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Tara E. Thompson
Tara.Thompson@chicagounbound.edu

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Locating Discrimination: Interactive Web Sites as Public Accommodations under Title II of the Civil Rights Act

Tara E. Thompson

One of the advantages to communicating via the internet is inherent anonymity—the opportunity to express opinions without the same consequences that result from face-to-face encounters. Unfortunately, this anonymity leads some people to use web sites, specifically those that host chat rooms and bulletin boards, as outlets for racist, offensive, or hateful opinions. Individual forum users have limited recourse against such behavior other than reporting misbehavior to site managers. Some interactive web site operators ("site operators"), entities that host internet bulletin boards, chat rooms, and other interactive web sites ("interactive sites"), elect to monitor the forums they host by posting

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1 B.A. 2000, University of Utah; J.D. Candidate 2003, University of Chicago.

2 Estimates for the number of "hate sites"—web sites specifically devoted to hateful speech—that exist vary widely from 400 to over 1,200. See Lakshmi Chaudhry, Hate Sites Bad Recruiting Tools, Wired (May 23, 2000), available online at <http://www.wired.com/news/culture/0,1284,36478,00.html> (visited Nov 15, 2002) [on file with U Chi Legal F]. In addition to hosting sites specifically devoted to hate speech, persons with hateful messages can interrupt otherwise benign speech in chat rooms and bulletin boards. See, for example, Class Action Complaint for Discrimination in Public Accommodation and Breach of Contract, Noah v AOL Time Warner, Inc, Civil Action No. 01-1342-A (E D Va filed Aug 30, 2001) ("Noah Class Action Complaint") (initiating a lawsuit alleging that forum participants made anti-Islamic statements in an America Online chat room devoted to Islam).

3 See, for example, Yahoo's form for reporting misbehavior, available online at <http://add.yahoo.com/fast/help/mesg/cgi_abuse> (visited Nov 15, 2002) [on file with U Chi Legal F].

4 Applying the right terminology to describe these types of web sites and their operators is difficult, but this Comment will use "web site operators" rather than other more commonly used terms like Internet Service Providers ("ISPs") or Internet Content Providers ("ICPs"). See Michael D. Scott, Internet and Technology Law Desk Reference 329 (Aspen 2001) (compiling internet definitions used in court opinions and defining ISPs as "typically offering [modem] telephone access to a computer or computer network linked to the internet"). Scott also defines ICPs as "individuals or organizations that have established a presence, or 'site' on the Web by publishing a collection of Web pages." Id at 327. ICPs and ISPs, while potentially encompassing interactive web sites and their operators, both have a broader meaning and are therefore inappropriate when more precise terminology is available.

409
rules and checking for compliance. They also remove prohibited content and punish those users who post such material by issuing warnings or denying them future access to interactive site forums.

Forum monitoring obviously benefits customers who do not want to encounter such conduct, but site operators may also have legal reasons for regulating user behavior. In August 2001, Mr. Saad Noah filed a putative class action lawsuit against his site operator, America Online ("AOL"), for failing to remove discriminatory postings from an AOL chat room or punish the users who posted them. Noah alleged that AOL monitored and held accountable users who made discriminatory remarks against non-Muslim religious groups, but failed to prevent or punish anti-Muslim remarks even after Noah repeatedly documented and reported such activity. Noah argued that AOL's actions constituted discrimination in a place of public accommodation, a violation of the Civil Rights Act of 1964.

If Noah's lawsuit succeeds, AOL and other site operators could face a legal responsibility to prevent discrimination in their chat rooms and on their bulletin boards. Under Title II of the Civil Rights Act ("Title II"), all persons are entitled to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation of any place of public accommodation." Broadly defined, public accommodations are entities that are privately owned and operated but hold themselves out as providing service to the public. Courts have yet to determine how, or if, laws regulating public accommodations apply to the inter-
net. Consequently, if the internet can be a public accommodation, the regulatory power of Title II would expand significantly.

This Comment argues that internet chat rooms and bulletin boards are public accommodations under Title II. Part I analyzes a threshold question, whether Title II's definition of public accommodations can include “non-physical” entities like organizations. Part II examines the circuit split on the question of insurance offerings as public accommodations under the analogous Title III of the Americans with Disabilities Act (“ADA”), and analyzes this split’s applicability to the Title II context. Part III explores the purposes of Title II and argues that characterizing the internet as a public accommodation is consistent with those purposes. Part IV examines the internet itself and how the law should classify interactive sites—as places, as membership organizations with ties to a physical location, or as something else. Finally, Part V considers both how courts would apply the Civil Rights Act to interactive sites and the consequences of such an application.

I. REGULATION OF PUBLIC ACCOMMODATIONS UNDER TITLE II

This Part of the Comment explains how Title II regulates public accommodations. Section A gives an overview of Title II itself. Section B addresses a basic question that the language of the statute leaves unanswered: whether membership organizations are public accommodations under Title II. Case law on membership organizations leaves open the question of whether interactive sites can be Title II public accommodations.

A. “Public Accommodations” Defined in Title II

To determine whether Title II extends to interactive sites, one must first examine the language of the statute. Title II of the Civil Rights Act of 1964 provides that:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.11

11 42 USC § 2000a(a).
In short, Title II prohibits discrimination, meaning the denial of full enjoyment, based on one's "race, color, religion, or national origin," of places that the Civil Rights Act defines as "public accommodations." The Civil Rights Act defines public accommodations by providing a list of "establishments" that are public accommodations under the Act so long as their "operations affect commerce." Title II divides these establishments into three principal categories: inns and motels; restaurants and lunch counters; and a third entertainment category that includes "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment." Internet bulletin boards and chat rooms fall, if anywhere, under this third "entertainment" category. Aside from this category's broad language, Title II leaves little room for anything but the specific places it lists as public accommodations.

B. Membership Organizations under Title II

To decide whether internet forums qualify as "other place[s] of exhibition or entertainment," it is useful first to examine how broadly courts have interpreted the language of Title II. On its face, Title II only provides for public accommodations that are traditional "physical" locations, accommodations located in buildings and other traditional spaces. The courts, however, have not reached a consensus as to under what circumstances "non-physical" establishments can be Title II public accommodations.

\[^{12} \text{See id.}\]

\[^{13} \text{42 USC § 2000a(b). The statute begins: "Each of the following establishments which serves the public is a place of public accommodation . . ." Id. Technically this language leaves room for the inclusion of other public accommodations, but no court has found an entity to be a public accommodation without placing it in one of the three statutory categories.}\]

\[^{14} \text{42 USC § 2000a(b)(1).}\]

\[^{15} \text{42 USC § 2000a(b)(2).}\]

\[^{16} \text{42 USC § 2000a(b)(3) (emphasis added).}\]

\[^{17} \text{A canon of statutory construction also suggests this result. The maxim expressio unius states that courts should interpret statutes so that including one thing implies the exclusion of its alternative. See William N. Eskridge, Philip P. Frickey, and Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 819, 824 (West 3d ed 2001) (discussing various statutory canons). The first two categories in Title II list only specific public accommodations, but the final category includes broad language. The fact that the first two categories could have been similarly broad, but are not, suggests that they are narrower than the third. See id. This canon is only of limited usefulness, however, since courts ignore it when it leads to undesired results. See id.}\]
While there is no clear precedent addressing internet forums, courts have considered the analogous question of whether membership organizations like the Boy Scouts of America ("Boy Scouts") constitute public accommodations under Title II.\(^\text{18}\) While they may operate public accommodations,\(^\text{19}\) membership organizations are not themselves physical locations. Based on this distinction, the Boy Scout decisions effectively preclude courts from applying Title II to non-physical entities like membership organizations unless those organizations have a connection to a specific physical location.\(^\text{20}\) While this analysis appears to suggest that Title II does not apply to interactive sites, the courts' failure to define "physical location" still leaves the door open for Title II interactive site regulation.

1. The "Boy Scouts" cases.

The Boy Scouts have faced several recent lawsuits that unsuccessfully attempted to use Title II to challenge its membership requirements.\(^\text{21}\) These claims failed because courts did not view the Boy Scouts as (1) a public organization, or (2) a physical facility.\(^\text{22}\)

In *Welsh v Boy Scouts of America*,\(^\text{23}\) Mark Welsh brought a Title II discrimination claim against the Boy Scouts after the organization denied him membership because he refused to recite the Boy Scout oath.\(^\text{24}\) The Seventh Circuit examined Title II's list of public accommodations and determined that the statute did not apply to the Boy Scouts.\(^\text{25}\) This opinion deserves particularly

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\(^{18}\) See, for example, *Welsh v Boy Scouts of America*, 993 F2d 1267, 1269 (7th Cir 1993) (holding that the Boy Scouts of America is not a public accommodation under Title II).

\(^{19}\) A paradigmatic example would be a Boy Scout camp.

\(^{20}\) Courts have found that YMCA gyms are public accommodations. See, for example, *Smith v YMCA of Montgomery*, 462 F2d 634, 636 (5th Cir 1972) (holding that the YMCA's racially discriminatory practices violated African Americans' constitutional and statutory rights). For a more detailed explanation of membership organizations under Title II, see Part I B 1 (discussing the Boy Scouts decisions).

\(^{21}\) See, for example, *Welsh v Boy Scouts of America*, 993 F2d 1267 (7th Cir 1993); *Boy Scouts of America v Dale*, 530 US 640 (2000) (holding that the application of New Jersey's public accommodations law to require the Boy Scouts to readmit a troop leader fired for disclosing his homosexuality violates the Boy Scouts' First Amendment rights).

\(^{22}\) See *Welsh*, 993 F2d at 1269.

\(^{23}\) 993 F2d 1267 (7th Cir 1993).

\(^{24}\) See id at 1268. Welsh refused to recite the oath because it requires scouts to state a belief in God, and he argued that excluding him from the organization on this basis constituted discrimination on the basis of religion. See id.

\(^{25}\) See id at 1269 (holding that the Boy Scouts was not "[an]other place of exhibition or entertainment" under § 2000a(b)(3)).
close attention because of the court's analysis of the language of Title II and the inferences the court draws from that language concerning Congress's intent in passing Title II.

The Welsh opinion addressed two separate issues: whether the Boy Scouts could be a place of public accommodation under the Act, and whether the Boy Scouts were a public or a private organization. Interpreting the plain meaning of the statute, the court first addressed the issue of how Title II defines public accommodations. After reviewing the list of entities defined as public accommodations in Title II, the Seventh Circuit found that all of them were physical facilities and none even resembled membership organizations. All of these observations served as evidence to the court that the enacting Congress did not intend Title II to regulate membership organizations that do not "maintain a close connection to a structural facility . . . ."

The court then reviewed earlier decisions that found membership organizations to be public accommodations, and distinguished them on the ground that in each case the organizations operated a physical facility or a structure. The organizations in these cases operated a swimming pool; a YMCA gymnasium; a hunting and fishing preserve; a youth football field with bleachers and a concession stand; a public golf course; and a teachers' organization that held meetings at a public school. These earlier

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26 See Welsh, 993 F2d at 1269. The court found that the Boy Scouts was a private, rather than a public organization, and for this reason alone did not qualify as a public accommodation. See id at 1276–77. Despite this finding, the bulk of the opinion nevertheless focused on the other issue, whether the Boy Scouts is an "accommodation" under Title II.

27 See id at 1269.

28 Id. For the Welsh court, if Congress had meant to include membership organizations in the all-inclusive category they would have worded it instead as "or other public exhibition or entertainment." Welsh, 993 F2d at 1272.

29 Id at 1269.

30 See id at 1272–74.


32 Smith v YMCA of Montgomery, 462 F2d 634, 636 (5th Cir 1972).


34 United States v Slidell Youth Football Association, 387 F Supp 474 (E D La 1974).

35 Wesley v City of Savannah, 294 F Supp 698, 701–02 (S D Ga 1969).

36 Auerbach v African American Teachers Association, 356 F Supp 1046, 1948 (E D NY 1973). Aside from this case, what each of these courts could have said, to make their position clearer, was that the specific public facilities run by membership organizations are public accommodations, and the membership organizations, as owners or lessors, are responsible for discrimination in their facilities. Still, this interpretation does not explain the cases where a membership organization merely held meetings in a public facility. The
cases confirmed the Welsh court’s conclusion because each of these organizations used public facilities or operated facilities open to the public.\textsuperscript{37} Although the Welsh court unequivocally held that membership organizations, absent a close connection to a physical facility or location, are not public accommodations, it failed to define clearly “public accommodation” under Title II. Subsequent courts have used this language to establish a physical location requirement for membership organizations to be public accommodations.\textsuperscript{38} The opinion described a public accommodation using the words in § 2000a(b): as a facility, a structure, an establishment, and a place.\textsuperscript{39} The opinion does not attempt to define any of these terms, except to differentiate membership organizations which are instead defined as “mere gatherings of people.”\textsuperscript{40} The Welsh court’s general concern was that including membership organizations under Title II would potentially define many social relationships, such as groups of acquaintances meeting together, as public accommodations. For the court, this most certainly was not the intent of the enacting Congress.\textsuperscript{41}

The Supreme Court in Boy Scouts of America v Dale\textsuperscript{42} suggested a possible expansion of the Welsh court’s “physical location” requirement.\textsuperscript{43} Dale rejected a challenge under New Jersey’s state public accommodations law to the Boy Scouts’ policy of denying membership to homosexuals.\textsuperscript{44} The Supreme Court declined to apply the statute to the Boy Scouts, finding the statute violative of the Boy Scouts’ First Amendment right to expressive association.\textsuperscript{45} In dicta, however, the Court devoted a short paragraph to discussing whether the Boy Scouts even qualified as a public accommodation.\textsuperscript{46} The Court noted that while state public accom-

\textsuperscript{37} Welsh, 993 F2d at 1272.

\textsuperscript{38} See, for example, Clegg v Cult Awareness Network, 18 F3d 752, 756 (9th Cir 1994) (holding that a membership organization was not a public accommodation because it had no connection to a physical facility).

\textsuperscript{39} Welsh, 993 F2d at 1269–75. Some, but not all of these references describe “place” in physical terms (such as a “physical facility” or a “physical structure”).

\textsuperscript{40} Id. at 1275.

\textsuperscript{41} Id. (“In Title II Congress focused exclusively on prohibiting discrimination in places of public accommodation and not in every conceivable social relationship.”).

\textsuperscript{42} 530 US 640 (2000).

\textsuperscript{43} See id at 657.

\textsuperscript{44} See id at 659.

\textsuperscript{45} See id at 649–50.

\textsuperscript{46} See Dale, 530 US at 657.
modations laws originally protected only “traditional public accommodations” such as “inns and trains,” states had started expanding the definition to include more “places.” Chief Justice Rehnquist said that New Jersey expanded its statute to even more locations than other states, but should not have “applied its public accommodations law to a private entity without even attempting to tie the term ‘place’ to a physical location.” This statement implies that it is the “physical” nature of an entity that makes it a public accommodation.

Like the Welsh court, however, the Dale Court did not define physical location, except to conclude that the definition does not include the Boy Scouts. In reaching this conclusion, the Court cited Welsh and four state court decisions that interpreted their respective state public accommodation laws to exclude the Boy Scouts. None of these statutes clearly defined the term “public accommodation,” and none used the term “physical” in defining “public accommodation.” The Dale dicta

47 See id. The Court did not elaborate on what those “places” are in state statutes nationwide, but noted that under New Jersey law these “places” include taverns, retail shops, and libraries. See id.
48 Id. This troubled the Court because applying Title II to organizations increases the “potential for conflict” between Title II and First Amendment rights to expressive association. See Dale, 530 US at 657.
49 See id.
50 Id at 657 n 3, citing Curran v Mount Diablo Council of Boy Scouts of America, 952 P2d 218, 228 (Cal 1998) (rejecting the Boy Scouts as a public accommodation under California’s Unruh Civil Rights Act, which requires equal accommodations in “all business establishments of every kind whatsoever”); Seabourn v Coronado Area Council, Boy Scouts of America, 891 P2d 385, 405 (Kan 1995) (rejecting the Boy Scouts as a public accommodation under the Kansas Act Against Discrimination, which prohibits discrimination in “public accommodations” defined similarly as those in the Civil Rights Act); Quinnipiac Council, Boy Scouts of America, Inc v Commission on Human Rights and Opportunities, 528 A2d 352, 357–58 (Conn 1987) (rejecting the Boy Scouts as a public accommodation under Connecticut’s state public accommodations law, which defines public accommodations as “any establishment . . . which caters or offers its services or facilities or goods to the general public”); Schwenk v Boy Scouts of America, 551 P2d 465, 469 (Or 1976) (rejecting the Boy Scouts as a public accommodation under the Oregon Public Accommodation Act which defines public accommodations as “any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise”.
51 See Cal Civ Code § 51 (West 1982 & Supp 2002) (“All persons . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”); Conn Gen Stat Ann § 46a-63 (West 2002) (“‘Place of public accommodation, resort or amusement’ means any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent.”); Kan Stat Ann § 44-1002(h) (2001) (“Public accommodations’ means any person who caters or offers goods, services, facilities and accommodations to the public. Public accommodations include, but are not
suggests a further limitation to Welsh by not expressly conceding that organizations connected to a physical structure can be public accommodations.

2. Welsh applied to other membership organizations.

In Clegg v Cult Awareness Network, the Ninth Circuit expanded the Welsh physical location requirement to organizations beyond the Boy Scouts. Frizell Clegg, an African American and a Scientologist, claimed that the organization Cult Awareness violated Title II by refusing to allow him to become a member. In rejecting Clegg's claim, the court relied on Welsh to hold that Cult Awareness, because it was a membership organization, did not fall within the purview of Title II. The Clegg decision further clarified the Welsh court's interpretation of Title II by holding that organizations fell within its scope "only when they are affiliated with a place open to the public and membership in the organization is a necessary predicate to the use of the facility." Like Welsh, the court cited the example of a YMCA-operated public gym as an example of an organization that Title II would regulate.

3. Implications for interactive sites.

Like other decisions addressing whether membership organizations fall under the purview of Title II, Welsh does not neces-
necessarily bar the inclusion of the internet as a public accommodation under Title II. Courts could categorize internet chat rooms and bulletin boards as "gatherings of people" that are not tied to physical places. As such, Title II would not regulate them. If courts conclude that these internet forums have a specific location, namely at the specific physical address on the internet where interactive sites have provided space for them, these internet chat rooms and bulletin boards could qualify as Title II public accommodations, even under Welsh. Similarly, the Dale court could reach a similar finding as long as it was convinced that internet chat rooms and bulletin boards were not, in fact, membership organizations. To decide whether to apply Title II to the internet, however, courts following Welsh must determine whether internet chat rooms and bulletin boards have a connection to a physical location. The Boy Scouts cases do not offer an answer to this question.

II. REGULATION OF PUBLIC ACCOMMODATIONS UNDER THE ADA

Although few cases under the Civil Rights Act even analogously apply to the internet, courts have extensively addressed the regulation of non-physical entities under Title III of the ADA, analyzing in depth many of the same issues that the Boy Scouts cases do not fully address in the Title II context. Particularly in the public accommodations context, where the two statutes are similar, analysis of the language and judicial precedent surrounding the ADA suggests ways in which Title II regulation might develop in the future. In addition, an analysis of scholarship on the ADA public accommodations decisions also suggests the internet should be considered a public accommodation under Title II. Although some aspects of the ADA are broader than Ti-

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58 See Welsh, 993 F2d at 1269 (holding that membership organizations must be connected to a physical facility for Title II to regulate them).
59 42 USC § 12181 (1999) et seq.
60 See, for example, Doe v Mutual of Omaha Insurance Co, 179 F3d 557, 559 (7th Cir 1999) (holding that Title III of the ADA extends to public accommodations in electronic space), citing Carparts Distribution Center, Inc, v Automotive Wholesaler Association of New England, 37 F3d 12, 19 (1st Cir 1994) (finding that the "plain meaning" of entities Title III defined as public accommodations did not "require 'public accommodations' to have physical structures for persons to enter"); Parker v Metropolitan Life Insurance Co, 121 F3d 1006, 1012–13 (6th Cir 1997) (holding that Title III of the ADA does not regulate insurance underwriting practices).
61 To avoid confusion between Title II and Title III, this Comment occasionally refers to Title III of the ADA simply as "the ADA."
62 See Part II C.
tive II, drawing analogies between the two statutes is appropriate; the Supreme Court recently used Title II precedent to support a decision regarding the ADA, noting that public accommodation regulation under the Civil Rights Act parallels that same regulation under the ADA.63

A. Public Accommodations Defined in the ADA

In much the same manner that Title II prohibits discrimination based on race, color, religion or national origin, Title III of the ADA prohibits discrimination against the disabled.64 In contrast to Title II's short enumeration of public accommodations, the ADA's enumeration is much more detailed and ultimately encompasses a broader definition of public accommodation.65

Title III's enumeration of public accommodation includes, among other things, auditoriums, convention centers, museums, and libraries.66 It also includes the same catch-all language as Title II, stating that "other places of exhibition or entertainment" also might be public accommodations.67 The language of the ADA goes even further; in addition to enumerated establishments, "other places of public gathering" can also be public accommodations.68 The language "places of public gathering," which is not part of Title II, may more easily include internet chat rooms and bulletin boards. Additionally, the fact that the ADA generally encompasses a much broader range of facilities has led one commentator to conclude that courts are more likely to deem the internet a public accommodation under the ADA than under the Civil Rights Act.69

63 See PGA Tour, Inc v Martin, 532 US 661, 680 (2001) (finding the Professional Golfers’ Association Tour to be a public accommodation under the ADA).
64 See 42 USC § 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.”).
65 See 42 USC § 12191(7).
66 See 42 USC § 12191(7)(d)-(l).
67 See 42 USC § 12191(7)(c).
68 See 42 USC § 12191(7)(d).
B. Public Accommodations under the ADA

In addition to being a broader statute with more specific examples of public accommodations, the ADA also has a more developed body of case law than Title II does from which to analyze the inclusion of interactive sites as a public accommodation. Courts have examined three separate public accommodation issues under the ADA that are relevant to the interactive site question: (1) like the Boy Scouts cases, membership organizations as public accommodations under the Act;\(^\text{70}\) (2) what types of access, physical or economic, the ADA should regulate;\(^\text{71}\) and (3) public accommodations in electronic space.\(^\text{72}\) While only a few of these cases discuss the internet as a public accommodation, all suggest that current interpretations of the ADA do not preclude the inclusion of the internet as a public accommodation.

1. Membership organizations under the ADA.

Courts have rejected membership organizations as public accommodations under the ADA for the same reason that Clegg and Welsh rejected them as public accommodations under Title II: courts do not consider membership organizations to be public accommodations where they are not tied to a physical facility.\(^\text{73}\) Under this logic, courts have rejected claims made by a national youth hockey organization and a local youth hockey league;\(^\text{74}\) the

\(^{70}\) See, for example, Matthews v NCAA, 79 F Supp 2d 1199, 1206 (E D Wa 1999) (denying motion for preliminary injunction and holding that the complaint fails because the NCAA is not connected to an actual place).

\(^{71}\) See, for example Parker v Metropolitan Life Insurance Co, 121 F3d 1006, 1012–13 (6th Cir 1997) (holding that the ADA only regulates physical facilities).

\(^{72}\) See, for example, Doe v Mutual of Omaha Insurance, 179 F3d 557, 559 (7th Cir 1999) (suggesting that the ADA regulates public accommodations in electronic space).

\(^{73}\) See Matthews v NCAA, 79 F Supp 2d 1199, 1206 (E D Wa 1999); Brown v 1995 Tenet ParaAmerica Bicycle Challenge, 959 F Supp 496, 499 (N D Ill 1997) (holding that an organization sponsoring a bicycle race is not a public accommodation because it is not tied to a physical place); Elitt v USA Hockey, 922 F Supp 217, 223 (E D Mo 1996) (denying motion for a temporary restraining order, noting that USA Hockey is an organization that is not tied to a physical place); Schaff v Association of Educational Therapists, 1995 WL 381979, *2 (N D Cal) (granting summary judgment on Title III claim because the defendant, as an organization without a tie to a physical place, is not a public accommodation). But see Shultz v Hemet Youth Pony League, Inc, 943 F Supp 1222, 1225 (C D Cal 1996) (holding that a youth baseball league is a place of public accommodation because it was connected to a field and a concession stand).

\(^{74}\) See Elitt, 922 F Supp at 223. In light of the other arena and sports opinions under the ADA, this case seems to be wrongly decided. Compare Shultz, 943 F Supp at 1225 (holding that a youth baseball league is a place of public accommodation because it was connected to a field and a concession stand). In its opinion, the Elitt court made no effort to examine whether or not the local hockey league leased the ice rinks where its teams
National Collegiate Athletic Association ("NCAA") and a local collegiate athletic conference (the PAC-10); an organized bicycle race; and an association of therapists. However, a court has found a youth baseball league to be a public accommodation where that league was tied to a baseball field and a concession stand. These cases all demonstrate a fundamental judicial concern that ADA public accommodations must either be a physical facility or have strong ties to a physical facility.

These opinions seem to focus more closely on the ways a membership organization is tied to a facility. Under the ADA, courts have required a showing of control over the facility; a leasing or rental of the facility; or ties to a particular rather than multiple or various facilities. This is a stricter interpretation than Clegg or Welsh articulated in the Title II context.

2. Whether the ADA regulates economic access to goods and services.

Judicial standards governing whether membership organizations are public accommodations under the ADA are relatively clear that such organizations must have ties to a physical facility. Currently, however, courts are split on a different aspect of the held practices and games, which the league almost surely must have done. The court merely noted that Elitt had not demonstrated denial of access to the ice rink itself. See id. Since the league did not permit Elitt to participate, however, he was denied access to the rink.

See Matthews, 79 F Supp 2d at 1206. National athletic associations, such as the NCAA here or USA Hockey in the Elitt case, are treated as "umbrella" organizations and do not fall within the ADA because they do not have control over the public accommodations in which member organizations hold athletic events. See id at 1205.

See Brown, 959 F Supp at 499. In this case, the court found that the race took place on roads, tying it to a physical location, but these roads were public roads that a public accommodation neither owned nor leased and that the court found not to be a "physical structure" as required by the ADA. See id at 498–99.

See Schaaf, 1995 WL 381979 at *2. This opinion seems to contradict Auerbach v African Americans Teachers Association, 356 F Supp 1046, 1048 (E D NY 1973) (holding that a teachers association that held regular meetings at a public school was a Title II public accommodation). The Schaaf court was concerned that the therapist organization, while holding meetings in some physical facilities such as restaurants and hotels, also held meetings in private homes, and was therefore not tied to a "particular" place. 1995 WL 381979 at *2. In Auerbach, the association meetings were held regularly at the same public school, see 356 F Supp at 1048, satisfying a particularity requirement, but the question remains whether a school is a public accommodation under Title II.


See Schaaf, 1995 WL 381979 at *2 See Part I B.
ADA: whether Title III regulates insurance offerings.\textsuperscript{83} The courts examining these issues couch their opinions in the language of physical access, creating confusion about how these opinions define public accommodations under the Act. By probing the underlying issues in each of these cases, however, one can see that the division between courts is really only about what kinds of access the ADA should regulate. Some courts have held that the ADA only requires equal physical access to facilities,\textsuperscript{84} while other courts have held that the ADA also requires equal economic access to the goods and services facilities offer.\textsuperscript{85} Thus, these cases do not alter the definition of "public accommodations;" they only concern the level of equal access public accommodations must provide.

a) The broad view of access: equal economic access to goods and services. The first judicial decision appearing to extend ADA regulation to economic access was \textit{Carparts Distribution Center v Auto Wholesaler's Association of New England.}\textsuperscript{86} In this case, the Auto Wholesaler's Association provided medical insurance to its members who, like \textit{Carparts}, were small businesses.\textsuperscript{87} That insurance plan placed a lower limit on policy benefits for AIDS-related conditions.\textsuperscript{88} After recognizing this insurance cap as a valid ADA public accommodations claim, the Carparts court overturned the district court's grant of a motion to dismiss the case.\textsuperscript{89}

While noting that the plaintiffs had not demonstrated that the defendant association was an ADA public accommodation, the

\textsuperscript{83} See \textit{EEOC v Aramark Corp}, Inc, 208 F3d 266, 268 (DC Cir 2000) (recognizing the circuit split and holding, under an unrelated ADA provision, that stricter limitations on insurance benefits for those with mental or psychological disabilities did not violate the ADA).

\textsuperscript{84} \textit{Parker v Metropolitan Life Insurance Co}, 121 F3d 1006, 1012–13 (6th Cir 1997) (holding that the ADA does not regulate economic access).

\textsuperscript{85} \textit{Pallozzi v Allstate Life Insurance}, 198 F3d 28, 32 (2d Cir 1999) (holding that the ADA does regulate economic access).

\textsuperscript{86} 37 F3d 12 (1st Cir 1994).

\textsuperscript{87} See id at 12–33.

\textsuperscript{88} See id at 13. The plan capped benefits for AIDS-related illnesses at $25,000. For all other illnesses, the plan capped benefits at $1,000,000. See id.

\textsuperscript{89} \textit{Carparts}, 37 F3d at 12. The district court dismissed plaintiff's Title III claim because it found that the association was not an "actual physical structur[e] with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein." See id at 18. The plaintiff also had claims under unrelated sections of the ADA, which the Circuit Court also believed the district court erred in dismissing. See id at 19.
Carparts court left open the possibility that the district court could define the association as a public accommodation. The court examined the ADA's plain language and commented that Title III is not limited to instances when a person physically enters a business to purchase goods or services. The Carparts court reached this conclusion by analyzing the ADA's list of public accommodations and determining that some of the listed entities did not necessarily interact with the public through physical establishments alone.

The court also attributed a broad purpose to the ADA, noting that limiting

the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public. The court reasoned that it would be unreasonable to provide protection to people who purchased insurance in a physical office but not to those who purchased insurance over the telephone or through the mail. Based on this analysis, the Carparts court interpreted the ADA to apply to a wide range of business and service establishments, both physical and non-physical, in an effort to ensure equal economic access to insurance offerings.

The Second Circuit, in Pallozzi v Allstate Life Insurance, explicitly implemented the Carparts court's view of Title III. In Pallozzi, the defendant insurer argued that because the ADA enumerated "insurance offices" rather than "insurance companies" as public accommodations, Congress only intended to regulate the physical accessibility of insurance offices, not their un-

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90 See id at 12.
91 See Carparts, 37 F3d at 20.
92 See 42 USC § 12191(7)(d).
93 Carparts, 37 F3d at 19. The specific entities the court mentioned are service establishments (shoe repair, travel services) and professional officers (doctors, lawyers, accountants). These are not enumerated entities under the Civil Rights Act. See 42 USC § 2000a(b).
94 Carparts, 37 F3d at 19.
95 Id.
96 See id.
97 198 F3d 28 (2d Cir 1999).
derwriting practices. Citing Carparts, the Pallozzi court rejected this narrow interpretation of the ADA, commenting that the ADA "was meant to guarantee [the disabled] more than mere physical access" to public accommodations. The court also recognized that the insurance company defendant had to be a public accommodation in order for the ADA to regulate its insurance underwriting, but noted that this issue was not in dispute in the case. Both Pallozzi and Carparts broadly interpreted what it means for a public accommodation to deny "access" to goods and services.

b) The narrow view of access: threshold physical access to a public accommodation. Three other circuits, while recognizing that Title III regulates threshold physical access to a public accommodation, rejected an expansion of Title III to also regulate economic access to goods and services. In the course of these opinions, the courts offered varying definitions of what threshold physical access to a public accommodation entails.

In McNeil v Time Insurance Co, the court held that an insurer that capped benefits for patients with AIDS did not violate the ADA because the ADA did not "regulate the content of goods and services that are offered." The Fifth Circuit acknowledged that an insurance company cannot completely deny physical access to its goods or services, but rejected the Pallozzi holding that the ADA also governed the substance of those goods or services. In so holding, however, the McNeil court did not define what "physical access" meant, or what constituted a "public accommodation" under the Act.

The Sixth Circuit, while also rejecting economic access regulation, has been more explicit in strictly limiting the ADA's definition of public accommodations to physical places. In Parker v

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98 Id at 32.
99 Id.
100 Id at 32 n 3.
101 See Parker, 121 F3d at 1012–13 (excluding disability insurance provision from ADA's public accommodation provision); McNeil v Time Insurance Co, 205 F3d 179, 186 (5th Cir 2000) (concurring with Parker); Ford v Schering-Plough Corp, 145 F3d 601 (3d Cir 1998) (same).
102 205 F3d 179 (5th Cir 2000).
103 See id at 186.
104 See id at 188.
105 See id. This is logical, however, given that the list of public accommodations under the ADA is so much more detailed than Title II. See Part II A.
106 See Parker, 121 F3d at 1012–13 (holding that disability insurance is not a public accommodation under the ADA).
Metropolitan Life Insurance, the Sixth Circuit addressed the question of insurance offerings under the ADA, and found that insurers that capped benefits for mental but not physical disabilities did not violate the ADA.

The opinion bluntly stated, "[A] public accommodation is a physical place." The court intended this statement as a means of distinguishing places from services such as insurance offerings. Later in the opinion, the court explained that "[t]he purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided." This holding concurs with McNeil that insurers must offer insurance to the disabled but that they do not need to alter the terms of the insurance to make it equally valuable to the disabled.

Likewise, in Ford v Schering-Plough Corp the Third Circuit explicitly disagreed with Carparts. Ford upheld the dismissal of a Title III claim made against an insurer that capped benefits for mental but not for physical disabilities. The court could have concluded that because the plaintiff received insurance through her employment, the insurance was a private rather than a public offering and therefore not the service of a public accommoda-

107 121 F3d 1006 (6th Cir 1997).
108 See id.
109 See id at 1010. The Sixth Circuit cited Stoutenborough v National Football League, 59 F3d 580, 583 (6th Cir 1995) (determining that broadcasts of professional football games are not ADA public accommodations). In Stoutenborough, the court rejected a Title III ADA claim made by hearing-impaired people who argued that the National Football League's ("NFL") television "blackout" rule denied them access to a public accommodation. See id at 582. Engaging in a careful analysis of Title III's language, the court held that neither the NFL nor the television broadcast of its games were ADA public accommodations because they were not "places." See id at 583. In addition, the broadcast was not a service of the public accommodation because the NFL leased the broadcast to a television station that then transmitted it into homes. See id. The court distinguished between "the services the public accommodation offers" and "the services which the lessor of a public accommodation offers." Stoutenborough, 59 F3d at 583.

The Stoutenborough court could also have decided this case under an economic access theory. During blackouts, in choosing only to broadcast the game over the radio, all the television station was doing was providing a service that was less valuable to the hearing impaired than it was to other users. No matter who offers the service, under a narrow view of the ADA the broadcast is not the type of access the ADA regulates.

110 See Parker, 121 F3d at 1012.
111 See id.
112 See McNeil, 205 F3d at 186.
114 See id at 613–14.
115 Id at 603.
Instead, the court held that the plaintiff did not have a physical connection to the insurance office itself as its interpretation of the ADA required.  

_Ford_ cited _Welsh_ and _Clegg_, both Title II public accommodation cases, and noted that these courts limited public accommodations to places.  

Like _Parker_ and _McNeil_, _Ford_ rejected interpreting the ADA to regulate economic access. The _Ford_ court applied Title II case law to hold that the ADA only covers "places with resources utilized by physical access." Although this court disagreed with _Carparts_, it engaged in the same extensive analysis of the physical/non-physical characteristics of the public accommodation as a way of reaching its primary concern: whether the regulation of economic access to insurance is appropriate under Title III.

3. Public accommodations in electronic space: _Doe v Mutual of Omaha Insurance_.

In the midst of this split on the issue of economic access, the Seventh Circuit relied on precedent from both sides of the debate to offer a new interpretation of the ADA and the internet in _Doe v Mutual of Omaha Insurance_. The case involved an AIDS-related insurance cap similar to the one in _Carparts_. Following the logic of _Parker_, _McNeil_, and _Ford_, the Seventh Circuit rejected the plaintiffs’ claim, holding that the ADA does not require insurers or other facilities to "configure a service to make it as valuable to a disabled as to a nondisabled customer."  

_Mutual of Omaha_ also emphasized the issue of threshold access, making it clear that insurers violate the ADA if they refuse to sell an insurance policy to someone with AIDS. A great deal of the opinion analyzed what threshold access entails. In the

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108 The Seventh Circuit used this reasoning to reject a similar claim. See _Morgan v Joint Administration Board_, 268 F3d 456 (7th Cir 2001) (holding that because an employee received her insurance through her employer, it was a private offering and not a public accommodation).

107 See _Ford_, 145 F3d at 612–13. The plaintiff's employer received insurance for its employees from MetLife, but the court said Ford had no connection to MetLife's physical insurance office, and therefore MetLife had not discriminated against her. See id.

106 Id at 613, citing _Welsh_, 993 F2d at 1269, and _Clegg_, 18 F3d at 755–56.

119 See _Ford_, 145 F3d at 613.

120 Id at 558.

118 See id at 559–60.

121 See _Mutual of Omaha_, 179 F3d at 559.
course of rejecting the plaintiffs' claim, Judge Posner, speaking for the court, stated that the ADA means

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 electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.\textsuperscript{124}

This language describes a "Web site" as a type of facility covered by the ADA, on par with stores and hotels—establishments the \textit{Welsh} court considered traditional public accommodations.\textsuperscript{125} In articulating the public accommodations that the ADA covers, Judge Posner specifically included "electronic space," but also differentiated this space from physical space, leaving open the question of whether electronic space is "physical" space or something else. The \textit{Mutual of Omaha} court relied on \textit{Carparts} to extend its definition of threshold access beyond access to traditional public accommodations,\textsuperscript{126} but in rejecting the plaintiffs' claim also rejected the \textit{Carparts} conclusion that extending threshold access to non-physical accommodations also meant extending threshold access to economic access.\textsuperscript{127}

\textsuperscript{124} Id (emphasis added). The facts of \textit{Mutual of Omaha} do not involve electronic space, and no commentators have attempted to explain why Judge Posner chose to discuss this facet of ADA expansion in this particular case.

\textsuperscript{125} \textit{Welsh}, 993 F2d at 1269.

\textsuperscript{126} See \textit{Mutual of Omaha}, 179 F3d at 559, citing \textit{Carparts}, 37 F3d at 20 (noting that the ADA would be frustrated if did not apply to purchases of goods and services in non-physical instances).

\textsuperscript{127} The Seventh Circuit also reaffirmed the \textit{Mutual of Omaha} decision in another insurance case, \textit{Morgan v Joint Administration Board}, 268 F3d 456 (7th Cir 2001), involving an ADA claim related to a program that granted cost of living increases to regular but not to disability retirees. See id at 457. Only employees, not the public, received the insurance offering in the case, leading the \textit{Morgan} court to recognize that the limited availability of the offering rendered it non-public. See id at 459. Still, the court restated its \textit{Mutual of Omaha} reasoning, noting that "the site of the sale [of insurance] is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services." See id. Although extending threshold access to non-physical establishments in \textit{Mutual of Omaha} and \textit{Morgan}, the Seventh Circuit still may not go as far as to extend the ADA to membership organizations without ties to a physical facility. See \textit{Brown}, 959 F Supp at 499 (holding that an organization sponsoring a bicycle race is not a public accommodation). In \textit{Brown}, access to the service in question, participation in the bicycle race, does not raise the same kind of disparate protection concerns that the \textit{Mutual of Omaha} raised; \textit{Mutual of Omaha} extended threshold access to nonphysical accommodations because the court had concerns about disparate protection between people who made purchased insurance in a physical office and those that made the purchase over the telephone or through the mail. See \textit{Mutual of Omaha}, 179 F3d at 559. \textit{Brown} suggests that even those circuits with an
C. Applying Title II to the Internet in View of ADA Jurisprudence

ADA jurisprudence provides several ways of interpreting the ADA's public accommodations provisions: the Carparts view that the ADA governs economic access to the goods and services of public accommodations;\(^{128}\) the Parker view that the ADA only governs access to physical facilities;\(^{129}\) and the Mutual of Omaha view that, while the ADA only governs threshold access, it includes threshold access to public accommodations in electronic space.\(^{130}\) The Mutual of Omaha view most clearly suggests that the internet could be a public accommodation under Title II, but importantly the opinion does distinguish between “physical space” and “electronic space.”\(^{131}\) For courts following the narrow view that Title II only governs “physical space,” this opinion leaves room to exclude “electronic space” from that definition.

This choice in approaches and the existing circuit split on non-physical locations under the ADA has contributed to a deluge of scholarship on the applicability of the ADA to the internet, with scholars arguing on both sides of the issue.\(^{132}\) However, expansive view of the ADA might continue to hold organizations outside the purview of the ADA.

\(^{128}\) 37 F3d at 19.

\(^{129}\) 121 F3d at 1012–13.

\(^{130}\) 179 F3d at 559.

\(^{131}\) See id.

scholarship analyzing whether internet forums are public accommodations under the ADA analyze this issue in a manner that does not suggest answers to the analogous question in the Title II context.

Commentators arguing for inclusion point to the ADA's broad mandate to eliminate discrimination in many areas of public life, and conclude that the internet should be included as well. Commentators arguing for exclusion also refer to the purposes of the Act to argue the internet should be excluded. Opponents to expansion rely heavily on the Parker determination that the ADA does not regulate economic access. These economic access considerations, however, do not necessarily limit Title II's application to the internet. Even in jurisdictions that exclude insurance offerings from the purview of the ADA (or from Title II), courts trying to apply ADA precedent to the Title II context have a distinct choice. On the one hand, they can analogize discrimination in internet chat rooms and bulletin boards to a denial of equal economic access to a service; treating access to a web site as a service like providing someone with insurance. Alternatively, they can treat internet web sites as physical locations, meaning, like Mutual of Omaha, the ADA and Title II regulate threshold
access to the accommodation.\textsuperscript{136} This is why \textit{Mutual of Omaha}, while rejecting an equal economic access theory, still suggested that courts have the power to regulate threshold access to the internet under the ADA.

How extensively courts will interpret and rely on ADA analysis in addressing internet forums under Title II depends in part on how other courts react to \textit{Mutual of Omaha} and its reasoning. Unfortunately, courts may be slow in resolving this issue; no internet ADA cases have been filed since the AOL case. In addition, many site operators are voluntarily complying with ADA provisions in making their web sites accessible to those with disabilities.\textsuperscript{137} Consequently, while courts and scholars have analyzed much more thoroughly the position of web sites under the ADA than they have Title II, this analysis does not provide many concrete answers in the Title II context.

\section*{III. Purposes of Title II}

This Comment has argued that neither the ADA nor Title II precedent excludes interactive sites from Title II's reach. Furthermore, excluding interactive sites would also undercut one of the central purposes of Title II: to end discrimination in public accommodations affecting interstate commerce.\textsuperscript{138} One can interpret possible purposes of Title II by analyzing its plain language and its legislative history.

\subsection*{A. The Plain Language of Title II: Defining “Place”}

An initial starting point for examining legislative purpose is to look at the wording of the statute.\textsuperscript{139} "When the words of a stat-

\begin{footnotes}
\item[136] See \textit{Mutual of Omaha}, 179 F3d at 559.
\item[137] See Carrie Johnson, \textit{Agencies Act to Ease Use of Internet by Disabled}, Wash Post A23 (Aug 24, 2000) (discussing advances in internet accessibility to the disabled). Patrick Maroney suggested that market forces would keep web sites from becoming accessible unless Congress or the courts stepped in. See 2 Vand J Enter L & Prac at 203 (cited in note 132). So far, however, it appears that government action is largely unnecessary.
\item[138] Civil Rights Act of 1963, HR Rep No 914, 88th Cong, 1st Sess 21 (1963), reprinted in 1964 USSCAN 2494. For a more detailed discussion of the legislative history, see Part III B.
\item[139] See \textit{Richards v United States}, 369 US 1, 9 (1962), quoted in \textit{Welsh}, 993 F2d at 1269 ("[W]e must always be cognizant of the fact that 'the legislative purpose is expressed by the ordinary meaning of the words used.'"). See also Eskridge, Frickey, and Garrett, \textit{Legislation} at 819 (cited in note 17) (discussing the process of statutory interpretation).
\end{footnotes}
ute are unambiguous . . . judicial inquiry is complete."

Title II's plain language, however, does not conclusively include or exclude interactive sites within the definition of public accommodations. As noted earlier, Title II includes "other place[s] of exhibition or entertainment" as public accommodations. An obvious initial question is whether web sites can qualify as "places" under Title II. The statute does not define this term. In addition, internet chat rooms and bulletin boards may not provide exhibition or entertainment, falling outside Title II for that additional reason.

The plain meaning of the word "place," particularly without a statutory definition, is unclear. The Welsh opinion illustrates the vagueness of this word by interchanging the words "structure," "establishment," and "location" to define what it means in Title II. When the statutory meaning of a word is unclear, the Supreme Court frequently looks to a dictionary definition for guidance. For a term as broad as "place," Webster's Dictionary provides multiple definitions for the word "place," from the more specific ("building or locality used for a specific purpose") to the ubiquitous ("specific locality," "physical environment," "physical surroundings," "indefinite region or expanse"). Some of these definitions assume that a "place" must be physical, but others do not.

Even those definitions that assume "places" are physical do not automatically exclude the internet. Several, but not all, of the Webster's definitions also employ the word "physical"—a term employed and manipulated in both ADA and Title II case law.

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140 Connecticut National Bank v Germain, 503 US 249, 254 (1992) (holding that because a statute was silent on the issue of interlocutory appeals, the statute did not limit those appeals).
141 42 USC § 2000a(b)(3). See also Part I A.
142 For a discussion of the internet as a "place," see Part IV A.
143 For a discussion of how to characterize chat rooms and bulletin boards, see Part IV C.
144 See Welsh, 993 F2d at 1269 (using "structure," "location," and "establishment" interchangeably).
145 See, for example, Commissioner v Soliman, 506 US 168, 174 (1993) (confirming common sense definition of "principal" with Webster's definition and holding that a doctor's home office was not his "principal place of business" for tax purposes). For a general discussion, see Note, Looking It Up: Dictionaries and Statutory Interpretation, 107 Harv L Rev 1437 (1994) (discussing the recent popularity of dictionary references in Supreme Court opinions).
147 See id.
148 See, for example, Welsh, 993 F2d at 1269 (recognizing a physical location requirement for Title II); Ford, 145 F3d at 612–13 (the same for the ADA).
According to Webster's, "physical" means "of or belonging to all created existences in nature," or "of or relating to natural or material things as opposed to things mental, moral, spiritual and imaginary." The internet is not part of those things clearly excluded by the definition of the term "physical," but neither is it clearly within the definition. The best conclusion one can draw, interpreting the language's plain meaning, is that Title II does not automatically exclude the internet as a place of public accommodation.

B. Legislative History and the Purposes of Title II

When the text of a statute is unclear, courts look to legislative history to interpret the statute's meaning. The legislative history behind Title II suggests that the internet is the kind of "location" in which Congress intended Title II to prevent discrimination. Congress passed the Civil Rights Act in an era when segregation, discrimination, and the demonstrations against these practices undermined public life in the United States. Legislating in this context, Congress intended Title II, the public accommodations provision of the Civil Rights Act, to end discrimination in public accommodations affecting interstate commerce.

Title II contains an important qualifier: only entities that "affect commerce" are public accommodations. The stated pur-
pose of Title II was to end discrimination in the listed locations as it affected interstate commerce.\(^\text{154}\) Dean Griswold, appearing before the Senate Committee on the Judiciary, explained the connection between the Commerce Clause and discrimination:

Public establishments presently discriminating . . . are enjoying the benefits of access to a participation in commerce. The business of such establishments is fostered and made more profitable because of the advantages afforded them by utilizing these various channels of commerce. However, when the discriminatory practices employed by such establishments lead to demonstrations or boycotts in addition to the humiliation of those subject to discrimination, the economy of our Nation suffers.\(^\text{155}\)

African Americans traveling from state to state, particularly in the South, had limited options of where they could eat and sleep, a simple example of how discrimination hurt interstate commerce.\(^\text{156}\) Discrimination also affected the larger interstate economy because it discouraged industry from moving to the South,
and encouraged skilled workers to relocate to avoid discriminatory treatment. 157

An economic activity must "substantially affect" interstate commerce to fall within the scope of Congress's power to regulate commerce. 158 In American Libraries Association v Pataki, 159 a district court found without much analysis that the internet can fall within the purview of the Commerce Clause. 160 Applying Title II to a particular web site or internet application would require demonstrating that particular application substantially affected interstate commerce, and this Comment does not attempt to define that analysis. However, recognizing that the internet in general has an impact on interstate commerce, and understanding that the enacting Congress intended Title II to combat discrimination affecting interstate commerce, suggests that applying Title II to the internet would serve Title II's broad purpose of combating discrimination.

Cutting against this interpretation is the obvious point that, because the internet did not exist when Congress passed the Civil Rights Act of 1964, the enacting Congress could not have specifically contemplated the internet as a locale in need of regulation to prevent discrimination. 161 Congress likely enumerated hotels, motels, and places of entertainment as public accommodations because these were the key places in which this discrimination

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157 See id.
158 See United States v Lopez, 514 US 549, 560 (1995) (holding that the Commerce Clause did not cover possession of a gun in a school zone because gun possession near a school did not substantially affect interstate commerce). Chief Justice Rehnquist first examined the history of the Commerce Clause in order to clarify the appropriate test, and cites Heart of Atlanta as a valid exercise of the Commerce Clause. See id at 557.
159 969 F Supp 160 (S D NY 1997) (granting a preliminary injunction against the enforcement of a state law criminalizing the use of a computer to transfer obscene material to a minor).
160 Id at 167. The court granted the injunction because the statute interfered with Congress's right under the Commerce Clause to regulate interstate commerce. See id at 169. This is an invocation of the "dormant Commerce Clause" which allows Congress to prevent state regulations affecting interstate commerce from conflicting with one another and interfering with interstate commerce. See id. For a critique of this use of the Commerce Clause in the internet context, see Jack L. Goldsmith and Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L J 785, 786 (2001) (arguing the dormant Commerce Clause does not require invalidation of state internet regulations).
161 Congress's stated purpose in enacting Title II was to "remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." HR Rep No 88-914 at 18, reprinted in 1964 USCCAN at 2393 (cited in note 138).
occurred at the time, and were also focal points of interstate travel.\footnote{162}

In spite of this argument, discrimination on the internet, where found to substantially affect interstate commerce, seems an equally large economic concern in today's economy as concerns in the 1960s about interstate vehicle travel. Limiting public accommodations to traditional places of entertainment rather than all places of entertainment that implicate interstate commerce does not serve the broad purposes of Title II, particularly now when the internet is such a large part of interstate commerce and appears to be gaining economic importance for the future.\footnote{163} This remains true even though some commentators are wary of expanding the internet into existing regulatory structures.\footnote{164} As the \textit{American Libraries Association} court noted: "While no one should lose sight of the inventiveness \[of the internet\], the innovativeness of the technology does not preclude the application of traditional legal principles—provided that those principles are adaptable to cyberspace."\footnote{165}

Given the messy legislative history and the many private deals required to ensure the Civil Rights Act's passage, it is impossible to know exactly what entities the enacting Congress viewed as covered.\footnote{166} Unfortunately, the legislative history does not provide an explanation of the term "other places of exhibition or entertainment," which would be of particular assistance in this Comment's inquiry. Title II's legislative history, importantly, does not preclude the inclusion of chat rooms and bulletin boards as public accommodations.

\footnote{162 These may also be the only accommodations on which Congress could agree; in general, the passage of the Civil Rights Act involved careful compromises and tenuous coalitions. See Charles and Barbara Whalen, \textit{The Longest Debate: A Legislative History of the 1964 Civil Rights Act} 177-92 (Seven Locks Press 1985) (discussing the cautious negotiations and concessions proponents of the Act made to gain the necessary votes to ensure its passage).

\footnote{163} See \textit{ACLU v Reno}, 929 F Supp 824, 830–49 (E D Pa 1996), cited in \textit{Reno v ACLU}, 521 US 844, 849–58 (1997) (discussing at length the large and increasing number of internet users as well as the wide variety of information and communication services available on the internet).

\footnote{164} See Frank H. Easterbrook, \textit{Cyberspace and the Law of the Horse}, 1996 U Chi Legal F 207 (1996) ("Beliefs lawyers hold about computers, and predictions they make about new technology are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace. The blind are not good trailblazers.").

\footnote{165} \textit{American Libraries Association}, 969 F Supp at 167.

\footnote{166} See note 162 and accompanying text.}
IV. THE CASE FOR INCLUSION

The precedent behind Title II is disjointed, and the legislative intent underlying the statute is ambiguously broad. This leaves several other possible tests and lines of analysis to determine whether Title II regulates interactive sites as public accommodations. Under the broad Carparts framework of Mutual of Omaha that ignores the physical/non-physical distinction between accommodations, how one categorizes the internet or the interactive site is irrelevant. A plaintiff only need prove that a site operator has discriminatorily denied a service or a benefit in a way that implicates interstate commerce. Applying the narrower Parker or Welsh frameworks, however, plaintiffs only succeed if they demonstrate that the internet, and by extension the internet spaces that interactive sites control, are physical spaces. This section addresses the Parker and Welsh requirement by examining the general conception of the internet, the particular spaces interactive sites inhabit, and, finally, interactive site bulletin boards and chat rooms as physical locations.

A. The Internet as a Physical Location

Courts face a choice when defining the internet from a location standpoint: they can view the internet as a place, or consider it a medium of communication, analogous to a telephone or a television. Courts have adopted each definition. One can explain this discrepancy, however, through an application-based classification that distinguishes between internet uses, meaning that for some applications the internet serves as a method of communication, and for other applications it serves as a place. Commentators have argued extensively about the approach courts should take to apply existing jurisdictional rules to internet activity.
This debate suggests that while the internet is clearly not the same as a traditional physical space like a stadium or a theater, it should be considered their equivalent for the purposes of regulation.

1. Application-based classification.

Courts issuing opinions in internet-related cases have referred to the internet as both a place and as a form of media. In *Loving v Boren*, the district court denied the plaintiff's request for an injunction prohibiting the University of Oklahoma from blocking access to obscene material on its news server. The court described news groups as "interactive 'places' on the Internet, into which anyone with access, anywhere in the world, may place graphic or text messages." *Reno v ACLU*, which invalidated sections of the Communications Decency Act that prohibited online child pornography, noted that "cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at 'fixed' locations on the Internet." Still, the *Reno* court compared the internet with broadcast media in applying First Amendment standards to the problem of online pornography. The court in *American Libraries Association* also viewed the internet as a "conduit" and found it "analogous to a highway or railroad." The district court determined that the transmission of pornography through e-mail was a form of interstate commerce; the images transferred were "goods" moving in commerce, and the internet connections on which they traveled were the conduit that transported them from state to state.

In their totality, these cases suggest that courts do not classify the internet entirely as either a place or a form of media. Unlike other kinds of media, like the telephone or television, the internet is a generic space that hosts a wide variety of materials

174  Id at 954.
175  Id.
177  See id at 882 (basing their decision on the fact that the provisions were content-based and were facially overbroad).
178  Id at 890.
179  See id at 869–70 (applying standards set forth in cases governing FCC regulations, and specially calling the internet a "medium").
180  969 F Supp at 161, 173.
181  See id at 167.
182  See id at 173.
183  See also Wu, 85 Va L Rev at 1164 (cited in note 171).
2. Jurisdiction-derived arguments that the internet is a “place”: servers and networks.

In the field of personal jurisdiction over internet operators, at least one court has taken the media view of the internet with respect to web-based commerce. This inquiry is analytically distinguishable, however, from the “place” inquiry Title II requires. To determine personal jurisdiction where a party is absent from the forum state, courts must determine if that party had minimum contacts with the forum state. In the internet context, courts examine the level of contact the party created with the forum state through the specific internet application. Jurisdictional rules do not address the question of whether the internet is a location; for jurisdictional purposes, the judicial inquiry focuses on how that internet activity, regardless of whether it took place in an electronic “location,” affected an existing geographic jurisdiction. Thus, the internet can be a medium of contacting the forum state for purposes of jurisdiction, but also a location for other purposes.

Scholarship addressing jurisdictional problems relating to the internet provides strong arguments for classifying internet applications as more than a medium of communication. First,

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184 See Camp and Chien, 30 Computers & Socy at 14 (cited in note 170) (“The Internet is more like physical spaces in that the same generic technology defines things, which are very different—different spaces, locales, media or forums.”).
185 See Wu, 85 Va L Rev at 1193 (cited in note 171) (noting that the “end-to-end” design of the internet allows applications to determine function, ensuring flexibility for the system as a whole).
187 International Shoe Co v Washington, 326 US 310, 316 (1945) (finding minimum contacts existed where a corporation did limited business in the state).
190 See Alexander Tsesis, Hate in Cyberspace: Regulating Hate Speech on the Internet, 38 San Diego L Rev 817, 822–23 (2001) (arguing for the internet as a separate place); Andrew L. Shapiro, The Disappearance of Cyberspace and the Rise of Code, 8 Seton Hall
information accessible through the internet exists in traditional physical space—on a site operator's servers. David Johnson and David Post ascribe a "placeness" to the internet because of this structure; servers store information, giving it permanence, and allow many people to access it at the same time, making it shared.\footnote{191}

Other commentators apply Johnson and Post's idea but explain it differently.\footnote{192} Asaad Siddiqui characterizes the internet as a connected network with a central storage location; it is universal in that no one single person controls it.\footnote{193} Alexander Tsesis argues that the internet is a "real space" because it has characteristics of "space-time."\footnote{194} Applying Tsesis' argument, while two users accessing the same information through a web site are themselves in different physical locations, and the information they access is in yet another location on a server, a space exists where both the two users and the information are located.\footnote{195} That space is "real because [it is] public, accessible to all who have the necessary computer hardware and software, exist[s] at [a] specific time after which [the information] can be retained or deleted, and originate[s] from sources with individual internet addresses."\footnote{196}

A server that stores information accessible through the internet is not the only physical location through which internet activity takes place. The internet is a network of computers and servers, both those of the user and those of the site operator, as well as the conduits that transmit data between the two.\footnote{197} This aggregation of servers, computers, and users fortifies the place argument by creating a larger physical zone of interaction. Ascribing "placeness" to the internet implies that individual web sites on the internet can be thought of as locations within that physical space.

\footnote{191}{Const L J 703, 704 (1998) (arguing against the internet as a place); David R. Johnson and David Post, Law and Borders—the Rise of Law in Cyberspace, 48 Stan L Rev 1367, 1378–79 (1996) (proposing, for the first time, the consideration of the internet as a separate place).}
\footnote{192}{See Johnson and Post, 48 Stan L Rev at 1378–79 (cited in note 190) (arguing that because information exists in different existing jurisdictions, the internet should have its own jurisdiction).}
\footnote{193}{Tsesis, 38 San Diego L Rev at 822–23 (cited in note 190).}
\footnote{194}{See Siddiqui, 14 N Y Intl L Rev at 49 (cited in note 172).}
\footnote{195}{See Tsesis, 38 San Diego L Rev at 822–23 (cited in note 190).}
\footnote{196}{See id.}
\footnote{197}{Id.}
\footnote{198}{See Siddiqui, 14 N Y Intl L Rev at 52 (cited in note 172) (listing potential locations from which to determine jurisdictional location).}
Not all scholars agree with Johnson and Post that the internet has "placeness," but their disagreement stems from their belief that existing bodies of law should govern internet activity rather than creating new legal regimes. That is, they do not accept the view that new legal regimes are needed to resolve potential jurisdictional conflicts. In the case of Title II, applying existing law to internet activity seems to require rather than discourage the perception of "placeness." In order to regulate discrimination through Title II, that discrimination must occur somewhere other than the offices or homes of internet users. This makes the Title II context unique. Internet-based intellectual property regulation, for example, does not require the concept of placeness. Because certain internet applications have elements of placeness, in addition to meeting the other requirements of Title II, even a narrow conception of Title II should regulate them.

B. Interactive Sites As Membership Organizations

Categorizing the internet as a place satisfies the *Parker* test for interactive sites as public accommodations under the ADA. The *Welsh* Title II analysis, however, may require interactive sites to meet additional criteria. Popular interactive sites like AOL, Yahoo! ("Yahoo"), and the Microsoft Network ("MSN") require people to register or "sign up" to access their services. This registration process is arguably a membership application process. If so, these interactive sites only fall under Title II's purview when (1) they are "affiliated with a place open to the public" and (2) "membership in the organization is a necessary predicate to the use of the facility." Put another way, membership organiza-

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198 See Shapiro, 8 Seton Hall Const L J at 704 (cited in note 190) ("This conception [of the internet as place] wrongly implies that online interactions are, or should be, governed by their own body of law."). See also Easterbrook, 1996 U Chi Legal F at 207 (cited in note 165) (arguing that traditional property principles should apply to intellectual property on the internet).
200 Again, assuming that the site operator's activities affect interstate commerce. See *Welsh*, 493 F2d at 1269.
202 See Clegg, 18 F3d at 756.
tions are only public accommodations “when the organization functions as a ‘ticket’ to admission to a facility or location.”

To access their web site, most site operators require visitors to enter a username and password. Membership is therefore a predicate to entrance into the facility, so these interactive sites will almost always meet the second requirement. As long as the internet qualifies as a “place” for Title II purposes, the only remaining inquiry is whether the sites are open to the public, meaning universal eligibility to register and access the site. Private web sites, in contrast, screen those eligible to register and enter. Welsh provides seven factors to determine whether an organization is private rather than public. These factors include: (1) the organization’s selectivity; (2) membership’s control of the organization’s operations; (3) the organization’s history; (4) the use of facilities by nonmembers; (5) the organization’s purpose; (6) whether the organization advertises for members; and (7) whether the organization is nonprofit or for profit.

Of these factors, the most important is the organization’s selectivity. The online registration processes of Yahoo, MSN, and AOL allow anyone to sign up to enter their web sites and receive their services. Parts of AOL’s web site are accessible only to paying customers, but this service is still available to anyone. Registrants do not control these interactive sites have changed their membership requirements since their inception, a traditional indication that they remain public for the purposes of Title II. The purposes of these types of

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204 Welsh, 993 F2d at 1272, citing United States Jaycees v Massachusetts Commission Against Discrimination, 463 NE2d 1151, 1159 (Mass 1984).

205 See, for example, <http://chat.yahoo.com/> (visited Nov 17, 2002); <http://www.aol.com> (visited Nov 17, 2002); <http://login.passport.com> (portal to MSN web site) (visited Nov 15, 2002) [all on file with U Chi Legal F].


207 See Welsh, 993 F2d at 1276.

208 See id (discussing Tillman v Wheaton-Haven Recreation Association, Inc, 410 US 431, 438 (1973), which held that a swimming pool association that essentially allowed every white person within a certain geographic area to join was not a “private club” and therefore was subject to Title II regulation).

209 See, for example, <http://edit.yahoo.com> (visited Nov 17, 2001); <http://register.passport.com> (the sign-on portal to MSN) (visited Nov 17, 2001); <http://www.aol.com> (visited Nov 15, 2002) [all on file with U Chi Legal F].

210 See AOL’s pricing plans, available online at <http://www.aol.com/info/pricing.html> (visited Nov 15, 2002) [on file with U Chi Legal F].

211 The membership of private clubs tend to control the club operations.

212 This requirement seems to protect against sham private organizations, such as organizations that at one time were non-exclusive but abruptly changed to avoid the anti-
interactive sites seem to be to provide access to information and interaction opportunities for a wide group of internet users, a purpose that seems public in nature. Each of these interactive sites advertises for members. Finally, all of these services are for-profit.

Since all the above factors, including the most important factor of selectivity, suggest that these interactive sites are public, interactive sites with these characteristics would have difficulty maintaining the argument that they are private organizations. Consequently, these interactive sites could be public accommodations, insofar that they constitute "places of exhibition or entertainment" under Title II.

C. Categorizing Bulletin Boards and Chat Rooms

After resolving the membership issue, the final question remains whether internet bulletin boards and chat rooms are "places of exhibition and entertainment" under Title II. An analysis of existing precedent suggests that many bulletin boards and chat rooms meet this requirement.

1. Participatory and spectator entertainment.

The Supreme Court has held that a public accommodation falls within the exhibition and entertainment category of public accommodations if it "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." The specific "places of exhibition and entertainment" listed in Title II—motion picture houses, concert halls, theaters, sports arenas, and stadiums—are all places of performances that accommodate the public as spectators. Under the doctrine of ejusdem generis, because the specific places listed are all places associated with spectator entertainment, the gen-

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211 See Welsh, 993 F2d at 1276.
214 Daniel v Paul, 395 US 298, 303 (1969) (holding that a recreational facility with swimming, boating, and miniature golf constituted a place of entertainment under Title II).
eral term "places of entertainment" must be restricted to places of spectator entertainment.\(^{217}\)

Despite this possible narrower interpretation of the types of places of entertainment Title II might cover, courts have had a broader vision of the statute. Participatory entertainment is still covered under this language. The Supreme Court in *Daniel v Paul*,\(^{218}\) in holding that a recreational facility with swimming, boating, and miniature golf was a place of entertainment, specifically rejected the argument that places of entertainment must be places of spectator, rather than participatory, entertainment.\(^{219}\)

2. Avoiding the "social relationships" designation.

This expansion is crucial for internet chat rooms and bulletin boards since these fora are almost entirely participatory. However, this designation makes activity that occurs in internet fora more like mere "social relationships," which the *Welsh* court was careful to exclude as places of public accommodation.\(^{220}\) In dicta, the *Daniel* Court adopted a broad notion of "places of entertainment" as locations that "caus[e] someone's time to pass agreeably."\(^{221}\) This definition is broad almost to the point of being non-descriptive, but it does indicate that courts should interpret "places of exhibition and entertainment" more broadly than the types of places specifically mentioned in Title II.

One can analogize chat rooms and bulletin boards to traditional physical settings where people meet to mingle with one another, places like bars, restaurants, dance clubs, and coffee houses. Courts have held bars to be public accommodations under Title II, either under the restaurant classification where they serve a significant amount of food,\(^{222}\) or as places of entertainment, particularly where they contain specific sources of entertainment like a jukebox or a shuffleboard table.\(^{223}\) This same rea-
sioning would include dance clubs or coffee houses under Title II if they included musical mechanical entertainment devices.\textsuperscript{224}

This line of cases also suggest a liberal definition of "place of exhibition or entertainment," but that definition may still exclude internet chat rooms and bulletin boards. Whether a facility is determined to be a place of exhibition of entertainment seems to turn on the presence of specific devices or items that entertain patrons, rather than the accommodation as an opportunity for patrons to interact through conversation alone. In \textit{United States v Baird},\textsuperscript{225} for example, the court held a convenience store to be a place of entertainment under Title II solely because the store housed two video game machines.\textsuperscript{226} Defending this holding, the court noted that the games have a decisive impact on the use of the space because "[p]eople are less likely to stay in a store and talk to each other, if there is nothing to do there but buy convenience food and sundries, than if there are games to play."\textsuperscript{227}

Internet chat rooms and bulletin boards allow users to communicate in particular environments that are places of entertainment. Some interactive sites allow users to express their thoughts using stylized script, or to express their feelings using special icons that indicate emotion.\textsuperscript{228} These innovations may make the interactive site different from a physical structure that merely offers people a physical space in which to communicate. Still, \textit{Baird} suggests that the interactive sites that stand the best chance of categorization as places of entertainment are those that combine chat rooms or bulletin boards with specific entertainment options, such as those allowing users to play online games and chat with their opponents at the same time.\textsuperscript{229} As technology improves, internet chat rooms and bulletin boards will likely become more interactive, contain more specialized elements for par-

\begin{footnotesize}
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    \item See \textsuperscript{id}.
    \item \textsuperscript{85 F3d 450 (9th Cir 1996)}.
    \item See \textsuperscript{id at 453}.
    \item Id.
    \item Many chatroom users, for example, use "emoticons," or special icons that users can display to one another to supplement their typewritten conversations. A list and explanation of common emoticons is available online at \texttt{<http://www.pb.org/emoticon.html>} (visited Nov 15, 2002) [on file with U Chi Legal F].
    \item \texttt{<http://www.games.com>} (visited Nov 15, 2002) is one free interactive site that provides these services to registered users. Numerous gaming web sites also provide chat opportunities. See \texttt{<http://www.diamondclubcasino.com/help/?doc=HELP_PLAY>} (visited Nov 15, 2002) (explaining how to use the website's multiple player and chat functions); \texttt{<http://www.riverboatcasino.com/help/?doc=HELP_PLAY>} (visited Nov 15, 2002) (same); \texttt{<http://www.minivegas.com/help/?doc=HELP_PLAY>} (visited Nov 15, 2002) (same) [all on file with U Chi Legal F]. Other gambling or game sites likely provide similar services.
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participants to use in interacting with one another, and, in short, may become more entertaining.

CONCLUSION

In seeking to make a claim under Title II against a site operator, plaintiffs like Mr. Noah face an uphill battle. First, such plaintiffs must argue that their interactive sites are locations rather than services or media. Second, they must demonstrate that the interactive site is a public rather than a private entity. Third, they must prove that their interactive site is a “place of entertainment” under Title II.

The decision to expand Title II to cover interactive sites would mean viewing the purposes of Title II broadly in light of its legislative history. A court must either disregard Welsh’s application in the internet context, or accept the concept of the internet as the equivalent of physical space for purposes of Title II. A court also must maintain an open view of the way in which chat rooms and bulletin boards entertain their users. Title II precedent and the statute’s plain meaning and legislative history support these conclusions, but an adoption of this view is not imme-
diately obvious. Still, to the extent that interactive sites discriminate against users in internet spaces that are Title II public accommodations, courts should allow Title II claims to combat such discrimination.

It should also be noted that Mr. Noah is not the typical plaintiff, and has a more difficult case to make than another plaintiff who had, for example, been denied access to a chat room altogether because of her religion. Factually, demonstrating discrimination in access seems easier to prove than the disparate monitoring claim Noah brings; he claims that the behavior of other users, and subsequently AOL’s failure to regulate their behavior, denied him equal enjoyment of AOL’s public accommodation. See Complaint, Noah v AOL Time Warner, Inc, Civil Action No. 01-1342-A at *36. Courts may not be sympathetic to these kinds of claims where the underlying discrimination is an site operator’s failure to filter out objectionable content. Consider Evans v Harry’s Hardware, Inc, 2001 WL 1190987 (E D La). In Evans, a customer of a hardware store allegedly shouted racial epithets and threats at another customer, and the manager failed to intervene. See id at *1. In addition to dismissing the plaintiff’s claim because hardware stores are not covered under Title II, the court expressed skepticism that the owner’s conduct constituted “denial of full and equal enjoyment of the subject hardware store’s goods and services.” Id at *3.