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Application of the ADA to Websites: Congress Should Rely on the Standards Created by the World Wide Consortium

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I. INTRODUCTION

Congress created the Americans with Disabilities Act (ADA) in 1990 to assure equality of opportunity and independent living to those with physical or mental abilities.\(^1\) Although the roots of the Internet were growing rapidly when Congress passed the ADA,\(^2\) the World Wide Web did not really become popular until the mid 1990s.\(^3\) Congress has not yet updated the ADA to clearly cover websites, and the current regulations that ensure access for disabled persons to physical locations do not clearly apply to websites. The Department of Justice (DOJ) invited public comment on access to websites under the ADA from both website developers and disabled persons in July of 2010.\(^4\) The DOJ closed the comment period on January 24, 2011,\(^5\) but has not yet issued new guidance.

Tim Berners-Lee, the inventor of the World Wide Web, created the World Wide Web Consortium (W3C) in 1994 to develop specifications and guidelines to “lead the Web to its full potential.”\(^6\) W3C launched the Web Accessibility Initiative (WAI) to help the Internet meet that potential by promoting and achieving web functionality for disabled persons.\(^7\) Governments,

\(^1\) 42 U.S.C.A. § 12101 (West).
\(^5\) Id.
businesses, and web developers widely regard the guidelines developed by W3C, through its WAI, as the international standard for web accessibility.\(^8\)

In this paper, I will argue that the DOJ and Congress should follow the example of foreign nations, such as the European Union and Australia, by relying on the standards set by W3C to determine compliance with the ADA.\(^9\) In the first part of this paper, I will discuss the history of the ADA and the Internet. In the second part, I will discuss how the courts have applied the ADA to the Internet. In the final part of this paper, I will discuss why using the W3C recommendations as the legal standard for ADA access to websites is the best method.

### II. BACKGROUND OF THE ADA

In 1990, Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”\(^{10}\) Based on these findings, Congress created the ADA, identifying the purposes of the statute as to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,”\(^{11}\) and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”\(^{12}\)

Congress made no mention of the Internet or anything resembling a global network in the original version of the ADA.\(^{13}\) Instead, Congress emphasized access to physical locations.\(^{14}\)


\(^{10}\) 42 U.S.C.A § 12101(a)(2) (West).

\(^{11}\) See id. § 12101(b)(1).

\(^{12}\) See id. § 12101(b)(2).

Since 1990, Congress has revised Title III of the ADA twice, on September 25, 2008 and on September 15, 2010. Neither time did Congress amend “place of public accommodation” to include the Internet or websites. After Congress held its first and only, thus far, inquiry into whether a place of public accommodation should include online “places”, it chose not to amend the ADA explicitly to include websites. At the hearing, Mr. Hayes, Chairman of the United States Internet Industry Association, stated that, “the Internet is an evolving media, not a physical structure … if we apply regulations based on the technologies and possibilities of today, we may in fact limit the development of better access tools simply because we couldn’t conceive of them when the regulation was drafted.”

III. THE IMPACT OF DISABILITIES ON INTERNET USE

The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individuals.” Under this section, “major life activities” refer to “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communication, and working.” Although this list is not exclusive, the areas of major concern regarding Internet usage are seeing, hearing, speaking, reading, concentrating, communication, and working.

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14 42 U.S.C.A §§ 12181-12189 (West).
17 Id.
19 § 12102(2)(A).
The 2010 Census reported that 18.7 million Americans have a disability; 12.6 of those qualified as severe disabled.\textsuperscript{21} Of respondents aged 15 or older, 3.3 percent had difficulty seeing and 3.1 percent had difficulty hearing.\textsuperscript{22} The Census also found almost half of all households headed by someone with a disability did not have a computer at home (46%), while a much smaller percentage of homes where the head of the household had no disability lacked computers (20%).\textsuperscript{23}

The inability to access the Internet puts a person at a great disadvantage in society. The Internet provides an unprecedented amount of information and educational materials immediately available with a few keystrokes. Shoppers may purchase goods and services without leaving home. A store need not pay the overhead of a brick and mortar building, which means lower costs and thus cheaper prices for online purchases. People now have the option of working from home and even creating their own online businesses without going out their front doors. The flexibility the Internet affords benefits all Americans.

For disabled persons, Internet use can yield even greater benefits. Deaf persons may communicate with hearing persons without the aid of a sign language interpreter. This removes significant communication barriers for those with hearing disabilities. Persons with mobility disabilities may shop online for groceries and other household needs and even entertainment. Students with learning disabilities can take online courses structured to their special needs.

Blind persons gain considerably from access to the Internet. Before books were widely available in digital format, the imposition of going to a bookstore was just the beginning of the


\textsuperscript{22} Id.

barriers to access a blind person faced. At the store, few publishers make books available for blind or low visibility readers. Peter White, a blind writer who is the BBC’s Disability Affairs Correspondent, notes that prior to the Internet, he had to limit his voracious appetite for books to those available in Braille. Publishers make well under 1% of the world’s literature available in Braille form.24 With the advent of modern technology, blind people may more easily find books, magazines, and other sources of information online. Screen-reader devices read these documents aloud to blind persons and persons with low visibility,25 which has greatly expanded the range of literary material. For example, Project Gutenberg has scanned over 40,000 royalty-free books,26 and McGraw-Hill now provides 95% of its higher education titles in digital format, making them available to screen readers.27

Other assistive technologies include speech recognition software that blind persons use to navigate a website; captioning which allows deaf persons to access information in videos; and technology that enables persons with limited manual dexterity to interact with websites.28 Web developers must specifically modify websites to interact with the assistive tools, such as by providing alternate text for images and commands which respond to keystrokes as well as a mouse. W3C provides guidance on how to accomplish this interactivity.


28 Nondiscrimination on the Basis of Disability, supra note 4.
IV. COURTS’ APPLICATION OF THE ADA TO WEBSITES

The ADA currently does not provide clear standards for the Internet. Therefore, the courts have struggled to apply the ADA to the Internet. In the few cases on point, courts have primarily addressed the threshold issue of whether a website is a “place of physical accommodation” as required by the ADA without further applying the ADA to websites.

Title III of the ADA prevents discrimination against disabled persons in places of public accommodation.

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.29

The ADA defines “public accommodation” by using an exclusive enumerated list of private entities.

The following private entities are considered public accommodations for purposes of this subchapter, 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;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

29 42 U.S.C.A. § 12182(b) (West 1990) (emphasis added).
(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.  

A. Facebook and Southwest: Courts Which Found the ADA Does Not Apply to Websites

The enumerated list does not make clear whether websites count as “places of public accommodation.” In Young v. Facebook, Inc. and Access Now, Inc. v. Southwest Airlines Co., the courts found that websites were not “places of public accommodation”.

In Facebook, the plaintiff alleged she suffered from bipolar disorder and Facebook did not provide reasonable customer service to assist with her disability in violation of the ADA. The court dealt with the matter of “place of public accommodation” swiftly, noting that Facebook operates solely in cyberspace and is thus not a place of public accommodation.

While the headquarters of Facebook clearly occupy a concrete space, it was not that location to

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31 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011).
33 Facebook, 790 F. Supp. 2d at 1114.
34 Id. at 1115.
which the plaintiff claimed Facebook was denying her access.\textsuperscript{35} The plaintiff tried to establish a nexus between Facebook’s sales of gift cards in physical stores and her complaint.\textsuperscript{36} The court rejected her argument, stating that Facebook does not own nor operate the stores which sell gift cards.\textsuperscript{37}

In \textit{Southwest}, an Eleventh Circuit case, the plaintiff alleged that the inability of a blind person to purchase airline tickets from the Southwest.com website violated the ADA. The court relied on definitions in the Code of Federal Regulations to define a “place of public accommodation” as a “facility operated by a private entity whose operations affect commerce and fall with at least one of the [twelve enumerated categories].”\textsuperscript{38} The court wrote that, “[T]he Eleventh Circuit has recognized Congress’ clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation.”\textsuperscript{39}

The court found that Southwest’s website was neither a physical space as defined by the ADA, nor a means to access a concrete space.\textsuperscript{40} In answer to the plaintiff’s claim that the website represented physical ticket counters online, the court found no nexus between the southwest.com website and the physical counters,\textsuperscript{41} reasoning, “[T]he Supreme Court and the Eleventh Circuit have both recognized that the Internet is a “unique medium – known to its

\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 1317.
\textsuperscript{39} Access Now. 227 F.Supp at 1318.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 1319.
users as ‘cyberspace’ – *located in no particular geographical location* but available to anyone, anywhere in the world, with access to the Internet.”

The court concluded that because the website does not exist in any particular geographical location, the plaintiff could not show the website impeded the access of disabled persons to a specific, particular airline counter or travel agency. Moreover, “[i]t is the role of Congress, and not this Court, to specifically expand the ADA’s definition of ‘public accommodation’ beyond physical, concrete places of public accommodation, to include ‘virtual’ places of public accommodation.”

**B. Target and Netflix: Courts Which Found the ADA Does Apply to Websites**

All courts do not agree that the ADA does not apply to websites. The Northern District of California split from the *Southwest* decision, finding the ADA may apply to websites if there is a connection between a concrete location and a website. The District of Massachusetts found no need for any concrete location for the ADA to apply to websites.

The Northern District of California, in *Natl. Fed. of the Blind v. Target Corp.*, found that websites may be “places of public accommodation” when there is a suitable nexus between the website and a physical store. In *Target*, the plaintiff alleged that her inability as a blind person to purchase goods from the Target website violated Title III of the ADA. When it addressed the public accommodation question, the *Target* court focused on a nexus test.

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42 *Id.* at 1321, citing *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1237 n.3 (11th Cir.2001) (quoting *Reno v. ACLU*, 521 U.S. 844, 851, 117 S.Ct. 2329 (1997)).

43 *Id.* at 1321.

44 *Id.* at 1321 n.13.

45 *See infra* pp. 9-10.

46 *See infra* pp. 10-12.

47 452 F. Supp. 2d 946 (N.D. Cal. 2006).

48 *Target*, 452 F. Supp. 2d at 949.
held that a connection between the challenged service and a physical place of public accommodation will bring a service under Title III of the ADA.49 “Although a plaintiff may allege an ADA violation based on unequal access to a ‘service’ of a place of public accommodation, courts have held that a plaintiff must allege that there is a ‘nexus’ between the challenged service and the place of public accommodation.”50

The nexus in this case were the products sold at the physical store which were also sold on the website. The court also observed that Target integrated services available at the brick and mortar store into their website. In fact, Target’s website acted as a gateway to the physical stores.51 The court found the inaccessibility of the website denied the plaintiff the ability to enjoy the services of physical Target stores.52 The court ultimately held that Title III of the ADA covered only those goods that customers could purchase online or at the physical location. The court did not require the website to be completely accessible to disabled persons, only those parts which were also available at the brick-and-mortar location.53

Six years later, the United States District Court for the District of Massachusetts in Natl. Assoc. of the Deaf v. Netflix, Inc.54 found that websites were “places of public accommodations”. The court applied the ADA more broadly to websites than previous courts had in Netflix.55 Organizations representing deaf persons brought action against Netflix, a provider of streaming videos on the Internet, for violating the ADA.56 They claimed that only a

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49 Id. at 952.
50 Id. at 951.
51 Id. at 954.
52 Id. at 955.
53 Id. at 956.
55 Netflix, 11-CV-30168-MAP at 1.
56 Id. at 1.
small portion of the titles available for viewing on Netflix contained captioning text.\textsuperscript{57} In response, Netflix filed a motion to dismiss in part based on Netflix not being a place of public accommodation under the ADA.\textsuperscript{58}

The court denied the motion, holding Netflix’s website was a place of public accommodation.\textsuperscript{59} To reach this decision, the court cited the twelve enumerated categories and found that a video site could be a “place of exhibition and entertainment,” “place of recreation,” “sales or rental establishment,” or a “service establishment.”\textsuperscript{60} The court relied on earlier cases applying the ADA to non-website non-physical locations, holding that places of public accommodation are not limited to actual physical structures.\textsuperscript{61} The court explained that a person entering an office to purchase a service has the same protections as a person attempting to buy the same service via a phone or via the Internet.\textsuperscript{62}

The court expressed concern that excluding online businesses from the ADA would “run afoul of the purposes of the ADA.”\textsuperscript{63} Though the court acknowledged that the web did not exist when Congress passed the ADA, the court said the legislative history of the ADA made it clear that Congress intended the ADA to adapt to changes in technology.\textsuperscript{64} The court did not

\textsuperscript{57} \textit{Id.} at 1.

\textsuperscript{58} \textit{Id.} at 2. This case also contains a long discussion regarding the Communications and Video Accessibility Act (PL 111-260, Oct 8, 2010) which is beyond the scope of this paper.

\textsuperscript{59} \textit{Id.} at 4.

\textsuperscript{60} \textit{Id.} at 2 citing 42 U.S.C. § 12181(7).

\textsuperscript{61} \textit{Id.} at 2-3.

\textsuperscript{62} \textit{Id.} at 3.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}
mention that Congress had failed to amend the ADA to bring it in line with the needs of modern technology.\textsuperscript{65}

In its motion, Netflix argued that it does not own the video programming, but rather is a distributor.\textsuperscript{66} Because it does not hold the copyright for the videos, it would be unable to make the necessary changes to the videos to meet the ADA.\textsuperscript{67} The court chose not to address that matter at this stage.\textsuperscript{68}

One month later, on July 13, 2012, the Northern District of California heard a similar case entitled \textit{Cullen v Netflix, Inc.}\textsuperscript{69} The plaintiff was a deaf individual who also sued Netflix because of the lack of captioning on the site.\textsuperscript{70} The court adhered to the District Court’s precedent in \textit{Target} and found Netflix neither to be a place of public accommodation nor to have any nexus to a place of public accommodation.\textsuperscript{71}

\textbf{C. Analysis of Courts’ Disparate Approaches}

The recent decisions regarding the ADA reflect a spectrum from non-application to websites to complete application. This indicates that the judiciary is not in agreement on how best to apply the current ADA to modern technology. These broadly differing opinions indicate Congress must take action to resolve the dispute.

Further, the circuit splits leaves web developers without clear guidance on how the ADA applies to their site. Because of the national reach of the Internet, a developer in

\textsuperscript{65} The court granted Netflix’s motion to dismiss with leave to amend, though it allowed amendments only to the portions of the claim that did not fall under the ADA. \textit{Id.} at 10.

\textsuperscript{66} \textit{Id.} at 5.

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.}


\textsuperscript{70} \textit{Id.} at 1.

\textsuperscript{71} \textit{Id.} at 4.
California who followed the Northern District of California’s holding and did not comply with the ADA may find himself liable in another jurisdiction. Congress must clarify how the ADA applies, and should do so using the W3C’s WAI guidelines to provide web developers with the necessary standards for compliance.

V. THE DIFFICULTY WEBSITES FACE COMPLYING WITH THE ADA

Without clear standards provided by Congress or the courts, web developers must speculate about how to comply with the ADA when designing a website. This may result in costly development while still leaving the developer or site owner open to liability under the ADA. This section discusses how the current uncertainty about ADA liability raises undue costs and requires Congressional resolution.

A. The Blurred Line between Access and Product

The ADA and cases addressing the ADA are generally concerned with promoting access to physical locations. Buildings need access ramps for wheelchairs, signs need Braille text, and audible alarms need visual indications. The ADA does not directly regulate actual products in a physical location, however. For example, a bookstore must provide access to the physical store, but does not have to provide all books in Braille if doing so would fundamentally alter its business. According to the “Reasonable Modification” section of the ADA:

A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

72 Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 FR 35544-01.

73 28 C.F.R. § 36.302.
Under the ADA, it is difficult to draw the line between access and goods and services on the Internet. In the physical world, the distinction is clearer. The courts have held that theaters do not have to provide closed captioning to movies shown at their locations as it would fundamentally alter the nature of the service or would constitute an undue burden. Theaters must merely assure disabled access to the theater itself. Similarly, a video store does not have to provide closed-captioned video tapes, but must be wheelchair accessible. A restaurant menu does not have to be available in Braille. Having a waiter or staff person available to read the menu to the customer is enough.

On a website, the lack of physicality blurs the distinction between access and goods and services. Many restaurant websites use Flash in the design of their website. Flash is not compatible with most screen reading devices, meaning a blind person could not “enter” the website. However, flash restaurant sites often include a text-based address and phone number on their page. Therefore, a blind person using a screen reader would be able to obtain the phone number and call the restaurant to obtain the same information available on the site. It is not clear whether this would comply with the ADA if it applied to websites. W3C provides techniques for use by programmers when using software such as Flash to develop websites. The guidelines provided by W3C acknowledge that, although Flash continues to increase accessibility tools available in their software, Flash does not meet all WAI standards for accessibility.

74 See e.g., Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc., 603 F.3d 666 (9th Cir. 2010).
76 CAINLAWH, § 5:5. Title III, California Insurance Law Handbook § 5:5.
77 28 C.F.R. § 36app. C.
79 Id.
recommends programmers of websites provide alternative website views to accommodate disabled users.\textsuperscript{80}

It is also unclear how websites such as YouTube,\textsuperscript{81} which provide space for videos created by individuals unaffiliated with the site to be viewed by the public, would have to comply with the ADA. With the click of a button, a video can have embedded advertising, potentially making the 30 second short of a cat dancing like a human an item of commerce. YouTube also hosts entire movies, television shows, and music videos, as does Netflix. The ADA currently does not address whether each provider of a video to YouTube must provide captions, or if only professional videos but not personal videos must have captions. The line between a personal and professional video is unclear, making the issue more complicated. YouTube users may embed ads into any video they upload. If a video of their dog performing tricks receives enough views, or their home-based personal video blog becomes popular, the user can make over six figures.\textsuperscript{82} One solution may be for YouTube to have a view limit at which point captions are required. The user who uploaded the video would be liable for the captioning, as he or she is enjoying the commercial profits of the video. If the user does not add captions to the video in a given amount of time, YouTube would have to disable the video until such time as captions were added.

Captioning does not address the barriers of blind persons accessing online videos. It is unclear whether YouTube must provide textual descriptions depicting each video, or scene by scene descriptions, and who should provide textual descriptions. YouTube licenses most videos

\textsuperscript{80} Id.

\textsuperscript{81} Located at http://www.youtube.com.

from the person posting the content.\footnote{Terms of Service, Youtube, http://www.youtube.com/t/terms (last visited Nov 15, 2012).} The terms of service also state the person posting the content is solely responsible for the content.\footnote{Id.} This potentially makes each individual uploading a video liable for non-compliance with ADA standards. Every minute, 48 hours of video are uploaded to YouTube, resulting in nearly 8 years of content uploaded every day.\footnote{Frequently Asked Questions, Youtube, http://www.youtube.com/t/faq (last visited Oct. 21, 2012).} It is currently unclear what, if anything, either YouTube or video posters must do to comply with the ADA. The W3C covers uploaded media, and specifically refers to YouTube, in the WAI specifications.\footnote{Multimedia Accessibility Faq, W3C (Jun 29, 2008) http://www.w3.org/2008/06/video-notes#q6 (last visited Dec 7, 2012).} Congress should rely on the W3C WAI specifications as the ADA standard to which YouTube and video posters should conform.

\textbf{B. The Little Things Add Up}


Without guidance, web developers may find this task impossible. Websites that aggregate data, products, or documents from various external locations face a domino effect. Amazon.com,
a website that sells products from various online and physical stores, has hosted large company sites such as Target, Borders, and Sears, but also hosts products for individuals selling single items such as used law school books. In 2009, Marketwatch reported Amazon claimed over 1.6 million active sellers.\(^{90}\)

If the ADA applied to Amazon, it would significantly raise costs and oversight. The ADA does not establish whether Amazon would be required to insure that every one of its sellers complied with the regulation. The ADA may only apply to the entrance of each seller’s part of Amazon, or to the individual products contained within. It may only apply when the individual seller has a nexus to a physical store. Sellers often include videos to sell their product. The ADA does not specify if captions must be included in those videos. As suggested for YouTube, Amazon could require content posters to comply with WAI guidelines or have their content disabled until they do so. Because of the large numbers of sellers, Congress should require users to first notify Amazon, or similar aggregate businesses, of non-complying content.

The ADA provides no guidance on the impact of various disabilities on assorted types of websites. A game site primarily consisting of mouse-based entertainment may be unusable by a person with a mobility disability. A colorblind person may be unable to discern certain images or text which could lose their meaning if modified. In cases such as these, compliance with the ADA would fundamentally alter the business. These websites, or portions of a website, should be exempt from the ADA.\(^{91}\)

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\(^{91}\) See Adam M. Schloss, *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, 51 (2001). “Through the use of complex textual images or fonts, other websites add value to their web pages. To create brand equity websites that advertise products or services use complex textual and graphical images. If Title III required such websites to modify the images on their sites, perhaps Title III would undermine the essential purposes of the websites.”
The W3C addresses the myriad possible accessibility issues in its WAI standards. The guidance addresses cost and difficulty, provides reasonable means to help web developers conform to the standards, and acknowledges instances in which accessibility is not possible.92 If Congress were to adopt the WAI as the ADA standard, web developers would face a less daunting task to meet the regulatory minimums.

C. The High Price of Compliance

Creating a website can be very expensive. The burden of ADA compliance would be heavy even to the largest companies. In her article regarding how to transition websites to be handicap accessible, Karen Klein, a small-business writer for Bloomberg Businessweek, found the cost could be $5,000 to $15,000 dollars per site. This does not include the cost of modifications each time a developer updates a site, and it only addresses modifications for screen readers, not for all of the disabilities that the ADA covers. To a small business, even $5,000 could be significant. Karen Klein also wrote that there are few web developers familiar with writing an accessible site compatible with screen readers and other accessibility tools.93

When the changes require more than software modifications, the costs rise higher. Netflix provides streaming service online via a browser. It also provides service on game consoles, such as PS3, Wii, and XBOX 360; phones and tablets running Android or IOS; streaming players such as TiVo and Roku; built-in HDTV applications; Blu-ray players; and more.94 The captioning already in place works on most, but not all, of these devices.95 The settlement which Netflix and

the National Associate of the Deaf reached after the Netflix decision requires Netflix to obtain 100% device compatibility within the next few years, even though it does not control either the movies or the hardware. Because the ADA does not account for company size or profit, compliance may be impossible for smaller companies.

Some proffered solutions could make the situation far worse. After the Netflix decision, a commenter on a Huffington Post article suggested Netflix does not hold the copyrights to the movies it streams, and thus is legally unable to provide captions for the movies. The author of the article replied, “Netflix could have refused to accept titles without captioning.”96 If the author’s logic were applied to physical bookstores, those stores would have to refuse books not available in Braille. Video stores would have to refuse to sell or rent DVD’s without verbal action tracks for the blind. Movie theaters would be unable to show movies without closed captions.

Though society should strive to make all media available to all persons, removing that which is not accessible to some from the reach of all is not the solution. The highest possible cost resulting from an undiscerning application of the ADA to websites would be the complete loss of content because website owners would find compliance too costly.

D. ADA Troll Lawsuits

Possibly the most concerning result of applying the ADA to websites without further guidance would be ADA troll suits. Because application of the ADA to the Internet creates so many unanswered questions for web developers, the field is ripe for abuse by plaintiffs’ lawyers.

ADA “shakedowns” are fairly common in the realm of physical structures. For example, Thomas Frankovich specializes in suing small businesses for failing to comply with the ADA.\footnote{Tom McNichol, Targeting ADA Violators: Critics Call Him a Shakedown Artist, but Tom Frankovich Considers Himself a Private Attorney General Fighting for the Rights of the Disabled. Call a Lawyer (January 2012) http://www.callawyer.com/clstory.cfm?eid=919801 (last visited Oct 21, 2012).} One judge accused him of practices “bordering on extortionate shysterism.”\footnote{Id.} Scott Johnson, a California Attorney and disabled person, makes his living filing hundreds of ADA suits a year on his own behalf.\footnote{Id.} One such business he sued, Ford’s Real Hamburgers in Sacramento, had used its building for more than 60 years.\footnote{Id.} The needed modifications to the old restroom in the building were too costly and Mr. Johnson’s suit forced the business to close.\footnote{Id.}

According to David Peters, general counsel at Lawyers Against Lawsuit Abuse, these ADA trolls target small businesses because small businesses will settle rather than face expensive lawsuits, often going out of business in the process.\footnote{McNichol, supra note 90.} Mr. Peters said an ADA troll can make up to $50,000 in one afternoon.\footnote{Id.}

Often, lawyers target the businesses operating in very old buildings where modifications are impossible without excessive cost.\footnote{Thomas K. Pendergast, More ADA Lawsuits Slam Richmond District Businesses. Sunset Beacon (Apr. 12, 2012) http://sunsetbeacon.com/archives/richmondreview/2012editions/April12/adalawsuits.html (last visited Oct 21, 2012).} Some business owners lease their spaces, which means they may lack permission to remodel the building while still facing liability under the ADA.\footnote{Id.} Owners may believe the building is grandfathered in, as no changes to the building have been
made since the ADA was enacted.\textsuperscript{106} Business owners may have valid defenses that could relieve them of liability at trial but trolling lawyers rely on defendants settling rather than risking the costs and uncertainty of trial.\textsuperscript{107} Those affected by these lawsuits call them “drive-by lawsuits” or “legalized extortion”.\textsuperscript{108} Although some of these cases may have merit, small businesses find it too costly to present a defense and therefore settle rather than go to trial.

On October 1, 2012, California’s Governor Jerry Brown signed a bill into law that provides protections for small businesses from these often predatory claims, such as a provision that would provide businesses time to fix the violations, but the bill did not pass in time to save Ford’s.\textsuperscript{109} It is not yet clear if the law applies to websites. The law does not directly address websites nor have parties tested it in court.

ADA trolls like Mr. Johnson and Mr. Frankovich would have an even easier time harassing small online businesses if the ADA applied to websites. Without further direction from Congress, troll lawyers could come up with hundreds, if not thousands, of suits. Just like small businesses owners in physical buildings, small website owners will be more likely to pay the money to make the suit disappear than challenge the case.

V. THE SOLUTION: THE WORLD WIDE WEB CONSORTIUM AS THE ADA STANDARD

In order to reduce the uncertainty ADA liability creates and keep costs from skyrocketing, Congress should rely on the W3C’s expertise along with that of disabled persons

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
and web developers to craft detailed new rules specifically for websites. The W3C can provide the necessary guidance for web developers to create accessible websites at a reasonable cost.

Businesses will want to help websites become more accessible to gain more customers and more sales. They will also want to avoid online retribution. For example, Mr. Shandrow, a blind student, shames websites which are not disabled-friendly with screen readers by publicly ridiculing the offenders on Twitter, a social media site and one of the top 10 most visited websites on the Internet.

A. The History of the W3C and the WAI

The World Wide Web Consortium (W3C) is an international community where “Member organizations, a full-time staff, and the public work together to develop Web standards.” Tim Berners-Lee, the inventor of the World Wide Web, and Dr. Jeffrey Jaffe, the W3C CEO, lead W3C. MIT, the European Research Consortium for Informatics and Mathematics (ERCIM), and Keio University in Japan administer the organization via a joint agreement.

W3C focuses on the standardization of web technologies. W3C members, the advisory committee, business groups, and community groups work together to research and create high-quality standards. The W3C created community groups that are free and open and enable anyone to publicize their ideas for the web and future standardization.

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114 Id.
115 Id.
The W3C community created a process to develop web standards. The process begins when a W3C member or a member of the public generates interest on a particular topic. When there is enough interest, the director of the Advisory Committee announces a new proposal for developing a standard. Experts and members then work together to create specifications and guidelines that undergo cycles of revision and review by other members and the public resulting in a recommendation. This thorough process creates standards which are valid, stable, and which web developers widely implement, which in turn promotes the W3C goals of quality and fairness.

In 1997, W3C created the WAI, Web Accessibility Initiative, to develop guidelines and provide resources to help make the Web accessible to disabled persons. W3C consults with disability organizations, the government, accessibility research organizations, and other groups to develop support materials and ensure the core technologies of the Web support accessibility.

**B. The WAI is Recognized as an International Authority on Web Accessibility**

The governments of Australia, Canada, the European Union and its Member States, and New Zealand have adopted the WAI guidelines. The standards also form the basis of the Web provisions in the United States Government’s Section 508 rules, which require that Federal agencies ensure their electronic and information technology is accessible to people with

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117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
122 *Id.*
123 *Id.*
disabilities. Although Congress limits the application of this legal standard to government websites, the U.S. Department of Justice recommends web developers rely on W3C and the WAI when creating websites.

In addition, the U.S. government, U.S. Department of Education, the National Institute for Disability and Rehabilitation Research, the National Science Foundation, the European Commission Information Society Technologies Programme, the Government of Canada, and several businesses including IBM and Microsoft, have provided funding for the WAI. These organizations assist the W3C with its WAI goal to “bring together a unique partnership of industry, disability organizations, national governments, and research organizations in a coordinated effort to improve the accessibility of the Web for people with disabilities.”

C. The WAI Web Accessibility Guidelines

W3C recognizes that accessibility depends on several components working together. The WAI addresses these components using three sets of guidelines.

1. The Web Content Accessibility Guidelines (WCAG)

The WCAG defines how to make websites more accessible to disabled persons. The recommendations deal directly with the end user and include guidance regarding alternate text

124 29 U.S.C.A. § 794(d) (West)
127 Id.
for non-text content such as images and media, captions for prerecorded audio, keyboard accessibility for all functionality in a website, and programming to avoid triggering seizures.\textsuperscript{130}

The guidelines include website conformance requirements and also provide guidelines on what to do when a user claims that a website does not conform.\textsuperscript{131} The guidelines create three levels of conformance throughout the document (A, AA, and AAA), allowing governing bodies to select the most appropriate level for individual situations.\textsuperscript{132} For example, the European Union requires compliance with the WCAG at level AA, the mid-level compliance standard.\textsuperscript{133}

\section*{2. The Authoring Tool Accessibility Guidelines (ATAG)}

W3C created ATAG to address the software and services people use to create web pages and content.\textsuperscript{134} ATAG documents define how web development tools should help website developers produce content that is accessible and conforms to WCAG.\textsuperscript{135}

ATAG compliant tools provide web developers with a means to produce accessible websites, prompt the developer for accessibility related information, and provide ways to verify the content is accessible. The tools themselves should also be accessible to disabled persons.\textsuperscript{136} ATAG compliant software reduces the effort needed by web developers to produce accessible websites.\textsuperscript{137} As software developers create more tools conforming with ATAG, web developers’ costs of compliance will be reduced.

\textsuperscript{130} \textit{Id.}  
\textsuperscript{131} \textit{Id.}  
\textsuperscript{132} \textit{Id.}  
\textsuperscript{134} \textit{Authoring Tool Accessibility Guidelines (ATAG 2.0)}, W3C (Apr 10, 2012) http://www.w3.org/TR/ATAG20/ (last visited Nov 15, 2012).  
\textsuperscript{135} \textit{Id.}  
\textsuperscript{136} \textit{Id.}  
\textsuperscript{137} \textit{Id.}
3. The User Agent Accessibility Guidelines (UAAG)

UAAG explain what is required for the accessible design of user agents.\textsuperscript{138} User agents are web browsers, media players, and assistive technology software that disabled persons use to interact with computers.\textsuperscript{139} Some requirements include full keyboard support for mouse commands and easily-locatable directions on how to use built-in browser accessibility features.\textsuperscript{140}

WCAG, ATAG, and UUAG work together to make the Web accessible.\textsuperscript{141} For example, for alternative text on images, WCAG would require images be accompanied by descriptive text, ATAG would require that the web design software verify that images on the website contain alternate text, and UUAG would require the browser to display the alternate text in a manner that works with screen reading software.\textsuperscript{142} The combination of these guidelines provides clear direction to web developers at all stages of Web design.\textsuperscript{143}

D. Congress Should Rely on W3C’s WAI Guidelines for ADA Enforcement

Congress could amend the ADA to apply to websites without using W3C guidelines, but it would take a great deal of work and the guidance would soon be outdated. W3C has already


\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Henry, supra note 124.

\textsuperscript{142} Id.

\textsuperscript{143} Id.
created standards, using the expertise and experience of hundreds of web users over almost two decades, to offer clarity and guidance to website developers.

In Southwest, the District Court stated the WAI guidelines were obsolete as the guidelines were over three years old. In its brief to the court, W3C said the court’s assumption was simply incorrect. W3C policies, including the WAI standards, are under continual development. Statutory provisions created by Congress during legislative sessions could never match the flexibility nor reach that W3C standards achieve.

VII. CONCLUSION

The U.S. must continue to strive to provide equal access to the Internet for those living with disabilities. To do so, Congress, relying on the W3C, must provide clear, consistent, and enforceable standards for web developers. Congress should take advantage of the thoroughly vetted guidance provided by the W3C in its Web Accessibility Initiative. The W3C is the leading standards organization on the web, and creates enforceable law in many nations. The W3C continually modifies these standards to match the needs of the disabled community in a manner that the legislative process could not match. This clear guidance, combined with the tools available from W3C, would assist website developers in designing accessible websites while avoiding violations of the ADA.

144 Southwest at 1315, n.1.
145 Mulligan & Urban, supra note 45.