ARTICLES

THE COMING UBIQUITY OF ADA COMPLIANCE TO THE INTERNET AND ITS EXTENSION TO ONLINE EDUCATION

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The ADA is not designed to allow individuals to advance to professional positions through a back door. Rather, it is aimed at

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rebuilding the threshold of a profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering the front door.[1]

INTRODUCTION

The Internet bridges on near necessity for most Americans.[2] A 2014 Pew Research Report finds that 87% of Americans use the Internet regularly.[3] The Internet's pervasion is particularly acute in the realm of online shopping, social media, and education.[4] The Americans with Disabilities Act of 1990[5] (ADA) has been gradually applied to the marketplace. It has applied to state actors without question[6] but there has been an evolving trend of applying it to private commercial websites.[7]

American higher educational institutions employ a near ubiquitous model of Internet supplements such as "blended" or hybrid courses where face-to-face interaction is appended with some online components facilitated through learning management systems (LMS).[8] Another pervasive modality is the "wholly-online" course. Indeed, there are entire academic programs, from associates through doctorate degrees, which may be earned without ever stepping inside a traditional classroom. For both of these situations, there should be considerable efforts made to make common accommodations under the ADA and Sections 504[9] and 508[10] of the Rehabilitation Act of 1973. California has even included it into their state regulations and course guidelines.[11] Higher educational institutions are legally obliged to provide accommodations, but many do not due to the freshness of technology and how it relates to laws and regulations or ignorance of the methods for compliance.[12] There are

1. Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 421–22 (S.D. W. Va. 1997) (quoting Deborah Piltch et al., *The Americans with Disabilities Act and Professional Licensing*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 556 (1993)).

2. *See* Katherine Rengel, Comment, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUTER & INFO. L. 543, 544 (2008).

3. Lee Raineie et al., *The Web at 25 in the U.S.*, PEW RESEARCH CENTER, 5 (Feb. 27, 2014) http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf.

4. *See* Kenneth Kronstadt, Note, *Looking Behind the Curtain: Applying Title III of the Americans With Disabilities Act to the Businesses Behind Commercial Websites*, 81 S. CAL. L. REV. 111, 134–35 (2007).

5. 42 U.S.C. §§ 12101–12213 (2009).

6. 42 U.S.C. §§ 12131–12132 (1990).

7. *See generally* Kronstadt, *supra* note 4, at 111.

8. *See generally id.*

9. 29 U.S.C. § 794 (2014).

10. 29 U.S.C. § 794d (2000).

11. *See* Cal. Code Regs. tit. 5, §§ 55200–55210 (2008).

12. Lysandra Cook et al., *Priorities and Understandings of Faculty Members Regarding*

common accommodations for an online course to comply with the ADA, including use of media that allows for tagging of alternate descriptions, color, tables, html code, and image maps that screen-reading technology may accommodate under the World Wide Web Consortium (W3C).[13] It is the purpose of this article to highlight the ADA and Rehabilitation Act requirements, contemporary case law to the ADA and websites generally, a focused application to higher education institutions, and other applicative illustrations from practice in the field.

This Article will thoroughly trace the statutory, regulatory, and case law as per the ADA and online modalities for state and private actors. The article will conclude with the extensions to online higher educational courses and the new realities of compliance with the ADA.

I. THE 1990 AMERICANS WITH DISABILITIES ACT AND THE 1973 REHABILITATION ACT

The forerunner to the ADA was the 1973 Rehabilitation Act.[14] Under section 508 of the Rehabilitation Act, websites maintained, developed, procured, or used by the federal government must be accessible to individuals with disabilities.[15] The Rehabilitation Act does not regulate private e-commerce websites or websites run by private individuals unless the private entity is covered under the Rehabilitation Act pursuant to Section 503 relating to government contracts or Section 504, which applies to any entity receiving federal financial assistance.[16] The ADA and the Rehabilitation Act are similar but not identical. Congress stated that there should be a broader interpretation of the ADA, as it "extend[s] disability protection to private employers and places of public accommodation, as well as to 'all programs, activities and services provided or made available by state and local government or instrumentalities or agencies thereto, regardless of whether or not such entities receive federal financial assistance.'"[17]

College Students with Disabilities, 21 INT'L J. TEACHING & LEARNING HIGHER EDUC. 84, 85 (2009).

13. *See Web Design and Applications*, WORLD WIDE WEB CONSORTIUM, http://www.w3.org/standards/webdesign/ (last visited Nov. 23 2014).

14. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 389–90 (1991).

15. 29 U.S.C. § 794d.

16. 29 U.S.C. §§ 793–794; *see also* Stephanie Khouri, Note, *Disability Law—Welcome to the New Town Square of Today's Global Village: Website Accessibility for Individuals with Disabilities After Target and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331, 331 (2010).

17. Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 220 (2003) (quoting H.R. 101-

The ADA is meant to follow the purposes and structure of the 1964 Civil Rights Act.[18] It has four purposes:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this [Act] on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[19]

Despite the recent *Netflix* decision which deemed a website to be a public place of accommodation under Title III,[20] websites are not specifically covered by the ADA (no appellate court has ruled otherwise).[21] Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ."[22] A "place of public accommodation" is the phrase at the heart of applying the ADA to websites, as the Internet is not a place defined in the statute and no appellate court has ruled otherwise.[23]

The National Federation of the Blind (NFB) argues that "inaccessible websites not only put blind people at a social and economic disadvantage, but also are illegal."[24] Essentially, the argument is that inaccessible websites violate the ADA's requirement that "places of public accommodation" are reasonably accessible to the disabled.[25] Under Title

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485(II), 101st Cong. (1990), *reprinted in* 1990 4 U.S.C.C.A.N. 303, 360).

18. *People with Disabilities*, THE LEADERSHIP CONFERENCE, http://www.civilrights.org/resources/civilrights101/disability.html (last visited Mar. 26, 2015).

19. 42 U.S.C. § 12101(b) (2009).

20. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 202 (D. Mass. 2012).

21. Diane Murley, *Web Site Accessibility*, 100 LAW LIBR. J. 401, 402 (2008).

22. 42 U.S.C. § 12182(a) (1990).

23. *See* Murley, *supra* note 21, at 402.

24. Rengel, *supra* note 2, at 545, n.15 ("National Federation of the Blind in the United States with more than 50,000 members in all fifty states. The NFB considers itself the 'voice of the nation's blind.' The NFB is dedicated to improving blind people's lives by protecting their civil rights and fighting for equality."); *see also* Jeffrey Scott Ranen, Note, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 416 (2002).

25. *See* 42 U.S.C. § 12182(a) (1990) (entitled "Prohibition of Discrimination by Public Accommodations"); *see also* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1316 (S.D. Fla. 2002).

III, places where public accommodations must be made to comport to the ADA include: restaurants, theaters, shopping centers, travel services, parks, museums, and gymnasiums.[26] These are accommodations made to physical places, yet electronic accommodations have yet to be broadly implemented.

II. THE ADA AND INTERNET USE

The ADA was signed into law just prior to the Internet's widespread use, so Congress did not foresee the complications that arose due to the legislation.[27] There are many accommodations that can be made for the blind or visually impaired individuals by using computer assistant software. A website's code must be written in "alternative text" in order to be accessible to those with visual disabilities.[28] Alternative text is invisible text, embedded beneath websites' graphics, which describes a website's contents.[29] Screen reader software "reads" the alternative text and gives an audio explanation of the website's text and graphics.[30] Navigation links can also be screen reader compatible, allowing blind users to navigate through websites by using a keyboard instead of a mouse.[31] Computer assistant software includes voice-dictation software, voice navigation software, and magnification software to assist the visually disabled in navigating through sites' text and graphics.[32] It is recommended that a website's code must contain alternative text in order to be accessible to blind users.[33] Blind Internet users have regularly taken advantage of the benefit of the Internet[34] via screen reader software.[35]

Due to the legislation date, the ADA does not specifically mention the Internet and thus does not apply to websites to the chagrin of disability advocates.[36] The purpose of the ADA is to "'bring individuals with

26. 42 U.S.C. § 12181(7) (1990).
27. Rengel, *supra* note 2, at 550–51.
28. *See Access Now*, 227 F. Supp. 2d at 1316.
29. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949–50 (N.D. Cal. 2006).
30. *Id.* at 950.
31. *Id.*
32. *Access Now*, 227 F. Supp. 2d at 1314.
33. *See id*. at 1314–15.
34. Rengel, *supra* note 2, at 552.
35. *See* Joe Clark, *Why Bother?*, BUILDING ACCESSIBLE WEBSITES, *available at* http://joeclark.org/book/sashay/serialization/Chapter02.html (2002) (stating that the American Foundation for the Blind estimates there are 900,000 visually-impaired computer users in the United States.).
36. *See* Anita Ramasastry, *Should Web-only Businesses be Required to be Disabled-Accessible?*, (Nov. 7, 2002), http://www.cnn.com/2002/LAW/11/07/findlaw.analysis.Ramasastry.disabled/index.html (explaining that Web sites should be included in the ADA because it applies to "other service establishments").

disabilities into the economic and social mainstream of American life,'" which is frustrated by the fact that blind individuals are unable to access the internet and other non-physical services.[37] Advocates have fought for change.

III. LEGAL APPLICATIONS OF THE ADA

Courts have a curtailed role to play in the interpretation of the ADA. The government is structured in a way that limits the courts' role to interpret laws with a strict adherence to the plain language of the statute.[38] The legislative branch, as an elected, representative body, is responsible for determining which of the competing public policies a law should favor and creating laws that clearly encompass their purposes.[39] The language of the statute matters in this regard.[40] The role of the judiciary is to interpret the laws enacted by the legislative branch.[41] The principle of separation of powers prevents courts from making up their own laws by restricting courts to interpret laws in accordance with congressional intent.[42]

Thus, the judiciary interprets the ADA regarding the Internet in the light of a "place of public accommodation" to include Internet sites or nonphysical public accommodations. Applying the Internet to the ADA has the feeling of shoehorning. Indeed, due to the constrictions of legal interpretation and application of case precedent, the Internet has been forced into the ADA.

A. *Federal Regulations*

In the hierarchy of the legislative process, Congress will enable an agency within the executive branch to draft regulations, or the more practical rules regarding enacted legislation. When the legislature authorizes an agency to interpret a law, courts must give the interpretations deference and use that agency's recommendations as the basis for their statutory analysis when deciphering the meaning of the law.[43] In 2006, Congress authorized the Department of Justice (DOJ) to

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37. Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (quoting H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382).

38. *See* Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1270–71 (7th Cir. 1993).

39. *See id.*

40. *See* Richards v. United States, 369 U.S. 1, 9 (1962); *see also* Jones v. Hanley Dawson Cadillac Co., 848 F.2d 803, 806–07 (7th Cir. 1988).

41. *Welsh*, 993 F.2d at 1271.

42. *Id.* at 1270–71.

43. Rengel, *supra* note 2, at 553.

issue regulations with regard to the provisions of the ADA.[44]

A year after the passage of the ADA, the DOJ issued the regulations.[45] The regulations defined terms of a physical nature such as a "place of public accommodation" as "a facility,"[46] which is defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."[47] This regulatory wording defining physical attributes is an implicit limitation of Title III public accommodations to physical places.[48] Consequently, disability advocates were forced to craft creative interpretations to incorporate Internet into the ADA's purview.

B. *Statutory Interpretation*

Title III of the ADA states "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ."[49] The plain language of the ADA does not include the Internet as a place of public accommodation.[50] Under the statute, there are twelve distinct groups: (1) places of lodging, (2) establishments serving food or drink, (3) places of exhibition or entertainment, (4) places of public gathering, (5) sales or rental establishments, (6) service establishments, (7) stations used for public transportation, (8) places of public display or collection, (9) places of recreation, (10) places of education, (11) social service center establishments, and (12) places of exercise or recreation.[51] The Internet is not considered within the scope of public accommodations under the ADA in the plain language of the text.[52]

The term "services" is the means for interjection of the Internet into the statute.[53] "The ADA applies to the services *of* a place of public accommodation, not just the services *in* a place of public accommodation."[54] All places of public accommodation must ensure that

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44. *See* 42 U.S.C. § 12186(b) (1995).
45. *See* 28 C.F.R. § 36.104 (2011).
46. *Id.*
47. *Id.*
48. *See* Rengel, *supra* note 2, at 553.
49. 42 U.S.C. § 12182(a) (1990).
50. *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994).
51. 42 U.S.C. § 12181(7) (1990).
52. *See Carparts*, 37 F.3d at 19.
53. *See id.*
54. Rengel, *supra* note 2, at 557.

the disabled have full and equal enjoyment of its goods and services by making reasonable modifications and accommodations to its services.[55]

Courts were interpreting the ADA as if Congress intended the twelve categories to be an exhaustive list, which creates problems in the plain interpretation of the ADA.[56] Under this interpretation, individual provisions of the ADA are narrowly tailored, limiting the scope.[57] Thus, a website must fit into one of the twelve categories in order for the ADA to apply.[58] As the places of public accommodation specifically listed by the ADA are all physical places, the statutory intent was aligned with a plain interpretation so that the ADA only applies to physical places of public accommodation; the promulgated regulations are keeping with this interpretation.

The DOJ regulations concerning limit disability accommodation requirements are limited to physical entity locations.[59] The DOJ's 1991 regulations are applicable to the ADA to define "place" by describing physical places of public accommodation.[60] Specifically, the regulation defines places of public accommodation as "facilities," which include "complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."[61] The DOJ's explanation of what constitutes a place of public accommodation indicates that the ADA was not meant to apply to websites unconnected to physical public entities.[62]

C. *Case Precedent*

The growth of the Internet has raised the question of whether the ADA is applicable to the Internet.[63] The answer to the question ultimately relies on how a court interprets the physicality component of the ADA language and intent to the ethereal nature of the Internet.

In 1994, a Michigan federal district court defined the elements necessary to establish a prima facie case under Title III of the ADA.[64] The plaintiff must prove: (1) that he or she has a disability; (2) that the defendant maintains a place of public accommodation; and (3) that the

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55. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 951 (N.D. Cal. 2006).

56. *See* Paul V. Sullivan, Note, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1127–28 (1995).

57. Rengel, *supra* note 2, at 556.

58. *See* Sullivan, *supra* note 56, at 1127–28.

59. Rengel, *supra* note 2, at 553.

60. *Id.* at 559.

61. 28 C.F.R. § 36.104.

62. *See* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1011–12 (6th Cir. 1997).

63. Rengel, *supra* note 2, at 564.

64. Mayberry v. Von Valtier, 843 F. Supp. 1160, 1164 (E.D. Mich. 1994).

plaintiff was discriminated against by being refused "full and equal enjoyment" of the accommodation or service.[65] Title III has caused courts confusion regarding the interpretation of "place of public accommodation."[66] Congress intended that the list of categories of public accommodations be exhaustive but the statute does not list every type of entity.[67] Thus, courts employ a case-by-case analysis.[68] Courts apply the plain language of the statute but the case precedent varies in application.[69]

The nexus requirement doctrine is the majority's test when deciding whether the ADA applies.[70] It is based on the aforementioned strict interpretation approach that holds "places of public accommodation" to be limited to physical facilities.[71] But in order for Title III of the ADA to apply to nonphysical applications, there must be a nexus between the disparity of benefits or services, and a physical place of public accommodation.[72] Thus, a physical location must be offering some kind of nonphysical service for the ADA to apply.

The U.S. Supreme Court has not heard the issue of websites' conformance to the ADA standards. Federal courts are divided into three camps: (1) the original view suggests that the ADA is only applicable to physical places of public accommodation;[73] (2) the majority view finds that ADA applies to all services so long as there is a nexus between the service and a physical place of public accommodation;[74] and (3) the minority view offers that the ADA applies very broadly to include non-physical places.[75]

At first, strict interpretation of the statute dealt with the issue of public accommodations to physical access of facilities only.[76] For example, the ADA was held to be non-applicable to a newspaper publication because a published periodical was not comparable to any of the places of public

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65. *Id.* at 1164.

66. *See, e.g.*, Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (1995); *Parker*, 121 F.3d at 1010–11; Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994); Ford v. Schering-Plough Corp., 145 F.3d 601, 613–14 (3d Cir. 1998).

67. *See Parker*, 121 F.3d at 1010.

68. *See id.*

69. *See* Torres v. AT&T Broadband, 158 F. Supp. 2d 1035, 1037–38 (N.D. Cal. 2001).

70. Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 34 (2d Cir. 1999) (broadening the scope of the ADA).

71. *Stoutenborough*, 59 F.3d at 583.

72. *See Parker,* 121 F.3d at 1011.

73. Rengel, *supra* note 2, at 553.

74. *Id.* at 553-54; Access Now v. Sw. Airlines, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

75. Rengel, *supra* note 2, at 554; *see* Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New England, 37 F.3d 12, 19 (1st Cir. 1994).

76. Treanor v. Wash. Post Co., 826 F. Supp. 568 (D.D.C. 1993).

accommodation listed in the statute.[77] Eventually courts modified their interpretations of the ADA to a larger scope.[78]

In 1993, the *Treanor v. Washington Post* case became the first to interpret the meaning of "places of public accommodation" within the ADA.[79] In that case, the plaintiff, a disabled author, alleged that the defendant, a newspaper company, violated Title III of the ADA by failing to publish a review of his book when it had published reviews of similar books by non-disabled authors.[80] The court rejected the plaintiff's argument that a newspaper was a public place under the ADA.[81] Thus, the *Treanor* court limited the scope of the ADA to accommodating access to a facility comparable to those listed in Title III, thereby maintaining that places of public accommodation are physical entities.[82]

In 1994, *Carparts Distrib. Ctr., Inc. v. Auto Wholsaler's Assn. of New England* rejected the nexus requirement holding that Title III public accommodations are not limited to physical structures.[83] The court reasoned that the list of public accommodations given by the ADA does not require that public accommodations have a physical structure.[84] The ADA was intended to apply to all service establishments including non-physical ones.[85] Therefore, businesses that deal solely over the phone or by mail should be subject to the same regulations as those who conduct business in an office or other facility.[86] By applying the ADA to nonphysical entities, the court disregarded the language of the ADA and Congressional intent.[87] The court was consequently criticized for overreaching and legislating from the bench.

In 1995 *Stoutenborough v. Nat'l Football League*,[88] a "nexus" argument was proposed between televised broadcasts of National Football League (NFL) games, which the NFL blacked out when fan attendance was below a certain level, and the football stadiums where teams actually played the games.[89] The court found that the Title III claim

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77. *Id.* at 569; *Carparts*, 37 F.3d at 12.
78. *See, e.g., Treanor*, 826 F. Supp. at 568; *Carparts*, 37 F.3d at 12.
79. *See Treanor,* 826 F. Supp. at 568.
80. *Id.* at 569.
81. Rengel, *supra* note 2, at 565.
82. *Id.*
83. *See Carparts*, 37 F.3d at 19.
84. *Id.*
85. *Id.*
86. *Id.*
87. Rengel, *supra* note 2, at 568.
88. *See* Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 582–83 (1995).
89. Mark Keddis, Comment, *Separation Anxiety: Redefining the Contours of the "Nexus" Approach Under Title III of the Americans with Disabilities Act for Heavily Integrated but Separately Owned Websites and "Places of Public Accommodation*," 43 SETON HALL L. REV. 843, 853 (2013).

failed because the service was not discriminatory, as the game was blacked out to everyone regardless of ability.[90] The court clarified that Title III only covers the services "which the public accommodation offers, not [those] which the lessor of the public accommodation offers. . . ."[91] The essence of this nexus argument is that there must be a sufficient degree of integration between the service and the place of public accommodation.[92] The televised game could not be linked to an actual public place.[93]

In 2002, the nexus approach was again examined in *Rendon v. Valleycrest Prods., Ltd.*[94] The case was about the fast-finger-question telephone-selection process for prospective contestants for the game show "Who Wants to be a Millionaire."[95] Plaintiffs with hearing impairments and mobility concerns could not use the process to appear on the game show and alleged discrimination under ADA's Title III.[96] The court found a nexus between the telephone process and the television studio that physically held the game show.[97] This decision opened the door to link ethereal services with a physical place.[98]

NFB v. Target, decided in 2006, was a class action lawsuit against Target Corporation (Target) on behalf of the visually impaired who were shopping on Target's online website.[99] The issue in the case regarded Title III of the ADA and the website inaccessiblily to the blind.[100] Target filed a motion to dismiss the claim, arguing that the plaintiffs failed to state a cause of action because the ADA does not apply to internet websites, but the judge denied Target's motion to dismiss, finding that the NFB had a valid Title III action against Target for violating the ADA by operating an inaccessible Internet site.[101] This was the first time that a court determined that the ADA regulations applied to a private commercial website.[102] The judge further certified a national class action on behalf of blind Internet users under the ADA.[103] There was an eventual settlement wherein the parties stipulated that further changes would be

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90. *Id.*
91. *Id.* (quoting *Stoutenborough,* 59 F.3d at 583).
92. *Id*. at 835–54.
93. *See id.*
94. Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002).
95. Keddis, *supra* note 89, at 854.
96. *Id* at 1280.
97. *Id.*
98. *Id.* at 854–55.
99. Rengel, *supra* note 2, at 546.
100. *Id.*
101. *Id.*
102. *Id.*
103. Nat'l Fed'n of the Blind v. Target Corp., No. 06-1802, 2007 WL 2846462 (N.D. Cal. Oct. 2, 2007).

made to the Target.com website and related policies, in addition to establishing a $6,000,000 settlement fund to compensate members a subclass.[104] The opinion establishes there must be a "nexus" between the website and a physical store.[105] If there is no such nexus, an entity need not comply with ADA regulations.[106]

In *Nat'l Ass'n of the Deaf v. Netflix, Inc.*,[107] a national non-profit advocacy group brought suit against Netflix for failing to provide both equal access technologies with closed-captioning for all of its streaming content and ease of access for content that does have captioning.[108] The Federal district court held that the Internet was a place of public accommodation under Title III of the ADA.[109] Citing the *Carparts* decision, the court held that the ADA was meant to apply to rapid changes in technology, Congress had no intention of the enumerated list of public spaces to be exhaustive, and that streaming video, even when done in a private residence, is covered under Title III as a place of public accommodation.[110] The parties have since reached a settlement requiring Netflix to close caption its entire inventory in the next two years and reimburse the plaintiffs' attorneys' fees in the amount of $755,000.[111]

Interpretation of the ADA's applicability to Internet services has swung the full pendulum range from a narrowly tailored application of the statute finding no connection with the ADA and online services to the recent inclusion of the Internet as a place of public accommodation under Title III. Despite the law's complicated history, at this point there is no denying that the ADA applies to websites. Like the Internet, the sphere of higher education is another area where the ADA's application has been subject to debate.

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104. Chris Danielson, *National Federation of the Blind and Target Agree to Class Action Settlement*, DISABILITY RIGHTS ADVOCATES (Aug. 27, 2008), http://www.dralegal.org/pressroom/press-releases/national-federation-of-the-blind-and-target-agree-to-class-action.

105. Rengel*, supra* note 2, at 548.

106. *Id.*

107. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012).

108. *Id.* at 199.

109. *Id.* at 200–02.

110. *Id.* (quoting Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal.2006), "The statute applies to the services of a place of public accommodation, not services in a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.").

111. Daniel Goldstein & Gregory Care, *Disability Rights and Access to the Digital World: An Advocate's Analysis of an Emerging Field*, 59 DEC. FED. LAW. 54, 57 (Dec. 2012) (quoting Consent Decree, Nat'l Ass'n of the Deaf v. Netflix Inc.*,* No. 11-CV-30168, 2012 WL 2343666 (D. Mass. June 12, 2012), *available at* dredf.org/captioning/netflix-consent-decree-10-10-12.pdf.).

IV. LEGAL APPLICATION TO HIGHER EDUCATION

In the legal application of the ADA, Rehabilitation Act, DOJ regulations, and case law with regard to higher education institutions, there is much that is settled and apparent given the nature and financial realities of the industry. Even so, the disruptive nature of Internet technologies have caused ambiguities. Some technological developments may still be in limbo with regard to whether public accommodations under the ADA apply and if they may receive federal funds under Section 504 of the Rehabilitation Act of 1973.[112] Massive Open Online Courses (MOOCs) may fall into this exception. The following section explores how the law applies to higher educational institutions in the context of accommodations and online course design.

A. *The Application of the ADA and Rehabilitation Act to Higher Education*

Under the ADA, private entities like universities are considered public accommodations if their operations affect commerce so may therefore not discriminate against disabled students because of their disability.[113] Further, the Rehabilitation Act will apply to all websites with any institution or entity that takes federal financing under section 504[114] or that is a under a federal contract or subcontract under section 503.[115] Federal government websites are explicitly covered under section 508 of the Rehabilitation Act.[116]

Thus, many higher educational institutions are bound to provide accommodations under section 504 of the Rehabilitation Act for accepting financial aid from students under Pell Grants, Stafford, and Perkins loans.[117] There are many further potential online disability requirements for entities under federal contract per section 503.[118] Educational nonprofits that operate under federal grants may be the best example of this. But even if a private education institution is out of the reach of the Rehabilitation Act, the broad sweep of the ADA will apply.[119] The recent *Netflix* case has shown the extent of the ADA's reach even to wholly online service providers.[120] MOOCs are firmly within the reach of the ADA regardless of the nexus or affiliation with a higher

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112. *Id.*
113. Wilhelm, *supra* note 17, at 220–21.
114. 29 U.S.C. § 794 (1993).
115. 29 U.S.C. § 793 (1993).
116. 29 U.S.C. § 794d (1993).
117. *See generally* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 701 (1993).
118. *See generally* Rehabilitation Act of 1973 § 503, 29 U.S.C. § 793 (1993).
119. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012).
120. *Id.*

education institution or a public company.[121]

B. *Reasonable Accommodation Process*

As of 2012, the U.S. Census Bureau estimated that about 56.7 million Americans, or 19% of the population, reported a disability in the 2010 census.[122] Disability is defined by the ADA as a physical or mental impairment that substantially limits one or more of the major life activities of such individual with a record of such impairment or being regarded as having such.[123] The statute is meant to be broad and focused on the effects of the impairment to the substantial limitation of major life activities.[124] The legal ambiguity leaves much to interpretation, but this is the beauty of the ADA as it is adaptive and not limited too narrowly in scope. This section will examine what an impairment is and when the impairment is deemed to be substantially limiting.

Impairments are not limited to physical disabilities, as mental disabilities also qualify when they significantly limit major life activities.[125] The Equal Employment Opportunity Commission (EEOC) defines mental impairment as a "mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[126] Examples of mental illnesses include bipolar disorder, major depression, anxiety disorders such as panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder, schizophrenia, and personality disorders; however, the ADA does not cover common personality traits such as irritability, poor judgment, or irresponsible behavior.[127] Dyslexia (difficulty with reading) is the most common cognitive impairment for college students, but other impairments include dyscalculia (difficulty with math), dysgraphia (difficulty with writing), anxiety disorders, Attention Deficit Disorder (ADD) and Attention Deficit/Hyperactivity Disorder (ADHD).[128]

Not all documented disabilities can be reasonably accommodated or even deemed to be necessary of accommodation.[129] This assessment

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121. *Id.*

122. *Nearly 1 in 5 People Have a Disability in the U.S.*, CENSUS BUREAU REPORTS (July 5, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

123. 42 U.S.C. § 12102(2) (1990).

124. *See id.*

125. *See* Wilhelm, *supra* note 17, at 223.

126. 29 C.F.R. § 1630.2(h)(2) (1993).

127. Wilhelm, *supra* note 17, at 223.

128. *Id.* (quoting SHELBY KEISER, TEST ACCOMMODATIONS: AN ADMINISTRATOR'S VIEW, IN ACCOMMODATIONS IN HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT 47 (Michael Gordon & Shelby Keiser eds., 1998)).

129. *Id.*

delves into the legal definition of "substantially limiting" disability. The EEOC regulations give the example of:

> [A]n individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at a moderately below average speed.[130]

In the realm of education, an above average student with a learning disability that makes the student on par with the performance of an average student would not qualify for accommodation.[131] What's more, where students have adaptive study habits that mitigate the disability, no accommodation is deemed necessary.[132]

The reality of online course accommodations is one that be accommodated to both students of physical disabilities as well as mental impairments.[133] The growing ubiquity, bordering on necessity, of online education must be addressed by higher educational institutions. There are technologies now that aid institutions to help their students.[134]

C. *Online Accommodative Technologies*

There has been a historical process of accommodations to technologies analogous to the Internet with television, telephone, and radio.[135] Telecommunications devices for the deaf (TDD), also known as telephone typewriters or teletypewriters (TTY), have been made available to those with hearing impairments. Television and films are now accessible to those with hearing impairments through closed captioning.[136] There are guidelines and regulations given by the Federal Communications Commission Section 613 of the Telecommunications Act that require television programming with closed-captioned access to

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130. 29 C.F.R. Pt. 1630, App. § 1630.2(j).

131. *See* Wilhelm, *supra* note 17, at 225–27.

132. *Id. See* Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419 (S.D. W. Va. 1997); McAlindin v. Cnty. of San Diego, 192 F.3d 1226 (9th Cir. 1999); *but see* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997).

133. *See* Wilhelm, *supra* note 17, at 225–27.

134. *Id.* at 217, 227.

135. Stephanie Khouri, *Disability Law-Welcome to the New Town Square of Today's Global Village: Website Accessibility for Individuals with Disabilities After Target and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331 343–45 (2010).

136. *Id*. (quoting Bonnie Poitras Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 HOUS. L. REV. 1101, 1132 (2000)).

individuals who are deaf or hearing impaired.[137] This was at the heart of the recent case, *Netflix*.[138] *Rendon*, the case involving the game show Who Wants to Be a Millionaire's "fast finger" process, concerned the telephone.[139]

The early Internet was simplistically textual, so screen reading technologies for accessibility were easily designed; but the Internet evolved to text with images and started to use HTML in new ways not amendable to easy adaptation, unlike HTML's original uses.[140] W3C, an organization which includes representatives of industry, disability organizations, government, and accessibility research organizations, support the Web Accessibility Initiative (WAI), which promotes web usability for individuals with disabilities.[141] In 1994, the World Wide Web Consortium (W3C) was founded to give standards for coding and hardware.[142] Initially released in 1996, Cascading Style Sheets (CSS), which allowed websites to be designed without separate formatting code, would enable faster loading times and be more compatible with formats that give: (1) synthetic speech, which reads aloud the code "behind the screen," (2) braille, which is provided to the user on a refreshable peripheral device next to the keyboard, or (3) a magnified image of the screen.[143]

Alternative tags (alt tags) make images accessible is to add alternative text to images and some tools automatically insert the file name of an image as alternative text.[144] Webpages that inadequately name or describe images will be unhelpful for those using screen readers. This was the central issue in the *Target* decision of 2008.[145]

Link text is also a helpful accessibility tool.[146] A hypertext link description allows a screen reader to facilitate a user with information.[147] Links that read "click here" or "more" do not provide useful information to someone scanning a page in this manner.[148] This will be of paramount importance to online education for source checking and one should be cognizant of this aspect in online course construction.

137. *Id.*

138. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 199 (D. Mass. 2012).

139. *Rendon*, 294 F.3d at 1286 (11th Cir. 2002).

140. Murley, *supra* note 21, at 404.

141. *Id.*; *Web Accessibility Initiative (WAI)*, W3, http://www.w3.org/WAI/#skip (last visited Nov. 30, 2014).

142. Murley, *supra* note 21, at 404.

143. *Id.*; Daniel Goldstein & Gregory Care, *Disability Rights and Access to the Digital World: An Advocate's Analysis of an Emerging Field*, 59 FED. LAW. 54, 55 (Dec. 2012).

144. Murley, *supra* note 21, at 405–06.

145. *Id.* at 405.

146. *Id.* a 405–06.

147. *Id.*

148. *Id*.

Heading enumeration for the HTML heading elements (h1, h2) will also be helpful to course construction.[149] The important part to notice is that this is a step in and of itself, as merely changing the size, color, or bolding of the font, the headings will not be read as headings by screen reading software.[150]

V. PRACTICAL APPLICATIONS OF THE ADA TO HIGHER EDUCATION

Online course construction and implementation is becoming ubiquitous in classrooms from primary school all the way through higher education.[151] Professional development organizations even implement it in their workshops and training.[152] Quality Matters, a nonprofit organization, has sought to implement quality and control checks to online course construction to wholly online and blended educational courses by using a rubric.[153]

Quality Matters (QM) is perhaps one of the most discussed methods of meeting the needs of special learners in higher education. QM is a peer review process that uses a set of benchmarks to verify that online classes are designed in such a way that they meet ADA guidelines.[154] In addition to using QM for meeting the needs of all learners, other factors addressed include, course delivery, course content, course delivery system, institutional infrastructure, faculty training/readiness, and student readiness/engagement.[155]

The QM review process is completed using the QM Rubric and is conducted by a team of certified QM Peer Reviewers.[156] At least one reviewer is from an outside institution and at least one is a Subject Matter Expert (SME) or someone within the same field as the course content.[157] A QM Master Reviewer (MR) who has experience teaching online using the process leads the team.[158] All members of the team are required to

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149. *Id.*

150. *Id.* at 406.

151. *Introduction to the Quality Matters Program*, QUALITY MATTERS, https://www.qualitymatters.org/sites/default/files/Introduction%20to%20the%20Quality%20Matters%20Program%20HyperlinkedFinal2014.pdf (last visited Mar. 19, 2015).

152. *Id*.

153. *Id.* The Quality Matters Program (QM) is an international organization representing broad inter-institutional collaboration and a shared understanding of online course quality. QM's quality assurance processes have been developed to improve and certify the design of online and blended courses. Academic, government, and education-related organizations use the tools in developing, maintaining, and reviewing their online courses and in training their faculty. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

have at least two years of online teaching experience and must have completed the QM training and certification process.[159] The review process is only completed for courses that have been taught for at least two semesters and have already been revised by the instructor.[160] It is important to note that the QM process does not assess the content of the course, but rather the course design.[161] The QM process is one that is continually revised with updates to the rubric used to assess courses as well as the peer review process.[162] A study of courses reviewed from 2011-2013 showed business courses met the QM standards most often, followed by education courses.

CONCLUSION

The Internet's pervasion has penetrated online shopping, social media, and education. American higher educational institutions have not escaped the reach of the statutes, as it applies to any higher educational institution that accepts federal financial aid from its students and the privately offered MOOCs or other private educational supplements will also be brought to comply with the ADA requirements as the recent case law has shown.[163] However, duties and requirements of the ADA are nothing to fear from a business perspective. The requirements have been foreseen by organizations such as W3C.[164] Furthermore, the economic rationale from a commercial website to a college course should be apparent. The greater accessibility is to all Internet users, the greater the profit is for business and the greater the dividend is to society for having a more highly capable and educated workforce.

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159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. Wilhelm, *supra* note 17, at 220–21.
164. Murley, *supra* note 21, at 404.