University of Dayton Law Review

Volume 30
Number 2 *Intellectual Property and Technology Issue*

Article 5

1-1-2005

Take Flight by Cyper-Sight: The Failure of Courts to Require the Americans with Disabilities Act Title III Public Accommodations Provision to Govern Public Places Such as an Airline's Website

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Cover Page Footnote

The author would like to extend her gratitude and thanks to her parents for all of their support and help in developing this Casenote, Professor Susan Elliott for her advice, wisdom, and multiple hours spent reviewing numerous revisions, and her Notes and Comments Editor, Jennifer Brill White, for her hard work and insight.

TAKE FLIGHT BY CYBER-SIGHT: THE FAILURE OF COURTS TO REQUIRE THE AMERICANS WITH DISABILITIES ACT TITLE III PUBLIC ACCOMMODATIONS PROVISION TO GOVERN PUBLIC PLACES SUCH AS AN AIRLINE'S WEBSITE

*Laura Michelle Stewart**

I. INTRODUCTION

It's urgent! You need to book the earliest flight and leave tomorrow! Imagine that your boss calls you around midnight, demanding you leave town the next day to seal a very important business deal in order to secure a big promotion. Like millions of Americans, you would probably sit down at a computer, log on to an airline's website, and book the earliest flight the next morning.[1] However, if you are Robert Gumson trying to book a flight on Southwest Airline's website, it could become a nightmare. Like nearly ten million other disabled Americans, Gumson is blind, and www.southwest.com lacks the available technology to allow Gumson to use its internet site to book a flight, rent a hotel, or simply acquire everyday information.[2] Gumson now has to either visit the airline or make an unnecessary phone call to try to purchase a ticket or acquire information — inconveniences that do not plague most other Americans.

As rapidly as internet technology is advancing, it is shocking to believe that millions of people like Gumson are being left behind.

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[1] *E.g.* Southwest Airlines, www.southwest.com (last accessed Nov. 18, 2004). For sighted individuals to book a ticket on Southwest's site all they have to do is (1) click on book air, (2) fill out arrival and departure information, (3) choose the flight they want to take, and (4) fill out their name and payment information and receive a confirmation in return. The entire process takes less than five minutes. *Id.*

[2] *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002). Blind individuals use technology developed by a number of computer companies called screen readers which either convert the text on a website to voice or to Braille to allow them to get the same information off the site that a sighted individual can. Many screen readers will actually speak the text that would otherwise appear on the web page. U.S. Dept. of Just., Civ. Rights Div., *Accessibility of State and Local Government Websites to People with Disabilities* 2, http://www.usdoj.gov/crt/ada/websites2.htm (last accessed June 2003) [hereinafter *Gov. Websites*].

However, that is exactly what today's courts are condoning.[3] These courts are denying blind individuals access to one of the most expansive public places we know — the World Wide Web. They are failing to defend the defenseless.

A perfect example is the court's ruling in *Access Now, Incorporated v. Southwest Airlines, Company*.[4] The *Access Now* court determined that Title III of the Americans with Disabilities Act ("ADA")[5] excludes cyberspace in its definition of "public accommodations," thus denying blind individuals — in this case Robert Gumson — the capability to use Southwest's website to obtain information and lower fares readily available to non-disabled individuals.[6]

This type of discrimination against the disabled is exactly what Congress intended to prevent by enacting the ADA.[7] Because nearly 43 million Americans suffer from some type of disability, Congress enacted the federal remedial statute in 1990 to ensure that disabled Americans receive the opportunity to "compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[8]

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[3] *E.g. Access Now*, 227 F. Supp. 2d at 1314.

[4] *Id.* at 1312.

[5] *Id.* at 1314. Title III of the ADA 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 . . . ." 42 U.S.C. § 12182(a) (2000).

[6] Southwest Airlines, *Why Does Southwest "Go it Alone" on the Internet?,* http://www.southwest.com/swatakeoff/southwest_wing_0311.pdf (last accessed Nov. 2, 2004). The ADA Title III provision identifies twelve categories of "places of public accommodation" which includes things such as:

> (A) an inn, hotel, motel, or other place of lodging . . . (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 of 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 . . . ; (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 . . . ; (K) a day care center, senior citizen center, homeless shelter . . . ; (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation. 42 U.S.C. § 12181(7) (2000).

[7] *Access Now*, 227 F. Supp. 2d at 1314; *see infra* n. 62.

[8] *See infra* n. 62.

> Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.
> (1) The phrase physical or mental impairment means--
> (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech

By narrowly interpreting the ADA's Title III provision to exclude cyberspace as a "place of public accommodation," courts are undermining Congress's purpose in passing the statute and failing to account for massive changes in technology that would allow disabled individuals access into the mainstream of society.

Section II of this Note provides the background and the court's holding of an illustrative case, *Access Now*. In Section III, this Note argues that the *Access Now* court erred by (1) stopping at the plain meaning of "public accommodation," rather than looking to the purpose of the ADA, and (2) failing to consider massive changes in technology that can potentially allow disabled individuals access to all aspects of society. While *Access Now* presented a case of first impression in the Eleventh Circuit, the vast technological advances sweeping the nation ensure many more litigants will follow suit if the courts do not take the appropriate action to end this type of discrimination. The *Access Now* court's erroneous interpretation is just one example of how courts are condoning discrimination against millions of people and, therefore, their decisions are inconsistent with the original purpose behind enacting the ADA.

II. BACKGROUND

This section provides the factual background of *the Access Now* case, sets out the arguments of both sides, and explains the court's decision to grant Defendant's Motion to Dismiss.

A. *The Facts of Access Now*

Access Now is a non-profit group which advocates access for disabled individuals in cases across the nation.[9] Gumson is a blind man

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> organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;
> (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;
> (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism .
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> 28 C.F.R. § 36.104 (2004).

[9] *E.g. Gutherman v. 7-Eleven, Inc.*, 278 F. Supp. 2d 1374 (S.D. Fla. 2003) (bringing class action suit against restaurant chain for violating the ADA because the chain failed to make the appropriate alterations and modifications to its facilities); *Access Now, Inc. v. Walt Disney World Co*., 211 F.R.D. 452 (M.D. Fla. 2001) (bringing suit against owners and operators of theme parks claiming they violated Title III of the ADA because they failed to provide plaintiffs with full and free access to their services and goods such as certain buildings which architecturally violated the ADA); *Access Now, Inc., v. Town of Jasper, Tenn.*, 268 F. Supp. 2d 973 (E.D. Tenn. 2003) (bringing suit on behalf of nine-year old girl suffering from spina bifida alleging town's refusal to allow her to keep a miniature horse as a service animal violated Title II of the ADA); *Matta v. Lam*, 2003 WL 21448942 (N.D. Tex. June 18, 2003)

who sought help from Access Now when he could not book an airline flight on the website www.southwest.com because the site lacked the readily available technology that would have allowed him to use the website, despite his disability.[10] Access Now and Robert Gumson brought their action in the United States District Court in the Southern District of Florida for injunctive and declaratory relief under the ADA, 42 U.S.C. §§ 12101, *et seq.*[11] The Plaintiffs contended that Southwest Airline's website violated the ADA because the website deprived blind individuals access by failing to provide the appropriate technology.[12] The Plaintiffs argued that the website failed to provide a screen reader program, online forms which can be readily filled out, and a skip navigation link. All of these features would make the site more accessible to blind persons, but the lack of these features prevented disabled individuals from reaping the benefits the website provided to others.[13] Therefore, Plaintiffs argued the website thus violated the ADA's Title III provision by discriminating against disabled individuals in a "place of public accommodation."[14]

In addition, they further argued that Congress's purpose behind passing the ADA supports a finding that cyberspace is a "place of public accommodation" because it would provide disabled individuals benefits offered by a private entity involved in commerce.[15] Because Southwest Airlines is a private entity whose operations, including its website, affect commerce, Plaintiffs contended that the ADA's Title III does extend to its website.[16] Therefore, Plaintiffs requested that the court enjoin Southwest from continuing to engage in these violations by ordering it to provide blind

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(bringing suit on behalf of plaintiff stating defendant's restaurant violated the ADA because it failed to provide adequate parking, available seating, and an accessible route through the restaurant for disabled individuals).

[10] *Supra* n. 2 (providing background on the type of technology available for blind individuals).

[11] *Access Now*, 227 F. Supp. 2d at 1314. United States Code title 42, section 12101 sets out the findings and purpose behind the statute. It shows that Congress finds that some 43 million Americans suffer from a disability and that the number keeps increasing. Furthermore, it declares individuals with disabilities as a "discrete and insular" group and that the Nation's goals are to ensure this group receives "equality of opportunity, full participation, and independent living . . . " 42 U.S.C. §§ (a)(1), (a)(7-8) (2000).

[12] *Access Now*, 227 F. Supp. 2d at 1315. *Access Now* argued the site failed to provide alternative text so that a screen reader program, commonly used by the blind, could translate the information into speech. It further argued that the website "fail[ed] to provide online forms which can be readily filled out by [Plaintiffs] and fail[ed] to provide a 'skip navigation link' which facilitates access for these blind consumers by permitting them to bypass the navigation bars on a website and proceed to the main content." *Id.* at 1316; *see supra* n. 2.

[13] *Access Now*, 227 F. Supp. 2d at 1316.

[14] *Id.* at 1320.

[15] *Id.* at 1318. The federal regulations that govern the ADA define a public accommodation as "a facility, operated by a private entity, whose operations affect commerce" such as insurance companies, places of entertainment, and travel services. *Id.* (citing 28 C.F.R. § 36.104 (2000)).

[16] *Id.* at 1316. Southwest Airline's website allows consumers to log on and book a flight, check fares, rent a car or hotel, and learn of various sales and promotions. Sales of over $500 million dollars, all stemming from online commerce, were reported in revenue for the first quarter of 2002. *Id.*

individuals access to its website by making it compatible with screen reader technology.[17]

Southwest argued that the ADA's Title III "public accommodations" provision does not regulate its website. The airline argued that Congress intended for the "public accommodations" provision to include only an actual physical structure and that because its website failed to meet this criteria, the ADA's Title III provision did not apply.[18] Southwest, therefore, filed a Motion to Dismiss Plaintiffs' Complaint on the grounds that it was clear no relief could be granted to Plaintiffs under any set of facts.[19]

B. *The Court's Decision to Deny the Motion to Dismiss*

The court in *Access Now* granted Southwest's Motion to Dismiss Plaintiffs' Complaint by finding that the Plaintiffs failed to state a claim upon which relief could be granted.[20] In interpreting the statute, the court found that Congress could not have intended for the ADA's Title III provision to include cyberspace as a "place of public accommodation."[21] The court issued its decision after evaluating the legislative history of the ADA and distinguishing cases presented by the Plaintiffs from the factual circumstances facing its bench. The court refused to follow other circuits and legal commentators which broadened the interpretation of the ADA's Title III provision beyond physical structures.[22] Finally, the court evaluated the federal regulations defining a "place of public accommodation" and found the definition was limited to only facilities' physical structures.[23] Thus, the court concluded that "the plain and unambiguous language of the statute and relevant regulations" did not support a finding that Southwest's website is a "place of public accommodation" under the ADA's Title III provision.[24]

III. ANALYSIS

This Note argues that by narrowly interpreting the ADA's Title III

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[17] *Id.*
[18] *Id.* at 1318.
[19] *Id.* at 1314, 1326.
[20] *Id.* at 1317.
[21] *Id.* at 1319.
[22] *Id.* at 1317.
[23] *Id.* at 1318. The court found that the federal regulations governing the ADA also defined a "place of public accommodation" as a "facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve (12) enumerated categories set forth" in the statute. *Id.* (citing 28 C.F.R. § 36.104). Furthermore it defines a facility as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." *Id.*
[24] *Id.* at 1318. "[T]o fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover 'virtual spaces' would be to create new rights without well-defined standards." *Id.*

provision to exclude cyberspace as a "place of public accommodation," courts such as *Access Now* are erroneously (1) undermining Congress's purpose for passing the statute, and (2) failing to account for vast changes in technology developed in the thirteen years since the statute was enacted that can allow disabled individuals further access into the mainstream of society.[25] First, this Note demonstrates that the *Access Now* court erred in applying a narrow interpretation because it failed to acknowledge the ambiguity surrounding the term "public accommodation."[26] This ambiguity would have required the court to move beyond the plain meaning of the term "public accommodation" and to follow Congress's purpose in passing the ADA.[27] Second, this Note argues that the court should have considered the vast changes in technology developed since the passing of the statute which provide disabled individuals access into all aspects of society.[28] In doing so, the court would have found that Congress intended the ADA's Title III provision to be broadly interpreted and to include cyberspace within the statute's definition of a "place of public accommodation." In turn, this would have been a stepping stone to destroy the wall of discrimination against disabled Americans in "places of public accommodations."

A. *Courts are Misinterpreting the ADA's Title III Provision on "Public Accommodations" in Light of the Statute's Underlying Purpose*

Courts misinterpret the ADA's Title III "public accommodations" provision by failing to interpret the provision in light of Congress's underlying purpose in passing the statute. Canons of legislative interpretation contravene stopping at the plain meaning of the term "public accommodation" due to the ambiguity and, therefore, require a broadened interpretation.[29] Second, the legislative history, the Department of Justice's recommendations, and case law all support a broader interpretation of the ADA's Title III provision.[30] Finally, a broad interpretation does not result in an undue burden on private entities such as Southwest Airlines because their size and profits generate the ability to accommodate the disabled.[31] Therefore, by failing to take into account the ambiguity of the term, Congress's purpose in passing the statute, and Southwest's ability to accommodate, the *Access Now* court further condoned discrimination

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[25] One of the main purposes for passing the statute was to allow disabled individuals access to all aspects of society that non-disabled individuals enjoy. *See infra* n. 62.
[26] *See infra* nn. 29-56 and accompanying text.
[27] *See infra* nn. 57-90 and accompanying text; *infra* n. 57 (defining the plain meaning rule).
[28] *See infra* nn. 113-129 and accompanying text.
[29] *See infra* nn. 29-56 and accompanying text.
[30] *See infra* nn. 57-90 and accompanying text.
[31] *See infra* nn. 91-112 and accompanying text.

against the blind by ruling that cyberspace is not a "place of public accommodation" within the meaning of the ADA's Title III provision.

1. Even Applying a Textualist Argument, the Term "Public Accommodation" Can Be Broadly Interpreted to Include Cyberspace, or at Least, Found to be Ambiguous

Appropriate application of the canons of interpretation indicates that the term "public accommodation" can be broadly interpreted – even using a textualist argument – to include cyberspace, or at least, that the term is ambiguous and requires looking to the purpose of the act.[32]

Textual canons are used to help make inferences as to the drafter's choice of words or phrases and how they relate to other parts of the statute which use the same or similar language.[33] A textualist first "find[s] the ordinary meaning of the language in its textual context," and second, uses canons of interpretation to ask if there is any "clear indication that some permissible meaning other than the ordinary one applies."[34] A textualist who finds a term ambiguous utilizes limited extrinsic material such as other sections of the same statute or other statutes to determine the plain, ordinary meaning of the text in the statute.[35]

Two canons — one which the *Access Now* court used and one the court failed to even consider — would have, at the very least, shown the public accommodation term to be ambiguous and required the court to look beyond the plain meaning of the term. First, if the court had properly applied the canon *ejusdem generis*, it would have found that a broader interpretation of the public accommodations provision was at least plausible and should require further inquiry into the purpose of the statute.[36] Second, if the court had applied the Whole Act Canon and looked to other

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[32] There are three approaches to statutory interpretation. William N. Eskridge, Jr, Philip P. Frickey, Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 818 (3d ed., West 2001). First, there is textualism where courts look to find the plain, ordinary meaning of the statute. *Id.* They consult materials such as dictionaries and what a reasonable person would understand the word to mean. *Id.* at 818-820. In the rare case a textualist finds ambiguity, he only then looks to other materials such as other provisions of the statute. *Id.* at 688, 756-758. Second, "intentionalism" is the approach where courts look to the "original intent" of the enacting Congress. *Id.* at 99. They try to place themselves in the position of that Congress when it enacted the statute by looking to various types of legislative history. *Id.* The third approach is called the "purpose approach" in which courts look to find Congress's underlying purpose for passing the statute. *Id.* at 696-697. This is a step broader than intentionalism because if they cannot find the legislative intent they will actually find a purpose consistent with today's times. *Id.*

[33] Canons of interpretation allow courts to interpret statutes and make inferences "from the language, format, and subject matter of the statute." *Id. at 818.* Textual canons help in making inferences from the words used within the statute and their relationship to other parts of the "whole statute." *Id.* Textualists will usually allow these types of canons to be used in order to determine the plain and ordinary meaning of a term or phrase within a statute. *Id.*; *infra* nn. 47-48 (explaining the Whole Act Canon).

[34] Eskridge, *supra* n. 32 at 763 (citing dissenting opinion in *Chisom v. Roemer*, 501 U.S. 380 (1991)); *infra* n. 57 (defining the plain ordinary meaning).

[35] Eskridge, *supra* n. 32 at 830.

[36] *See infra* nn. 39-46 and accompanying text.

provisions of the ADA, it also would have found the plain meaning of Title III of the ADA was intended to be interpreted broadly to include cyberspace as a place of public accommodation.[37]

a. *Ejusdem Generis*

Ejusdem generis , which means "of the same kind, class or nature," is a canon commonly used in a textualist argument.[38] The concept behind the canon is "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[39] Therefore, even though a specific term may not be listed within the statute's classes, a court interpreting the statute could find the term closely resembles the other classes listed and should be included within the generic clause following the class.[40]

The *Access Now* court misapplied the use of the canon *ejusdem generis* when it erroneously struck down Plaintiffs' argument that Southwest Airline's website falls within the ADA's definition of "a place of 'exhibition, display and a sales establishment.'"[41] By applying the canon *ejusdem generis*, the court argued Plaintiffs' interpretation was irrational because all of the terms selectively chosen by Plaintiffs were from different parts of the statute's twelve listed categories, or classes, and related only to physical structures.[42]

However, the court misapplied the use of the canon in this instance. Southwest Airline's website is a place of exhibition, display, *and* a sales establishment.[43] The other terms listed in each of these classes include

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[37] *See infra* nn. 47-56 and accompanying text.
[38] Eskridge, *supra* n. 32 at 823.
[39] *Id.* The purpose behind the rule "is to give effect to all the words—the particular words indicate the class and the general words extend the provisions of the statute to everything else in the class." *Id.*
[40] *See e.g.* Norman J. Singer, *Stat. and Statutory Constr.* vol. 2A, § 47:17, 273-282 (6th ed., West 2000). *Ejusdem generis* "is of ancient vintage, going back to Archbishop of Canterbury's Case." *Id.* at 273. It is used to "save the legislature from spelling out in advance every contingency in which the statute could apply." *Id.* at 281-82. For example, a statute giving the Department of Conservation "authority to sell 'gravel, sand, earth, or other material'" was found only to include materials of "the same general type and the phrase [did] not include commercial timber harvested on state parkland." *Id.* (citing *Sierra Club v. Kenney*, 429 N.E.2d 1214 (Ill. 1981)). Also, an Arkansas court found that domestic animals, such as kittens, were not considered to be included within the statute's meaning of "domesticated animals" because all the animals listed were livestock, and thus, a legislative intent to exclude pets. *McKinney v. Robbins*, 892 S.W.2d 502, 503 (Ark. 1995) (listing things such as "goats, cattle, swine, and poultry" as domesticated animals).
[41] *Access Now*, 227 F. Supp. 2d at 1318. The court found that if Congress had intended to include cyberspace it would have included it among its list of definitions of "places of public accommodation." *Id.*; *see supra* n. 6.
[42] *Access Now*, 227 F. Supp. 2d at 1318.
[43] *Id*. (emphasis added). Plaintiffs pulled their argument from three different categories of the twelve categories listed as public accommodations. They contend that (1) it is a place of exhibition as listed in section (7)(C) of the statute, (2) it is a place of a public display as listed in section (7)(H) of the statute

businesses such as a "theater, concert hall, stadium . . . a museum, library . . . a bakery, grocery store, clothing store, hardware store, [and] shopping center."[44] Furthermore, the addition of a generic clause to each of these classes indicates that the drafters intended flexibility by allowing the inclusion of other similar terms.[45] The court narrowly found each of these terms to include only physical, concrete structures; however, most of these establishments also own websites which consumers commonly use to purchase items such as game tickets, clothing, and supplies.[46] Airlines also have physical structures *and* websites for consumers to utilize for information. It is illogical to include a business' structure as a place of public accommodation but to exclude its website. Both provide exactly the same services and both are capable of violating the ADA by not modifying a structure, or a website, to comply with statutory requirements. Therefore, the canon *ejusdem generis* can be used to support, rather than contravene, the finding that cyberspace is a place of public accommodation within the ADA's Title III provision. Nothing within the statute's listed terms limit them to a physical structure and most, if not all of these places, include the types of places which also have websites. This means that cyberspace should have been included as a term that logically fits within each of these classes' generic phrases.

The *Access Now* court erroneously substituted its own judgment for that of the drafters. The existence of two plausible meanings for the term supports the argument that the "public accommodations" term, as used in Title III of the statute, is at least ambiguous. Courts, therefore, should broaden their interpretation to entertain the idea that the term could mean more than merely a physical structure.

b. The Whole Act Canon

Another canon utilized by textualists to determine the plain, ordinary meaning of an ambiguous term is the Whole Act Canon. The

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and (3) it is a sales or rental establishment as listed in section (7)(E) of the statute. *Access Now*, 227 F. Supp. 2d at n. 6 (citing 42 U.S.C. § 12181). A stronger argument, however, might have been for them to find Southwest Airline's website could be considered a travel service as listed in section 7(F) of the statute. 42 U.S.C. § 12181. In fact, on September 24, 2004, Access Now filed an appeal in the Eleventh Circuit attempting to use this exact argument. *Access Now, Inc. v. S.W. Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004). It argued that "Southwest Airlines *as a whole* is a place of public accommodation because it operates a 'travel service,' and that it has violated Title III precisely because of the web site's *connection* with Southwest's 'travel service.'" *Id.* at 1328. The court dismissed the case on the grounds that the plaintiffs had not argued this point before the district court. *Id.*

[44] 42 U.S.C. § 12181(7)(C-H).

[45] *Id.*; *see infra* nn. 58-59 (explaining Congress's purpose behind these provisions).

[46] *See e.g.* AMC Theatres, http://www.amctheatres.com/ (last accessed Nov. 8, 2004); Cincinnati Bengals, *The Official Website of the Cincinnati Bengals*, http://www.bengals.com/paulbrownstadium/ (last accessed Nov. 8, 2004) (linking to site where game tickets can be purchased); J.Crew, http://www.jcrew.com/home.jhtml (last visited Nov. 8, 2004) (providing links to purchase clothing items from the website); Lowes, *Improving Home Improvement*, http://www.lowes.com/lkn?action=home (last accessed Nov. 1, 2004).

Whole Act Canon acts on the presumption that when Congress passes a statute as a whole, a court should interpret a particular clause in view of the entire statute and other provisions within the same statute.[47] Therefore, if a certain provision appears ambiguous in isolation, it may be clarified by examining similar language in another provision.[48]

Employment of the Whole Act Canon in examining the public accommodations provision indicates the drafters' intent that the public accommodations provision be interpreted broadly. Plaintiffs in *Access Now* urged the court to follow a 2002 decision in which a district court judge found the Metropolitan Atlanta Rapid Transit Authority ("MARTA") was violating the ADA because its website was not equipped with the technology needed to support a screen reader.[49] However, the *Access Now* court found the *MARTA* case to be distinguishable from Southwest's case because the plaintiffs in *MARTA* relied on Title II of the ADA, instead of Title III.[50]

Once again, the *Access Now* court erred in this analysis. If the court had used the Whole Act Canon to look to other sections of the same statute to resolve ambiguity, it would have found that a broader interpretation of the public accommodations provision in Title III was required. Both the Title II and the Title III provisions of the ADA make it apparent Congress intended these two sections to work similarly.[51] Title II prohibits discrimination against disabled individuals by any state or local government program.[52] The purpose of Title II was to extend the opportunities provided by public entities of government agencies to disabled individuals and to enable them to participate in all aspects of community life.[53] Furthermore, the Department of Justice has recently passed guidelines stating that the term, public entity, under Title II extends

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[47] Eskridge, *supra* n. 32 at 830. The Whole Act Canon is deeply rooted in American tradition and has been used by the Supreme Court since its earliest cases. *E.g. United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805).

[48] *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988).

[49] *Access Now*, 227 F. Supp. 2d at 1319 n. 9 (citing *Vincent Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362 (N.D. Ga. 2002)). The judge in this case found that the transit system was violating Title II of the ADA which states that a public entity cannot discriminate against disabled individuals in the benefits of its services, programs, or activities. *See Vincent Martin*, 225 F. Supp. 2d 1362. The court found the transit authority failed to accommodate the plaintiffs' disabilities by denying them full and equal access to public transportation. *Id.* at 1383-1384.

[50] *Access Now*, 227 F. Supp. 2d at 1319 n. 9.

[51] *See infra* n. 55 (discussing Congress's intent for Title II and Title III to be applied consistently).

[52] Section 504 of the Rehabilitation Act was implemented to prohibit any program or activity that received financial assistance from the federal government from discriminating against disabled individuals. 29 U.S.C. § 794 (2000). Congress integrated Section 504 of the Rehabilitation Act into Title II of the ADA and further broadened it to include state and local governments regardless of whether they receive financial assistance from the federal government. H.R. Rpt. 101-485(III) at 472-473 (May 15, 1990).

[53] H.R. Rpt. 101-485(III) at 472-473.

to government websites.[54] Congress has further stated that Title III is essentially an extension of Title II by forbidding private entities from discriminating against disabled individuals in places of public accommodation.[55] The Title II provision forbids the *governmental sector* from discriminating against disabled individuals, while the Title III provision prohibits the *private sector* from discriminating against disabled individuals.

In support of this contention, a letter written by the Assistant Attorney General of the Civil Rights Division to Senator Tom Harkin in 1996 stated: covered entities which use websites to communicate their "programs, goods, or services must be prepared to offer those communications" to disabled individuals to be within the parameters of Title II *and* Title III of the ADA.[56] This further expresses the government's intent to extend these types of internet services to everyone, including disabled individuals. The Whole Act Canon directs these provisions be read together, leading to the necessary conclusion that cyberspace is a "place of public accommodation" under Title III, just as cyberspace has been found to be included as a "public entity" under Title II. Consequently, cyberspace is governed by the ADA's Title III provision.

In misapplying the canon *ejusdem generis* and failing to apply the Whole Act Canon, the court in *Access Now* stopped at what *it* considered to be the plain, ordinary meaning of a place of public accommodation instead of what the *drafters* of the statute intended the meaning to be. At the very least, the court should have applied these canons to find the public accommodations provision is ambiguous and broadened its inquiry by looking to the underlying purpose behind the statute. Examination of the underlying purpose shows that Congress intended this statute to remain flexible and that cyberspace is a place of public accommodation that should be governed by the ADA.

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[54] *Gov. Websites*, *supra* n. 2, at 1 (stating that the "[i]nternet is playing a vital role in allowing government to better serve all of its citizens" including disabled citizens).

[55] H.R. Rpt. 101-485(II) at 381 (stating that they were extending the same provision of the Rehabilitation Act that they did to broaden Title II and broadening it to include private entities as well); *supra* n. 52 (explaining how Congress broadened the Rehabilitation Act when enacting Title II).

[56] U.S. Department of Justice, http://www.usdoj.gov/crt/foia/cltr204.txt (last accessed Sept. 27, 2003) [hereinafter *DOJ Letter*]. This is a letter written on September 9, 1996 to Senator Tom Harkin from the Assistant Attorney General of the Civil Rights Division, Deval Patrick. It was written on behalf of a constituent in response to a question about whether internet sites should be accessible for disabled individuals under the ADA. It stated that "[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet." *Id.*

2. Because of the Ambiguity Surrounding the Term "Public Accommodations," the Underlying Purpose of the ADA Must be Considered

If the term "public accommodation" fails to clearly incorporate non-physical sites such as the internet, it is at least ambiguous, and the underlying purpose of the statute must be considered.[57] Congress's stated purpose for passing the ADA was to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[58] Congress enacted the ADA's Title III provision with the purpose of prohibiting discrimination against disabled individuals in places of public accommodation.[59]

Furthermore, because the ADA is a remedial statute, it should be interpreted with "an approach sympathetic to its objectives."[60] Courts, such as the *Access Now* court, have been anything but sympathetic to the objective behind passing the statute. The courts should take into account Congress' stated purpose for passing the remedial statute by (a) evaluating the legislative history along with the Department of Justice's recommendations, and (b) examining other case law. They would then discover that cyberspace *is* a place of public accommodation that is governed by the ADA's Title III provision.

a. The Legislative History and Government Guidelines Clearly Define Congress's Intent in Passing the ADA

The legislative history of the ADA and relevant guidelines confirm that cyberspace is a place of public accommodation within the ADA's Title III provision. When President Bush signed the ADA into law on July 26, 1990, he intended for the nearly forty-three million disabled Americans to have access to all facets of society.[61]

Congress's stated purpose for the ADA Title III provision was to allow disabled individuals "full participation in and access to all aspects of

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[57] Textualists always start with the plain, ordinary meaning of the text of a statute and stop there if they find no ambiguity. Plain meaning is "that which an ordinary speaker of the English language . . . would draw from the statutory text." Eskridge, *supra* n. 32 at 756. It is similar to the reasonable person standard in torts. *Id.* When a term appears ambiguous, statutory interpreters should move beyond the plain meaning of the text and look to Congress' underlying purpose for passing the statute to clear the confusion. *Id.*

[58] *Access Now*, 227 F. Supp. 2d at 1314.

[59] *Id.*; *supra* n. 6 (defining the twelve categories of places of public accommodations).

[60] *Natl. Org. for Women, Essex County Chapter v. Little League Baseball*, 318 A.2d 33, 37 (N.J. 1974) (interpreting a state statute with a public accommodations clause modeled after the ADA and finding that a little league organization is a "place of public accommodation" even though it has no permanent place to be considered a physical, concrete structure).

[61] *Access Now*, 227 F. Supp. 2d at 1314; *see infra* n. 73 and accompanying text for President Bush's intent for disabled Americans.

society."[62] The legislative history states that:

> [i]t is critical to define places of public accommodations to include all places open to the public, not simply restaurants, hotels, and places of entertainment . . . because discrimination against people with disabilities is not limited to specific categories of public accommodations.[63]

When discussing the twelve categories of public accommodations, the legislative history states that while the terms are exhaustive, they are *not* limited.[64] For instance, the statute only lists a few examples of each category and then extends the phrase *and other similar entities*.[65] Congress further intended for these other provisions to 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*" non-disabled individuals.[66]

Department of Justice publications regulating the ADA further support a broad interpretation of the statute's public accommodations provision.[67] The guidelines state that "[p]oorly designed websites can create unnecessary barriers for people with disabilities, just as poorly designed buildings prevent some from entering."[68] This publication indicates that Internet sites should be made accessible to everyone and not just non-disabled individuals.[69] The Justice Department guidelines state that requiring websites to provide access to disabled individuals is an imperative way to further Congress's purpose for the ADA to make programs, services, or activities available to the disabled.[70]

Moreover, the Assistant Attorney General of the Civil Rights Division also considers cyberspace to be a place of public accommodation. In a letter addressed to Senator Harkin in 1996, Assistant Attorney General Deval Patrick stated that public *and* private entities that use the Internet to communicate their "programs, goods, or services" should also make their websites accessible to disabled individuals.[71] Patrick states: "The Internet is an excellent source of information, and, of course, people with disabilities should have access to it as effectively as people without

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[62] H.R. Rpt. 101-485(II) at 317.
[63] *Id.*
[64] *Id.* at 383.
[65] 42 U.S.C. § 12181(7) (2000).
[66] H.R. Rpt. 101-485(II) at 383 (emphasis added).
[67] *See generally Gov. Websites*, *supra* n. 2.
[68] *Id.* (referencing Title II of the ADA and supporting extending the provision to include government entities' websites).
[69] "When accessible features are built into web pages, websites are more convenient and more available to everyone--including users with disabilities." *Id.* at 3.
[70] *Id.*
[71] *DOJ letter*, *supra* n. 56.

disabilities."[72]

Finally, in a letter for the celebration of the 12th anniversary of the ADA's enactment, President George W. Bush stated that the ADA still needs to be expanded to allow disabled individuals *full access* to all aspects of society.[73] The internet, with all of its vast opportunities and information, is *the* tool to allow these individuals full access into society.

Despite the clearly articulated message of Congress, the *Access Now* court erroneously found that the statute's "public accommodations" provision was unambiguous, leaving no room for interpretation by legislative intent or purpose.[74] The court found, as have many others, that for a place of business to fall within the "public accommodations" provision it must be a "physical, concrete structure."[75] The legislative history and government guidelines, however, demonstrate that Congress left the Act open for interpretation.[76] Congress stated in the House Reports that the reason behind listing the "other" clauses at the end of many of the twelve categories was to keep the avenue open to include other types of businesses similar to the ones listed. Private entities' websites are clearly the type of business that could be included within these categories.[77] The main purpose behind the statute is to include disabled individuals in all facets of life enabling them to enjoy the same types of benefits provided by private entities that non-disabled individuals are given. The legislative history and government guidelines make it clear that private entities' websites must be included within the "public accommodations" provision of the ADA to prohibit discrimination against disabled individuals.

Millions of consumers access private entities' websites daily to purchase products or services without stepping foot inside a store. However, if they do step foot inside a store, that store is required to comply with the ADA in providing accessibility to disabled individuals. If a business' physical structure must be readily accessible to disabled individuals, then so should a business' internet site which allows them to purchase the same items within the convenience of their own homes. The

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[72] *Id.*

[73] The White House, *Anniversary of the Americans with Disabilities Act, 2002: By the President of the United States of America*, www.whitehouse.gov/news/releases/2002/07/20020726-10.html (last accessed September 29, 2003).

[74] *Access Now*, 227 F. Supp. 2d at 1317. The court stated that when Congress has set forth clear and unambiguous standards, courts must follow those standards unless the legislature steps in and changes them. *Id.*

[75] *Id.*; *infra* n. 79 (citing courts who have found the term, place of public accommodation, to strictly mean physical structures).

[76] *See supra* nn. 74-76 and accompanying text (explaining how Congress intended these categories to be open to interpretation).

[77] *See supra* nn. 44-46 and accompanying text (explaining how Southwest is similar to the other businesses listed in the public accommodations categories and how they also have websites).

internet is an excellent source of information for everyone and should be as accessible to disabled individuals as it is to the rest of society. The President has noted that we are still working toward fully integrating disabled Americans into all facets of our society. These facets must include the vast growing business of cyberspace, and therefore, include private entities' websites and, especially, www.southwest.com.

b. Case Law and Legal Commentary Further Support a Broader Interpretation of the ADA, Title III Provision

Case law and legal commentary further demonstrate the compelling reasons it is necessary to expand Title III of the ADA to include access to cyberspace. In looking to the statutory term "place," which is the term preceding public accommodation in the statute, courts have found this to be a term of convenience rather than a term of limitation.[78] Accordingly, the public accommodations provision should not be limited to the definition of only a physical, concrete structure, but should be broadened to include other types of places such as cyberspace. In view of these conclusions, even those courts that lean toward finding it to be a term of limitation should recognize the ambiguity and move beyond the plain meaning to examine the congressional purpose for enacting the ADA.[79]

For example, in *Carparts Distribution Center Incorporated v. Automotive Wholesaler's Association of New England*,[80] the First Circuit held that a place of public accommodation is broader than courts choose to acknowledge.[81] In *Carparts*, the court found an insurance company's health-benefit plan to be a "place of public accommodation" as defined in Title III of the ADA.[82] The court found that the plain meaning of the terms listed as places of public accommodations within the statute do not require

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[78] *See e.g.* Johnathan Bick, *Americans with Disabilities Act and the Internet*, 10 Alb. L.J. Sci. & Tech. 205, 215 (2000); *Natl. Org. for Women*, 318 A.2d at 37; *Kinney v. Yerusalim*, 812 F. Supp. 547, 551 (E.D. Pa. 1992), *aff'd*, 9 F.3d 1067 (3d Cir. 1993) (finding the ADA to be a remedial statute which should be interpreted broadly to further Congress' goal to provide disabled individuals access to all aspects of society); *Cerpac v. Health and Hosp. Corp.*, 920 F. Supp. 488, 497 (S.D.N.Y. 1996) (finding Congress's intended purpose for the ADA is to be "broadly construed to effectuate its remedial purpose").

[79] *See e.g. Kolling v. Blue Cross & Blue Shield of Mich.*, 318 F.3d 715, 716 (6th Cir. 2003) (holding a public accommodation "is limited to a physical place and cannot be applied to the contents of employer-furnished benefit plans"); *Pappas v. Bethesda Hosp. Assn.*, 861 F. Supp. 616, 620 (S.D. Ohio 1994) (holding that an association and an administrator both did not constitute a public accommodation under the ADA Title III); *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003) (refusing to extend Title II of the Civil Rights Act of 1964 to an internet chat room as a place of public accommodation but noting in dicta that Title III of the ADA is limited to physical structures); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (finding a place of public accommodation to be " a physical place open to public access").

[80] 37 F.3d 12 (1st Cir. 1994).

[81] *Access Now*, 227 F. Supp. 2d at 1319 (finding the Eleventh Circuit "has not read Title III of the ADA nearly as broadly as the First Circuit").

[82] *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19.

the businesses to have "physical structures for persons to enter."[83] Also, the court stated that it would be irrational to limit a place of public accommodation to businesses with physical structures because many companies, such as travel services, do business by mail or by phone so that the customer never sets foot inside an actual building.[84] It found that this interpretation furthers the legislative intent behind passing the statute "to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner."[85] The court noted:

> [t]o exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and other advantages, available indiscriminately to other members of the general public.[86]

The Seventh Circuit has *expressly* stated that the ADA's Title III provision governs cyberspace.[87] In *Doe v. Mutual of Omaha*, Judge Posner found that the ADA Title III provision plainly means "that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, [*w*]*eb site*, or other facility (*whether in physical space or in electronic space*), that is open to the public" cannot discriminate against disabled individuals and should allow them to use their facilities the exact same way as non-disabled individuals.[88]

These cases support including cyberspace in the ADA's Title III "public accommodations" provision. It would be irrational to find that a person who walks into an airline is protected by the ADA, but a person who visits the same airline's website is not protected. Furthermore, legal commentators support the view that a place of public accommodation should be considered a place of convenience and not a place of limitation and that the ADA must be expanded to include cyberspace.[89] The *Access*

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[83] *Id.* (finding that "even if the meaning of 'public accommodation' is not plain, it is, at worst, ambiguous").
[84] *Id.* ("It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not."). Travel services are included among the list of twelve categories considered to be public accommodations by Congress. *See supra* n. 43.
[85] *Carparts Distrib. Ctr. Inc*., 37 F.3d at 19.
[86] *Id.* at 20.
[87] *Doe v. Mutual of Omaha*, 179 F.3d 557, 559 (7th Cir. 1999).
[88] *Id.* (emphasis added) (discussing in dicta the purpose behind the ADA Title III).
[89] *See e.g.* Jeffrey Scott Ramen, Student Author, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. Third World L.J. 389 (2002); Robert L. Burgdorf, Jr., *"Equal*

Now court erred in finding Southwest Airline's website to be outside the realm of a "place of public accommodation" and should have broadened its interpretation of the ADA's Title III provision to include cyberspace. Once again, this interpretation is absolutely necessary to make certain that millions of visually impaired individuals are not left in the dark while non-disabled individuals are enlightened by the vast opportunities of the internet.

3. This Broad Interpretation Does Not Require a Fundamental Alteration of Services or Place an Undue Burden on Private Entities, Such as Southwest Airlines, Because They Have the Ability to Accommodate

Modifying a website would not place an undue burden on private entities that cater to online customers. A broader interpretation of the ADA's Title III provision does not require a fundamental alteration of services or place an undue burden on a private entity such as Southwest Airlines because its size and profits provide it with the ability to accommodate. According to 42 United States Code title section 12182, a private entity involved in commerce discriminates against disabled individuals by denying them the ability to "fully and equally [enjoy] any goods, services, facilities, privileges, advantages, or accommodations" offered by the business.[90] Furthermore, unless the company can prove that accessibility would "fundamentally alter the nature of the good, service, facility, privilege, advantage, *or accommodation being offered or would result in an undue burden*," it is required to make its public accommodation fully accessible to the disabled.[91]

Accessibility becomes an undue burden if it requires significant difficulty or expense to modify or alter the place of public accommodation.[92] In determining whether an alteration would result in an undue burden, the Department of Justice has set out in its Code of Regulations certain factors to be considered. These include the cost of making the modification and the business' ability to accommodate due to

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Members of the Community": The Public Accommodations Provision of the Americans with Disabilities Act, 64 Temp. L. Rev. 551 (1991); Adam M. Schloss, Student Author, *Web-Sight for Visually Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?* 35 Colum. J.L. & Soc. Probs. 35 (2001); Bick, *supra* n. 78; Thomas R. Burke, *Internet Law and Practice: Part II. Starting and Managing an Online Business*, 1 Internet Law and Practice § 5:1.

[90] 42 U.S.C. § 12182(b)(2)(A).

[91] 42 USC §12182(b)(2)(A)(iii)(emphasis added)(defining a discrimination under the statute as a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden).

[92] 28 C.F.R. § 36.104.

its financial resources.[93]

Requiring a business like Southwest to alter or modify its website to provide adequate technology compatible with screen readers does not place an undue burden on the company or require a fundamental alteration of its website. Publications set out by the Department of Justice show that web page designers can make their websites accessible to disabled individuals with ease, seldom having to change the layout or appearance of the site.[94]

In addition, guidelines set up by the World Wide Consortium show that developing an accessible sight for the blind does not add significant costs to the process and, in some circumstances, it can even reduce the cost of updating or maintaining websites.[95] The guidelines further show it can actually be cost-effective for an existing website to alter its layout for use by the disabled because of the wider range of customer availability and its enhanced usability.[96] For example, studies in Great Britain show many airlines are losing millions of dollars each year by not modifying their sites to be accessible to disabled individuals.[97] In addition, Department of Justice publications demonstrate that using the techniques suggested for modifying websites also makes them more accessible to people who use older computers or newer technology such as web-enabled cell phones or handheld computers.[98] This, once again, broadens the potential customers and profits.

Finally, the *Access Now* court found that these accessibility guidelines are not consistent enough to keep up with changing technology.[99] However, they are actually designed to be abstract enough to keep up with technological advances on the internet and to remain stable over extended periods of time making them cost efficient.[100]

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[93] *Id.*
[94] *Gov. Websites*, *supra* n. 2 at 2.
[95] W3C, *Fact Sheet for Web Content Accessibility Guidelines 1.0,* http://www.w3.org/1999/05/WCAG-REC-fact#need (last accessed Nov. 8, 2003). The guidelines are issued by the World Wide Consortium, or W3C, a group which has over four-hundred member organizations whose objective is to make the World Wide Web accessible to disabled individuals. *Id.* This group has issued a set of guidelines for program writers on how to make new and existing websites accessible to disabled individuals. *Id.* They are also working on a newer version of these guidelines further showing the importance of creating and modifying existing websites to provide disabled users internet access. *Id.*
[96] *Id.*
[97] Ability Net, *Top Airlines Losing Millions by Barring Disabled People From Websites*, http://www.abilitynet.org.uk/content/oneoffs/e-nation.htm (accessed Dec. 6, 2003). "With a potential market of 1.6 million registered blind users as well as a further 3.4 million with disabilities preventing them from using the standard keyboard, screen and mouse set-up with ease, e-businesses are losing out on some £50 - £60 billion per year buying power." *Id.*
[98] *Gov. Websites*, *supra* n. 2.
[99] *Access Now*, 227 F. Supp. 2d at 1315.
[100] W3C, *supra* n. 95.

Southwest is one of the largest commercial airlines in the United States and the mere additional cost of making its website accessible to disabled individuals pales in comparison to the revenues it earns annually.[101] Southwest is the fourth largest domestic carrier in the United States, conducting 2,800 flights each day and employing more then 35,000 employees.[102] It was the first airline to create a website on the internet and "prides itself on operating an Internet website that provides 'the highest level business value, design effectiveness, and innovative technology use achievable on the Web today.'"[103] Its website allows customers to check air fares, book tickets online, reserve hotels and cars, and learn of the company's promotions or sales.[104] Southwest further prides itself on the cost savings involved with booking tickets online: "as the cocktail napkins used on our planes say, '[t]he only place our low fares call home is www.southwest.com.'"[105] The airline generates more than three billion dollars of passenger revenue annually from online bookings alone.[106] This constitutes about 85% of its customers who book flights electronically.[107] Even during a time when many airlines are struggling and nearing bankruptcy, Southwest is still making a profit.[108] In addition, the airline claims that nearly 3,500,000 people "subscribe to Southwest's weekly Click 'N Save e-mails."[109] Therefore, considering its massive economic impact on society, the company is obviously a "private entity whose operations affect commerce" qualifying it as a place of public accommodation within the meaning of the ADA.[110]

Taking into consideration the slight cost and inconvenience of modifying an existing website and Southwest's massive financial earnings, the company undoubtedly possesses the ability to accommodate disabled individuals. Altering its website to make it accessible to disabled individuals, particularly the blind, does not fundamentally alter its service or place an undue burden on the fourth largest airline in the United States. In fact, it could actually prove to be cost-effective for the airline. By making its website accessible to millions of disabled individuals, the

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[101] *Access Now*, 227 F. Supp. 2d at 1315.
[102] Southwest Airlines, *Southwest Airlines Now Offers Internet Boarding Pass; Added Convenience From the Country's Most Successful Airline Web Site*, http://www.southwest.com/about_swa/press/prindex.html (last accessed Feb. 5, 2004).
[103] *Access Now*, 227 F. Supp. 2d at 1315.
[104] *Id.*
[105] Southwest Airlines, *supra* n. 6 at 2.
[106] Southwest Airlines, *supra* n. 102.
[107] *Id.*
[108] Forbes, http://www.forbes.com/finance/mktguideapps/compinfo/CompanyTearsheet.jhtml?cusip=844741108 (last accessed March 11, 2005). Forbes.com reports that as of Dec. 13, 2004 Southwest Airlines was generating profits of $4.4 billion dollars. *Id.*
[109] *Access Now*, 227 F. Supp. 2d at 1315.
[110] *See supra* n. 15 (defining which businesses are included within Title III of the ADA).

company would actually benefit by earning profits from further on-line sales and broadening its potential customer base.[111] While Southwest may pride itself on the use of innovative technology on its site, it is shamefully shutting out a huge portion of the population by not implementing the simple technology that would make it accessible to the blind.[112] As it stands now, Southwest continues to discriminate against the blind by not providing the appropriate technology on its website that would allow them the same cost savings and convenience as the non-disabled.

Therefore, even a broadened interpretation of Title III to include cyberspace as a place of public accommodation would not place an undue burden or require a fundamental alteration of Southwest's services. The company clearly has the financial resources available to make such a modest modification to its website. The undue burden actually falls on the blind individuals that courts are failing to protect by refusing to provide them access to one of the most important tools in our society, the internet. The *Access Now* court, therefore, should have paved the way for the ADA to govern all "places of public accommodation," including cyberspace.

B. *Vast Changes in Technology Provide Disabled Individuals Full Access into the Mainstream of Society*

Vast changes in technology can now provide disabled individuals full access into the mainstream of society. Computer technology and the internet have a tremendous potential to broaden the lives and increase the independence of people with disabilities, especially the blind.[113] One legal commentator has noted that "[j]ust as the ADA has become part of the fabric of America so has the Internet."[114] This further supports Congress's stated purpose behind enacting the ADA — to allow disabled individuals access into the mainstream of society.[115]

Blind individuals formerly had to wait months, or even years, before acquiring information in Braille or on audiotape.[116] With the aid of vast technological advances and the internet, this type of information is now available at their fingertips at the same time it is available to sighted

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[111] Ability Net, *supra* n. 97 (demonstrating how British airlines are losing billions of dollars by not modifying their websites to be accessible to the blind).
[112] *See supra* nn. 103-108.
[113] Kaye, H.S., *Computer and Internet Use Among People with Disabilities*: *Disability Statistics Report (13)*, U.S. Dept. of Education, Natl. Institute on Disability and Rehabilitation Research (2000) at 1.
[114] Bick, *supra* n. 78 at 207, 217 (noting that to require a website's software "to be compatible with screen-readers is similar to requiring a bookstore to offer ramps and bathrooms for the disabled").
[115] *Supra* nn. 62-63 (One of Congress's purposes behind passing the statute was to help disabled individuals lead less isolated lives.).
[116] Kaye, *supra* n. 113 at 1.

individuals.[117] Second to checking email, the next most common reason for internet use by disabled consumers is to search for information.[118] In fact, 62.8% of them use the internet for this reason compared to 64.3% of people who are non-disabled.[119] For someone who is blind, using the internet can be more convenient than leaving the house to acquire information. This is also true for many in wheelchairs and with other disabilities. Furthermore, consumers with disabilities have more than 175 billion dollars to spend in discretionary income.[120] Statistics also show that out of nearly ten million visually impaired individuals in the United States, approximately 1,500,000 of them access and use the internet.[121]

What better way to bring disabled individuals into the mainstream of society than to afford them the opportunity to access instant information via the World Wide Web? Even America Online, (AOL), the largest internet provider in the nation, has acknowledged this profit-producing potential by broadening its services to provide access to blind individuals.[122] AOL implemented these services after settling a lawsuit with the National Federation of the Blind, which alleged AOL was violating the ADA by not providing blind individuals access to its services.[123] Instead of taking the lawsuit to trial, AOL agreed to a settlement requiring it to alter its services to be compatible with such technology as screen-readers for the blind.[124] The next logical step in furthering Congress's purpose for passing the ADA would be to extend Title III's "public accommodations" provision to include these massive advances in technology.

The *Access Now* court found that because Congress did not actually include the term "cyberspace" within its list of public accommodations, Congress intentionally excluded it and that it is the legislature's job to amend the statute to include the term if it so intends.[125] While this is a logical argument in the abstract, it is illogical in context. When the ADA was enacted in 1990, the World Wide Web was barely making its

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[117] *Id.*
[118] *Id.* at 11.
[119] *Id.*
[120] U.S. Department of Labor: Office of Disability Employment Policy, *Affirmative Action and People with Disabilities*, http://www.dol.gov/odep/pubs/ek98/affirmat.htm (accessed April 2003) (stating that like all other consumers disabled individuals will be more likely to spend this money in places where they feel welcome).
[121] *Access Now*, 227 F. Supp. 2d at 1314; National Federation of the Blind, *Legislative Agenda of Blind Americans:*
Priorities for the 108th Congress, First Session, http://www.nfb.org/law/leg_agenda.htm (last accessed January 31, 2003) (finding that 1.1 million individuals are blind within the United States and that 75,000 individuals become blind or visually impaired every year).
[122] *See* Bick, *supra* n. 78 at 217-219. The National Federation of the Blind brought the lawsuit in November 1999. It stated that AOL "has designed its service[s] so that it is incompatible with screen access software programs for the blind" and thus violated Title III of the ADA. *Id.*
[123] *Id.* (AOL agreed to the settlement but never conceded that the ADA applied to its services).
[124] *Id.*
[125] *Access Now*, 227 F. Supp. 2d at 1318.

appearance in our society.[126] In fact, in 1990 the hypertext system of communications now known as the internet was just being developed in Geneva.[127] It was not until about 1996 that the World Wide Web really took flight and began to develop into the massive technological business it has become today.[128] Therefore, Congress would have needed a crystal ball when enacting a statute in 1990 to foresee such an explosion of internet use or to include it within its definition of a place of public accommodation. Furthermore, as is indicated in the language of the legislative history, Congress intended for this statute to be fluid and to include new developments such as the internet to prevent the legislature from having to rewrite or amend it every single time a new, unforeseen, type of business emerges on the market.[129] Courts must include cyberspace as a place of public accommodation within the ADA's Title III provision to stop private entities, such as Southwest, from discriminating against millions of blind Americans. This broader interpretation furthers Congress's stated purpose in passing the statute by providing disabled individuals greater access into the mainstream of society.

IV. CONCLUSION

The ADA's Title III "public accommodations" provision is intended to govern not only physical sites, but internet sites as well. Courts should recognize the ambiguity in the term public accommodations and move past a textualist argument to look to Congress's true purpose for passing the ADA. The legislative history, Department of Justice guidelines, and other case law support a broader interpretation of the ADA to include cyberspace as a "place of public accommodation." Furthermore, adapting a website to become accessible to the blind does not place an undue burden on private entities such as Southwest Airlines because, due to their size and profits, they clearly possess the ability to make this accommodation. Finally, massive changes in technology developed since the enactment of the statute further support a broader interpretation of a place of public accommodation by allowing disabled individuals full access into the mainstream of society.

While the decision in *Access Now* directly affected the life of only one blind man, Robert Gumson, the opinion is sure to affect millions of other blind individuals in this country. The discrimination condoned in *Access Now* is exactly the type that Congress intended to prevent by

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[126] Bick, *supra* n. 78 at 225 (noting that at the time the ADA was enacted "cyberspace belonged to the realm of science fiction").
[127] Krista Ostertag, *The Net's Come a Long Way Baby*, http://www.varbusiness.com/sections/90franchise/ten/10inter.asp (last accessed September 1, 2003).
[128] *Id.*
[129] *Supra* n. 64.

enacting the ADA in the first place. This type of ruling will negatively influence other web providers' decisions on whether to make their sites accessible to the blind or to follow suggested guidelines when developing new sites.[130] The *Access Now* court did a great injustice to the underlying purpose of the ADA and to the nearly forty-three million disabled Americans by failing to require the ADA's Title III place of public accommodation provision to govern cyberspace. If these courts are not going to step up to the plate to eliminate such outright discrimination, then maybe it is time the legislature enact a new statute to govern the massive growth of the internet and to ensure — expressly — that millions of blind individuals are not left in the dark.

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[130] *Access Now*, 227 F. Supp. 2d at 1314.