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## Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems

Deeva V. Shah

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# Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems

by DEEVA V. SHAH\*

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## I. Introduction

In early 2015, Netflix aired its original series *Daredevil*, based on a Marvel comic book series by the same name.<sup>1</sup> *Daredevil* is the story of a blind lawyer with superpowers: a crusader who fought crime despite what some might presume was a disability.<sup>2</sup> Marvel fans often hailed the Daredevil character as an important addition to the Marvel family due to the representation of disability in a positive light.<sup>3</sup> Quite a few fans of the *Daredevil* franchise have visual impairments and were looking forward to enjoying the Netflix show. While the show was a success, the Netflix release of *Daredevil* was ironically inaccessible to the visually impaired community. The initial release of *Daredevil* on Netflix did not include audio descriptions to explain the actions occurring onscreen to visually impaired users.<sup>4</sup> Daredevil himself would not have been able to watch the show.

*Daredevil* was just one illustration of an ongoing problem: most online content is inaccessible to visually impaired users even though the technology exists to make it accessible.<sup>5</sup> There is no legal clarity on whether and how the Americans with Disabilities Act (“ADA” or “the Act”) applies to online content. In a challenge brought under the ADA, the Ninth Circuit ruled that Netflix is not legally required to provide closed captioning because the website has no connection to a physical place.<sup>6</sup> The court read the ADA’s accommodation requirements as applying only to places of public accommodation that have some connection to a physical place.<sup>7</sup> In contrast, the Massachusetts district court considering a similar case held that Netflix is a “place of public accommodation” under the ADA, even though it is exclusively online.<sup>8</sup>

Part I of this paper considers the current status of the ADA and explains why statutory interpretation does not clarify whether the ADA applies to websites. Part II looks at the multiple judicial opinions considering the application of the ADA to online content. Specifically,

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1. NPR Staff, *After Fan Pressure, Netflix Makes ‘Daredevil’ Accessible to the Blind*, NPR (Apr. 27, 2015), <http://www.npr.org/2015/04/18/400590705/after-fan-pressure-netflix-makes-daredevil-accessible-to-the-blind>.

2. *Id.*

3. *Id.*

4. Hope King, *Netflix Introduces Audio Descriptions for Visually Impaired*, CNN MONEY (Apr. 14, 2015), <http://money.cnn.com/2015/04/14/technology/netflix-visually-impaired/>.

5. *Id.*

6. *Cullen v. Netflix, Inc. (Cullen II)*, 600 F. App’x 508, 509 (9th Cir. 2015).

7. *Id.*

8. Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 202 (D. Mass. 2012).

Part II focuses on the development of the “nexus test” by some courts, which limits application of the ADA’s accommodation requirements to those online providers with a nexus to a physical location. Part III argues that the nexus test is often misapplied and has been ineffective in addressing the underlying concerns the ADA was meant to address. This note therefore recommends rejection of the nexus test entirely. Part IV considers possible regulations in addition to more consistent judicial interpretations of the ADA, focusing on the Department of Justice’s 2010 Advanced Notice of Proposed Rulemaking to address the problem. Part IV also suggests changes to the Department of Justice’s proposed approach to allow for flexibility and better guidance for online service providers to effectuate changes to the accessibility of their web content. It focuses on regulatory changes that will effectively address issues in statutory interpretation unanswered by the courts and also set guidelines for online content providers in creating accessible content.

## II. Current Status of the Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (“ADA” or “the Act”) aims “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>9</sup> Congress intended this comprehensive mandate to provide “clear, strong, consistent, enforceable standards” for addressing such discrimination.<sup>10</sup> Title III of the Act concerns public accommodations and services operated by private entities.<sup>11</sup> Title III specifically states that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.”<sup>12</sup>

Under the ADA, places of public accommodation have an affirmative duty to remove barriers for entry or access to goods and services for individuals with disabilities.<sup>13</sup> Examples of barrier removal include building ramps, installing grab bars, lowering telephones, and providing auxiliary aids.<sup>14</sup> The ADA places the legal obligation to remove barriers on both landlords and tenants at a place of public accommodation.<sup>15</sup>

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9. Americans with Disabilities Act (ADA) of 1990, 42 USC § 12101(b)(1) (2015).

10. *Id.* § 12101(b)(2).

11. *Id.* §§ 12181-82.

12. *Id.* § 12182(a).

13. *Id.* § 12182.

14. *The ADA: Questions and Answers*, U.S. Equal Emp. Opportunity Comm’n, <http://www.eeoc.gov/facts/adaqa2.html> (last updated Jan. 15, 1997).

15. *Id.* Landlords and tenants may decide who will actually make the changes in their lease agreement; however, both will be legally responsible. *Id.*

The Act defines many critical terms, including disabilities, discrimination, and place of public accommodation;<sup>16</sup> nonetheless, the definitions are not clear or broad enough to provide easy answers to questions posed by certain technological innovations. For visually impaired individuals, a critical question is whether a website is a “place of public accommodation” under the Act. The Act defines public accommodation by way of example, listing twelve different types of private entities that “are considered public accommodations.”<sup>17</sup> These private entities include theaters, places of public gathering, shopping centers, recreational and educational places, and social service establishments.<sup>18</sup> The list of categories of places of public accommodation is exhaustive, but what types of accommodation fall under each category are not. The list itself simply provides a breadth of examples of what may fall under the ADA requirements to remove barriers to access.

When Congress passed the ADA in 1990, websites were just starting to be used by research institutions.<sup>19</sup> They had not yet become destinations for online shopping, social networking, education, and even employment,

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16. § 12182.

17. *Id.* § 12181(7).

18. 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 entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(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.

*Id.*

19. Ali Abrar & Kerry K. Dingle, Note, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 134 (2009).

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as they are today. The ADA was drafted on the cusp of a technology and information revolution that Congress did not address, and most likely did not foresee.<sup>20</sup> The question thus became whether the language of the ADA is broad enough to cover new kinds of accommodations that did not yet exist when the statute was written. Many websites now serve the function of theaters, public gathering areas, shopping centers, and recreational and educational services—all private entities that are also places of public accommodation. This paper will first explain how statutory construction does not clearly answer the question of whether websites fall under the ADA, even though textual support and congressional intent could both support a reading of websites as places of public accommodation.

#### A. Statutory Construction of the ADA in an Online World

Courts and scholars have used many tools of statutory construction and interpretation to debate whether the ADA applies to online content. Some courts, using specific intent analysis and textual and dynamic interpretation, have concluded that the ADA would apply to online content if Congress had thought about legislating for the Internet at that time. Other courts, using strict textualism and specific intent, have found against the application of the ADA to online content based on the wording of the statute. Although there is ambiguity in the statute, courts should read “places of public accommodation” to include websites under the definition of places of public accommodations. This interpretation of the statute is most consistent with the purpose of the ADA and also supported by both the text and specific intent of its congressional sponsors.

Looking at the text of the ADA, the statutory prohibition against discrimination is limited to any *place* of public accommodation. The statute specifically states “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.”<sup>21</sup> Under a text-based analysis, the word “place” in this phrase might suggest a limitation to physical location.<sup>22</sup> A similar

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20. *Id.* at 140.

21. § 12182(a) (emphasis added).

22. The text of the statute uses “place of public accommodation” and “public accommodation” somewhat interchangeably. However, the operative provision related to discrimination specifically restricts discrimination in “places” of public accommodation. This qualification could be read as a limitation on the meaning of public accommodation, but the distinction between “public accommodations” and “places of public accommodation” is unclear. Due to a lack of statutory distinction between the two, this paper does not address whether websites are only “public accommodations” or also “places of public accommodation.” However, this textualist argument cuts both ways. While inclusion of the word “place” could limit the relevant operative provision to physical locations, its intermittent use throughout the

focus is suggested in the statutory definition of “public accommodations,” which sets forth a list of institutions typically embodied in physical facilities (especially at the time Congress enacted the statute).<sup>23</sup> The plain meaning of “place” could refer to a physical place, as could the dictionary meaning of “place.” In fact, the first definition listed under “place” in Merriam-Webster is “a physical environment . . . physical surroundings.”<sup>24</sup>

However, the text never specifically excludes “virtual” places from “places of public accommodation.” There is also nothing apparent in the specific intent of the ADA to indicate that “virtual” places were exempt from application.<sup>25</sup> Congress specifically noted in the Act<sup>26</sup> that the list should not and would not include every type of public accommodation required to comply with Title III of the ADA.<sup>27</sup>

Employing the textual canon of *ejusdem generis*, one could argue that the examples enumerated as places of accommodation are limited to physical structures<sup>28</sup> and therefore the accessibility requirements only apply to physical buildings. There is no textual indication whether the statute should be read to only include physical structures or to extend past the physical notion of “place” and the examples listed. However, this interpretation does not seem correct, as it would not cover telephone-based services, such as pizza delivery services or telephone travel agencies.

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statute arguably demonstrates that “place” is not meant to refer to a physical place but simply to contextualize “public accommodations.” This interpretation is likely considering the responses below from Senator Harkin, the sponsor of the ADA, noting that “place” was not meant to have any specific meaning in Title III.

23. § 12181(7). The statute repeats the word “place” numerous times in listing the types of private entities that count as public accommodations, including “place of lodging,” “place of exhibition entertainment,” “place of public gathering,” “places of public display,” “place of recreation,” “place of education,” and “place of exercise.” *Id.*

24. *Place Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/place> (last visited Dec. 26, 2015).

25. Virtual places may not have been important enough at the time to even consider including.

26. H.R. REP. NO. 101-485(II), at 100 (1990). “The twelve categories of entities included in the definition of the term “public accommodation” are exhaustive . . . . The Committee intends that the . . . terminology should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.” *Id.* Within each of these categories, the legislation only lists a few examples and then, in many cases, adds a phrase including “other” entities that are similar in nature.

27. There is a counter argument to construing the exhaustive list broadly. The list originally contained “other similar entities” after each phrase; however, that was removed before the ADA was passed. One could argue that this provision was removed in order to limit application of the ADA to fewer accommodations. The response is that the provision was removed because it was surplusage. One could also argue that removing the word “similar” loosens constraints on catch-all-terms. The record and debate transcriptions do not indicate the actual reason for removing the phrase.

28. *See supra* note 22.

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Many of these businesses are already regulated by the ADA. Furthermore, there are multiple services listed under “public accommodation” that exist today in a strictly online setting. To name just a few examples, Netflix.com is arguably a theater under 42 U.S.C. § 12181(7)(C); Ted Talks are similar to lecture halls under (D); Amazon.com is a shopping center under (E); Kayak.com is a travel service under (F); and Pokerstars.com is place of recreation under both (I) and (L). Therefore, places already covered until Title III—theaters, shopping centers, travel services, places of recreation, and more—could include online variants—like Netflix, Ted Talks, Kayak, and Pokerstars.

The best response to the argument above comes from a specific intent standpoint. In 1990, Congress had no occasion to consider whether it intended to cover websites under Title III. Congress could not have specifically intended to speak to online content and websites. This reasoning, however, also cuts in favor of applying Title III to online content. Although the list of categories of public accommodations in 42 USC § 12181(7) is exhaustive,<sup>29</sup> the specific types of public accommodations that fall under each category are not exhaustive. This could be because Congress did not intend to limit the definition of “places of public accommodation” beyond a very inclusive list of categories. In other words, Congress intentionally provided a list that could include a wide range of changing services.

Another textual argument for excluding websites from the ADA is that the list of public accommodations does not include institutional information service providers in existence at the time that could be considered similar to websites. For example, the list does not include providers of telecommunications and television services that arguably constitute nonphysical places of accommodation. Access to these services for disabled users is not addressed in Title III but is instead addressed in Title IV of the ADA.<sup>30</sup> These services, especially telecommunications services, might be more analogous to internet services and provisions of information on the World Wide Web than the public accommodations in Title III. The exclusion of these services from Title III, which is for places of public accommodation and not information service providers, suggests that Congress may not have intended for Title III to govern online access to websites as places of public accommodation.

There are three responses to this argument. First, the Federal Communications Commission (“FCC”) has historically controlled telecommunications and television; therefore, the ADA arguably needs a

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29. 47 U.S.C. § 225 (2015); *see also* Abrar & Dingle, *supra* note 19, at 148 n.117.

30. 47 U.S.C. § 225 (2015).

separate statutory provision for those services, to grant corresponding regulatory power to the FCC instead of the Department of Justice (“DOJ”).<sup>31</sup> This argument does not preclude Title III from applying to online accommodations, especially considering how many websites have connections to physical locations that Title III already clearly addresses. In fact, reading Title IV (referring to information service providers) as excluding online places of public accommodation from Title III would create an odd dichotomy where physical locations are governed by a separate statutory section regulating conduct even though the same services are offered online. Second, Title IV of the ADA only applies to “common carriers,” which, according to the Civil Rights Division of the DOJ, means telephone companies.<sup>32</sup> Online service providers are not limited to telephone companies, and even online telephone service providers may not fall under typical definitions of common carriers. Third, and most importantly, although the information used by online service providers travels through the Internet—a telecommunications service—the services provided on Amazon.com or Pokerstars.com are not telecommunication services.<sup>33</sup> Perhaps broadband providers like Comcast would qualify as telecommunication services governed by Title IV; however, Amazon.com and Pokerstars.com more clearly constitute online offerings of retail or recreational services, both of which are services defined as “public accommodations” under Title III.

An analysis of the text of Title III, even taking into account Title IV, still favors a finding that online content and websites are places of public accommodation. Evaluating the specific and general intent of the ADA further supports this interpretation.

### **B. Moving Past Textual Analysis: Statutory Interpretation of Title III**

There are arguments against simply adopting a textualist approach alone, especially when reading Title III to omit websites would be against the intent and purpose of the ADA. The specific intent of the sponsors of the ADA actually weighs in favor of regulating online content under Title III. The sponsors noted that places of public accommodation should include a broad range of goods and services, not simply those enumerated in 42 U.S.C. § 12181(7).<sup>34</sup> Senator Tom Harkin, one of those sponsors, stated in the legislative history that the ADA was meant to have a broader reach because “discrimination against people with disabilities is not limited

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31. *A Guide to Disability Rights Law*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. (July 2009), <http://www.ada.gov/cguide.htm#anchor63109>.

32. *Id.*

33. *Id.*; see also 47 USC § 153(24) (2015) (defining “information services”).

34. Abarar & Dingle, *supra* note 19 at 137–38.

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to specific categories of public accommodation.”<sup>35</sup> Furthermore, Senator Harkin argued that courts overemphasize the word “place,” given that the original version of the ADA only said “public accommodation” and not “place of public accommodation.”<sup>36</sup> According to him, the only reason for the addition of “place of” was to make the language of the ADA echo that of “public accommodations” in the Civil Rights Act, making the ADA easier to explain and endorse.<sup>37</sup> The word “place” was not meant to add any additional constraints to “public accommodations” under Title III.

The strongest argument against this is that the actual text of the act does include the word “place” without any further clarification. Perhaps “place” was not important to the sponsors but it could have been critical for those who voted to pass the Act. Furthermore, even if the ADA was meant to cover a broader range of goods and services than those enumerated, it is unclear what it should cover and where a court should draw the line. To expand what counts as a “place of physical accommodation” would make it difficult to provide adequate notice to private entities regarding whether their goods and services were included under the statute. Inasmuch as the purpose of the ADA is to provide “clear, strong, consistent, enforceable standards,”<sup>38</sup> interpretations that favor inclusion of websites under the ADA might frustrate such a purpose without further statutory or regulatory guidance.

On the other hand, one could argue that the primary purpose of the act is not just to provide “clear, strong, consistent, and enforceable standards” for preventing discrimination against individuals with disabilities, but rather to relieve disabled individuals of “barriers” to participating in everyday activities and services.<sup>39</sup> To fulfill this purpose then, courts should resolve ambiguities in the statutory language in favor of removing barriers to access. Courts should therefore read phrases like “places of public accommodation” to include websites, as Congress used broad language in order to remove such barriers. Especially when such a large amount of information is now available online, including resources related to education and finding jobs, it would defeat Congressional goals to read the statute to exclude such basic information from the services that must be accessible to individuals regardless of disability.

The legislative history also suggests that the ADA was not meant to be a static regulation but was meant to “keep pace with the rapidly changing

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35. *Id.*

36. Robert L. Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. ON C.L. & C.R. 241, 285–86 (2008).

37. *Id.* at 286.

38. 42 U.S.C. § 12101(b) (2015).

39. *Id.* at 263, 266, 276.

technology of the times.”<sup>40</sup> The Committee Report also noted that technology would change over time and public accommodations would have to provide aids “which today would not be required because they would be held to impose an undue burden on such entities.”<sup>41</sup> This language also supports a more liberal interpretation of “places of public accommodation” to include goods and services available online. The response to these arguments is that statements made by a few individuals before the Senate or the House do not indicate the inclinations of all of the individuals who voted for the ADA.

While there are arguments against the inclusion of websites as places of public accommodation, the stronger arguments support including websites in Title III of the ADA. As Part II of this paper shows, multiple courts have reached contrary decisions about whether the ADA applies to online content. Because the ADA would otherwise fail to apply to any new technologies, courts should read the statute to apply to online content. Even courts that take a stronger textualist approach would be able to find support in the text of the ADA to support such an interpretation. Courts should, at the least, acknowledge the ambiguity in the statutory language in such cases, leaving room for DOJ regulation in the future.<sup>42</sup>

### **III. Current Judicial Status of the Americans with Disabilities Act and Web Accessibility**

For years after the passage of the ADA, there was no discussion regarding whether the ADA applied to websites and online content.<sup>43</sup> In 2001, Access Now filed suit against Southwest Airlines in the Southern District of Florida, forcing the judiciary to finally address the issue.<sup>44</sup> This section addresses the current circuit split in applying Title III to websites as places of public accommodation. It discusses the difficulties in applying the nexus test, a test some courts have devised to see if websites are in fact

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40. H.R. REP. NO. 101-485(II), at 108 (1990)

41. *Id.*

42. *Chevron* deference to statutory interpretations by administrative agencies tasked with executing the statute trumps any precedent of the United States Courts of Appeals unless the court specifically states that under *Chevron* the statute is unambiguous. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–85 (2005).

43. While there were other cases before 2002, those cases were settled or decided on grounds that were not related to ADA interpretation. *See* Complaint, Nat'l Fed'n for the Blind v. Am. Online, No. 99 CV 12303, 1999 WL 33756896 (D. Mass. Nov. 9, 1999) (settling shortly after due to AOL agreeing to updates to next version of software); *see also* *Hooks v. OKBridge, Inc.*, No. SA-99-CV-214-EP (W.D. Tex. June 28, 1999) (dismissing originally for ADA scope rationale but Fifth Circuit declined to follow that reasoning and dismissed for other reasons).

44. *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004) (dismissing appeal because claims abandoned before or were being raised for the first time on appeal).

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places of public accommodation. Finally, this section discusses the difficulties of judicial interpretation of Title III and why the judiciary is limited in what it can accomplish.

Access Now argued that Southwest.com, owned by Southwest Airlines, violated the ADA because it was inaccessible to visually impaired users.<sup>45</sup> The website did not provide alternative text that could be picked up by a screen reader to communicate the visual elements of a page to impaired users.<sup>46</sup> Southwest.com provides services such as checking fares, booking and altering flight reservations, and accessing flights schedules. Plaintiff claimed that Title III applied to Southwest.com because the website was a “sales establishment” under the ADA.<sup>47</sup> Plaintiff cited the First Circuit’s decision in *Carparts v. Automotive Wholesaler’s*, which applied Title III to an insurance program, as authority for applying the ADA to non-physical goods and services.<sup>48</sup>

The court in *Access Now* read the statute narrowly, stating that a place of public accommodation must be a physical place and that websites were therefore not covered by the ADA.<sup>49</sup> The court applied a strictly textual approach to interpreting the ADA and found the textualist arguments more convincing against ADA application to online content.<sup>50</sup> The court then attempted to apply what it called the nexus test to determine whether there was a significant connection between the services provided on Southwest.com and the physical concrete place of public accommodation. The nexus test was based on an Eleventh Circuit decision finding that in order to state a claim under Title III, plaintiffs must demonstrate a “nexus between the challenged service and the physical premises of the public accommodation.”<sup>51</sup> If there were a significant connection, the ADA might require that the website be accessible in order to avoid discrimination in access to the physical place of accommodation.

The *Access Now* court stated that the plaintiffs did not establish a nexus between Southwest.com and a physical, concrete place of public accommodation, such as a particular airline ticket counter or travel agency.<sup>52</sup> Although the court recognized that websites function as

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45. *Id.* at 1314–15.

46. *Id.* at 1316.

47. *Id.* at 1318.

48. *Id.* at 1319 (citing *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Assoc. of New England*, 37 F.3d 12, 19 (1st Cir. 1994)).

49. *Id.* at 1318.

50. *Id.* at 1317–19.

51. *Id.* at 1320 (citing *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1283 n. 6 (11th Cir. 2002)).

52. *Id.* at 1321

metaphorical spaces, it concluded that the ADA applies only to physical spaces:

[T]he Supreme Court and the Eleventh Circuit have both recognized that the Internet is “a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location . . . .” Plaintiffs are unable to demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.<sup>53</sup>

*Access Now* was the first in a series of cases to analyze the application of the Americans with Disabilities Act to online content; however, the court’s use of the nexus test was not adopted by other courts as they faced similar issues.

#### A. Understanding the Nexus Test

*Access Now* was the first time the nexus test was applied in an online context.<sup>54</sup> Now, that test has become somewhat commonplace in judicial assessments of the application of the ADA to websites and online content.<sup>55</sup> However, as this section discusses, the application of the test has led to inconsistent results that bear no relation to the purpose of the ADA. Under the nexus test, the ADA would not apply to websites that do not have a connection to a physical place of accommodation, leaving many places of public accommodation inaccessible to visually impaired users and only affecting already-accessible places.

The nexus test originated in contexts outside of the Internet as a test for deciding what specific activities and services the ADA could regulate.<sup>56</sup> It was not meant to apply to websites or the virtual world, which partially accounts for its misapplication now. In *Rendon v. Valleycrest Products*, plaintiffs argued that the television show “Who Wants to Be A Millionaire?” discriminated against visually and hearing impaired individuals.<sup>57</sup> Plaintiffs stated that the screening process for the show, which required quickly answering questions on the phone using a keypad, discriminated against them in violation of the ADA.<sup>58</sup> Defendants argued

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53. *Id.* at 1318–21 (quoting *Reno v. ACLU*, 521 U.S. 844, 851 (1997)).

54. *Id.* at 1319–21.

55. Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 *MERCER L. REV.* 963, 972–78 (2004).

56. *Id.* at 973.

57. 294 F.3d 1279 (11th Cir. 2002).

58. *Id.* at 1286.

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that the ADA did not apply to the contestant hotline because the hotline was not a physical barrier.<sup>59</sup> The Eleventh Circuit found that the ADA covered “both tangible and intangible barriers . . . such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person’s ability to enjoy the defendant entity’s goods, services, and privileges.”<sup>60</sup> Because there was a connection between a physical place of public accommodation and inaccessible goods or services, the court concluded that the ADA applied.<sup>61</sup> While *Rendon* was not related to online content, *Access Now* started applying the test to web accessibility. As the next section discusses, after the *Access Now* ruling in 2002, multiple courts began using the nexus test in cases involving the application of the ADA to websites.

### **B. Challenges in Application of the Nexus Test**

Continued application of the nexus test began to show its shortcomings. As this section discusses, the test allows for a broad range of judicial interpretation and is not in line with either of the ADA purposes: 1) creating clear, strong, consistent, and enforceable standards; and 2) ensuring access for impaired individuals. There is too much room for conflicting judicial interpretation in applying the nexus test. As seen above, *Access Now* was already partially indicative of that failure. After the case was decided, multiple scholars argued that there was a clear nexus between the services Southwest.com offered and the physical flights users would be boarding.<sup>62</sup> None of the services offered on Southwest.com were exclusively available online and all of the services relied on the physical world of Southwest flights. Furthermore, the physical corollaries of Southwest.com were arguably the Southwest ticket counters accessible at multiple airports.

Confusion as to what counts as a “nexus” continued to plague courts after *Access Now*. In *National Federation of the Blind v. Target*, filed in 2006 in the Northern District of California, plaintiffs stated that Target.com was not accessible to blind individuals using alternative text readers.<sup>63</sup> Plaintiffs claimed that visually impaired users were thus denied full and equal access to Target stores under the ADA.<sup>64</sup> The court agreed with this interpretation of the ADA and the plaintiffs’ application of the nexus test,

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59. *Id.* at 1283.

60. *Id.*

61. *Id.* at 1286.

62. Moberly, *supra* note 55, at 992.

63. Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949–50 (N.D. Cal. 2006).

64. Plaintiffs argued that critical information about the physical stores, such as location, hours, and services available, were all listed on Target.com. *Id.*

stating that a user's access to goods and services in a physical store were impacted by an inability to access the Target.com website.<sup>65</sup>

The court noted that the purpose of the ADA “is broader than mere physical access—seeking to bar actions or omissions which impair a disabled person's ‘full enjoyment’ of services or goods of a covered accommodation . . . [i]ndeed, the statute expressly states that the denial of equal ‘participation’ or the provision of ‘separate benefit[s]’ are actionable under Title III.”<sup>66</sup> Unlike *Access Now*, the *Target* court found that there was enough of a nexus to the physical location because the website included information about the physical Target stores.

A comparison of *Access Now* and *Target* demonstrates the inconsistent results of applying the nexus test. The nexus test is easy to misapply, leading to results that are out of line with the purpose of the ADA. Southwest.com does in fact have a link to a physical service in the form of a flight and thus would seemingly satisfy the nexus test. Most flights are now purchased through online ticketing services and not at a physical ticket counter. If the ADA should cover any type of website, it seems that a website that is a direct gateway to accessing a physical service such as transportation should qualify. Therefore, the *Access Now* ruling shows how the nexus test fails in its own goal of applying the ADA to places with a significant physical connection to the online service. Furthermore, the ruling does not even come close to meeting the purpose of the ADA as a whole, instead fortifying barriers to access for impaired users.

The *Target* case, on the other hand, errs on the other side. Most of the services available on Target.com are actually fully available at physical Target stores. The information on the website that the court claims creates a nexus to the physical store (hours, location, and contact information), is all available by telephone, which is fully accessible to visually impaired users.<sup>67</sup> Title III already ensures that the physical stores have been made accessible to visually impaired users. Forcing Target.com to meet ADA requirements, especially when there are other methods of easily obtaining the same information, is also a misapplication of the nexus test.

Moreover, when comparing the two cases, there are many websites that disability rights advocates would want covered under the nexus test that would simply be left out. For example, while Target.com would have to make changes because of its nexus to brick-and-mortar stores, Amazon.com would not have to make the same changes. Amazon.com would be exempt from ADA application even though the impact on

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65. *Id.* at 956.

66. *Id.* at 954 (citing 42 U.S.C. §§ 12182(a)-(b) (2015)).

67. *Id.* at 956.

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disabled customers would be much worse than the impact on disabled customers of Target.com as none of Amazon's services are available offline or in a physical location. Application of the nexus test would give visually impaired users further access to services that already have physical locations, and thus are already required to provide accommodations in some sense. On the other hand, it would do nothing to make services that are web-exclusive change their websites to become more accessible. In other words, the nexus test provides the benefits of the ADA where they are needed least and withholds them where they are needed most.

Unpredictability in how the courts will apply the nexus test continue to exist has led to another problem—a lack of notice to website programmers and developers regarding when the ADA does or does not apply to their websites. It is unclear whether websites fall under the label “place of public accommodation” at all, allowing for conflicting judicial interpretations. If a court does not find the website itself to be a place of public accommodation, there is still a question of what judicially constitutes a nexus to a physical location, allowing for more varying judicial interpretation.

### **C. The Problem with Varying Judicial Applications of the ADA**

As this section shows, without clearer answers to both questions, judicial interpretation may lead to further confusion and conflicting rulings. Some courts will rely only on statutory interpretation while others might apply the nexus test, without any uniformity in how the test is applied. This section looks specifically at recent conflicting rulings by federal district courts in Massachusetts and California applying the ADA to Netflix.com, an online provider of television and movies. These conflicting rulings serve as an example of why varying judicial interpretation is problematic in giving notice, providing clarity on the law, and determining what exactly ADA web compliance entails.

The National Association of the Deaf sued Netflix in the District of Massachusetts for failure to provide equal access to the “Watch Instantly” portion of the website.<sup>68</sup> Netflix argued that the plaintiffs had failed to show how Netflix was a “place of public accommodation” under the ADA.<sup>69</sup> The court rejected Netflix's argument for three reasons in an opinion that did not even apply the nexus test.

First, the court stated that failure to specifically mention websites in the ADA did not mean that Congress did not intend the ADA to adapt to

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68. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 198 (D. Mass. 2012).

69. *Id.* at 200.

changes in technology.<sup>70</sup> Second, the court stated that Congress did not intend to limit the ADA to specific examples, as evidenced by statements in the congressional record.<sup>71</sup> Finally, the court ruled that even though individuals accessed Netflix privately, that did not prevent Netflix from being a place of public accommodation.<sup>72</sup> Citing the Northern District of California's decision in the *Target* case, the District of Massachusetts held that the ADA applies to the services "of" a place of public accommodation, not services "in" a place of public accommodation.<sup>73</sup> Thus the court concluded that the Watch Instantly portion of the Netflix site was a place of public accommodation, as a service establishment, place of exhibition, or entertainment, and a rental establishment under the ADA.<sup>74</sup> There was no need for the court to apply the nexus test as the court found the statute itself applied to online content.

The next month, however, Netflix prevailed in a similar case in the Northern District of California, in a decision recently affirmed by the Ninth Circuit.<sup>75</sup> In *Cullen v. Netflix*, plaintiff filed a class action lawsuit claiming Netflix promised to subtitle its streaming library, allowing plaintiffs to falsely rely on those statements and continue purchasing subscriptions.<sup>76</sup> Cullen also claimed that Netflix was a place of public accommodation under Title III of the ADA and that its failure to provide captioning on movies in a reasonable amount of time imposed a "deaf tax."<sup>77</sup> This barrier was arguably discriminatory because plaintiff and members of his class were forced to buy the DVD-by-mail plans (instead of the instant streaming plans) that were significantly more expensive compared to services offered

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70. *Id.* at 201. *See, e.g.*, H.R. REP. 101-485(II), at 108 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 391 ("[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.").

71. *Netflix*, 869 F. Supp. 2d at 201 ("Congress did not intend to limit the ADA to the specific examples listed in each category of public accommodations. Plaintiffs must show only that the web site falls within a general category listed under the ADA."). *See, e.g.*, S. REP. NO. 101-116, at 56 (1990) ("[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation . . ."); *see also* H.R. REP. NO. 101-485(III), at 54 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 477 ("A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category.").

72. *Netflix*, 869 F. Supp. 2d at 201.

73. *Id.*

74. *Id.*

75. *Cullen II*, 600 F. App'x 508, 509 (9th Cir. 2015).

76. *Cullen v. Netflix, Inc. (Cullen I)*, 880 F. Supp. 2d 1017, 1021 (N.D. Cal. 2012).

77. *Id.*

to individuals who were not disabled.<sup>78</sup> The District Court found that under Ninth Circuit precedent, websites are not places of public accommodation because they are not physical places.<sup>79</sup> The Ninth Circuit affirmed the decision in a memorandum, stating that a place of public accommodation must require some connection between the good or service at issue and an “actual physical place.”<sup>80</sup>

Within one month, two District Courts reached opposing decisions on whether Netflix is a place of public accommodation under the ADA. The Massachusetts court did not even apply the nexus test, holding that websites were places of public accommodation in their own right. The Northern District of California applied the nexus test and found that Netflix had no connection to a physical location.<sup>81</sup> The same company is now left with two opposing decisions and no conclusion on how to determine if the ADA applies to its services and if so, under what circumstances.<sup>82</sup> Outside of the confusion Netflix is experiencing, these divergent rulings create a problem of uncertainty and allowing plaintiffs to forum shop. While these issues occur whenever a circuit split exists, this problem is particularly distinctive in an online context. Online businesses inevitably operate across state and circuit lines, whether they intend to or not.<sup>83</sup> Any legally binding changes are difficult to apply without changing the entire website, regardless of where the user is located. Even if a website wins an ADA suit in one location, one loss is enough to force major changes.

Subsequent decisions have failed to clarify this important issue of ADA interpretation. Although the Ninth Circuit affirmed the *Cullen* decision in April 2015, other courts have found websites to be places of public accommodation. For example, the United States District Court for the District of Vermont, aware of the Ninth Circuit *Cullen* decision, ruled in

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78. *Id.*

79. *Id.* at 1023 (referencing Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (holding that the ADA can only apply to a website when “there is a ‘nexus’” between the conduct at issue and defendant’s physical location)); Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (dismissing ADA claim against Facebook because Facebook operates only in cyberspace and thus is not a place of public accommodation as construed by the Ninth Circuit); Earll v. eBay, Inc., No. 5:11-CV-00262-JF HRL, 2011 WL 3955485, at \*2 (N.D. Cal. Sept. 7, 2011) (holding that eBay’s website is not a place of public accommodation under the ADA).

80. *Cullen II*, 600 F. App’x at 509.

81. Plaintiffs could have argued that the DVD mailing service constituted a physical service covered by the ADA. No court has ruled on that issue and it is not clear that Plaintiffs in the *Cullen* case made that argument.

82. Netflix could also satisfy both courts by simply making their services accessible by visually impaired users.

83. Servers are located in different states and online businesses generally do not discriminate based on which states a customer is located in.

May 2015 that websites could be considered places of public accommodation in *National Federation of the Blind v. Scribd*.<sup>84</sup> The Vermont District Court noted that the ADA is ambiguous and chose to resolve that ambiguity in favor of the Plaintiffs.<sup>85</sup> The court also found that Scribd, a digital library subscription service, owned, leased, or operated a place of public accommodation because its services fell within the general categories listed in the ADA.<sup>86</sup> Plaintiffs argued that the computer servers that Scribd utilized to provide its services also constituted a sufficient nexus to a physical place of public accommodation.<sup>87</sup> The Vermont District Court stated that the Ninth Circuit *Cullen* decision relied on “cramped reasoning” and that it was also non-precedential.<sup>88</sup> While no other circuit court has yet ruled on the matter, a split is clearly forming. Questions about ADA interpretation and application of the nexus test persist and lead to confusion for businesses operating in multiple jurisdictions.

#### D. Going Beyond Rejection of the Nexus Test

The nexus test lacks clarity, has no clear purpose, and fails to provide consistency in applying the ADA to online content.<sup>89</sup> Courts should therefore reject the nexus test and instead interpret Title III of the ADA as applying to online content. As seen above, the nexus test is a stop-gap measure taken from physical corollaries that just does not effectively apply to the internet.

However, this interpretation by the courts is only part of the solution. Judicial decision-making will only apply piecemeal to websites as they are brought in front of a court. While this is better than leaving visually impaired users without recourse, piecemeal changes are simply not enough.<sup>90</sup> Court are not the correct venue to set forth guidelines on which

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84. Nat'l Fed'n of the Blind v. Scribd Inc., No. 2:14-cv-162, 2015 WL 3454738, at \*3 (D. Vt. May 29, 2015).

85. *Id.* at \*1.

86. *Id.*

87. *Id.* at \*2.

88. *Id.* at \*3.

89. Modification of the test is also not the answer. Broadening what constitutes a “nexus” would still not provide any clarity or uniformity on what web compliance with the ADA requires. There would still be a variety of decisions regarding what is needed to comply with Title III and when a website has met those requirements. As discussed in Part IV, a Notice of Proposed Rulemaking would better address many of these questions. It is also unclear what the purpose of the nexus test would be if it was broadened to the extent this paper calls for it to change. Under the statutory interpretation suggested here, the nexus requirement would be removed as the ADA simply does not require it and it is contrary to public policy.

90. If courts all start ruling that Title III of the ADA applies to online content, websites may start complying without waiting to be sued; however, as noted in Part III, that is not enough to fix

specific websites are places of public accommodation, which sites qualify for the undue burden exception, and what changes are specifically needed for websites to comply with Title III.

While rejection of the “nexus test” is necessary to begin bringing courts together regarding Title III and web accessibility, the DOJ is best equipped to make broad and lasting changes. There is a need for concrete and clear regulatory statements on when and how places of public accommodation that exist online should meet the requirements set forth in the ADA. As long as courts recognize the ambiguity of ADA statutory language in its relation to online content, they would sufficiently give the DOJ concrete regulatory authority to speak on the issue.<sup>91</sup>

Even if courts are clear and interpret Title III as applying to websites, the DOJ would still need to speak on the issue at some point. Conflicting rulings from prior courts have just led some companies to ignore any possible application of the ADA to online content until there is clarity, as seen with continued cases against Netflix. Even the courts that do require accessibility for visually impaired users have not set clear standards for what constitutes accessibility and have failed to specify the timeframe in which accessibility is required.

There are multiple reasons that agencies are better suited to make such changes instead of the courts. First, the DOJ is likely to have more expertise on issues regarding technical standards than a judge. The “agency expertise” argument is fairly common and is particularly true in industries that require scientific or technical understanding applicable to a large number of industries.<sup>92</sup> Especially when a statute is ambiguous, resolution of that ambiguity requires policy judgments that are not for courts, but for political branches.<sup>93</sup> Second, agency rulemaking allows for

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the problem. There will still be a lack of clarity regarding what is required to meet Title III in terms of changes to websites and website code. For this reason, a judicial interpretation in favor of online content as part of Title III is not enough.

91. See *supra* note 42.

92. See *e.g.* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984) (“Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . . . Judges are not experts in the field . . . . When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2028–30 (2015).

93. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989).

political accountability without being mired in the inefficiencies of Congress and courts. Notice-and-comment rulemaking allows for both ex ante and ex post participation by interested constituents and lobbying groups without making any agency beholden to a specific group of people.<sup>94</sup> While judicial oversight is still available as necessary, decisions can be made without an action being brought.

Third, agencies have more flexibility than courts in responding to changing conditions and expanding (or retracting) the scope of regulation accordingly.<sup>95</sup> This is especially necessary when discussing technological regulation, as technology changes without much notice and as seen above, can otherwise only be addressed when plaintiffs bring an action before courts. As discussed below, flexible nonbinding guidelines issued by the DOJ would allow for uniformity on how websites should be changed without holding companies to outdated standards as technology changes. Courts simply do not have the expertise or flexibility to make comprehensive changes to ADA policy and also cannot make nonbinding suggestions that can be changed over time. Such flexibility is especially valuable when the effects of a policy are still somewhat uncertain and the viability of making accessible changes will increase over time.<sup>96</sup>

As seen in the next section, regulatory guidelines could provide more clarity than the current conflicting court rulings on access to constantly changing technology. Regulation could also provide an actual timeline for change and parameters in which that change should occur. Regulation would also fairly account for necessary exemptions and cost-related issues that judges may not be best equipped to discuss and decide. Any positive impact from statutory interpretation in favor of regulating online content and a rejection of the nexus test would only be enhanced by DOJ regulation and clarity in implementation.

#### **IV. Administrative Issues in Adapting the Americans with Disabilities Act**

While courts have not provided a consistent answer to the question of whether websites are covered under the ADA, until recently a clear administrative answer was lacking as well. The ADA assigns to the Department of Justice, specifically the Attorney General, the task of issuing ADA Title III regulations under 42 USC § 12186(b).<sup>97</sup> The DOJ issues

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94. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 136 (2005).

95. See e.g., Scalia, *supra* note 93, at 517.

96. See Stephenson *supra* note 94, at 139–43.

97. 42 USC § 12186(b) (2015).

regulations regarding ADA accessibility requirements for governmental entities, recipients of federal funding, and places of public accommodation.<sup>98</sup> This section evaluates the evolution of DOJ interpretations with regard to web accessibility, specifically considering the recent Advanced Notice of Proposed Rulemaking that suggests specific changes to Title III.

The DOJ first took a position on the application of the ADA to websites in a brief filed in a 2000 case, *Hooks v. OKBridge*.<sup>99</sup> In *Hooks*, plaintiff alleged an online gaming site had terminated his membership because of his bi-polar disorder and related disabilities.<sup>100</sup> The company operated only online and had no nexus to a physical location.<sup>101</sup> The DOJ filed an amicus brief when the case was before the 5th Circuit. This was the first time the DOJ publicly noted its interpretation of the ADA. The DOJ stated that the ADA 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.<sup>102</sup> This interpretation showed that the DOJ already believed that Title III applied to web content as long as the service offered online was offered by a place of public accommodation.

In April 2010, the House Judiciary Subcommittee held hearings on the application of the ADA in the digital age, furthering the above interpretation.<sup>103</sup> The Principal Deputy Assistant Attorney General for Civil Rights for the DOJ, Professor Samuel Bagenstos, testified that access to electronic technology is increasingly becoming an issue of civil rights, especially considering employment and educational opportunities available online.<sup>104</sup> He reiterated the position the DOJ took in the *Hooks* brief that websites of private entities that are public accommodation must be fully accessible to individuals with disabilities.<sup>105</sup>

The testimony of Professor Bagenstos and others during the hearing did not rely on nexus to a physical facility and considered any websites that fell under the definition of a place of public accommodation as covered by the ADA. Professor Bagenstos specifically stated, “we in the Federal

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98. Joshua A. Stein & Kristine K. Huggins, *House Judiciary Subcommittee Conducts Hearing on ADA Issues in the Digital Age*, LEXOLOGY (May 26, 2010), <http://www.lexology.com/library/detail.aspx?g=73d4b92d-1c28-49ba-bd10-afb799e05200>.

99. Brief of the United States as Amicus Curiae Supporting Appellant, *Hooks v. OKBridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891).

100. *Id.* at 3–4.

101. *Id.* at 3.

102. *Id.* at 5.

103. See Stein & Huggins, *supra* note 98.

104. *Id.*

105. *Id.*

government must . . . make certain that individuals with disabilities are not excluded from the virtual world in the same way that they were historically excluded from ‘brick and mortar’ facilities,” demonstrating the DOJ’s belief that the nexus test may not even be necessary.<sup>106</sup> His testimony did not clarify what sort of exceptions would be available to business making websites accessible to visually impaired users, nor did it address the impact this would have on small businesses. It provided vague guidance regarding what standards the DOJ would consider adequate for web accessibility. That guidance would later result in an Advance Notice of Proposed Rulemaking.

In July 2010, the DOJ published an Advance Notice of Proposed Rulemaking (“ANPRM”) on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations.<sup>107</sup> The DOJ reiterated that Title III of the ADA applied to website accessibility even though the ADA did not specifically mention the Internet.<sup>108</sup> Specifically, the DOJ stated that the rationale for the ANPRM was “to explore whether rulemaking would be helpful in providing guidance as to how covered entities could meet their pre-existing obligations to make their websites accessible.”<sup>109</sup> These statements made clear that the DOJ considered websites that fall under the ADA enumerated categories to be places of public accommodation under Title III without the need to show a nexus to physical facilities.

The ANPRM also included some guidance on how the ADA applied to websites of public entities and possible standards for website accessibility.<sup>110</sup> While the specifics of the ANPRM and the results of the notice-and-comment period will be discussed below in Section IV, the DOJ has not moved on from the ANPRM to the next traditional phase for rulemaking, the Notice for Proposed Rulemaking (“NPRM”).<sup>111</sup> The date for the proposed NPRM has been delayed continuously from 2012 to 2018, essentially leaving any changes to the new administration.<sup>112</sup> The DOJ has not published any statement regarding why the NPRM phase has not begun

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106. *Id.*

107. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010) [hereinafter “DOJ ANPRM on Web Accessibility”].

108. *Id.*

109. *Id.*

110. *Id.*

111. Kenneth J Yerkes et al., *U.S. Department of Justice Further Delays ADA Title III Rulemaking on Website Accessibility*, NAT’L L. REV. (Nov. 20, 2015), <http://www.natlawreview.com/article/us-department-justice-further-delays-ada-title-iii-rulemaking-website-accessibility>.

112. *Id.*

yet or what is causing a hold in further progress in rulemaking regarding web accessibility. The only statement is that it has moved to the “long-term action” list.<sup>113</sup> Regardless, without rule-making or even a notice of proposed rule-making, the ANPRM does not hold much weight in a court of law.<sup>114</sup> It serves mostly as a way for the DOJ to ask questions and take into account the views of parties affected by possible future changes.

Meanwhile, the DOJ has continued to interpret the ADA to include online content in the context of enforcements. In November 2010, the DOJ entered into a consent decree with Hilton Hotels.<sup>115</sup> Hilton Hotels was required under the consent decree to make its online reservations system accessible to visually impaired users and to update information on its website about accommodation available to guests with disabilities.<sup>116</sup> This was the first time a DOJ consent decree had included a website when discussing ADA requirements. The Hilton Hotels consent decree is a further indication that the DOJ sees websites as fully covered under the ADA, without any necessity for a nexus test.

In November 2014, the DOJ reached a settlement with Peapod.com, an online grocery and food supply delivery service.<sup>117</sup> Unlike the Hilton Hotels example above, Peapod.com did not have a nexus to a physical place of public accommodation. Nonetheless, the Peapod.com settlement required that Peapod make both its websites and mobile applications accessible to disabled users.<sup>118</sup> The DOJ required the companies to comply with third-party web accessibility standards set by the Worldwide Web

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113. *Id.*

114. Some observers have speculated that confusion over which specific standards to use and concerns of corporations that conduct business online are largely to blame; however, there is not much evidence to corroborate that at this point. Regardless, those observers note that the need for the ANPRM to move forward is high. See Lainey Feingold, *Digital Accessibility Legal Update*, L. OFFICE OF LAINEY FEINGOLD (Dec. 15, 2015), <http://llegal.com/2015/12/legal-update-december15/>.

115. *Justice Department Reaches Agreement with Hilton Worldwide Inc. Over ADA Violations at Hilton Hotels and Major Hotel Chains Owned by Hilton*, DEP’T OF JUSTICE: OFFICE OF PUB. AFFAIRS (Nov. 9, 2010), <http://www.justice.gov/opa/pr/justice-department-reaches-agreement-hilton-worldwide-inc-over-ada-violations-hilton-hotels>); see also Consent Decree, *United States v. Hilton Worldwide Inc.* (Nov. 9, 2010), <http://www.ada.gov/hilton/hilton.htm>.

116. *Id.*

117. Settlement Agreement between United States and Peapod, LLC, DJ 202-63-169 (Nov. 10, 2014), <http://www.justice.gov/file/163956/download>; see also *Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website Is Accessible to Individuals with Disabilities*, DEP’T OF JUSTICE: OFFICE OF PUB. AFFAIRS (Nov. 17, 2014), <http://www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website>.

118. *Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities*, DEP’T OF JUSTICE: OFFICE OF PUB. AFFAIRS, *supra* note 117.

Consortium (discussed below in Part IV), indicating that the DOJ considers those guidelines to be an appropriate standard for web accessibility.<sup>119</sup> The settlement also required Peapod.com to work with third-party content providers that also meet similar accessibility standards unless it would create an undue burden, an exception already written into the ADA.<sup>120</sup>

The Peapod.com settlement is just one example of multiple settlement agreements the DOJ has entered into regarding web accessibility. These settlements include provisions such as retaining independent accessibility consultants to assist in making websites and mobile applications accessible, adoption of an accessibility policy, designation of a website accessibility coordinator, and annual training of website content personnel.<sup>121</sup> Furthermore, in early 2015, the DOJ filed two statements of interests in cases by the National Association of the Deaf, opposing Harvard University and MIT's lack of web accessibility for online programming.<sup>122</sup> The DOJ specifically stated that existing law already requires such content to be accessible. However, critics have noted that even though the DOJ claims the statute is clear on this matter, claims by private parties challenging the accessibility of websites is increasing and websites are still not changing their accessibility policies on their own.<sup>123</sup>

Over time and especially considering DOJ action after the ANPRM, the DOJ has favored interpretation of the ADA as already including online content without the need to prove a nexus to a physical location, which is in line with the statutory interpretation suggested above.<sup>124</sup> The DOJ states that websites now have a preexisting obligation to ensure that content is

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119. The specific requirements of the standards are discussed in section IV below. There are concerns that the DOJ has adopted the standards without notice-and-comment rulemaking, bypassing any method of political accountability and holding companies to those standards. This is yet another reason the ANPRM is needed.

120. *Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities*, DEP'T OF JUSTICE: OFFICE OF PUB. AFFAIRS, *supra* note 117.

121. *Id.*

122. *Justice Department Reaches Settlement with edX Inc., Provider of Massive Open Online Courses, to Make its Website, Online Platform and Mobile Applications Accessible Under the Americans with Disabilities Act*, DEP'T OF JUSTICE: OFFICE OF PUB. AFFAIRS, (Apr. 2, 2015), <http://www.justice.gov/opa/pr/justice-department-reaches-settlement-edx-inc-provider-massive-open-online-courses-make-its>.

123. *See* Feingold, *supra* note 114.

124. In the 2010 ANPRM, the DOJ still stated that public accommodations with inaccessible websites could still comply with the ADA by providing an equal degree of access through alternative means, such as the telephone. First, this seems to differentiate between public accommodation and websites, making for an argument that the DOJ in 2010 did not think websites themselves were places of public accommodation. Furthermore, it also shows a relaxed attitude towards what changes were actually necessary to provide adequate accommodations for visually impaired users.

accessible to visually impaired users. However, due to the continuous litigation on this matter, the DOJ should clarify the enforceability and scope of this view through further rulemaking. The DOJ continues to maintain that although the rulemaking process is incomplete, web-based services are still places of public accommodation under the ADA.<sup>125</sup> Further clarification and a renewed notice-and-comment process for ADA application to web accessibility would allow for effective guidance and change for visually impaired users.

## V. Current Provisions of the Advance Notice of Proposed Rulemaking on Web Accessibility

The ANPRM provides the most recent codified version of DOJ interpretations of the ADA. This section will unravel the specific interpretations in the 2010 ANPRM, discussing its shortcomings. Finally, this section will provide suggestions for further changes the DOJ can include in the NPRM to address concerns and issues with the 2010 ANPRM.

### A. 2010 ANPRM Provisions

#### 1. Accessibility Standards

The first significant element of the ANPRM concerns the accessibility standards that should apply to websites, meaning what website developers specifically or generally need to accomplish in order to comply with Title III.<sup>126</sup> On this issue, the ANPRM explicitly considers accessibility standards developed by the World Wide Web Consortium (W3C),<sup>127</sup> an international standards organization for the World Wide Web founded by Tim Berners-Lee.<sup>128</sup> The W3C attempts to standardize the code used in website development to remove inconsistencies in webpage access and display.<sup>129</sup> The W3C is made up of 319 members, including businesses, nonprofit organizations, universities, governmental entities, and individuals.<sup>130</sup> In accordance with its mission, the W3C has created the Web Accessibility Initiative (“WAI”) to create international accessibility

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125. DOJ ANPRM on Web Accessibility, *supra* note 107.

126. *Id.*

127. *Id.*

128. The World Wide Web Consortium (W3C) is an international community that develops open standards to ensure the long-term growth of the Web. The W3C is led by Tim Berners-Lee, regarded as the founder of the World Wide Web. World Wide Web Consortium, *About W3C*, WORLD WIDE WEB CONSORTIUM, <http://www.w3.org/Consortium/> (last visited Dec. 26, 2015).

129. *W3C Mission*, WORLD WIDE WEB CONSORTIUM <http://www.w3.org/Consortium/mission> (last visited Dec. 26, 2015).

130. *Id.*

guidelines to encourage developers to make web content more accessible to users with disabilities.

The guidelines, formally known as the Web Content Accessibility Guidelines (“WCAG”), are technical standards that are organized around four principles: making websites perceivable, operable, understandable, and robust for impaired users.<sup>131</sup> There are three levels of WCAG guidelines (A, AA, and AAA) to measure the success of a webpage, with A referring to the minimal necessary standards.<sup>132</sup> The WCAG 2.0 guidelines, published in 2010, provide basic guidelines and also technical materials to suggest techniques developers may use to develop accessible content.<sup>133</sup> There are also less technical materials, such as a guide, “Understanding WCAG 2.0,” for people who want to learn more about the guidelines at a basic level.<sup>134</sup> The technical guides also provide information based on types of content, e.g., images, links, tables, etc.<sup>135</sup> The guidelines also contain portions related to mobile accessibility<sup>136</sup> and possible guidelines for rich-media and newer web-based technologies.<sup>137</sup>

The ANPRM considered whether the WCAG guidelines were appropriate guidelines for the DOJ to apply in regulating web accessibility,<sup>138</sup> and if so, which level would be required.<sup>139</sup> W3C itself does not advise AAA compliance with the WCAG guidelines because many websites would simply not be able to satisfy the technical requirements. The other questions the ANPRM asked include how the DOJ should deal with future changes to the WCAG guidelines and at what

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131. *Web Content Accessibility Guidelines (WCAG) Overview*, WEB ACCESSIBILITY INITIATIVE, <http://www.w3.org/WAI/intro/wcag> (last updated Oct. 2, 2012).

132. *Id.*

133. *Id.*

134. *Understanding WCAG 2.0: W3C Working Group Note*, WORLD WIDE WEB CONSORTIUM (Feb. 26, 2015), <https://www.w3.org/TR/2015/NOTE-UNDERSTANDING-WCAG20-20150226/>.

135. *Web Content Accessibility Guidelines (WCAG) Overview*, *supra* note 131.

136. *Mobile Accessibility*, WEB ACCESSIBILITY INITIATIVE (Mar. 18, 2015), <http://www.w3.org/WAI/mobile/>.

137. *WAI-ARIA Overview*, WEB ACCESSIBILITY INITIATIVE (June 12, 2014), <http://www.w3.org/WAI/intro/aria.php>.

138. The DOJ also pointed to section 508 of the Rehabilitation Act of 1973 as a potential basis for technical guidelines governing web accessibility. Section 508 requires Federal government agency websites to comply with specific standards for user accessibility. The section 508 standards have recently been brought into compliance with the WCAG standards and therefore are not mentioned further in this article. The WCAG standards are still considered the gold standard in terms of writing. *Comparison Table of WCAG 2.0 to Existing 508 Standards*, UNITED STATES ACCESS BOARD (Mar. 31, 2015), <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/background/comparison-table-of-wcag2-to-existing-508-standards>.

139. DOJ ANPRM on Web Accessibility, *supra* note 107.

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point compliance with new guidelines should be required.<sup>140</sup> Understanding the technical requirements is critical to understanding what standards businesses will be held to under Title III as it applies to online content.

## 2. Coverage Standards and User-Generated Content

The second portion of the ANPRM concerns coverage limitations and the scope of ADA application to websites. The DOJ explicitly states here that Title III does reach websites of any entities that “provide goods or services that fall within the 12 categories of public accommodations as defined by the statute.”<sup>141</sup> The DOJ also notes that it is primarily focused on accommodations that operate exclusively or through some type of presence on the Web, meaning that it is focusing primarily on websites that would fail the nexus test.<sup>142</sup> The DOJ is also considering language that indicates that content created or even posted by users for “personal, noncommercial use” will not be covered, even if the website belongs to a place of public accommodation.<sup>143</sup> Another alternative is that such public accommodations would not be liable if user-generated content was not accessible as long as the users had some ability to make the posts accessible if they so desired.

A corollary to the user-generated content issue is whether online marketplaces, such as eBay, will be required to make their postings accessible. The DOJ suggests a distinction between informal and occasional private sellers and legally established business entities.<sup>144</sup> The business entities would be responsible for making their online content accessible to users with disabilities. The final scope issue the ANPRM considers is whether a public accommodation using another site (for payment processing or otherwise) would have to require the associated website to make information accessible. The ANPRM suggests that the public accommodation could be liable for other sites if it requires consumers to use the other site.<sup>145</sup> The DOJ asks for feedback on the scope of coverage and also asks if further exceptions are needed.<sup>146</sup>

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140. *Id.*

141. *Id.*

142. *Id.*

143. “This would include individual participation in popular online communities, forums, or networks in which people upload personal videos or photos or engage in exchanges with other users.” *Id.*

144. DOJ ANPRM on Web Accessibility, *supra* note 107.

145. The ANPRM also suggests that this would apply regardless of whether the original site operated or controlled any aspect of the linked site.

146. DOJ ANPRM on Web Accessibility, *supra* note 107.

### 3. *Cost-Benefit Analysis and Small Business Impact*

Finally, the ANPRM focuses on cost-benefit issues, especially since the proposed regulatory action would be “economically significant” and thus must include a formal regulatory analysis of the economic costs and benefits.<sup>147</sup> The DOJ asks for advice regarding how to estimate the number of public accommodations and then how to calculate the costs to each in implementing the new ADA regulations.<sup>148</sup> Here, the DOJ is concerned with small entities, including businesses, nonprofit organizations, and smaller government jurisdictions and what impact the regulations would have. The same issue applies to calculating the benefits of the new guidelines. The DOJ asks for further commentary regarding potential unintended consequences of their interpretation of the ADA, such as the impact on video providers.<sup>149</sup> The ANPRM hopes to elicit responses that would warn the DOJ of unintended issues that could be assessed in drafting the new guidelines.

Because the ANPRM considers so many facets, the DOJ has received a large number of comments on which standards to enforce, how to enforce them, and what exceptions will be necessary to minimize any unintended consequences and allow for continuing innovation. There are issues of user-generated and rich-media content that need to be addressed, as well as legal concerns regarding Chevron deference and the First Amendment. As will become clear in the next section, the DOJ should consider multiple exceptions and clarifications before implementing any set of rules regarding the ADA and web accessibility. These suggestions will go beyond the stated scope of the ANPRM and may complicate the system but they are critical to ensure efficiency, fairness, and continued innovation.

### **B. Challenges Faced by the 2010 ANPRM Provisions**

The ANPRM contains many provisions that would ultimately help provide access to visually impaired users; however, there are problems in this five-year-old document that the DOJ should consider before issuing the NPRM on web accessibility. The DOJ should reconsider which specific enforcement standards should be put in place and place a stronger emphasis on the existing language of the ADA that exempts places of public accommodation from making changes under the ADA if it would be an undue burden.

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147. *Id.* (citing Exec. Order No. 12,866(3)(f)(1), 58 Fed. Reg. 51735 (Oct. 4, 1993)).

148. *Id.*

149. *Id.*

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### 1. *Weaknesses in Enforcement Standards*

As mentioned in Section IV.A, the DOJ is currently planning to regulate web accessibility based on the WCAG technical guidelines. The DOJ also noted in the ANPRM that technical standards may not provide the best solution and instead there may be a need for performance standards.<sup>150</sup> This paper argues that a hybrid approach is necessary to ensure the purpose of the ADA is met and there is no undue burden on web developers.

The ANPRM itself does not note what the difference would be between the two types of standards. Performance standards are broad, functional statements that contain three parts: the requirement, the criteria, and the test.<sup>151</sup> Performance standards do not focus on how the requirement is met but just what overall goals should be accomplished.<sup>152</sup> For example, performance standards would focus on what the end-user would experience when looking at a site but would not prescribe how that would occur. Technical standards focus on what specifically needs to be done in terms of code and placement in order to provide accessibility. Technical standards, like the WCAG, attempt to codify what basic methods should be used in implementing changes for accessibility and are not necessarily focused on the end result.

The public comments to the ANPRM regarding performance and technical standards range from suggesting just technical standards or just performance standards to suggesting a mix of the two.<sup>153</sup> The reason some prefer technical standards is that performance standards can be difficult to measure and are not “specific, clear, objective and easy” for developers to perform.<sup>154</sup> Technical criteria would also provide useful help to less proficient web developers rather than forcing them to seek outside help to determine what exactly would meet the ADA requirements. Proponents of performance standards argue that flexibility is necessary because new technology will keep growing and technical standards are difficult to change.

### 2. *Strength in Combining Performance and Technical Standards*

This paper contends that performance and technical standards should not be mutually exclusive but should instead be used together.

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150. *Id.*

151. Laura Corcoran, *ADA and the Internet: Standardizing the Accessibility of Web Sites*, SELECTEDWORKS 16 (May 9, 2011), [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=laura\\_corcoran](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=laura_corcoran)).

152. *Id.* at 17.

153. *Id.*

154. *Id.* at 17–18.

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Performance standards can provide a practical view of who must be able to use each website and how a visually impaired user should be able to successfully navigate the page. Technical standards should only serve as non-binding examples and guidelines regarding which methods will be most effective in meeting performance standards.<sup>155</sup>

Performance standards focus on the user instead of on the technology, allowing the technology to change without a need for new guidelines with each change. There may be elements of a page that technically would be difficult to regulate, such as videos, tables, and images; however, performance standards would focus on the overall experience for the visually impaired user instead of forcing each element of a page to be accessible when that may not even be possible. Meanwhile, technical standards could function akin to DOJ interpretive guidance documents instead of full-scale regulations. The technical standards could easily be changed since they only serve a guiding function. This would ensure that less “technically savvy” developers would still have examples and technical standards to guide them without the need to constantly update standards through a formal process.

Performance standards would allow for flexibility and a focus on the user, ensuring that the ADA’s purpose was met and that visually impaired users could access content in a reasonable manner. The technical standards, most likely from the WCAG, could provide guidance to ensure that there were examples of what would pass ADA regulations.<sup>156</sup> If they were non-binding, the technical standards could be changed without notice-and-comment proceedings, allowing for flexibility and incorporation of new technologies.<sup>157</sup> This is especially critical as the hardware and software to provide access to impaired users is improving every year. If the DOJ were to implement only technical standards, it would force web developers to code for older technology even though newer and better options may be available.

### 3. *Undue Burden and Narrowing the Scope of the ANPRM*

Title III of the ADA currently contains a provision that states that a place of public accommodation is exempt from meeting the requirements of the ADA if taking such steps would “fundamentally alter the nature of

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155. *Id.*; See also Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312–16 (June 1992).

156. This may be improper delegation of authority to a private entity; however, this paper does not consider the implications of using such a model as the legal issues with such delegation have yet to be fully understood.

157. Administrative Procedure Act (APA), 5 USCA § 551 (1995).

the good, service, facility, privilege, advantage, or accommodation being offered” or “would result in an undue burden.”<sup>158</sup> An “undue burden” is defined as a “significant difficulty or expense.”<sup>159</sup> The ADA aims to minimize the cost of accessibility if it would create an excessive hardship for businesses. In the physical context, “undue burden” still remains a murky concept that is slowly being clarified by case law.<sup>160</sup>

Moving from the physical world to the digital world would mean that many of the considerations of what constitutes an undue burden might change or might not translate over as well. To ensure that the same murkiness does not occur with regard to web accessibility and defining an “undue burden,” the DOJ should include guidance on what constitutes an undue burden in the digital world. Currently, the ANPRM does not even mention undue burden and there is no consideration of how that language would change after notice-and-comment rulemaking.<sup>161</sup> As seen in the below examples, there are a few types of content that might be exempt due to the excessive hardship required to become ADA compliant.

#### 4. *User-Generated Content and Marketplaces*

Due to the prevalence of user-generated content and the constant addition of new ways of interacting online, the scope of the web accessibility regulations should be narrowed more than the ANPRM suggests. This section explores exceptions that should be included in the DOJ’s rulemaking on the ADA and web accessibility and what problems may persist even after DOJ regulatory change.

As already noted in the ANPRM, user-generated content should be exempt from accessibility standards, largely because content providers would face a large and sometimes impossible burden in attempting to recode every user response, including images, gifs, video, or other non-text methods of posting.<sup>162</sup> This sort of exemption would be justified under the undue burden clause of the ADA but stating it specifically would provide more uniformity and clarity. Online marketplaces fall in an odd mix between user-generated content from private individuals and content from

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158. 42 USC § 12182(b)(2)(A)(iii) (2015).

159. 28 C.F.R. 36.104 (2003). The DOJ considers several factors in determining whether an accommodation creates an undue burden on a place of public accommodation, including the “nature and cost of the action needed” and “the overall financial resources of the site.” *Id.*; see also 28 C.F.R. 36.303(b)(1) (2003).

160. Ronda K. O’Donnell & Lee C. Durivage, *Undue Hardship*, THE LEGAL INTELLIGENCER (June 14, 2011), <http://www.marshall Dennehey.com/media/pdf-articles/O%2020231%20by%20R.%20O%27Donnell%20%26%20L.%20Durivage%206.14.11.pdf> (citing multiple cases that consider different factors in addressing the meaning of an undue burden).

161. DOJ ANPRM on Web Accessibility, *supra* note 107.

162. *Id.*

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commercial entities. The ANPRM argues that the line should be drawn between legally established business entities, which would have to be ADA compliant, and informal sellers who are not legally business owners.<sup>163</sup>

While this standard does provide a clear line of who does or does not need to meet the regulations, it does lead to a somewhat perverse result. Businesses that are not registered, such as individual shops on Etsy.com, are often the sole method of income for an individual. Etsy.com runs on user-generated posting of goods in each Etsy “shop.” Under the ANPRM, a small business in a physical location that may make less than an Etsy shop online will be forced to ensure ADA accessibility because they require a legal business license.<sup>164</sup> Meanwhile, online “shop” owners may not have to comply. There is no clear response to this other than pointing to the text of the ADA that allows for exemptions based on an “undue burden” for small businesses.<sup>165</sup> Regulating all online business would otherwise err into drawing lines between businesses where no clear lines can in fact be drawn.

Another example of a need for scope change is YouTube. Since 2010, YouTube has become more commercial, with ads being shown before videos. Furthermore, multiple commercial entities, such as movie and recording studios, use YouTube in order to upload music videos and movie trailers for publicity. While they are not charging for YouTube views, these videos often contain links to websites where users can buy the product for themselves. Even if the user-generated content is owned by a commercial entity, it would be unreasonable to expect that Google and YouTube would have to provide different ways to make each ad or video accessible. On the other end of the spectrum, Google is profiting from the ads and would therefore profit from not having to enforce web accessibility standards.<sup>166</sup> Some of this might be covered under the “undue burden” exemption but further clarity on content providers that shift between user-generated content and commercial content may also be needed.

##### 5. *Rich Media and Mobile Devices*

Another area where a scope change is necessary concerns the type of media being used on the website. If the webpage has a large amount of rich-media, meaning videos and images, the DOJ should specify how accessible each element must be. This is particularly important for social networking sites, like Facebook and Instagram, which contain large

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163. *Id.*

164. *Id.*

165. 42 USC § 12182(b)(2)(A)(iii) (2015).

166. This is a problem that, as of now, does not have a clear solution.

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amounts of rich media posted by multiple users. There are two possible solutions to this issue. The first solution to this is including performance standards instead of just technical standards. The technical guidelines would still provide clear ways in which rich-media content could be accessible while the performance standards would ensure that web developers would not have to go above and beyond for every piece of content on a webpage.

The second solution to the rich media issue could also potentially address the commercialized user-generated content issue mentioned in the paragraph above. Sites with large amounts of rich media or even user-generated content would simply be required to provide tools to users that would allow users to make their own content web accessible. Users on Facebook or YouTube would have the option to add commentary into the code for their photo or video (or whatever other media). This commentary would be accessible by advanced text-to-speech readers for visually impaired users and would explain, to some degree, the content shown on the screen. The burden on companies like YouTube and Facebook would be to create a mechanism for individual users to add more accessible commentary to rich media content; however, these companies would not be required to make all of the content accessible themselves, removing any “undue burden” that they may otherwise face.

The final issue of scope concerns web-based devices that include access to places of public accommodation. The ANPRM does not mention mobile applications although in 2014, the DOJ did comment on the need for applications to fall under the ADA as well.<sup>167</sup> The concern with mobile applications is that they include everything from interactive games and social media to basic mobile needs such as telephone services. While mobile devices are still used by visually impaired users, most applications connected to places of public accommodation do have online versions available. The DOJ should state that if one method of online content is available for visually impaired users, that should suffice until mobile reader technology improves. Restrictions on mobile content accessibility should require a separate approach as technology use increases and there is a greater need for guidance.<sup>168</sup>

While there are other problems with the ANPRM as it exists now, the ones discussed above should be fixed to ensure the feasibility of any related notice-and-comment rulemaking. Otherwise, any notice-and-comment

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167. Minh Vu, *Justice Department Targets Websites, Mobile Apps, and POS Devices*, ADA TITLE III NEWS & INSIGHTS (Apr. 8, 2014), <http://www.adatitleiii.com/2014/04/justice-department-targets-websites-mobile-apps-and-pos-devices/>.

168. See *Mobile Accessibility*, WEB ACCESSIBILITY INITIATIVE, *supra* note 136 (regarding mobile accessibility guidelines).\*

rulemaking will either be too lax or too harsh, either circumventing the purpose of the ADA or forcing too many websites to claim an undue burden exemption due to cost.

## **VI. Conclusion**

There is currently a lack of consensus on if and how Title III of the ADA applies to online content. Web accessibility is critical for visually-impaired users to fully participate in society. Instead of using the nexus test, courts should find in favor of applying the ADA to online content or at least, note the ambiguity of the statute instead of ruling that the statute simply does not apply. However, such rulings by courts will not do enough to create usable standards for web accessibility for visually impaired users.

DOJ rulemaking can offer substantial and direct guidance and clarity. Forcing the Department of Justice to clarify its position and to provide actual standards will lead to more effective change in the field of web accessibility and will cut down on the impact of perverse results from recent judicial decisions. An improved Notice of Proposed Rulemaking and eventual regulation will provide clear and adequate notice to online content providers, users, and courts moving forward.