Virtually Enabled: How Title III of the Americans with Disabilities Act Might Be Applied to Online Virtual Worlds

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I. INTRODUCTION

In recent years, the Internet has provided new options for individuals suffering from debilitating infirmities to enjoy their lives independently. Much of this has come from online commerce, such as Web sites, like Amazon.com, that sell products or services to people without them ever needing to leave home. However, games like Second Life and World of Warcraft have gone further, creating virtual worlds in which individuals, disabled or not, may enjoy virtual lives, sharing experiences, forming friendships, and starting businesses. For disabled individuals, virtual worlds may mean a life less hindered by physical disability and social interactions without stigma, increasing self-worth and independence.

However, individuals with severely impaired vision, hearing, or motor abilities may not be able to enjoy the benefits provided by virtual worlds. Since virtual worlds are primarily conveyed through visual media, "low vision" or blind users may find life in these virtual worlds even more prohibitive than their real lives. If not subtitled, conversation in virtual worlds may be impossible, even to those able to read lips. Those lacking the motor or visual capacity to use a mouse effectively can be handicapped if mouse inputs are the only means of interacting with the world.

To remedy these problems, disabled individuals must rely on accessibility functions and settings in virtual-world programs, or third-party software and hardware, to be able to play or "live" in these virtual worlds. However, providing access to impaired individuals is entirely voluntary for virtual-world developers and is thus inconsistent among these games. Third-party software and hardware may be incompatible with some games, blocked by others as "cheats" that provide users with an unfair advantage, or may be prohibitively expensive.

Developments in disability-law jurisprudence, such as the recent settlement in *National Federation of the Blind v. Target Corp.* have provided hope for some in the disability advocacy community that the Americans with Disabilities Act (ADA) may be applied to these virtual worlds.[1] The *Target* case was the first action applying the ADA to a Web site that survived a motion to dismiss.[2] The plaintiffs were blind individuals who claimed Target's retail Web site discriminated against them by not accommodating the screen-reading software they use to view Web sites. If such suits become more prevalent, then disability advocates hope that Web sites and Internet service providers (ISPs) may soon be forced by law to

1. *See* Posting of Benjamin Duranske to Virtually Blind, http://virtuallyblind.com/2008/10/06/disabled-user-access-virtual-worlds/ (Oct. 6, 2008).

2. *See id*.

provide reasonable accessibility measures to their Web sites. If the ADA is applicable to Web sites, then, by extension, it may be applicable to online virtual worlds. Alternatively, even if the ADA is not applicable to Web sites, disability advocates hope that features of virtual worlds analogous to the real world may provide stronger arguments for the application of the ADA to virtual worlds.[3]

Such optimism may be premature, however, as the decision to hear the case was more of a reflection of the current circuit split over whether "places of public accommodation" under the ADA should include "places" other than physical structures. Moreover, while some features of online virtual worlds make application of the ADA to virtual worlds more apposite than to Web sites, other features, such as their nature as products themselves, may exempt virtual worlds from the requirements of the ADA. If advocates wish to succeed in applying the ADA to virtual worlds, courts will need to be educated about the prevalence and future of online commerce, and persuaded that application of the ADA to virtual worlds is possible as the ADA is currently written.

This Note attempts to distinguish virtual worlds from Web sites and discusses the potential for overcoming the circuit split by suggesting application of the ADA to virtual worlds independent of its application to Web sites. Section II of this Note discusses virtual worlds and their relevance to people with disabilities. Section III outlines Title III of the ADA and discusses the historical and current split in the federal circuits over the ADA's definition of "places of public accommodation" under Title III. Section IV discusses problems with the application of Title III to virtual worlds and suggests new arguments for its application to virtual worlds. Section V concludes by arguing from the material presented that courts should adopt an interpretation of Title III that looks to the character of a place instead of its physicality.

II. VIRTUAL WORLDS, VIRTUAL LIVES

Web sites offer access to a multitude of products and services, vast amounts of information, and a global connection unimagined prior to the invention of the World Wide Web. However, Web sites are not immersive and, thus, often provide little experience to the user beyond sitting at a desk in front of a computer. Unlike Web sites, most virtual worlds do not offer products or services, but are often products themselves.[4] Also, unlike Web sites, the experiences virtual worlds provide are immersive and, as a result, virtual worlds can provide virtual lives.

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3. *See id*.
4. *See, e.g., infra* Part IV.

A. Characteristics of Virtual Worlds

Virtual worlds are essentially computer games or software that allow the player or user to view and interact with others over the Internet in a persistent three-dimensional environment.

Some of these worlds may be true to life, representing a suburban neighborhood or an East Coast metropolis, or they may be fantastic, representing a medieval kingdom or a planet in a faraway galaxy. Some worlds, like Second Life, provide the opportunity to experience a multitude of virtual landscapes in a single program.

In these virtual worlds, the user is represented by an "avatar," a three-dimensional model that inhabits the world and accepts and follows commands inputted by the user.[5] The user is able to personalize an avatar, providing a greater connection to his or her virtual representative. Users interact with the world and with other users through these avatars, and may often communicate through text, voice, or gestures.

The bond between a user and avatar can be very intimate and personal, so personal that he or she may actually feel the actions that the avatar has been commanded to perform. Mark Dubin, a neuroscientist and former University of Colorado professor, explained this phenomenon, stating, "[y]ou have a representative that is you and responds to you. You move, it moves. You feel like you're there. Literally your brain will show activity typical of what the avatar is doing."[6] Dubin's explanation has some anecdotal support as well.[7] For instance, users of Second Life have gone so far as to create a "virtual ability island," where people with disabilities may perform therapeutic activities that help them overcome difficulties in their real lives.[8]

The persistence of virtual worlds—virtual-world programs continue to run with or without users, allowing them to store data about users' locations, attributes, inventories, and so on[9]—creates a continuity not only to the virtual world, but also to its virtual inhabitants. As a result of this continuity, users may develop entirely new online personas within the virtual world that change as they change. Indeed, a significant number of virtual-world users prefer their virtual life to their real life.[10]

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5. Kevin W. Saunders, *Virtual Worlds—Real Courts*, 52 VILL. L. REV. 187, 190 (2007).

6. Shelley Schendler, *Second Life Frees Disabled from Restrictions of Everyday Life*, Voice of America, Sept. 17, 2008, *available at* http://www.voanews.com/english/archive/2008-09/2008-09-17-voa24.cfm.

7. *See id.*

8. *See* Duranske, *supra* note 1; Virtual Ability Home Page, http://virtualability.org/default.aspx (last visited Dec. 10, 2009).

9. Saunders, *supra* note 5, at 191.

10. *Id.* at 191-92.

Moreover, as a result of the continuity and persistence of these avatars, users can develop real, lasting relationships with other users within the game. The authenticity of these relationships can be demonstrated by the extravagant virtual-world weddings between virtual inhabitants that replace real-world ceremonies,[11] and the real divorces that result from virtual infidelities.[12]

B. Virtual Worlds' Benefits to People with Disabilities

The benefits of virtual worlds to the disabled are immense. As previously mentioned, the bond a virtual-world user shares with his or her avatar creates a vicarious motility, so he or she actually feels like acts are being performed through the avatar. Because of this vicarious motility, virtual worlds provide an alternative means for social interaction that closely mimics the real world.

This alternative interaction grants a social life to people who would otherwise be bound to their home or their bed. In virtual worlds, people with physical disabilities may go out dancing, rock climbing, or fight in the prince's army. Alternatively, they can play games with other people, as superheroes in a super-powered team, or join a raiding party fighting goblins on the outskirts of a virtual town. Second Life even trades virtual currency with real-world currency on a virtual exchange, sells virtual real estate, and allows its users to keep intellectual property rights in virtual property they create in the game.[13] This level of interactivity and persistence allows people with disabilities to start successful businesses making thousands of real dollars a year, allowing them greater independence and increasing self-worth.[14]

Moreover, a homogeneous appearance of capability among avatars removes or mitigates the stigma of disability from interpersonal relations.[15] The form of one's avatar may or may not be limited by the game; some developers provide model templates and a limited number of personalization options, while others provide merely a basic shape and allow tech-savvy users to create their own models and textures, their

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11. *See* CNN, *Virtual World, Real Emotions: Relationships in Second Life*, Dec. 15, 2008, http://www.cnn.com/2008/LIVING/12/12/second.life.relationship.irpt/index.html (last visited Dec. 10, 2009).

12. *See* CNN, *Second Life Affair Ends in Divorce*, Nov. 14, 2008, http://www.cnn.com/2008/WORLD/europe/11/14/second.life.divorce/index.html (last visited Dec. 10, 2009).

13. Steven J. Davidson, *An Immersive Perspective on the Second Life Virtual World*, 947 PLI/PAT 673, 681 (2008).

14. Steve Mollman, *Online a Virtual Business Option for Disabled,* CNN, July 10, 2007, http://edition.cnn.com/2007/BUSINESS/07/10/virtual.disabled/index.html (last visited Dec. 10, 2009).

15. Schendler, *supra* note 6.

appearance limited only by their imaginations.[16] Regardless of limitations, the result is the same: users cannot easily discern whether the user behind the avatar is disabled. Because the user appears no different from other users, the user is treated no differently. Being treated as an equal to one's peers increases self-worth.

C. Virtual Worlds' Obstacles for People with Disabilities

The positive effects of virtual life are not uniformly available, however, as visual, aural, and physical disabilities limit access to many options in virtual worlds. Though complete blindness is a near insurmountable obstacle, as the immersiveness[17] of current virtual worlds is largely contingent upon visual cues and perspective, people with "low vision" may still benefit if given the opportunity. Low vision is not a complete inability to see—included are people with uncorrectable near- or far-sightedness, colorblindness, or partial blindness—but rather a limitation on one's vision that creates a difficulty perceiving "content that is small, does not enlarge well, or which does not have sufficient contrast."[18] If virtual-world textures and models blend together due to muted colors or lack of contrast, or virtual-world text is insufficiently large or distinctive in color, a user may be unable to function effectively in the virtual world.[19] Similarly, when a mouse is required for interaction within the world (without the option of keyboard-based alternatives), access to virtual

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16. For example, World of Warcraft features ten playable races with nine playable classes that affect the appearance (and abilities) of an avatar. *See* World of Warcraft Race Information, http://www.worldofwarcraft.com/info/races/index.html (last visited Dec. 10, 2009). Each avatar has cosmetic features, such as gender, face, hair color and style, and skin color, which may be chosen from a limited number of options, though changing these features after initially choosing them costs $15. *See* Blizzard Support, World of Warcraft Character Recustomization FAQ, http://us.blizzard.com/support/article.xml?locale =en_US&tag=CRCFAQ (last visted Dec. 10, 2009). Second Life, on the other hand, allows users to create, buy and sell textures that change the clothing and appearance of their avatars, boasting that "[t]he only limit is your imagination." *See* Second Life Avatars, http://secondlife.com/whatis/avatar/?lang=en-US (last visited Dec. 10, 2009). These attributes may be changed drastically, and at any time. *See* Jonathan Strickland & David Roos, *How Second Life Works*, HOWSTUFFWORKS.COM, http://computer.howstuffworks.com/internet/social-networking/networks/second-life2.htm (last visited Dec. 10, 2009).

17. The New Oxford American Dictionary defines "immersive" as "(of a computer display or system) generating a three-dimensional image that appears to surround the user." THE NEW OXFORD AMERICAN DICTIONARY 850 (2001).

18. Nikki D. Kessling, Note, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation"*, 45 HOUS. L. REV. 991, 999 (2008) (quoting Web Accessibility in Mind, Visual Disabilities—Low Vision, http://www.webaim.org/articles/visual/lowvision.php (last visited Dec. 10, 2009)).

19. *See id.*

worlds may be prohibitively difficult for those users unable to see a cursor on the screen.[20]

Aural disabilities, such as partial or total deafness, do not present obstacles as great as visual disabilities to the virtual-world experience. However, the sole use of auditory cues or vocal conversation can lead deaf users to miss out on necessary elements of in-game stories, or exclude them entirely from virtual-world discussions. [21]

Physical and motor disabilities ranging from severe carpal tunnel syndrome to partial paralysis may also limit users' access within virtual worlds. A virtual-world program's over-reliance on either keyboards or computer mouses may exclude those unable to use one or the other device. For those that have limited use of either type of device, objects that are very small or very dynamic can present difficulty.[22]

D. Options to Overcome the Obstacles

Obstacles due to visual, aural, and physical disabilities are very real and, under current law, developers are under no legal obligation to provide options to disabled gamers. However, some developers, like Mythic Entertainment discussed below, voluntarily provide accessibility options, often due to coaxing from disability advocates. Such advocacy has had varied success and can take a great deal of time.

For example, AbleGamers, an online community for disabled gamers, reported somewhat different experiences contacting the makers of two very stylistically similar virtual-world games, World of Warcraft and Warhammer Online, in regard to each game's accessibility to disabled gamers.[23] Mythic Entertainment, the creator of Warhammer Online, offered several optional settings which significantly increased the game's accessibility to visually and physically impaired people.[24] AbleGamers, impressed with Mythic's seeming dedication to disabled gamers, sought to recognize the company as the "Most Accessible Mainstream Game" of 2008, but did not do so without first securing support from Mythic for On-Screen Keyboard.[25] On-Screen Keyboard is a mousable interface allowing

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20. *Id.* at 1000.

21. *Is Blizzard Committed to Disabled Gamers?*, A Dwarf Priest, http://dwarfpriest.com/2008/09/03/is-blizzard-committed-to-disabled-gamers/ (Sept. 3, 2008, 23:38 EST).

22. *See id.*

23. *See* Annette Gonzalez, *AbleGamers Gives WarHammer "Most Accessible Mainstream Game" of 2008*, ABLEGAMERS.COM, Feb. 2, 2009, http://www.ablegamers.com/game-news/415-ablegamers-gives-warhammer-game-of-2008.html; A Dwarf Priest, *supra* note 21.

24. Gonzalez, *supra* note 24.

25. *Id.*

users to type data on their screen by clicking[26]—a useful tool for gamers unable to manage a keyboard. AbleGamers appealed to Mythic and convinced them the request "was not just an additional feature request, but a real need."[27] Within months, Mythic implemented a patch to make the game compatible with the On-Screen Keyboard and subsequently received the recognition from AbleGamers.[28]

In contrast, AbleGamers claimed it took three years for Blizzard Entertainment, maker of World of Warcraft, to respond to their e-mails and requests to make World of Warcraft compatible with third-party accessibility software.[29] What ultimately spurred Blizzard to act was a threat to publicize Blizzard's lack of response on t-shirts at a game developers' conference.[30] Blizzard claimed its hesitancy was due to concerns about third-party accessibility software providing opportunities to cheat.[31] Accessibility software often allows for automation of certain functions so that disabled players, unable to quickly enter several commands, may achieve an even playing field with other players.[32] According to J. Allen Brack, Lead Producer for Blizzard, "[t]here are several reasons [other than automation] why certain functions are not permitted in [third-party software]. First and foremost, we forbid any functionality that could lead to cheating or that violate [sic] our Terms of Use."[33]

Blizzard's statement about such software highlights one obstacle disability advocates face when attempting to garner increased support for accessibility options and third-party software: game balance. Developers must strike a balance between providing access to disabled players and preventing abuse of accessibility software by players who do not need it.

However, despite the worries expressed by Blizzard, AbleGamers reported of Warhammer Online that:

> [N]o matter what your general disability is, this game may have the ability to accommodate you. We have found that game pads work extremely well, the game can be fully moused, and alternatively []

26. *Id.*
27. *Id.*
28. *See id.*
29. A DWARF PRIEST, *supra* note 21.
30. *Id.*
31. *Id.*
32. *See, e.g.*, A Dwarf Priest, *supra* note 21 (discussing the "struggle of balancing game accessibility with over-automation of the game").
33. *Id.*

> third party programs such as voice commands, sip and puff, and other input devices work with 100% proficiency.[34]

The accessibility of Warhammer Online demonstrates that the reluctance to provide accessibility may be a product of an overabundance of caution, if not a lack of proper motivation. Moreover, despite accessibility functionality voluntarily implemented in virtual-world programs, updates in technology stand to undermine, or at least make more difficult, efforts to keep virtual worlds accessible. For example, a switch from text-based communication to voice-based communication in a virtual world diminishes deaf users' capability to participate, though such a change may be preferable to the majority of players. In Second Life, the move toward voice communication has sparked controversy.[35] In order to properly motivate developers to maintain accessibility functionality, virtual worlds may need to be regulated and, if so, Title III of the Americans with Disabilities Act provides an attractive option.

III. THE AMERICANS WITH DISABILITIES ACT AND THE INTERNET

Title III of the Americans with Disabilities Act reads, in relevant part: "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 operates a place of public accommodation."[36] Thus, whether the provisions of Title III can be applied has most often hinged on whether a business, company, or service provider fits the statutory definition of a "place of public accommodation." The statute defines "place of public accommodation" as any of the following private entities that affect commerce:

> (A) an inn, hotel, motel, or other place of lodging . . . ;
> (B) a restaurant, bar, or other establishment serving food or drink;
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

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34. *Id.* (quoting Steve Spohn, *Warhammer: Age of Accessibility*, ABLEGAMERS.COM, Aug. 27, 2008, http://www.ablegamers.com/game-news/332-warhammer-age-of-accessibility.html).

35. Posting of Martin Oliver to Learning from Social Worlds, http://learningfromsocialworlds.wordpress.com/exclusion-community-in-second-life/ (Nov. 2007).

36. 42 U.S.C. § 12182(a) (2006).

> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
> (G) a terminal, depot, or other station used for specified public transportation;
> (H) a museum, library, gallery, or other place of public display or collection;
> (I) a park, zoo, amusement park, or other place of recreation;
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation. [37]

While most of the enumerated places of public accommodation arguably have a concrete character, the vagueness in each categories' inclusion of "or other [place or establishment]"—and particularly the inclusion of "travel service" in (F)—has resulted in a circuit split as courts attempt to construe the statute as either inclusive or exclusive of commercial entities not housed within brick-and-mortar facilities, but which nonetheless deny disabled individuals access to their products or services. However, the circuits seem to agree that it is not the products or services provided by the place of public accommodation, but the access to those products and services that brings an entity under the ambit of Title III. Therein lies the difficulty for virtual worlds, most of which are products or services not included within any enumerated category.

A. The First, Second, and Seventh Circuits: Places of Public Accommodation Need not Be Physical Structures

The First Circuit held in its 1994 decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England* that places of public accommodation did not need to be brick-and-mortar buildings, and that any company which provided services listed in the definition provided by the statute could be a "place of public accommodation."[38] Much of the First Circuit's decision was based on the appearance of "travel service" in the definition.[39] The court found that the plain meaning of the terms included in the definition did not require public accommodations to

37. 42 U.S.C. § 12181(7) (2006).

38. Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994).

39. *Id.*

have physical structures.[40] Since many service establishments do not require a physical structure, and instead conduct business by telephone or mail, the court found that "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not."[41]

The First Circuit left open the question of whether the provisions of Title III were intended to provide only access to a product or service, or were "intended in addition to shape and control which products and services may be offered."[42] To that end, Title III does offer that reasonable modifications must be made to provide access to goods and services to individuals with disabilities "unless the entity can demonstrate that taking such steps would fundamentally alter the nature" of such goods or services.[43]

Later decisions in the Second and Seventh Circuits follow the precedent set by the First Circuit in *Carparts*.[44] Notably, the Seventh Circuit, in *Doe v. Mutual of Omaha Insurance Co.*, interpreted *Carparts* in dicta to state that

> [t]he core meaning of [Title III] . . . is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, *Web site*, or other facility (whether in physical space or in electronic space . . .) that is open to the public cannot exclude disabled persons.[45]

Similar to the First Circuit, the Seventh Circuit distinguished between requiring places of public accommodation to provide people with disabilities access to their products or services, and requiring places to fundamentally alter their products or services to accommodate people with disabilities.[46]

B. The Third, Sixth, Ninth, and Eleventh Circuits: The Nexus Test

In contrast to the First and Seventh Circuits, there is a consensus among the Third, Sixth, Ninth, and Eleventh Circuits that places of public accommodation must be concrete, physical structures. In the Sixth Circuit's 1995 opinion in *Stoutenborough v. National Football League, Inc.*, the plaintiffs sued the National Football League (NFL) and several television stations, arguing under Title III that the defendants were places of public

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40. *Id.*
41. *Id.*
42. *Id.*
43. 42 U.S.C. § 12182(b)(2)(A)(iii) (2006).
44. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32-33 (2nd Cir. 2000); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999).
45. *Mutual of Omaha*, 179 F.3d at 559 (emphasis added).
46. *Id*. at 560.

accommodation.[47] The plaintiffs' claim centered on the NFL's "blackout rule" which prohibited local television broadcasts of home games if the stadium was not sold out three days before the game.[48] The plaintiffs alleged that the blackout rule discriminated against hearing-impaired individuals, preventing them from enjoying a game that hearing individuals could enjoy via radio broadcast.[49] The court held that the blackout rule prevented television viewing of football games by both hearing and hearing-impaired people alike and, thus, could not be discriminatory.[50] Moreover, the court held that radio broadcasts did not fall under the ambit of the blackout rule and, thus, the availability of the radio broadcasts was irrelevant.[51]

Furthermore, the Sixth Circuit agreed with the defendant companies that the plaintiffs failed to state a claim, as none of the defendant companies were "places of public accommodation," defining a "place" as a "facility" which regulations define 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."[52] Though the court reasoned that the televised broadcast of the football games was a service, the definition of "place" as concrete and physical kept the NFL and television stations from the reach of the statute.[53] Additionally, though the court found that games were played in stadiums, which are places of public accommodation, the televised broadcast of the game was not a service of the stadium but rather of the NFL, and "[i]t is all of the services which the *public accommodation* offers, not all services which the lessor of the public accommodation offers which fall within the scope of Title III."[54]

The Sixth Circuit reaffirmed its definition of "place of public accommodation" as a physical, concrete structure in *Parker v. Metropolitan Life Insurance Co*.[55] In *Parker*, the court denied application of Title III to a disability insurance policy offered to businesses.[56] The defendant had sold the plaintiff's employer long-term disability insurance, and the plaintiff brought suit, alleging that the insurance policy violated the provisions of

47. Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 582 (6th Cir. 1995).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 583 (quoting 28 C.F.R. § 36.104 (2008)).
53. *Id.*
54. *Id.* (emphasis added).
55. Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010-11 (6th Cir. 1997).
56. *Id.* at 1008.

Title III by offering differing benefits contingent upon whether the person's disability was mental or physical.[57] While the court agreed that Title III specifically barred the provision of disparate benefits by a place of public accommodation, and that insurance policies fall under the purview of products and services under Title III, the Sixth Circuit affirmed the district court's grant of summary judgment against the plaintiff.[58] The court reasoned that, in order to apply Title III's provisions to a product or service, even if discriminatory, there must be a "nexus" between the product or service and a place of public accommodation.[59] Since the plaintiff did not access the policy from the defendant's insurance office, but rather through her employer, there was no "nexus" between a place of public accommodation and discriminatory benefits, despite Title III expressly providing that insurance companies are places of public accommodation.[60]

The "nexus" language was repeated in the Third Circuit's opinion in *Ford v. Schering-Plough Corp.* to deny a similar plaintiff seeking to apply Title III to an employer's disability insurance package through MetLife.[61] Since the plaintiff had received her disability insurance as a benefit of her employment and not directly from MetLife, the court found no "nexus" with MetLife's insurance office.[62] The Ninth Circuit similarly quoted the "nexus" language in its decision in *Weyer v. Twentieth Century Fox Film Corp*., agreeing with the Third and Sixth Circuits.[63]

The Eleventh Circuit first ratified the "nexus" test in dicta in *Rendon v. Valleycrest Productions, Ltd.*[64] The plaintiff in *Rendon* sued the producers of "Who Wants to Be a Millionaire," a televised quiz show, alleging that the telephone screening process for contestants discriminated against the hearing- and mobility-impaired, who could either not hear the questions being asked of them or could not press the buttons on their phone quickly enough to record their answers.[65] The district court dismissed the claim, concluding that, since the automated telephone service was not conducted at a physical location defined by the statute, it was not a place of public accommodation subject to Title III provisions.[66] The Eleventh

57. *Id.* at 1008-9.
58. *Id.* at 1008-10.
59. *Id.* at 1011.
60. *Id.*
61. Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3d Cir. 1998).
62. *Id.*
63. Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114-15 (9th Cir. 2000) (citing Parker, 121 F.3d at 1010-11; Ford, 145 F.3d at 612-13).
64. Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002).
65. *Id.* at 1281.
66. *Id*.

Circuit reversed the district court, however, reasoning that the theater was a place of public accommodation, and the telephone selection process provided the means to access the theater.[67] The Eleventh Circuit was not persuaded by the defendants' arguments that Title III's definition of discrimination only contemplated physical bars to access and not "off-site discrimination."[68] The court held that, because there is no such limiting statutory language, and the requisite nexus was provided between the theater and the allegedly discriminatory phone service, the case could move forward.[69]

C. The Americans with Disabilities Act and Web Sites

After the above cases, the circuits stood split on the definition of "place of public accommodation" and whether it can encompass places that are not physical structures. The First Circuit has held that the definition is inclusive of nonphysical places, and the Seventh Circuit has agreed, at least in dicta. The Third, Sixth, Ninth, and Eleventh Circuits, however, apply the "nexus test" to determine if the discriminatory product or service bears a relationship to a concrete, physical structure within the statutory definition of "place of public accommodation."

The first case to test Title III's application to Web sites was the Eleventh Circuit case *Access Now, Inc. v. Southwest Airlines Co.*[70] The Eleventh Circuit dismissed the claim raised by the plaintiff, Access Now, who argued that the defendant, Southwest Airlines, discriminated against blind persons by neither providing compatibility with accessibility software—screen readers—nor optimizing the "virtual ticket counter" on its Web site for use by blind customers.[71] The district court originally dismissed the claim as it focused entirely on the application of Title III to Southwest Airlines's Web site as a place of public accommodation.[72] According to the district court, "the plain and unambiguous language of the statute and relevant regulations does [sic] not include Internet websites among the definitions of 'places of public accommodation.'"[73] The district court then applied the "nexus test" and determined that no nexus was established between Southwest.com and a physical structure because the plaintiffs never attempted to argue such a connection existed.[74]

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67. *Id*. at 1284-85.
68. *Id*. at 1285.
69. *Id.* at 1283-84.
70. Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1325 (11th Cir. 2004).
71. *Id.* at 1325-26.
72. *Id.* at 1325.
73. *Id.* at 1328 (quoting Access Now, Inc. v. Sw. Airlines Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002)).
74. *Id.*

On appeal, the plaintiffs no longer argued that Southwest Airlines's Web site was a place of public accommodation, and instead argued that Southwest Airlines provided a "travel service," which falls under the statutory definition of "place of public accommodation."[75] Therefore, the plaintiffs alleged, Southwest Airlines discriminated against blind persons by not making its Web site accessible, as a service, to them.[76] Because the plaintiffs no longer argued their original theory on appeal, the court treated the original theory as abandoned and, due to appellate procedure, would not address the new theory.[77] Thus, the Eleventh Circuit dismissed the appeal and the district court's ruling stood affirmed.[78]

The National Federation of the Blind (NFB) fared much better in a similar case against Target Corporation.[79] The NFB filed suit in the U.S. District Court for the Northern District of California, within the Ninth Circuit, alleging that Target Corporation's Web site, Target.com, discriminated against blind persons by not providing for compatibility with screen readers.[80] In a victory for disability advocates, the claim was not dismissed as it was in *Access Now*.

However, despite allowing the cause of action, the decision denying the motion to dismiss reaffirmed the court's adherence to a definition of "place of public accommodation" that includes only brick-and-mortar structures, and analysis under the nexus test.[81] The court's denial of the motion hinged on "off-site discrimination"—that is, Title III bars discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations *of* [as opposed to *in*] any place of public accommodation."[82] The court viewed the Target Web site as an extension of Target's stores and agreed with the plaintiffs insofar as "the inaccessibility of Target.com denies the blind the ability to enjoy the services of Target stores."[83] However, the court held that "[t]o the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA."[84]

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75. *Id.* at 1328-29.
76. *Id.*
77. *Id.* at 1335.
78. *Id.*
79. *See* Duranske, *supra* note 1.
80. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949-50 (N.D. Cal. 2006).
81. *Id.* at 952.
82. *Id.* at 953 (quoting 42 U.S.C. § 12182(a)) (emphasis in original).
83. *Id.* at 955.
84. *Id.* at 956.

The NFB case was recently settled out of court, so no new precedent was set.[85] However, most scholarship since the denial of the motion to dismiss has concluded that the nexus test requires a Web site to have some nexus to a physical structure that constitutes a place of public accommodation under the twelve categories listed in 42 U.S.C. § 12181(7) in order to fall under the requirements of Title III.[86] As the nexus test requires a discriminatory product or service to hold a nexus with some sort of physical structure in order for Title III to apply, and the *Carparts* line of decisions has only included Web sites as places of public accommodation in dicta, it remains to be seen whether, or in what manner, the ADA will be applied to the World Wide Web. Furthermore, because virtual worlds bear no nexus at all with concrete structures constituting places of public accommodation, the ADA's application to virtual worlds is even trickier.

IV. BEYOND THE NEXUS TEST: RECENT ARGUMENTS FOR THE AMERICANS WITH DISABILITIES ACT'S APPLICABILITY TO THE INTERNET

The nexus test's reliance on notions of physical place categorically excludes the majority of online commerce, as Web sites like eBay.com and Amazon.com have no nexus with a concrete place of public accommodation. However, *both* constructions of "place of public accommodation" present a problem for virtual worlds. Those circuits which require a nexus between physical places of public accommodation and discriminatory access will immediately dismiss an action against a virtual world as lacking any nexus with a concrete physical structure enumerated by the statute. Virtual worlds are computer programs created by game developers, and game-development companies do not fit any of the twelve statutory categories. Even under the broad definition provided by the First and Seventh Circuits, a distinction remains between a business providing reasonable access to its products and services, and a business altering its products and services to accommodate people with disabilities.[87] Because of this distinction, even if game-development companies or ISPs are an eligible category under Title III, their products may not be subject to it.

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85. Duranske, *supra* note 1.

86. Shani Else, Note, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is a Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1141 (2008).

87. *See, e.g.*, *Parker*, 121 F.3d at 1012 ("The applicable regulations clearly set forth that Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation."); *Mutual of Omaha*, 179 F.3d at 560 ("The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated.").

Two recent student publications have argued that the nexus test is incorrect and should be abolished, but each is problematic for the purposes of virtual worlds. Shani Else's note, published in the Summer 2008 *Washington and Lee Law Review*, argues that all of "cyberspace" should be considered a "place" under Title III.[88] Nikki D. Kessling's note, published in the 2008 *Houston Law Review*, also argues that the nexus test should be abandoned, but provides an alternative "commerce- and character-based" analysis.[89]

A. "Cyberspace" as a "Place of Public Accommodation"

In her note, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is a Place Under Title III of the Americans with Disabilities Act*, Else argues that "[t]he [I]nternet is designed to be used as a place, is used as a place, and individuals think of the [I]nternet as a place," and, thus courts, must follow suit and recognize the Internet as a place of public accommodation.[90] However, Else's definition paints with a rather broad stroke and is prone to failure if applied generally.

The Internet is a medium of communication, and "cyberspace" is difficult to define. Does the definition of "cyberspace" include the entire Internet, or just the World Wide Web? The note does not expressly provide the answer, and Else fails to demonstrate a clear understanding of the subject matter. For instance, Else uses words like "Internet," "World Wide Web," "online," and "cyberspace" interchangeably.[91] The World Wide Web is only part of the Internet, however, and many aspects of the Internet are not at all recognizable as "places." While Web sites inherently may evoke ideas of place ("site" is even included in the word), other Internet-based services, such as instant-messaging services, e-mail, Internet relay chat channels, and VoIP telephone services do not evoke the same feelings of "place" that Web sites do. Should courts define e-mail, or e-mail clients such as Microsoft Outlook or Mozilla Thunderbird, as places of public accommodation? Else seems to believe they should not, as the note provides, "[a] television broadcast, insurance, or a telephone is not designed, used, or perceived as a place."[92]

Despite the vagueness of Else's definition of "cyberspace," the virtual-world-as-place argument has some elemental appeal. Once Else establishes that "cyberspace" is "designed, used, and perceived as a

88. Else, *supra* note 87, at 1124.
89. Kessling, *supra* note 18, at 1024.
90. Else, *supra* note 8, at 1124.
91. *See id.* at 1122, 1125.
92. *Id.* at 1145.

place,"[93] she analogizes treating cyberspace legally as a place in the same way that, she argues, in *Marsh v. Alabama*, the Supreme Court treated a privately owned city as a public municipality because it was designed and used as a public municipality.[94]

If Else's analogy holds, when applied specifically to virtual worlds, the analogy could be even stronger. In fact, VirtuallyBlind.com, a disability advocacy blog, argued that the similarities between the real world and three–dimensional virtual worlds may allow for persuasive arguments that virtual worlds are, or at least provide, places of public accommodation.[95] Many virtual worlds contain buildings that serve as meeting places, retail stores, educational facilities, virtual zoos, inns, and auction houses, among other things. Second Life contains storefronts for real-world companies like American Apparel, BMW, Dell Computer, Toyota, Sprint, Reebok, and many others.[96] As previously mentioned, Second Life also sells virtual real estate and maintains virtual currency on an exchange with real-world currency. There is no question that a virtual world is designed, used, and perceived as a place. Furthermore, if the private ownership of a city was no hindrance to the application of federal law in *Marsh v. Alabama*, then Title III should apply to virtual worlds despite private developers' ownership. However, Else again paints with too broad of a stroke. In *Marsh v. Alabama*, it was not merely that the privately owned city was designed, used, and perceived as a public city, but that, notwithstanding its ownership, the privately owned city was in all meaningful ways the same as a public municipality.[97] For that reason, the Supreme Court determined that the state could not allow the privately owned city to violate fundamental rights under the First and Fourteenth Amendments. The Court did not go so far as to find that the privately owned city was legally a public municipality.[98] It is not clear that de facto denials of access to a virtual world infringe any fundamental rights under the First or Fourteenth Amendments.

Moreover, even if courts did extend this line of reasoning to encompass virtual worlds, it is likely that Title III would apply only in a piecemeal fashion to those virtual structures that have real world analogues fitting one of the twelve categories defined by Title III. Disability advocates seek to apply Title III to more than just certain stores in Second Life. Virtual worlds consist of more than buildings and walkways; indeed,

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93. *Id.* at 1139.
94. *Id.* at 1147 (citing Marsh v. Alabama, 326 U.S. 501, 509 (1946)).
95. *See* Duranske, *supra* note 1.
96. Davidson, *supra* note 13, at 681.
97. 326 U.S. 501, 508 (1948).
98. *Id.* at 508-09.

they are entire worlds, which are not covered per se by Title III. Virtual worlds cannot—under *Marsh* or the current split in precedent among the circuit courts—fall under Title III.

B. The Commerce- and Character-Based Test

Kessling's note, titled *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation,"* like Else's, argues that Web sites should be analyzed as "'places of public accommodation' in their own right," but does not define them as places categorically.[99] Instead, Kessling's test focuses on the commerciality and character of a Web site to determine if it will fall under the provisions of Title III.[100] Like Else's analogy, this test has some appeal for virtual worlds, but is problematic and may require tweaking in order to apply it properly.

According to Kessling, the first step of the test requires that the Web site "affect interstate commerce in some way," as required by Title III, and be a private entity.[101] This threshold step, Kessling argues, would "rule out the myriad websites that do not actually engage in commercial activity" and exclude per se those Web sites that neither sell products or services nor charge membership fees.[102] Almost all virtual-world developers would pass this threshold step because the bulk of all massively multiplayer online role-playing game (MMORPG) developers charge for the software content of their game—including subscription fees for access—and many of the remaining virtual-world services sell products within their world.

The second step requires an analysis of the character of the commercial entity and its resemblance to any of the twelve enumerated categories of places of public accommodation under Title III.[103] Kessling lists several Web sites and how they might fit the categories; for example, Amazon.com is a "sales or rental establishment" and Games.yahoo.com is a "place of recreation."[104]

The reach of the second step may be broad or narrow when applied to virtual worlds. Broadly, it may be argued that a virtual world like Second Life is at least a "place of public gathering" under the statute, or that a virtual world like World of Warcraft is a "place of entertainment." Alternatively, the second step may narrowly reach only those elements

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99. Kessling, *supra* note 18, at 1024.
100. *Id.*
101. *Id.* at 1025.
102. *Id.*
103. *Id.*
104. *Id.* at 1025-26.

within virtual worlds that closely resemble one of the categories under Title III, like an in-world auction house or retail establishment. The latter is too narrow because mandated access to an in-world retail establishment will not ameliorate those problems of access to the world in general. The reach of the former definition, however, may be too broad, as virtual worlds are commercial products and Title III explicitly exempts products themselves from its purview; it is the *access* to products that concerns the statute.[105] This remains problematic so long as the virtual world itself is the product, but, as virtual worlds begin to become merely the platform for products sold, concerns about access to those products begin to have more legal weight. For this reason, it is necessary to distinguish between virtual worlds as products themselves and virtual worlds as platforms for the sale of goods and services.

C. Regulating Virtual Worlds as Platforms

Professor Edward Castronova offers a way to distinguish virtual worlds that may provide assistance in applying the "commerce and character test" proposed by Kessling: a dichotomy between "open" and "closed" worlds.[106] This dichotomy may not map perfectly on top of the virtual-world-as-product and virtual-world-as-platform dichotomy but, for the purposes of analysis, it provides a reasonable analogy.

According to Castronova, "closed" worlds are those in which the "border between the [virtual] world[s] and the real world is considered impermeable" and user interests are regulated by the terms of the End User License Agreement (EULA) between the developers and the users.[107] These "closed" worlds are games that attempt to remain unadulterated by real-world interests.[108] Most virtual worlds are sold as, and intended to be, computer games, like World of Warcraft, Dark Age of Camelot, Everquest, City of Heroes, and so on. These games have stories with fixed beginnings for entering players, and fixed endings with several intermediate, and often optional, missions or quests between them. To assist the player and provide incentive to complete missions or quests, these games offer progressively better virtual equipment with which to outfit their avatars when players defeat monsters or complete quests. Acquiring this virtual property often requires a great deal of time, and some of it is more rare and more powerful than other virtual property, so enterprising players have begun selling it on

105. *Mutual of Omaha*, 179 F.3d at 560.
106. Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 201-02 (2004).
107. *Id.* at 201.
108. *See id.* at 201-02.

Internet auction sites like eBay to players who have the money, but not the time, to invest in acquiring it.[109]

However, such external sales are most often expressly prohibited by the game's EULA.[110] Because of this, while virtual products are bought and sold in these "closed" worlds, the virtual-world providers are not using the virtual world as a platform for the sale of virtual goods. No real-world money is intended to exchange hands for the purchase of virtual property; instead, it is meant to be kept in-game. To some extent, imposing the terrestrial law on these games would be tantamount to prosecuting a football player who tackles another player or a boxer who hits another boxer for assault and battery.

In contrast to "closed" worlds, Castronova describes "open" worlds as providing a porous border between the real and virtual worlds such that the "interests and conditions of users are regulated by applicable real-world law."[111] "Open" worlds, in effect, are those virtual worlds that allow real-world interests, such as real-world currency, to permeate them. In these worlds, the sale of virtual goods and services for real currency may be commonplace and, thus, can be said to be platforms for the sale of products and services.

A good example of such an "open" world is Second Life. Linden Labs, the company that created and maintains Second Life, released a development kit for Second Life and allowed its users to create the world—buildings, clothing, landscapes, and all.[112] While the Second Life software is free, Second Life has its own in-world currency, called Linden Dollars, and maintains a currency exchange between its currency and real-world currency.[113] It also sells virtual real estate, and collects ongoing fees, like a tax, for the ownership and maintenance of this virtual land.[114] Eventually, Linden Labs allowed its users to maintain intellectual property rights in their in-game creations,[115] creating a property interest that must be

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109. Since 2007, eBay has delisted all such virtual-property auctions. Posting by Zonk, Slashdot.org, http://games.slashdot.org/article.pl?sid=07/01/26/2026257 (Jan. 26, 2007 03:39 PM EST). However, auction Web sites still exist to sell virtual world property and accounts. *See, e.g.*, MMOBay.net, http://www.mmobay.net/ (last visited Dec. 10, 2009); BuyMMOAccounts.com, http://www.buymmoaccounts.com/ (last visited Dec. 10, 2009).

110. *See*, *e.g.*, WoW Terms of Use (2)(B), http://www.worldofwarcraft.com/legal/termsofuse.html ("You agree that you will not, under any circumstances . . . exploit the Game or any of its parts . . . for gathering in-game currency, items or resources for sale outside of the Game.") (last visited Dec. 10, 2009).

111. Castronova, *supra* note 107, at 202.

112. Davidson, *supra* note 13, at 680.

113. *Id.*

114. *Id.* at 680-81. *See also*, Second Life Land FAQ, http://secondlife.com/land/faq/ (last visited Dec. 10, 2009).

115. *Id.* at 690-91.

protected, which could ultimately lead to the possibility of government intervention in the handling of disputes.[116]

As Second Life is a free service, its sale of virtual products for real money—or at least for virtual money that has a direct exchange rate for real money—makes it a platform for the sale of products. This "platform" affects interstate commerce and, under Kessling's commerce and character test, may be characterized as a "place," in particular a "service establishment" akin to a real-estate agency. Similarly situated "open" worlds may be argued comparably as "places" under Title III.

V. CONCLUSION

The Internet, and in particular virtual worlds, provides innumerable opportunities for people with disabilities to enjoy their lives independently, by increasing their social interaction, self-worth, and self-reliance. More than that, virtual worlds provide an opportunity for individuals, disabled or not, to experience a virtual life unhindered by social stigma or physical disability. Because virtual worlds provide a unique opportunity to take reprieve from real-world hindrances, those individuals with the greatest obstacles to everyday life stand to benefit the most from the experience virtual worlds offer.

As such, it is imperative that we reexamine accessibility jurisprudence to build and maintain a bridge between the real and virtual worlds for disabled individuals. The Americans with Disabilities Act was intended to level the playing field for opportunities among people despite their disabilities. However, because of its passage prior to the growth of the Internet, its provisions do not contemplate online commerce. Advances in Internet technology that could most benefit people with disabilities, such as virtual worlds, are accessible only at the whim of developers.

So long as courts hang on to the "nexus test" or notions of "place" that require concrete, physical structures, people with disabilities will be denied opportunity in virtual worlds. Adopting a new notion of "place," which looks to the character of the virtual world, may ameliorate this, but courts will need to be educated about such similarities to real world places in order to advance the cause of people with disabilities as intended by the Americans with Disabilities Act.

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116. Indeed, the State already has intervened against a virtual world that denied access to one of its virtual property owners, ruling clauses of the terms of use to be contracts of adhesion. *See* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007).