**THE FUTURE OF “ACCESSIBLE” INTERNET AS A LITIGATION MILL:**

**A CRITICAL PERSPECTIVE ON INTERNET ACCESSIBILITY**

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Most individuals without disabilities do not understand that seemingly simple tasks such as paying the bills or going grocery shopping can be extremely difficult for individuals with disabilities. Then came the Internet, removing many of such obstacles and challenges that individuals with disabilities face in engaging in life’s essential activities.[[1]](#footnote-1) The Internet has equally benefitted the nondisabled community, offering them more choice, convenience, and productivity in performing important social, commercial, educational, employment, and other important functions in life. Unfortunately, however, many blind individuals cannot fully and equally benefit from these opportunities.

Against this backdrop, the central issue thus far in the modern Americans with Disabilities Act (ADA) jurisprudence has been whether Title III of the ADA applies to online entities. Title III relevantly requires places of public accommodation to be accessible to disabled individuals. However, Title III’s definition of public accommodation does not explicitly encompass cyberspace. Accordingly, courts have treated the issue with differing opinions,[[2]](#footnote-2) and the Department of Justice, the agency charged with administering the statute, has yet to issue formal regulations governing web accessibility. In turn, disability advocates have been increasingly calling for a legislative reform to bring the websites explicitly within the scope of Title III. Indeed, in light of the Internet’s growing importance in everyday American life, not making online places of public accommodation accessible to blind individuals would be to deny them equal access and rights to enjoy the benefits of the most important invention of the century.

This paper seeks to assist in the discussion of how Title III’s access mandate should be reformed by considering a rather unfamiliar issue of abusive accessibility litigation and its potential to arise in the context of the web accessibility.[[3]](#footnote-3) In doing so, the paper will proceed in five parts. Part I introduces the problem of web inaccessibility. Part II provides a general overview of Title III’s access mandate and its applicability over the Internet. Part III then introduce abusive accessibility litigation and explains how it occurs and why it is important to consider this issue in envisioning the future of disability law. Part IVdiscusses whether and how abusive accessibility litigation could occur on cyberspace and argues that extending the existing regulatory scheme would ultimately encourage such practices. Part V concludes by reminding the reader that even though the Internet must be made accessible, it must be done in a manner that minimizes the potential for abuse.

1. **Internet Inaccessibility**

As the number of businesses offering goods and services to the public on the Interest has increased, so have lawsuits against owners or operators of those websites that are wholly or partly incompatible with a screen reader, an assistive technology that visually impaired individuals commonly employ in navigating the web.[[4]](#footnote-4) These plaintiffs claim that they are denied access, and thus discriminated against, when a website is not coded in a manner that permits the use of a screen reader.[[5]](#footnote-5) A screen reader converts text on the screen into verbal information by vocalizing it to the user.[[6]](#footnote-6) However, it cannot process web elements or graphics that are not coded in a way that embeds text descriptions that it can recognize.[[7]](#footnote-7) One such example is a coding technique of shielding the text from user control, designed in part to prevent unauthorized copying of proprietary information such as recipe or lyrics. Though a deliberate use of this technique serves important functions, omission of text descriptions in other contexts can produce an unintended effect of precluding disabled individuals from opportunities that are otherwise available to the general public. For instance, if a retail website offers only one way to conduct a sales transaction, that is through a shopping cart button that directs the user to the checkout page, and the button does not embed text descriptions of its function, a blind user employing a screen reader to navigate the web cannot access the checkout page. Therefore, if a website offers exclusive online deals, the lack of embedded text descriptions for the shopping cart button become an invisible barrier that effectively denies a blind individual an opportunity to take advantage of the bargain.

This discriminatory effect becomes even more problematic when, for instance, the mainstream American society is increasingly finding and applying for jobs on a job search website that is inaccessible to disabled individuals.[[8]](#footnote-8) Denying these individuals any increased benefits of conducting a job search online would place them at an even more disadvantageous position in the job market.[[9]](#footnote-9) Recognizing the dire consequences of denying access to the increasingly digitizing government information, Congress has modified section 508 of the Rehabilitation Act in 1998 to expressly mandate government websites to be accessible.[[10]](#footnote-10) In doing so, it directed the Architectural Transportation Barriers and Compliance Board to develop regulatory technical standards governing website accessibility.[[11]](#footnote-11) However, Congress did not make comparable amendments for Title III, which governs private entities.[[12]](#footnote-12)

1. **Public Accommodations’ Duty to Provide Access under Title III of the ADA**

Under Title III and its implementing regulations,[[13]](#footnote-13) a commercial facility that constitutes a place of public accommodation is prohibited from discriminating on the basis of disability.[[14]](#footnote-14) Discrimination is defined in part as the failure to take necessary steps to accommodate the needs of individuals with disabilities, when doing so does not result in an “undue burden.”[[15]](#footnote-15) Therefore, a person or entity that owns, leases, or operates a place of public accommodation must allow disabled people to benefit equally from the goods, services, and other benefits it offers the general public in the “most integrated setting appropriate.”[[16]](#footnote-16) The statute relevantly requires commercial facilities built or altered after 1992 to make its goods and services “readily accessible” and preexisting facilities to remove accessibility barriers if doing so is “readily achievable,”[[17]](#footnote-17) that is, “easily accomplishable and able to be carried out without much difficulty.”[[18]](#footnote-18) To implement these statutory mandates, the DOJ has published the concrete accessibility standards and building specifications in the ADA Accessibility Guidelines.[[19]](#footnote-19)

In defining a place of public accommodation, Title III provides twelve categories of private entities that are considered public accommodations when their operations affect commerce, but it does not list electronic space as one of them.[[20]](#footnote-20) In turn, courts have treated the issue with differing opinions. Some courts have held that Title III excludes commercial websites altogether,[[21]](#footnote-21) while others have reached the opposite conclusion, broadly construing the term public accommodation to encompass cyberspace and other nonphysical settings.[[22]](#footnote-22) The Ninth Circuit has taken the middle ground, extending Title III to the Internet only when there is a nexus between the physical place of business and the website.[[23]](#footnote-23)

Meanwhile, the conflicting views on Title III’s reach has equally dominated the legal scholarship, reflecting the longstanding ideological split between textualist and purposivist views on statutory interpretation. Many commentators have argued that Congress intended Title III to reach all kinds of public accommodations including those operating on the Internet,[[24]](#footnote-24) while others have argued that a proper reading of Title III excludes cyberspace.[[25]](#footnote-25)

The latter argument favoring a narrower interpretation of the statute is arguably bolstered by the DOJ’s continued delay in issuing formal accessibility regulations governing commercial websites. Over the past few years, the Department has made it relatively clear through its informal pronouncements that it views the ADA as reaching the Internet; however, the agency has repeatedly failed to fulfill its 2010 promise to issue formal regulations.[[26]](#footnote-26) This inaction is seemingly indicative of the Department’s confidence in the limits of its statutory grant of authority. Indeed, any rule that formalizes the agency’s unilateral interpretation of the statute in light of unsettled case law would carry heightened risks of judicial review, which could result in invalidation of any future agency initiatives to enforce Title III against online commercial entities.

At any rate, it is increasingly obvious that a statutory reform is necessary to bring online commercial entities within the scope of Title III. Even in jurisdictions that recognize Title III as reaching the Internet, courts have been treating the issue of web accessibility as essentially resolving matters of policy, often reaching unpredictable conclusions.[[27]](#footnote-27) Furthermore, even though the DOJ has taken issue with the websites of city governments, county courts, public museums, and an online grocer,[[28]](#footnote-28) its informal enforcement of Title III has similarly unfolded in a rather piecemeal fashion. In the meantime, the majority of the commercial websites remain inaccessible, while the legal uncertainty has produced an uncertain business environment. Nevertheless, a full discussion of broadening the regulatory scope of the existing accessibility mandate under Title III should proceed carefully and take into account the increasingly prevalent practice of abusive accessibility litigation.

1. **Abusive Accessibility Litigation: What It Is, Why It Occurs, Why It’s Important**

While the term abusive accessibility litigation can be defined in a variety of ways, this paper confines its meaning to the practice of filing “predatory” lawsuits in a way that prioritizes financial gain over improved accessibility (or even at the expense of accessibility). These lawsuits are often serial (filed by the same plaintiff or attorney), entrepreneurial (aimed at making business), and morally questionable.[[29]](#footnote-29) Widely criticized by judges, legislators, and scholars, abusive accessibility litigation ultimately undermines the goal of the accessibility mandate.

1. The Usual Suspects

The plaintiffs responsible for such ADA lawsuits—sometimes dubbed as “professional plaintiffs,” “serial litigants,” or “vexatious litigants”—often appear to have a common strategy: they visit as many businesses as possible, often at the request of their lawyer,[[30]](#footnote-30) hoping to uncover violations that are fairly minor and technical such as “as a railing height being off by a centimeter.”[[31]](#footnote-31) To better illustrate how an abusive litigant operates, the case of Jarek Molski provides a useful starting point. Jarek Molski, a wheelchair paraplegic and a law school graduate residing in California, filed between 400 and 700 complaints from 1998 to 2004 against small restaurants and other similar service establishments,[[32]](#footnote-32) frequently alleging questionably obstructive “barriers” (such as a grab bar that is a few inches longer than the standard) and the ensuing injury that is equally dubious (e.g. “trauma” to hand).[[33]](#footnote-33) Molski’s complaints were, however, often rife with implausible and contradicting assertions. In at least two cases, he unsuccessfully claimed to have incurred injuries within businesses that he did not even attempt to enter because of allegedly inaccessible entrance or inadequate handicapped parking space.[[34]](#footnote-34) On a separate occasion, Molski implausibly and unsuccessfully asserted that he had suffered essentially identical physical injuries at 13 different places of businesses in less than a week.[[35]](#footnote-35) Deducing from the overall pattern of Molski’s behavior that his lawsuits were intended “simply to extract a cash settlement,”[[36]](#footnote-36) the California district court eventually declared Molski a “vexatious litigant” and prohibited him from filing any further lawsuits without the court’s prior approval.[[37]](#footnote-37) But by then, Molski and his lawyer had already made hundreds of thousands of dollars from settlements and trial awards.[[38]](#footnote-38)

*Molski*-esque lawsuits are most visible in states with laws that authorize monetary damages in addition to the injunctive relief that the ADA provides.[[39]](#footnote-39) But why do abusive accessibility lawsuits proliferate even where local law does not provide monetary damages? The answer lies in the attorney’s fee provision.[[40]](#footnote-40) Under Title III, a prevailing plaintiff can obtain injunctive relief and, at the court’s discretion, recover attorneys’ fees.[[41]](#footnote-41) But the attorney’s fee provision, initially designed to lessen the aggrieved plaintiffs’ burden of seeking legal recourse, has unfortunately given birth to a “cottage industry”[[42]](#footnote-42) of litigious plaintiff’s lawyers. Indeed, as one federal judge noted, “the current ADA lawsuit binge is . . . essentially driven by economics—that is, the economics of attorney’s fees.”[[43]](#footnote-43)

Lawyers responsible for abusive accessibility lawsuits are generally known to commence a lawsuit or send a vague letter aimed at inducing a settlement without notifying the property owners. In fact, at least one business owner who has been repeatedly targeted by abusive lawsuits complained to have received multiple settlement demand letters with alleged violations so vaguely described that it was difficult to identify and correct the violations to make the property accessible.[[44]](#footnote-44) While the vagueness may not have been intended, the plaintiff’s lawyers have great incentives to intentionally do so, as they cannot recover the attorney’s fees from the defendant if she corrects the violations upon the lawsuit’s commencement. Furthermore, many of these lawyers often engage in activities that are bordering on the unethical and other times just outright unethical. For instance, one Florida lawyer has filed numerous suits on behalf of a 12-year old girl, claiming that she has been denied full access to various adult-oriented businesses, such as a liquor store or a pawnshop—businesses that a minor child doesn’t ordinarily frequent.[[45]](#footnote-45) Molski’s lawyer was found to have given legal advice to their unrepresented defendants “notto retain a lawyer and not to make changes to improve the accessibility of their premises while litigation was pending.”[[46]](#footnote-46) But most importantly, these lawyers are often known to fail to follow through, upon obtaining a settlement, to ensure that the defendants have corrected the violations.[[47]](#footnote-47)

In the mean time, the past few years have witnessed an explosive growth of serial accessibility lawsuits nationwide, causing concerns in Florida,[[48]](#footnote-48) Pennsylvania,[[49]](#footnote-49) Illinois,[[50]](#footnote-50) Arizona,[[51]](#footnote-51) and Texas[[52]](#footnote-52) that Congress is currently considering amending Title III’s standing rules to be more restrictive.[[53]](#footnote-53) Professor Bagenstos and many others argue that the number of these serial lawsuits provides a helpful indicator of the widespread noncompliance of the ADA.[[54]](#footnote-54) Indeed, the sheer number of lawsuits by itself, even if profit-motivated, does not provide a cause for concern if it furthers the ADA’s goal of improving accessibility and remedying the widespread discrimination against the disabled individuals.[[55]](#footnote-55) However, Title III remains remarkably unenforced to this day, and the persisting widespread noncompliance notwithstanding the explosive growth in the number of lawsuits hints that such lawsuits do little to help the situation. Indeed, the source of noncompliance lies elsewhere.

1. Source of Noncompliance

A major source of the widespread noncompliance touches upon the very factor that makes the Title III an attractive target for abuse: complexity of the regulations. An illustrative example is found in section 603.3 of the 2010 Accessibility Guidelines, a provision governing the location of a bathroom door:[[56]](#footnote-56)

“Toilet compartment doors, including door hardware, shall comply with [§ 404] except that if the approach is to the latch side of the compartment door, clearance between the door side of the compartment and any obstruction shall be 42 inches (1065 mm) minimum. Doors shall be located in the front partition or in the side wall or partition farthest from the water closet. Where located in the front partition, the door opening shall be 4 inches (100 mm) maximum from the sidewall or partition farthest from the water closet. Where located in the sidewall or partition, the door opening shall be 4 inches (100 mm) maximum from the front partition. The door shall be self-closing. A door pull complying with § 404.2.7 shall be placed on both sides of the door near the latch. Toilet compartment doors shall not swing into the minimum required compartment area.”

When this level of specificity governs virtually every feature of a building (such as entryway, counters, aisles, doors, toilet facilities, telephones) as well as its surrounding areas (parking lots, signs, etc.), there are thousands of ways to inadvertently violate the ADA.[[57]](#footnote-57) In turn, this makes vulnerable even a well-meaning property owner who had his property inspected by outside ADA consultants.[[58]](#footnote-58) At the same time, however, even the most minor and technical violation entitles a plaintiff to injunctive relief as well as attorney fees.[[59]](#footnote-59)

Encouraging any potential for abuse are broad standing requirements that are generally available under civil rights statutes.[[60]](#footnote-60) Generally, a plaintiff bringing a suit must demonstrate (1) an injury in fact—an invasion of a judicially cognizable interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical, (2) that the injury is fairly traceable to the defendant’s conduct, and that (3) the injury will be redressed by a favorable decision.[[61]](#footnote-61) While the injury-in-fact often poses problems for many aggrieved plaintiffs, “Congress has the power to define injuries and articulate chains or causation that will give rise to a case or controversy where none existed before.”[[62]](#footnote-62) Under civil rights statutes, therefore, injury to the congressionally defined right to be free from discrimination often satisfy injury-in-fact requirement upon a demonstration of discrimination.

However, under many civil rights statutes, it is still often difficult to establish an actionable pattern of discrimination in its conventional meaning. For instance, Even under the Fair Housing Act, the anti-housing discrimination statute well-known for its broad injury-in-fact requirement that establishes the right to truthful information,[[63]](#footnote-63) a plaintiff bringing a suit over misrepresentation of facts must expend some time and research to acquire the relevant information.[[64]](#footnote-64) Yet, under Title III of the ADA, discrimination can be established by a violation of the access regulation that is physical and readily detectable.[[65]](#footnote-65) One only needs to glance at the height of a parking sign to claim an injury. Indeed, some abusive litigants are reported to have even used Google Map to look for actionable injuries from the comfort of their home.[[66]](#footnote-66)

1. Social Impact

Abusive accessibility lawsuits do little to improve the accessibility situation while inflicting much pain on the society. Defenders of these lawsuits often blame the noncomplying businesses on the ground that the businesses were put on notice simply by the virtue of the longstanding nature of the Act. However, because the regulations are not only extremely specific yet constantly changing without sufficient notice,[[67]](#footnote-67) even the businesses that try to comply remain vulnerable, as even *de minimis* violations are actionable.[[68]](#footnote-68) The more convincing defense comes from Professor Bagenstos, who argues, “as in other technical regulatory areas . . . businesses can always hire their own lawyers or consultants to assess their current compliance.”[[69]](#footnote-69) Perhaps it is reasonable to expect a large corporation with a fully staffed legal department to comply with the access regulations, but it is much less reasonable, if not unfair, for small businesses that lack relevant legal and financial resources to rely on for regulatory compliance and defense.[[70]](#footnote-70)

In fact, many abusive litigants and their lawyers are reported to often target owners of small businesses or of minority background because it is easier to exploit their lack of education, general or cultural fear of legal entanglement, and communication barriers.[[71]](#footnote-71) Because those business owners are also likely unaware of the existing judicial safeguards against frivolous claims,[[72]](#footnote-72) legal letters accusing them of wrongdoings characterized in vague terms carry considerable force.[[73]](#footnote-73) Even if these owners had some knowledge of how the court system works, the fact the ADA does not award a prevailing defendant in the way it awards a prevailing plaintiff is a significant disincentive for them.[[74]](#footnote-74) Some would argue that the Act protects these small businesses,[[75]](#footnote-75) citing provisions exempting business from accessibility obligations if doing so would cause an “undue burden,” or “significant difficulty or expense,” or would “fundamentally alter” the nature of the services provided.[[76]](#footnote-76) The problem with this line of reasoning is that a defendant cannot demonstrate this undue hardship until later in the litigation stage. In this light, even those business owners that are in compliance would make the rational decision to reach a settlement and avoid incurring attorney fees and subjecting itself to intrusive litigation processes for the following months, if not years, only to face an uncertain outcome.[[77]](#footnote-77) However, when a business goes bankrupt after making many of these settlements and shuts down, the accessibility situation is not any better.

To address these concerns, Congress had considered multiple bills aimed at implementing various safeguards on several different occasions.[[78]](#footnote-78) The latest solution being proposed is a 60-day notice requirement.[[79]](#footnote-79) In the meantime, however, affected business owners are reportedly increasingly placed in fear as a disabled person enters their business[[80]](#footnote-80) that some are even taking steps to to restrict the public’s access by, for instance, allowing only patrons to use the restroom facility.[[81]](#footnote-81) The general public has likely have become possibly prejudiced against the disabled, as the media publicizes more stories focusing on these abusive litigants even though they are far from representative of the general disabled community.[[82]](#footnote-82)

Similarly frustrated,[[83]](#footnote-83) courts have begun to employ judicially crafted solutions to restrict ADA plaintiffs’ access to the courts.[[84]](#footnote-84) Indeed, despite having it relatively easy with the injury-in-fact prong of the standing requirement,[[85]](#footnote-85) plaintiffs seeking injunctive relief under Title III must also demonstrate a reasonable likelihood of future injury by showing their intent to return to the place of alleged discrimination.[[86]](#footnote-86) Therefore, a court can decline to hear a case if a plaintiff does not exhibit such intent.[[87]](#footnote-87) Accordingly, skeptical courts have resorted to dismissing perceived frivolous claims when there is a considerable physical distance between the plaintiff’s residence and the location of the defendant’s place of business.[[88]](#footnote-88) Courts have also begun to question the credibility of plaintiffs who have a lengthy history of filing Title III accessibility claims.[[89]](#footnote-89) This practice has somewhat constrained potentially frivolous and abusive lawsuits by serial litigants who claimed to intend to return to the businesses even though they lived a couple hundred miles away or had never set foot inside such place.[[90]](#footnote-90) While the judges’ aversion and skepticism toward the *Molski* kind of cases are understandable, it provokes considerable anxiety when a court’s general unwillingness to hear serial plaintiffs’ accessibility claims grows to the point of dismissing a potentially legitimate claim for, for instance, a pleading defect.[[91]](#footnote-91) Indeed, it’s not a coincidence that the standing of ADA “testers” (plaintiffs who visit a business to test its compliance with federal law and litigates to ensure its compliance) is far less recognized than that of testers of civil rights statutes such as the Fair Housing Act or Equal Employment Opportunity Act.[[92]](#footnote-92)

When Congress enacted the ADA in 1990, it sought to “remedy widespread discrimination against disabled individuals” by recognizing that discrimination can result from the “failure to make modifications to existing facilities and practices.”[[93]](#footnote-93) But the foregoing analysis reveals that the current statutory scheme leaves unchecked exploitative lawsuits that do not improve accessibility while inflicting much harm on the society.

1. **The Future of Internet Accessibility under Title III**

Will extending Title III to cyberspace create another litigation mill of unscrupulous attorneys and their entrepreneurial plaintiffs? The recent surge of accessibility complaints targeting retail websites suggests that this concern is not entirely groundless. In the last two months, for instance, two legally blind plaintiffs Sean Gorecki and Guillermo Robes have together filed over 12 complaints mainly against big restaurant companies over the websites.[[94]](#footnote-94) Both represented by the same lawyer Joseph R. Manning, Jr.,[[95]](#footnote-95) these plaintiff's’ complaints alleged in their boilerplate complaints that the restaurants violated their obligation as public accommodations by failing to provide text equivalent for every non-text element featured on the website.[[96]](#footnote-96)

In the physical realm, the complexity of the accessibility standards plays a major role in fostering the cottage industry; however, in cyberspace, the legal uncertainty surrounding web accessibility standards is likely to be the biggest concern, placing the source of abuse on the opposite end of the spectrum. As noted earlier, case law on the issue of web accessibility varies across jurisdictions, and it is constantly evolving.[[97]](#footnote-97) Exacerbating this judicial uncertainty is the absence of a uniform standard governing website accessibility, as different parts of the federal government and states recommend a range of different standards.[[98]](#footnote-98) Notwithstanding the lack of formal regulations, the DOJ has frequently cited as a guiding principle the Web Content Accessibility Guidelines 2.0 (WCAG 2.0) in its administrative documents or enforcement actions.[[99]](#footnote-99) But it is unsettled how much court deference is to be given to an agency’s informal policy pronouncements.[[100]](#footnote-100) Even setting aside the question of constitutionality of requiring compliance with privately created rules such as WCAG 2.0 that have not been adopted via proper agency-rulemaking process, it is arguable whether it is reasonable to expect website operators, who do not clearly fall within the statutory definition of “public accommodations,” to keep abreast of the constantly evolving contours of the web accessibility mandate.

Even if the regulators somehow reach a consensus that WCAG 2.0 is the governing standard, it is debatable whether full compliance with WCAG 2.0 is even possible. At first blush, WCAG 2.0 paints a promising future: it presents of a set of user-friendly principles.[[101]](#footnote-101) But a further review of these deceptively simple principles leads to an opposite conclusion. For example, Guideline 2.3 requires that a website’s content be not designed in a way that is known to cause seizures.[[102]](#footnote-102) Generally, a content that flashes too much threatens a seizure attack. Then, for instance, when constructing an animated web element featuring a small advertisement, how much time interval between picture frames should one assign so as to avoid provoking seizure attacks? The substantive answer to this question may be found across several different webpages, deeply buried within the website, at a daunting level of technical specificity.[[103]](#footnote-103) To illustrate, Section 2.3.1 generally prohibits a rapidly changing image sequence or a flash,[[104]](#footnote-104) defined “a pair of opposing changes in relative luminance that can cause seizures in some people if it is large enough and in the right frequency range.”[[105]](#footnote-105) A flash is large enough to cause seizure if “the combined area of flashes occurring concurrently occupies no more than a total of .006 steradians within any 10 degree visual field on the screen (25% of any 10 degree visual field on the screen) at typical viewing distance.”[[106]](#footnote-106) But the definition of relative luminance, to make the matter worse, is formulated with reference to photometric terms and RGB values that a layperson cannot understand.[[107]](#footnote-107)

While trained web developers who are proficient in photometry *may* understand such language, such language as well as the level of technical specificity would baffle many business owners who, even without extensive technical background, have nevertheless been able to successfully provide services online, either as part of their physical business or a sole source of income. Furthermore, inconsistent and overlapping meanings of definitions that are critical to understand the anti-seizure standard lead one to wonder if full compliance with Section 2.3.1 could truly prevent a seizure attack.[[108]](#footnote-108) Regarding the WCAG 2.0’s practicality, one journalist who also specializes in web accessibility incisively commented that the WCAG development is inaccessible to non-English speakers and those with certain disabilities including “people with a reading disability (who must wade through ill-written standards documents and e-mails) and anyone who’s deaf (who must listen to conference calls).”[[109]](#footnote-109)

Yet, there seems to be a widespread assumption among many disability advocate legal scholars that making such website modifications is easy. Admittedly, lawyers are generally not known to be as scientifically or technologically proficient as they are logically and verbally. But some have gone as far as to insist, for example in the non-Internet context, that accommodating vision-impaired individuals by making a watch talk (the latest technological invention at the time) would require a “very simple, slight modification” to a watch.[[110]](#footnote-110) Such argument, though well-intended, clearly disregards the practical considerations that a business must take into account when incorporating a new technology into an existing facility, ranging from patent considerations to machinery compatibility issues for mass manufacturing. In the Internet context, some commentators have relied on supportive snippets of reliable authority so as to bolster their case for expanding Title III. For instance, one commentator has cited an expert’s statement that “the technical solutions are easy [because] [t]hey don’t involve any type of advanced coding,” while disregarding the immediately following statement in the original article that “[such] solutions are the responsibility of Web site developers, designers, and Webmasters,” which put the former statement in context.[[111]](#footnote-111)

The kind of argument that assumes technological accommodation is easy not only proliferates a misguided belief that understanding and implementing WCAG 2.0 is a simple task, but it also disregards the practical reality that complying with even the minimum standard advocated by WCAG 2.0 often entails having to recode the entire website. This is in part because websites function differently based on the user’s computer and browser type. To further complicate the matter, disabled web users not only rely on different assistive technology that needs accommodating[[112]](#footnote-112) but also have differing levels of browsing skills. For an average business operating a website, addressing all these variables would be extremely difficult, if not impossible, without costly professional assistance. In fact, the automated accessibility software currently available for testing website accessibility is believed to pick up only 30% of accessibility failures.[[113]](#footnote-113) This means that the only way to make sure if a website is fully accessible is to have a professional manually test all existing elements.[[114]](#footnote-114) Some might point to the case of *Netflix*,[[115]](#footnote-115) where the giant online video company was sued for failing to provide captions for its movies. Surely, most people with basic knowledge of video production would agree that closed-captioning videos’ audio content does not require a complete overhaul of the website. Indeed, because of the widespread availability of full-length movie captions as well as automated captioning software that, once the operator sets the starting point, automatically time-frames the entire movie clip. Such task is qualitatively different from making all elements of a website accessible. Indeed, very few would agree that a small business owner,[[116]](#footnote-116) whose inaccessible website is likely the product of a do-it-yourself software or an online make-your-own-website template, would find it easy delve into the underlying web interface source files to embed text descriptions. The DOJ has also expressed similar concerns over the potential impact of imposing the rules on small businesses and other entities with limited resources.[[117]](#footnote-117)

Another reason that abusive accessibility litigation proliferates is the relative ease of identifying the prohibited violation to meet the injury-in-fact requirement. On the Internet, however, establishing a case becomes even easier. An abusive litigant can make use of the very software used by a well-meaning website operator to test and improve web accessibility. As explained earlier, this software does not catch all of the accessibility issues, thereby requiring online business owners to hire professionals to ensure full compliance.[[118]](#footnote-118) However, for an abusive litigant that seeks to capitalize on the near-impossibility of complying with the access regulations, any single inaccessible feature would suffice: one click (or several clicks, if using multiple computers or running the software on multiple websites), and an abusive litigant could identify tens and hundreds of violations to sue upon.

Moreover, the character of the Internet likely dilutes the effect of the standing rules as procedural safeguards. As noted earlier, the requirement that plaintiffs show plausible intent to return to the place of alleged discrimination has somewhat successfully to filter legitimate claims from frivolous, abusive claims. On the Internet, however, any safeguarding effect this requirement produces would disappear, as a single click on a link can easily overcome thousands of miles while establishing a “visit” history.

Recently, a California district court in Davis v. BMI/BND has found for the first time in nation’s history that an online retailor violated the ADA by not making its website accessible.[[119]](#footnote-119) Prior to this ruling, most cases involving website accessibility have been settled before being fully adjudicated. But having found the defendant liable, the *Davis* court ordered the retailor to shut its website down if it cannot make the website accessible.[[120]](#footnote-120) The website has been closed since the ruling in March earlier this year, affecting both disabled and nondisabled consumers. In turn, various media and law firms are urging retailors and other businesses with physical establishments that offer online services to shut down their websites services just to be safe.[[121]](#footnote-121) The effect of taking such precaution, however, is reduced online accessibility for the disabled and nondisabled alike.

An equally serious implication of the *Davis* case concerns livelihood of disabled individuals operating a business online. In the physical setting, many disabled owners of physical business establishments have been equally vulnerable to abusive claims as nondisabled owners. On the Internet, proliferation of abusive lawsuits is likely to be equally threatening, if not more, for disabled individuals. This is because in light of persisting employment discrimination against the disabled community, the Internet has happily offered an alternative, discrimination-free way to make income for individuals with speech, hearing, mobility, or cognitive impairments. Furthermore, disabled individuals with limited income are likely to find online business lucrative because setting up a small shop online takes little to no startup capital.[[122]](#footnote-122) But if the current statutory framework merely extends the scope of Title III by imposing an obligation to comply with WCAG 2.0, these individuals will severely be limited in their commercial activity.

1. **Conclusion**

Though law necessarily lags behind the technological development for numerous reasons, law must keep pace with the developing technologies. This is so particularly true with the law of disabilities, which seeks to integrate disabled individuals, historically and continually excluded by the mainstream society as it evolves in response to technology. However, it would be premature to extend the existing regulatory framework of Title III to include commercial websites without implementing adequate safeguards against existing problems, which can quickly multiply and eventually undermine the purpose of disabilities law. Only a reform that takes into account these adverse implications will ultimately further the goal of the ADA to remedy the widespread discrimination.

1. For a more extensive discussion of how the Internet benefits disabled individuals, *see* Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 Geo. Wash. L. Rev. 449, 458 (2015). [↑](#footnote-ref-1)
2. *See, e.g.,* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc., 37 F.3d 12, 20 (1st Cir. 1994); Access Now, Inc. v. Sw. Airlines Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002); Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006); Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012); Nat’l Fed’n. of the Blind v. Scribd Inc., 97 F. Supp. 3d 565 (D. Vt. 2015). [↑](#footnote-ref-2)
3. *Examining Legislation to Promote the Effective Enforcement of the ADA’s Public Accommodation Provisions: Hearing Before the Subcomm. on the Constitution and the Civil Justice of the H. Comm. On the Judiciary*, 114th Cong. 11 (May 19, 2016) [hereinafter *2016* *Hearing*] (statement of Rep. Poe) (before introducing ADA Education and Reform Act of 2015, observing that the abusive disabled access lawsuits continues to inundate local and state courts across the country). [↑](#footnote-ref-3)
4. *See, e.g.,* Areheart *et al*, *supra* note 1, at 463. [↑](#footnote-ref-4)
5. At last one plaintiff alleged discrimination in this way. *See, e.g.,* Pl.’s Compl. para. 18, *Gorecki v. VCA Inc.*, *infra* note 94, at 6. [↑](#footnote-ref-5)
6. *See, e.g.,* Areheart *et al*, *supra* note 1, at 463. [↑](#footnote-ref-6)
7. *Id*. [↑](#footnote-ref-7)
8. *Id*. [↑](#footnote-ref-8)
9. *Id*. at 458. [↑](#footnote-ref-9)
10. *See* 29 U.S.C. § 794(d) (2015). [↑](#footnote-ref-10)
11. 36 C.F.R. § 1194.22 (2015). [↑](#footnote-ref-11)
12. Laura Wolk, Note, *Equal Access in Cyberspace: On Bridging the Digital Divide in Public Accommodations Coverage through Amendment to the Americans with Disabilities Act*, 91 Notre Dame L. Rev. 447, 468 (2015). [↑](#footnote-ref-12)
13. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213). *See also* 28 C.F.R. § 36.104. [↑](#footnote-ref-13)
14. 42 U.S.C. § 12182(a) (“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.”). [↑](#footnote-ref-14)
15. *Id*. § 12182(b)(2)(A)(iii). [↑](#footnote-ref-15)
16. *Id*. § 12182(b)(1)(B) (“Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”). [↑](#footnote-ref-16)
17. *Id*. § 12182(b)(2)(A)(iv). Even if removing such barrier is not readily achievable, a business must seek other available means that are “readily achievable.” *Id*. § 12182(b)(2)(A)(v). [↑](#footnote-ref-17)
18. The determination of undue burden considers various factors, including the company’s financial capacity. 28 C.F.R. § 36.304(a). [↑](#footnote-ref-18)
19. 42 U.S.C. § 12183 (2015). If newly constructed or altered between Jan. 26, 1993 and Sep. 15, 2010, the 1991 Standards applies. If newly constructed or altered after March 15, 2012, the 2010 Standards apply. 28 C.F.R. § 36.406. [↑](#footnote-ref-19)
20. 42 U.S.C. § 12181(7). [↑](#footnote-ref-20)
21. *See, e.g., Access Now,* *supra* note 2, at 1327 (finding no statutory reference to physical structures). [↑](#footnote-ref-21)
22. *See, e.g.,* Doe v. Mutual of Ohama Insurance Co., 179 F.3d 557, 559 (7th Cir. 1999) (stating, in dicta, that public accommodations include Web services); *Netflix, supra* note 2, at 200 (rejecting the claim that public accommodations are limited to physical structures); *Carparts*, *supra* note 2, at 19 (same); *Scribd Inc.,* *supra* note 2, at 575 (finding that an online business offering subscription-based online reading services is a public accommodation). [↑](#footnote-ref-22)
23. *See* *Target*, *supra* note 2, at 955 (stating that Title III will reach a retailer if “[its] website is “heavily integrated with [its] brick-and-mortar establishment and operated in many ways as a gateway to the stores.”). However, this “nexus” test would exempt online businesses that do not have physical places of business. *See, e.g.*, Earll v. eBay, Inc., 599 Fed. Appx. 695, 696 (9th Cir. 2015) (affirming that eBay.com is not a place of public accommodation under the ADA because its services are not connected to any “actual, physical place.”); Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (same for Facebook.com). [↑](#footnote-ref-23)
24. *See, e.g.,* Areheart et al, *supra* note 1, at 450–58. [↑](#footnote-ref-24)
25. For a compelling argument on the subject of statutory interpretation of Title III, *see* Wolk, *supra* note 12, at 465–70 (2015) (arguing that plain meaning, context, canon of constructions, and legislative history all counsel against expanding the scope of the provision beyond physical, brick-and-mortar establishments). [↑](#footnote-ref-25)
26. *See* Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,461–43,464 (2010) (notice of proposed rulemaking) [hereinafter “Web Accessibility NPRM”] (stating that Title III covers websites of any entities providing goods or services that fall within the meaning of public accommodations). *See* *also* Hiram Kuykendall, *Accessibility-Related Factors in Current Litigation*, Lexis Legal News (April 2016), http://www.lexislegal news.com/articles/7653/commentary-accessibility-related-factors-in-current-litigation. [↑](#footnote-ref-26)
27. *See* Wolk, *supra* note 12, at 473–76. [↑](#footnote-ref-27)
28. *See* Press Release, Dep’t of Justice (2014), http://www.justice.gov/opa/pr/justice-department-reaches-settlements-four-cities-across-country-remove-disability-related; Press Release, Dep’t of Justice (2015), http://www.justice.gov/opa/pr/justice-department-reaches-agreement-orange-county-clerk-courts-florida-ensure-equal-access; Press Release, Dep’t of Justice (2014), http://www.justice.gov/ opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website. [↑](#footnote-ref-28)
29. *2016* *Hearing, supra* note 3, at 11–15. [↑](#footnote-ref-29)
30. *See, e.g.,* Rodriguez v. Investco, L.L.C. 305 F. Supp. 2d 1278, 1285 (M.D. Fla. 2004) (“Plaintiff’s testimony left the distinct impression that he is merely a professional pawn in an ongoing scheme to bilk attorney’s fees from the Defendant.”). [↑](#footnote-ref-30)
31. Linda H. Wade & Timothy J. Inacio, *A Man in a Wheelchair and His Lawyer Go into a Bar: Serial ADA Litigation is No Joke*, 25 Trial Advoc. Q. 31 (2006). [↑](#footnote-ref-31)
32. *See, e.g.,* Carri Becker, Note, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?* 17 Hastings Women’s L. J. 93, 101 (2006). [↑](#footnote-ref-32)
33. *See, e.g.,* Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860 (C.D. Cal. 2004) (suing a restaurant over inaccessible bathroom facilities); Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007) (same); Molski v. M.J. Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007) (same). *See also, e.g.,* Molski v. Rapazzini Winery, 400 F. Supp. 2d 1208, 1210–11 (N.D. Cal. 2005) (suing a winery over inaccessible bathroom facilities); Molski v. Kahn Winery, 405 F. Supp. 2d 1160 (C.D. Cal. 2005) (same); Molski v. Foley Estates Vineyard, 531 F.3d 1043 (9th Cir. 2008) (same). [↑](#footnote-ref-33)
34. Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. Rev. 1, 35–36 (2006). [↑](#footnote-ref-34)
35. *Mandarin Touch Rest.*, *supra* note 33, at 865 (“The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period. This is to say nothing of the hundreds of other lawsuits Molski has filed over the last four years.”). [↑](#footnote-ref-35)
36. *Id.* at 866. [↑](#footnote-ref-36)
37. *Id.* at 861 (declaring Molski a vexatious litigant). *See also* Carol J. Williams, *Frequent Filer Can Sue No More*, Los Angeles Times (July 28, 2008), http://articles.latimes.com/2008/nov/18/ local/me-wheelchair18. [↑](#footnote-ref-37)
38. *See* Williams, *supra*. [↑](#footnote-ref-38)
39. The most notable example of such law is California’s Unruh Civil Act. However, California Legislature recently amended the Unruh Act on May 10, 2016 to allow 15 days for businesses to correct minor technical violations from the date of an ADA lawsuit or a notice of violation without liability. *See* Cal. Civ. Code § 52(a). [↑](#footnote-ref-39)
40. *See Mandarin Touch Rest.*, *supra* note 33, at 863 (“[Obtaining attorney’s fees] have become more important and desirable than [achieving accessibility].”). [↑](#footnote-ref-40)
41. 42 U.S.C. § 12188(a)(2); 28 C.F.R. §§ 36.501, 36.505. [↑](#footnote-ref-41)
42. *See* Leslee Lee, *Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine is not the Right Solution to Abusive ADA Litigation*, 19 Va. J. Soc. Pol’y & L. 319, 350 (2012). [↑](#footnote-ref-42)
43. *Investco*, *supra* note 30, at 1282. [↑](#footnote-ref-43)
44. *See* *2016 Hearing*, *supra* note 3, at 27 (testimony of a local minority business owner). [↑](#footnote-ref-44)
45. Wade *et al., supra* note 31, at 33–34. [↑](#footnote-ref-45)
46. Bagenstos, *supra* note 34, at 35. *See also* Walter Olson, *Chicago’s ADA Filing Mill*, Overlawyered Blog (Mar. 9, 2004), http://www.overlawyered.com/2004/03/chicagos\_ada\_filing\_mill.html (observing a Chicago lawyer/complainant team “tagging” some 175 businesses in Chicago). [↑](#footnote-ref-46)
47. *See, e.g.,* Disability Adv. & Counseling Grp., Inc. v. Betancourt, 379 F. Supp. 2d 1343, 1349 (S.D. Fla. 2005) (“[A]fter Plaintiff’s counsel was paid a substantial fee the case languished with no effort to enforce the injunction or remove the barriers,’ and the defendant ultimately ‘saved the cost of [complying with the ADA].’”); *ADA Notification Act: Hearing Before the Subcomm. on the Constitution of the H. Comm on the Judiciary,* 106th Cong. 5 (2000) (statement of Rep. Mark Foley) (“ADA [was] being used by some attorneys to shake down thousands of businesses from Florida to California . . . at the [expense] of people with disabilities.”); *id.* at 5–6 (“[H]aving a bunch of rogue attorneys using the law to reap attorney’s fees does no one but the lawyers any service.”). *Cf*. Bagenstos, *supra* note 34, at 35 (calling into question the credibility of such statements based on lack of specific examples). *However*, national newspapers have consistently reported instances of lack of follow-through, such as a lawyer/plaintiff tag team dropping complaints in exchange for a prompt settlement of about $600 per violation and a mere promise to install “doorbells and portable ramps. *See, e.g.,* Ben Schmeltzer, *Disability Lawsuits Rile North Side Businesses*, The Chicago Tribune (Mar. 4, 2004), http://articles.chicagotribune.com/2004-03-07/business/0403070535\_1\_store-owner-businesses-buildings. [↑](#footnote-ref-47)
48. *See, e.g., 2016 Hearing, supra* note 3, at 11 (observing that a Florida man named Howard Stone has filed 529 of such lawsuits from 2014 to 2016). [↑](#footnote-ref-48)
49. *Id*. (describing the case of Christopher Mielo). [↑](#footnote-ref-49)
50. *See, e.g.,* Schmeltzer, *supra* note 47. [↑](#footnote-ref-50)
51. In 2016, an Arizona man has filed 530 lawsuits within a three-month period against 530 different establishments located within less than a 30-mile radius*. See* Dave Biscobing & Courtland Jeffrey, *Valley Man files 530 ADA lawsuits in 3 months*, ABC News (Aug. 3, 2016), http://www.abc15.com/ news/local-news/investigations/map-valley-man-files-530-ada-lawsuits-in-3-months. [↑](#footnote-ref-51)
52. Texas Rep. Ted Poe recently introduced a new bill proposing to implement a 60-day notice requirement to address the significant threats posed against local businesses*. See* *Hearing 2016*, *supra* note 3, at 10–14. [↑](#footnote-ref-52)
53. *Id*. [↑](#footnote-ref-53)
54. *See, e.g.,* Bagenstos, *supra* note 34, at 22. [↑](#footnote-ref-54)
55. *See* Adam A. Milani, *Go Ahead. Make My 90 Days: Should Plaintiffs be Required to Provide Notice to Defendants Before Filing Suit under Title III of the Americans with Disabilities Act?*, 2001 Wis. L. Rev 107, 133 (observing the benefits of widespread serial ADA litigation). [↑](#footnote-ref-55)
56. *2010 ADA Standards for Accessible Design*, § 603.3, U.S. Dep’t of Justice (Sept. 15, 2010). [↑](#footnote-ref-56)
57. *See, e.g., id.* (“Mirrors located above lavatories or countertops shall be installed with the bottom edge of the reflecting surface 40 inches (1015 mm) maximum above the finish floor or ground. Mirrors not located above lavatories or countertops shall be installed with the bottom edge of the reflecting surface 35 inches (890 mm) maximum above the finish floor or ground.”). [↑](#footnote-ref-57)
58. Alison Statemen, *Lawsuits by the Disabled: Abuse of the System?,* TIME (Dec. 29, 2008). [↑](#footnote-ref-58)
59. *See* Wade *et al*., *supra* note 31, at 32. [↑](#footnote-ref-59)
60. *See, e.g.,* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972) (holding that prudential standing rules do not apply in FHA cases). [↑](#footnote-ref-60)
61. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). [↑](#footnote-ref-61)
62. *Id.* [↑](#footnote-ref-62)
63. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982) (interpreting FHA as conferring rights to “truthful information about available housing” to “any person” to conclude that even testers have standing to sue). [↑](#footnote-ref-63)
64. *See* Lee, *supra* note 42, at324–26. [↑](#footnote-ref-64)
65. *Id.* at321. *But see infra* texts accompanying note 92 (citing an article noting how the ease of establishing injury-in-fact has eventually led many judges to turn a skeptical eye towards “testers”). [↑](#footnote-ref-65)
66. *See 2016 Hearing*, *supra* note 3, at 17. [↑](#footnote-ref-66)
67. *Id.* at 19 (testimony of a disabled minority doughnut shop manager) (testifying not having received notice of changed regulations). A full discussion on the relevant issue of notice is for another day. For instance, in *Lambert v. California*, 355 U.S. 225, (1957), the Supreme Court prohibited punishing an individual who had no notice of the ordinance that imposes an affirmative duty of felon registration. *Id*. at 228–29. [↑](#footnote-ref-67)
68. *See* Statemen, *supra* note 58; *see* *also* Becker, *supra* note 32, at 100. [↑](#footnote-ref-68)
69. *See* Bagenstos, *supra* note 34, at 19. [↑](#footnote-ref-69)
70. *See* *2016 Hearing*, *supra* note 3, at 19 (testimony of a disabled minority doughnut shop manager). [↑](#footnote-ref-70)
71. *Id.* at 27 (testimony of a minority local business owner) (“[M]ost frightening [thing] is that often [small, local lodging businesses] are targeted because so many of us are minorities and first and second generation Americans.”). *See also* Tom McNichol, *Targeting ADA Violators*, California Lawyer (January 2012), http://ww2.callawyer.com/clstory.cfm?eid=919801 (criticizing that “[serial litigant’s lawyer] specializes in suing businesses, mostly small ones.”). [↑](#footnote-ref-71)
72. *See infra* text accompanying notes 83–90. [↑](#footnote-ref-72)
73. *See* *2016 Hearing*, *supra* note 3, at 27 (testimony of a minority local business owner) (describing personal experience). *See also* *id*. at 40–43. [↑](#footnote-ref-73)
74. *Id.* at 45. Furthermore, courts rarely penalize the plaintiffs and lawyers bringing frivolous claims. *Id*. [↑](#footnote-ref-74)
75. *See* Carly Schiff, Note, *Cracking the Code: Implementing Internet Accessibility through the Americans with Disabilities Act*, 37 Card. L. R. 2316, 2348–49 (2016). [↑](#footnote-ref-75)
76. *See supra* text accompanying notes 15 and 18. [↑](#footnote-ref-76)
77. *See 2016 Hearing, supra* note 3, at 45. [↑](#footnote-ref-77)
78. *See, e.g.,* H.R. 881, 112th Cong. (2011) (Notification Act); H.R. 3356, 112th Cong. (2011) (ACCESS); H.R. 777, 113th Cong. (2013) (Notification Act); H.R. 241, 114th Cong. (2015) (ACCESS), H.R. 4719, 114th Cong. (2016) (Correcting Obstructions to Mediate, Prevent, and Limit Inaccessibility Act). [↑](#footnote-ref-78)
79. H.R. 3765, 114th Cong. (Oct. 2016) (ADA Education and Reform Act of 2015). *See also, generally, 2016 Hearing*, *supra* note 3. [↑](#footnote-ref-79)
80. *2016 Hearing*, *supra* note 3, at 20 (testimony of a disabled minority doughnut shop manager) (describing her personal experience as a disabled customer at another store). [↑](#footnote-ref-80)
81. *Id.* [↑](#footnote-ref-81)
82. *Id.* at 19 (“[T]he lawyers are causing the able-body community to dislike the [ADA].”). *See also* Statemen, *supra* note 58. [↑](#footnote-ref-82)
83. Professor Bagenstos lists examples of published opinions where judges complained about the “explosion” of access lawsuits, “current ADA lawsuit binge,” “voluminous docket” of ADA cases “unnecessarily burdening” the courts. *See* Bagenstos, *supra* note 34, at 22 (describing various phrases used by courts in decrying the burden imposed by the serial ADA litigation). [↑](#footnote-ref-83)
84. Some courts have imposed fines. *See, e.g.,* *Mandarin Touch Rest.,* *supra* note 36, at 863. *See also* Wade *et al.,* *supra* note 31, at 34. [↑](#footnote-ref-84)
85. *See supra* textaccompanying notes 65–66. [↑](#footnote-ref-85)
86. A plaintiff lacks standing to seek an injunction if there is no “real and immediate threat” of future harm. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). [↑](#footnote-ref-86)
87. *See, e.g.,* Moss v. Comfort Inn Woodland Hills, 275 Fed. Appx 717, 718 (9th Cir. 2008). [↑](#footnote-ref-87)
88. *See, e.g.,* *Kahn Winery, supra* note 33, at 1164 (finding no standing because the 104-mile distance between Molski’s house and the winery “weighs against finding a reasonable likelihood of future harm”). *See also* Brother v. Tiger Partner LLC, 331 F. Supp. 2d. 1368, 1373 (M.D. Fla. 2004) (dismissing for lack of standing where a Miami plaintiff sued an Orlando-based hotel, more than 280 miles away). [↑](#footnote-ref-88)
89. *See, e.g.,* *Brother, supra* at 1374–75 (“[Plaintiff] has professed an intent to return to all fifty-four of the properties he has sued. This is simply implausible.”). *See also* Lee, *supra* note 42, at 329–30. [↑](#footnote-ref-89)
90. A Florida man had once alleged discrimination by a Key West hotel, even though he had never been a registered guest. Bill Norkunas, the original drafter of the ADA, even sided with the hotel in that case and stated that Cohen was operating “a continuing criminal enterprise that boils down to extortion.” *See* *2016 Hearing*, *supra* note 3*,* at 11. [↑](#footnote-ref-90)
91. *See* Access 4 All, Inc. v. Wintergreen Commer. P’ship., Ltd., 2005 U.S. Dist. LEXIS 26935 (N.D. Tex. 2005). [↑](#footnote-ref-91)
92. *See* Lee, *supra* note 42, at 324–30 (discussing how judicial skepticism has caused the general reluctance in recognizing the ADA testers’ standing). [↑](#footnote-ref-92)
93. PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001), *interpreting* 42 U.S.C. § 12101(a)(5). [↑](#footnote-ref-93)
94. *See, e.g.,* Pl.’s Compl., *Gorecki v. Chilis Grill & Bar*, No. 2:16-CV-7553 (C.D. Cal. Oct 10, 2016); Pl.’s Compl., *Gorecki v. The Quizno’s Master LLC*, No. 2:16-CV-7572 (C.D. Cal. October 11, 2016); Pl.’s Compl., *Gorecki v. Arby’s Restaurant Group, Inc*., No. 2:16-CV-7608 (C.D. Cal. October 12, 2016); Pl.’s Compl., *Gorecki v. 24 Hour Fitness USA*, Inc., No. 2:16-CV-7531 (C.D. Cal. Oct 7, 2016); Pl.’s Compl., *Gorecki v. T.G.I. Friday’s Inc*., No. 2:16-CV-7716 (C.D. Cal. October 17, 2016); Pl.’s Compl., at 6, *Gorecki v. VCA Inc*., No. 2:16-CV-6992 (C.D. Cal. Sep 16, 2016) (alleging, among other things, that “a text equivalent for every non-text element is not provided”). *See also* Pl.’s Compl., *Robles v. Speedy Cash*, No. 2:16-CV-7722, (C.D. Cal. Oct 17, 2016); Pl.’s Compl., *Robles v. Bubba Gump Shrimp Co. Restaurants, Inc.,* No. 2:16-CV-7642 (C.D. Cal. Oct 13, 2016); Pl.’s Compl., *Robles v. The Cheesecake Factory Inc*., No. 2:16-CV-7400 (C.D. Cal. Oct 3, 2016); Pl.’s Compl., *Robles v. Bose Corporation*, No. 2:16-CV-6806 (C.D. Cal. Sep 9, 2016); Pl.’s Compl., *Robles v. Domino’s Pizza* LLC, No. 2:16-CV-6599 (C.D. Cal. Sep 1, 2016). [↑](#footnote-ref-94)
95. Manning graduated University of San Diego Law School in 1998 and passed the California bar in 2002. His average case lasts less than 40 days. He settles most of his cases, securing an average settlement of $ 6,000. *See* Attorney Search, Lexis Advance Litigation Profile, LexisNexis; Attorney Search Database, State Bar of California, http://members.calbar.ca.gov/fal/ Member/Detail/223381 (last accessed October 25, 2016). [↑](#footnote-ref-95)
96. *See, e.g.,* Pl.’s Compl., *Gorecki v. VCA Inc., supra* note 94, at 6. [↑](#footnote-ref-96)
97. *See* Part II. [↑](#footnote-ref-97)
98. *See* *Web Accessibility NPRM, supra* note 26, at 43,464 (observing that “differing standards for determining Web accessibility . . . indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III”). [↑](#footnote-ref-98)
99. *See* Kuykendall*, supra* note 26. [↑](#footnote-ref-99)
100. *See* *Access Now,* *supra* note 2, at 563. *Cf*. Courts generally defer to agency interpretations of the statute in its formal regulations. *See* Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 843–44 (1984). [↑](#footnote-ref-100)
101. *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C Recommendation (Dec. 11, 2008), https://www.w3.org/TR/WCAG20/ (last accessed Oct. 31, 2016) [hereinafter “WCAG 2.0 Guidelines”]. [↑](#footnote-ref-101)
102. *See, e.g.,* Areheart *et al*, *supra* note 1, at 466. [↑](#footnote-ref-102)
103. *See, e.g., WCAG 2.0 Guidelines*, *supra* note 101. *See also* *Understanding SC 2.3.1: Three Flashes or Below Threshold*, W3C Recommendation [hereinafter “Understanding SC 2.3.1”], https://www.w3.org/TR/understanding-WCAG20/seizure-does-not-violate.html (last accessed October 31, 2016); *Understanding SC 2.3.2: Three Flashes*, W3C Recommendation [hereinafter “Understanding SC 2.3.2”], https://www.w3.org/TR/understanding-WCAG20/seizure-three-times.html (last accessed Oct. 31, 2016). [↑](#footnote-ref-103)
104. *See Understanding SC 2.3.1*, *supra* note 103. [↑](#footnote-ref-104)
105. *See WCAG 2.0 Guidelines, supra* note 101 (referring to change as “change in relative luminance between the relative peaks and valleys in a plot of relative luminance (or relative luminance/color for red flashing) measurement against time.”). [↑](#footnote-ref-105)
106. *Id*. [↑](#footnote-ref-106)
107. WCAG 2.0 Guidelines provides the following. *See supra* note 101 :

     “Relative luminance” is defined as: the relative brightness of any point in a colorspace, normalized to 0 for darkest black and 1 for lightest white.

     Note 1: For the sRGB colorspace, the relative luminance of a color is defined as L = 0.2126 **\* R** + 0.7152 \* **G** + 0.0722 \* **B** where **R**, **G** and **B** are defined as:

     * + if RsRGB <= 0.03928 then **R** = RsRGB/12.92 else **R** = ((RsRGB+0.055)/1.055) ^ 2.4
       + if GsRGB <= 0.03928 then **G** = GsRGB/12.92 else **G** = ((GsRGB+0.055)/1.055) ^ 2.4
       + if BsRGB <= 0.03928 then **B** = BsRGB/12.92 else **B** = ((BsRGB+0.055)/1.055) ^ 2.4

     and RsRGB, GsRGB, and BsRGB are defined as:

     * + RsRGB = R8bit/255
       + GsRGB = G8bit/255
       + BsRGB = B8bit/255

     The “^” character is the exponentiation operator. (Formula taken from [sRGB] and [IEC-4WD]). [↑](#footnote-ref-107)
108. *Id*. *See also* Understanding SC 2.3.1, *supra* note 103. [↑](#footnote-ref-108)
109. Joe Clark, *To Hell with WCAG 2*, A List Apart (2006), http://alistapart.com/article/tohellwithwcag2. [↑](#footnote-ref-109)
110. Rachel F. Adler, Linda Weiser Friedman & Hershey H. Friedman, *The Use of Information Technology to Create a Better Workplace for Individuals with Disabilities*, Mgmt. Online Rev., 3 (August 2008) (“[M]any products require very simple, slight modifications to make them visually-impaired friendly, e.g., a talking watch or a big button telephone; adding a tiny number that can be felt by the fingertips is also a big plus.”). [↑](#footnote-ref-110)
111. *See, e.g*., Schiff, *supra* note 75, at 2349, *citing* Jonathan Lazar & Paul Jaeger, *Reducing Barriers to Online Access for People with Disabilities*, 27 Issues Sci. & Tech. 69, 74–75 (2011). [↑](#footnote-ref-111)
112. *See, e.g.,* Areheart, *supra* note 1, at 463 (describing various assistive technologies such as speech-based browsers or voice-based browsers), 449 (describing a mouth stick used by a quadriplegic). [↑](#footnote-ref-112)
113. *See* Kuykendall, *supra* note 26 (“Virtually no web products are free from an automated test failure in some form.”). [↑](#footnote-ref-113)
114. *Id*. [↑](#footnote-ref-114)
115. *See* *Netflix*, *supra* note 2, at 196. [↑](#footnote-ref-115)
116. By way of example, *see* http://littledarlingtoypoodles.com is a small business owner’s self-made website based on a template. [↑](#footnote-ref-116)
117. *See generally Web Accessibility NPRM*, *supra* note 26. Experts generally agree that on a practical level, it is considerably less costly and time-consuming to include accessibility in the design from the start, rather than trying to retrofit an existing website. *See also* Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 Hastings Comm. &. Ent. L. J. 215, 240–42 (discussing the DOJ’s stance on the Internet coverage and the potential regulatory burden on small businesses). [↑](#footnote-ref-117)
118. *See* Kuykendall, *supra* note 26. [↑](#footnote-ref-118)
119. Davis v. BMI/BND Travelware, 2016 Cal. Super. LEXIS 217, 3 (Cal. Super. Ct. 2016) (granting a summary judgment for the plaintiff after finding the requisite nexus). [↑](#footnote-ref-119)
120. *Id*. [↑](#footnote-ref-120)
121. *See, e.g.,* Dianna D. McCarthy, *Make it accessible or SHUT IT DOWN!!!,* Client Alert, Winget, Spadafora & Schwartzberg, LLP. (April 14, 2016), http://www.wssllp.com/pdf/04.14.16\_Client%20Alert\_Access\_ DDM.pdf. [↑](#footnote-ref-121)
122. A person seeking to build a business online may start selling goods and services from an existing market platform such as etsy.com or create a standalone website using a template offered by a variety of available software. [↑](#footnote-ref-122)