

# ARTICLE

## THE AMERICANS WITH DISABILITIES ACT AND THE INTERNET

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### I. INTRODUCTION

On December 21, 2000, the federal government promulgated handicapped accessibility requirements that will apply to federal department and agency Web sites.<sup>1</sup> Litigants who sue private providers of Internet sites and services

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<sup>1</sup> See Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500 (2000) (to be codified at 36 C.F.R. pt. 1194) [hereinafter EITAS]; see also Carrie Johnson, Giving the Disabled Increased E-Access: Firms Helping Agencies Obey New

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under the Americans With Disabilities Act (“ADA”) will likely use these federal standards as a model for Internet accessibility requirements. Indeed, the Department of Justice believes that the ADA’s accessibility requirements apply to private Internet Web sites and services.<sup>2</sup> And in November 1999, the National Federation of the Blind filed a lawsuit against the Internet service provider America Online, claiming that the ADA’s accessibility requirements apply to AOL’s Internet services and that the manner in which such services are currently provided violates the ADA.<sup>3</sup>

In light of the significance of the Internet economy to recent economic growth, there are significant costs associated with applying the ADA accessibility requirements to this rapidly expanding segment of the economy. Furthermore, there are substantial First Amendment implications of applying the ADA to private Internet sites and services. This article offers some background for those who will be dealing with these complex issues.

Part I of this article provides introductions to the Internet economy, the benefits of the Internet to the disabled, and the ADA. Part II discusses the current legal climate, including the position of the Department of Justice. Part II also discusses the lawsuit by the National Federation of the Blind against America Online, and the efforts to promulgate Internet accessibility standards for federal departments and agencies. Part III details the potential economic effects of applying the ADA to the Internet, and Part IV analyzes current legal precedent. Part V concludes that, because of the diverse effects of applying the ADA to private Internet sites, serious debate should take place before courts allow such an extension.

*A. The Significance of the Internet Economy*

A 1999 Department of Commerce report summarized the remarkable growth of the Internet economy.<sup>4</sup> This growth has been spurred by the rapid increase in the number of consumers with access to computers and the Internet.<sup>5</sup> As a

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Rules, WASH. POST, Aug. 24, 2000, at E3.

<sup>2</sup> See Brief of the United States as Amicus Curiae in Support of Appellant at 6, *Hooks v. OKBridge, Inc.*, No. 99-50891 (5th Cir. Aug. 21, 2000). This case was decided without a published opinion. See *Hooks v. OKBridge*, No. 99-50891, 2000 U.S. App. LEXIS 23035 (5th Cir. Aug. 24, 2000).

<sup>3</sup> See *National Federation of Blind Sues AOL Over Lack of Access*, CHI. TRIB., Nov. 5, 1999, at N10 [hereinafter “*National Federation of Blind*”].

<sup>4</sup> See U.S. DEP’T OF COMMERCE, *THE EMERGING DIGITAL ECONOMY II* 2 (1999).

<sup>5</sup> See *id.*

*The Industry Standard* reports that from 1998 to 1999 the number of web users world-wide increased by 55 percent, the number of Internet hosts rose by 46 percent, the number of web servers increased by 128 percent, and the number of new web address registrations rose by 137 percent.

*Id.*

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result of the increased population on the Internet, the revenues of U.S. Internet companies have also increased.<sup>6</sup> Additionally, a survey of U.S. companies showed that “the proportion of U.S. companies that sell their products over the Internet will jump from 24 percent in 1998 to 56 percent by 2000.”<sup>7</sup> Thus, Internet commerce represents a significant contribution to the recent economic growth in the United States.

*B. The Benefits the Internet Currently Provides to the Disabled*

The Internet has provided vast benefits to the disabled community, particularly the blind.<sup>8</sup> Many in the disabled community, however, have expressed concern that accessing commercial Web sites will become increasingly difficult as more sites use programming languages such as VBScript and JavaScript.<sup>9</sup> These languages are graphics-based and cannot be translated into text by electronic screen readers.<sup>10</sup> Experts report that currently “more than 90 percent of all Web sites have some barriers to users with physical or cognitive disabilities.”<sup>11</sup>

The Internet industry has already responded to many of these concerns. For example, because the change in operating systems from DOS (text-based) to Windows (graphics-based) was detrimental to blind users, Microsoft introduced the Microsoft Active Accessibility component with its Internet Explorer version 3.02.<sup>12</sup> This component contains code that interacts with accessibility aids such as screen readers for the blind or software that helps the

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<sup>6</sup> *See id.* at 5 (“[C]urrent private estimates of 1998 online retail trade range between \$7.0 billion and \$15 billion. Forecasters now project online retail sales in the range of \$40 billion to \$80 billion by 2002.”).

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *See, e.g.,* Sreenath Sreenivasan, *Blind Users Add Access on the Web: Turning Graphics Into Spoken Text*, N.Y. TIMES, Dec. 2, 1996, at D7 (quoting Larry Scadden of the National Science Foundation as saying, “‘The Internet has changed forever the lives of blind people, mainly because it provides independent access to information;’” and Kelly Ford, who runs an accessibility discussion group on the Internet, as saying, “‘Sighted people don’t know how difficult it is for a blind person to use services that everyone else takes for granted, like looking up a phone directory . . . Now that a lot of this is on line, I feel so liberated.’”); Michael Moeller, *Disabling Web Barriers: Dynamic Content, Multimedia Advancements Could Fail Disabled Users*, PC WEEK, May 11, 1988, at 25 (quoting Jamal Mazuri, a blind web user, as stating, “[e]ven with accessibility being an issue, the Web has been a great equalizer. I have access much quicker to more information than ever before.”).

<sup>9</sup> *See* Moeller, *supra* note 8, at 25.

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See* Debra Nussbaum, *Bringing the Visual World of the Web to the Blind*, N.Y. TIMES, Mar. 26, 1998, at G8.

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deaf.<sup>13</sup> In 1997, Microsoft released a new version of Internet Explorer without the Active Accessibility component.<sup>14</sup> This sparked immediate criticism, so Microsoft released Internet Explorer 4.01, which re-instituted Active Accessibility, approximately thirty-five days later.<sup>15</sup> Sun Microsystems also added accessibility features to its 1998 Java Development Kit 1.2.<sup>16</sup> Lotus Development Corporation and International Business Machines Corporation have also offered “disabled-friendly versions of their products.”<sup>17</sup>

Notwithstanding the efforts of private industry to make the Internet more accessible to the disabled, the Department of Justice (“DOJ”) and others have sought to apply the handicapped accessibility requirements of the Americans with Disabilities Act of 1990 to Internet Web sites.<sup>18</sup>

#### *C. The Americans With Disabilities Act*

Title III of the ADA requires publicly accessible businesses to ensure that individuals with disabilities are not subject to discrimination and have full and equal enjoyment of the goods, services, and facilities they provide.<sup>19</sup> The entity must provide all customers, patients and clients, whether disabled or not, the same type and quality of care, service, and access to facilities.<sup>20</sup> Covered entities must make reasonable modifications in policies, practices, and procedures as needed so that disabled individuals can enjoy the company’s services and facilities.<sup>21</sup> Either an individual or the DOJ can bring lawsuits under the ADA.<sup>22</sup>

Deciding whether the Internet is a “place of public accommodation” subject

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<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See* Moeller, *supra* note 8, at 25.

<sup>17</sup> Johnson, *supra* note 1.

<sup>18</sup> *See* Brief of the United States as Amicus Curiae in Support of Appellant at 6; *National Federation of Blind*, *supra* note 3.

<sup>19</sup> *See* 42 U.S.C. § 12182(a) (1994).

<sup>20</sup> *See id.* § 12182(b)(1)(A).

<sup>21</sup> *See id.* § 12182(b)(2)(A)(ii).

<sup>22</sup> *See id.* § 12188(a)(1), (b)(1)(B); U.S. DEP’T OF JUSTICE, THE AMERICANS WITH DISABILITY ACT: TITLE III TECHNICAL ASSISTANCE MANUAL § III-8.1000 (1993). Individuals are not required to bring an administrative charge with a federal agency prior to bringing a lawsuit. *See id.* § III-8.2000. In private individual lawsuits, remedies are limited to permanent or temporary injunctions, restraining orders, or other equitable remedies. *See id.* Compensatory or punitive damages cannot be awarded. *See id.* The court may, however, award the cost of a successful plaintiff’s attorneys’ fees. *See id.* § III-8.5000. If the Department of Justice (“DOJ”) sues, the penalties are more severe. An entity found to be in violation can be fined up to \$50,000 for a first offense and \$100,000 for each subsequent offense. *See id.* § III-8.4000.

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to ADA requirements has several significant implications. First, there are economic implications. An affirmative answer to the question would increase the costs of doing business in the fastest growing segment of the U.S. economy, and would make most anyone who offers goods or services over the Internet a potential defendant in an ADA lawsuit. In addition to large entities, scores of small businesses that use the Internet to introduce their products and services to customers nationwide would be affected. Constitutional implications would also arise. The application of the ADA's requirement to the Internet raises serious First Amendment concerns. Finally, there would be significant implications regarding the scope of the ADA and the extent to which it can reach non-physical places and services delivered through other media, such as newspapers, radio, or television.

### II. THE CURRENT LEGAL CLIMATE

The ADA's applicability to the Internet has become the subject of discussion in policy circles and, more recently, the subject of a prominent lawsuit. This section discusses these legal developments.

#### A. *The Department of Justice*

The DOJ argues that Internet Web sites *are* "public accommodations" subject to the ADA's handicapped accessibility requirements.<sup>23</sup> Deval Patrick, Assistant Attorney General, Civil Rights Division, stated:

Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.<sup>24</sup>

Assistant Attorney General Patrick noted that a covered entity could comply with the accessibility requirements of the ADA by, for example, forgoing exclusive reliance on graphical Web pages.<sup>25</sup> One alternative would be to provide content in text format so that those with visual disabilities can access the information with a screen reading device.<sup>26</sup> Another option is to communicate through alternative mediums that are in more accessible formats,

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<sup>23</sup> See Brief of the United States as Amicus Curiae in Support of Appellant at 20; Ritchenya A. Shepherd, *Net Rights for the Disabled?*, NAT'L L.J., Nov. 22, 1999, at B8, available in LEXIS, News Group File; Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to Sen. Tom Harkin (D, IA) (Sept. 9, 1996), available at <<http://www.usdoj.gov/crt/foia/tal712.txt>>.

<sup>24</sup> Letter to Sen. Tom Harkin.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

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such as audio material or literature printed in large type or Braille.<sup>27</sup>

More recently, the DOJ filed an amicus curiae brief for the United States in the Court of Appeals for the Fifth Circuit in support of the plaintiff in *Hooks v. OKBridge, Inc.*<sup>28</sup> The defendant in *Hooks* operated a Web site that allowed paying members to participate in Internet bridge tournaments and on-line discussion groups related to the game.<sup>29</sup> Appellant Hooks filed suit after OKBridge terminated his membership because of his allegedly obscene and abusive postings on the site's discussion forum.<sup>30</sup> Hooks denied these allegations, claiming they were merely pretext for his termination, which was really based on his disabilities.<sup>31</sup>

The DOJ argued that a company that offers services solely via the Internet is subject to the public accommodations provision of Title III of the ADA.<sup>32</sup> The lower court disagreed with this interpretation of the ADA and granted summary judgement for OKBridge. The court held that Title III does not apply to OKBridge because it lacks a physical location.<sup>33</sup>

*B. Private Lawsuit by the National Federation of the Blind*

In November 1999, the National Federation of the Blind, Inc. ("NFB") filed a complaint against America Online ("AOL"), a provider of "interactive services, Web brands, Internet technologies, and electronic commerce services."<sup>34</sup> NFB's complaint alleged that:

[t]he AOL service is a public accommodation as defined by Title III of the ADA, 42 U.S.C. section 12181(7), in that it is a place of exhibition and entertainment, a place of public gathering, a sales and rental establishment, a service establishment, a place of public display, a place of education, and a place of recreation.<sup>35</sup>

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<sup>27</sup> *See id.*

<sup>28</sup> *See generally* Brief of the United States as Amicus Curiae in Support of Appellant.

<sup>29</sup> *See id.* at 3. The site has 18,000 members from 90 countries. *See id.*

<sup>30</sup> *See id.* at 3-4.

<sup>31</sup> *See id.* at 4. Hooks claims to suffer from bi-polar disorder and other disabilities. *See id.*

<sup>32</sup> *See id.* at 6.

<sup>33</sup> *See Hooks v. OKBridge, Inc.*, No. SA-99-CA-214-EP, slip op. at 7 (W.D. Tex. Aug. 4, 1999) ("If there is no physical structure or facility, there is no place of public accommodation and Title III of the ADA is not applicable.").

<sup>34</sup> Complaint ¶ 15, *National Fed'n of the Blind v. America Online, Inc.*, No. SA-99-CA-214-EP (D. Mass. Filed Nov. 4, 1999), available at <<http://www.education-rights.org/homenfbvaol.html>>. The National Federation of the Blind has about 50,000 members, many of whom are blind. *See id.* ¶ 4. AOL has approximately 17.6 million members worldwide. *See id.* ¶ 16.

<sup>35</sup> *Id.* ¶ 19.

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The complaint also alleged various violations of the ADA by AOL, including failure to remove existing communications barriers from the services provided;<sup>36</sup> failure to make reasonable accommodations to policies, practices, and procedures necessary to allow access by the blind;<sup>37</sup> and failure to make the service fully accessible and independently usable by the blind.<sup>38</sup> In particular, the complaint alleged that:

AOL's proprietary software for the AOL internet service does not function in the standard way required for screen access programs to effectively monitor the computer screen and to fully convert the information into synthesized speech or a refreshable Braille display. Among other things, AOL's proprietary software employs (a) unlabeled graphics, (b) commands that cannot be activated by using the keyboard but which instead can only be activated by using the mouse, and (c) custom controls painted on the screen.<sup>39</sup>

In July 2000, the NFB and AOL announced that they had reached a settlement of the suit in which AOL agreed to make future versions of Internet software compatible with accessibility technology for the blind.<sup>40</sup> Thus, AOL 6.0, released this past Fall, is compatible with screen reader assistive technology.<sup>41</sup> As part of this agreement, the NFB agreed to drop its lawsuit against AOL, but retained the right to renew its claims after one year.<sup>42</sup>

*C. Current Efforts to Establish Internet Accessibility Standards For Federal Departments and Agencies*

The Web sites of federal departments and agencies will be required to be handicapped accessible in coming months.<sup>43</sup> The process of drafting the technical accessibility standards for federal departments and agencies illustrates the types of standards that may apply to the private sector, most notably Internet companies, should the ADA's requirements be applied to it.

1. Reach of Section 508

On August 7, 1998, President Clinton signed into law the Workforce

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<sup>36</sup> See *id.* ¶¶ 28, 31.

<sup>37</sup> See *id.* ¶ 34.

<sup>38</sup> See *id.* ¶ 37.

<sup>39</sup> *Id.* ¶ 23.

<sup>40</sup> See *National Federation of the Blind and America Online Reach Agreement on Accessibility*, P.R. NEWSWIRE, July 26, 2000, available at LEXIS, News Group File.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See Johnson, *supra* note 1; see also Carrie Johnson, *Agencies Act to Ease Use of Internet by Disabled: Changes Mandated by 1998 Amendment Affect Business Too*, WASH. POST, Aug. 24, 2000, at A23.

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Investment Act of 1998, which included section 508 of the Rehabilitation Act Amendments of 1998.<sup>44</sup> The Rehabilitation Act Amendments significantly expanded the federal technology access requirements of the original section 508.<sup>45</sup> The old version of section 508 established binding guidelines for technology accessibility, but the statute lacked an enforcement mechanism.<sup>46</sup> The new version, by contrast, creates binding, enforceable standards.<sup>47</sup> Federal agencies must use these standards in all of their electronic and information technology acquisitions.<sup>48</sup>

Section 508 “does not apply to recipients of Federal funds, and does not directly regulate the private sector.”<sup>49</sup> It does apply, however, to states that receive federal funds under the Technology Related Assistance for Individuals with Disabilities Act of 1988 (“TRAIDA”).<sup>50</sup> Essentially, the states must universally comply with section 508, as “all 50 states, plus the District of Columbia, Puerto Rico, and the four outlying territories” receive grants under TRAIDA.<sup>51</sup>

The language of section 508, which provides that all information technology “used” by federal departments and agencies is to meet accessibility requirements, leaves unresolved whether a federal department or agency employee’s use of a private Internet service such as “Yahoo” (a popular search engine and research tool) subjects that private Internet service to section 508’s accessibility requirements. The Access Board’s proposed rules and two attachments to Attorney General Reno’s memorandum to all heads of federal agencies provide some guidance, but neither supercede the language of section 508 itself.<sup>52</sup>

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<sup>44</sup> See Rehabilitation Act Amendments of 1998, Pub. L. No. 105-220, 112 Stat. 1092 (codified at 29 U.S.C. § 794d (Supp. IV 1999)); see also Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 17,346, 17,346 (2000) (to be codified at 36 C.F.R. pt. 1194) (proposed Mar. 31, 2000) [hereinafter EITAS Proposed Rules].

<sup>45</sup> See EITAS Proposed Rules, 65 Fed. Reg. at 17,346 (“The changes to section 508 contained in the Rehabilitation Act Amendments of 1998 were designed to strengthen the previous law.”).

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* at 17,347-48.

<sup>48</sup> See *id.* at 17,363 (to be codified at 36 C.F.R. § 1194.2(a)).

<sup>49</sup> U.S. DEP’T. OF EDUC., Q&A TITLE IV – REHABILITATION ACT OF 1998 SECTION 508: ELECTRONIC AND INFORMATION TECHNOLOGY, available at <<http://www.usdoj.gov/crt/508/deptofed.html>>.

<sup>50</sup> See *id.* This act was later replaced by the Assistive Technology Act of 1998. See Pub. L. No. 105-394, 112 Stat. 3627 (codified at 29 U.S.C. § 3001-58 (Supp. IV 1999)).

<sup>51</sup> Adam Clayton Powell III, *U.S. Government Web Site Regulations Being Released Today*, FREEDOM FORUM ONLINE, May 12, 1999, available at <<http://www.freedomforum.org/technology/1999/5/12govweb.asp>>.

<sup>52</sup> See EITAS Proposed Rules, 65 Fed. Reg. at 17,354.

These standards do not apply to external web sites, including search engines, which are

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2. Scope of Section 508

The amended version of section 508 provides that “[w]hen developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency” must ensure that such electronic and information technology is accessible to people with disabilities in the absence of a showing of undue burden.<sup>53</sup> “Electronic and information technology” is not defined in the statute, but was described in Reno’s 1999 memorandum to the heads of all federal agencies to “include[] computers (such as hardware, software, and accessible data such as web pages), facsimile machines, copiers, telephones, and other equipment used for transmitting, receiving, using, or storing information.”<sup>54</sup>

Notwithstanding Reno’s interpretation of the statute, section 508 directed an entity called the Access Board to publish standards which set forth (1) “a definition of electronic and information technology” and (2) technical and functional performance criteria necessary to achieve electronic information access and implementation of the accessibility requirements.<sup>55</sup> The Access Board was instructed to consult with the Departments of Education, Commerce, and Defense; the General Services Administration; the Federal Communications Commission; the electronic and information technology industry; and disability organizations in carrying out its responsibilities.<sup>56</sup> The Access Board appointed members from each of these organizations to the Electronic and Information Technology Access Advisory Committee (“EITAAC”), which advised the Access Board as it developed the proposed accessibility standards.<sup>57</sup>

The Access Board was required to define electronic and information technology to be consistent with the definition of information technology contained in the Clinger-Cohen Act.<sup>58</sup> Congress enacted the Clinger-Cohen Act in 1996 for the purpose of creating consistency across federal agencies in

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not developed or procured by a Federal agency. For example, an employee of an agency may use a search engine which is based on a commercial web site. That search engine does not have to comply with these standards.

*Id.*; see U.S. DEP’T OF EDUC., *supra* note 49 (“[Section 508] does not regulate the private sector.”); *Section 508 Frequently Asked Questions (FAQ)* (last modified June 2, 1999) <<http://www.usdoj.gov/crt/508/508faq.html>> (“Section 508 establishes obligations only for the federal government. Section 508 does not **directly** affect either private businesses or state and local governments.”).

<sup>53</sup> 29 U.S.C. § 794d(a)(1)(A) (Supp. IV 1999).

<sup>54</sup> Memorandum from Attorney General Janet Reno to Heads of All Federal Agencies (Apr. 2, 1999), *available at* <<http://www.usdoj.gov/crt/508/memohead.html>>.

<sup>55</sup> See 29 U.S.C. § 794d(a)(2)(A).

<sup>56</sup> See *id.*

<sup>57</sup> See EITAS Proposed Rules, 65 Fed. Reg. at 17,348.

<sup>58</sup> See 29 U.S.C. § 794d(a)(2)(A)(i).

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the acquisition, use, and disposal of information technology.<sup>59</sup> The Clinger-Cohen Act defines information technology as “any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency.”<sup>60</sup> The term also refers to computers, ancillary equipment, software, firmware, support services, and related resources.<sup>61</sup>

3. Proposed Rules Under Section 508

On May 12, 1999, the EITAAC published its Final Report.<sup>62</sup> The EITAAC stated that “[t]he purpose of this report is to provide a set of recommended standards for Federal procurement officers and commercial suppliers of electronic and information technology and services that will result in access to and use of the technology and information by individuals with disabilities.”<sup>63</sup> The report detailed only “minimally acceptable standards,” and encouraged parties involved in the design and procurement of the relevant technology to “go beyond these standards to maximize the accessibility and usability of products by all individuals.”<sup>64</sup> The EITAAC’s recommended standards ensure that all electronic and information technology subject to the requirements of section 508 will make such technology more accessible to “as wide a range of people with disabilities as possible.”<sup>65</sup> The recommendations are meant to benefit those who may have any of the following disabilities: visual disabilities (e.g., blindness, low vision and lack of color perception); hearing disabilities; physical disabilities (e.g., limited strength, reach or manipulation); speech disabilities; language, learning or cognitive disabilities (e.g., reading disabilities, thinking, remembering, or sequencing disabilities); any other disabilities (including epilepsy and short stature); or any combination of the above conditions.<sup>66</sup>

Press reports have noted that neither the EITAAC Final Report nor the Access Board’s definition of electronic and information technology has delineated which entities’ Web sites are covered by or excluded from section

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<sup>59</sup> See Clinger-Cohen Act of 1996, Pub. L. No. 104-106, 110 Stat. 679 (codified as amended at 40 U.S.C. § 1401-1503 (Supp. IV1999)).

<sup>60</sup> 40 U.S.C. § 1401(3)(A).

<sup>61</sup> See *id.* § 1401(3)(B).

<sup>62</sup> See ELECTRONIC & INFO. TECH. ACCESS ADVISORY COMM., FINAL REPORT (1999), available at <<http://www.access-board.gov/sec508/commrept/eitaacrpt.htm>> [hereinafter EITAAC FINAL REPORT].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *id.*

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508's regulations.<sup>67</sup> Thus, the question of whether the accessibility requirements could apply to state universities, for example, is largely left unanswered.<sup>68</sup> When asked at a press conference whether the Access Board had formulated any clear online accessibility guidelines applicable to state universities and similar organizations, Dave Yanchulis, who is an accessibility specialist and research coordinator for the Access Board, simply told university webmasters to contact the Access Board for guidance.<sup>69</sup>

Despite lacking clear indications as to which Web sites are covered, the EITAAC Final Report details technical and functional performance criteria that aim to determine whether a covered technology product or system is "accessible".<sup>70</sup> In general, an information technology system is accessible to the disabled if it can be used in a way that does not depend solely on a single sense or ability.<sup>71</sup>

The EITAAC recommendations governing online publishing include requirements for the captioning of streaming audio or video,<sup>72</sup> restriction on the use of color to convey information,<sup>73</sup> and the provision of "at least one mode that does not require user vision."<sup>74</sup> Other proposed regulations ban touch screens,<sup>75</sup> prohibit moving text or animation (unless a static display containing the same information is also accessible),<sup>76</sup> and require all Web sites to "provide at least one mode that minimizes the cognitive, [sic] and memory ability required of the user."<sup>77</sup>

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<sup>67</sup> See Adam Clayton Powell III, *Proposed U.S. Government Web Site Regulations Approved*, FREEDOM FORUM ONLINE, May 13, 1999, available at <<http://www.freedomforum.org/technology/1999/5/13govwebsite.asp>>.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See EITAAC FINAL REPORT, *supra* note 62, § 5.2. This section and its subparts detail the accessibility requirements for various disabilities. See *id.*

<sup>71</sup> See *id.* § 5.2.1; see also *id.* §§ 5.2.1.4 (addressing limited hearing), 5.2.1.6 (addressing "limited manual dexterity, reach and/or strength"); U.S. DEP'T OF EDUC., *supra* note 49 (noting that a system providing "output only in audio format would not be accessible to people with hearing impairments, and a system . . . requir[ing] mouse actions to navigate would not be accessible to people who cannot use a mouse because of dexterity or visual impairment").

<sup>72</sup> See EITAAC FINAL REPORT, *supra* note 62, § 5.3.5.1.

<sup>73</sup> See *id.* § 5.3.2.8.

<sup>74</sup> *Id.* § 5.2.1.1.1. This can be accomplished "by formatting all information in a form compatible with Braille and speech-synthesis devices." Powell, *supra* note 51.

<sup>75</sup> See EITAAC FINAL REPORT, *supra* note 62, § 5.2.1.14.

<sup>76</sup> See *id.* § 5.2.1.7.2.

<sup>77</sup> *Id.* § 5.2.1.9; see also *id.* §§ 5.2.1.1 – 5.2.1.16 (providing other examples of the specific accessibility requirements proposed by the EITAAC in its Final Report). Features of federal department and agency Internet sites that require alteration were further discussed in an attachment to a memorandum from Attorney General Janet Reno. See *Information*

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The EITAAC standards also incorporate specific provisions that apply to electronic and information technology that uses information or applications from the web.<sup>78</sup> The standards require that such technology meet the “Priority 1” and “Priority 2” requirements of the Web Content Accessibility Guidelines 1.0, which were created by the World Wide Web Consortium (“W3C”) standards body.<sup>79</sup> One such “Priority 1” requirement is that the Web site “[u]se the clearest and simplest language appropriate for [the] site’s content.”<sup>80</sup>

Based on the suggestions in the EITAAC’s Final Report, the Access Board proposed the following requirements for “Web-based information or applications:”

- (1) A text equivalent for every non-text element shall be provided via “alt” (alternative text attribute), “longdesc” (long description tag), or in element content.
- (2) Web pages shall be designed so that all information required for navigation or meaning is not dependent on the ability to identify specific colors.
- (3) Changes in the natural language (*e.g.*, English to French) of a document’s text and any text equivalents shall be clearly identified.
- (4) Documents shall be organized so they are readable without requiring an associated style sheet.
- (5) Web pages shall update equivalents for dynamic content whenever the dynamic content changes.
- (6) Redundant text links shall be provided for each active region of a

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*regarding Section 508 of the Rehabilitation Act, available at <<http://www.usdoj.gov/crt/508/info.html>>.*

<sup>78</sup> See EITAAC FINAL REPORT, *supra* note 62, § 5.3.3.

<sup>79</sup> See *id.* § 5.3.3.1. The Web Content Accessibility Guidelines 1.0 can be found on the Internet. See W3C, *Web Content Accessibility Guidelines 1.0* (last modified May 5, 1999) <<http://www.w3.org/TR/WAI-WEBCONTENT/>> [hereinafter “W3C, *Guidelines*”]. The Access Board’s “Notice of Proposed Rulemaking on Standards for Electronic and Information Technology Implementing Section 508 of the Rehabilitation Act” (“NPRM”) did not appear to incorporate “priority level two” checkpoints. See EITAS Proposed Rules, 65 Fed. Reg. 17,346, 17,355 (2000) (“[T]he proposed standards include provisions which are based generally on priority level one checkpoints of the Web Content Accessibility Guidelines 1.0 . . .”).

<sup>80</sup> See W3C, *Guidelines*, *supra* note 79, ¶ 14.1. Paragraph 14.1 of the W3C, *Guidelines* is not reflected in the NPRM. See EITAS Proposed Rules, 65 Fed. Reg. at 17,364-65 (to be codified at 36 C.F.R. § 1194.23(c)). This paragraph was rejected in the final rule promulgated by the Access Board because “it is difficult to enforce since a requirement to use the simplest language can be very subjective.” EITAS, 65 Fed. Reg. 80,500, 80,510 (2000) (to be codified at 36 C.F.R. pt. 1194).

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server-side image map.

(7) Client-side image maps shall be used whenever possible in place of server-side image maps.

(8) Data tables shall provide identification of row and column headers.

(9) Markup shall be used to associate data cells and header cells for data tables that have two or more logical levels of row or column headers.

(10) Frames shall be titled with text that facilitates frame identification and navigation.

(11) Pages shall be usable when scripts, applets, or other programmatic objects are turned off or are not supported, or shall provide equivalent information on an alternative accessible page.

(12) Equivalent alternatives for any multimedia presentation shall be synchronized with the presentation.

(13) An appropriate method shall be used to facilitate the easy tracking of page content that provides users of assistive technology the option to skip repetitive navigation links.<sup>81</sup>

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<sup>81</sup> EITAS Proposed Rules, 65 Fed. Reg. at 17,364-65 (to be codified at 36 C.F.R. § 1194.23(c)). The proposed standard differs from “Checkpoint 1.1” of the W3C *Guidelines*, which states:

Provide a text equivalent for every non-text element (e.g., via “alt”, “longdesc”, or in element content). *This includes*: images, graphical representations of text (including symbols), image map regions, animations (e.g., animated GIFs), applets and programmatic objects, ascii art, frames, scripts, images used as list bullets, spacers, graphical buttons, sounds (played with or without user interaction), stand-alone audio files, audio tracks of video, and video.

W3C, *Guidelines*, *supra* note 79, ¶ 1.1. The NPRM deviates from this wording and mandates the use of “alt,” “longdesc,” or text equivalent in element content, rather than suggesting these techniques as one of many possible solutions. *See* EITAS Proposed Rules, 65 Fed. Reg. at 17,364 (to be codified at 36 C.F.R. § 1194.23(c)(1)). Consequently, the Access Board’s rule is restricted to HTML-based Web technologies and cannot accommodate evolving Web technologies which might require other types of text equivalents. Thus, “the NPRM is outdated with regard to Web technologies before the rule is finalized; and would become severely outdated by the time of the next refreshment of Section 508 standards, which could conceivably be five years or more in the future.” Judy Brewer, Comments Submitted in Response to the Notice of Proposed Rulemaking on Electronic and Information Technology Accessibility Standards (May 31, 2000), *available at* <<http://www.w3.org/2000/05/w3cwai-508nprm.html>>. This problem was rectified in the final rule promulgated by the Access Board. *See* EITAS, 65 Fed. Reg. at 80,511 (“This provision incorporates the exact language recommended by the WAI [Web Accessibility Initiative] in their comments to the proposed rule.”).

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### 4. Enforcement of Section 508

Congress instituted an administrative complaint procedure that was scheduled to become effective on August 7, 2000, which would have enabled any individual with a disability to file a complaint alleging that a department or agency had not complied with the accessible technology standards.<sup>82</sup> The complexity of the issues related to the rulemaking process and the difficulties of conforming federal procurement programs to the proposed rules, however, have resulted in the need to delay enforcement.<sup>83</sup> In response to this need, President Clinton signed into law an appropriations bill that included an amendment to Section 508 of the Rehabilitation Act.<sup>84</sup>

Section 508 will utilize the same complaint process that is used for Section 504 of the Rehabilitation Act for complaints alleging discrimination on the basis of disability in federally conducted programs or activities.<sup>85</sup> It will provide for “injunctive relief and attorney’s fees to the prevailing party, but does not include compensatory or punitive damages.”<sup>86</sup>

### 5. Final Rule Issued by the Access Board

On December 21, 2000, the Access Board issued its final rule on electronic and information technology and accessibility standards.<sup>87</sup> Section 1194.22(a)-(p) of the rule regards Web-based Intranet and Internet information and applications.<sup>88</sup> In a note to section 1194.2, the final rule states that the Board interprets paragraphs (a) through (k) of section 1194.22 as “consistent with” certain priority one Checkpoints of the WC3 Guidelines.<sup>89</sup> One such

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<sup>82</sup> See 29 U.S.C. § 794d(f)(1), (3) (Supp. IV 1999).

<sup>83</sup> See EITAS Proposed Rules, 65 Fed. Reg. at 17,347.

<sup>84</sup> See Fiscal Year 2001 Military Construction Appropriations Act, Pub. L. No. 106-246, § 2405, 114 Stat. 511, 555 (2000) (amending the enforcement provision of section 508 to read “Effective 6 months after the date of publication by the Access Board of final standards”).

<sup>85</sup> See EITAS Proposed Rules, 65 Fed. Reg. at 17,347-48.

<sup>86</sup> See U.S. DEP’T OF EDUC., *supra* note 49.

<sup>87</sup> See EITAS, 65 Fed. Reg. at 80,500. Consequently, complaints and lawsuits may be filed under the rule June 21, 2001. See *supra* note 84 (discussing the congressional amendment of section 508’s enforcement provision, allowing suits six months after the Access Board’s final rules are enacted).

<sup>88</sup> See EITAS, 65 Fed. Reg. at 80,525 (to be codified at 36 C.F.R. § 1194.22).

<sup>89</sup> See *id.* at 80,510. Comments provided by the Board on the rule also state that:

The final rule does not reference the WCAG 1.0. However, the first nine provisions in § 1194.22, paragraphs (a) through (i), incorporate the exact language recommended by the WAI in its comments to the proposed rule or contain language that is not substantially different than the WCAG 1.0 and was supported in its comments.

Paragraphs (j) and (k) are meant to be consistent with similar provisions in the WCAG 1.0, however, the final rule uses language which is more consistent with enforceable regulatory language. Paragraphs (l), (m), (n), (o), and (p) are different than

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Checkpoint, 11.4, is listed as “consistent with” section 1194.22(k) of the final rule, which states: “[a] text-only page, with equivalent information or functionality, shall be provided to make a web site comply with the provisions of this part, when compliance cannot be accomplished in any other way. The content of the text-only page shall be updated whenever the primary page changes.”<sup>90</sup> Checkpoint 11.4 states that “[i]f, after best efforts, you cannot create an accessible page, provide a link to an alternative page that uses W3C technologies, is accessible, has equivalent information (or functionality), and is updated as often as the inaccessible (original) page.”<sup>91</sup> It appears, then, that the rule sets out in section 1194.22(k) a minimum accessibility standard – “text-only page, with equivalent information” – that must be present on a Web site “when [accessibility] compliance cannot be accomplished in any other way.”<sup>92</sup> It is not clear, however, whether or to what extent the Board intended interpretations of subsection (k) to be informed by the W3C Guidelines’ definitions of “equivalent” or “best efforts.”

III. POTENTIAL ECONOMIC RAMIFICATIONS OF APPLYING THE ADA’S  
REQUIREMENTS TO THE INTERNET

Should the ADA be expanded to cover private Internet companies, the breadth of its definitions of accessibility provisions, combined with the technologically innovative ways in which information is being communicated

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any comparable provision in the WCAG 1.0 and generally require a higher level of access or prescribe a more specific requirement.

*Id.*

<sup>90</sup> *Id.* at 50,525 (to be codified at 36 C.F.R. § 1194.22(k)).

<sup>91</sup> W3C, *Guidelines*, Checkpoint 11.4. W3C Guidelines define “accessible” as follows: “Content is accessible when it may be used by someone with a disability.” See W3C, *Guidelines*, Appendix B—Glossary. The W3C Guidelines define “equivalent” as follows:

Content is “equivalent” to other content when both fulfill essentially the same function or purpose upon presentation to the user . . .

Since text content can be presented to the user as synthesized speech, braille, and visually-displayed text, these guidelines require text equivalents for graphic and audio information. Text equivalents must be written so that they convey all essential content. Non-text equivalents (e.g., an auditory description of a visual presentation, a video of a person telling a story using sign language as an equivalent for a written story, etc.) also improve accessibility for people who cannot access visual information or written text, including many individuals with blindness, cognitive disabilities, learning disabilities, and deafness.

*Id.* The W3C Guidelines do not define “best efforts,” but the final rule promulgated by the Access Board refers to an exception for those situations in which applying the rules would cause an “undue burden,” which the rule defines as “significant difficulty or expense.” 65 Fed. Reg. at 80,506 (also stating that the term “undue burden” is based on caselaw interpreting Section 504 of the Rehabilitation Act, Title III of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iii), and Title I of the ADA, 42 U.S.C. § 12111(10)(A)).

<sup>92</sup> 65 Fed. Reg. at 80,525 (to be codified at 36 C.F.R. § 1194.22(k)).

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on the Internet, make precise assessments of economic ramifications difficult. Some economic effects, however, are readily foreseeable.

As a first consideration, several of the standards proposed by the EITAAC in its Final Report—but not present in the Notice of Proposed Rulemaking—appear particularly difficult to comply with, given their vague parameters.<sup>93</sup> For example, proposed rules 5.2.1.9.1<sup>94</sup> and 5.2.1.10.1<sup>95</sup> contain protected subjects related to those with disabilities (those with “cognitive” and “memory” disabilities, and those with “learning disabilities”) that could potentially encompass all manner of forgetfulness and short attention spans.<sup>96</sup>

In order to comply with these rules, a Web site can provide, for example, text that explains graphics. Depending on the type and intricacies of the graphics, however, such explanatory information could prove costly to provide because it increases the amount of information the Web site is required to convey.<sup>97</sup> Moreover, the graphics may not effectively translate into text.<sup>98</sup>

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<sup>93</sup> See, e.g., *supra* notes 72-77 and accompanying text.

<sup>94</sup> See EITAAC FINAL REPORT, *supra* note 62, § 5.2.1.9.1 (“Provide at least one mode that minimizes the cognitive, [sic] and memory ability required of the user.”).

<sup>95</sup> See *id.* § 5.2.10.1 (“Provide at least one mode that accommodates people with learning disabilities.”).

<sup>96</sup> The recommendations would have required that products be accessible to persons who have cognitive and learning disabilities were excluded from the Access Board’s proposed rules. While the number of citizens who might be covered by these and other federal Internet accessibility requirements remains uncertain, according to a report issued by the Surgeon General, more than 50 million Americans, or roughly one in five citizens, suffer from some form of mental illness each year. See Marc Kaufman, *Mental Illness in America: 50 Million People a Year*, WASH. POST, Dec. 14, 1999, at A3. At a May 12, 1999, press conference, concern was expressed about the vagueness of some of the proposed regulations. See Powell, *supra* note 67. For example, section 5.2.1.9.1 of the rules proposed in the EITAAC Final Report would require provision of “at least one mode that minimizes the cognitive, [sic] and memory ability required of the user.” EITAAC FINAL REPORT, *supra* note 62, § 5.2.1.9.1. When asked what that section meant, “advisory board member James R. Fruchterman, CEO of Arkenstone, a leading nonprofit supplier of reading devices for those with reading and visual disabilities[,]” replied, “[y]ou bring up a very challenging section that we spent a lot of time discussing . . . . We felt it was important to mention without being able to devise a simplification standard for people who have, say, difficulty with memory.” Powell, *supra* note 67.

<sup>97</sup> Closed-captioning of most new television programs is currently required by Section 305 of the Telecommunications Act of 1996. See 47 U.S.C. § 613(b) (Supp. IV 1999). To help businesses alleviate the costs of closed-captioning, however, there is a small business tax credit available for providing “accessibility.” See 26 U.S.C. § 44(c)(2)(B) (1994) (providing tax credit for “eligible access expenditures,” defined as including “amounts paid or incurred . . . to provide qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments”).

<sup>98</sup> Curtis Chung, Director of Technology for the National Federation of the Blind, has acknowledged that the extent to which a Web site creator must go to make graphics

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Alternatively, Web site designers could provide sound features to achieve compliance. But as noted by Jim Twu, general counsel for an Internet advertising company, “[s]ound features are not often utilized because they make the Web site slower to load and more expensive to operate, as they require much more bandwidth. Also, many Internet users do not have sound capacity.”<sup>99</sup> A further detriment of providing sound is that the increase in necessary bandwidth keeps more people on the Web site longer, which in turn makes it more difficult for others to access the site.<sup>100</sup>

The exponential growth of the Internet economy could be slowed if Internet companies were forced to devote Web space to relaying information in a format accessible to the handicapped.<sup>101</sup> Companies would be required to reduce the number of revenue-generating graphics and advertisements that attract potential customers in order to include the required information.

## IV. CURRENT LEGAL PRECEDENT

### A. *The First, Second, and Seventh Circuits*

The National Federation of the Blind brought its suit against AOL in federal

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handicapped accessible is difficult to determine. See *Interview: Answers About Blind Computer Use*, SLASHDOT, Dec. 10, 1999, available at <<http://slashdot.org/articles/99/12/09/1342224.shtml>>. In an interview with the online magazine *Slashdot* he stated, “If information is to be displayed graphically (for example, a chart or image), ensure that there is at least some textual description of this available . . . . I fully appreciate that space and interpretation can place limits on this.” *Id.*

<sup>99</sup> S. Connolly, *Compliance with the Americans With Disabilities Act in Cyberspace*, 3 CYBERSPACE LAWYER 1, 8 (1999). What Is.com offers the following tutorial on bandwidth: The bandwidth of a transmitted communications signal is a measure of the range of frequencies the signal occupies . . . . All transmitted signals, whether *analog* or *digital*, have a certain bandwidth . . . . Generally speaking, bandwidth is . . . proportional to the complexity of the data for a given level of system performance. For example, it takes more bandwidth to download a photograph in one second than it takes to download a page of text in one second. Large sound files, computer programs, and animated videos require still more bandwidth for acceptable system performance. Virtual reality (VR) and full-length three-dimensional audio/visual presentations require the most bandwidth of all.

*Bandwidth*, WHATIS, Oct. 5, 2000, available at <[http://whatis.com/WhatIs\\_Definition\\_Page/0,4152,211634,00.html](http://whatis.com/WhatIs_Definition_Page/0,4152,211634,00.html)>.

<sup>100</sup> See Jon Swartz, *Tolls Rising on Information Highway*, SAN. FRAN. CHRON., Feb. 12, 1998, at B1 (“[T]he increased use of pictures and sound over the Web is gobbling up more expensive bandwidth and causing users to stay online longer.”).

<sup>101</sup> Internet advertising revenues more than doubled between 1997 and 1998. See U.S. DEP’T OF COMMERCE, *supra* note 4, at 4; *supra* notes 4-7 and accompanying text (discussing the recent explosive growth in Internet usage).

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district court in Boston, Massachusetts.<sup>102</sup> This venue may have been chosen, at least in part, because the United States Court of Appeals for the First Circuit has held that an establishment of “public accommodation” under Title III of the ADA is “not limited to actual physical structures.”<sup>103</sup> In so deciding, the First Circuit reasoned that “[t]he plain meaning of the terms do not require ‘public accommodations’ to have physical structures for persons to enter.”<sup>104</sup> The court noted that because “travel service” is one of the enumerated “public accommodations,” Congress clearly intended the statute to cover businesses that lack a physical structure, as many travel agencies conduct business via telephone.<sup>105</sup> Thus, the court concluded that “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.”<sup>106</sup>

The First Circuit also broached the subject of whether the ADA reached beyond the facilitation of access to goods and services and extended to the *types* of goods and services offered.<sup>107</sup> The court quoted section 12182 of the ADA, which addresses denial of “the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.”<sup>108</sup> The court noted that a non-frivolous argument exists as to whether the statute intends to “shape and control which products and services may be offered” because “there is nothing in [the legislative] history that explicitly precludes an extension of the statute to the substance of what is being offered.”<sup>109</sup>

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<sup>102</sup> See Complaint, National Fed’n of the Blind v. America Online, Inc., No. SA-99-CA-214-EP (D. Mass. Filed Nov. 4, 1999), available at <<http://www.education-rights.org/homenfbvaol.html>>.

<sup>103</sup> *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See id.*

<sup>108</sup> *Id.* (quoting 42 U.S.C. § 12182(b)(1)(A)(i) (1994)).

<sup>109</sup> *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19, 20. “Suppose, for example, a company that makes and distributes tools provides easy access to its retail outlets for persons with every kind of disability, but declines to make even minor adjustments in the design of the tools to make them usable by persons with only quite limited disabilities.” *Id.* at 20. The question regarding differences between the provision of access to services and the opportunity to “benefit from” those services arises starkly in the context of Internet Web sites. Books sold on a Web site, for example, may not have to be provided in Braille under the Americans With Disabilities Act (“ADA”), whereas the Web site itself may be required to be accessible by the blind. The question remains, however, as to how an online version of a newspaper should be treated. In this case, the Web site and the service supplied, namely information, would appear to be one and the same.

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In *Doe v. Mutual of Omaha Insurance Company*, the Seventh Circuit discussed the nondiscrimination requirements of Title III of the ADA as they relate to insurance policy caps for AIDS and AIDS related complications.<sup>110</sup> Judge Posner cited *Carparts* in dicta, finding that the plain meaning of Title III of the ADA mandates:

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.<sup>111</sup>

Notwithstanding the court's finding that the ADA regulates access to goods, the court concluded that "section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled . . . ."<sup>112</sup>

The Second Circuit has also acknowledged that the ADA is not limited to physical access.<sup>113</sup> In *Pallozzi v. Allstate Life Insurance Company*, the court held, in the context of the issuance of life insurance policies, that "Title III's mandate that the disabled be accorded 'full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation,' suggests to us that the statute was meant to guarantee them more than mere physical access."<sup>114</sup>

*B. The Sixth and Third Circuits*

The First Circuit's decision in *Carparts* and the DOJ's position that the ADA applies to the Internet are at odds with the decisions of other federal courts.<sup>115</sup>

In *Parker v. Metropolitan Life Insurance Co.*, the Sixth Circuit addressed the applicability of the ADA to an employee benefit plan.<sup>116</sup> The court held that such a plan is "not a good offered by a place of public accommodation."<sup>117</sup> The court further found that "public accommodation" is limited to physical places, and as such "Title III does not govern the content of a long-term disability policy offered by an employer."<sup>118</sup> The Sixth Circuit maintained that

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<sup>110</sup> See *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 558-59 (7th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3432 (U.S. Jan. 11, 2000) (No. 99-772).

<sup>111</sup> *Id.* at 559 (emphasis added) (citation to *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19 omitted).

<sup>112</sup> *Mutual of Omaha Ins. Co.*, 179 F.3d at 563.

<sup>113</sup> See *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999).

<sup>114</sup> *Id.* (alteration in original) (citation omitted).

<sup>115</sup> See *supra* notes 23-33 and accompanying text.

<sup>116</sup> 121 F.3d 1006, 1008 (6th Cir. 1997).

<sup>117</sup> *Id.* at 1010.

<sup>118</sup> *Id.* at 1010, 1012.

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the ADA regulates only the availability of goods and services offered by a public accommodation, and not the contents of those goods and services.<sup>119</sup>

In *Ford v. Schering-Plough Corp.*, the Third Circuit followed the Sixth Circuit and held that the ADA's accessibility requirements do not extend to the products offered by companies whose physical offices are covered.<sup>120</sup> The court found that the plain meaning of Title III is that "public accommodation" is limited to physical places.<sup>121</sup> The court reasoned that this interpretation is consistent with the examples of "public accommodations" listed in the ADA, which refer to physical places.<sup>122</sup> Thus, the court stated, "[t]he fact that an insurance office is a public accommodation . . . does not mean that the insurance policies offered at that location are covered by Title III."<sup>123</sup>

The Third Circuit also pointed to DOJ regulations that are at odds with Assistant Attorney General Deval Patrick's conclusion that the ADA applies to the Internet.<sup>124</sup> The court quoted from the regulations:

"The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes."<sup>125</sup>

Thus, in holding that "an insurance office must be physically accessible to the disabled but need not provide insurance that treats the disabled equally with the non-disabled," the court rejected DOJ documents which state that Title III does cover the substance of goods offered by entities whose physical structures are covered.<sup>126</sup>

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<sup>119</sup> *See id.* at 1012.

<sup>120</sup> 145 F.3d 601, 612-13 (3d Cir. 1998) ("Since [plaintiff] received her disability benefits via her employment . . . she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation.").

<sup>121</sup> *See id.* at 612.

<sup>122</sup> *See id.* at 612 & n.3 (citing 42 U.S.C. § 12181(7) (1994)).

<sup>123</sup> *Ford*, 145 F.3d at 612.

<sup>124</sup> *See id.* at 613; *see also supra* notes 23-27 and accompanying text.

<sup>125</sup> *Ford*, 145 F.3d at 613 (quoting 28 C.F.R. pt. 36, app. B, at 640 (1997)).

<sup>126</sup> *Ford*, 145 F.3d at 613 ("While the Dept. of Justice has issued other documents stating that Title III does cover the substance of insurance contracts, such an interpretation is 'manifestly contrary' to the plain meaning of Title III and, accordingly, is not binding on this court.") (citation omitted).

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C. *The First Amendment and Supreme Court Precedent*

Applying the ADA to the Internet presents novel First Amendment concerns.<sup>127</sup> Requiring Web sites to “mirror” content in a handicapped accessible form does not mean that the government is forcing Web sites to alter the substance of what they say. Web site creators would remain free to determine content, but would be required to make that content handicapped accessible on some part of the site. Such a requirement is not “forced speech” wherein one is required to publish ideas with which one does not agree. Rather, the “forced speech” would amount to “forcing” the form in which certain information is delivered, with the consequent “forced use” of limited Web space and server capacity for the delivery of information in handicapped accessible form.

1. *Miami Herald Publishing Co. v. Tornillo*

Although it addressed a content-based regulation that required newspapers to publish opinions with which their editors did not agree, *Miami Herald Publishing Co. v. Tornillo*, comes closest to dealing with the issues at hand.<sup>128</sup> *Tornillo* involved a Florida “right of access” statute wherein a newspaper that published criticism of political candidates was forced to print the candidate’s response at no cost to the candidate and in the same type and space as used to print the original criticism.<sup>129</sup> The Supreme Court held that the statute violated the First Amendment because it operated as a command to newspapers to publish that which “‘reason’ tells them should not be published . . . .”<sup>130</sup> The Court held that the statute exacted a content-based penalty due to the cost of printing the reply and because the reply took limited space that could have been devoted to preferable material.<sup>131</sup>

In a similar fashion, extending the ADA’s requirements to the Internet could be seen as exacting a “penalty” on Web publishers whenever they choose to relay information in a way found to be insufficiently “accessible” to the handicapped. The penalty takes the form of the increased costs of buying space on a Web server to accommodate the extra information required to create handicapped accessible content, and other related direct costs such slower downloads, increased consumer frustration, and a potential loss of customers.

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<sup>127</sup> The Supreme Court has held that the Internet is a distinct medium of communications, distinct from broadcast media, and that it is to be provided the broadest possible First Amendment protections, such as that applied to newspapers. *See Reno v. ACLU*, 521 U.S. 844, 868-70 (1997). “[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [the Internet].” *Id.* at 870.

<sup>128</sup> 418 U.S. 241, 256-58 (1974).

<sup>129</sup> *See id.* 244.

<sup>130</sup> *Id.* at 256.

<sup>131</sup> *See id.* at 257 & n.22.

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The *Tornillo* Court analyzed the nature of newspaper publishing, noting that “‘since the amount of space a newspaper can devote to ‘live news’ is finite, if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else.’”<sup>132</sup> In addition to financial restraints such as the amount of advertising, publishers are limited in the amount of news they can print by physical factors such as circulation and customer complaints of “‘bulky, unwieldy papers.’”<sup>133</sup> Similarly, subscribers or browsers of Web sites often complain that sites take particularly long to “download”. Requiring Internet sites to include information in forms that require more “download” time, such as audio files that duplicate the substance of written information, would slow the process of information retrieval.

The Court found two additional grounds on which to reject the right of access statute in *Tornillo*. First, the Court argued that editors who face the statute’s penalties might choose to reduce political and electoral coverage rather than become subject to the access mandate.<sup>134</sup> Thus, “[g]overnment-enforced right of access inescapably ‘dampens the vigor and limits the variety of public debate.’”<sup>135</sup> Second, the Court held that the statute impermissibly “intrude[s] into the function of editors.”<sup>136</sup> The Court noted that “[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”<sup>137</sup> As such, it is an editorial process wherein the staff makes decisions regarding the size and content of the paper and how it will treat newsworthy issues and people.<sup>138</sup> The government had not proffered a persuasive argument as to how regulation of this editorial process could coexist “with First Amendment guarantees of a free press as they have evolved to this time.”<sup>139</sup>

Requiring Web site creators to devote limited Web space to duplicating information in handicapped accessible form in order to satisfy the ADA’s requirements could similarly restrict the scope of editorial judgment exercised by Web site creators. Companies would be forced to devote Web space to information they may not have otherwise included, thereby restricting some other speech in which the company might have engaged. Thus, although

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<sup>132</sup> *Id.* at 257 n.22 (quoting Note, 48 TUL. L. REV. 433, 438 (1974)).

<sup>133</sup> *Tornillo*, 418 U.S. at 257 n.22 (quoting Bagdikian, *Fat Newspapers and Slim Coverage*, COLUM. JOURNALISM REV. 19 (Sept./Oct. 1973)).

<sup>134</sup> *Tornillo*, 418 U.S. at 257.

<sup>135</sup> *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

<sup>136</sup> *Tornillo*, 418 U.S. at 258.

<sup>137</sup> *Id.*

<sup>138</sup> In *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, the Supreme Court noted that *Tornillo*’s concern of interference with the editorial process was an “independent ground” for invalidating the statute because of “its effect on editors’ allocation of scarce newspaper space.” 475 U.S. 1, 11 n.7 (1985).

<sup>139</sup> *See Tornillo*, 418 U.S. at 258.

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applying the ADA to the Internet may not constitute “content-based” restrictions, it would constitute “content-reducing” restrictions.

2. *Turner Broadcasting System, Inc. v. FCC*

In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court reversed the district court’s decision that the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable companies to carry local broadcast stations on cable systems, do not violate the First Amendment.<sup>140</sup> The Supreme Court applied an intermediate level of scrutiny<sup>141</sup> to the challenged provisions and found that because they were unrelated to the content of speech,<sup>142</sup> they imposed “a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”<sup>143</sup> Under this intermediate analysis, a majority of the Supreme Court found that the regulations furthered Congress’ policy of ensuring that free local broadcast stations remain economically viable and available to those without cable television.<sup>144</sup>

Further, the majority found that “[t]he scope and operation of the challenged provisions ma[de] clear . . . that Congress designed the must-carry provisions

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<sup>140</sup> 512 U.S. 622, 668 (1994).

<sup>141</sup> The Supreme Court uses either intermediate scrutiny or strict scrutiny for statutes that invoke First Amendment concerns. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 790 (1994). Under intermediate scrutiny, “regulations are permissible so long as they ‘are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’” *Id.* at 791 (citation omitted). If regulations are not content-neutral, strict scrutiny applies and the regulation must be “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.” *Id.* at 790 (citation omitted) (alteration in original).

<sup>142</sup> *See Turner*, 512 U.S. at 642-44.

<sup>143</sup> *Id.* at 642.

<sup>144</sup> *See id.* at 647 (“By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue—or, in the case of noncommercial broadcasters, sufficient viewer contributions—to maintain their continued operation.”) (citation omitted); *id.* at 646.

Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable.

In unusually detailed statutory findings, Congress explained that because cable systems and broadcast stations compete for local advertising revenue, and because cable operators have a vested financial interest in favoring their affiliated programmers over broadcast stations, cable operators have a built-in “economic incentive . . . to delete, reposition, or not carry local broadcast signals.” Congress concluded that absent a requirement that cable systems carry the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened.  
*Id.* (citations omitted) (alteration in original).

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not to promote speech of a particular content, but . . . to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content.”<sup>145</sup>

Some might argue, drawing an analogy to *Turner Broadcasting*, that Congress has an interest in seeing that Web sites that are currently handicapped accessible (e.g., those that have not become graphics-based) are protected from extinction by market forces. But the economic dynamics addressed by Congress in the Cable Television Consumer Protection and Competition Act of 1992 were much different than the dynamics that govern the Internet.<sup>146</sup> Unlike the cable industry, which is controlled by a limited number of cable companies, each with control over access to its system, the Internet is a vastly more open system.<sup>147</sup>

Also, the ADA does not contain congressional findings related to the market dynamics of the Internet; consequently, there is no cognizable congressional intent to legislatively alter those dynamics. Furthermore, “[a]lthough a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium.”<sup>148</sup> Unlike the chokehold that exists in the cable industry, “[n]o single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.”<sup>149</sup> Thus, for First Amendment purposes, the Internet should be treated like newspapers, not the cable industry.<sup>150</sup>

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<sup>145</sup> *Id.* at 649.

<sup>146</sup> *Cf. Reno v. ACLU*, 521 U.S. 844, 870 (1997) (discussing the dynamics governing Internet growth).

<sup>147</sup> *See id.* (“[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity.”).

<sup>148</sup> *Turner*, 512 U.S. at 656.

<sup>149</sup> *Reno*, 521 U.S. at 853 (citation omitted).

<sup>150</sup> As the Supreme Court noted in *Turner Broadcasting*:

A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers’ access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.

The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home . . . . A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

*Turner*, 512 U.S. at 656. Web designers, unlike cable operators, cannot silence other voices “with the flick of a switch,” as they are almost always independent operators occupying

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The must-carry statute in *Turner Broadcasting* is distinguishable from the right of access statute in *Tornillo* because the former affects only editorial discretion over quantity, while the latter affects choices over content.<sup>151</sup> Thus, “[t]he number of channels a cable operator must set aside [under the statute] depends only on the operator’s channel capacity; hence, an operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers.”<sup>152</sup> The *Turner Broadcasting* majority further noted that the provisions “do not compel cable operators to affirm points of view with which they disagree . . .”<sup>153</sup> and “do not produce any net decrease in the amount of available speech.”<sup>154</sup> In contrast, the *Tornillo* statute imposed its right of access only when the newspaper chose to print a criticism of a political candidate.<sup>155</sup> Thus, unlike the must-carry provisions, the statute in *Tornillo* “exact[ed] a penalty on the basis of . . . content.”<sup>156</sup>

Unlike the cable programmers in *Turner Broadcasting*, but like the newspaper publishers in *Tornillo*, Web designers subject to ADA requirements would be able to avoid the ADA’s penalties by designing their Web sites such that, for example, fewer graphics or video images were used.

The *Turner Broadcasting* majority distinguished *Pacific Gas* by stating that the access requirement in *Pacific Gas*, unlike in *Tornillo*, “was not triggered by speech of any particular content . . .”<sup>157</sup> Because of this distinction, the *Tornillo* editor, unlike the *Turner Broadcasting* cable operator or the *Pacific Gas* utility, might “conclude that ‘the safe course is to avoid controversy.’”<sup>158</sup> Thus, access requirements that are triggered by certain content could “diminish the free flow of information and ideas.”<sup>159</sup>

Justice O’Connor, writing for herself and Justices Scalia, Ginsburg, and

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their own independent niche in a much larger system of networks. *See id.*

<sup>151</sup> *See supra* Sections IV-C-1 to -2 (discussing the *Tornillo* and *Turner Broadcasting* cases).

<sup>152</sup> *Turner*, 512 U.S. at 644 (citation omitted).

<sup>153</sup> *Id.* at 647.

<sup>154</sup> *Id.*

<sup>155</sup> *See supra* text accompanying note 129.

<sup>156</sup> *Turner*, 512 U.S. at 653 (quoting *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)) (alterations in original).

<sup>157</sup> *Turner*, 512 U.S. at 654. *Cf. Pacific Gas & Elec. Co. v. Public Utilities Comm’n of Cal.*, 475 U.S. 1, 9, 20-21 (1985). In *Pacific Gas*, the Supreme Court held that a California Public Utilities Commission order requiring a utility to place the newsletter of a third party into its billing envelopes violated the First Amendment because the order: (a) required the utility’s expression of particular points of view; (b) forced the utility to alter its speech to conform with an agenda it did not set; and (c) was not justified by the state’s interest in promoting speech to make a variety of views available to ratepayers. *See id.*

<sup>158</sup> *Turner*, 512 U.S. at 656 (quoting *Tornillo*, 418 U.S. at 257).

<sup>159</sup> *Turner*, 512 U.S. at 656.

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Thomas, dissented from this view.<sup>160</sup> Justice O'Connor noted that because a cable operator can only carry a limited number of channels at one time, the operator must choose some programmers in lieu of others.<sup>161</sup> It thus follows that the must carry statute exacts a content based penalty.<sup>162</sup> O'Connor voiced her opinion as follows:

my conclusion that the must-carry rules are content based leads me to conclude that they are an impermissible restraint on the cable operators' editorial discretion as well as on the cable programmers' speech. For reasons related to the content of speech, the rules restrict the ability of cable operators to put on the programming they prefer, and require them to include programming they would rather avoid. This, it seems to me, puts this case squarely within the rule of *Pacific Gas & Elec. Co.*<sup>163</sup>

Thus, Justices O'Connor, Scalia, Ginsburg, and Thomas would have applied the same strict scrutiny, instead of intermediate scrutiny,<sup>164</sup> to the provisions challenged in *Turner Broadcasting*, as the court applied to the challenged provisions in *Pacific Gas* and *Tornillo*.<sup>165</sup> Consequently, these Justices would likely apply the same strict scrutiny to an analysis of the ADA's applicability to the Internet because of the "zero-sum" problem that would occur when, for example, a decision to add video might require the adding of closed-captioning, with the consequent reduction of Web space otherwise available to communicate ideas.

V. CONCLUSION

Private litigants may use accessibility requirements that apply to federal department and agency Web sites as a model for accessibility standards that should apply to private Web sites through the ADA.

The Internet is a burgeoning source of information that has, without the burden of accessibility regulations and threatened ADA litigation, already provided the disabled community with vast new opportunities to retrieve information. Thus, the growing importance of the Internet industry to the U.S. economy, the potentially vast liability implications for private companies of applying the ADA to the Internet, the costs of communication over the medium, the First Amendment implications of an application of the ADA to the Internet, and recent efforts to press for litigation of these issues, all counsel carefully addressing the potential pitfalls, both economic and constitutional, of

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<sup>160</sup> See *id.* at 674-82.

<sup>161</sup> See *id.* at 674.

<sup>162</sup> See *id.* at 678.

<sup>163</sup> *Id.* at 681-82.

<sup>164</sup> See *supra* note 141.

<sup>165</sup> See *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 30 (1985); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

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