Vanderbilt Journal of Entertainment & Technology Law

Volume 2
Issue 2 *Spring 2000*

Article 5

2000

The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the Americans with Disabilities Act of 1990?

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Are Commercial Websites Places of Public Accomodation Under the Americans with Diasabilities Act of 1990?

Title III of the Americans with Disabilities Act of 1990 (ADA) requires that places of public accommodation provide equal access to both able-bodied and disabled customers.[1] Commercial places of sales, service, and entertainment qualify as places of public accommodation.[2] A movie theater therefore must take reasonable efforts to ensure its facility is accessible to the disabled.[3] But what if a theater owner creates a separate company to offer entertainment content exclusively over a website? Can the website contain barriers to access by the disabled? Issues of online accessibility are becoming increasingly dramatic. A recent suit filed against America Online,[4] hearings before the House Judiciary Committee,[5] and an opinion by Judge Posner of the Seventh Circuit[6] all aim to extend accessibility requirements to the Internet by including websites within Title III's definition of "places of public accommodation."

byPATRICKmaroney

The text of the ADA does not support such an extension. The interpretative canons of *noscitur a sociis* [7] and *ejusdem generis*[8] dictate that "places of public accommodation" refer exclusively to physical facilities. The canons also sufficiently resolve any possible statutory ambiguities, thereby foreclosing the opportunity for contrary agency interpretations.[9] Although the intentionally broad purpose and design of the ADA make the statute an attractive avenue for advocates of online expansion, that same purpose and design limit the ADA to physical facilities. This note addresses the issues in two parts. First, it presents the arguments just listed. Second, it recognizes the need for alternate accessibility regulation and then advances a case for seeking legislative solutions. Online accessibility is a critical issue. The existing ADA is just the wrong tool for the right job.

Disabilities and the Web

Ninety-eight percent of websites are inaccessible to the disabled.[10] This inaccessibility is not inherent to the Internet but the result of strategic choices in design. When developers use graphics, sound, rich media, and complex page layout for a web page's navigation, they render sites inaccessible to individuals with particular disabilities.[11] Screen access programs for the blind, for instance, work by converting the text on a site into an auditory signal or braille the user receives over a specially designed keypad.[12] Despite recent advances in these assistance programs, they continue to have limitations. Screen access programs can not recognize most graphics and convert them into translatable text. When a screen reader comes to a graphic, "it says only the word 'graphic' or 'icon.' Users are aware of the graphic's presence but are unable to assess its meaning."[13]

Graphics do not just include the photographs and art on a web page. They can include functional tools such as menu bars, arrows used to represent the next page of a document, and icons indicating the home page or a link to another site. Moreover, just because a word appears on a page does not mean a translator can decipher it. Web designers commonly embed words in pictures, layer them over images, or otherwise artistically render text. All these design choices can make words unrecognizable to access software.[14] Similar design problems also affect individuals with other disabilities. The deaf are unable to utilize web pages which provide primary information in the form of sounds, and individuals with mobility restrictions are often excluded from navigating websites which require exceptionally precise mouse or wand movement.[15]

In the face of these access barriers, it may seem surprising that 76 percent of disabled Americans are online compared to only 50 percent of the general population.[16] The difference though critically captures both the unique importance of the Internet to the disabled and the truly tragic harm of discrimination in website accessibility. First, one qualifier. Not all real-world disabilities are "online disabilities." Those confined to a wheelchair but with the full use of their upper body can just as easily utilize a mouse, keyboard and monitor as an able-bodied person. When this article hereafter speaks of disabilities, the intent is to cover those individuals with disabilities that affect their online experience. This clarification, however, does not explain the 66% difference in adoption.[17] That difference is likely rooted in a second critical factor. The Internet offers especially valuable opportunities to all disabled Americans, even those with "online disabilities," and the disabled have accordingly been quick to adopt the Internet. For instance, despite the difficulties of using a wand to navigate websites with precise navigation links, paraplegics can visit online museums, stores, or discussion boards much easier than visiting the real-world equivalents. For blind and deaf individuals, the social stigma that can accompany their disability makes online identification by IP address or avatar,[18] and not by physical appearance and actions, a liberating place. The Internet truly has the potential to offer the disabled a sense of independence and community that otherwise might be unavailable.

Access barriers, moreover, did not always litter the Internet.[19] Before the World Wide Web, the Internet was a largely text-based world.[20] Bandwidth and personal computer power could not support graphic and sound transfers. This "simplicity" uniquely empowered the disabled. Text recognition software enabled blind users to explore the full network without the same barriers of access that prevented them from exploring elements of the real world.[21] They could engage in online chats without their disability being apparent and freely navigate early websites through text-based links.[22] On a simpler Internet, the deaf could navigate cyberspace without

encountering sound elements and media streaming.[23]

Web page architecture has since changed. Increases in bandwidth have allowed web designers to build and deliver pages with graphic rich environments and embedded media displays such as Java applets, Shockwave displays, and video streaming.[24] These additional features can include information that websites once would have presented in a pure textual format as well as additional information unavailable in translatable formats. Consequently, an increasing percentage of information contained on web pages is inaccessible to the disabled. As Crista L. Earl of the American Foundation for the Blind notes, "all that glitz causes a lot of trouble."[25] What once was an architecture that fostered equality has become an architecture of inaccessibility. Leading Internet scholar Lawrence Lessig has observed that, "when graphics entered the Net...the blind became 'blind' again. As sound files or speech in Avatar space have been created, the deaf have become 'deaf' again."[26] There is a genuine sense of possibility denied. Many disabled individuals experienced a unique sense of freedom on the early Net only to have it taken away by "advances" in web page content and "progress" in web page construction.

The issue of accessibility is becoming increasingly dramatic. Bandwidth increases drive website development, and the issues of disabled access are likely to become more apparent as high-speed access becomes more popular.[27] While the public migration from dial-up to high-speed cable and DSL[28] connections offers web designers the opportunity to create more attractive, entertaining, and feature rich sites, it threatens to exclude individuals with online disabilities from a growing part of society and the economy. As the architecture of the Net becomes increasingly concrete, now is the time to decide how the value of equal access should shape the structure of the Net. Inaccessibility is not the inherent nature of the Internet but the result of our deliberate choices in website design.[29]

The Limited Accessibility of Commercial Websites

Accessibility problems particularly plague commercial websites. Distinguishing a website from the millions of other ".coms" requires crafting a unique "user experience," and commercial sites have adopted highly stylized icons and graphics to design a memorable and recognizable customer interface. In a market were revenue is often generated from "catching eyeballs," pages increasingly can contain little text that is not stylized in the form of a colorful graphic or scrolled across the screen in a Java applets or Shockwave sequence.[30] The trend is particularly evident in entertainment sites. Entertainment sites tend to use cutting edge technology and offer a glimpse of where web design is heading. The homepage for the feature movie *The X-Men* contains few words that are not in the form of a graphic, entirely unintelligible to access software.[31] Entertainment oriented sites like MP3.com also rely heavily on streaming media.[32] This includes movies and audio files transmitted over players such as Apple's Quicktime, Real Media's Real Player, and Microsoft's Windows Media Player. Information conveyed over these players does not offer anything similar to the closed captioning found on TV. Yet, even the "simpler" sites present accessibility barriers. A test conducted for this note revealed that all ten of the most popular websites were inaccessible to the disabled.[33]

The increasing inaccessibility of commercial Internet sites has prompted several excluded individuals to seek relief via the ADA.[34] The ADA has provided a vehicle for achieving access to "brick and mortar" businesses and facilities, and it remains the most comprehensive federal regulation on disability access.[35] The Act requires employers, state and local governments, and private places of public accommodation to offer reasonable services or measures to insure people are not discriminated against based on their disabilities.[36] The ADA was enacted to make strides in eradicating the exclusion of the disabled from social, commercial, and labor settings.[37] The text of the statute does not mention electronic space, however, and the challenge of statutory interpretation is to determine whether the ADA's greater purpose warrants treating commercial websites as places of public accommodations despite their lack of the physical facilities common to all the examples of public accommodations listed in the statute.

Public Accommodations and the ADA

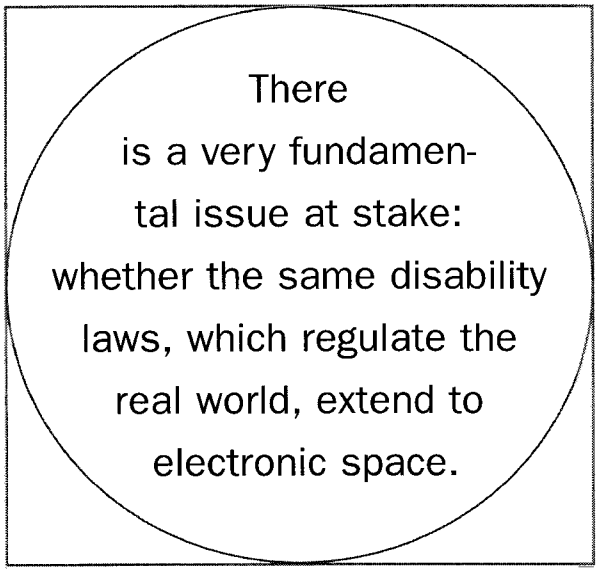
The ADA consists of five titles.[38] Title III covers public accommodations[39] and public transportation services operated by private entities.[40] Section 12182(a) of Title III prohibits discrimination on the

"basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns. . . or operates a place of public accommodation."[41] The ADA does not specifically define "places of public accommodation." It only states "places of public accommodation" must be operated by a private entity, affect commerce, and fall within 12 categories of places.[42] Among the categories, three include business models frequently replicated on the web. The text of § 12182(7) includes the following relevant examples of "places of public accommodation":

> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales. . .establishment;
>
> (F) a laundromat, dry-cleaner, bank, . . .travel service, shoe repair service, . . . office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.[43]

Commercial websites operated by private entities offer entertainment, sales, and professional services similar to those listed in §§ (C), (E), and (F). There are online pharmacies, clothing stores, and music sites.[44] Yet in one essential respect, websites differ dramatically from the theaters, shopping centers, and stadiums listed in the statute. websites do not have tangible facilities. While their designers, owners, and servers are physically housed in the real world, customers do not actually enter or visit these places. Interaction is limited to cyberspace and the use of services provided by the web page.[45] In contrast, all the examples of public accommodation listed in the ADA are real-world, brick and mortar businesses.[46]

Still, the Internet is often described in tangible "brick and mortar" terms. We now commonly speak of chat *rooms*, an information *superhighway*, Internet *architectures*, and web pages being "*under construction.*"[47] All of these real-world metaphors draw on the parallels between electronic space and the tangible world—each capturing how similar e-space and real space can be. The obvious textual question, therefore, is whether the real-world examples of Title III limit the application of the ADA, or whether the catch-all phrases found in each of the sections—"or other place of . . . entertainment,"[48] "or other sales . . . establishment,"[49] "or other service establishment"[50]—extend beyond real-world facilities.



The National Federation for the Blind has already raised this issue in a recent complaint filed against America Online. Baran v. AOL alleges AOL violated the ADA by failing to make reasonable accommodations for users' lack of sight.[51] In particular, the complaint alleges the program required to gain access to America Online's services is incompatible with the assistance programs blind individuals use to translate web pages. The plaintiffs contend that "AOL has particularly designed its AOL service so that it is incompatible with screen access software programs for the blind...and has failed to remove communications barriers presented by its designs thus denying the blind independent access to this service."[52] Of particular note to website operators, AOL's alleged role as an electronic place of entertainment, commerce and sales—within the meaning of public accommodation—is an essential premise of the complaint.[53]

AOL does differ from most website operators in that it provides not only content but access software. The user must install a version of America Online software in order to log in and access AOL's exclusive content or use its servers to access the "outside" web.[54] Baran alleges it is this software that is blocking disabled access.[55] Most websites, in contrast, do not provide access software and instead rely on access by the user's choice of web browser and Internet Service Provider (ISP). Still, the implications of Baran should not be uniquely limited to AOL's partial role as a software company. Every website has access elements. These include the links that connect the user to the available content on the subdirectory pages of the

site[56] as well as the layout of the material presented on the screen. ADA regulation of the Internet, therefore, would not be limited to ISP's and portal sites like Yahoo!, Northernlights, and Excite.

There is a very fundamental issue at stake, whether the same disability laws, which regulate the real world, extend to electronic space. There are now approximately 1 billion web pages[57] and the implications of demanding accessibility in the large number of those sites that might fall under the purview of the ADA present issues demanding serious consideration. The determination of the issue requires examining statutory text, legislative purpose, and common law precedent. In the end, their resolution ultimately offers testimony that even the most important laws and policies in the real world do not always translate to effective regulation on the Internet.

Textual Interpretations Advanced in Precedential Authority

As the Supreme Court has observed "the starting point, as always, is the language of the statute."[58] To understand the language of § 12181(7), it is helpful to explore the competing judicial interpretations of its text. No court has yet directly ruled whether Title III's text includes commercial websites. The only case on point addressed the issue in *dicta*, with Judge Posner of the Seventh Circuit Court of Appeals stating websites were indeed ADA places of public accommodation.[59] Posner unfortunately did not explain his conclusion and instead simply cited the First Circuit's holding in Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England.[60] Carparts is one of several relevant cases involving employer-offered insurance plans. Each case considers whether "places of public accommodation" include insurance plans without physical places of client interaction.[61] The analogy to websites is apparent. A number of circuits have severely criticized Carparts, however, with the Sixth's Circuit's holding in Parker v. Metropolitan Life Insurance representing the most critical attack on the First Circuit's textual analysis.[62] Although the circuit split undermines each case's precedential value, Carparts and Parker offer a framework for comparing the competing textual interpretations of Title III. The First Circuit has read the ADA's general use of the term "service establishment" expansively,[63] while the Sixth Circuit contends the canon of *noscitur a sociis* requires places of public accommodation to have physical structures.[64]

Service Without Physical Accommodation

First and Seventh Circuit precedent read the text of 42 U.S.C. § 12181(a) to support the application of the ADA to commercial insurance plans lacking physical places of public accommodation. In Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, the First Circuit found places of public accommodation were not limited to physical structures.[65] Carparts and its sole employee sued a trade association from which the company obtained medical insurance for its employee.[66] The complaint alleged the association's cap on benefits for A.I.D.S. related illnesses discriminated based on disability.[67] Critically, the employer distributed the self-funded plan, and the association collected all claims over the telephone or through the mail.[68] There was not a physical office where insured clients brought their claims or a place were they interacted with the association's insurance staff. The district court found this absence of a connection between a physical place of public accommodation and the alleged discrimination invalidated Carparts's Title III claim.[69]

On review, the First Circuit Court of Appeals reversed. The court held that ADA public accommodations were "not so limited" and an insurer who provides services on the job or over the telephone can qualify as a provider of a place of public accommodation.[70] The court's textual support drew on § 12181(7)(F)'s use of the terms "travel service" and "other service establishments" to define places of public accommodation. Section 12181(7)(F) includes a "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."[71] The First Circuit reasoned that by "including 'travel service' among the list of services considered 'public accommodations,' Congress clearly contemplated that other "service establishments' include providers of services which do not require a person to physically enter an actual physical structure."[72] "Many travel services conduct business by telephone or correspondence," the court noted, and do not require "their customers to enter an office in order to obtain their services."[73] The ambi-

guity apparently justified extending similar coverage to the insurance policy in Carparts, despite § 12181(7)(F)'s specific mention of an "insurance office." As the court noted, "this ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures."[74]

Judge Torruella's opinion determined that it would be "irrational" and "absurd...to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not."[75] Such a conclusion "would run afoul of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public."[76] Torruella's reading of the term "travel service" created enough alleged ambiguity to draw in these purposive and intentionalist arguments.

The First Circuit's textual reasoning has garnered support in other circuits. Judge Richard Posner has not only embraced critical aspects of the Carparts holding but also specifically extended them to websites. As part of his majority opinion in Doe v. Mutual Omaha Insurance Co.,[77] Posner stated,

> The core meaning of this provision, *plainly enough*, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, *website*, (whether in physical space or *electronic space*)... that is open to the public cannot exclude disabled persons from entering the facility and once inside from using the facility in the same way the non-disabled do.[78]

Posner's citation to Carparts suggests the Seventh Circuit, at least via *dicta*, has joined the First Circuit and several district courts in recognizing the legitimate extension of Title III to places which do not provide physical accommodations.[79] Posner's opinion also appears to go beyond Carparts. Carparts dealt exclusively with § 12181(7)(F) and service establishments. Websites not only provide commercial services, but also commercial sales, entertainment and other § 12181(7) accommodations. Carparts did not consider these categories, and none of them include terms as ambiguous as "travel service." Any direct application of First Circuit precedent to websites, therefore, is limited to websites offering § 12181(7)(F) services.

However, the other 11 categories of places of public accommodation do include catchalls similar to the phrase "other service establishments."[80] Both Posner's statement and the Baran complaint seek to include websites offering non-service accommodations within these catchalls. Carparts does not directly comment on such an extension, but the First Circuit's strong desire to support a broad interpretation of the ADA's purpose does offer support.[81] Purposive arguments indeed loom large in this area. For the moment, however, it is first important to continue examining the competing interpretations of "places of public accommodation" and the text of 42 U.S.C. § 12181(7), for "legislative purpose is expressed by the ordinary meaning of the words used."[82]

Noscitur a Sociis: Judicial Responses to Carparts

There are competing analyses of the 42 U.S.C. § 12181(7). The Sixth Circuit has consistently applied the canon of *noscitur a sociis* to reject the ADA's extension to intangible places of public accommodation.[83] Parker v. Metropolitan Life Insurance involved an employee who sued his employer and its medical plan for failing to cover certain long-term illnesses.[84] Similar to Carparts, the employer administered the health plan and the employee did not visit MetLife's offices.[85] Unlike Carparts, however, the Sixth Circuit refused to find the health plan maintained a "place of public accommodation." The opinion was particularly critical of the First Circuit's textual analysis. Parker accused the First Circuit of "disregard[ing] the statutory canon of construction, *noscitur a sociis*."[86] The canon of *noscitur a sociis* instructs that "a term is interpreted within the context of the accompanying words 'to avoid the giving of unintended breadth to the Acts of Congress.'"[87] Courts should ascertain the meaning of questionable or doubtful words or phrases in a statute by reference to the meaning of other words or phrases associated with it.[88] Applying *noscitur a sociis*, the Sixth Circuit noted that "every term listed in § 12181(7) and subsection (F) is a physical place open to public access."[89] The terms used in the section—"auditorium," "movie theater," "museum," "park," "nursery," "food bank," and "gymnasium,"—all refer to places with "resources utilized by physical access."[90] The court concluded the ADA thus only covered similar physical places of public

accommodation.[91]

Yet the First Circuit's reading relied on the very same text. Carparts held that while the ADA only listed physical examples, the general term "travel service" when coupled with the phrase "other establishments of service" was intended to cover both tangible and intangible "places."[92] The Sixth Circuit disputed this textual interpretation. It found that "rather than suggesting that Title III includes within its purview entities other than physical places, it is likely that Congress simply had no better term than 'service' to describe an office where travel agents provide travel services and a place where shoes are repaired."[93] Contrary to the First Circuit, the Sixth Circuit concluded that *noscitur a sociis* required a "travel service" be a physical place.

Other circuits have adopted this interpretation. In Ford v. Ring-Plough, the Third Circuit Court of Appeals aligned itself with Parker.[94] The court noted that "the First Circuit failed to read the examples of public accommodations" and "pursuant to the doctrine of *noscitur a sociis*, the terms that the First Circuit finds ambiguous should be interpreted by reference to the accompanying words of the statute...to avoid the giving of unintended breadth to the Acts of Congress."[95] The Third Circuit found neither the term "public accommodation" nor any of the terms in 42 U.S.C. § 12181(7) refer to non-physical access or even suggest any ambiguity as to their meaning.[96]

As this split indicates, the circuits advance contrary textual arguments. The Sixth and Third Circuits rely on *noscitur a sociis* to limit ADA extension while the First, Seventh, and Eighth suggest the inclusion of catchalls warrant extending the definition of public accommodation to intangible places.

Seeking a Resolution

The Sixth and Third Circuits' textual arguments offer the more convincing reading. The term "travel service" and the various catchall phrases are best defined in light of the immediately surrounding text. Websites are intangible places. Title III requires physical structures. And while the text of the ADA also includes a broad statement of purpose, that purpose must be read in light of the surrounding sections. Finally, regardless of whether a court agrees with a restrictive textual analysis, efforts to extend the ADA to websites through the interpretation of the existing statute risk wasting political energy. The Supreme Court has become increasing hostile to expansive applications of the ADA, and Sutton v. United Airlines, in particular, demonstrates the Court's growing reliance on strict textualism, even amidst strong purposive arguments, to deny ADA extensions.[97]

Noscitur a Sociis and *Ejusdem Generis*: Textual Resolutions

The Sixth Circuit's reading of "public accommodation" better fits the plain meaning of the text. The "service" in "travel service" simply does not create ambiguity when read in the context of the surrounding words. As Parker noted, "Every term listed in § 12181(7) and (F) is a physical place open to public access."[98] An "insurance office," "laundromat," "barber shop," "gas station," "funeral parlor," and "office of an accountant or lawyer" are all physical places. Section 12181(7)(F), moreover, mentions a "shoe repair service" along side the "travel service."[99] Shoe repair services are offered through physical places of public accommodation and generally not over the telephone or outside a connection to a physical place of public accommodation. The Sixth Circuit thus plausibly concluded, "Congress simply had no better term than 'service' to describe an office where travel agents provide travel services and a place where shoes are repaired."[100] Furthermore, a separate ADA Title covers many of the concerns the First Circuit had with "travel services" sold exclusively over the phone. [101] Title VI amends Title II of the Communications Act of 1934 to mandate common communications carriers support telephone relay systems.[102] These systems enable people with hearing and speech impairments to communicate by telephone with persons who may or may not have such disabilities. This includes conversations with travel agents.[103] Expanding the text of § 12181(7)(F) is unnecessary to fulfill the purpose of the ADA.

Outside the definition of public accommodation, Title III speaks in purely physical terms. Parker noted that "a 'place,' as defined by the applicable regulations, is 'a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve public accommodation categories.'"[104] "'Facility,' in turn, is defined as 'all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property,

including the site where the building, property, structure or equipment is located.'"[105] The enforcement mechanisms also speak exclusively in physical terms. The Architectural Barriers Compliance Board is charged with setting minimum guidelines for Title III compliance in order to "ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities."[106] These surrounding sections all address issues and remedies that are ill fitted for travel services exclusively conducted over the telephone or mail.

Yet, *noscitur a sociis* only addresses the first step in the First Circuit's logic. The First Circuit does not suggest employer-insurance policies are "travel services," but that because "travel service" can refer to a service without a physical place of public accommodation, the catchall phrase "other service establishments" can also include intangible "places" like the Carparts insurance program. While *noscitur a sociis* limits "travel services" to physical places, a separate canon applies to catchall phrases like "other service establishments." *Ejusdem generis* instructs that when general words follow an enumeration of specific words, the general words are to be read as applying only to the same general kind or class as the specific words.[107] Every term listed in § 12181(7)(F) "is a physical place open to public access."[108] Reading the phrase "or other service establishments" to justify including public accommodations lacking a physical structure runs contrary to the plain meaning of the text. Commercial website are not "other service establishment[s]." But can they fall into any of the eleven other categories of places of public accommodation?

Ejusdem generis also resolves questions pertaining to public accommodations outside commercial services. The eleven other § 12181(7) categories include their own catchalls.[109] The phrases are all similarly proceeded exclusively by physical examples of sales establishments, places of entertainment, etc. *Ejusdem generis* thus denies their application to intangible places. Posner's and Baran's attempts to draw on the catchalls to include websites offering commercial sales, entertainment, recreation, etc., run contrary to the plain meaning of the text and the clarity of this textual interpretation suggests there may be an alternate way of interpreting the Carparts holding.

Although the First Circuit attempted to offer textual support for its decision, the true rationale for Carparts appears to lie not in strict textual integrity but in the court's previously mentioned expansive view of the ADA's purpose and legislative history.[110] The opinion repeatedly refers to the ADA's purpose and intent,[111] and Judge Torruella's opinion appears to explode, then exploit, alleged ambiguities in the text to reach the purposive arguments necessary to justify its holding. The text of the statute, however, leaves little room for such maneuvering. *Noscitur a sociis* and *ejusdem generis* clearly show that the terms "travel service" and "other places of" should be limited to physical places, and an analysis of the entire statute shows the text speaks in purely physical terms. Carparts's examination of the purpose of the statute is justified. But while the text itself contains a broad statement of purpose, the enumerated purpose must be read in the context of the surrounding statute.

ADA's Attraction as a Cure-All: Judge-Made Law

Exploding the text in order to achieve an expansive perception of the ADA's purpose is a tempting option. There are compelling arguments of expansive purpose and legislative history surrounding the ADA, and they provide numerous straws for supporters of purpose--based interpretations to grasp. However, the actions of Congress in addressing website accessibility in other statutes, as well as the limitations of the *current* ADA, demonstrate that even if the text of 42 U.S.C. § 12181 were ambiguous, the *current* ADA should not be extended to commercial websites based on perceived statutory purposes and notions of legislative history.

The Supreme Court has recognized it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purpose."[112] Congress codified the ADA's purpose in the statute's text. Section 12101(b) states the ADA's express purpose is "to invoke the *sweep* of congressional authority . . . in order to address the *major areas of discrimination* faced *day-to-day* by people with disabilities;"[113] to "provide a *clear and comprehensive* national mandate for the elimination of discrimination,"[114] and "to provide *clear, strong, consistent enforceable* standards addressing discrimination against individuals with disabilities."[115] When President Bush signed the ADA in 1990, he stated the legislation

embodied "the full flowering of our democratic principles" and promised "to open up *all aspects* of American life to individuals with disabilities."[116] Both Congress and the President adopted an Act that they intended to be broad in scope and reach all areas of *existing* society.[117]

Yet nowhere does the ADA's statement of purpose mention the Internet or intangible places of public accommodation. While Congressional reports repeatedly state the ADA was intended to bring the disabled into the "mainstream of American life,"[118] the Internet was simply not a part of mainstream life in 1990. Its rapid growth was unforeseen by lawmakers even a decade ago. The Internet's absence from the original debate over the ADA thus raises serious issues of statutory interpretation. In the absence of a conscious exclusion (the now pervasive nature of the Internet was unrealized at the time), does the statute's general purpose warrant overlooking the absence of electronic space from the list of places of public accommodation?

An extension is tempting. In fact, the next four paragraphs could easily convince a reader enamored of purposivism of an extension's necessity and viability. Online inaccessibility is quickly becoming a "major area of discrimination faced day-to-day by people with disabilities"[119] as commerce and community rapidly move to the Internet.[120] Businesses now exist that exclusively provide services via the web and do not maintain any physical facilities for public accommodation. Companies such as CDNOW and Amazon.com sell music CDs, videos, and books exclusively online.[121] Beyond entertainment, pharmacies, general stores, and almost every aspect of the commercial market are migrating to the Internet. Combined, these ventures represent an increasing chunk of the marketplace that, wrapped in complex graphics and minimal text commands, could exclude many disabled Americans. The ADA would surely cover these ventures if they existed in the real world,[122] and thus the general shift to e-business threatens to dilute the ADA's effectiveness. Chief Judge Martin's dissent in Parker correctly predicted that "[a]s the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted."[123]

The legislative history of the ADA reflects consistent efforts to keep the definition of public accommodation broad and inclusive. In its first incarnation before the 100th Congress, the precursor to the ADA limited the definition of public accommodations to those types of businesses covered by Title II of the Civil Rights Act of 1964.[124] That bill faded, and a second version reemerged in May of 1989.[125] It carried a much broader notion of public accommodations and defined the term in the example format found in the final Act.[126] The expansion was the product of political bargaining. The Bush administration supported the expansion of public accommodations beyond those in Title II of the Civil Rights Act only on the condition the Senate delete "a provision which would have allowed plaintiffs to recover compensatory and punitive damages for intentional discrimination in employment."[127]

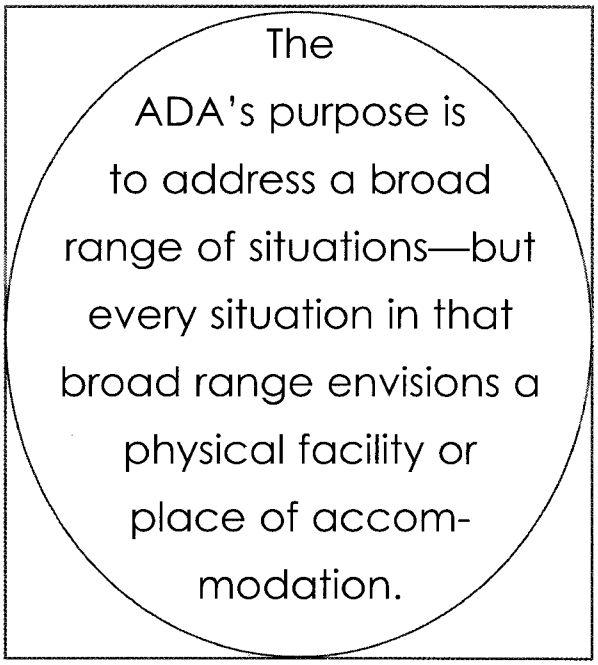
Even this definition of public accommodation was not in its final form. The bill included the phrases "other *similar* places of retail sales" and "other *similar* places of service establishment."[128] The House deleted the word "*similar*" in each of the 12 categories.[129] The Committee on the Judiciary's intent was to insure a person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient to show that the jewelry store sells items to the public."[130] The committee's intent may suggest Congress desired the act of selling to the public to be the determining factor and not necessarily sharing other similar characteristics with the places listed in the statute. This Note addresses the flaws in this reasoning below, but for the moment it is sufficient to concede the drafting committees intended even the "'other similar places' terminology should be construed liberally."[131]

Finally, advocates for purpose-based ADA extension are sure to point to the similar purpose of the Rehabilitation Act of 1973.[132] In 1998, Congress through the Work Force Investment Act amended § 508 of the Rehabilitation Act to require disabled accessibility in all federal websites built after August 7, 2000.[133] The Federal Rehabilitation Act of 1973 requires the federal government, federal contractors, and other recipients of federal funds to provide equal access to disabled Americans in employment opportunities and facilities.[134] The ADA and the Rehabilitation Act are sister statutes: "Congress drew heavily

from the Rehabilitation Act in fashioning the ADA" and "many of the principles embodied in the ADA are based on the Rehabilitation Act of 1973."[135] In many ways, the ADA was intended to be more aggressive in insuring accessibility and to build on the experience of 17 years of Rehabilitation Act enforcement.[136]

The 1998 amendments to the Rehabilitation Act provoke two competing interpretations. On one hand, the shared purposes of the ADA and Rehabilitation Act might suggest Congress has recognized the need for accessibility *across* the Internet. The two statutes share a similar purpose of limiting the obstacles to the disabled, and Congress did intend the ADA to offer more aggressive protection in the private sector.[137] The Rehabilitation Act's extension of accessibility requirements to federal websites may suggest online access is part of the same purpose the ADA was fashioned to address. A *judicial* extension of the ADA therefore would arguably align with the shared purpose of the two statutes. On the other hand, the decision to amend the Rehabilitation Act suggests that indeed the two acts do share a common purpose—and like the Rehabilitation Act of 1973, any extension of the ADA to require website accessibility should come by legislative amendment, not judicial policy making. While the relevant text of the Rehabilitative Act was more constricting in interpretation than the relevant sections of the ADA, and thus more apt to extension via amendment, the issue of online accessibility was clearly addressed in the federal government context without similar efforts being made to remedy the problems of disability access in online commercial contexts.

Several classic critiques of purposive arguments and intentionalism also ring particularly true. First, the ADA is a statute with an express purpose explicitly contained in its text.[138] Citations to notions of purpose expressed by individual lawmakers, the Act's drafters, or President Bush have limited value. This includes the House committee's explanation of the decision to drop the word "similar" from the § 12181(7) catchalls. Unlike the statement of purpose actually contained in the text of the ADA, none of these comments was subject to vote by other members of Congress and none received official bicameral support. Each simply lacks presentation or bicameral validity.



The primary focus should be on the statement of purpose enumerated in the text itself. The statement of purpose does state the ADA is intended "to invoke the *sweep* of congressional authority . . . in order to address the *major areas of discrimination* faced *day-to-day* by people with disabilities."[139] However, this purpose must be read in the context of the entire statute. The entire statute implements the statement of purpose concerning public accommodations in purely physical terms. Thus, the purpose should be read to extend "comprehensively[sic]"[140] to "major areas" of discrimination found in physical facilities or public accommodations.

The legislative history of the ADA supports this conclusion. While both the comments of individual congressmen and the ADA's redesign to cover more places of public accommodation than the Civil Rights Act suggest Congress intended for public accommodations to be interpreted broadly, even the expansionist First Circuit admitted, "one who simply reads the committee report describing the operations of Title III could easily come away with the impression that it is primarily concerned with access in the sense of...physical access."[141] Other portions of the legislative history, moreover, clearly show that the "'lack of *physical access* to facilities' was intended to be one of the areas Title III should remedy."[142] Finally, the use of the 12 categories of examples of public accommodation in § 12181(7) was the result of a harshly fought political compromise between the Bush administration and the congressional majority. As a result, exploding the meaning of § 12181(7) to cover websites is a dangerous task which seems to assume the example-based definition of public accommodation was the result of cohesive policy goals and a singular purpose, which clearly was not the case.

Finally, the broad notions

advanced in the legislative history are consistent with the denial of ADA application to websites. The ADA's purpose is to address a broad range of situations—but every situation in that broad range envisions a physical facility or place of accommodation. The most expansive notions of the ADA's purpose come not from the text but from the individual comments of congressmen or President Bush. The problems with relying on the comments and interpretations of a single representative, senator, or political actor when interpreting a statute passed in both congressional bodies and approved by the executive branch are thoroughly developed earlier and elsewhere.[143] Suffice it to say, there are serious issues of presentment, special interest lobbying, and legislative "influence on the cheap" to warrant according the comments any weight.

Agencies' Agendas

The ADA grants authority to the Attorney General to issue regulations necessary to carry out the provisions of Title III.[144] Section 12186(b) states "the Attorney General shall issue regulations in an accessible format to carry out the provisions of this Title...that include standards applicable to facilities."[145] The Attorney General's standards must be consistent with "the minimum guidelines established by the Architectural Barriers Compliance Board."[146] Section 12204 directs the Board to establish "minimum guidelines" to "ensure that buildings, facilities, rail passenger cars, and vehicles are accessible in terms of architecture and design transportation and communication to individuals with disabilities."[147]

In this capacity, the Department of Justice (DOJ) supports the extension of the ADA to commercial websites. A 1996 advice letter from the Civil Rights Division suggests places of public accommodation, which communicate through websites, must ensure their online information is accessible under the ADA.[148] The letter does not suggest websites themselves are places of public accommodation, and because the online information provided by public accommodations is usually available through other accessible means, the letter's approach to website accessibility is severely limited.[149] Agency decisions, which further extend coverage to websites without a physical place of public accommodation, however, deserve consideration and anticipation.[150]

Chevron scrutiny governs administrative statutory interpretations.[151] The first motion in a Chevron analysis is to determine whether Congress directly spoke on the issue at hand.[152] If so, agency and judicial interpretations must yield to the unambiguous congressional intent.[153] If the text is ambiguous, courts must defer to agency interpretations that permissibly apply the statute.[154] The justification for agency deference rests on two grounds. If the text is *intentionally* vague, Congress likely intended for the appointed agency to work out the details. If the text is *unintentionally* vague, the appointed agency deserves deference because of its expertise. Chevron establishes an assumption that, in either case, agency discretion prevails.[155]

Agency discretion is not absolute, however. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[156] For instance, if a court employs a traditional tool of statutory interpretation like *noscitur a sociis* or *ejusdem generis* to resolve alleged ambiguities in the text, an agency can not proceed to take actions regarding the section if those actions run contrary to the canon-based interpretation. *Ejusdem generis* and *noscitur a sociis* both resolve any alleged ambiguities in the definition of "public accommodation." Each canon indicates that public accommodations are physical places and do not include cyberspace. A DOJ conclusion to the contrary is thus unfounded and limited in authority.[157]

Growing Backlash Against ADA Expansion

Regardless of whether disability advocates agree with a restrictive analysis of §12181(7), efforts centered on extending the existing ADA to websites risk wasting political energy. As the final section of this Note will indicate, that energy is better spent on alternate avenues for addressing online accessibility. Recent Supreme Court cases have signaled a growing "backlash" against expansive ADA interpretations. The restrictive approach in Sutton v. United Airlines, Inc. perhaps best captures this movement.[158] The case admittedly deals with a different Title of the ADA and is not direct precedent.[159] Nonetheless, Sutton illustrates the Court's increasing reliance on strict textualism to reject the expansive arguments of statutory purpose, legislative history, and agency deference

that would likely be raised by the treatment of websites as places of public accommodation.

Karen Sutton and her twin sister filed disability discrimination charges against United Airlines when the company denied their pilot applications because each suffered severe myopia.[160] Lenses could fully correct their myopia, and thus the central issue of statutory interpretation was whether these corrective and mitigating measures should be considered when determining whether the sisters were "substantially" disabled.[161] The text of the ADA defines a qualifying disability as "a physical or mental impairment that *substantially limits* one or more...major life activities"[162] and estimates *43 million* individuals have qualifying disabilities. Despite pleas to the broad remedial purpose of the ADA, as well as supporting comments in the legislative history, the Court adopted a restrictive textualist reading to conclude that the sisters' myopia was not a qualifying disability. Verb tense and plain meaning won out over general purpose and favorable legislative history.

First, the Court noted the ADA's definition of an eligible disability is written in the present indicative verb form—"substantially limits."[163] Thus, "we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[164] When the sisters wore their lenses, the court reasoned their vision was corrected and hence it no longer substantially limited a major life activity.[165] Second, the Court noted the text of the ADA states "some 43,000,000 Americans have one or more physical or mental disabilities."[166] This number was far below the number of disabled Americans who would qualify if the Court extended the term to include disabilities for which corrective or mitigating measures were available. In each instance, Justice O'Connor focused on the ADA's exact wording, although Justice Stevens' dissent repeatedly offered examples of legislative history that appeared to support a more expansive definition of disability. Justice Stevens pointed out that, "in order to be faithful to the remedial purpose of the Act, we should give it a generous rather than a miserly, construction;"[167] that the Senate Report specifically stated disability should be assessed without regard to mitigating measures;[168] and that each of the three executive agencies charged with implementing the Act had consistently interpreted the ADA to mandate disability status be determined without regard to mitigating measures.[169] Though they arise in a clearly different context, these are the same general types of arguments that advocates for extending the ADA to websites are likely to make—purpose, legislative history, and agency deference. Described as a "hypertexualist" reading by one commentator,[170] Sutton embodies an increasing use of textualism at all levels of ADA interpretation to deny expansive applications of the statute.[171]

In sum, the text of Title III does not include websites as places of public accommodation. *Noscitur a sociis* and *ejusdem generis* dictate places of public accommodation must be physical facilities. The canons also sufficiently resolve any alleged statutory ambiguities, thereby foreclosing the opportunity for contrary agency interpretations. Although the intentionally broad purpose and design of the ADA encourage advocates of online expansion, the same purpose and design limit Title III exclusively to physical facilities.

Proposed Solution

This Note in no way discourages efforts to increase website accessibility. In fact, quite the contrary. Instead, it has only tried to demonstrate that the current ADA is just the wrong tool for the right job. Regulation of website design is both possible and likely necessary in light of the market's failure to address the needs of the disabled, the value of including the disabled in the commercial Internet community, and the realistic limits on compliance costs. First and foremost, the Internet's architecture is not inherently inaccessible.[172] Its inaccessibility reflects a choice in values.[173] Web firms have chosen to exclude the disabled in favor of technological advances and profit. They have chosen to use complex graphics and applets to attract users over accessible features to ensure disabled access.

Through the efforts of the World Wide Consortium (W3C) and other accessibility groups,[174] most major commercial web designers are likely aware of the needs of the disabled. They simply choose to overlook them.[175] For instance, CNET.com recently posted a special report on the need for accessible web design.[176] The report included numerous suggestions and requirements to make a web page accessible. Unfortunately, the report itself was not accessible.[177] This same phenomenon has occurred on several other sites.[178] The market forces that refused to make real-world accommodations for the disabled

until the passage of the ADA likely will continue to present the same opposition online. Until Congress takes legislative action, commercial websites will continue to exclude the disabled.

Greater accessibility, however, cannot come at any price. The cost must be reasonable in light of the potential impact on online businesses and the promotion of open discourse on the Internet. There ultimately must be some concrete valuation of the competing goals. A necessary element of this valuation is determining the cost of increasing online accessibility and ensuring website compliance. Such a study is beyond the abilities of this Note. Although the following paragraphs will suggest that the cost is likely lower than expected and offset by benefits to both the disabled and the able-bodied, discovering the true price tag of accessibility is a fundamental element of designing accessibility policies which optimize market and societal values.

Compared to building accessible real-world facilities, it is much harder to calculate cost estimates for website redesigns. Wheelchair ramps and accessible counters are one-time costs, built into or attached to the physical structure of a facility. Web pages, on the other hand, are often built and rebuilt every day. Graphics and icons are constantly added and pages redesigned to remain competitive and up to date. Incorporating accessibility thus becomes a recurring cost over the life of a website. As the site adds new pages, additional textual references must be made to ensure the site remains universally navigable. Add to this the millions of existing, popular, and rarely visited, commercial web pages ADA style regulation would force into compliance. One of the Internet's greatest strengths is its ability to archive millions of old pages and bits of information because of the low cost of data storage. If these archived pages were required to comply with accessibility requirements, several website operators have testified they would drop them due to the cost.[179]

Four factors mitigate these costs, however. The actual process of tagging an *individual* graphic with text is not program-intensive. One option is to "provide pop-up text that gives a description of the graphics and can be read aloud by devices for the visually impaired."[180] The technology for such tagging is a common aspect of HTML called "Alt.tag." Simply programming a text tag into the HTML would take limited time and provide a valuable benefit. The second technique is to provide parallel web pages which include the same content without graphics or disability barriers.[181] Web designers often fear accommodating the disabled requires restricting the aesthetic nature of their websites; inserting pop-up texts or using parallel pages could greatly resolve this problem. To quote Tim Berners-Lee, "inventor" of the Internet and director of the W3C,

> The Web excels as a medium in which accessibility can be addressed. On the Web, a computer can automatically and cost-effectively represent the same information in a variety of ways according to the needs of users. Within the neutral forum of W3C, industry leaders, disability representatives, and others convened to develop accessibility solutions that are reasonable, practical, and effective. Websites designed using very simple tools naturally tend to be accessible. Even sophisticated sites, designed with major effort, can be kept accessible with only a small proportion of that effort.[182]

Second, ADA styled accessibility regulation does not require that the *content* be accessible or in braille, only that a disabled individual be able to enter and navigate the site. In the context of brick and mortar entertainment service providers,

> 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 videotapes.[183]

In order to insure compliance with the First Amendment, web page accessibility regulation must follow a similar course.[184] Regulation must be limited to access elements and not content. Such tailoring limits the number of web page elements requiring alteration and therefore limits the cost of compliance. Moreover, the navigational links and core site map

for a website often remain constant over the life span of a site, and other than the addition of links to new pages, require less redesign than the content they display.

Third, increases in business from certain disabled customers could offset some costs. According to the 1996 U.S. Census, the collective purchasing power of disabled Americans should reach $1 trillion by 2001.[185] This number does not even reflect the potential for increases in the productivity of the disabled. Moreover, investments in accessibility can benefit the able-bodied. Text equivalents for graphics and sound can help all users search websites based on their graphical content. Current search engines are limited to using a web page's text and the information contained in the metatag of the site. Tagging graphics would allow search engines to also use the text cues to index graphics and media content. Furthermore, the screen sizes of personal digital assistants (PDAs) and Internet ready wireless telephones limit the ability to display graphic content. Text-based navigation of websites would enable these devices to provide the majority of information in an accessible medium rather than relying on separate sites designed for PDA's and wireless phones. Accessibility guidelines could work with Wireless Application Protocols (WAP) as possible substitutes. In several technologies, very real and tangible innovations can arise from developing technology and accessible designs that benefit the disabled.[186] Fourth, the increasing focus on voice recognition software requires text availability. In order to have a computer read the day's news and interpret a user's voice commands, the web page must express its core elements in text. Finally, arguments that regulating inaccessibility will also stifle innovation on the Internet miss the bigger point. The blind rush to innovation and the fervent embrace of new media displays are what caused us to leave out the disabled in the first place.

The W3C has already released a set of guidelines intended to establish clear requirements for making websites accessible.[187] The EEOC has adopted the guidelines to implement the amended Rehabilitation Act of 1973. The guidelines emphasize the importance of text equivalents for non-text content. As the W3C notes, "The power of text equivalents lies in their capacity to be rendered in ways that are accessible to people from various disability groups using a variety of technologies."[188] Text can be readily output to speech synthesizers and braille displays and can be presented visually (in a variety of sizes) on computer displays and paper. According to the W3C, "Synthesized speech is critical for individuals who are blind and for many people with the reading difficulties that often accompany cognitive disabilities, learning disabilities, and deafness."[189] The guidelines also encourage using text and graphics that are understandable when viewed without color, controlling the use of style sheets, and using tables for truly tabular information and not merely page layout. Finally, the guidelines aim to have the user interfaces of websites follow "principles of accessible design: device-independent access to functionality, keyboard operability, self-voicing, etc."[190] Device-independent access "means that the user may interact with the user agent or document with a preferred input (or output) device—mouse, keyboard, voice, head wand, or other."[191] The W3C notes that if "a form control can only be activated with a mouse or other pointing device, someone who is using the page without sight, with voice input, or with a keyboard or who is using some other non-pointing input device will not be able to use the form."[192]

The Square Peg, The Round Hole

The W3C's guidelines demonstrate that website accessibility is technologically possible. The question is under what type of regulatory regime accessibility should be pursued. Without an accurate assessment of the cost of ensuring accessibility in commercial websites, it is difficult tell. A detailed study is needed. What is clear, however, is that Title III of the ADA is not the proper means to regulate website architecture. The interpretative canons of *noscitur a sociis* and *ejusdem generis* dictate that "places of public accommodation" refer exclusively to physical facilities. Although the intentionally broad purpose and design of the ADA make the statute an attractive avenue for advocates of online expansion, that same purpose and design limit Title III to physical facilities. Addressing website accessibility is a critical issue and deserves public discourse and debate. Title III of the ADA is just the wrong tool for the right job. ◆

[1] See 42 U.S.C. § 12182(a) (1999).

[2] See 42 U.S.C. §12181(7)(E),(F),(C) (1999).

[3] See 42 U.S.C. § 12182(a).

[4] The complaint is available online at the National Federation for the Blind's Hompage. See *AOL Complaint* (visited Mar. 30, 2000) <http://www.nfb.org/aolcompl.htm>. See also *AOL Named in Disabilities Act Suit Filed By Blind Users*, 17 No. 4 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 7, 7-8 (Nov. 1999).

[5] See *Testimony Presented to the Subcommittee on the Constitution* (visited Mar. 5, 2000) <http://www.house.gov/judiciary/2.htm>.

[6] See Doe v. Mutual of Ohama Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999).

[7] *Noscitur a sociis* is a canon of statutory interpretation. It instructs that a term should be interpreted within the context of the accompanying words—the term is known by its associates.

[8] *Ejusdem generis* is a canon of statutory interpretation. It instructs that when general words follow an enumeration of specific words, the general words are to be read as applying only to the same general kind or class as those enumerated.

[9] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

[10] See Sally McGrane, *Is the Web Truly Accessible to the Disabled?* (visited Jan. 18, 2000) <http://home.cnet.com/specialreports/0-6014-7-1530073.html>. See also Steve Lawrence, C. Lee Giles, *Search is on for Better Search Engines*, NATURE, Vol. 402, No. 6761, p.458 (1999).

[11] See McGrane, *supra* note 10.

[12] See Pamela Mendels, *Advocates for Blind, in Suit, Say AOL Impedes Access to Internet*, N.Y. TIMES ABSTRACTS 25, November 5, 1999, *available in* Westlaw, 1999 WL 30548065.

[13] See id.

[14] See id.

[15] See id.

[16] See McGrane, *supra* note 10.

[17] See id.

[18] An avatar is an online persona. It can include a graphical image that represents the user in online chat forums or virtual communities. The image appears on the screen of the participants to an online discussion and can be thought of as a virtual face or body.

[19] See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 66 (1999).

[20] See id.

[21] See id. at 65.

[22] See id. at 66.

[23] See id.

[24] See id. These displays allow for the presentation of moving images on otherwise static web pages. For instance, Shockwave applets are commonly used to deliver short images of scrolling text or animation.

[25] See Pamela Mendels, *Barriers Online for those with Disabilities* (visited Feb. 10, 2000) <http://www.nytimes.com/library/tech/99/11/cyber/articles/04disability.html>.

[26] LESSIG, *supra* note 19 at 66.

[27] See S. Connolly, Compliance with the Americans with Disability Act in Cyberspace, 3 No. 10 Cyberspace Law., Jan. 1999, at 8.

[28] DSL stands for digital subscriber line. DSL is a method of sending digital data over existing copper telephone lines at rates considerably faster than dialup transfers using ordinary telephone connections.

[29] See LESSIG, *supra* note 19 at 66.

[30] See generally Connolly, *supra* note 27.

[31] See *X-Men The Movie* (visited Apr. 4, 2000) <http://www.x-men-the-movie.com>.

[32] See *MP3.com* (visited Feb. 18, 2000) <http://www.mp3.com>.

[33]The sites were tested using the Center for Applied Special Technology's (CAST) Bobby program. The Bobby program is designed to identify websites which are accessible to the disabled. Bobby evaluates sites based on the World Wide Web Consortium's Accessibility Guidelines. The guidelines insure sites provide 1) text equivalents for all non-text elements, 2) summaries of graphs and charts, 3) means to ensure all information conveyed with color is available without color, and 4) logically and clearly alternate content for inaccessible applets or plug-in features. See *Welcome to Bobby 3.11* (visited Mar. 30, 2000) <http://www.cast.org/bobby>.

[34] See Connolly, *supra* note 27 (outlining an early complaint alleging a web page of the San Francisco Metropolitan Transportation Commission violated the ADA's ban against discrimination on the basis of disability in places of public accommodation).

[35] See Karen M. Volkman, *The Limits of Coverage: Do Insurance Policies Obtained Through An Employer and Administered by Insurance Companies Fall Within The Scope Of Title III of the Americans with Disability Act?*, 43 ST. LOUIS U. L.J. 249, 250 (1999).

[36] See generally 42 U.S.C. §§ 12101-12210.

[37] See 42 U.S.C. § 12101(a),(b).

[38] See generally 42 U.S.C. § 12101.

[39] See 42 U.S.C. § 12182(a).

[40] See 42 U.S.C. § 12184(a).

[41] 42 U.S.C. § 12182(a).

[42] See 42 U.S.C. § 12181(7).

[43] Id. The entire section includes a list of 12 categories of places of

public accommodation. Specifically, § 12181(7) sets forth the following list of places of public accommodations:

> an inn, hotel, motel, or other place of lodging...
> a restaurant, bar, or other establishment serving food or drink;
> a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> an auditorium, convention center, lecture hall, or other place of public gathering;
> a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
> 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;
> a terminal, depot, or other station used for specified public transportation;
> a museum, library, gallery, or other place of public display or collection;
> a park, zoo, amusement park, or other place of recreation;
> a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
> a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
> a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

[44] See generally *RX.com* (visited Mar. 2, 2000) <http://www.rx.com>; *BlueFly* (visited Mar. 2, 2000) <http://www.bluefly.com>; *CDNOW* (visited Mar. 2, 2000) <http://www.cdnow.com>.

[45] There obviously are unique issues posed by traditional places of public accommodation which also offer their services online. The Gap clothing store's primary revenue comes through its stores located in malls and other physical facilities across the country. Yet, the Gap also offers its clothing and goods online. The stores qualify as public accommodations under § 12181(7)(E) and thus the question is whether this designation extends to the Gap's website. The likely answer is no. The websites do not offer similar physical facilities for customer interaction and sales, and thus any online discrimination on the basis of disability is not sufficiently connected to a physical place of public accommodation listed in § 12181(7). Moreover, even under the logic of the Baker v. Hartford Life Ins. Co., 1995 WL 573430, 3 (N.D.Ill. 1995), the servers and support for the websites are not open to the public or housed in actual Gap stores. See note 79 for a discussion of Baker v. Hartford Life Ins. Co.

[46] See § 12181(7).

[47] See generally PHILIP E. MARGOLIS, RANDOM HOUSE WEBSTER'S COMPUTER AND INTERNET DICTIONARY, 3RD EDITION (1999).

[48] See § 12181(7)(C).

[49] See § 12181(7)(E).

[50] See § 12181(7)(F).

[51] The complaint is available online at the National Federation for the Blind's Hompage. See *AOL Complaint* (visited Mar. 30, 2000) <http://www.nfb.org/aolcompl.htm>.

[52] Id. at ¶1.

[53] See id. at ¶19 ("The AOL service is a place of 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").

[54] Generally, this software comes preinstalled in a consumer PC or will be available via a mass mailing or upon user request.

[55] See *supra* note 51 at ¶23.

[56] For instance, CNN.com offers a homepage covered with links to its own articles on various topics in various sections of the online "paper." See <http://www.cnn.com>. Bluefly.com similarly sells clothes through a site which contains links to pages for each of its various individual items as well as links which let the web surfer navigate to the checkout area or online customer service department. See <http://www.bluefly.com>.

[57] See Lawrence, *supra* note 10.

[58] See BankAmerica Corp. v. United States, 462 U.S. 122, 128 (1983); see also K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

[59] See Doe v. Mutual of Ohama Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999).

[60] See id.

[61] See Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994).

[62] See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1013 (6th Cir. 1997); see also Ford v. Shering-Plough Corp., 145 F.3d 601 (3d Cir. 1998)(following Parker and rejecting Carparts).

[63] See Carparts, 37 F.3d at 19.

[64] See Parker, 121 F.3d at 1013.

[65] See Carparts, 37 F.3d at 19.

[66] See id. at 14.

[67] See id.

[68] See id.

[69] See Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 826 F.Supp. 583, 586 (D.N.H. 1993).

[70] See Carparts, 37 F.3d at 19.

[71] See 42 U.S.C. § 12181(7)(F).

[72] Carparts, 37 F.3d at 19.

[73] Id.

[74] Id.

[75] See id.

[76] Id. at 20.

[77] See Mutual of Ohama, 179 F.3d at 559.

[78] Id. (emphasis added).

[79] But see Baker v. Hartford Life Ins. Co., 1995 WL 573430, *3 (N.D.Ill. 1995). Baker involved an insurance plan which customers contacted exclusively over the phone or through the mail. The Illinois district court, in Baker, reached a similar result to Carparts but under a different logic. The court found that while the term "place" in the definition of public accommodation does imply a physical location, "the ADA does not require a plaintiff to be physically present at the place of public accommodation." According to the court, telephone calls between the plaintiff and the defendant provided a sufficient nexus to a physical place of public accommodation, because "the place from which the defendant's telephone communication with plaintiff's father took place was an insurance office." Insurance offices are specifically covered under 42 U.S.C. § 12181(7)(F). This rationale has interesting applications to websites. A customer's interactions with a website might equate to the phone calls in Baker. Even though the customer never physically enters the website or its real- world support facilities, the website originates from a physical location were its server is housed. The parallel ends there, however. All the examples cited in the statute are intended for public access, and under the canon of *noscitur a sociis,* the same criteria should apply to any place a plaintiff might claim is a place of public accommodation. The Baker court does not provide sufficient information to determine whether the insurance office where the calls were received and placed was intended to be open to the public. Most likely it was. Housings for website servers generally are not open to the public and definitely are not expressly mentioned in the text of § 12181 like insurance offices. At best they fall under "other places of sales, service, etc." language which as previously mentioned is constrained to public places under the doctrine of *noscitur a sociis.*

[80] See 42 U.S.C. § 12181(7).

[81] See Carparts, 37 F.3d at 19-20.

[82] See Richards v. United States, 364 U.S. 1, 9 (1962).

[83] See Parker, 121 F.3d at 1013. See also Stoutenborough v. National Football League, Inc., 59 F.3d 580 (6th Cir. 1995). In Stoutenborough, Thomas Stoutenborough and an association for the hearing impaired sued the National Football League (NFL) and several television stations alleging the NFL's "blackout rule" violated Title III of the ADA. Because they were deaf and could not listen to the games over the radio, the plaintiffs alleged the NFL and TV stations had unfairly discriminated against them by not televising the games. The complaint claimed the television transmission of football games qualified as a public accommodation. In a pre-Carparts opinion, the Sixth Circuit found television transmissions did not fall into any of the 12 enumerated categories in § 12181(7). The court reasoned each of the 12 categories covered places, and a place is defined as a "facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve 'public accommodation' categories." The ADA, in turn, the court noted, defines facility as "all or any portions of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." A place of public accommodation, the court reasoned, requires a physical structure.

[84] See Parker, 121 F.3d at 1008.

[85] See id.

[86] See id. at 1012.

[87] See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 701-03 (1995).

[88] See BLACK'S LAW DICTIONARY (6th ed. 1988).

[89] See Parker, 121 F.3d at 1012.

[90] See 42 U.S.C. § 12181(7)(D)-(F), (H)-(L).

[91] See Parker, 121 F.3d at 1011-12.

[92] See Carparts, 37 F.3d at 19.

[93] See Parker, 121 F.3d at 1014.

[94] See Ford v. Shering-Plough Corp., 145 F.3d 601, 605 (3d Cir. 1998).

[95] Id. at 614.

[96] See id.

[97] See Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139 (1999). See also James P. Colgate, *If You Build It, Can they Sue? Architects' Liability Under Title III of the ADA*, 68 FORDHAM L. REV. 137, 142 (1999) (presenting an excellent discussion of the growing restrictive trend in Supreme Court ADA opinions).

[98] Parker, 121 F.3d at 1014.

[99] See 42 U.S.C. § 12181(7)(F).

[100] Parker, 121 F.3d at 1014.

[101] See Carparts, 37 F.3d at 19.

[102] See 47 U.S.C. § 225 (d).

[103] See 47 U.S.C. § 225 (a)(3).

[104] Parker, 121 F.3d at 1011.

[105] Id.

[106] 42 USC § 12204 (b). But note the Architecture Board's Access Board now sets standards for federal websites under § 508 of the Rehabilition Act of 1973 (as amended by the Work Force Investment Act of 1998).

[107] See Arcadia v. Ohio Power Co., 498 U.S. 73, 78 (1990)(applying *ejusdem generis* to narrowly construe the phrase "or any other subject matter" in 318 of Federal Power Act). See also Hughey v. United States, 495 U.S. 411, 419 (1990); Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 91-92 (1989).

[108] Parker 121 F.3d at 1014.

[109] See 42 U.S.C. § 12181(7) (including "other sales or rental establishment," "other place of ... entertainment," and "other places of entertainment").

[110] See Carparts, 37 F.3d at 18.

[111] See id. at 19-20.

[112] See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

[113] 42 U.S.C. § 12101(b)(4) (emphasis added).

[114] 42 U.S.C. § 12101(b)(1) (emphasis added).

[115] 42 U.S.C. § 12101(b)(2) (emphasis added).

[116] BERNARD D. REAMS , PETER J. MCGOVERN, AND JON S. SCHULTZ, DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990 PUBLIC LAW 101-336, VOL. 1 Doc. 10 (1992). See also Emily Alexander, *The Americans with Disability Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L. REV. 2233 (1998) (general discussion of the role of the ADA statement of purpose).

[117] See ROTHSTEIN & LIEBMAN, EMPLOYMENT LAW 344 (1998).

[118] See H.R. REP. NO. 485, 101 Cong., 2d Sess., pt. 2, at 99 (1990).

[119] See Alexander, *supra* note 116.

[120] See Reno v. ACLU, 521 U.S. 844, 853 (1997) (stating the Internet is comparable, from "the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers").

[121] See *CDNOW* (visited Mar. 3, 2000) <http://www.cdnow.com>, *Amazon.com* (visited Mar. 3, 2000) <http://www.amazon.com>.

[122] Assuming they met the criteria of a private entity, offering commercial services, in one of the categories of places covered in 42 U.S.C. § 12181(7).

[123] See Parker, 121 F.3d at 1020 (Martin, J., dissenting).

[124] See THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 34 (1990) (offering an overview of the legislative history of the ADA).

[125] See id.

[126] See id. at 39.

[127] See id. at 46 (noting that the Attorney General argued that using a definition of public accommodation other than that in Title II of the Civil Rights Act of 1964 would lead to too much litigation and a statute that was confusingly vague).

[128] See S. REP. NO. 101-116, at 59 (1989).

[129] See H.R. REP. NO. 101-486, pt. 3, at 10-11 (1990).

[130] See H.R. REP. NO. 101-486, pt. 3, at 54 (1990).

[131] See S. REP. NO. 101-116, at 59 (1989).

[132] See 29 U.S.C. § 701(b).

[133] See 29 U.S.C. § 724d (as amended by the Workforce Investment Act of 1998).

[134] See generally 29 U.S.C. §§ 701-726.

[135] ROTHSTEIN & LIEBMAN, *supra* note 117 at 44.

[136] See id.

[137] See id.

[138] See 42 U.S.C. § 12101(b)(1)-(4).

[139] Id. (emphasis added).

[140] See 42 USC § 12101(b)(1)-(4) (emphasis added).

[141] Carparts, 37 F.3d at 20.

[142] See Volkman *supra* note 35 at 251 (emphasis added).

[143] See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); but see William N. Eskridge, Jr., *Textualism the Unknown Ideal?,* 96 MICH L. REV. 1509 (1998).

[144] See 42 U.S.C. § 12186(b).

[145] Id.

[146] Id.

[147] 42 USC § 12204 (a)-(b).

[148] The letter is available at the DOJ's homepage (visited Mar. 3, 2000) <http://www.usdoj.gov/crt/foia/cltr204.txt>.

[149] See id. The DOJ opinion letter states,"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." The letter does not state websites themselves are places of public accommodation, only that places of public accommodation distributing information over websites must make the online information accessible. This note's tailored focus on websites as places of public accommodation precludes a developed discussion of these issues. It is worth noting, however, that information and services offered online by places of public accommodation are often offered at the physical place of public accommodation or through toll-free 800 numbers. The availability of these alternate accessible sources of information likely qualify as defenses under the ADA, thus excusing most instances of liability.

[150] See Volkman, *supra* note 35 at 275-79 (providing a general discussion of the agency opinions regarding Title III's definition of public accommodation).

[151] See Chevron, 467 U.S. at 853.

[152] See id. at 842.

[153] See id. at 842-43.

[154] See id. at 843.

[155] See id. at 842-43.

156 Id. at 845.

157 See id. at 843.

158 See Sutton, 119 S.Ct. at 2139.

159 Sutton involved charges brought under Title I of the ADA. Title I covers discrimination in employment on the basis of disability.

160 See id. at 2143.

161 See id. at 2144.

162 See 42 U.S.C. § 12102(2)(a)(emphasis added).

163 See Sutton, 119 S.Ct. at 2146.

164 Id.

165 See id.

166 Id. at 2147 (quoting 42 U.S.C. § 12101(a)(1)).

167 Id. at 2152 (Stevens, J., dissenting).

168 See id. at 2154.

169 See id. at 2155.

170 See James P. Colgate, *supra* note 97 at 142.

171 It should be noted that the Sutton majority concluded the ADA's text did not appoint an agency to interpret the term "substantial disability." Thus, the contrary opinions of the three federal agencies were not accorded Chevron deference. This is not the case in Title III. Section 12186(b) clearly grants authority to the DOJ to draft and implement rules to effectuate accessibility in public accommodations. Despite this difference, Sutton remains illustrative of the Court's willingness to overlook the advice of agencies with considerable expertise in implementing the ADA in order to remain true to the Court's own textual interpretations.

172 See LESSIG, *supra* note 19 at 66.

173 See id.

174 The W3C is hosted by Masschuettes Institute of Technology and seeks to shape the development of the Internet and World Wide Web. The W3C's mission statement is available online. See *About the World Wide Web Consortium* (visited Mar. 3, 2000) <http://www.w3.org/Consortium/>.

175 See *Web Accessibility Initiative* (visited Mar. 3, 2000) <http://www.w3.org/WAI>.

176 See McGrane, *supra* note 10.

177 See id.

178 See TechlawJournal, *Online Accessibility* (visited Mar. 3, 2000) <http://www.techlawjournal.com/censor/20000210.htm>.

179 See Charles Cooper, *Testimony before House Subcommittee on the Constitution*, (visited Mar. 3, 2000) <http://www.house.gov/judiciary/coop0209.htm>.

180 See McGrane, *supra* note 10.

181 The Department of Justice and other federal agencies have adopted this approach. The DOJ homepage makes extensive use of graphic images and toolbars, but in the right hand corner provides a text hyperlink to a page which mirrors the content without the use of graphics. See *DOJ Homepage*, (visited Apr. 4, 2000) <http://www.usdoj.gov>; *DOJ Text Based Homepage* (visited Apr. 4, 2000) <http://www.usdoj.gov/index.html>.

182 See *Testimony Presented to the Subcommittee on the Constitution* (visited Mar. 5, 2000) <http://www.house.gov/judiciary/2.htm>.

183 Parker, 121 F.3d at 1012.

184 See Peter Blanck, *Testimony before the House Subcommittee on the Constitution* (visited Mar. 3, 2000) <http://www.house.gov/judiciary/blan0209.htm> (stating ADA-style regulation would not violate the First Amendment "because [it] would not require changes to the subject matter or content of websites and services but only to the manner by which information is presented").

185 See TechlawJournal, *supra* note 178. This statistic includes all disabled individuals and not just those with online disabilities.

186 See Blanck, *supra* note 184 ("My colleagues and I have attempted to identify emerging issues related to accessibility and ADA implementation. First, research suggests that cost-effective, economically beneficial, and fair implementation of the ADA itself is furthered by providing information in accessible formats to persons with disabilities. Second, my colleagues and I have conducted a review of economic activity in the assistive technology market (e.g., using data derived from the United States Patent and Trademark Office). The preliminary findings illustrate, but do not yet prove, that the ADA fosters future technological innovation and economic activity in the private Internet-based service industry, in many ways unanticipated at the time that the law was passed. As e-commerce markets and initiatives for goods and services expand, inventors, manufacturers, retailers, and employers are responding to meet the needs of consumers with disabilities, those who may become disabled in the future, and the elderly. The untapped accessible web-based 'e-commerce' marketplace holds vast profit-making opportunities").

187 See *Web Accessibility Initiative*, *supra* note 175.

188 Id.

189 Id.

190 Id.

191 Id.

192 Id.