AMERICANS WITH DISABILITIES ACT AND E-COMMERCE:
TARGET CORPORATION AND BEYOND

J. KEATON GRUBBS*
BETH R. BRICE**
SUSAN EVANS JENNINGS***

I. INTRODUCTION

President George H. W. Bush signed the Americans with Disabilities Act (ADA) into law in 1990. At the time of enactment, Congress stated in its findings that forty-three million Americans "have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."1 The U.S. Equal Employment Opportunity Commission (EEOC) cites studies on visual impairment and blindness that reflect estimates of one million American adults older than the age of forty as blind, and 2.4 million as visually impaired.2 The studies also indicate that only forty-six percent of working-age adults with vision impairments and thirty-two percent of legally blind working-age adults are employed.3 President George W. Bush began a New Freedom Initiative for disabled Americans in 2001 and made clear the Administration’s commitment to enforcement of the ADA.4 The Department of Justice5 and EEOC6 have been rigorously

* M.B.A., J.D., Professor of Legal Studies, Nelson Rusche College of Business, Stephen F. Austin State University.
** J. D., Lecturer, Legal Studies and Ethics, Nelson Rusche College of Business, Stephen F. Austin State University.
*** Ed. D., Professor, Business Communications and Technology, Nelson Rusche College of Business, Stephen F. Austin State University.
3 Id.
enforcing provisions of the ADA. As part of the New Freedom Initiative, federal agencies are implementing and promoting website accessibility. As part of the New Freedom Initiative, federal agencies are implementing and promoting website accessibility. In 2007, the Americans with Disabilities Restoration Act of 2007 was introduced in both the Congress and the Senate as House Resolution 3195 and Senate Bill 1881, respectively. With bipartisan support and after considerable joint legislative activity, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA 2008) was introduced in the Senate on July 31, 2008, for final enactment as S. 3406. In the ADAAA 2008, Congress makes clear that it is shoring up its intent for broad coverage under the ADA. More particularly, Congress is moving to ameliorate the narrowing effects of the U.S. Supreme Court’s decisions in Sutton v. United Air Lines, Inc. (1999) (impaired vision applicants not disabled with corrective lenses – disability is determined in its mitigated or corrected state), Murphy v. United Parcel Service, Inc. (1999) (applied Sutton – medicated high blood pressure did not substantially limit major life activity), Albertson’s, Inc. v. Kirkingburg (1999) (truck driver with monocular vision not per se disabled – must prove extent of limitations on case-by-case basis), and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams (2002) (disability determination focuses on tasks central to most people’s daily lives). The ADAAA 2008 became law on September 25, 2008, effective January 1, 2009. These are but a few of the signs of the times reflecting the momentous evolutionary trends and impact of this civil rights law for e-commerce and employment, particularly visually impaired or blind individuals.

---

II. NATIONAL FEDERATION OF THE BLIND V. TARGET CORPORATION

The case of *National Federation of the Blind v. Target Corp.* was filed in the United States District Court, Northern District of California, on March 9, 2006, after initially having been filed in California state court. The case was removed to federal court on the motion of Defendant, Target Corp. The suit sought to protect the rights of all legally blind individuals in the United States regarding their ability to access websites of public, commercial, establishments. The lawsuit asserted causes of action under applicable California antidiscrimination laws, together with Title III of the Americans with Disabilities Act.

The Plaintiff, National Federation of the Blind (NFB), is a national non-profit advocacy organization, whose purpose is to (1) assist the blind in their efforts to integrate themselves into society on terms of equality and (2) remove barriers and change social attitudes, stereotypes, and mistaken beliefs that sighted and blind persons hold concerning the limitations created by blindness and that result in the denial of opportunity to blind persons in virtually every sphere of life. NFB has affiliate chapters in all fifty states with more than fifty thousand members. NFB is particularly focused on assisting its members in being able to access and use the fast developing technologies available in our society today.

The Defendant, Target Corp., is a for-profit corporation organized under the Minnesota State law. It operates approximately 1,648 stores nationwide, including California, which offer a variety of personal and household products for sale to the public. Target is the nation’s second largest discount chain, behind Wal-Mart. Philanthropy has been and continues to be an integral component of Target’s operations. Target Corporation routinely gives five percent of its income to organizations that support

---

18 Id. at 950.
19 Id. at 949.
21 See Nat’l Fed’n of the Blind v. Target Corp., 452 F.Supp.2d 946 (N.D. Cal. 2006); see also First Amended Complaint filed by National Federation of the Blind in Case No. C 06-01802 [hereinafter Complaint].
22 See Complaint, supra note 21, at 2.
23 See id.
25 Id.
27 Case No. C 06-01802 MHP, Case Settlement Agreement, supra note 24.
education, social services, and the arts, resulting in an average contribution of three million dollars per week to the communities where Target’s retail outlets are located.28

As many commercial businesses have done, Target has developed a website to promote online accessibility to a variety of the products and services the Target Corporation makes available in its public stores. Target’s website offers a variety of information regarding its products and services, including an online pharmacy, online photo shop, weekly ads promoting special sales on goods and/or services, online wedding and baby registries, information about employment opportunities, and online sale of products and services available to in-store customers.

National Federation of the Blind alleged in the case that Target’s website (www.target.com) is a public extension of the public retail outlets operated by the Target Corporation. Simply stated, the website is a service that is provided by and integrated with a public accommodation as defined by Title III of the ADA. NFB contended that Target’s website was designed in a manner that poses significant barriers to visually impaired individuals, which effectively denies their ability to access and use the website to the same extent as individuals without visual impairments. As a result, NFB contended that visually impaired individuals are denied protection from discrimination, as provided by Title III of the ADA.

Target Corporation responded to the Plaintiffs’ lawsuit by filing a motion to dismiss, contending that no law, state or federal, requires the company to make its website accessible to the public, as is required of its public retail outlets. Target further asserted that its website is compliant with existing law, and that it will continue to adopt new technologies as they become available, in order for its website to be accessible to all of Target’s customers, including those with disabilities.

III. OVERVIEW of FEDERAL LAW

A. Americans with Disabilities Act of 1990 and ADA Amendments Act of 2008

In its original public law format, the Americans with Disabilities Act of 1990 was divided into five Titles (Title I – Employment; Title II – Public Services; Title III – Public Accommodations and Services Operated By Private Entities; Title IV – Telecommunications; and Title V – Miscellaneous).29 Titles I, II, III, and V have been codified in the United States Code in Title 42 – The Public Health and Welfare, Chapter 126 –

28 Id.
Equal Opportunity for Individuals with Disabilities. These Titles appear as Subchapter I on employment, Subchapter II on public services, Subchapter III on public accommodations and services by private entities, and Subchapter IV on miscellaneous provisions, respectively, in the United States Code. Title IV of the original Act on telecommunications is found in the United States Code in Title 47 – Telegraphs, Telephones, and Radio Telegraphs, Chapter 5 – Wire or Radio Communication.

The broad purpose of the ADA was to “invoke the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.” Its enactment was to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’ by reinstating a broad scope of protection to be available under the ADA…” Immediately following the Findings and Purpose provisions are key definitions, as amended by the ADAAA 2008, applicable to all Titles of the Act:

(1) Disability … means, with respect to an individual
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such impairment (as described in paragraph (3)).

(2) Major Life Activities
(A) In General.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. [italics added]
(B) Major Bodily Functions.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

33 42 U.S.C. § 12101(b)(1).
(3) Regarded as Having Such an Impairment.—For purposes of paragraph (1)(C):

(A) An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. 36

The “Rules of Construction Regarding the Definition of Disability” from the ADAAA of 2008 37 are especially strong and clear in the expansion and coverage of the Act. The definition of disability is to be “construed broadly in favor of coverage”. 38 “Substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA amendments Act of 2008.”39 “An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”40 “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”41 The determination of whether an impairment substantially limits a major life activity:

[S]hall be made without regard to the ameliorative effects of mitigating measures such as—‘(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), …; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications. 42

The Act continues: “The term ‘low-vision devices’ means devices that magnify, enhance, or otherwise augment a visual image”. 43

36 42 U.S.C. §§ 12102(3)(A), 12102(3)(B)
The definition of “Auxiliary aids and services” was included in the ADA and is applicable to all ADA Titles. It was not changed in the ADAAA of 2008, but it was moved to a new section following the definitions and interpretations of ‘disability’\textsuperscript{44} and reads:

Sec. 4. Additional Definitions.
(1) Auxiliary aids and services.—The term ‘auxiliary aids and services’ includes—
(A) [Q]ualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
(B) [Q]ualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(C) [A]cquisition or modification of equipment or devices; and
(D) [O]ther similar services and actions.\textsuperscript{45}

There are also Miscellaneous Provisions provided in Subchapter IV to the ADA, which apply to the Act and Titles/Subchapters I, II, and III, generally or respectively.\textsuperscript{46} Retaliation, interference, coercion, or intimidation are prohibited against any individual exerting rights, participating in an investigation, or aiding or encouraging any other individual in the exercise of any right under the employment, public services, public accommodations provisions in the ADA.\textsuperscript{47} Furthermore, an individual with a disability cannot be required “to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.”\textsuperscript{48} Two amendments to the Miscellaneous Provisions subchapter from the ADAAA of 2008 are also notable at this point. One provides that nothing in the ADA “shall provide a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”\textsuperscript{49} The second applies to a “covered entity under Subchapter I, a public entity under Subchapter II, and any person who owns, leases (or leases to), or operates a place of public accommodation under Subchapter III” and proscribes that such entities or persons are not required to provide reasonable accommodations or reasonable modifications.

\textsuperscript{44} 42 U.S.C. § 12103(1) (2009).
\textsuperscript{45} Id.
\textsuperscript{46} 42 U.S.C. § 12201 (2009).
\textsuperscript{47} 42 U.S.C. §§ 12203(a), 12203(b) (2009).
\textsuperscript{48} 42 U.S.C. § 12201(d).
\textsuperscript{49} 42 U.S.C. § 12201(g).
to policies, practices or procedures to individuals who meet the definition of disability in Section 12102(1) solely on the bases of being “regarded as” in subparagraph (C).\textsuperscript{50} Another pertinent Miscellaneous Provisions amendment will be addressed in Part B below.

It is important to note that while the ADAAA of 2008 did not contain amendments to the specific provisions within Title III of the ADA, the purposes and findings and the amendments to the ADA definitions, rules of construction, and other provisions apply to all Titles under the ADA, specifically including Title III.

B. Title III of the ADA-Public Accommodations and Services Operated by Private Entities

The specific purpose of Title III of the ADA is “to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner.”\textsuperscript{51} In drafting Title III of the ADA, it was intended that goods and services available in private establishments would be equally accessible to all individuals, including those with disabilities.\textsuperscript{52}

Title III of the ADA states 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 accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”\textsuperscript{53}

Title III defines “public accommodations” as the following private entities if the operations of such entities affect commerce:

1. 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;
2. A restaurant, bar, or other establishment serving food or drink;
3. A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
4. An auditorium, convention center, lecture hall, or other place of public gathering;
5. A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

\textsuperscript{50} 42 U.S.C. § 12201(h).
\textsuperscript{52} S. REP. No. 116, 101st Cong., 58 (1989).
\textsuperscript{53} 42 U.S.C. § 12182(a) (2009).
6. 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;
7. A terminal, depot, or other station used for specified public transportation;
8. A museum, library, gallery, or other place of public display or collection;
9. A park, zoo, amusement park, or other place of recreation;
10. A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
11. A day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment; and
12. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.54

A “private entity” is “any entity other than a public entity (as defined in section 12131(1) of this title).”55 A “public entity” includes any State or local government or department, agency, district, or instrumentality of a State, States, or local government.56 “Commerce” is “travel, trade, traffic, commerce, transportation, or communication . . . (a) among the several States; (b) between any foreign country or any territory or possession and any State; or (c) between points in the same State but through another State or foreign country.”57

Enumerated general prohibitions of discrimination under Title III include: (1) the denial, on the basis of disability, of the opportunity to participate in or benefit from the goods, services, privileges, advantages, or accommodations of an entity; (2) not affording benefits that are equal to other individuals or that are different or separate from that for other individuals; (3) not affording an integrated setting; (4) utilizing administrative methods, standards, or criteria that have the effect of discriminating; and (5) discriminating on the basis of association.58 Specific prohibitions include: (a) imposition or application of eligibility criteria that screen out disabled individuals; (b) failure to make reasonable and necessary modifications in policies, practices, or procedure for the provision of goods, services, facilities, privileges, advantages, or accommodations; (c) failure to ensure non-segregation or inclusion because of

---

57 42 U.S.C. § 12181(1).
the absence of auxiliary aids and services; (d) failure to remove structural architectural and communication barriers in existing facilities, and transportation barriers in existing vehicles; and (e) failure to use alternate methods to provide access when such alternate methods are readily achievable.59 The Title also includes anti-discrimination provisions for accessibility in new construction and alterations in public accommodations and commercial facilities60 and in public transportation services provided by private entities.61

There are important exceptions and defenses to the specific requirements in Title III. Eligibility criteria that screens out disabled individuals are allowed when the criteria can be shown to be “necessary for the provision” of goods, services, facilities, privileges, advantages, or accommodations offered.62 Failure to make reasonable modifications in policies and practices is not discriminatory when the entity can show that such modifications would “fundamentally alter the nature of” such goods, services, facilities, privileges, advantages, or accommodations.63 An ADA amendment to the Subchapter IV Miscellaneous Provisions in the ADAAA of 2008 specifically addresses the “fundamental alteration” exception in stating,

Nothing in this chapter alters the provision of section 12182(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.64

Provision of auxiliary aids and services are not required if the entity can show that the steps to provide these would “fundamentally alter the nature” of the goods, services or accommodations, or would “result in an undue burden.”65 Failure to remove structural architectural and communication barriers or transportation barriers is not a violation when such removal is not “readily achievable,” and alternate methods of access are not “readily

achievable”.66 In addition, Title III does not impose antidiscrimination requirements where an individual “poses a direct threat to the health and safety of others.”67 A “direct threat” exists where there is “significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”68

Title III on Public Accommodations is enforced by the Department of Justice,69 together with the Department of Transportation, with the attending mandates for regulations, standards, and technical assistance.70 The Title III Regulations appear in Title 28 of the Code of Federal Regulations on Judicial Administration, under “Chapter I. Department of Justice, Part 36. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities.”71 The Department of Justice published its ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities in November 1993, together with a 1994 Supplement.72 The Department of Justice began revision of the Title III Regulations, including its ADA Standards for Accessible Design by Notice of Proposed Rulemaking in the Federal Register on June 17, 2008.73 The Department did not propose Web accessibility provisions in the new rules but has received considerable comments and requests on the subject.74 On July 23, 2010, final regulations amending the Title III regulations, 28 C.F.R. Part 36, were signed. The new regulations are effective March 15, 2011, and compliance is required by March 15, 2012.75 However, these regulations do not address Web accessibility. On July 26, 2010, the Justice Department’s Civil Rights Division published in the Federal Register its Advance Notice of

68 Id.
70 42 U.S.C §§ 12134, 12149, 12164, § 12186, 12206.
Proposed Rulemaking for “Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations.” The notice provides that the government is considering revising the rules to include Web accessibility standards and invited written comments by January 24, 2011. The notice further includes nineteen questions concerning such areas as accessibility standards to apply, coverage limitations, compliance issues, an effective date, costs and benefits of Web site regulations, impact on small entities, and any other relevant input interested stakeholders might provide.

IV. INTERPRETATION OF APPLICABLE LAW IN TITLE III OF THE ADA

Application of Title III of the ADA has been problematic for the federal courts. A challenging issue is posed when goods or services are made available to the public; however, in order to access those goods and services, individuals are not required to enter the physical boundaries or premises of the “public accommodation”. Does Title III of the ADA apply only to physical, brick and mortar structures of a public accommodation, or does Title III of the ADA also apply to virtual spaces created by public accommodations? If Title III does apply to internet web sites, what are the parameters of requisite accessibility?

In Carparts Distribution Center Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc., the United States District Court for the District of New Hampshire initially ruled that a public accommodation was limited to actual physical structures with definite physical boundaries and dismissed the plaintiff’s Title III claim. However, the First Circuit Court of Appeals, addressing this issue on first impression, ruled that the protections of Title III of the ADA apply beyond the actual physical structure of a business or institution, reasoning that many of the covered public accommodations in the ADA do not require a person to enter an actual physical structure to conduct business. The Court further reasoned that to rule otherwise would frustrate the original objectives of the ADA. The case was remanded to allow the plaintiff an additional opportunity to introduce evidence to support its claim that the defendant was a “public accommodation” as defined by the ADA.

77 Id. at 464-43,467.
78 Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc., 37 F.3d 12 (1st Cir. 1994).
On remand, the trial court acknowledged disagreement among the circuits on the scope of Title III’s reach and interpretation of “public accommodation” while accepting that its circuit adopted the view that “a public accommodation might be something other than a physical structure or personal property.” The court then denied the respective parties’ summary judgment requests on the issue due to lack of proof.

In the case of Doe v. Mutual of Omaha Insurance Co., the Seventh Circuit Court of Appeals also ruled that Title III of the ADA extends to non-physical structures, reasoning that if a facility is open to nondisabled members of the public, then it cannot “close the door” to disabled individuals.

In Access Now, Inc. v. Southwest Airlines, Co., the Court addressed the specific issue of whether or not an Internet website is a place of public accommodation as defined by Title III of the ADA. The District Court for the Southern District of Florida ruled that the website of Southwest Airlines (www.southwest.com) is not a “place of public accommodation,” and therefore, not covered by Title III of the ADA. The Court further ruled that Access Now, Inc. failed to establish a connection between Southwest Airlines’ website and a “physical, concrete place of public accommodation.” As a result, the plaintiffs were unable to support their claim that Southwest’s website impeded their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency. The Court granted Southwest Airlines’ motion to dismiss the plaintiff’s claim. The Court found support for its granting of the motion to dismiss by reasoning that the plain and unambiguous meaning of public accommodation, as defined by Title III of the ADA, did not include a virtual, non-physical structure. The Court further reasoned that to add a “website” to the extensive enumerated listings of public accommodations would effectively result in judicial law writing.

A settlement agreement announced on September 27, 2007 between the Civil Rights Division of the U. S. Department of Justice and Sylvan Learning Centers presents a parallel application of Title III of the ADA to online services. Sylvan Learning Centers began twenty-five years ago to provide

---

81 Doe v. Mutual of Omaha Ins. Co., 179 F3d 557 (7th Cir.1999).
82 Id.
84 Id. at 1319.
85 Id. at 1321.
86 Id. at 1318.
87 Id.
highly trained and certified tutors to children from pre-K through 12th grade, in order to help children succeed in math, writing, and reading, as well as assisting students with study skills and standardized test preparation.\textsuperscript{88} There are more than 1,100 Sylvan Learning Centers located in the United States and Canada, which boast of personal and online tutoring programs to meet the math and reading needs of a child from the comfort of their own home.\textsuperscript{89} However, the mother of a deaf child complained to the Department of Justice that her child was unable to participate in the live, online tutoring services offered by Sylvan because no effective written materials were provided in order to assist students with a hearing disability to participate in the online tutoring provided by Sylvan.\textsuperscript{90} The mother asserted that Sylvan had discriminated against her deaf child in violation of the ADA because it refused to provide auxiliary aids and services necessary to allow the child to communicate and participate equally in the services and programs provided by Sylvan.\textsuperscript{91} The mother’s complaint effectively posed the question: Does Title III of the ADA extend public accommodation protection to online activities, such as online tutoring services?

The announcement of the settlement agreement between the Department of Justice and Sylvan Learning Centers is noteworthy in several respects.\textsuperscript{92} In a release from the Department of Justice announcing the settlement, Rena Comisac, acting Assistant Attorney General in charge of the Civil Rights Division, stated that “Sylvan will not discriminate against any individual on the basis of disability in the full and equal enjoyment of the [services] or accommodations of Sylvan by excluding or providing unequal treatment to persons who are deaf or hard-of-hearing.”\textsuperscript{93} In reaching the agreement, a specific finding was made that the online services of Sylvan were a public accommodation as defined by Title III of the ADA, even though the word “online” does not appear in the current text of Title III.\textsuperscript{94} The agreement considers the online tutoring services of Sylvan as being incorporated within the meaning of “other place of education” as defined by Title III as a public accommodation.\textsuperscript{95} As a result of the agreement, Sylvan will continue to provide online services by voice or audio; however, it must now provide

\textsuperscript{89} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. Settlement Agreement between the United States of America and Sylvan Learning Centers, L.L.C. under the Americans with Disabilities Act, DJ 202-35-195.
\textsuperscript{94} Settlement Agreement Sylvan Learning Centers, \textit{supra} note 92.
“written materials …videotext displays, or any other effective methods of make aurally delivered materials available to students with hearing disabilities.”

What if the student involved in the Sylvan complaint had been blind instead of deaf? Would the settlement agreement between the respective parties have extended Title III of the ADA in the same manner? Arguably, it would be reasonable to extend Title III to include online services as a public accommodation, which must be accessible for a visually impaired student. Using the analysis incorporated by the parties in the instant settlement agreement, it appears quite likely that Sylvan would have been required to make its online tutoring services accessible as a public accommodation under Title III, had the student in question been blind. The settlement agreement under such facts would have required that all written tutoring materials would need to be produced in Braille or audio versions, or be available for viewing through a web interface or in a format that screen reader software could convert to an audio format.

The Department of Justice, Civil Rights Division, addressed this issue on September 9, 1996 in response to a letter received from Senator Tom Harkin (D-IA). Senator Harkin contacted the Department on behalf of a constituent who had questions about the policy of the Clinton administration on making web pages accessible/compatible for disabled persons.

In response, Deval L. Patrick, Assistant Attorney General, Civil Rights Division, responded that “the Internet is an excellent source of information and, of course, people with disabilities should have access to it as effectively as people without disabilities.” Mr. Patrick’s response also specifically suggested:

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

Therefore, it appears that the Department of Justice, during the tenure of President Clinton, supported the application of Title III of the ADA to require covered entities to furnish appropriate auxiliary aids and services to

---

96 Settlement Agreement Sylvan Learning Centers, supra note 92.
98 Id.
99 Id.
render the Internet accessible to individuals with disabilities. The settlement agreement between the Department of Justice and Sylvan Learning Centers suggests that the Bush administration supported a similar interpretation.

**V. RESOLUTION TO NATIONAL FEDERATION OF THE BLIND v. TARGET CORPORATION**

National Federation of the Blind first challenged the application of Title III of the ADA to e-commerce in a complaint filed against America Online (AOL). NFB contended that AOL had failed to remove communication barriers, had failed to provide reasonable accommodations, and had failed to make its services available to visually impaired individuals. The complaint was resolved by a compromise settlement agreement, whereby AOL agreed to modify its services to promote accessibility.

In the case filed against Target Corporation, NFB began in May 2005 to negotiate with Target to voluntarily modify its website in order to improve accessibility to NFB members; however, the negotiations were unsuccessful and the subject lawsuit was filed. On September 7, 2006, in response to Target’s motion to dismiss the Plaintiffs’ claims, Judge Marilyn Hall Patel denied the Defendant’s motion to dismiss and held that Title III of the ADA applies to a retailer if its website is inaccessible to the blind, finding that the ADA does prohibit discrimination in the “enjoyment of goods, services, facilities or privileges.”

A major development in the case occurred on October 2, 2007, when Judge Marilyn Patel certified the case as a class action lawsuit, identifying two classes of plaintiffs. One nationwide class would represent “all legally blind individuals in the United States who have attempted to access Target.com and as a result have been denied access to the enjoyment of goods and services offered in Target stores.” A second subclass would represent “all legally blind individuals in California who have attempted to access Target.com”. Additionally, Judge Patel denied Target’s motion for summary judgment. In commenting on Judge Patel’s rulings, Dr. Marc Maurer, President of the National Federation of the Blind, commented, “This

---

100 Case Number 99CV12303EFH, National Federation of the Blind et al. v. American Online, Inc. (Dist. MA 1999), Complaint dated 11-4-99.
102 See First Amended Complaint, supra note 21, at 8.
105 Id.
106 Id.
107 Id.
is a tremendous step forward to blind people throughout the country who for too long have been denied equal access to the Internet economy. All e-commerce businesses should take note of this decision and immediately take steps to open their doors to the blind.”

A step to open the doors of e-commerce businesses to the blind occurred on August 27, 2008, when the National Federation of the Blind and Target Corporation announced the parties had reached an agreement to settle the pending lawsuit. The terms of the settlement agreement are as follows:

- Target, in consultation with the National Federation of the Blind, was to determine the steps it needed to take to make its web site accessible to the blind, incorporating NFB’s recommendations into Target’s internal guidelines for Web accessibility.
- NFB is to monitor Target’s progress in making its web site accessible, which will include assistance with the training of Target employees responsible for the company’s web site, and analyzing complaints by those who use Target.com in order to evaluate accessibility to the web site and, if necessary, assist Target in responding to said complaints.
- By February 28, 2009, Target.com is to be fully accessible, which means that from the designated date into the future, all information and transactions available to sighted people on Target.com will be fully accessible to blind people with substantially equivalent ease of use.
- Upon Target’s completion of all necessary steps to make its web site accessible, then the National Federation of the Blind will grant Target.com its Nonvisual Access (NVA) Certification, which Target may display the NFB-NVA Web Certification seal on Target.com.
- Target has agreed to deposit $6 million in an interest-bearing account to be paid to members of the California subclass who submit valid claims. Each claimant will receive $3,500 or an equal pro rata share of the damages fund, depending upon the number of claimants and the availability of funds. Individuals may make up to two claims based on separate incidents for a total of $7,000.

---

• Target agreed to pay $20,000 to a nonprofit corporation established by Bruce Sexton, the original named plaintiff, for the purpose of establishing the California Center for the Blind, a rehabilitation and training center for blind individuals.

• The payment of reasonable attorney’s fees and costs to National Federation of the Blind.\(^{110}\)

In announcing the settlement, Dr. Marc Maurer, president of the National Federation of the Blind, said:

Access to Web sites is critical to the full and equal participation of blind people in all aspects of modern life. The National Federation of the Blind is pleased to have reached a settlement with Target that is good for all blind consumers, and we recognize Target has already taken action to make certain that its Web site is accessible to everyone. . . . It is our sincere hope that other businesses providing goods and services over the Internet will follow Target’s example and take affirmative steps to provide full access to their Web sites by blind consumers.\(^{111}\)

There is no question that the settlement between the NFB and Target establishes a clear precedent or guideline for other businesses to consider in the development of their web sites. The successful settlement by NFB certainly sends a warning signal to other public retail stores, who make their products and services available to consumers online, to consider the issue of accessibility in the development of their company’s web site.

Since the announcement of the NFB-Target settlement, inquiries to the office of counsel for NFB have been steady, with callers requesting advice on how to improve accessibility to web sites for disabled individuals, without the necessity and expense of litigation. Daniel Goldstein, who tried the Target case on behalf of NFB says, “Two significant things have happened since the settlement. Other retailers have come to us, asking what they need to do to make their web sites accessible without entering into lawsuits, and blind people have come to us to tell us about web sites they’re frustrated with trying to use.”\(^{112}\) John Kemp, an attorney who specializes in accessibility issues for disabled people at the law firm of Powers Pyles Sutter & Verville PC agreed with Goldstein’s assessment of the impact of the NFB-Target

\(^{110}\) Id.


settlement. “We expect there will be more agreements coming down the pike,” says Kemp. The Target settlement sent a loud and clear signal that if you don’t make your web site accessible, there will be a bull’s-eye on your back.”

Public retail stores, who market and sell their products and services to consumers online, cannot ignore the NFB-Target settlement. During the pendency of the NFB-Target lawsuit in 2007, Amazon.com Inc. and RadioShack Corp. entered into agreements with NFB to promote accessibility to their respective web sites. Specifically, Amazon.com signed a six-year agreement with NFB, agreeing to jointly develop and implement better screen access software. RadioShack agreed to comply with guidelines, which will assist visually impaired consumers who use screen readers, or magnification technology, and who rely on a keyboard instead of a mouse to shop online. Shortly after the announcement of the NFB-Target settlement, Apple Inc. agreed to make its iTunes.com site more accessible to visually impaired consumers. In short, to answer the question posed by the title to this paper, it is clear that there is a connection between e-commerce and the Americans with Disabilities Act of 1990.

VI. TECHNICAL BARRIERS AND SOLUTIONS FOR BLIND WEBSITE USERS

In order for those who are blind to access the Internet, some type of assistive technology is necessary. There are various types of assistive technologies currently available. A common type of assistive technology is a form of software called a screen reader program. There are two major screen reader software programs currently in use. The first is “JAWS,” which stands for "Job Access for Windows and Speech." Freedom Scientific created the program, which allows people who are blind to gain access to information on their computers. This software can be ordered at a cost of approximately

113 Id.
116 Id.
117 Id.
$1,100 for the “Professional” version or $900 for the “Standard” version.\textsuperscript{120} The second widely used program is Window-Eyes, which provides a similar Internet experience for the user. The company that sells “Window-Eyes” is GW Micro.\textsuperscript{121} This software is approximately $900 with no premium version offered.\textsuperscript{122}

Major software companies are also now including accessibility tools in their programs.\textsuperscript{123} At the time of the Target lawsuit, Windows XP and Windows Vista were the most common operating systems.\textsuperscript{124} Windows Vista had incorporated several accessibility options into the software.\textsuperscript{125} The newest version of Windows, Windows 7, has further enhanced features from their previous Windows products. Accessibility tools include things such as:

- Ease of Access Center, which is a centralized location to adjust accessibility settings and manage accessibility programs. In this area it is also possible for the user to answer a series of questions to help determine which settings might be the appropriate ones for the user. Settings in Windows 7 Ease of Access Center include:
  1. Optimizing for blindness to enable the use of the computer without a display
  2. Optimizing for visual display which makes the computer screen easier to see
  3. Setting up alternate input devices to allow for the use of the computer without a mouse or keyboard
  4. Adjusting the setting for the mouse to make it easier to use
  5. Adjusting the settings for the keyboard to increase the ease of use
  6. Setting up alternative sounds
  7. Adjusting settings for reading and typing to make it easier to focus on tasks
- Speech Recognition built-in to the software, which enables the users to interact with the computer using only their voices. This

\textsuperscript{122} Id.
significantly reduces the use of a mouse and keyboard while maintaining overall productivity.

- Magnifier feature, which enlarges a portion of the screen to make things easier to see. A magnification range from 2 to 16 times the original can be selected. In the newest version the magnifier feature now includes a lens mode and a full-screen mode.
- Narrator feature is a text-to-speech program that reads aloud on-screen text and describes some events (such as error messages) that happen while using the computer.
- On-Screen Keyboard is a new feature with the introduction of Windows 7 that allows the users to display a keyboard on the computer screen and make selections either using the mouse, a pointing device, or, on a touch screen, with their fingers.126

According to Microsoft, “Windows 7 includes accessibility options that make it easier to see, hear, and use your computer including ways to personalize your PC.”127 The features enhance the already present features in Windows Vista that were described as being “[P]articularly helpful to people with visual difficulties, hearing loss, discomfort in their hands or arms, or reasoning and cognitive issues.”128

It is important to realize, however, that even the use of the screen reader does not guarantee accessibility for the blind. To increase the success of screen readers, it is important that website designers follow a few basic procedures to enhance this assistive technology. In the case of Target, there were three technical barriers that were highlighted. These were:

- Lack of alt text (alternate text), which when used would produce a text description for a picture or other nonword image when the cursor is moved over said picture or image.
- Image maps that neither have alt text or a functional equivalent on the page, which prevents easy navigation within the website.
- Requirement for using a mouse to perform various functions on the site, which may prevent a visually impaired consumer from making a purchase independently using the website.129

127 Id.
129 Id.
Derek Featherstone, Leader of the Accessibility Task Force for The Web Standards Project, when discussing the problems with the Target website, said that the first two issues (alt text and image maps) should have been addressed in Web Design 101. The third issue he found to be a bit more difficult to assess. Mr. Featherstone found that because the coding required an “x” and “y” coordinate, which was found by the mouse click, the use of a keyboard was not an option for selecting the onscreen task.

As with all technology, web design has progressed as new capabilities became available. In the case of websites, early web designers were creating websites before many of the accessibility programming capabilities had been developed. Accessibility was probably not part of the training received for most programmers. Just as with the evolution of any technology, problems arise and solutions are developed over time.

Featherstone points out that some of the Target website fixes are quick, easy things to remedy. However, just knowing technical fixes is not necessarily enough and can lead to even further problems if not implemented correctly according to Jim Thatcher, who served as vice-chair of the Electronic and Information Technology Access Advisory Committee, which proposed standards for Section 508 of the Rehabilitation Act of 1973. Section 508 of the Rehabilitation Act mandates enforceable standards to promote access to electronic and information technology procured by agencies of the federal government. In meeting these standards, Thatcher highly recommends the use of consultants who really know accessibility and usability issues to oversee the web development. He stresses that it is not enough just to tell your web developer to make your site Section 508 compliant. Despite the fact that developers have the technical skill to implement recommended accessibility techniques, they lack the knowledge of the impact each of these techniques has on the final product when accessed by assistive technology.

Thatcher gave an example of this “good-intention gone bad” when looking at a federal agency page. Though the designers had used the recommended techniques, such as alt text on images, long descriptions, summaries on tables, and text-only sites, the results were much less than

---

130 Id.
132 Id.
134 Id.
135 Id.
136 Id.
137 Id.
stellar. He felt that this was a case of blindly using the techniques without really understanding the impact of them. Mr. Thatcher went in and made adjustments to the code of the document, which resulted in an 85% decrease in characters and an 87% decrease in words.\textsuperscript{138} All of this was done without changing any of the final product of what was seen on the screen.\textsuperscript{139} Again, this is an example of needing someone who knows more than just the technical fix, but also has a good understanding of the final product needed for use with assistive technology. The cost to companies to fix their website problems becomes an even more complex problem. It is impossible to give a definitive dollar amount to fix the problems of a website, since all have varying numbers of pages, links, graphics, etc. WebAIM, a non-profit organization within the Center for Persons with Disabilities at Utah State, provides a plethora of information on web accessibility. In a 2006 discussion board on how to determine the cost of retrofitting a website, Mark D. Urban, Chair of the North Carolina Governor’s Advocacy Council for Persons with Disabilities, responded to a question in regard to the expense of retrofitting a website.\textsuperscript{140} He gave the following information as a guideline to the costs in making a site accessible:

<table>
<thead>
<tr>
<th>Training time 40 hours (24 in self-led or instructor-led accessibility and 16 in review of literature and techniques of the chosen tool)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advanced techniques training 24 hours for the lead developer or “accessibility guru”</td>
</tr>
<tr>
<td>Cost of courses (prices can vary greatly)</td>
</tr>
<tr>
<td>Literature and reference book costs</td>
</tr>
<tr>
<td>Planning Logistics (the cost of time spent explaining and making sure everyone is onboard with the plan and has scheduled themselves for training)</td>
</tr>
<tr>
<td>Quality Assurance - Hours will depend on number of pages (Checking each new page to ensure its accessibility before posting)</td>
</tr>
<tr>
<td>Tool Cost – Depends on the site size</td>
</tr>
<tr>
<td>Review and Remediation of new pages (1/2 hour for every 3 pages assuming the developers have been trained)</td>
</tr>
<tr>
<td>Review and Remediation of existing pages (2 hours for every 5 pages), which factors in design issues\textsuperscript{141}</td>
</tr>
</tbody>
</table>

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{141} Id.
It is clear from research on this issue that the cost factor to build an accessible website is much less than that to retrofit an existing website. Paciello cited a report which estimated a company can expect to pay about 10 times more to fix an accessibility problem than it would have cost to design it to accessibility standards during its creation.\(^\text{142}\)

In March, 2008, The National Federation of the Blind announced a program that is designed to help companies identify and correct barrier problems that blind people have when using assistive technology for website viewing.\(^\text{143}\) The program titled “Nonvisual Access Certification Program” is in partnership with Deque Systems, Inc., a company whose focus is web accessibility.\(^\text{144}\) To ensure that all aspects of a website are optimally designed to accommodate those with visual disabilities, website developers connect with experts on blindness and accessibility.\(^\text{145}\) At the Deque site, one can enter a website address and receive a report of whether that site is considered accessible.\(^\text{146}\) Many other companies are now providing these free checks of websites as well (e.g. tuv.com, section508corp.com, wave.webaim.com). However, most, if not all, including Deque, are marketing their services to correct any problems found.

In the 1990s Adobe adapted their PDF formats to make them screen reader friendly.\(^\text{147}\) One of the engineers working on this project was T. V. Raman, a native of India.\(^\text{148}\) Now a Google engineer, he says he developed his love of math, books, and puzzles at an early age.\(^\text{149}\) However, glaucoma robbed him of his eyesight at the age of 14.\(^\text{150}\) This has made him uniquely aware of the challenges that those with disabilities face when using the Internet. He has since used his talents to improve technology for the blind. Raman has gained high accolades from Paul Schroeder, V.P. for programs


\(^{144}\) Id.


\(^{146}\) Id.


\(^{148}\) Id.

\(^{149}\) Id.

\(^{150}\) Id.
and policy at the American Foundation for the Blind. Schroeder says Raman is “leading thinking on accessibility issues, and his capacity to design and alter technology to meet his needs is unique.” Raman prefers to think of his work as benefitting everyone who uses technology. Instead of thinking how something could work for someone who is blind, he asks himself how it should work if someone is not looking at the screen. The speech someone standing near would hear from his screen reader is roughly three times the speed of a normal voice. This makes it incomprehensible to those not accustomed to the screen reader. However, according to Mr. Raman, this fast speed allows him to “read” at approximately the same speed as a sighted person.

Web accessibility has a much broader reach than simply serving the visually impaired. According to the Web Accessibility Initiative definition of web accessibility, it encompasses any and all disabilities: visual, physical, speech, cognitive, and neurological. The Web Accessibility Initiative website has guidelines and techniques to address accessibility for people with a variety of disabilities.

Previous web content accessibility guidelines were dated 1999. With the number of newer web technologies being used on websites, it undoubtedly was time for a newer set of guidelines to be published. The Target lawsuit no doubt added an impetus to getting these guidelines updated. The new version dated December 11, 2008 is called Web Content Accessibility Guidelines (WCAG) 2.0. Obviously after the lawsuit between NFB and Target Corporation was settled, many changes were made to the Target Website. Hopefully, just as Mr. Raman strives for, these changes impacted all users of the website positively. Target Online Assistive Technology Guidelines (TOATG) were created by Target.com Guest Experience, Interactive Marketing Creative, and TTS with the stated purpose of providing, “a scope of technology recommendations, including the logical and physical components of an application, in sufficient detail, to effectively

---

151 Id.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id.
157 Id.
159 Id.
and appropriately build a Target site experience."\textsuperscript{161} In this guide there is detailed information for designs on navigation, structure, layout, electronic forms, alt and title attributes, browser support, and a variety of other components.\textsuperscript{162}

In a March 2010 review of the redesigned Target site, it was noted that the National Federation of the Blind granted Target.com “Nonvisual Accessibility Web Certification.”\textsuperscript{163} Target was one of the first major retailers to implement web accessibility. Dolson does, however, go on to say:

Simply making a website accessible to the blind is not the end goal for web accessibility. And, while Target's website has been thoroughly revised according to the terms of its lawsuit settlement, those terms only covered a portion of the issues relevant for website accessibility. Target Corporation has done an admirable job of meeting the requirements demanded by the settlement, but its website still needs further improvements to become accessible to all.\textsuperscript{164}

As new methods of creating websites evolve and the laws and regulations begin to cover all aspects of accessibility more fully, these and other accessibility issues should improve.

\textbf{VII. IMPLICATIONS AND CONCLUSION}

Since July 26, 1990, the day President George H. W. Bush signed the ADA into existence, disabled individuals across the United States have been protected by a measure designed to eliminate discrimination as a result of one’s disability. During this same period of time, the development of information technology has grown rapidly and explosively. Use of the Internet is commonplace today as an effective means of communicating, securing information, and participating in the stream of commerce, job market, and workplace. However, individuals who suffer with visual disabilities are unable to benefit from this fast developing technology to the same extent as individuals who are not visually impaired. It is estimated that approximately ten million Americans are visually impaired, and of this


\textsuperscript{162} Id.


\textsuperscript{164} Id.
number approximately 1.5 million are Internet users. It is logical to project that Internet usage by visually impaired individuals would increase as a result of enhancements to accessibility.

If the ADA mandated the elimination of discrimination based upon an individual’s disability, then why do visually impaired individuals experience difficulty in using the websites of businesses covered by the ADA? The reason is no clear mandate is set forth in existing law to require a website to be accessible to disabled individuals. Many businesses have voluntarily upgraded websites to enhance accessibility, whereas other businesses do not feel compelled by law to do so. Even though the NFB-Target case was settled outside the courtroom, it establishes a clear warning signal that the business sector will need to assess. In 2008, Congress had the opportunity to address the primary issue questioned in our paper, whether or not the term public accommodation is limited only to actual physical structures with definite physical boundaries, or does it apply beyond an actual physical structure, to include online services provided by the public accommodation. However, the ADA Amendments Act of 2008 failed to address this gap in the law. The 2010 amendments to the Title III regulations again did not address the issue, but the Department of Justice has begun the process for devising regulations for Web accessibility. The authors’ assessment is that business would be well served to participate in the Department of Justice process and to elect to enhance accessibility to web sites in order to potentially avoid or at least diminish government regulation, legal liability, and related costs. Businesses can further promote social responsibility and ethical conduct by voluntarily recognizing the difficulty of accessibility disabled individuals face in the virtual business world of today.