 98.

⁶⁵ BRUCE HARING, BEYOND THE CHARTS: MP3 AND THE DIGITAL MUSIC REVOLUTION 6 (2000).

⁶⁶ See IFPI, IFPI Publishes Digital Music Report 2008 (Jan. 24, 2008), http://www.ifpi.org/content/section_resources/dmr2008.html.

⁶⁷ IFPI, DIGITAL MUSIC REPORT 2008, at 6 (2008), available at <http://www.ifpi.org/content/library/DMR2008.pdf>.

ing networks.⁶⁸ Web-facilitated video piracy affects Hollywood in a similar fashion; the film industry has responded by producing advertisements to ward off potential pirates.⁶⁹ This does not mean, however, that the audio and video content available on the Internet is solely comprised of pirated professional works. On the contrary, musicians and singers, filmmakers and animators, comedians and tragedians alike, have together created a constantly updating, ever-expanding collection of free entertainment available on the Internet. Perhaps the best-known example of such a collection is YouTube, a popular video sharing community.⁷⁰ As of March 2008, over 78.3 million freely available videos had been uploaded to YouTube by its users.⁷¹ Every day roughly 150,000 videos are added to that number.⁷² Averaging just under three minutes per video, it would require over 400 years for someone to watch all of the content available on YouTube.⁷³ As the table below shows, most of this content is user-generated.

| Video Type | Percent of Total Videos |
|-----------------------------|--------------------------------|
| Professional User-Generated | 14.7 |
| Amateur User-Generated | 80.3 |
| Commercial Content | 4.7 |
| Video Blogs | 4.7 |

*Fig. 2. Categories of YouTube Videos.*⁷⁴

Several Internet businesses have arisen in response to the growth of the Internet. It has become increasingly possible to offer services online that would have traditionally occurred exclusively offline. Google, for example, offers e-mail, word processing, and spreadsheet tools that do not require the user to complete any downloads.⁷⁵ Instead of requiring the user to install a word processor, run it on a local machine, and save and edit files locally, Google has popularized the idea of running programs on a remote machine by turning the program into a website.⁷⁶ Users of Google Docs, Google's word processing and spreadsheet service, go to the Google Docs website as they would any other website. This website has all of the features of a word processor and allows the user to open and save files stored remotely on

⁶⁸ *Id.*

⁶⁹ *See, e.g.*, The Industry Trust for Intellectual Property Awareness, Piracy Is a Crime, <http://www.piracyisacrime.com> (last visited Aug. 23, 2008).

⁷⁰ *See, e.g.*, YouTube, <http://www.youtube.com> (last visited Aug. 23, 2008).

⁷¹ Digital Ethnography, YouTube Statistics, <http://ksudigg.wetpaint.com/page/YouTube+Statistics?t=anon> (last visited Aug. 23, 2008).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See, e.g.*, Google, Google Docs Tour, <http://www.google.com/google-d-s/tour1.html> (last visited Aug. 23, 2008).

⁷⁶ *Id.*

Google's servers.⁷⁷ This enables the user to access the file from any computer at any time, since Internet access has become so expansive.⁷⁸ Increasingly, computer uses are now occurring entirely within users' web browsers and on remote web servers: games,⁷⁹ instant messaging,⁸⁰ storage of photos⁸¹ and videos,⁸² finding and playing music,⁸³ and word processing.⁸⁴ This new approach, whereby "software is accessed with a Web browser and delivered over the Internet from vast data centers run by Google and others," is being called "cloud computing."⁸⁵

The extent to which these technological developments are changing the average American's lifestyle is difficult to judge. The Internet has become an indispensable component of daily life, and it seems very likely that its importance will continue to increase. As this occurs, access to the Internet will become increasingly necessary for full participation in community and social life. The ADA's original goal, to enable disabled Americans to participate fully and equally in American society, therefore will become impossible to fulfill if Internet accessibility is not achieved.

C. *Internet for the Disabled: Opportunity and Risk*

It seems that the Internet has indeed become the all-encompassing network that Licklider imagined, but this reality is not without its pitfalls. Thirty years before the existence of the Internet, Licklider himself worried that unequal access could undermine the benefits of the Internet:

For the society, the impact will be good or bad, depending mainly on the question: Will 'to be on line' be a privilege or a right? If only a favored segment of the population gets a chance to enjoy the advantage of "intelligence amplification," the network may exaggerate the discontinuity in the spectrum of intellectual opportunity.⁸⁶

The discontinuity of opportunity—the opportunity to participate in the social, intellectual, cultural, and economic life of the community—between those who can access the Internet and those who cannot grows with every advance in technology and every increase in technology adoption. Licklider

⁷⁷ *Id.*

⁷⁸ See Earl Lane, Advancing Science, Serving Society, Community Wireless Networks Could Have "Transformative" Impact, Experts Say (June 5, 2008), <http://www.aas.org/news/releases/2008/0605wireless.shtml>.

⁷⁹ See, e.g., Kongregate, <http://www.kongregate.com> (last visited Aug. 23, 2008).

⁸⁰ See, e.g., Meebo, <http://www.meebo.com> (last visited Aug. 23, 2008).

⁸¹ See, e.g., Flickr, <http://www.flickr.com> (last visited Aug. 23, 2008).

⁸² See, e.g., YouTube, *supra* note 70.

⁸³ See, e.g., SeeqPod, <http://www.seeqpod.com> (last visited Aug. 23, 2008).

⁸⁴ See Google, *supra* note 75.

⁸⁵ Steve Lohr, *Microsoft Seeks Path Beyond Gates's Legacy*, N.Y. TIMES, June 27, 2008, at A17, available at <http://www.nytimes.com/2008/06/27/technology/27soft.html>.

⁸⁶ See Licklider, *supra* note 49, at 40.

feared that monetary constraints would prevent a class of people from reaping the benefits of the Internet,⁸⁷ but physical limitations have proven to be a greater obstacle.

United States Census Bureau data shows that about 15% of Americans suffer from some form of sensory or physical disability.⁸⁸ To take but one example, data from the American Foundation for the Blind shows that 1.3 million Americans are legally blind, and another ten million suffer from serious visual impairment.⁸⁹ For these individuals, the Internet holds great promise. According to a study conducted in 2000, 48% of disabled Internet users reported that Internet access had “significantly improved the quality of their lives.”⁹⁰ By comparison, 27% of respondents without disabilities thought the Internet had significantly improved their lives.⁹¹ Over half of the disabled Internet users surveyed stated that Internet access allowed them to be “better informed about the world,” and 44% reported that the Internet made them feel “connected to the world around [them].”⁹² Another 42% reported that the Internet better allowed them to forge bonds with people “who have similar interests or experiences.”⁹³

The problem lies in the so-called “digital divide.”⁹⁴ As the Internet becomes increasingly multimedia-oriented, web designers often fail to take into account the disabilities of many of their fellow Americans. For example, deaf Americans can rely on the availability of captioned television, and blind Americans may take advantage of programs with descriptive video, but neither option is available on popular websites such as YouTube. For the blind in particular, day-to-day browsing can be seriously impaired by the increasingly graphical style favored by many web developers.⁹⁵

⁸⁷ *Id.* at 35-37, 40.

⁸⁸ See U.S. Census Bureau, Detailed Table B18030: Disability Statistics, http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_&-lang=en&-caller=geoselect&-state=dt&-format=&-mt_name=ACS_2006_EST_G2000_B18030 (last visited Nov. 5, 2008) (listing approximately 41 million Americans as having “any disability,” out of approximately 270 million).

⁸⁹ See American Foundation for the Blind, Statistical Snapshots, <http://www.afb.org/Section.asp?SectionID=15&DocumentID=4398> (last visited Oct. 29, 2008).

⁹⁰ Humphrey Taylor, How the Internet is Improving the Lives of Americans with Disabilities (June 7, 2000), http://www.harrisinteractive.com/harris_poll/index.asp?PID=93. Another 41% reported some improvement in quality of life. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Elaine Gerber & Corinne Kirchner, *Who’s Surfing? Internet Access and Computer Use by Visually Impaired Youths and Adults*, 95 J. VISUAL IMPAIRMENT & BLINDNESS 176, 177 (2001).

⁹⁵ In addition to these impairments, which have obvious deleterious effects on a user’s ability to fully access the Internet, there are likely other physical and cognitive impairments that limit access to the Internet. See PACIELLO, *supra* note 6, at 10-11. Though these impairments are beyond the scope of this Note, the World Wide Web Consortium (“W3C”) guidelines address Internet accessibility for individuals with such impairments. See *infra* notes 217-224, and accompanying text.

Though there are some technologies that assist disabled users in accessing the Internet, there are currently no perfect technological solutions to the problem of the inaccessibility of media-rich websites. Disabled users access the Internet in a variety of ways. Blind individuals may use “screen readers,” which are synthetic voices that read aloud the contents of a webpage, or, less commonly, refreshable Braille displays that mimic the functionality of computer monitors.⁹⁶ Voice browser software is also available, allowing navigation by voice command.⁹⁷ Those with less severe vision impairment may employ screen magnification hardware or software and large, high-contrast fonts.⁹⁸

These assistive devices, however, can only go so far. Disabled people rely on the creators of Internet content to provide cues for the assistive devices. Screen readers, for example, cannot describe images on web pages unless web page creators properly encode image descriptions.⁹⁹ Similarly, deaf people currently have no tool that allows automatic transcription of audio, and must rely on subtitles or descriptive text to fully appreciate online video.¹⁰⁰ In the days of basic web pages comprised primarily of text, links, and the occasional image, the tools available to disabled Internet users were sufficient. Today, however, they are not.

Although any alterations to existing websites would entail some amount of cost and effort, there are website design principles that could mitigate the accessibility problems of media- and graphic-intensive websites, primarily by making sites more compatible with assistive devices.¹⁰¹ Regulation mandating that websites be designed with these principles in mind would likely spur technological innovations that would increase the efficiency with which Internet websites can be made accessible. As the next section will show, the governmental institutions responsible for interpreting and enforcing the ADA have failed to explore or address fully the issue of web inaccessibility. Moreover, as we will explore in Part IV, there are likely to be legal and practical challenges to such an all-encompassing regulation of the Internet.

III. CONGRESSIONAL (IN)ACTION AND INSTITUTIONAL RESPONSES

Title III of the Americans with Disabilities Act does not explicitly address Internet accessibility or give any textual indication that the Internet is subject to the requirements of the ADA. This statutory gap has become the source of several court battles¹⁰² and frequent commentary.¹⁰³ A detailed

⁹⁶ See PACIELLO, *supra* note 6, at 70-71.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *infra* Part IV.A, discussing the W3C's Web Accessibility Initiative (“WAI”).

¹⁰² See Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006); Access Now v. Southwest Airlines, 227 F. Supp. 2d 1312 (S.D. Fla. 2002); see also AOL

textual analysis of the ADA's applicability to the Internet has been undertaken elsewhere,¹⁰⁴ and will not be attempted in this Note. Rather than focusing on the text of the statute, this Section will first provide a brief sketch of the evidence used to support and oppose application of Title III to the Internet. Second, this Section will outline the responses of Congress, the DOJ, and the courts to the problem of achieving Internet accessibility for disabled persons.

A. Congress's Intent at the Time of Title III's Passage

The starting point of any court or agency action applying Title III to the Internet must be Congress's intent in passing the ADA.¹⁰⁵ As other commentators have noted, the Internet itself is not defined as a place of public accommodation within the text of Title III.¹⁰⁶ Therefore, private Internet websites must be embraced by one of the twelve enumerated categories described above in order to be regulated by the Act.¹⁰⁷ Statutory analysis of Title III, Congress's passage of separate statutes regulating telecommunications and television accessibility, and the DOJ regulation implementing Title III all cast doubt on the theory that Congress intended or would have intended to regulate the Internet under the ADA.

Reading the enumerated categories using standard canons of statutory construction,¹⁰⁸ the Internet cannot be clearly defined as a place of public accommodation, because all of the examples provided for in each category

Named in Disabilities Act Suit Filed by Blind Users, 17 No. 4 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. (West) 7 (discussing Nat'l Fed'n of the Blind v. AOL, No. 99-CV12303 (D. Mass. filed Nov. 4, 1999)). *National Federation* was ultimately settled.

¹⁰³ See, e.g., Michael O. Finnigan, Jr., Brian C. Griffith & Heather M. Lutz, *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 U. CIN. L. REV. 1795, 1826 (2007) (concluding that "the language of the ADA does not allow Title III to apply to the Internet" and surveying the likely problems that will occur if the language is thus stretched); Kelly E. Konkright, *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713 (2001) (analyzing the implications of court rulings on this issue for private Internet Service Providers ("ISPs") and arguing that Title III is not the appropriate legislation by which to regulate ISPs to achieve Internet accessibility); Richard Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963 (2004) (arguing for expanded use of the "nexus" test adopted by courts to bring the Internet under the umbrella of the ADA).

¹⁰⁴ Finnigan, *supra* note 103, at 1808-13.

¹⁰⁵ See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984))).

¹⁰⁶ See *supra* note 103 and text accompanying note 104.

¹⁰⁷ 42 U.S.C. § 12181(7) (2000); see *supra* Part II.A.

¹⁰⁸ See, e.g., *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 378 (2006) ("The canon, *noscitur a sociis*, reminds us that a word is known by the company it keeps, and is invoked when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning . . ." (internal quotations omitted)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in

are physical places.¹⁰⁹ At least one court has agreed that defining a private Internet website as a place of public accommodation would violate the canon of *eiusdem generis*, because the statute specifically enumerates only “physical, concrete structures.”¹¹⁰ A plain reading of the statute, combined with the fact that the Internet was a nascent technology when the ADA was passed in 1991, suggests that Congress did not intend to stretch the statute to cover the electronic space of the Internet.

Moreover, Title III’s silence with respect to the Internet stands in stark contrast to the specific regulation of telephone and television services in other pieces of legislation,¹¹¹ suggesting that even if Congress had anticipated the rise of the Internet, it would not have chosen to regulate the Internet through Title III. For example, Congress indicated that it did not intend for telephone services to be regulated under Title III when it enacted Title IV, an amendment to the ADA, to regulate separately the accessibility of telecommunications services.¹¹² Because Internet service more closely resembles telephone service and other telecommunications than it does the places of public accommodations enumerated in Title III, a reading of Title III that excludes the Internet from coverage appears more in line with congressional intent than a reading that allows the Internet, but not telephone systems, to be regulated as a place of public accommodation.¹¹³

A similar comparison can be drawn between the Internet and television services. Congress passed the Television Decoder Circuitry Act of 1990 (“TDCA”) just three months after passing the ADA.¹¹⁴ The TDCA mandates that all televisions over thirteen inches in size that are sold in the United States must come equipped with built-in decoder circuitry in order to display closed-captioning.¹¹⁵ Congress passed this statute based in part on its finding that “deaf and hearing-impaired people should have access to the television medium.”¹¹⁶ As one commentator has noted, Congress’s creation of separate statutory schemes for places of public accommodation, telecommunications, and television services suggests that Congress “regarded them as significantly different from each other and not properly subject to the same regulations.”¹¹⁷ The existence of these statutes at the very least calls into question the assumption that, had Congress only been able to anticipate

nature to those objects enumerated by the preceding specific words.”) (employing the canon of *eiusdem generis*).

¹⁰⁹ 42 U.S.C. § 12181(7).

¹¹⁰ See *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1318-19 (S.D. Fla. 2002).

¹¹¹ Compare § 12181(7) (defining public accommodations without reference to electronic spaces), with 47 U.S.C. § 225 (2000) (regulating accessibility of telecommunications) and 47 U.S.C. § 303 (2000) (regulating accessibility of television broadcasts).

¹¹² 47 U.S.C. § 225 (2000).

¹¹³ See Konkright, *supra* note 103, at 724.

¹¹⁴ Pub. L. No. 101-336, 104 Stat. 366 (codified as amended at 47 U.S.C. § 303 (2000)).

¹¹⁵ 47 U.S.C. § 303 (2000).

¹¹⁶ *Id.*

¹¹⁷ See Konkright, *supra* note 103, at 724.

the Internet's eventual domination, it would have intended to regulate the Internet under Title III.

The DOJ's reading of the statute is also relevant to determining whether Title III covers the Internet, because Congress delegated to the DOJ the responsibility for promulgating ADA rules.¹¹⁸ Although the DOJ has given some indication that it regards private Internet websites as properly regulated by Title III,¹¹⁹ its official regulation promulgating rules under that statute contains no language indicating that such websites must comply with the strict ADA requirements governing physical public spaces. The DOJ regulation implementing Title III, like the statute itself, specifies twelve categories of public accommodations, and also asserts that “[w]hile the list of categories is exhaustive, the representative examples of facilities within each category are not.”¹²⁰ The DOJ rule further discounts any interpretation of Title III that would define the Internet as a place of public accommodation because it describes categories of such places as “facilities,” which are further defined as “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.”¹²¹ The physical nature of the definition of “facility” would seem to preclude using the DOJ regulation to read Title III as enabling the regulation of private Internet websites.

These indications of congressional intent appear to place the Internet outside the regulatory reach of Title III—a fact that is, in itself, unsurprising given the state of the Internet at the time of Title III's passage. Since the rise of the Internet, however, Congress, the DOJ, and the courts have complicated the analysis by taking additional action to address the application of Title III to the Internet.

B. Congressional and Institutional Responses After the Rise of the Internet

Although each of the actors involved in determining the parameters of the ADA have addressed the interaction between Title III and private Internet websites to some extent, none has taken significant steps or established guidelines to bring clarity to this area. Given the current state of the legal landscape described in the previous section, private Internet websites will only be required by law to be accessible to individuals with disabilities

¹¹⁸ 42 U.S.C. § 12117 (2000); *see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹¹⁹ *See infra* Part III.C.

¹²⁰ 28 C.F.R. § 36.104 (2007).

¹²¹ *Id.*

if Congress, the DOJ, or the courts use additional legislation, new regulations, or non-textual interpretations of Title III.

Congress's Response

The Internet has dramatically changed many aspects of the lives of most Americans, yet Congress has not enacted an amendment to the ADA or other legislation mandating the accessibility of private Internet websites. Congress has, however, taken steps bearing on the issue. First, in 1998, Congress enacted legislation requiring public government websites to be accessible, possibly with the hope that this requirement would spur private innovation in the accessibility arena. Second, in 2000, Congress held a hearing on the application of Title III to privately provided Internet content.

In 1998, Congress amended § 508 of the Rehabilitation Act to add accessibility requirements for all websites operated by the federal government.¹²² The amendment requires that electronic and information technology purchased by the federal government comply with specific accessibility standards to ensure that it is as accessible to persons with disabilities as it is to persons without disabilities.¹²³ These standards are promulgated through an independent standards-setting agency, the Architectural Transportation Barriers Compliance Board (“Access Board”). The Access Board is also tasked with “periodically review[ing] and, as appropriate, amend[ing] the standards . . . to reflect technological advances or changes in electronic and information technology.”¹²⁴

The standards set by the Access Board include sixteen requirements that all federal agencies must follow in order to make their sites accessible.¹²⁵ Among other requirements, webpage designers must include alternative text for images so that images may be “read” by screen readers.¹²⁶ Where an alternate text-only page is provided, it must contain “equivalent information or functionality” and must “be updated whenever the primary page changes.”¹²⁷ Alternatives must be provided for all multimedia presentations, and must be synchronized with the presentation of that multimedia.¹²⁸ Additionally, designers must take a number of steps to increase the efficiency of screen readers, including titling frames to facilitate frame identification and navigation,¹²⁹ and allowing users to skip repetitive naviga-

¹²² 29 U.S.C. § 794d (2000). Section 508 was bolstered by the Assistive Technology Act, which implemented a federal incentive package “to support State efforts to improve the provision of assistive technology to individuals with disabilities,” and to promote Section 508 compliance. 29 U.S.C. § 3001 (2000).

¹²³ See Christopher R. Yukins, *Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement*, 33 PUB. CONT. L.J. 667, 669 (2005).

¹²⁴ 29 U.S.C. § 794d(a)(2)(B).

¹²⁵ 36 C.F.R. § 1194.22 (2008).

¹²⁶ 36 C.F.R. § 1194.22(a).

¹²⁷ 36 C.F.R. § 1194.22(k).

¹²⁸ 36 C.F.R. § 1194.22(b).

¹²⁹ 36 C.F.R. § 1194.22(i).

tion links located at both the top and bottom of virtually every individual page of a website.¹³⁰

Though some commentators¹³¹ and members of the government¹³² expressed their hope that the Section 508 amendment would motivate a broader accessibility movement encompassing the entire Internet, this goal was curtailed by the vagueness of the intended scope of the Access Board's standards and of the standard of review for the "undue burden" exception.¹³³ These problems have led to "uncertainties in the enforcement scheme" that have threatened to "hamper the social initiative that Section 508 represents."¹³⁴ In short, to date, the accessibility requirements of Section 508 have largely failed to drive the accessibility of private sector websites.

Perhaps because Congress did not write Section 508 to apply to private Internet websites, the impending implementation of that legislation prompted a congressional hearing to address the applicability of the ADA to private websites.¹³⁵ Thus, in 2000, nearly a decade after passing the ADA, members of Congress first tackled the issue of Internet accessibility for the disabled. The hearing was divided into two panels: the first discussed technical issues relating to Internet accessibility for the disabled, and the second discussed the legal and policy implications of applying the ADA to private Internet websites. Witnesses at the hearing included advocates for the disabled,¹³⁶ industry representatives,¹³⁷ technology experts,¹³⁸ and legal experts.¹³⁹ No single consensus emerged from the hearing. Witness testimony, however, revealed three major disagreements between Internet industry advocates, who sought to limit costs and protect Internet autonomy, and advocates for the disabled, who urged that the government take a leading role to increase the accessibility of private websites.

First, many of the Internet industry advocates pointed out possible First Amendment problems with the wholesale application of the ADA in the In-

¹³⁰ 36 C.F.R. § 1194.22(o).

¹³¹ See John J. Pavlick Jr. & Rebecca Pearson, *Implementing the New 508 Accessibility Standards for the Disabled*, THE PROCUREMENT LAWYER, Spring 2001, at 1, 1.

¹³² See, e.g., 143 CONG. REC. 8592 (1997) (statement of Sen. Dodd) ("Barriers to information and technology must be broken down [T]hese new efforts will encourage the private sector to adopt similar procedures. Let the Federal Government provide a good example to the private sector in its efforts.")

¹³³ See Yukins, *supra* note 123, at 680.

¹³⁴ *Id.* at 720.

¹³⁵ See *Hearing*, *supra* note 8. Representative Canady, Chairman of the Subcommittee on the Constitution, explained that the hearing was intended to explore "the significant impact of the Internet on the economy, the potential costs that application of the ADA may impose on that rapidly expanding segment of the economy and the innovations it has encouraged, and the substantial [F]irst [A]mendment implications of applying the ADA to private Internet Web sites and services." *Id.* at 9.

¹³⁶ See *id.* at 48-61 (statement of Judy Brewer, Director, W3C's WAI).

¹³⁷ See *id.* at 69-74 (statement of Dennis Hayes, Chairman, U.S. Internet Indus. Ass'n).

¹³⁸ See *id.* at 14-24 (statement of Gary Wunder, expert blind computer user and program analyst, ITS-Hospital Business Apps, Univ. of Mo.).

¹³⁹ See *id.* at 103-10 (statement of Peter D. Blanck, Professor of Law, Univ. of Iowa Coll. of Law).

ternet context. For example, in discussing a class action lawsuit that the National Federation of the Blind filed against America Online, one commentator noted that not only was defending such a lawsuit expensive for AOL, but the case “could produce a judicial decision or even a settlement that will have a chilling effect on other service and site providers.”¹⁴⁰ Another witness countered that such chilling, if it occurred at all, would not implicate First Amendment issues because the ADA “is a law of general applicability aimed at regulating commercial activity, not speech.”¹⁴¹ This witness further argued that requiring information to be presented in formats compatible with screen readers would not affect the content of Internet speech, but instead would serve to “expand[] the dissemination of the speaker’s freely chosen message.”¹⁴² This position was rebuffed by a third witness who maintained that publishing web pages is not solely or even primarily a commercial endeavor but is also “the way in which ordinary citizens increasingly broadcast their views to the world.”¹⁴³ The witness argued that mandating a particular set of web authoring tools for all Internet content providers was akin to “telling them that an officially approved manner of expression has come to displace the older ideal of free expression.”¹⁴⁴ The witness urged the Committee to consider the First Amendment implications of applying accessibility requirements meant for the physical world to regulation of speech and expression.¹⁴⁵

Second, witnesses argued over the cost of accessibility. Susan Conway, a representative of the U.S. Internet Industry Association, warned of the high costs accompanying accessibility changes: “Every site uses different features, tools, navigation elements and functionality. Software changes on an almost daily basis and the adoption of better technology often lags because of the high cost involved in these constant changes.”¹⁴⁶ Another witness sought to rebut those concerns, testifying that “[s]ince much of Web accessibility is a matter of good design, the cost for accessibility on many sites is negligible.”¹⁴⁷ Despite the strong stances taken by many parties on this issue, no evidence was presented on the actual costs that businesses and others could expect to face if Title III were applied to private Internet websites.

Finally, witnesses sparred over whether government-mandated web accessibility would stunt or bolster the innovation of accessibility technolo-

¹⁴⁰ *Id.* at 97 (statement of Elizabeth Dorminey, Attorney, Wimberly, Lawson, Steckel, Nelson & Schneider, P.C.).

¹⁴¹ *Id.* at 121 (statement of Charles J. Cooper, Partner, Carvin & Rosenthal).

¹⁴² *Id.*

¹⁴³ *Id.* at 119 (statement of Walter Olson, Fellow, Manhattan Institute).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 63 (statement of Susan Conway, representative of the U.S. Internet Indus. Ass’n).

¹⁴⁷ *Id.* at 50 (statement of Judy Brewer, Director, W3C’s WAI).

gies.¹⁴⁸ Dr. Steven Lucas, the Chief Technology Officer and Senior Vice President of Privaseek, Inc., testified that “legislation where prematurely applied can also have the effect of slowing technology innovation.”¹⁴⁹ Professor Peter Blanck, on the other hand, had conducted a review of economic activity in the assistive technology market and testified that his preliminary findings “illustrate[d], but [did] not yet prove, that the ADA fosters future technological innovation and economic activity in the private Internet-based service industry, in many ways unanticipated at the time that the law was passed.”¹⁵⁰

After the hearing, the Committee filed a brief House Report “rais[ing] issues related to the new significance of the Internet economy to recent economic growth, the costs that application of the ADA would impose on that rapidly expanding segment of the economy, and the substantial First Amendment implications of applying the ADA to private Internet websites and services.”¹⁵¹ Despite this report, Congress has taken no action either encouraging or discouraging Title III’s application to private Internet websites in the intervening seven years, nor has Congress promulgated any other legislation mandating that Internet content providers undertake steps to increase the accessibility of their websites for disabled individuals.

Mixed Messages from the DOJ

The DOJ has indicated that it reads Title III to require the accessibility of at least some Internet websites. However, to date it has not commenced a formal notice-and-comment rulemaking to address this issue. Despite the absence of formal rules and guidelines for Internet accessibility, in at least one letter¹⁵² and one amicus brief¹⁵³ the DOJ has staked out its position that Title III applies to private Internet websites. The letter was written in re-

¹⁴⁸ *Id.* at 24-48 (statement of Dr. Steven Lucas, CIO and Senior Vice President, Privaseek, Inc.). *But see id.* 103-10 (statement of Peter D. Blanck, Professor of Law, Univ. of Iowa Coll. of Law).

¹⁴⁹ *Id.* at 26. Dr. Lucas continued: “Application of the ADA in its current form without consideration of the progress made to date could result in companies doing just what is necessary to comply with the law instead of furthering the advancement of technology.” *Id.* at 45; *see also id.* at 90 (statement of Elizabeth K. Dorminey, Attorney, Wimberly, Lawson, Steckel, Nelson & Schneider, P.C.). Ms. Dorminey testified:

Technology is evolving so quickly that any standards written into regulations almost certainly would be obsolete by the time they worked their way through notice and comment. Regulation would be more likely to delay than hasten broader access. There also would be serious enforcement problems because it would be a simple matter for site owners to move offshore to avoid the reach of regulations which would ultimately hurt the United States’ competitive position in this field.

Id.

¹⁵⁰ *See Hearing, supra* note 8, at 109 (statement of Peter D. Blanck, Professor of Law, Univ. of Iowa Coll. of Law).

¹⁵¹ H.R. REP. NO. 106-1048, at 275 (2001).

¹⁵² Letter from Deval L. Patrick, Ass’t Att’y Gen. for Civil Rights, to Tom Harkin, United States Sen. (Sept. 9, 2002), available at <http://www.usdoj.gov/crt/foia/tal712.txt>.

sponse to a request for information on the applicability of Title III to private Internet websites by Senator Tom Harkin, the primary sponsor of the ADA. Deval Patrick, then Assistant Attorney General of the Civil Rights Division at the DOJ, responded:

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.¹⁵⁴

Patrick grounded his response in sections of the DOJ regulation indicating that places of public accommodation must furnish “appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities”¹⁵⁵ The DOJ later took a similar approach in an *amicus curiae* brief. The brief was filed on behalf of an individual claiming that his membership to an online bridge club had been terminated due to his bi-polar disorder and other disabilities. In its *amicus* brief in *Hooks v. OKBridge, Inc.*, the DOJ argued that the services provision of Title III, 42 U.S.C. § 12182(a), was not limited to services provided “at” a place of public accommodation, but rather could apply to any service offered by a place “of” public accommodation, even if that service was offered offsite.¹⁵⁶ Thus, the DOJ appears to support the so-called “nexus” test for determining whether a given website is covered by the ADA.¹⁵⁷

Congressional hearings on the application of the ADA to private Internet websites revealed that the ultimate meaning of the DOJ’s actions remains very unclear. One witness at the hearings pointed out that “the Department of Justice opinion in September 1996 already stated that the ADA applies to the Web,”¹⁵⁸ and “the past 3 years hardly stand out as struggling years for the Internet industry.”¹⁵⁹ While the witness’s conclusion

¹⁵³ Brief for the United States as Amicus Curiae Supporting Appellant, *Hooks v. OK-Bridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891), 1999 WL 33806215 [hereinafter *Hooks* Brief].

¹⁵⁴ Patrick, *supra* note 152, at 1.

¹⁵⁵ *Id.* (citing 28 C.F.R. § 36.303). Patrick also pointed out that places of public accommodation were exempt from this requirement to the extent that compliance would “result in a fundamental alteration to the program or service or in an undue burden.” *Id.*

¹⁵⁶ *Hooks* Brief, *supra* note 153, at 9; *cf.* Brief for the United States as Amicus Curiae Supporting Appellants, *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (No. 01-111197), 2001 WL 34094038 [hereinafter *Rendon* Brief] (arguing that Title III applies to both privileges and services provided off-site or over the telephone).

¹⁵⁷ See *infra* Part III.B.

¹⁵⁸ *Hearing*, *supra* note 8, at 51 (statement of Judy Brewer, Director, W3C’s WAI).

¹⁵⁹ *Id.* The witness’s comment was apparently a glib reference to the Internet boom of the late 1990s, also called the “dot-com bubble,” which peaked almost exactly one month after the hearing took place.

might have been correct, another witness pointed out a major break in his causal chain of reasoning: “It was said very truly on the first panel that the ADA has not yet had much of an effect in slowing down the Internet. That is a very fair observation. The reason is that everyone has agreed to behave as if the ADA does not apply to the Internet.”¹⁶⁰

Despite the uncertainty about the effectiveness of the DOJ’s actions, the House Report filed after the hearings concluded that “[i]t is the opinion of the Department of Justice that the ADA’s accessibility requirements do apply to private Internet web sites and services.”¹⁶¹ That Congress did not subsequently take up this issue suggests that it is deferring to the DOJ’s authority to promulgate rules implementing Title III instead of amending Title III or drafting new legislation. The DOJ, however, has failed to create a regime of web accessibility due to the informality of its proclamations and its nearly non-existent enforcement efforts against companies with inaccessible web-sites. The DOJ recently published a proposed rule reformulating the accessibility design standards under Title III.¹⁶² The proposed rule fails to formulate guidelines for web accessibility, and, in fact, entirely fails to mention Internet sites at all. As comments at the hearings suggest, without a formal notice-and-comment rulemaking on this issue, it seems unlikely that the DOJ’s opinions on Internet accessibility for the disabled will have a significant effect. The result is that both Congress and the DOJ have failed to address Internet accessibility head-on, and instead have left the development of the law in this area to the courts.

Courts Step In

In the absence of clear guidance from Congress or the DOJ, two district courts have been called upon to address whether Title III requires a defendant to make a private Internet site accessible for individuals with visual impairments.¹⁶³ Although the courts diverged in their conclusions, both adhered to a version of the so-called “nexus” test to determine whether the ADA required accessibility. Under the “nexus” test, an Internet website is subject to the ADA if a court finds that it offers either the same services as a physical place of public accommodation or a service that affects access to the physical places and services traditionally covered by the Act.¹⁶⁴ These

¹⁶⁰ *Id.* at 112 (statement of Walter Olson, Fellow, Manhattan Institute). Mr. Olson went on to point out that even <http://www.whitehouse.gov> was out of compliance as of the time of the hearings.

¹⁶¹ H.R. REP. NO. 106-1048, at 275 (2001).

¹⁶² Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 117 (June 17, 2008) (to be codified at 28 C.F.R. pt. 36), available at http://www.ada.gov/NPRM2008/t3NPRM_federalreg.htm.

¹⁶³ See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).

¹⁶⁴ See *id.* at 956 (limiting application of Title III to services on websites that were the same as services offered in Target stores).

cases have been analyzed extensively elsewhere¹⁶⁵; however, a brief overview is necessary to provide a foundation for addressing the limitations of the “nexus” approach.

In *Access Now v. Southwest Airlines*, the first case to address the issue, the District Court for the Southern District of Florida held that Title III did not mandate accessibility of Southwest.com’s “online ticket counters” because inaccessibility of the website did not impede access to Southwest Airlines’ physical ticket counters.¹⁶⁶ The court read Title III narrowly to apply only to concrete, physical places.¹⁶⁷ It applied a similarly narrow version of the “nexus” test in which a website is only covered if it affects access to a physical place of public accommodation and not if the website merely offers the same goods or services as a place of public accommodation.

This decision was based, in part, on the Eleventh Circuit’s decision in *Rendon v. Valleycrest Productions*, in which the court held that plaintiffs had successfully stated a claim under the ADA.¹⁶⁸ The plaintiffs were denied access to the television studio where “Who Wants to Be a Millionaire” was filmed based on their inability to participate in a fast-finger telephone selection process.¹⁶⁹ The *Access Now* court distinguished *Rendon* on the grounds that, whereas the game show at issue took place at a physical television studio otherwise covered under Title III, Southwest’s online ticket counters existed only on the Internet.¹⁷⁰ As the *Access Now* court noted, the Supreme Court and the Eleventh Circuit have both recognized the Internet is “a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”¹⁷¹ The court therefore held that “[h]aving failed to establish a ‘nexus’ between Southwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim upon which relief can be granted under Title III of the ADA.”¹⁷²

Several years later, in *National Federation of the Blind v. Target Corp.*,¹⁷³ another district court adopted a broader approach to the “nexus” test. In that case, blind plaintiffs sued Target, claiming that Target.com’s inaccessibility to blind users violated Title III. The District Court for the Northern District of California, drawing on circuit court cases applying the ADA to insurance policies,¹⁷⁴ held that Target.com violated Title III only to

¹⁶⁵ See, e.g., Moberly, *supra* note 103.

¹⁶⁶ 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

¹⁶⁷ *Id.* at 1319.

¹⁶⁸ 294 F.3d 1279, 1286 (11th Cir. 2002).

¹⁶⁹ *Id.* at 1281.

¹⁷⁰ *Id.* at 1321.

¹⁷¹ *Access Now*, 227 F. Supp. 2d at 1321 (quoting *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001) (quoting *Reno v. ACLU*, 521 U.S. 844, 851 (1997))).

¹⁷² *Id.* at 1321.

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

¹⁷⁴ See, e.g., *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (noting, in dicta, that a “place of public accommodation” encompasses facilities open to the public in both physical and electronic space, including websites); *Carparts Distrib. Ctr., Inc. v. Auto.*

the extent that its inaccessibility “impede[d] the full and equal enjoyment of goods and services offered in Target stores.”¹⁷⁵ The court also indicated, however, that “to the extent that Target.com offers information and services unconnected to Target stores, which do not affect enjoyment of goods and services offered in Target stores, the plaintiffs fail[ed] to state a claim under Title III of the ADA.”¹⁷⁶ By reading the statute to cover Internet sites that offer access to the goods and services of a physical place, rather than merely the physical place itself, the *Target* court thus took a broader view of the scope of the “nexus” test than was employed by the *Access Now* court. The *Target* court stopped short, however, of holding that all goods and services offered over the Internet must meet Title III’s accessibility requirements.

Despite the fact that Title III’s statutory and regulatory scheme focuses on public accommodations as actual, physical spaces, neither court that has been asked to apply it to the Internet has interpreted that statute so narrowly as to preclude a Title III accessibility requirement for any website. Conversely, neither court interpreted Title III to require the accessibility of all private Internet sites. In 1999, Judge Richard Posner advocated the latter position in dicta in the context of a decision regarding Title III’s applicability to insurance policies.¹⁷⁷ Judge Posner declared that the “core meaning” of Title III is that “the owner or operator of a . . . Web site . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.”¹⁷⁸ Judge Posner cited for support the First Circuit’s decision in *Carparts District Center v. Automobile Wholesaler’s Association of New England*,¹⁷⁹ another insurance case not addressing Internet accessibility. In that case, the First Circuit reasoned that it would be “absurd” 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.”¹⁸⁰

Judge Posner provided no further reasoning for his assertion that a website is a place of public accommodation—either in *Doe v. Mutual of Omaha* or subsequently. However, the most reasonable interpretation of his reference to *Carparts* is that he thought it similarly absurd that services provided over the Internet should escape the requirements of the ADA. To the extent that this reasoning justifies wholesale application of Title III to a medium

Wholesalers Assoc. of New England, Inc., 37 F.3d 12, 19-20 (1st Cir. 1994) (holding that “public accommodations” encompass more than actual physical structures and include the defendant insurance company).

¹⁷⁵ *Target*, 452 F. Supp. 2d at 956 (emphasis added).

¹⁷⁶ *Id.*

¹⁷⁷ *Doe*, 179 F.3d at 559.

¹⁷⁸ *Id.*

¹⁷⁹ 37 F.3d 12, 22 (1st Cir. 1994) (focusing on the phrase “travel service” in 42 U.S.C. § 12181(7)(f) to conclude that Congress intended to bring service providers who did not have physical facilities under the reach of Title III).

¹⁸⁰ *Id.* at 19.

not contemplated within the statute, it ignores the text of the statute and other indicia of Congress's intent in passing the ADA.¹⁸¹ Congress itself seems to caution against such expansion of the statute in the purpose statement of the statute, which states that Title III is meant to "provide a clear and comprehensive national mandate for the elimination of discrimination."¹⁸² Judge Posner's interpretation of the statute would both lack clarity and create a piecemeal approach to Internet accessibility laws in jurisdictions across the country. As the *Access Now* court noted, "[t]o expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."¹⁸³

To date, no court has accepted Judge Posner's challenge and applied Title III to a private Internet site without finding some nexus. The current judicial trend is to find that government-mandated Internet accessibility extends only as far as the website is directly connected to the goods and services of a tangible place of public accommodation. In the form of the "nexus" test, courts have thus far set forth the most influential accessibility guidelines for private Internet websites of any of the institutional actors. As the next section will discuss, however, the "nexus" test that is spreading among courts both fails to ensure equal access to the disabled and exacerbates several of the problems that plague government regulation of Internet content, most notably concerns regarding costs and free speech.

IV. CHILLING EFFECTS: THE PROBLEM WITH MANDATED ACCESSIBILITY

Though some commentators have suggested that it is permissible, or even desirable, for courts to continue to regulate the Internet through a statute intended to address inequalities in the physical world,¹⁸⁴ other commentators have pointed to the textual limitations of Title III as a reason for excluding the Internet from the ADA's coverage.¹⁸⁵ While it is important for courts to recognize the boundaries set by the text of Title III before interpreting it to require Internet accessibility, there are extra-statutory First Amendment and practical barriers to the direct application of Title III to the Internet. Arguments over the appropriateness of extending Title III to the Internet based on the text of the statute could be silenced by new legislation expressly applying the ADA in the Internet context. The other concerns, however, would still remain. Thus, going forward, it will be important for interested parties to consider how First Amendment and practical issues

¹⁸¹ See *supra* Part III.A.

¹⁸² 42 U.S.C. § 12101(b) (2000).

¹⁸³ *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

¹⁸⁴ See Moberly, *supra* note 103, at 1010 (arguing that the "nexus" approach provides a "reasonable and principled alternative" to all-or-nothing regulation of Internet accessibility). *But see* Taylor, *supra* note 11, at 27 (2001) (calling for "serious debate" before allowing Title III to be thus extended).

¹⁸⁵ See, e.g., Finnigan, *supra* note 103, at 1826 (concluding that "the language of the ADA does not allow Title III to apply to the Internet").

should be resolved prior to the implementation of any government regulation that seeks to narrow the digital divide through increased accessibility.

The problem of the under-inclusiveness of the “nexus” test is fairly straight-forward, because extending accessibility to cover all Internet sites would have at least some clear benefits for the disabled. The courts’ current use of the “nexus” test, disability rights advocates argue, fails to fully appreciate the intent of Congress,¹⁸⁶ which “sought to eliminate a broad range of discrimination against the disabled, and intended the ADA to keep pace with technological change.”¹⁸⁷ As Gary Wunder, a program analyst who testified at the hearings, stated, “the Internet is not just a window on the world, but more and more it is the world.”¹⁸⁸ By limiting the accessibility requirements to those operations linked to real, physical places, the “nexus” test fails to mandate accessibility for online spaces where many people are spending more and more of their lives. Indeed, the “nexus” test allows Internet commercial giants to escape accessibility requirements altogether. Even the broader reading of the “nexus” test advanced in the *Target* decision produced a somewhat odd result: the court recognized a blind individual’s right to receive a pillowcase by mail via an online order from a brick and mortar store, while at the same time denying that individual the right to receive the same pillowcase from a web-only company such as Amazon.com. Achieving Congress’s goal of addressing “the major areas of discrimination faced day-to-day by people with disabilities”¹⁸⁹ requires a more consistent approach to Internet regulation that matches the experiences of individuals with disabilities in their everyday lives.

Over-inclusive application of Title III to private Internet sites also has the potential to create significant problems. As discussed above, a reading of Title III expansive enough to include all private Internet websites undermines the ADA’s purpose as set forth by Congress: “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”¹⁹⁰ Even the “nexus” test could create serious problems if it is widely adopted. Given the number of Internet content and service providers, any regulation of Internet content creates a vast number of potential defendants. The absence of specific statutory guidance is likely to exaggerate fairness and enforceability problems stemming from this situation. The lack of specific standards raises two key problems: unreasonable

¹⁸⁶ NATIONAL COUNCIL ON DISABILITY, WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE: APPLICATION OF THE ADA TO THE INTERNET AND THE WORLDWIDE WEB (2003), available at <http://www.ncd.gov/newsroom/publications/2003/adainternet.htm>.

¹⁸⁷ See Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 n.2 (N.D. Cal. 2006) (citing 42 U.S.C. § 12101(b); H.R. REP. NO. 101-485 pt. 2, at 108 (1990)).

¹⁸⁸ *Hearing*, *supra* note 8, at 16 (statement of Gary Wunder, expert blind computer user and program analyst, ITS-Hospital Business Apps., Univ. of Mo.).

¹⁸⁹ 42 U.S.C. § 12101(b)(4) (2000).

¹⁹⁰ 42 U.S.C. § 12101(b)(2).

costs that could hinder the growth of the Internet and infringements on free speech that could run afoul of the First Amendment.

A. *Halting the Growth of the Internet: Practical Barriers to Internet Accessibility*

Any regulation that requires private websites to be accessible will be accompanied by costs. The severity of these costs varies from site to site; however, multimedia websites and websites that are continuously updated likely face the greatest burden. Examining the example of YouTube—a website emblematic of the type of media-rich environment the Internet has become—brings the barriers to accessibility into sharp focus.

Recently, researchers in the Czech Republic were able automatically to generate subtitles for a video of speeches given before the Czech Parliament using a program called LVCSR.¹⁹¹ LVCSR was able to recognize anywhere between 80 and 95% of the words used by the speakers and transcribe them correctly.¹⁹² To achieve these impressive results, however, the researchers had to ensure that the audio was as clear as possible, and had to prepare the LVCSR software suite by “training” it on 40 hours of recorded Parliament speeches.¹⁹³ LVCSR was also pre-loaded with hundreds of thousands of words and phrases likely to appear in Parliament speeches.¹⁹⁴ While LVCSR might someday be available to the lay user, the technology must overcome many significant hurdles before being effectively deployed to combat inaccessibility. Most significantly, the fact that LVCSR requires training for a particular context before being able to produce accurate results greatly limits its usefulness in the diverse world of online video and audio.

The only other solution is for the audible parts of the video to be transcribed into subtitles. Either YouTube, the user posting the video, some other user, or the disabled viewer would have to absorb the costs of such transcription. It is unlikely that YouTube would or could absorb the costs associated with transcribing the myriad videos available on its site. The argument for placing the burden on YouTube is that the video-sharing website generates revenue from the content users post. YouTube does not, however, charge its users for the video-hosting and playback services it provides, and thus could not effectively spread the costs of accessibility. Instead, YouTube would have to generate increased advertising revenue to cover the costs of transcription. This would be difficult; industry analysts estimate that You-

¹⁹¹ Ales Prazak et al., *Automatic Online Subtitling of Czech Parliament Meetings*, 4188 LECTURE NOTES IN COMP. SCI. 501, 501-08 (2006).

¹⁹² *Id.* at 501.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

Tube is currently operating at a loss or, at best, barely breaking even.¹⁹⁵ The site is expected to take in between \$90 and \$125 million in revenue in 2008, but bandwidth costs are likely to exceed that.¹⁹⁶ As Munarriz says in “Squeezing Money Out of YouTube,” “serving up chunky video files doesn’t come cheap.”¹⁹⁷ YouTube’s financial performance has been disappointing despite numerous attempts to monetize the popular site’s enormous volume of traffic.¹⁹⁸

Even if YouTube were far more profitable than it currently is, any attempt at mass transcription of videos would likely jeopardize the company’s existence. Roughly 450,000 minutes of video are added to the website daily.¹⁹⁹ Even at the lowest available rates,²⁰⁰ transcription would cost between \$787,500 (with a three- to four-week delay) and \$1,687,500 (twelve-hour delay) every day. This works out to a yearly cost somewhere between \$287,437,500 and \$615,937,500. Such figures are far in excess of YouTube’s revenue-generation capabilities, and they leave untouched the problem presented by the massive number of videos already on the website.

One way of spreading the massive costs of transcription would be to lay them at the doorstep of the user. YouTube could force each user to provide a transcript of every video she uploads. Instead of YouTube paying for accessibility with cash, users would collectively pay for accessibility with their time. Unfortunately, this solution would undermine a key element of YouTube’s success and popularity—ease of use.

Commentators have noted that YouTube was not the first website offering video-sharing services, but, despite being a latecomer, it managed to become the industry leader.²⁰¹ A noted technology writer explained: “The first thing you notice about YouTube is the lack of barriers to entry. You can sign up quickly and upload anything in any format right away.”²⁰² This is the secret to YouTube’s success. That other sites require the user to fill out “endless forms,” or to convert videos into other formats has been cited as a reason for their inability to effectively compete with YouTube.²⁰³ Requiring the user to transcribe videos before uploading them is a chore that would cause many to stop uploading videos. Users might instead seek video-shar-

¹⁹⁵ Rick Aristotle Munarriz, *Squeezing Money Out of YouTube*, THE MOTLEY FOOL, June 4, 2008, <http://www.fool.com/investing/general/2008/06/04/squeezing-money-out-of-youtube.aspx>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Digital Ethnography, *supra* note 71.

²⁰⁰ See, e.g., GMR Transcription, Affordable Transcription Services, <http://www.gmrtranscription.com/prices.aspx> (last visited Nov. 4, 2008).

²⁰¹ John C. Dvorak, *Missing the Point About YouTube*, MARKETWATCH, Aug. 10, 2006, <http://www.marketwatch.com> (enter terms “dvorak missing point youtube” in search box; then follow hyperlink for “John Dvorak’s Second Opinion: Most people are missing the point about YouTube”).

²⁰² *Id.*

²⁰³ *Id.*

ing websites—perhaps those located in foreign jurisdictions—that do not impose such requirements.

The only other group of people, aside from the disabled themselves, who could possibly bear the burden of adding subtitles to videos is other users.²⁰⁴ A combination of online entrepreneurs and volunteers are working to do just that. Project ReadOn, for example, allows users to post subtitled videos and maintains a permanent staff that transcribes popular videos found on YouTube and other parts of the Internet.²⁰⁵ The site is funded by advertisements and sponsors.²⁰⁶ Project ReadOn sidesteps the problem YouTube faces with accessibility by prioritizing the transcription of videos that have already proven themselves popular on other websites.²⁰⁷ Other sites take different approaches. Overstream.net, for instance, relies on its volunteer user community to post transcripts of videos.²⁰⁸ The videos are found on other video-sharing websites, and the users decide which ones are worthy of transcription.²⁰⁹ Overstream avoids video-hosting and manpower costs by relying entirely on volunteers and using videos hosted on other websites. No advertisements or other obvious signs of monetization were found on Overstream's website, indicating that the organization probably is not taking in the funds necessary to support in-house transcription efforts.²¹⁰

Another volunteer-based site aims to solve accessibility problems beyond those related to hearing loss. Dotsub, a volunteer-based website, has as its goal the elimination of the language barrier in online video.²¹¹ Volunteers in the Dotsub community, like their counterparts using Overstream, select videos and post their transcripts.²¹² Through automatic online translation, one set of subtitles can easily and cheaply be translated into many other languages, making at least rudimentary subtitles available to many groups.²¹³ Once the text has been extracted from the video, accessibility becomes easy to attain for a variety of groups. Dotsub uses this insight to market its product to a broad audience, including the deaf and foreigners.²¹⁴ Again, by reducing the quantity of information to be transcribed, and by expanding the user base from which costs will be recouped or profits reaped, sites such as Dotsub provide the best chance for accessibility of online media.

²⁰⁴ We have intentionally left out the state. It seems unlikely, and inconsistent with past accessibility legislation, that the government would cover the enormous and ongoing costs of accessibility.

²⁰⁵ See Project ReadOn, About PRO, <http://www.projectreadon.com/index.php?pg=about> (last visited Aug. 23, 2008).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See Overstream, What is Overstream?, <http://www.overstream.net/whatisoverstream.php> (last visited Aug. 23, 2008).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See Dotsub, About Dotsub, <http://dotsub.com/about.jsp> (last visited Aug. 23, 2008).

²¹² *Id.*

²¹³ See, e.g., Yahoo!, Babelfish, <http://babelfish.yahoo.com> (last visited Nov. 4, 2008).

²¹⁴ See Dotsub, *supra* note 211.

Most websites are not as media-rich as YouTube. For these websites, a set of design principles exists that would ensure maximum accessibility at little or no additional cost and considerable additional benefit. After creating the World Wide Web, Tim Berners-Lee founded the World Wide Web Consortium.²¹⁵ The stated goal of the W3C is “[t]o lead the World Wide Web to its full potential by developing protocols and guidelines that ensure long-term growth for the Web.”²¹⁶ In furtherance of this goal, the W3C has established the Web Accessibility Initiative. The WAI, as the name indicates, was created to deal with accessibility problems that became increasingly prevalent as the Web became more media- and graphic-intensive.²¹⁷ Like Dotsub, WAI hopes to benefit multiple groups by promoting a single accessibility standard:

Millions of people have disabilities that affect their use of the Web. Currently most Web sites and Web software have accessibility barriers that make it difficult or impossible for many people with disabilities to use the Web. As more accessible Web sites and software become available, people with disabilities are able to use and contribute to the Web more effectively.

Web accessibility also benefits people without disabilities. For example, a key principle of Web accessibility is designing Web sites and software that are flexible to meet different user needs, preferences, and situations. This flexibility also benefits people without disabilities in certain situations, such as people using a slow Internet connection, people with “temporary disabilities” such as a broken arm, and people with changing abilities due to aging.²¹⁸

The standards that make such accessibility possible are fairly simple, and will be briefly described below:

1. Separation of Content and Style: The W3C encourages Web developers to make content independent of the style or layout of their webpage.²¹⁹ This standard does not require acquisition of new skills on the part of website creators; developers can continue to create websites in HTML as before. The W3C simply asks that all of the parts of the HTML document that affect the visual presentation of the website (including, e.g., fonts, colors, sizes) be organ-

²¹⁵ World Wide Web Consortium, About W3C, <http://www.w3.org/Consortium/> (last visited Aug. 23, 2008).

²¹⁶ *Id.*

²¹⁷ See World Wide Web Consortium, Introduction to Web Accessibility, <http://www.w3.org/WAI/intro/accessibility.php> (last visited Aug. 23, 2008).

²¹⁸ *Id.*

²¹⁹ See World Wide Web Consortium, WAI Guidelines and Techniques, <http://www.w3.org/WAI/guid-tech.html> (last visited Aug. 23, 2008).

ized under a separate heading at the start of the document.²²⁰ This organization allows users with special accessibility requirements to apply their own style, using a Cascading Style Sheet, in place of the style decided upon by the website developer.²²¹ Visually impaired users, for example, can easily change the contrast, size, or spatial organization of the website, allowing them to customize the appearance to best suit their needs.

2. **Alternative Text:** When web developers use images, animations, or even video, the W3C standards require that alternative text be provided for users who cannot access such graphical information.²²² The brief descriptions contained in alternate text are especially useful to those employing screen readers, which cannot “read” images.
3. **Summarization:** Data presented in complex tables and charts are often impossible for users to parse when they are only able to access them aurally, or when screen magnification or large font sizes are required for reading. The W3C deals with this problem by asking that tables be briefly summarized or described, or by simply posting the raw data and allowing users to use their own tools to access it by their preferred method.²²³

These simple methods, easily implementable using existing technologies and techniques, would go a long way toward making the Internet more accessible and would provide many additional benefits to web content owners. Accessible design makes it easier for disabled people, non-English speakers, users on mobile devices, and users with different software to access a particular website.²²⁴ One market research firm estimates that over fifty-eight million Personal Digital Assistants (“PDAs”) will be sold in the United States in 2008.²²⁵ These devices have created a huge group of mobile Internet users, accessing web pages on miniscule screens. Accessibly designed websites have no trouble coping with this change in online demographics; a mobile-friendly style sheet can easily be applied to the website’s content, making it accessible on such devices. Aside from compatibility with emerging browser technologies, the W3C standards make the website easier for

²²⁰ See generally World Wide Web Consortium, Overview of WCAG 2.0 Documents, <http://www.w3.org/WAI/intro/wcag20> (last visited Aug. 23, 2008); World Wide Web Consortium, Techniques for Web Content Accessibility Guidelines 1.0, <http://www.w3.org/TR/WAI-WEBCONTENT-TECHS> (last visited Aug. 23, 2008).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See World Wide Web Consortium, Developing a Web Accessibility Business Case for Your Organization: Overview, <http://www.w3.org/WAI/bcase/Overview> (last visited Aug. 23, 2008).

²²⁵ Press Release, eTForecasts, Smartphones Have Started to Impact PDA Sales (June 16, 2003), <http://www.etforecasts.com/pr/pr0603.htm>.

computers to read, and thus allow the website to gain a higher rank in search engine results.²²⁶ This, in turn, increases the number of hits a website receives, enhancing the site's monetization potential.

Though the W3C standards are exhaustive, they are far from stifling. To comply with the W3C standards, websites will likely have to add content, not remove it. For example, the W3C standards favor text headings over image headings. At first glance, this particular guideline may seem to limit a web designer's options when creating headings for her website. However, if the heading is merely text, the web designer can use a font that produces the desired effect. If the heading incorporates a logo or some other creative flourish that a font cannot capture, the W3C standards merely require that the designer include alternate text transcribing the heading that assistive devices can read, while it remains hidden from the general user.²²⁷

B. Chilling Speech

Applying the "nexus" test to determine whether private Internet websites run afoul of Title III, or employing any mechanism that has the effect of directly regulating Internet content, risks infringing on the speech rights of Internet content providers. Although witnesses at the congressional hearings on the application of the ADA to private Internet sites mentioned the First Amendment concerns with applying the ADA to private Internet sites,²²⁸ the parameters of those implications were not fully discussed. As one witness asked while discussing the possibility of applying Title III to the Internet, "At what point would such legislation cross the First Amendment?"²²⁹

Concern that regulation of Internet accessibility could infringe on free expression is significant in light of the only Supreme Court case addressing the First Amendment implications of government regulation of the Internet, *Reno v. ACLU*.²³⁰ The Supreme Court held unconstitutional a law seeking to protect minors from indecent materials available on the Internet, and stated that the Internet is not simply a medium of speech and expression, but rather is "a vast platform from which to address and hear from a worldwide audi-

²²⁶ Press Release, Kelsey Group, Local Search Now 25% of Internet Commercial Activity (Feb. 11, 2004), <http://www.kelseygroup.com/press/pr040211.asp>.

²²⁷ To counter the perception that the W3C limits web design options, websites have emerged that collect and display creatively designed W3C compliant web pages. *See, e.g.*, W3C Web Designers, <http://www.w3cwebdesigners.com> (last visited Sept. 18, 2008).

²²⁸ *See supra* Part III.B.1; *see also Hearing, supra* note 8, at 9 (opening statement of Chairman Canady) (referring to the "substantial first amendment implications of applying the ADA to private Internet Web sites and services").

²²⁹ *See Hearing, supra* note 8, at 73 (prepared statement of Dennis Hayes, Chairman, U.S. Internet Association).

²³⁰ 521 U.S. 844 (1997).

ence of millions of readers, viewers, researchers, and buyers.”²³¹ In addition to other First Amendment concerns, the Court called the vagueness of the statute problematic because “of its obvious chilling effect on free speech.”²³² The First Amendment implications of The Communications Decency Act (“CDA”) were exacerbated by the clearly content-based nature of the restriction (indecent material) and the fact that violation of the Act resulted in criminal charges.²³³ The regulation of the Internet accomplished through the “nexus” test, or any other expansion of Title III, differs from the CDA in that the restrictions would not be viewpoint-based,²³⁴ and any punitive measures would be civil, rather than criminal, in nature.²³⁵ At the very least, however, the rhetoric of the *Reno* Court suggests that courts and legislators should tread lightly when regulating Internet content.²³⁶

Other Supreme Court cases also demonstrate that the First Amendment implications here could be significant. Regulation of speech-related activities generally receives heightened scrutiny, even where regulating speech is not the explicit or even implied intent of the legislature.²³⁷ In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,²³⁸ the Court reviewed a tax on publications under heightened scrutiny despite finding no evidence that the tax was meant to censor or infringe speech.²³⁹ The Court stated: “Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.”²⁴⁰ Thus, government regulation of Internet accessibility need not be aimed at controlling ideas or expression to be subject to heightened scrutiny under the First Amendment.

²³¹ *Id.* at 853. The Court continued: “Any person or organization with a computer connected to the Internet can ‘publish’ information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.” *Id.*

²³² *Id.* at 871-72.

²³³ *Id.*

²³⁴ Though perhaps not viewpoint-based, restrictions under Title III may be content-based. See *Hearing, supra* note 8, at 89 (statement of Elizabeth K. Dorminey, Attorney, Wimberly, Lawson, Steckel, Nelson & Schneider, P.C.) (describing, as an example, a regulation as mandating text in lieu of graphics, and arguing that such a regulation would alter the content of the expression).

²³⁵ 42 U.S.C. § 12188 (2000).

²³⁶ See *Reno v. ACLU*, 521 U.S. 844, 885 (1997). The Court was reluctant to allow Internet regulation at such an early stage of Internet development:

As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

²³⁷ See Stuart Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 286-88 (2000).

²³⁸ 460 U.S. 575 (1983).

²³⁹ *Id.* at 579.

²⁴⁰ *Id.* at 592 (internal citations omitted).

Though there is some debate as to whether Title III would be a content-based or content-neutral regulation as applied to the Internet,²⁴¹ any government interference with Internet content providers is likely to at least raise the specter of First Amendment concerns. In *Turner Broadcasting System, Inc. v. FCC*,²⁴² the Court reviewed a regulation requiring cable television systems to carry local broadcast television stations under so-called “must-carry” provisions. Though the regulation was content-neutral, the Court applied intermediate scrutiny, rather than rational basis review, in holding that the provisions could be sustained only if: (1) the law corrects an actual, rather than merely posited, harm; (2) the restrictions are “no greater than is essential”²⁴³ to the furtherance of the government’s interest; and (3) the importance of correcting the harm justifies the degree to which the law inhibits speech.²⁴⁴ These would likely be the minimum requirements the government would have to meet in order to uphold application of Title III to a private Internet site under the First Amendment.

The standard of review a court would likely employ when reviewing a First Amendment challenge to Title III’s application to a private Internet site depends on how the Court views the core First Amendment concern. If the Court focused on the technology involved it might adopt the strict scrutiny of *Reno v. ACLU*, in keeping with the Supreme Court’s overarching concerns about Internet regulation. On the other hand, the Court could view Title III as a content-neutral regulation and use the intermediate scrutiny employed in *Turner*. Under either analysis, ending discrimination against the disabled is likely an important government interest.²⁴⁵ In line with the heightened scrutiny afforded to speech-related activities, however, courts will probably not defer to legislative fact-finding with regard to the seriousness of the harm caused by Internet inaccessibility or the closeness of fit of any proffered solution.²⁴⁶ Thus, the most likely First Amendment stumbling block for application of the ADA to the Internet is whether the accessibility requirements

²⁴¹ See *Hearing*, *supra* note 8, at 89 (prepared statement of Elizabeth K. Dorminey, Attorney, Wimberly, Lawson, Steckel, Nelson & Schneider, P.C.) (suggesting that, under *Reno v. ACLU*, regulations that encourage accessibility by mandating text instead of graphics would violate the First Amendment). *But cf.* William Lynch, *The Application of Title III of the Americans with Disabilities Act of 1990 to the Internet: Proper E-Planning Prevents Poor E-Performance*, 12 COMM LAW CONCEPTS 245, 260-61 (2004) (arguing that Title III is a viewpoint-neutral restriction as applied to the Internet).

²⁴² 512 U.S. 622 (1994). The Court ultimately vacated the district court’s decision and remanded for development of the factual record concerning the importance of the issue to the broadcast industry. *Id.* at 668.

²⁴³ *Id.* at 662 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

²⁴⁴ *Id.*

²⁴⁵ See 42 U.S.C. § 12101(a) (2000) (referring to individuals with disabilities as a “discrete and insular minority,” calling discrimination against individuals with disabilities a “serious and pervasive social problem,” and finding that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals”).

²⁴⁶ See Benjamin, *supra* note 237, at 300.

are “no greater than is essential”²⁴⁷ to achieve accessibility for the disabled, and whether the importance of Internet accessibility justifies the degree to which the law inhibits speech.

Although any regulation of Internet content could raise First Amendment concerns, the “nexus” test in particular presents at least two harms that are difficult to justify in light of the importance of the regulation. First, the chilling effect of Internet regulation could violate the First Amendment. In practical terms, courts that take a broad view of the “nexus” test could require all private Internet content associated with any place of public accommodation to be accessible. This would apply not only to commercial websites with direct brick and mortar analogues, but also to the online arms of non-profit organizations such as museums, advocacy groups, and universities. Such groups may find accessibility difficult to achieve due to lack of resources, and the resultant chilling effect caused by this “tax” on speech could rise to the level of a First Amendment violation given the vast number of potential defendants involved. Second, the vagueness of the regulation could violate the First Amendment rights of individuals and organizations subject to Title III suits. Because the ADA was passed before Internet usage became widespread, that statute provides neither a clear requirement for the level of accessibility nor appropriate guidelines for achieving web accessibility. Currently, courts apply the ADA to the Internet on an ad hoc basis, without deferring to specific legislation or DOJ guidance. Since courts in different jurisdictions will apply the ADA differently in similar contexts,²⁴⁸ parties would not necessarily have notice that they were out of compliance before being haled into court. This uncertainty could further inhibit speech in a manner not justified by the need for Internet accessibility.

The constitutionality of regulating private Internet websites under Title III is at best questionable. Legislation that is closely tailored to increasing Internet accessibility for the disabled and that does not risk chilling significant amounts of Internet content is less likely to trigger First Amendment concerns. The most obvious way to accomplish this is to require only commercial content, such as the websites of businesses selling goods and services, to be made accessible. This is because commercial speech is afforded less protection than expressive speech under the First Amendment,²⁴⁹ and limiting the regulation to commercial entities would be unlikely to chill non-commercial forms of Internet content. Though commercial entities have thus far been the focus of cases applying the “nexus” test, the distinction

²⁴⁷ *Turner*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

²⁴⁸ *Compare Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) with *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002). Though both courts claim to apply the “nexus” test, they reach different conclusions about the scope of that test.

²⁴⁹ *See, e.g., Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978) (affording commercial speech a “limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression”).

between commercial and non-commercial is not required by the test itself. Moreover, the test treats businesses differently based on whether they have an analogous presence in physical space even when their websites are functionally the same. This discriminates against businesses such as Target in favor of businesses such as Amazon.com. Legislation that takes a uniform approach to regulating the accessibility of commercial speech online, while minimizing the impact of the regulation on non-commercial speech, would be less likely to violate the First Amendment.

V. AMENDING THE ADA

The ADA should be amended to make explicit the standards of accessibility expected of private Internet websites. This is a time when a “new generation of computer literate young people [has been] able to access and create information, art, and entertainment at a previously unimaginable rate.”²⁵⁰ As so many forms of social intercourse become possible through mouse, keyboard, monitor, and speaker, those who are unable to interact with those inputs and outputs may find themselves unable to participate in online social life. Legislative, administrative, and judicial responses to this problem have been confused, inconsistent, or arbitrary. The “nexus” test that has been used sporadically to enforce Internet accessibility may force Walmart.com to make itself accessible while remaining silent regarding Amazon.com, based only on the fact that the former has a brick and mortar presence while the latter does not.²⁵¹ It also does little to allay the speech and cost concerns that necessarily accompany regulation of an expressive and commercial outlet. To solve these problems in the near future, given the current technological constraints, will require a combination of targeted efforts rather than a wholesale mandate mimicking Title III.

The W3C standards have been promulgated by a group of scientists and engineers who have studied the Internet since its inception. These standards provide the best hope for Internet accessibility and should be formally adopted by Congress as guidelines for all Internet content. Congress must adopt a nuanced approach to the enforcement of these guidelines, making use of two distinctions: (1) multimedia versus static websites, and (2) for-profit enterprises versus non-profits and individuals. How these distinctions should affect the legislative scheme is described below:

(1) With respect to the costly problem of subtitled online video, the W3C standards must remain mere *guidelines*, inviting voluntary compliance but lacking a cause of action or other penalty for noncompliance. The costs of transcription would drive even the most popular free online multimedia sharing sites out of business, either because costs would be raised for the

²⁵⁰ 2 EDWIN S. GAUSTAD ET AL., UNTO A GOOD LAND: A HISTORY OF THE AMERICAN PEOPLE 1209 (2005).

²⁵¹ Cf. *Target*, 452 F. Supp. 2d at 956.

user generating the content or because the website would have to bear the enormous burden of transcribing every video uploaded by its users. Though it may be unsatisfying, disabled users must content themselves with the subtitling efforts of the volunteer and nonprofit community, at least until the technology exists to automatically transcribe video. Rather than diverging from the ADA's mandate, careful attention to the likely effects of costs is in line with many of the actions taken by the federal government in tandem with the original passage of that statute.²⁵²

(2) Congress should mandate that the web content of for-profit enterprises (as opposed to non-profits and individuals) be accessible according to the standards laid down by the W3C (with the exception of subtitling). A for-profit enterprise, for the purposes of this proposal, is one that directly profits from the good or service sold over the Internet. Though Title III of the ADA went beyond regulating commercial businesses to regulate nearly all places open to the public, the First Amendment impact of mandating accessibility of free Internet content would be difficult to justify.²⁵³ In the realm of the Internet, where content can be posted by individuals and organizations at practically no cost, we suggest that the line for regulation should be drawn more explicitly between commercial/non-commercial enterprises. For-profit enterprises are able to spread costs among their customers, while non-profits and individuals are generally not; imposing even a small tax on a free service risks killing it. The voluntary nature of compliance for individuals and non-profits is necessary to avoid First Amendment and economic concerns that would make Internet accessibility regulation untenable. Under this regime, the burden of regulation would only fall where it would be lightest.

Judge Posner's suggestion that the Internet, as a whole, must be accessible is impossible to achieve at a reasonable cost under current technological constraints. In the unlikely event that Judge Posner's pronouncements were to be transformed into a congressional or agency mandate, a large amount of user-generated content would be forced off the Web. Government action that is far-reaching and aspirational is also likely to be widely unenforceable, resulting in spotty compliance. The upshot of these realities is that, if at any point Congress or the DOJ commits to tackling the daunting task of regulating web accessibility, they would best serve both individuals with disabilities and the public at large by focusing on large commercial entities rather than seeking to replicate the breadth of the impact achieved by the ADA on physical places of public accommodation.

Blanket edicts that ignore costs would either be the end of the Internet as we know it or would drive websites overseas. Neither outcome is especially appealing. Alternatives to government mandates include increased reliance on the private sector and public-private partnerships. There are

²⁵² See *supra* notes 41-43 and accompanying text.

²⁵³ See *supra* Part IV.B.

already models for these approaches in the accessibility context. New Internet ventures such as Dotsub.com have sought to bridge language and ability divides, and have recognized the large market for subtitles, captions, and other equivalents. Because these websites do not face the quantity problem (due to their voluntary nature), they are able to avoid the massive costs that any blanket decree of accessibility would entail.

Non-profit organizations have also partnered with government agencies and corporations in order to identify and find solutions to accessibility barriers. For example, the Center for Applied Special Technology (“CAST”), a non-profit organization whose mission is to expand learning opportunities for individuals with disabilities, partnered with the federal government to create the National Instructional Materials Accessibility Standards, which were implemented to help educational institutions comply with the Individuals with Disabilities Education Act (“IDEA”).²⁵⁴ Rather than mandating immediate accessibility through the IDEA, CAST worked with government agencies and other interested parties to devise solutions that would be most effective for ensuring that individuals with disabilities had equal access to educational opportunities.²⁵⁵ These entrepreneurial ventures and volunteer-based websites might, then, represent the best means of ensuring some measure of accessibility for Internet media.

VI. CONCLUSION

This Note has attempted to explain the barriers to Internet accessibility and to provide some sense of how, and to what extent, the Internet may be made accessible to the disabled by law. There is certainly a great need for accessibility. Disabled individuals are often cut out of the American mainstream. The ADA was meant to remedy that situation, and was largely successful in the physical world. Now the Internet has created a new world that Americans increasingly inhabit. Indeed, disabled individuals in particular have found that the Internet provides new opportunities for them to meet people who share their interests, and to participate in a community. On the Internet, they can simply be individuals, rather than disabled individuals. But the advent of media-rich websites has changed that, ushering in a new era of division and exclusion. Neither the judiciary nor the legislature has arrived at a sensible dividing line separating those websites that should be made accessible from those that need not comply.

This Note contends that two distinctions should be made in implementing new regulations to increase the accessibility of private Internet websites. The first distinction is between media-rich websites (e.g., YouTube) and websites where the presentation of media is not the primary objective. Ac-

²⁵⁴ 20 U.S.C.A. § 1400 (2008).

²⁵⁵ See CAST, Policy & Practice, <http://www.cast.org/policy/index.html> (last visited September 19, 2008).

cessibility for the former is currently impossible, whereas accessibility for the latter may be achieved through the use of the W3C standards. The former should be left to private actors—entrepreneurs and volunteers—while the latter may be effectively governed by law. Within this distinction, government regulation should further distinguish between commercial websites and the informational and expressive websites of individuals and non-profit organizations. For the former, the cost of accessibility can be spread to consumers through the costs of the goods or services available online. Any harm caused by these costs could then be justified by the need for government regulation to achieve the important goal of Internet accessibility for disabled persons. The same is not true of non-profit websites, given the scope and importance of the Internet as an expressive medium. Both of these distinctions must be recognized by courts and lawmakers if their pronouncements made in accordance with the ADA are to have their intended effect.