

Abstract

Emily Short, a 2004 J.D. candidate at the University of Oklahoma, is the Managing Editor of the Oklahoma Journal of Law and Technology and the Marketing Editor of Oklahoma Law Review. In this e-brief, Ms. Short examines the application of the Americans with Disabilities Act (ADA) to the Internet. This e-brief analyzes *Access Now v. Southwest Airlines*. Part I assesses the history and background of the ADA's application to technology by examining the statute and subsequent case law. Part II presents the facts, procedural history, holding, and reasoning of *Access Now*. Finally, Part III explores the court's reasoning, and details its implications to future plaintiffs attempting to apply the ADA to the Internet. Specifically, Part III examines problems surrounding increased accessibility, government agencies' accessibility plans, and concerns regarding judicial activism.

**E-COMMERCE AND THE AMERICANS WITH DISABILITIES ACT:
FAILING TO EXTEND THE ADA TO THE INTERNET
IN *ACCESS NOW* v. *SOUTHWEST AIRLINES***

Emily Short

I. Introduction

According to recent findings, 580 million people worldwide have access to the Internet, which currently consists of approximately 177,547,277 sites.¹ Around 168.6 million of these Internet users reside within the U.S.² However, those with disabilities are likely excluded from these statistics due to the difficulty of accessing the Internet with ease. For example, experts indicate that nearly 98 percent of current websites are inaccessible to blind and deaf users³ despite the fact that 76 percent of all disabled Americans are online.⁴ Critics and proponents of

¹ CyberAtlas staff, *June 2003 Internet Usage Stats*, CYBERATLAS, July 21, 2003 at http://cyberatlas.internet.com/big_picture/traffic_patterns/article/0,,5931_2237901.html (last visited Sept. 22, 2003).

² Robyn Greenspan, *More Than Half-Billion Online Globally*, CYBERATLAS Feb. 21, 2003 at http://cyberatlas.internet.com/big_picture/geographics/article/0,1323,5911_1593591,00.html (last visited Sept. 22, 2003). The U.S. maintains the highest Internet population. *Id.*

³ Sally McGrane, *Is the Web Truly Accessible to the Disabled?* CNET, Jan. 26, 2000 at <http://www.cnet.com/specialreports/0,10000,0-6014-7-1530073,00.html> (last visited Sept. 22, 2003). Inaccessibility means that the site is incompatible with current technological tools, such as electronic screen readers, text-to-braille translators, voice-dictation software, voice-navigation software, and magnification software. *Id.*

⁴ *Id.*

forced accessibility acknowledge the enormous technological challenge;⁵ however, as the Internet grows and e-commerce becomes a fundamental part of the nation's economy, either the courts or Congress must address the problems of accessibility.

Federal district and appellate courts are split on how far The Americans with Disabilities Act ("ADA")⁶ should extend in electronic communications.⁷ In the most recent case that examines the application of the ADA to the Internet, *Access Now v. Southwest Airlines*,⁸ the Southern District of Florida addressed the controversial issue of whether the ADA applies to the Internet, and correctly held that southwest.com was not a "place of public accommodation"⁹ as defined by the ADA. The court also held that the plaintiffs failed to satisfy the fall-back test of

⁵ See Christopher G. McDonald, *Access to the Internet: Should the Americans with Disabilities Act ("ADA") Apply to Private Web Sites?* LAW & THE INTERNET, Fall 2002 (Dec. 18, 2002) at <http://gsulaw.gsu.edu/lawand/papers/fa02/mcdonald> (last visited Sept. 22, 2003) (noting the potential cost in retrofitting current sites to make them compatible with numerous different kinds of technology and software applications).

⁶ 42 U.S.C. §§ 12101-12213 (2000).

⁷ See *infra* Part II.

⁸ *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

⁹ The ADA specifically enumerates twelve categories of "places of accommodation." "Public accommodation" includes:

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

42 U.S.C. § 12181(7) (2000).

establishing a nexus between the website and a “physical, concrete place of public accommodation.”¹⁰ Applying the ADA to Internet sites attempts to extend the purpose of the Act by providing accessibility in both physical and virtual places; however, that extension overreaches Congress’ intent. This e-brief will discuss the application of the ADA to the Internet in *Access Now*. Part I assesses the history and background of the ADA’s application to technology by examining the statute and subsequent case law. Part II presents the facts, procedural history, holding, and reasoning of *Access Now*. Finally, Part III explores the court’s reasoning, and details its implications to future plaintiffs attempting to apply the ADA to the Internet. Specifically, Part III examines problems surrounding increased accessibility, government agencies’ accessibility plans, and concerns regarding judicial activism.

II. The History and Background of the ADA’s Application to the Internet

When addressing Internet accessibility, courts consider two statutes. The first is The Americans with Disabilities Act (“ADA”), passed by Congress in 1990.¹¹ According to President George Herbert Walker Bush’s remarks at the statute’s signing, “every man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”¹² Specifically, Title III of the ADA¹³ focuses on discrimination in places of public accommodation and lists twelve categories of establishments

¹⁰ *Access Now*, 227 F. Supp. 2d at 1317, 1319.

¹¹ The ADA consists of five sections, covering employment, public services, public accommodations and services operated by private entities, telecommunications and miscellaneous provisions. See McDonald, *supra* note 5; Frank J. Cavalier & Carter Williams, *The Internet and the Americans with Disabilities Act: The Evolving “Readily Achievable” Standard*, 12 SOUTHERN L. J. 33, 34 n.8 (2002) at <http://www.lexopolis.com/salsb/slj/vol-xii/cavalieve.pdf> (last visited Sept. 22, 2003).

¹² President George Herbert Walker Bush. *Remarks on Signing the Americans with Disabilities Act of 1990*. July 26, 1990, available at <http://bushlibrary.tamu.edu/papers/1990/90072600.html> (last visited Sept. 22, 2003).

¹³ The general rule of Title III 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

covered by the Act.¹⁴ The second statute courts consider when addressing accessibility concerns is The Vocational Rehabilitation Act of 1973, amended by The Workforce Investment Act of 1998,¹⁵ which governs the federal government's technology accessibility requirements. While the ADA applies to both public and private businesses and organizations, The Vocational Rehabilitation Act only governs the federal government's use of technology.¹⁶

Courts have found interpreting these statutes and applying the ADA to Internet sites confusing and difficult. Indeed, district and appellate courts are divided regarding whether the ADA applies only to physical places. In *Carparts Distribution Center Inc. v. Automotive Wholesaler's Association of New England, Inc.*,¹⁷ the First Circuit Court of Appeals addressed an attempted application of Title III to insurance providers. The court held that Title III is not

public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a) (2000).

¹⁴ See 42 U.S.C. § 12181(7) (2000).

¹⁵ See Rehabilitation Act Amendments of 1998, Pub. L. No. 105-220, 112 Stat. 1092, 29 U.S.C. § 794d (2002). The Act sets forth electronic accessibility requirements for federal departments and agencies:

- (A) When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology—
 - (i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities; and
 - (ii) individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities. 29 U.S.C. § 794(d) (2002).

The Amendment details the standards and means for implementing the accessibility goals. .

¹⁶ McDonald, *supra* note 6, at 3. For a more in-depth discussion of the accessibility standards for federal departments and agencies, see Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 32-41 (2001).

¹⁷ *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994).

limited to actual physical structures.¹⁸ Focusing on Congress' inclusion of "travel service" in its list of places of public accommodation,¹⁹ the court noted, "Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure."²⁰ Noting no specific language requiring an actual physical boundary or place of physical entry, the First Circuit Court of Appeals suggested that Title III could cover the sale of goods and services by telephone or by mail.²¹ In 1999, the Seventh Circuit Court of Appeals addressed the same issue in *Doe v. Mutual of Omaha Insurance Co.*²² When interpreting the ADA's applicability to non-physical structures, Judge Posner, in dicta, suggested a broad reading:

The core meaning of [Title III], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, *Web site*, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.²³

The application of the ADA to *electronic* resources first received attention in November of 1999 when The National Federation of the Blind, Inc. ("NFB") filed a complaint against America Online ("AOL"). The NFB alleged AOL had violated Title III by failing to remove communications barriers, failing to provide reasonable accommodations, and failing to make the service accessible to, and usable by, the blind.²⁴ In July of 2000, the parties reached a settlement

¹⁸ *Id.* at 19. The court stated, "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." *Id.*

¹⁹ 42 U.S.C. §12181(7) (2000).

²⁰ *Carparts*, 37 F.3d at 19.

²¹ *Id.* at 20.

²² *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

²³ *Id.* at 559 (citations omitted and emphasis added).

²⁴ Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 32 (2001).

agreement, setting forth the changes AOL promised to incorporate into its service.²⁵ However, the NFB/AOL settlement did not end the controversy over accessibility applications.²⁶ In June of 2002, the Eleventh Circuit Court of Appeals addressed the ADA's application to electronic resources in *Rendon v. Valleycrest Productions*,²⁷ and applied Title III to the "fast finger process" of contestant selection for the television show "Who Wants to Be A Millionaire" ("Millionaire").²⁸ The court, failing to recognize the plain and unambiguous statutory language, stated that

[T]he definition of discrimination provided in Title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services, and privileges, 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.²⁹

In applying the ADA to the telephone screening procedure, the court required a "nexus between the challenged service and the premises of the public accommodation,"³⁰ and found a nexus present between the telephone procedure and the television studio. Thus, the court limited its application of the ADA to cases in which plaintiffs could establish a nexus between the electronic medium and a physical, concrete place.

²⁵ The settlement agreement sets forth AOL's commitment to make its service fully accessible to blind persons. For example, the settlement acknowledges AOL's promise to make its new version compatible with screen readers and sets out the time period for new releases. See National Federation of the Blind/America Online Accessibility Agreement, July 26, 2000 available at <http://www.nfb.org/Tech/accessibility.htm> (last visited Sept. 22, 2003).

²⁶ See *Torres v. AT & T Broadband*, 158 F.Supp.2d 1035 (N.D. Cal. 2001) (court dismissed visually impaired digital cable subscriber's claim that the service provider's refusal to make on-screen channel listing program accessible to visually impaired customers violated the ADA because home television is not a "public accommodation").

²⁷ *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

²⁸ *Id.* at 1280.

²⁹ *Id.* at 1283.

³⁰ *Id.* at 1284 n.8.

III. Statement of the Case: Access Now v. Southwest Airlines

Southwest Airlines (“Southwest”), the nation’s fourth largest airline, was the first to establish a home page on the Internet.³¹ Southwest reported, “[A]pproximately 46 percent, or over \$500 million, of its passenger revenue for first quarter 2002 was generated by online bookings via southwest.com.”³² *Access Now*, a non-profit organization and advocate for accessibility,³³ and a blind consumer filed a complaint in federal court for injunctive and declaratory relief alleging that Southwest’s website “excludes Plaintiffs in violation of the ADA, as the goods and services Southwest offers at its ‘virtual ticket counters’ are inaccessible to blind persons.”³⁴ Specifically, the complaint alleged that Southwest’s website “violates the communication barriers removal provision of the ADA, violates the auxiliary aids and services provision of the ADA, violates the reasonable modifications provisions of the ADA, and violates the full and equal enjoyment and participation provisions of the ADA.”³⁵ The Plaintiffs requested the court to compel compliance by requiring that the airline take specific steps to increase the site’s accessibility.³⁶ Southwest moved to dismiss the complaint on the grounds that southwest.com is not a “place of public accommodation” and therefore outside the scope of Title III.³⁷ The court granted Southwest’s motion to dismiss, holding that the website was not a “place

³¹ *Access Now*, 227 F. Supp. 2d at 1315.

³² *Id.*

³³ *Access Now* has also brought suit against Barnes & Noble and Claire’s Stores, claiming the websites were not ADA compliant; however, both cases settled before trial. McDonald, *supra* note 6, at 7. Interestingly, the court that approved the Barnes & Noble settlement specifically noted that “no court has held that Internet website made available to the public must be accessible.” *Id.*

³⁴ *Access Now*, 227 F. Supp. 2d at 1314. However, the Plaintiffs do not argue that purchasing tickets is impossible and admit that a blind person can purchase through alternative means, including telephone or by visiting an airline ticket counter. *Id.* at 1316 n.3.

³⁵ *Id.* at 1316.

³⁶ *Id.*

³⁷ *Id.* at 1314.

of public accommodation’ as defined by the plain and unambiguous language of the ADA”³⁸ and that Plaintiffs failed to establish “a nexus between southwest.com and a physical, concrete place of public accommodation.”³⁹

A. The District Court’s Analysis

To defend its holding, the court began by examining the background and purpose of the ADA, stating that “Congress’ . . . purposes in enacting the ADA were, among other things, to provide ‘a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,’ and ‘clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.’”⁴⁰ The court also noted the existing accommodations available for the visually impaired under the clear language of the Act.⁴¹

B. Southwest.com Fails to Fall Within the Scope of Title III of the ADA

In deciding whether to grant the motion to dismiss, the court phrased the issue as “whether an Internet website, such as southwest.com, is a ‘place of public accommodation’ as defined by the ADA” and concluded that such a question must be answered by examining statutory construction.⁴² The first step in interpreting any statute is to determine whether the language has a “plain and unambiguous meaning.”⁴³ The court determined that the plain language of the statute at issue does not include the website. By looking to the Eleventh Circuit interpretation, which recognizes Congress’ clear intent, the court correctly reasoned that “courts

³⁸ *Id.* at 1317.

³⁹ *Id.* at 1312.

⁴⁰ *Id.* at 1314.

⁴¹ The court noted that several computer software companies developed technology to assist the visually impaired, including voice-dictation software, voice-navigation software, and magnification software. *Id.*

⁴² *Id.* at 1317.

⁴³ *Id.*

must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights.”⁴⁴ Accordingly, the court refused to create a new right by extending the ADA to cover virtual spaces. Instead, the court rejected the Plaintiffs’ creative reading of the statute, which alleged that southwest.com falls within its scope by conflating three types of establishments: exhibitions, displays, and sales establishments.⁴⁵ Because the statute’s list is enumerative rather than descriptive, the court refused to combine aspects of each place of public accommodation.

C. There is No Nexus Between Southwest.com and a Physical, Concrete Place of Public Accommodation

Furthermore, the court rejected Plaintiffs’ contention that the court was not bound by the statute’s plain language and could instead broadly hold that the ADA reaches beyond mere physical structures to the extent the First Circuit Court of Appeals did in *Carparts*.⁴⁶ However, *Carparts* was not binding on the court and the Eleventh Circuit’s interpretation has yet to apply the ADA as far as *Carparts* had permitted. Instead, the Eleventh Circuit Court of Appeals, in *Rendon*,⁴⁷ applied the ADA’s accessibility requirements to an automated telephone selection process only where there was a “*nexus* between the challenged service and the premises of the public accommodation.”⁴⁸ The *Access Now* court considered *Rendon*, but nevertheless found Southwest’s website to be neither a physical public accommodation nor a means of accessing a concrete space.⁴⁹ The court reasoned that the Internet is a “unique medium” with no “particular

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Carparts*, 37 F.3d at 12.

⁴⁷ *Rendon*, 294 F.3d at 1279.

⁴⁸ *Id.* at 1284 n.8 (emphasis added).

⁴⁹ *Access Now*, 227 F. Supp. 2d at 1321.

geographic location.”⁵⁰ Since there is no actual location, Plaintiffs could not demonstrate an impediment to access a “specific, physical, concrete space.”⁵¹ Thus, the court found that neither a public accommodation nor an adequate nexus between the site and a physical, concrete place were present.

IV. Access Now: Application and Analysis

A. Access Now Recognizes Difficulties in Mandating Accessibility Compliance

When examining the questions presented in *Access Now* regarding the application of the ADA to Internet websites, both legal experts and courts express concerns regarding the feasibility and cost of making all publicly accessed websites ADA compliant.⁵² Both opponents and proponents recognize these difficulties.⁵³ Nevertheless, many companies and organizations have launched initiatives to assist in increasing accessibility, rendering the availability of websites to the disabled much easier.

The development of evaluative tools and access guidelines demonstrates the feasibility of making the Internet accessible to the disabled. The Center for Applied Special Technology (“CAST”),⁵⁴ a not-for-profit research and development organization, offers several tools to determine website accessibility. CAST has also worked closely with the World Wide Web

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² McDonald, *supra* note 6, at 8-9.

⁵³ Some of the arguments discussed by the opponents include: “it is detrimental to e-commerce because of the effort required to redesign sites for accessibility; accessible Web sites are not as appealing to users without disabilities; and enforcement is problematic.” Paul Bohman, *The Applicability of the ADA to the Internet*, C.P.D. NEWS, available at <http://www.webaim.org/articles/ada> (last visited Sept. 22, 2003). The proponents arguments include: “the Internet is too important an entity to be a vehicle of segregation between those with disabilities and those without; it is not difficult to make Web sites accessible as some people think; making Web sites accessible often improves Web sites for those without disabilities; and the fact that the Internet is public space makes identification of inaccessible sites simple.” *Id.*

⁵⁴ See <http://www.cast.org> (last visited Sept. 22, 2003).

Consortiums's ("W3C") Web Accessibility Initiative (WAI)⁵⁵ in developing evaluative tools and providing page and site evaluations. CAST sets forth a list of requirements that a good website should possess.⁵⁶ Additionally, CAST created Bobby, "a comprehensive web accessibility software tool designed to help expose and repair barriers to accessibility."⁵⁷ Users can enter websites into Bobby to determine their level of accessibility. Bobby then generates a report about the level of accessibility and provides a description of the site's shortcomings.⁵⁸ By following the simple guidelines and correcting the problems detailed in the report, website operators can assure access to the disabled.

Additional concerns regarding mandated accessibility focus on the cost of compliance. Opponents of this mandated compliance maintain that the economic costs would be "crippling."⁵⁹ The cost concern breaks down into two components: litigation costs and technological costs. Numerous cases have been filed and more cases are sure to come, which

⁵⁵ WAI provides extensive resources to assist web designers in creating a fully accessible web site. *WAI Resources*, W3C Web Accessibility Initiative, at <http://www.w3.org/WAI/Resources/> (last visited Sept. 22, 2002). These resources include introductions and quick tips; checklists, techniques, and translations; frequently asked questions; and evaluation and repair tools. *Id.*

⁵⁶ "A good site must:

1. provide text equivalents for all images and multimedia such as animations, audio, and video;
2. ensure that all information conveyed with color is also available without color;
3. identify headers for data tables and make line-by-line reading sensible for layout tables;
4. provide summaries of graphs and charts;
5. identify document language and any changes of the language;
6. organize content logically and clearly, such as with headings, list elements, meaningful links, and navigational bars; and
7. provide alternative content for certain complex features (e.g. applets or plug-ins)

Cavalier & Williams, *supra* note 12, at 41 (quoting <http://www.cast.org/Bobby/WhatIsBobby907.cfm>).

⁵⁷ See About Bobby, at <http://bobby.watchfire.com/bobby/html/en/about.jsp> (last visited Sept. 22, 2003). Bobby was subsequently sold to Watchfire and is maintained through their service. *Id.*

⁵⁸ Southwest.com failed to meet the requirements for Bobby approval status; however, the report listed several problems and how often they occurred, giving the web site operator a better understanding of what is necessary to have a fully accessible web site. See <http://bobby.watchfire.com/bobby/html/en/index.jsp> (last visited Sept. 22, 2003).

⁵⁹ McDonald, *supra* note 6, at 8.

could result in shutting down small business websites.⁶⁰ Litigation is, of course, an economic concern, but the implementation of accessibility devices presents the greatest economic cost to site providers. Including additional information on websites, such as text to explain graphics or sound features, increases the amount of information the site must convey, making the site slower to load and more expensive to operate.⁶¹ Critics predict

[H]undreds of millions of existing pages would be torn down for failure to comply, the cost of publishing sites will increase since amateur publishers will be replaced by highly trained web designers who are savvy enough to avoid legal pitfalls of an illegally designed site and many additional sites will be delayed in order to ensure compliance.⁶²

One option necessary to avoid the difficulties and costs associated with forced accessibility compliance is to permit Internet businesses to develop accessible websites on their own. Given the number of disabled people accessing the Internet, their purchasing power⁶³ could entice e-commerce to cater to their needs without judicial or legislative mandate.⁶⁴ The most effective option, however, is altering the ADA to extend to the Internet and provide a detailed and extended timetable for compliance.⁶⁵

B. A Difference in Accessibility: Case Law versus Federal Government Standards

Access Now and the federal government's standards are at variance regarding questions of Internet accessibility. While *Access Now* refuses to extend the ADA to private commercial websites, The Workforce Investment Act of 1998 has required ADA compliance in public governmental virtual places in order to accommodate disabled federal employees.⁶⁶ In addition to

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ According to the 1996 census, the collective purchasing power of the disabled community will be approximately \$1 trillion by 2001. McGrane, *supra* note 4, at 1.

⁶⁴ See <http://wemedia.com>

⁶⁵ See part C.

⁶⁶ 29 U.S.C. § 794(d) (2002).

governmental websites, a Department of Justice opinion letter has suggested the need for ADA compliance by *private* websites.⁶⁷ The Department of Justice's policy letter stated,

Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicated through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.⁶⁸

The problem with the opinion is that it fails to identify which sites fall under the definition of "covered entities," but nevertheless extends the need for ADA compliance to an attorney's column in an on-line newsletter, which happens to be a purely private enterprise. Conversely, *Access Now* refuses to extend the ADA because there is no place of public accommodation and no nexus between the website and an actual physical place; however, the Department of Justice does not require such an extension and allows coverage for all types of media. The court's and the federal government's readings cannot easily be reconciled. If Congress wishes to apply the ADA to the Internet – to aid businesses in understanding how to comply with the act and in light of increasing Internet use – it should speak directly on the subject and define more precisely the applicability of the ADA to private Internet sites.

C. **Judicial Activism: Keeping the Courts Out of Congress**

Access Now correctly refuses to extend the ADA to Internet websites through judicial extension. In holding that southwest.com falls outside the scope of the ADA, the *Access Now* court declared that the "courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights."⁶⁹ Additional justification for

⁶⁷ Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Senator Tom Harkin, (Sept. 9, 1996) available at <http://www.usdoj.gov/crt/foia/tal712.txt> (last visited Sept. 22, 2003).

⁶⁸ *Id.*

⁶⁹ *Access Now*, 227 F. Supp. 2d at 1318.

this position is found in the principle of “*inclusio unius est exclusio alterius*, the inclusion of some assumes the intentional exclusion of others.”⁷⁰ Congress specifically enumerated a list of included places of public accommodation, while purposely failing to address Internet use.⁷¹ Although the ADA’s list of places of public accommodation includes “other service establishments”⁷² and the legislative history suggests an intentionally broad statutory definition,⁷³ the Internet was still in its infancy when the ADA was debated and passed.⁷⁴ By waiting for Congress to revise the legislation, the *Access Now* court’s interpretive focus acknowledges both the clear language of the statute as well as the drafters’ legislative intent. Any other approach would impermissibly extend the ADA beyond its intended scope.

Congress has examined the ADA’s limited application with respect to private Internet sites in the House Subcommittee on the Constitution of the House Committee on the Judiciary’s “Hearing on The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites.”⁷⁵ The House Subcommittee on the Constitution examined the issues in light of the extended regulations for federal government and agency websites and the Department of Justice’s understanding that the ADA already applied to private Internet websites and services.⁷⁶

⁷⁰ McDonald, *supra* note 6, at 6.

⁷¹ Whether the exclusion was intentional or because the Internet did not exist, does not matter when applying this principle.

⁷² 42 U.S.C. § 12181(7)(F) (2000).

⁷³ Anita Ramasastry, *The Americans with Disabilities Act in Cyberspace: Should the Web-Only Businesses Be Required To Be Disabled-Accessible?* FINDLAW’S WRIT LEGAL COMMENTARY Nov. 6, 2002 at <http://writ.findlaw.com/ramasastry/20021106.html> (last visited Sept. 22, 2003).

⁷⁴ McDonald, *supra* note 6, at 6. Experts emphasize this argument, stating that “Congress could not have possibly have had the Internet in mind” and that “the Internet was not even on the radar in the law 1980s and 1990s when the ADA was passed.” *Id.*

⁷⁵ *Hearing on The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites Before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Congress (2000).

⁷⁶ *Hearing on The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites Before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Congress (2000) (statement of Honorable Charles T. Canady, a Representative in Congress from the State of Florida, and Chairman, Subcommittee on the Constitution).

Additionally, Subcommittee Chairman Honorable Charles T. Canady stated in his introduction to the hearing:

In light of the significant impact of the Internet on the economy, the potential costs that application of the ADA may impose on that rapidly expanding segment of the economy and the innovations it has encouraged, and the substantial first amendment implications of applying the ADA to private Internet Web sites and services, I believe it is appropriate for the Constitution Subcommittee to consider the impact of the ADA on the Internet.⁷⁷

However, Congress has yet to act on the expansion of the ADA to private Internet websites. Information presented at the hearing provided Congress with a better understanding of the importance and associated costs in extending the ADA through legislation as well as alternatives to additional regulation, such as education and voluntary participation.⁷⁸ The possible means to increase accessibility may come through a legislative extension of the ADA to private sites and public sites alike. Without Congressional intervention, district and appellate courts may look beyond the plain meaning of the statute and abandon *Access Now*'s logical interpretation of the ADA's scope regarding website accessibility.

V. Conclusion

The *Access Now* court correctly interpreted the current ADA standards in light of Title III's specific list of places of public accommodation. By reading only the actual text rather than extending the accessibility requirements far beyond Congress' original intent, the District Court did not frustrate the statute's application. Although accessibility should be a goal for Internet websites and service providers, the best solution to increase that accessibility is through voluntary compliance or legislative regulation, not judicial activism. The government has taken the initial step by requiring that federal and agency websites provide access to the disabled. In

⁷⁷ *Id.*

⁷⁸ See *Hearing on The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites Before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Congress (2000).

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the years to come, any increased access to the Internet should come through private efforts or by legislation following a careful analysis of the costs involved.