Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Courts Weigh Access to the Internet under the Americans with Disabilities Act

May 4, 2018

When the Americans with Disabilities Act (ADA) was enacted in 1990, the internet was still in its infancy and unavailable to most of the general public. Since that time, the internet has become inextricably linked with many of life's activities including shopping, banking, education, and health care. Although this tool has attained near ubiquity in modern American life, disabled persons, including those with auditory, cognitive, physical, speech and visual disabilities, may have more limited access to goods and services available online. Inaccessibility issues potentially span a broad range of internet content—from videos that do not include captions for the hearing impaired to text that does not permit use of a screen reader for the visually impaired. Though a number of federal laws and policies (see here, here, and here) seek to promote or ensure that electronic and information technology is accessible to disabled persons, whether such measures legally require private entities operating online to ensure their websites are accessible to disabled persons is unsettled.

Title III of the ADA requires "places of public accommodation," such as hotels, restaurants, and stores, to make reasonable efforts to ensure their goods and services are available to the disabled. It does not explicitly reference the internet, and rules promulgated under Title III are silent on the ADA's application to the web. The Department of Justice (DOJ) considered promulgating regulations addressing the ADA's application to internet accessibility during the Obama Administration, but no final rules were issued. More recently, the Trump Administration halted the rulemaking process, questioning the necessity of such rules. In the absence of such statutory or regulatory guidance, federal courts are split on whether "places of public accommodation" under the ADA must be connected to a physical place, an approach adopted by federal appellate and/or district courts in the Third, Sixth, Ninth, and Eleventh Circuits, or could also apply to entities that primarily operate independent of any physical place, as courts in the First, Second, and Seventh Circuits have held.

This Sidebar provides a brief overview of Title III, surveys the case law interpreting Title III's applicability to the internet, and notes several legislative approaches that Congress could potentially take in response to judicial and regulatory developments.

Congressional Research Service
https://crsreports.congress.gov
LSB10127

Background on Title III of the ADA

Congress enacted the ADA to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . . ." Towards this end, the ADA contains provisions aimed at deterring discrimination against individuals with disabilities in a number of contexts, including employment, public services, and public accommodations and services operated by private entities. With regard to public accommodations, Title III of the ADA generally provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or public accommodations of any place of public accommodation . . . ." In short, to ensure access to individuals with disabilities, Title III places an affirmative duty on places of public accommodation to make reasonable modifications to their policies, practices, or procedures; provide auxiliary aids and services to the disabled; and remove architectural and communication barriers.

Title III is enforced primarily through private causes of action—meaning the law empowers members of the public to file claims in order to ensure compliance with the ADA. Courts have recognized that to make a valid legal claim under Title III, a plaintiff must demonstrate: (1) he is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability. (There is disagreement among the courts (see, e.g., here and here) as to whether plaintiffs must exhaust administrative remedies before filing suit in federal court).

With regard to ADA challenges to internet accessibility, the primary question centers on element three of a Title III claim: whether a disabled individual has been denied access to a "place of public accommodation." Under Congress's grant of authority to the Attorney General to issue rules under the ADA, a "place of public accommodation" is defined in regulation as a "facility," run by a private entity, whose operations affect commerce, and that falls within one of 12 categories of enumerated accommodations, including places of lodging, restaurants and bars, places of entertainment, sales or rental establishments, and other service establishments. "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."

Neither Title III nor its accompanying regulations directly reference the internet as a place of public accommodation, leading to some disagreement about the ADA's application to online activities. Federal courts have reached different conclusions when addressing this issue.

Does an internet website qualify as "place of public accommodation"?

The central debate among the federal courts on Title III's application to the web is whether a "place of public accommodation" must be connected to a physical space. Courts in the First, Second, and Seventh Circuits have concluded that a "place of public accommodation" need *not* be tied to a real world, physical structure. For example, applying this rule to internet accessibility, the U.S. District Court for the District of Massachusetts held in *National Association of the Deaf v. Netflix, Inc.* that Netflix's Watch Instantly website was a "place of public accommodation" as it fell within at least one of the enumerated examples in Title III, including "service establishment," "place of exhibition or entertainment," and "rental establishment." Eschewing a physicality requirement, the court noted that the ADA covers the services "of" a public accommodation, not services "at" or "in" a public accommodation. Employing a similar analysis, the U.S. District Court for the District of Vermont held that Scribd, a subscription-based digital library which does not operate at any physical location to the public, was a place of public accommodation. In addition to finding that the online service was similar to several of the listed examples under Title III of a "place of public accommodation" (including a "library"), the court declared that "Congress intended that the statute be responsive to changes in technology …." In a similar vein, the

Seventh Circuit Court of Appeals declared, albeit in dicta, in an opinion often cited when discussing the ADA's potential scope, that the "core meaning" of Title III "is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, *Web site*, or other facility (whether in physical space or in *electronic space*, that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do." (emphasis added).

However, courts in the Third, Sixth, Ninth, and Eleventh Circuits have interpreted "place of public accommodation" to reference an actual, physical place. Under this approach, the goods and services the disabled person seeks to access must have a sufficient "nexus" with such a real world place. For instance, in *Access Now v. Southwest Airlines*, a group of plaintiffs sued Southwest Airlines under Title III claiming that Southwest.com discriminated against individuals with visual impairments as the goods and services offered on the website were inaccessible to persons using a screen reader. The U.S. District Court for the Southern District of Florida held in a 2002 decision that the company's website neither constituted a place of public accommodation nor had a sufficient nexus with a "physical, concrete place of public accommodation" to be subject to Title III (In 2013, the Department of Transportation, pursuant to the Air Carrier Access Act, issued regulations that require most airlines to ensure their public-facing websites are accessible to persons with disabilities.) More recently, the U.S. District Court for the Southern District of Florida granted a manufacturer of video and audio equipment's motion to dismiss a Title III challenge concerning website accessibility as the plaintiffs failed to establish a sufficient nexus between the defendant's retail stores and its website. Similarly, in a pair of unreported decisions, the U.S. Court of Appeals for the Ninth Circuit held that eBay—a virtual commercial marketplace—and Netflix—an online video streaming service—were not covered by the ADA as there was not a sufficient tie between the services offered on the websites and an actual, physical place. Conversely, the U.S. District Court for the Northern District of California concluded in *National Federation of the Blind v. Target Corporation* that, while Ninth Circuit precedent recognized that a "place" of public accommodation must be physical, plaintiffs had a cognizable Title III claim to the extent they alleged that their inability to access Target's website hindered them from enjoying the goods and services of Target's brick-and-mortar stores.

Withdrawal of DOJ's Web Accessibility Rulemaking

Acknowledging the potential application of the ADA and other laws to the internet, DOJ developed a voluntary action plan in 2003 to assist government agencies and private entities in making websites accessible to disabled persons. Taking more formal action pursuant to its rulemaking authority under Title III, DOJ issued an advanced notice of public rulemaking (ANPRM) in 2010 to determine whether implementing regulations should require goods and services offered via the internet to be accessible to individuals with disabilities. However, in December 2017, the DOJ formally withdrew the ANPRM, questioning whether "promulgating regulations about the accessibility of Web information and services is necessary and appropriate." Since the withdrawal, DOJ has not taken any official action on this matter.

Takeaways for Congress

In addition to the judicial and regulatory developments surrounding internet accessibility for disabled individual, over the years Congress too has assessed the applicability of ADA to private websites (see here and here). To provide more legal certainty in this burgeoning area of the law, Congress could amend Title III to either expressly *apply* Title III's accessibility mandates to services provided on the web or *exempt* websites and other internet content from the definition of places of public accommodation. Perhaps taking a middle approach, Congress could instead codify the nexus test applied by some reviewing courts in ADA cases to require that a website have a sufficient tie to a real-world, physical place for Title III to apply to that entity's online services. Alternatively, Congress could require DOJ to issue new interpretive rules or informally urge the Department to use its current grant of regulatory authority to establish a framework for applying the ADA to the internet. In the absence of congressional

or regulatory action, the litigation in the federal courts will likely continue to shape how the ADA's "public accommodation" requirements apply to the ever-changing digital landscape.

Author Information

Richard M. Thompson II
Legislative Attorney

Disclaimer