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APPLYING THE AMERICANS WITH DISABILITIES ACT TO PRIVATE WEBSITES AFTER NATIONAL FEDERATION OF THE BLIND V. TARGET

Jeffrey Bashaw¹

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Abstract

The United States District Court for the Northern District of California recently held that websites which are tightly integrated with a physical store must be accessible to the blind, or risk running afoul of the Americans with Disabilities Act ("ADA"). The court in this case, *National Federation of the Blind v. Target* ("*Target*"), declined to grant summary judgment for Target, a retailer which operates both physical stores and an e-commerce website, in a suit alleging that Target's website, Target.com, was discriminating against the blind. This Article will describe the narrow application of *Target*, which found that websites which are tightly integrated with a physical store must be accessible to the blind to comply with the ADA. This Article also discusses the uncertainties this case leaves unanswered, such as at what point a business' web presence becomes subject to this ruling and is required to be accessible to the blind. Finally, this Article will explore arguments about how the ADA may apply to pure e-commerce sites as well.

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INTRODUCTION

<1>A class of blind plaintiffs recently sued Target, alleging that Target.com does not meet the minimum standard of web

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accessibility for the blind because it lacks alt-text, requires the use of a mouse to complete a transaction, and contains other graphical features which prevent blind users from navigating and making full use of all of the functions of Target.com.² In this case, *National Federation of the Blind v. Target* ("Target"),³ the United States District Court for the Northern District of California found that websites that are tightly integrated with a physical store must be accessible to the blind or risk running afoul of the Americans with Disabilities Act ("ADA").⁴ Target moved to dismiss the complaint, arguing that Title III of the ADA only applies to physical places.

<2>The court denied Target's motion to dismiss,⁵ finding that Target.com may be so tightly integrated with physical Target stores as to constitute an interference with blind individuals' ability to fully enjoy the physical stores.⁶ This Article will describe the narrow ruling of *Target* and what that ruling means for businesses which are clearly subject to that ruling. This Article will also explore arguments about how the ADA applies to pure e-commerce sites.

THE AMERICANS WITH DISABILITIES ACT

<3>The ADA provides that "public accommodations"⁷ may not discriminate against people with disabilities. Specifically, it directs that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation...."⁸ There are "two alternative conceptual frameworks under which a ... Website is subject to Title III: (a) as a place of 'public accommodation' in its own right, and/or (b) as one of the 'goods, services, facilities, privileges, advantages, or accommodations of' a place of public accommodation."⁹ In *Target*, the court found that websites are *only* subject to the ADA to the extent that they offer "goods, services, facilities, privileges, advantages, or accommodations of" a place of public accommodation, expressly finding that websites are never, in their own right, places of "public accommodation."¹⁰ However, as discussed later in this Article, there are compelling arguments that commercial websites are themselves places of public accommodation subject to the ADA.¹¹

NATIONAL FEDERATION OF THE BLIND V. TARGET: A NEXUS TEST

<4>In *Target*, a class of blind plaintiffs sued Target, alleging that Target.com does not meet the minimum standard of web accessibility for the blind because, among other things, the site lacks alt-text, requires the use of a mouse to complete a transaction, and

contains other features which prevent blind users from navigating and making full use of all of the functions of Target.com, which is tightly integrated with physical Target stores.¹² Target moved for the case to be dismissed for failure to state a claim.¹³ The court denied Target's motion, finding that websites may be so tightly integrated with physical stores as to constitute a good or service of that public accommodation, and thus must be accessible to the blind under the ADA.¹⁴

<5>Prior to *Target*, those courts that have addressed the applicability of the ADA to the Internet have been split. Some courts interpret the ADA to require only that websites that have a "nexus" with a physical store must comply with the ADA¹⁵ while others have found explicitly that the ADA does not apply to non-physical "places."¹⁶ Another position taken by courts is that the ADA is applicable because "public accommodations" need not be physical places,¹⁷ with one court stating expressly that websites are themselves "public accommodations."¹⁸ *Target* is an example of a "nexus" case.

<6>In *Target*, the court found that Target.com was a "service" of a "place of public accommodation," namely Target brick-and-mortar stores, and as such was required to comply with the ADA.¹⁹ However, the court limited application of the ADA to Target.com solely to the extent that Target.com "is heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores."²⁰ In so doing, the court adopted a nexus test for applicability of the ADA to websites.

<7>The court began its analysis by quickly rejecting Target's argument that a claim under the ADA is not cognizable if it occurs *away* from a place of public accommodation. The court emphasized that the plain language of the ADA "applies to the services *of* a place of accommodation, not services *in* a place of public accommodation."²¹ The court also quickly rejected Target's argument that "in order for plaintiffs' claim to be actionable under the ADA, the 'off-site' discrimination must still deny physical access to Target's brick-and-mortar stores."²² Thus, the court held that a claim under the ADA need not allege a denial of physical access to brick-and-mortar stores.²³

<8>The court next discussed the applicability of the ADA to websites specifically, finding that websites by themselves are never "public accommodations," because "[u]nder Ninth Circuit law, a 'place of public accommodation,' within the meaning of Title III, is a physical place."²⁴ As such, in order to state a claim for "unequal access to a 'service' of a place of public accommodation," a plaintiff must allege that a nexus exists between the service and the place of public accommodation.²⁵

The court's nexus test was previously developed in a series of

similar cases. In *Rendon v. Valley Crest Prods., Ltd.*, the court found that the defendant denied disabled persons equal enjoyment of a privilege (competing on the show "Who wants to be a Millionaire?") of a place of public accommodation (the studio where the show was produced) by using a contestant screening process that discriminated against people with hearing and other disabilities.²⁶ In *Ford v. Schering-Plough Corp.*, the court held that the plaintiff failed to state a cause of action under the ADA by failing to allege a nexus between the place of public accommodation (an actual insurance office) and the insurance benefits offered by the employer.²⁷ In *Stoutenborough v. National Football League*, the court dismissed a Title III claim because the challenged service (the live telecast of a football game) was not offered by a place of public accommodation (the stadium).²⁸ Finally, in *Access Now, Inc. v. Southwest Airlines Co.*, the court held that the plaintiff failed to state a Title III claim by alleging that the inaccessibility of Southwest.com prevented access to Southwest's "virtual" ticket counters, rather than a *physical* place of public accommodation.²⁹ Based on these cases, the court in *Target* concluded that the only way in which a private website may be subject to the ADA is if it is a "service" of a "place of public accommodation."³⁰

<10>The court in *Target* concluded that the plaintiffs had in fact alleged the requisite nexus between a public accommodation (the physical Target stores) and the "service" of that public accommodation (Target.com).³¹ The plaintiffs argued that "unequal access to Target.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation."³² In demonstrating that Target.com is a service of Target stores, plaintiffs alleged numerous ways in which Target.com is an *extension* of Target stores, noting that the online store allows customers "to browse products, product descriptions and prices; view sale items and discounts for online shopping; print coupons for use in Target retail stores; purchase items for home delivery; order pharmacy items and have prescriptions filled for pickup at Target retail stores; find retail stores" and a variety of other services.³³ In note four, the court concludes from its own review of Target.com that "Target treats Target.com as an extension of its stores, as part of its overall integrated merchandising efforts."³⁴ Thus, the court found the requisite nexus between a public accommodation (Target brick-and-mortar stores) and a service it offers (Target.com) to hold that the service must comply with the ADA.

<11>However, in keeping with its nexus theory, the court did grant Target's motion to dismiss "[t]o the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores."³⁵ Thus, the case will proceed "only insofar as the complaint

alleges a nexus between the Website and the physical stores.”³⁶

Bashaw: Applying the Americans with Disabilities Act to Private Websites

<12> This ruling represents a significant step in the movement to apply the ADA to private websites. Similar lawsuits have previously settled,³⁷ while only one court flatly held that the ADA does not apply to websites,³⁸ and the circuits are otherwise split on the question of whether public accommodations must be physical places, as discussed in the following section.

<13> At least for now, this is the clearest case which extends liability under the ADA to the Internet. Based on this ruling, businesses that operate websites that are heavily integrated with their physical stores clearly must maintain such websites in a manner that provides accessibility to the blind. However, this case leaves certain questions unanswered, such as at what point a website becomes a “service” of the place of public accommodation, or at what point a physical presence (such as a drop-off point for shipping or repair) becomes a “place of public accommodation.” In short, the applicability of this case to other businesses likely depends on whether the physical business, standing alone, would constitute a “place of public accommodation.” Thus, an online retailer with a limited physical presence (such as drop-off locations) is unlikely to be subject to the ruling in *Target*, since the website is not likely to be classified as a “service” of a place of public accommodation. Another question that remains unanswered after this case is the effect of linking, cross-marketing, or catalog merging arrangements. For instance, this case does not resolve the issue of whether a company like Amazon, which itself has no physical presence but does link to and list products for sites that do have physical presences, such as Target, must be ADA compliant.

APPLICATION OF THE ADA TO PURE E-COMMERCE SITES

<14> Although the court in *Target* expressly found that websites are not themselves public accommodations,³⁹ strong arguments have been made that websites can be, in themselves, public accommodations under the ADA.

Similar Cases Which Have Settled

<15> There have been cases factually similar to *Target*, but these have settled. The Attorney General of New York sued Priceline.com⁴⁰ and Ramada.com⁴¹ on the basis of inaccessibility to blind individuals. Both cases settled, with part of the settlement being that the websites would be made accessible. Under the reasoning of *Target*, Priceline.com, as a pure e-commerce site, would have been exempt from the ADA. However, the Attorney General of New York thought that Priceline.com was under the purview of the ADA, and Priceline.com, in settling, may have indicated that it thought that there was at least some chance that a judge would

agree. Additionally, in 1999 the National Federation of the Blind sued America Online ("AOL"), alleging that AOL's web services were a public accommodation regulated by the ADA, and as such AOL was obligated to make its services accessible to the blind. This case also settled, again with part of the settlement agreement requiring AOL to make its services accessible to the blind.⁴²

<16> These cases should demonstrate to even web-only businesses that compliance with the ADA is a recommended practice, as it avoids the negative publicity of similar lawsuits, the costs of defending and settling such lawsuits, and also the possibility of a court extending the ADA to pure e-commerce websites.

Legislative History and Purpose of the ADA

<17> Another factor to consider in analyzing the applicability of the ADA to the Internet is the timing of the statute's promulgation. The drafters likely did not contemplate widespread use of the Internet at the time of the statute's passing. The ADA was passed in 1990, and while the Internet was invented in 1989, it did not come into widespread use until 1995.⁴³ In analyzing this factor, the Supreme Court has noted that "[w]hen technological change has rendered its literal terms ambiguous, [an] Act must be construed in light of [its] basic purpose."⁴⁴ Because Congress likely did not contemplate the current state of the Internet, the term "public accommodation" may have become ambiguous. As such, the Supreme Court's mandate should be followed and the Act should be construed in light of its basic purpose. Some of the general purposes of the Act are "to provide a clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities," and "to invoke the *sweep of congressional authority*...in order to address the major areas of discrimination faced day-to-day by people with disabilities."⁴⁵ The express purpose of Title III of the ADA was "to bring individuals with disabilities into the economic and social mainstream of American life."⁴⁶ Since, at this point in history, "mainstream America uses the Internet for both economic and recreational purposes, the above goal of Title III cannot be met without ensuring access to the Internet for all Americans."⁴⁷ This argument finds additional support in the fact that the Supreme Court has stated that the definition of public accommodation "should be construed liberally."⁴⁸

The Department of Justice's Interpretation of the Applicability of the ADA to the Internet

<18> The Department of Justice ("DOJ"), the agency given the authority to issue regulations for Title III of the ADA, as well as to provide technical assistance and enforcement of the ADA,⁴⁹ has

taken the position that the ADA applies to the Internet.⁵⁰ For instance, the DOJ filed an Amicus Curiae brief in *Hooks v. OKBridge, Inc.*,⁵¹ arguing that the definition of “public accommodation” includes entities that operate *solely* on the Internet.⁵²

“Place” Under the ADA

<19> Finally, any analysis of the ADA must include an analysis of its plain text. The ADA uses three different terms to describe “public accommodations:” “places,” “establishments,” and “stations used for specified public transportation.”⁵³ In addition, the ADA does not define the term “place.”⁵⁴ Moreover, the list of different public accommodations frequently ends with the phrase “or other place of. ...”⁵⁵ Thus, the list is merely descriptive, not definitive. Although some courts have claimed that the examples listed in the statute are physical, and thus the statute *excludes* the non-physical,⁵⁶ this notion has been flatly rejected by other courts and commentators,⁵⁷ leaving open the possibility that a court will find that a pure e-commerce presence must be accessible under the ADA.

The Circuit Split

<20> There is a split among federal circuit courts on the issue of whether public accommodations must be physical places or whether, instead, a website may in and of itself be a public accommodation.⁵⁸ Cases finding that public accommodations are not limited to physical places base their conclusions on the plain language of the statute and secondarily rely on underlying policy concerns and agency regulations. These cases include *Carparts Distrib. Ctr. v. Automotive Wholesaler’s Ass’n*⁵⁹ (finding that AIDS victims’ health care plans are “public accommodations”) and *Doe v. Mutual of Omaha Ins. Co.*⁶⁰ (stating that websites specifically are public accommodations as defined by the ADA).

<21> Those courts which find that public accommodations must be physical places also tend to focus on the plain language of the ADA and find the term “public accommodation” to unambiguously refer solely to physical places. *Parker v. Metropolitan Life Ins. Co.*⁶¹ used the canon *noscitur a sociis*, which directs that terms be interpreted within the context of accompanying words.⁶² *Weyer v. Twentieth Century Fox Film Corp.* also applied that doctrine in its interpretation of “place,” and also found that a place of public accommodation must be a physical place.⁶³

<22> In *Ford v. Schering-Plough Corp.*, the court found that “[t]he plain meaning of Title III is that a public accommodation is a place....[i]n keeping with the host of examples of public accommodations provided by the ADA, all of which refer to

places.”⁶⁴ Citing the examples from § 12181(7), and applying the interpretive canons discussed above, the court stated that it did “not find the term ‘public accommodation’ or the terms in [42 U.S.C. § 12181\(7\)](#) to refer to non-physical access or even to be ambiguous as to their meaning.”⁶⁵ The court in *Access Now, Inc. v. Southwest Airlines, Co.* also applied the interpretive canons discussed above and held that, “to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure” and that “the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of ‘places of public accommodation.’”⁶⁶ The court then went on to find that plaintiffs had not established a nexus between Southwest.com and a physical, concrete place of public accommodation.⁶⁷ Similarly, the court in *Hooks v. OKBridge* held that a physical facility is a necessary attribute of a public accommodation.⁶⁸

CONCLUSION

<23>The *Target* decision is a significant development in the law applying the ADA to the Internet. The decision holds that websites are never public accommodations, and thus in order to be subject to the ADA, must be a “service” of a “public accommodation.” Although this court held that pure e-commerce websites and websites which are *not* tightly integrated with a physical store are *not* subject to the ADA, businesses which operate these types of websites are wise to bring them into compliance anyway.⁶⁹ Not only is this a sound business practice (opening the doors to the millions of blind individuals who are potential customers and avoiding negative publicity), but, in light of the lawsuits which have been brought but have settled, and the current circuit split on the issue, it also functions as a preemptive solution to subsequent cases which may hold that websites themselves are public accommodations or new legislation which would expressly require commercial websites to be accessible to the blind.

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Footnotes

1. Jeffrey Bashaw, University of Washington School of Law, Class of 2008. Thank you to Professor Anita Ramasastry of the University of Washington School of Law and Jared Barrett.
2. Disability Rights Advocates, *Legal Precedent Set for Web Accessibility* (2006), http://www.drlegal.org/cases/private_business/nfb_v_target.php. For another description of the way Target.com interacts

(Target.com allows customers to “browse products, product descriptions and prices; view sale items and discounts for online shopping; print coupons for use in Target retail stores; purchase items for home delivery; order pharmacy items and have prescriptions filled for pickup at Target retail stores” and a variety of other services).

3. National Federation of the Blind v. Target, 452 F. Supp. 2d 946 (N.D. Cal. 2006).
4. 42 U.S.C. §§ 12101-12213 (2000).
5. A Fed. R. Civ. P. 12(b)(6) motion to dismiss tests the sufficiency of a claim. “Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Target*, 452 F. Supp. 2d at 950.
6. *Target*, 452 F. Supp. 2d at 956. See also Eric Goldman, *Must Websites Comply with the ADA (and State-Law Equivalents)? National Federation of the Blind v. Target*, Oct. 9, 2006, http://blog.ericgoldman.org/archives/2006/10/must_websites_c.htm ; *Target*, 452 F. Supp. 2d at 956.
7. “Public accommodations” are defined at 42 U.S.C. § 12181(7) as an entity that affects commerce and falls within one of the twelve enumerated categories: “The following private entities...if the operations of such entities affect commerce--
 - A. an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
 - B. a restaurant, bar, or other establishment serving food or drink;
 - C. a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
 - D. an auditorium, convention center, lecture hall, or other place of public gathering;

- F. a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
 - G. a terminal, depot, or other station used for specified public transportation;
 - H. a museum, library, gallery, or other place of public display or collection;
 - I. a park, zoo, amusement park, or other place of recreation;
 - J. a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
 - K. a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
 - L. a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.”
8. 42 U.S.C. § 12182(a).
9. COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 8-9 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf.
10. *Target*, 452 F. Supp. 2d at 956.
11. *See, e.g.*, Jeffrey Scott Ranen, note, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. Third World L.J. 389, 407 (2002) (an extensive treatment of the argument for applicability of the ADA to the Internet); Jonathan Bick, *Americans With Disabilities Act and the Internet*, 10 Alb. L. J. Sci. & Tech. 205, 213 (2000) (another extensive analysis of the applicability of the ADA to the Internet) ; COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 23 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf

(arguing that a website is a place of public accommodation), *Bashaw: Applying the Americans with Disabilities Act to Private Websites*, Brief of the United States as Amicus Curiae Supporting Appellant, *Hooks v. OKBridge, Inc.*,

232 F.3d 208 (5th Cir. 2000), available at <http://www.usdoj.gov/crt/briefs/hooks.htm> (arguing that the court did not need to determine “whether a web site on the internet can be a ‘place’ within the meaning of the statute, for [defendant] OKBridge has a physical facility in San Diego, California, where it houses its computers and personnel. The bridge tournaments it runs on its computers are ‘services’...of that place”); Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to Sen. Tom Harkin (Sept. 9, 1996), available at <http://www.usdoj.gov/crt/foia/tal712.txt>; Adam M. Schloss, note, *Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?*, 35 Colum. J.L. & Soc. Probs. 35 (2001); National Council on Disability, *When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web*, available at <http://www.ncd.gov/newsroom/publications/2003/adainternet.htm>

12. *Target*, 452 F. Supp. 2d at 949-50. See also Disability Rights Advocates, *Legal Precedent Set for Web Accessibility* (2006), http://www.dralegal.org/cases/private_business/nfb_v_target.php. To see the plaintiffs’ description of the way Target.com interacts with Target stores, see Amended Complaint at 4-5, *National Federation of the Blind v. Target*, 452 F.Supp.2d 946 (N.D. Cal. 2006), available at http://www.dralegal.org/downloads/cases/target/nfb_v_target_complaint. (Target.com allows customers to “browse products, product descriptions and prices; view sale items and discounts for online shopping; print coupons for use in Target retail stores; purchase items for home delivery; order pharmacy items and have prescriptions filled for pickup at Target retail stores” and a variety of other services).
13. Target Corporation’s Answer to Amended Complaint, 2006 WL 3267474 (Sep. 20 2006).
14. *Target*, 452 F. Supp. 2d at 956.
15. See, e.g., *Target*, 452 F. Supp. 2d 946 (holding that the plaintiffs stated a claim under the ADA only to the extent that they alleged that the website is tightly integrated with the physical stores); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) (holding that the plaintiff failed to state a cause of action under the ADA

- employer); *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (holding that the plaintiff failed to state a Title III claim by alleging that the inaccessibility of Southwest.com prevented access to Southwest's "virtual" ticket counters, rather than a *physical* place of public accommodation); *Stoutenborough v. Nat'l Football League*, 59 F.3d 580, 583-84 (6th Cir. 1995) (dismissing a Title III claim because the challenged service (the live telecast of a football game) was not offered by a place of public accommodation (the stadium)).
16. See *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).
 17. *Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994).
 18. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).
 19. *Target*, 452 F. Supp. 2d at 955 ("the challenged service here is heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores").
 20. *Target*, 452 F. Supp. 2d at 955.
 21. *Target*, 452 F. Supp. 2d at 953.
 22. *Id.*
 23. *Id.*
 24. *Id.* (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000), which concluded that places of public accommodation are "actual physical place[s]," and specifically held that "an insurance company administering an employer-provided disability policy is not a "place of public accommodation under Title III."
 25. *Target*, 452 F. Supp. 2d at 952-53.
 26. *Rendon v. Valley Crest Prods., Ltd.*, 294 F.3d 1279, 1280-81 (11th Cir. 2002). See also *Target*, 452 F. Supp. 2d at 953-54.
 27. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place...Since [plaintiff] Ford received her disability benefits via her employment at Schering,

she had no nexus to MetLife's 'insurance office' [the
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"place of public accommodation"] and thus was not
discriminated against in connection with a public
accommodation). *See also Target*, 452 F. Supp. 2d at
953-54.

28. *Stoutenborough v. National Football League*, 59 F.3d 580, 583-84 (6th Cir. 1995). *See also Target*, 452 F. Supp. 2d at 953-54.
29. *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002). *See also Target*, 452 F. Supp. 2d at 954.
30. *Target*, 452 F. Supp. 2d at 952, 955-56.
31. *Target*, 452 F. Supp. 2d at 952, 955-56.
32. *Target*, 452 F. Supp. 2d at 952.
33. Amended Complaint at 5, *Target*, 452 F.Supp.2d 946, available at http://www.drlegal.org/downloads/cases/target/nfb_v_target_complaint.
34. *See also Target*, 452 F. Supp. 2d at 956, note 4.
35. *See also id.* at 956.
36. COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 23 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf.
37. *See Evgenia Fkiaras, Liability Under the Americans with Disabilities Act for Private Web Site Operators*, 2 SHIDLER J. L. COM. & TECH. 6, ¶ 1 (2005), available at <http://www.lctjournal.washington.edu/Vol2/a006Fkiaras.html>.
38. *See Target*, 452 F. Supp. 2d at 954 (citing *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), which held that "plaintiff failed to state a claim under the ADA because plaintiff alleged that the inaccessibility of southwest.com prevented access to Southwest's 'virtual' ticket counters" because "'virtual' ticket counters are not actual, physical places, and therefore are not places of public accommodation").
39. *See also Target*, 452 F. Supp. 2d at 956.
40. *See Fkiaras, supra* note 37.
41. *See id.*

43. ~~Committee on Legal Issues Affecting People with Disabilities, Association of the Bar of the City of New York, Website Accessibility for People with Disabilities 2 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf~~
- .
44. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). See also Fortnightly Corp. v. United Artists, 392 U.S. 390, 395-96 (1968) (“[O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change”). For a thorough analysis of the legislative history of the ADA, see COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 16-20 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf
- .
45. 42 U.S.C. § 12101(b) (emphasis added): It is the purpose of this Act--
1. to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
 2. to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
 3. to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
 4. to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.
46. Jeffrey Scott Ranen, note, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. Third World L.J. 389, 407 (2002). See also Jonathan Bick, *Americans With Disabilities Act and the Internet*, 10

Alb. L. J. Sci. & Tech. 205, 213 (2000) (“The underlying objective of the ADA was to ensure the equality of opportunity, full participation, and self-sufficiency necessary to allow people with disabilities to compete for society’s goods and services on an equal basis”).

47. Ranen, *supra* note 46, at 407.
48. PGA Tour, Inc. v. Martin, 532 U.S. 661, 676 (2001). *See also* Fkiaras, *supra* note 37; Ranen, *supra* note 46, at 391-92, 395-96 (“A broad reading of the public accommodations clause in Title III of the ADA suggests that public accommodations are not limited to strictly physical structures; therefore, nonphysical entities like the Internet also fall within the statute’s purview. This interpretation of Title III, in conjunction with supporting case law and the statute’s legislative history, implies that a broad reading of the ADA and its applicability to the Internet is appropriate”); Bick, *supra* note 46, at 208 (“the public accommodations requirements cover almost all facets of American life in which members of the public come into contact with a business or other entity”).
49. 42 U.S.C. § 12188(b). The ADA gives the Attorney General the authority to issue regulations and provide technical assistance and enforcement of the ADA. The Attorney General heads the Department of Justice. *See also* Bick, *supra* note 46 at 208, n. 9.
50. *See* COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 10-12 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf, (finding that “a Website is a ‘facility,’ as defined by the DOJ regulations promulgated at the direction of the ADA. A ‘facility’ includes ‘all or any portion of...sites,... equipment,...or other...personal property...’ of the public accommodation. Under this definition, a Website clearly has a ‘site’—a physical location on ‘equipment’ such as a server. People enter this ‘site’ using remote computers, accessing ‘goods, services, facilities, privileges, advantages, or accommodations’ resident on that site or in another remote place in the same way people make a telephone call to a bricks-and-mortar store to place an order or walk into a library to read a book. Although the cyberspace ‘place’ of public accommodation may be smaller than a bricks-and-mortar counterpart (be it a huge department store or a small storefront), it is nonetheless a place. In this place, as in a walk-in place, people may view, evaluate, buy and sell, order, and even perform and deliver goods and services; enjoy a

wide variety of entertainment and exhibitions; borrow books; exhibit art and museum collections; pursue games and other recreation; enjoy entertainment; attend lectures and other forms of education; explore and obtain social services; and hold interactive conferences. It is, in short, a 'public accommodation' under Title III of the ADA, with obligations not to discriminate, and it must be accessible, whether attached to a bricks-and-mortar entity or existing only in cyberspace").

51. *Hooks v. OKBridge, Inc.*, No. 99-214 (W.D. Tex. Aug. 4, 1999), *aff'd* without opinion, 232 F.3d 208 (5th Cir. 2000) (holding that Title III does not apply to a Website because of a lack of physical space).
52. Brief of the United States as Amicus Curiae Supporting Appellant, *Hooks v. OKBridge, Inc.*, 232 F.3d 208 (5th Cir. 2000), available at <http://www.usdoj.gov/crt/briefs/hooks.htm> ("Defendant [offeror of computerized bridge tournaments] is a commercial business offering services for a fee to the general public and easily falls within the ADA's definition of a public accommodation as a 'private entity' that operates a 'service establishment,' place of 'entertainment,' or place of 'recreation.' 42 U.S.C. 12181(7)(C), (F), (L). It delivers those services from its place of business in San Diego, California, through the internet to its customers. Its computerized bridge tournaments are the 'services...of [that] place of public accommodation.'").
53. See COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 9 n.17 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf.
54. COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 9-10 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf (arguing that "the key attribute of the public accommodation is the act of selling to the public, not the nature of the location where it does the selling. Furthermore, a Website is a 'facility,' as defined by the DOJ regulations promulgated at the direction of the ADA"). See also Bick, *supra* note 46, at 220; Ranen, *supra* note 46, at 391-92.
55. 42 U.S.C. § 12181(7).

56. See *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006,

1014 (6th Cir. 1997) (“The doctrine 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’”). See also Ranen, *supra* note 46, at 398 (“One commentator used the canon of *ejusdem generis* to explain the Sixth Circuit’s rationale. This canon states 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’”). Applying these canons, if the specific terms listed in 42 U.S.C. § 12181(7) are all physical places, then the phrase “other service establishments” is understood to also refer to physical places.

57. See COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 10 (2006), http://www.nycbar.org/pdf/report/Website_Accessibility.pdf. See also *Carparts Distrib. Ctr. v. Automotive Wholesaler’s Ass’n*, 37 F.3d 12, 19 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); Ranen, *supra* note 46 at 396; Bick, *supra* note 46, at 214, 219-220.
58. A major website like Target.com, which operates nationally and arguably has sufficient contacts in every state to be subject to personal jurisdiction, is vulnerable in every circuit and must comply with the strictest interpretation of the ADA’s applicability to websites.
59. *Carparts Distrib. Ctr. v. Automotive Wholesaler’s Ass’n*, 37 F.3d 12, 19 (1st Cir. 1994) (“The plain meaning of the terms do not require “public accommodations” to have physical structures for persons to enter. Even if the meaning of “public accommodation” is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures. By including ‘travel service’ among the list of services considered ‘public accommodations,’ Congress clearly contemplated that ‘service establishments’ include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter

an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result"). See also Ranen, *supra* note 46, at 395-97.

60. 179 F.3d 557, 559 (7th Cir. 1999) ("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, *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).
61. 121 F.3d 1006, 1014 (6th Cir. 1997)
62. *Id.* ("The doctrine 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''"). See also Ranen, *supra* note 46, at 395-98 ("One commentator used the canon of *ejusdem generis* to explain the Sixth Circuit's rationale. This canon states 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.'"). Applying these canons, if the specific terms listed in 42 U.S.C. § 12181(7) are all physical places, then the phrase "other service establishments" is understood to also refer to physical places.
63. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) ("Title III provides an extensive list of 'public accommodations' in [§ 12181\(7\)](#), including such a wide variety of things as an inn, a restaurant, a theater, an auditorium, a bakery, a laundromat, a depot, a museum, a zoo, a nursery, a day care center, and a gymnasium. All the items on this list, however, have something in common. They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services. The principle of *noscitur a sociis* requires that the term, 'place of public accommodation,' be interpreted within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an actual physical place is required").
64. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998).

65. *Id.* at 612-14.
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66. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1317-19 (S.D. Fla. 2002).
67. *Id.* at 1319.
68. 232 F.3d 208 (decision without published opinion). For a description of the case, see U.S. Department of Justice, Enforcing the ADA: A Status Report from the Department of Justice (2000),
<http://www.usdoj.gov/crt/ada/aprsep00.htm>.
69. For a discussion of the steps a company should take in order to ensure compliance, see Fkiaras, *supra* note 37; COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 5-6 (2006),
http://www.nycbar.org/pdf/report/Website_Accessibility.pdf