

**SEPARATION ANXIETY: REDEFINING THE CONTOURS OF  
THE “NEXUS” APPROACH UNDER TITLE III OF THE  
AMERICANS WITH DISABILITIES ACT FOR HEAVILY  
INTEGRATED BUT SEPARATELY OWNED WEBSITES AND  
“PLACES OF PUBLIC ACCOMMODATION”**

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I. INTRODUCTION

In 2012, Hurricane Sandy left millions of households and commercial entities disconnected from the Internet in the midst of overwhelming power outages.<sup>1</sup> Loss of access to the World Wide Web is a significant hindrance today given society’s increased reliance on technology.<sup>2</sup> But each and every day, countless individuals like Karen Beth Young constantly face their own version of inaccessibility for another reason—the Internet is an imperfect technology that is often at odds with their particular disabilities.<sup>3</sup> While the Americans with Disabilities Act (ADA) is a vital tool for combating disability discrimination,<sup>4</sup> “Title III has been less successful than was originally

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<sup>1</sup> Joe Van Brussel, *Hurricane Sandy Power Outages Send New Yorkers Streaming North in Search of Current*, HUFFINGTON POST (Oct. 30, 2012, 7:04 PM), [http://www.huffingtonpost.com/2012/10/30/hurricane-sandy-power-outages-new-yorkers\\_n\\_2046187.html](http://www.huffingtonpost.com/2012/10/30/hurricane-sandy-power-outages-new-yorkers_n_2046187.html).

<sup>2</sup> Stephanie Khouri, *Welcome to the New Town Square of Today’s Global Village: Website Accessibility for Individuals with Disabilities after Target and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331, 342 (2010) (“In today’s society, it is hard to imagine a world without the Internet.”); Rick Newman, *10 Things We Can’t Live Without*, U.S. NEWS & WORLD REP. (May 18, 2010, 5:35 PM), <http://money.usnews.com/money/blogs/flowchart/2010/05/18/10-things-we-cant-live-without> (“In a Pew Research Center survey from last year, high-speed Internet was one of only three things people said was more of a necessity in 2009 than in 2006.”).

<sup>3</sup> See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

<sup>4</sup> LINDA HAMILTON KRIEGER, *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 299 (Univ. of Mich. Press 2003) (“The ADA creates an expansive antidiscrimination mandate.”).

hoped.”<sup>5</sup> Congress and the courts have been unable to agree on a standard for determining Title III’s applicability to the Internet at a time where litigation involving web-based businesses is on the rise, demonstrating Title III’s fragility.<sup>6</sup>

Differing interpretations of the statutory language itself fuel the uncertainty surrounding Title III’s applicability to the Internet.<sup>7</sup> Title III aims to prevent discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>8</sup> Courts specifically disagree as to whether the term “place of public accommodation” includes virtual spaces that affect commerce<sup>9</sup> and at what point, if at all, a website becomes a service of a place of public accommodation.<sup>10</sup>

Courts must resolve such questions in order to implement Title III’s purpose—to ensure access to places of public accommodation—because, for some disabled persons, closing a virtual door may have the effect of completely denying access to the accommodation.<sup>11</sup> The

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<sup>5</sup> Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 379 (2000).

<sup>6</sup> WILLIAM D. GOREN, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT 131 (Am. Bar Ass’n, 3d Ed. 2010) (“The question of how Title III of the ADA applies to the Internet is not going to go away, especially as e-commerce takes over all of our lives.”); see also *infra* note 95 and accompanying text. Compare *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) (finding Title III applicable to inaccessible website as a service of a place of public accommodation), with *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (finding Title III not applicable to inaccessible website as a place of public accommodation itself due to its virtual, as opposed to physical, nature).

<sup>7</sup> See generally Jonathan R. Mook, *Mook on the ADAs Application to the Internet*, 2008 EMERGING ISSUES 1780 (2008) (discussing the development of case law regarding Title III’s applicability to the Internet and comparing various court interpretations of Title III’s statutory language from such cases).

<sup>8</sup> 42 U.S.C. § 12182(a) (2006).

<sup>9</sup> Under Title III, a public accommodation is a private entity whose operations affect commerce. *Id.* § 12181(7).

<sup>10</sup> *E.g.*, *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d 946.

<sup>11</sup> MARGARET C. JASPER, THE AMERICANS WITH DISABILITIES ACT 25 (Oceana Publ’ns 1998) (“Businesses which have more than one public entrance must provide at least one accessible entrance during business hours.”); Colker, *supra* note 5, at 402 (emphasis added) (“The purpose of ADA Title III, however, was to remedy the lack of access to places of public accommodation by individuals with disabilities.”); Ryan Campbell Richards, *Current Issues in Public Policy: Reconciling the Americans with Disabilities Act and Commercial Websites: A Feasible Solution?*, 7 RUTGERS J.L. & PUB. POL’Y 520, 522 (2010) (“The Americans with Disabilities Act requires universal access to places of public accommodation and their respective services.”). A retailer with an inaccessible website may indeed close all doors to a disabled consumer who is attempting to make purchases when the physical entrance to a brick-and-mortar

ADA strives to address day-to-day discrimination and integrate the disabled into the “economic and social mainstream.”<sup>12</sup> Commerce, however, has evolved concurrently with technology, such that the Internet is now the most pervasive method of communication for both social networking and business.<sup>13</sup> Therefore, courts must settle the issue of Title III’s applicability to the Internet in order to ensure that the *way* in which an entity engages in commerce does not determine whether a disabled customer can access its goods and services.<sup>14</sup>

Over the years, courts have developed a plethora of case law

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store is closed. Khouri, *supra* note 2 (“It is clear the retail industry relies a great deal on its websites.”). There is a question as to what may constitute business hours when a retailer has a website because consumers can make purchases on a retailer’s website at all hours of the day. *Id.* Courts must resolve the questions surrounding Title III’s applicability to the Internet because the ADA is an important—and often the only—avenue of relief for disabled individuals. Colker, *supra* note 5, at 380 (“Although state law can sometimes serve as a remedial gap filler . . . that result has not occurred under ADA Title III.”).

<sup>12</sup> H.R. REP. NO. 101-485(II), at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381; 42 U.S.C. § 12101(b)(1) (2006) (“It is the purpose of this Act to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”); *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 792–93 (8th Cir. 2009) (alteration in original) (citation omitted) (internal quotation marks omitted) (“[The ADA] is to be accorded a liberal construction in order to carry out the purposes of Congress to eliminate the inconvenience, unfairness and humiliation of . . . discrimination.”). There is also a significant public policy consideration that exemplifies the ADA’s mandate for adequate communication capacity. *Martin v. Metro Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362, 1383 (N.D. Ga. 2002) (emphasis added) (“The ADA embodies a national policy that encourages *self-reliance and self-sufficiency*.”). While *Martin* is a Title II case, the court clearly saw a need to require better accommodations to the public. *See id.*

<sup>13</sup> *See supra* note 2. Facebook is a prime example of a dominant method of communication today for social networking and also for commerce—now with its own “virtual currency.” *See infra* notes 29, 102. While Facebook’s social networking platform is the primary driving force behind its stellar reputation, the company now profits from advertising and from selling its “Facebook Credits.” *See discussion infra* Part II.D.2. There is a question as to whether, for Title III purposes, a website with social influence carries the same weight as one with commercial influence; the answer is that Facebook penetrates both virtual and physical walls and therefore at least warrants the consideration that it is significant enough to come under Title III’s reach. *See Facebook Info. Mission Statement*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Jan. 27, 2012) (“Facebook’s mission is to give people the power to share and make the world more open and connected.”).

<sup>14</sup> The term “commerce” includes “communications.” § 12181(1). Title III prevents the escape of liability “through contractual, licensing, or other arrangements,” and “prohibit[s] a public accommodation [from] doing indirectly through a contractual relationship what it may not do directly.” *Id.* § 12182(b)(1)(A)(i) (alteration in original). Facebook could be an example of a virtual entity that attempts to escape liability because it authorizes retail stores to sell gift cards that purchasers can only use on its website. *See discussion infra* Part II.D.

regarding Title III's applicability to the Internet with two prominent arguments ultimately emerging.<sup>15</sup> The first—and more hotly contested—argument is that the Internet is a place of public accommodation irrespective of its virtual nature because its operations often affect commerce.<sup>16</sup> Courts, however, disagree as to whether Title III's public-accommodation provision is limited in its coverage to only physical places; this debate is currently unresolved.<sup>17</sup> This Comment will not address that issue, and will therefore define a place of public accommodation as a “place” in the physical sense.<sup>18</sup>

The second argument—this Comment's focal point—is an alternative to the first that involves the application of the “nexus” approach to websites.<sup>19</sup> Under this argument, a plaintiff can

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<sup>15</sup> *E.g.*, *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d 946 (considering whether a website can be a service of a place of public accommodation); *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (considering whether a website can itself be a place of public accommodation).

<sup>16</sup> *E.g.*, *Access Now*, 227 F. Supp. 2d 1312 (plaintiff arguing southwest.com itself to be a place of public accommodation because it is a virtual space whose operations affect commerce); *see also* *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994).

<sup>17</sup> § 12181(7). *Compare Carparts*, 37 F.3d at 19 (placing weight on the fact that Title III's drafters included “travel services” among the enumerated list of public accommodations along with “service establishments,” demonstrating the inclusion of service providers that do not require the physical presence of a consumer), *and* *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, No. 11-CV-30168, 2012 U.S. Dist. LEXIS 84518, at \*9–11 (D. Mass. June 19, 2012) (relying on *Carparts* and finding a “Watch Instantly” video-streaming website to be a Title III place of public accommodation as either a service establishment, place of entertainment, or a rental establishment that provides services in the home), *with Access Now*, 227 F. Supp. 2d at 1318 (finding congressional intent to be clear that Title III governs only physical places of public accommodation given the comprehensive definition of a public accommodation). This Comment may utilize certain aspects of this argument, when appropriate, to further the question presented. For an overview of the debate between physical and virtual places under Title III, *see generally* Jeffrey Bashaw, *Applying the Americans with Disabilities Act to Private Websites after National Federation of the Blind v. Target*, 4 SHIDLER J.L. COM. & TECH 3 (2008); Isabel Arana DuPree, *Websites as “Places of Public Accommodation”: Amending the Americans with Disabilities Act in the Wake of National Federation of the Blind v. Target Corporation*, 8 N.C. J.L. & TECH. 273 (2007).

<sup>18</sup> Both the Northern District of California and the Southern District of Florida have declared that a place of public accommodation must be a physical structure. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011); *Earll v. eBay, Inc.*, No. 5:11-cv-00262-JF, 2011 U.S. Dist. LEXIS 100360 (N.D. Cal. Sept. 7, 2011); *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d 946; *Access Now*, 227 F. Supp. 2d 1312.

<sup>19</sup> Plaintiffs can use the “nexus” argument as an alternative route because it does not ask whether the Internet itself is a public accommodation. *E.g.*, *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d 946. While some legal scholars advocate for different approaches to determine Title III's applicability to the Internet, this Comment will

demonstrate a violation of the ADA on the basis of unequal access to services by establishing a “nexus” between the challenged service and a place of public accommodation.<sup>20</sup> *National Federation of the Blind v. Target Corp.* is the seminal case that extends this approach to websites.<sup>21</sup> *Target* represents the scenario of a single entity that owns two spaces—one virtual and one physical—where the former is noncompliant with ADA standards while the latter is compliant with such standards.<sup>22</sup> The *Target* court’s ruling establishes that an inaccessible website can be a service of a place of public accommodation if it is “heavily integrated” with, or acts as a gateway to, the place.<sup>23</sup> The term “integration” is a source of lucidity because

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not address such arguments. For an analysis of the efficiency of such proposals, compare Nikki D. Kessling, *Why the Target “Nexus Test” Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites are “Places of Public Accommodation,”* 45 HOUS L. REV. 991 (2008), with Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963 (2004).

<sup>20</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 952. The “nexus” approach applies Title III to intangible barriers pursuant to the language “services of,” as opposed to “services in,” a place of public accommodation. 42 U.S.C. § 12182(a) (2006). A plaintiff seeking to establish a Title III claim must also generally establish three elements. *Id.*; *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008). The first is the demonstration of a disability within the meaning of the ADA. 42 U.S.C. § 12102(2)(A) (2006) (“The term ‘disability’ means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual.”). The second, and most relevant for this Comment’s purpose, is that the defendant owns, leases, or operates a place of public accommodation. § 12182(a). The third is that the defendant created discriminatory conditions through the denial of the full and equal opportunity to enjoy or participate in the services it provides. *Id.*; *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1286 (11th Cir. 2002); *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949.

<sup>21</sup> 452 F. Supp. 2d 946 (N.D. Cal. 2006); 4 IAN C. BALLON, E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS § 48.06[4] (2d ed. Supp. 2011), available at Westlaw ECOMMINTLAW (“Although *Target Corp.* was merely a district court decision . . . the case nonetheless has sparked similar suits in the Northern District of California and been influential in encouraging companies to make their sites accessible to disabled users.”); see also discussion *infra* Part II.B. While *Access Now* came before *Target*, it did not extend application of the “nexus” approach to websites; rather, *Access Now* is a critical decision for determining whether the Internet itself can be a place of public accommodation. See *Access Now, Inc. v. Southwest Airlines, Co.*, 385 F.3d 1324, 1328 (11th Cir. 2004) (plaintiffs raising “nexus” argument for the first time on appeal, and, thus, preventing the court from considering the argument due to its limited scope of review); see also discussion *infra* Part II.A.3.

<sup>22</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949–950. Before cases like *Target*, Title III litigation typically involved only one space—a noncompliant physical place of public accommodation. See discussion *infra* Part III.A.2.

<sup>23</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 954–55. Websites create a form of intangible discrimination, meaning that the website either creates a separate benefit for those able to access it, or prevents enjoyment or usage, of the goods or services of

it allows Title III liability to reach noncompliant virtual spaces that act as a doorway to a physical space.<sup>24</sup> But, at the same time, the term is also a source of confusion because the court did not provide concrete instructions for applying the “nexus” approach to future Internet cases.<sup>25</sup>

While *Target* allowed Title III to reach a noncompliant virtual space that the retailer owned and operated, the court did not anticipate that a noncompliant virtual space may well be integrated with a *separately* owned compliant physical space<sup>26</sup>—until recently.<sup>27</sup> In 2011, Karen Beth Young presented the United States District Court for the Northern District of California, the same jurisdiction that decided *Target*, with an opportunity to revisit the “nexus” approach in such a situation.<sup>28</sup> Young, a disabled individual, brought a Title III claim against Facebook, Inc. alleging that the company unlawfully deactivated her account and prevented her from interacting with society using the most pervasive method of communication today—facebook.com.<sup>29</sup> She was so adamant to resolve her dilemma that she drove from her home in Maryland to Facebook’s headquarters in

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a place of public accommodation. § 12182(a), (b)(1)(A).

<sup>24</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 956; see discussion *infra* Part II.B.

<sup>25</sup> DuPree, *supra* note 17, at 290–91; see also discussion *infra* Part II.C.

<sup>26</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949. The *Target* court came close to recognizing such a scenario when it allowed Title III to reach a noncompliant virtual space that acted as a “door” to a compliant physical place of public accommodation; however, the critical difference is that Target Corp. had unitary ownership and control of both spaces. *Id.* (“Target.com is a website owned and operated by Target.”); see also *infra* Figure 1. This distinction is important because while the “nexus” approach and the term “integration” are judicially created mechanisms, Title III still statutorily requires a defendant to have some form of ownership, leasing, or operation of a place of public accommodation. § 12182(a).

<sup>27</sup> The *Young* court may have had this exact scenario before it; however, the court dismissed the claim without assessing the merits of the “nexus” argument. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115–16 (N.D. Cal. 2011). This scenario has continued to recur throughout the years 2011 and into 2012, resulting in ongoing Title III litigation. See *infra* note 95 and accompanying text; discussion *infra* Part II.E.

<sup>28</sup> *Young*, 790 F. Supp. 2d at 1115. The great majority—or possibly the totality—of Title III cases implicating questions of ownership, leasing, or operation have not involved the Internet and the application of the “nexus” approach. See *infra* note 36. Prior to *Young*, Title III website cases did not implicate issues of ownership. *E.g.*, *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949 (“Target.com is a website owned and operated by Target.”).

<sup>29</sup> *Young*, 790 F. Supp. 2d at 1114–16; see also Jessica Guynn, *Facebook Hits 1 Billion Users, Reaching Historic Milestone*, LOS ANGELES TIMES (Oct. 4, 2012), <http://articles.latimes.com/2012/oct/04/business/la-fi-tn-facebook-hits-historic-milestone-1-billion-users-20121004> (“Facebook has hit the biggest milestone in the company’s eight-year history: 1 billion users.”).

California, and then appeared *pro se* in her Title III suit against the billion-dollar company.<sup>30</sup> Young argued that a “nexus” existed between the noncompliant Facebook website and various compliant brick-and-mortar stores because Facebook advertised and provided its gift cards, which purchasers could only redeem online for the virtual currency “Facebook Credits,” through such stores.<sup>31</sup> Ultimately, the court dismissed the claim without reaching the merits of this ‘integration’ argument because the plaintiff had not asserted Facebook’s ownership, leasing, or operation of a place of public accommodation.<sup>32</sup>

*Young*, however, sets the stage for this Comment’s question presented: can a “nexus” exist under Title III of the ADA between a noncompliant website and a separately owned place of public accommodation when the website and the physical space are heavily integrated, and the website’s inaccessibility prevents full and equal enjoyment of the goods its company provides through that physical place?<sup>33</sup> This question remains important because Title III litigation

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<sup>30</sup> *Young*, 790 F. Supp. 2d at 1114. It is quite likely that Young’s *pro se* status played a factor in the court’s dismissal of her Title III claim because she “failed to assert” a particular argument. *Id.* at 1116. Studies have shown that plaintiffs are bringing meritorious Title III claims, but *pro se* litigants appear to be disadvantaged as they lack the required legal knowledge and resources to pursue such actions. *E.g.*, Jaime A. Eagan, *The Americans with Disabilities Act: An Empirical Look at U.S. District Court Litigation Involving Government Services and Public Accommodations Claims* (June 23, 2011), available at <http://ssrn.com/abstract=1870601> (2007 study of U.S. District Court ADA litigation showing that while 11% of such suits are brought by *pro se* litigants, over half of those were dismissed without meaningful adjudication because *pro se* plaintiffs lacked the “legal knowledge and resources to assist them in properly serving litigation forms”). The *Target* plaintiffs were more fortunate because advocacy organizations and their counselors are generally much more successful in such suits. *See Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 948. This disparity in Title III litigation results demonstrates the need to protect *pro se* plaintiffs. *See, e.g., Young*, 790 F. Supp. 2d 1110.

<sup>31</sup> *Young*, 790 F. Supp. 2d at 1114; Am. Compl. for Injunctive Relief and Damages for Violations of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., Cal. Disabled Person Act, Cal. Civ. Code 54 et seq., Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, and Negligence at 2, 5, *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (No. 5:10-cv-03579-JF/PVT), 2010 U.S. Dist. Ct. Pleadings LEXIS 7820, at \*2–3, 9 (Dec. 10, 2010) [hereinafter Amended Complaint].

<sup>32</sup> *Young*, 790 F. Supp. 2d at 1116.

<sup>33</sup> Courts have traditionally applied the “nexus” approach to a retailer that owns and operates a website as opposed to a web-based retailer. Michael P. Anderson, *Ensuring Equal Access to the Internet for the Elderly: The Need to Amend Title III of the ADA*, 19 ELDER L.J. 159, 180 (2011) (alteration in original) (“[T]he ‘nexus’ test applies Title III of the ADA only to a website inasmuch as it denies one the full use and enjoyment of a brick-and-mortar store, thereby leaving out large web-only retail websites . . .”). This Comment examines a scenario similar to *Target* whereby a

continues to persist against major web-based companies like Netflix in 2011<sup>34</sup> and Redbox in 2012.<sup>35</sup> In some ways, this question is a modern twist on an old problem because courts have previously extended Title III liability for a noncompliant physical space to a non-owning entity through “operation”—a required but undefined term under the ADA.<sup>36</sup> But web-based companies create a unique form of discrimination where a virtual space’s noncompliance can penetrate a store’s once insurmountable bricks and mortar<sup>37</sup>—even if separately owned.<sup>38</sup> Like the term “discrimination,” the word “place” is a term of art that should embrace distinctive theories, such as defining a company’s “operation” of a place in such a way to reflect the existence of web-based entities—many of which have a physical

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physical space is compliant but a virtual space is noncompliant; however, this Comment deviates from *Target* in that each space is separately owned but appears to be heavily integrated.

<sup>34</sup> See *infra* note 95.

<sup>35</sup> Vic Lee, *Redbox Sued Over Access for Visually Impaired*, AMERICAN BROADCASTING COMPANY (Jan. 12, 2012), available at <http://abclocal.go.com/kgostory?section=news/business&id=8503401>; see discussion *infra* Part II.E.

<sup>36</sup> *E.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 665 (2001) (finding Title III applicable to four-day golf tours operated on golf courses that third parties own); *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 874 (9th Cir. 2004) (finding private groups staging a rodeo in a publicly owned arena for a limited time to be “operators” of the arena under Title III); see also *infra* Figure 1. Although Title III requires “operation,” the ADA has not assigned an explicit meaning to the term. *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995); *Dahlberg v. Avis Rent a Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1102 (D. Colo. 2000); see also KRIEGER, *supra* note 4, at 299 (“Many key definitions in the act are left open-ended.”). Lack of a definition has forced courts to scrutinize specific facts of each case to determine whether the particular defendant is an operator. See, e.g., *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 966 (9th Cir. 2006) (determining whether store owner was “operator” of a grassy strip and sidewalk that the city owned); *Disabled Rights Action Comm.*, 375 F.3d at 878; *Neff*, 58 F.3d at 1066 (determining whether franchisor retained sufficient control over franchisee ice cream stores to be an “operator” under Title III); *Dahlberg*, 92 F. Supp. 2d at 1102 (determining whether car-rental company operated facility during the time of the alleged discriminatory conduct); *United States v. Days Inns of Am., Inc.*, 22 F. Supp. 2d 612 (E.D. Ky. 1998) (determining whether franchisor was an “operator” for failure to make necessary hotel repairs); *Reed v. YMCA USA*, No. 3:07-0765, 2008 U.S. Dist. LEXIS 119311 (M.D. Tenn. July 22, 2008) (deciding whether franchisor exercised enough control over franchisees by examining organization documents and involvement in wrongful conduct).

<sup>37</sup> *E.g.*, *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) (finding retailer-companion website’s inaccessibility to affect blind customers’ ability to print out coupons for store usage, order photos for store pick-up, or access information on different store locations).

<sup>38</sup> *E.g.*, *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (plaintiff alleging that Facebook membership account deactivation affected her ability to redeem the value of Facebook Credit gift cards that consumers can purchase in brick-and-mortar retail stores).

presence in a place of public accommodation.<sup>39</sup> Indeed, several web-based companies like Redbox have developed a physical presence in separately owned brick-and-mortar retail stores by offering their products or services through a specific part of the stores—like a kiosk.<sup>40</sup> These companies' websites create a separate benefit, for those able to access it, or prevent full enjoyment of the goods and services that such companies offer through places of public accommodation—even when separately owned.<sup>41</sup> Therefore, courts should construct a definition for the term “operates” to allow for the extension of the “nexus” approach to web-based entities in order to avoid new analytical difficulties under Title III.<sup>42</sup>

To provide an answer to the question presented, this Comment will discuss how courts should define the concepts of “integration” and “operation,” and the weight that courts should place on them when analyzing the sufficiency of a proposed “nexus” test in Title III website litigation. This Comment proposes the “Backdoor Nexus”, which is a two-fold approach.<sup>43</sup> First, courts should utilize a totality of the circumstances method, including the *Target* factors, to define the minimum degree of “integration” that the “nexus” approach requires between a website and a public accommodation.<sup>44</sup> Second, courts

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<sup>39</sup> TIMOTHY P. GLYNN, RACHEL ANROW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW PRIVATE ORDERING AND ITS LIMITATIONS 509 (Aspen Publishers, 2d Ed. 2011) (“Indeed, discrimination is a term of art that embraces several different definitions, each with its own distinctive theory and methods of proof.”). Another related concern is how much courts should actually emphasize this “operation” element in cases where the disabled plaintiff is seeking to mandate an inaccessible website’s compliance with Title III by establishing a “nexus” to a public accommodation—especially when common ownership is lacking. *See, e.g., Young*, 790 F. Supp. 2d at 1116.

<sup>40</sup> *Media Center Facts About Redbox*, REDBOX, <http://www.redbox.com/facts> (last visited Jan. 27, 2012) (alteration in original) (“More than 68 percent of the U.S. population [lives] within a five-minute drive of a Redbox kiosk . . . .”); *see also infra* note 165; discussion *infra* Part II.E.

<sup>41</sup> *See* discussion *infra* Part IV.B.

<sup>42</sup> *See, e.g., Young*, 790 F. Supp. 2d 1110; *see also* discussion *infra* Part III.A.

<sup>43</sup> The Comment has elected to use the name “Backdoor Nexus” for two reasons. First, a physical door to a brick-and-mortar store and a heavily integrated companion website, like *target.com*, are the indisputable ways in which the owner of the establishment desires its customers to access the store. A separately owned website that nonetheless affects the goods or services within a brick-and-mortar store can act as a doorway, but the establishment owner neither controls the site nor anticipates its customers to use it; hence, the site is a backdoor. Second, the term “backdoor” in a computer system refers to a method in which the user attempts to bypass normal authentication while trying to remain undetected—something fitting for the Internet context.

<sup>44</sup> *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 946, 949 (N.D. Cal. 2006); *see* discussion *infra* Part III.B.1.

should define the term “operates”—or re-interpret Title III’s public-accommodation provision—such that a web-based company with a physical presence in a separately owned place of public accommodation can operate that place for Title III purposes.<sup>45</sup> The “Backdoor Nexus” approach will ultimately draw a firm distinction between companies like Facebook with only a virtual presence, which do not satisfy the approach, and companies like Redbox with a physical presence in a place of public accommodation, which do satisfy the approach.<sup>46</sup>

Part II of this Comment will provide an overview of “integration” and the “nexus” approach, including a discussion of the similarities between *Target* and *Young* and the potential complications of applying the “nexus” approach to a business entity like Redbox. Part III will examine the ways that courts have defined the term “operation” in other contexts in order to set out the concepts that the “Backdoor Nexus” approach incorporates, as well as the approach’s framework itself. Part IV will illustrate the framework’s application using the business structures of *Target*, Redbox,<sup>47</sup> and *Young*.<sup>48</sup> Part V will conclude.

## II. OVERVIEW OF “INTEGRATION” AND THE “NEXUS” APPROACH

This section will examine the “nexus” approach’s development, specifically “integration,” beginning with early decisions applying it in other contexts. A discussion of *Target*’s extension of the approach to websites and the resulting ambiguities will follow, as well as an assessment of *Young*, the potential ramifications of a 2012 Redbox Title III suit, and the reasons that courts must address “integration” in Title III website litigations.

### A. *The “Nexus” Approach Before Target*

While *National Federation of the Blind v. Target Corp.* was the

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<sup>45</sup> See 42 U.S.C. § 12181(7) (2006). The Supreme Court has argued for liberal construction of public accommodations under the ADA. Leah Poynter, *Setting the Standard: Section 508 Could Have an Impact on Private Sector Web Sites Through the Americans with Disabilities Act*, 19 GA. ST. U.L. REV. 1197, 1222 (2003). This Comment’s proposed solution will consider whether an entity can operate a separately owned place of public accommodation based on its presence in that place, or the fact that it offers services through that place. See discussion *infra* Part III.B.2.

<sup>46</sup> See discussion *infra* Parts IV.B–C, V.

<sup>47</sup> Redbox is a seminal example of a scenario involving a web-based company with a physical presence in a separately owned place of public accommodation. See discussion *infra* Parts II.E, IV.B.

<sup>48</sup> *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

landmark case that extended the “nexus” approach to websites, a number of important decisions preceding it were critical in shaping the analysis.<sup>49</sup>

### 1. Sufficiency of “Integration” under *Stoutenborough*

In 1995, the Sixth Circuit considered whether a “nexus” existed between televised broadcasts of National Football League (NFL) games, which the NFL blacked out when fan attendance was below a certain level, and the football stadiums where teams actually played the games.<sup>50</sup> The Sixth Circuit found that the Title III claim failed for two reasons.<sup>51</sup> First, the service was not discriminatory because the NFL blacked out the broadcasts to both hearing-impaired and hearing-able persons.<sup>52</sup> Second, while viewers could watch the broadcasts on a television in a place of public accommodation and the broadcasts were “certainly offered *through* defendants, [they were] not offered as a *service of* [any] public accommodation”<sup>53</sup> The court clarified that Title III only covers the services “which the public accommodation offers, not [those] which the lessor of the public accommodation offers . . . .”<sup>54</sup>

*Stoutenborough* provides a critical aspect of “integration,” which is the importance of establishing a connection between a challenged service’s functions and a particular place of public accommodation regardless of who is offering the service.<sup>55</sup> The mere fact that a particular defendant leases a place of public accommodation and also happens to provide a specific service is insufficient to establish a “nexus”; rather, the service must somehow exemplify that physical place’s purpose.<sup>56</sup> Therefore, a sufficient degree of “integration” requires something more than a televised broadcast, which viewers can watch in one place of public accommodation, of a game that a

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<sup>49</sup> See *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 953–54 (discussing previous decisions where courts considered the connection between challenged services and places of public accommodation).

<sup>50</sup> *Stoutenborough v. Nat’l Football League*, 59 F.3d 580, 581–82 (6th Cir. 1995).

<sup>51</sup> *Id.* at 582–83.

<sup>52</sup> *Id.* at 582.

<sup>53</sup> *Id.* at 583 (alteration in original) (emphasis added).

<sup>54</sup> *Id.* (alteration in original).

<sup>55</sup> *Id.*

<sup>56</sup> *Stoutenborough*, 59 F.3d at 583; Anderson, *supra* note 33, at 173 (“The court ruled that although the football game that the plaintiffs wanted to watch was held in a place of public accommodation, the television broadcast was not.”). The Sixth Circuit seemed to contemplate coverage of only tangible barriers; however, this is not the state of the law today. *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

team plays in another place of public accommodation.<sup>57</sup>

## 2. The Inclusion of Intangible Barriers Under *Rendon*

The Eleventh Circuit laid the groundwork for the *Target* court when it held that Title III's coverage extended to *intangible* barriers that created discriminatory conditions.<sup>58</sup> This decision became critical to the "nexus" approach's future applicability to websites because it established that Title III's statutory language plainly and unambiguously covered services that created discrimination from beyond the bricks and mortar of a place of public accommodation.<sup>59</sup> The challenged service in *Rendon v. Valleycrest Prods., Ltd.* was a fast-finger-question telephone-selection process for prospective contestants for the game show "Who Wants to Be a Millionaire."<sup>60</sup> The plaintiffs—who were deaf and had upper-body mobility impairments—were unable to utilize this process to appear on the game show and brought claims alleging discrimination under Title III.<sup>61</sup>

The Eleventh Circuit found that a substantial "nexus" existed between the telephone-selection process and the television studio that housed the game show because the process screened out disabled individuals who sought the privilege of participating in the game show.<sup>62</sup> In arriving at its decision, the court emphasized that an intangible space, like a medium of communication, could create noncompliance with ADA standards when it impaired the right to full and equal enjoyment and participation under Title III.<sup>63</sup> This decision moved courts away from the position that only physical or architectural barriers could create inaccessibility to the goods, privileges, and services of a place of public accommodation, and

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<sup>57</sup> Cf. *Rendon*, 294 F.3d at 1284 (distinguishing *Stoutenborough* and finding a sufficient "nexus" between a telephone-selection process and a television studio where a game show was conducted because the process was an intangible barrier to the *privilege* of competing on the show). For more on assessing the possible degrees of "integration" that can exist, see discussion *infra* Parts II.D–F.

<sup>58</sup> *Rendon*, 294 F.3d at 1283–84. Intangible barriers consist of eligibility requirements or screening criteria that hinder enjoyment and participation—or create a separate benefit—of the goods, services, privileges, etc. of public accommodations. *Id.*; see also 42 U.S.C. § 12182(b)(2)(A)(i)–(iii) (2006).

<sup>59</sup> *Rendon*, 294 F.3d at 1284–86.

<sup>60</sup> *Id.* at 1280. The selection process required prospective contestants to call a specified telephone number and enter responses to a series of pre-recorded questions using the telephone keypads. *Id.*

<sup>61</sup> *Id.* at 1281.

<sup>62</sup> *Id.* at 1286.

<sup>63</sup> *Id.* at 1283–84.

opened the door for the consideration of virtual barriers like the Internet.<sup>64</sup>

### 3. The Indirect Influence of *Access Now*

While *Access Now, Inc. v. Southwest Airlines, Co.* is in some ways the first decision to address Title III's applicability to the Internet, this case is aimed more toward an argument that is not the focus of this Comment.<sup>65</sup> The Southern District of Florida explicitly held that a website cannot itself be considered a place of public accommodation.<sup>66</sup> But the court never considered the "nexus" argument for two reasons.<sup>67</sup> First, it found that there was no physical place of public accommodation to connect to the southwest.com website in issue.<sup>68</sup> Second and more importantly, the plaintiffs did not raise the "nexus" argument until the appeal, and the Eleventh Circuit was unable to consider a new legal theory due to its limited power of review.<sup>69</sup>

Even though *Access Now* fell short of addressing the concept of "integration," paired with *Target*, it creates a spectrum.<sup>70</sup> This spectrum would include *Target* on one end as an example of a retailer-companion website that is fully integrated with a brick-and-mortar store.<sup>71</sup> The plaintiffs' arguments in *Access Now* prevented a

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<sup>64</sup> See Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953–54 (N.D. Cal. 2006).

<sup>65</sup> 227 F. Supp. 2d 1312 (S.D. Fla. 2002). The *Access Now* case is better classified as part of a group of Title III decisions that suggests a broader definition of the term "place of public accommodation." See, e.g., Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999). *Pallozzi* centered on the Second Circuit's consideration as to whether Title III of the ADA regulates insurance underwriting practices. *Id.* at 31. The significance of this decision directly tied into the conception that Title III was "meant to guarantee more than mere physical access." *Id.* at 32; see also Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 20 (1st Cir. 1994).

<sup>66</sup> *Access Now*, 227 F. Supp. 2d at 1317–19; see also DuPree, *supra* note 17, at 291 (discussing how *Target* and *Access Now* are on opposite ends of a continuum with regard to the "nexus" approach).

<sup>67</sup> The court's only reference to the "nexus" approach was a simple acknowledgement of the need for a connection between the service and the place. *Access Now*, 227 F. Supp. 2d at 1320 n.10 (emphasis added) (citations omitted) (internal quotation marks omitted) ("[S]ome connection between the good or service complained of and an actual physical place is required.").

<sup>68</sup> *Id.* at 1321.

<sup>69</sup> *Access Now, Inc. v. Southwest Airlines, Co.*, 385 F.3d 1324, 1328 (11th Cir. 2004).

<sup>70</sup> DuPree, *supra* note 17, at 291. This Comment does not view *Access Now* as a true "nexus" case to be on the spectrum of the degrees of "integration"; however, it views *Access Now* as a counterpoint to *Target* in terms of structure or presence of a business firm.

<sup>71</sup> See discussion *infra* Part IV.A.

determination as to whether the website involved could be a companion website to any physical airline facility.<sup>72</sup> Instead, *Access Now* represented an example of an entity that Title III could not reach—one that only appeared to function online—because the only identifiable space was a virtual one.<sup>73</sup> Therefore, the opposite end of the spectrum would include completely virtual entities, like Amazon or Netflix, without any clear presence in an identifiable physical place of public accommodation.<sup>74</sup>

*B. Extension of the “Nexus” Approach to Websites Under Target*

When the Northern District of California decided *Target*, it acknowledged the “nexus” approach for the first time as a judicially created mechanism to bring websites under the auspices of Title III.<sup>75</sup> Despite being only a district court decision, it was a catalyst for subsequent Title III suits and strongly influenced major companies to ensure accessibility to their websites.<sup>76</sup> *Target* established that Title III covered a website when it acted as a virtual door to accessing the goods and services of a place of public accommodation.<sup>77</sup> A website could act as a “gateway” when its inaccessibility created a separate benefit for those able to access it, or prevented full enjoyment or usage of the place’s goods or services to those would could not.<sup>78</sup> The court premised its finding, that Title III covered intangible barriers like the Internet, on its interpretation of the statutory language of Title III, which explicitly specified coverage for the “services of” and not “services in,” a place of public accommodation.<sup>79</sup>

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<sup>72</sup> *Access Now*, 385 F.3d at 1329–30.

<sup>73</sup> *Access Now*, 227 F. Supp. 2d at 1321. The plaintiffs did not identify any physical space, such as a Southwest airline facility, because they alleged that southwest.com denied access to “virtual ticket counters.” *Id.* Had the plaintiffs originally made the argument they later presented to the Eleventh Circuit, the Southern District of Florida could have made a determination as to whether southwest.com could be considered a companion website, like target.com, to the airline. *Access Now*, 385 F.3d at 328.

<sup>74</sup> See discussion *infra* Part IV.C.

<sup>75</sup> See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006) (extending the reasoning in *Rendon* to retailer website and finding a “nexus” to exist between the site and brick-and-mortar stores).

<sup>76</sup> See *supra* note 21.

<sup>77</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 954–55.

<sup>78</sup> *Id.* at 954.

<sup>79</sup> *Id.* at 953–54; see also 42 U.S.C. § 12182(a) (2006) (emphasis added) (“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.”).

In *Target*, the court found that target.com's inaccessibility to blind customers prevented full and equal enjoyment and usage of services that the retail stores offered because many benefits of the site were also services of the place of public accommodation.<sup>80</sup> The court referred to the website as being "heavily integrated" with the brick-and-mortar stores based on specific functions, such as the ability to access information on store locations and hours of operation, order photographs for pick-up, and print coupons to redeem in the store.<sup>81</sup> The court cautioned, however, that Title III only covered portions of a website that were directly related to the physical storefront, meaning that it did not cover "online only" products or deals.<sup>82</sup>

### C. Ambiguities in the Aftermath of *Target*

While *Target* provides a groundbreaking means for disabled litigants to seek relief under Title III for website inaccessibility, the court does not provide any concrete steps for implementing its reasoning.<sup>83</sup> Despite a clear "judicial willingness to bring websites within the jurisdiction of Title III," the *Target* court's reasoning creates ambiguity with regard to how much "integration" is needed and how to apply the "nexus" approach to future situations—even those similar to the facts of *Target*.<sup>84</sup> Even though a disabled individual can use the "nexus" test as a vehicle to combat the hardships of litigating Title III website claims,<sup>85</sup> courts must further clarify *Target's* operative language of "heavily integrated" and "gateway to the store."<sup>86</sup>

The "nexus" approach remains unclear at a time when Title III litigation is on the rise mainly because *Target* does not set forth the

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<sup>80</sup> *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 949, 956. The blind customers were unable to access target.com because the website's code could not be translated into vocalized text via usage of their screen-reader devices. *Id.* at 949–50.

<sup>81</sup> *Id.* at 949.

<sup>82</sup> *Id.* at 956; see also discussion of Blockbuster *infra* Part IV.A.1.

<sup>83</sup> DuPree, *supra* note 17, at 290–91 ("While the Ninth Circuit found a nexus in *Target* because of integrated services of Target.com and Target stores, it did not state a rule regarding the degree of integration necessary to find a nexus.").

<sup>84</sup> *Id.* (alteration in original) ("[While the court displayed a] judicial willingness to bring websites within the jurisdiction of Title III . . . [it] did not state a rule regarding the degree of integration necessary to find a nexus.").

<sup>85</sup> Moberly, *supra* note 19, at 976 (alteration in original) ("[C]ourts have used the nexus approach to link the types of discrimination prohibited by the ADA with the places of public accommodation regulated by the statute.").

<sup>86</sup> DuPree, *supra* note 17, at 291 (alteration in original) (emphasis added) ("[T]arget provides an *unformulated* standard and will require other circuits to *define points on the continuum* between the endpoints as they address future Title III claims.").

“minimum connection or integration required to find the necessary “nexus” between a website and public accommodation for Title III to apply.”<sup>87</sup> *Target* does not consider the point at which “a website [can] become a ‘service’ of the place of public accommodation.”<sup>88</sup> Additionally, the extension of the *Target* court’s reasoning specifically “to retailers with website services less integrated to storefronts remains unclear.”<sup>89</sup> While heavily integrated websites will clearly meet the “nexus” requirement under *Target*, the court’s reasoning could also suggest that “any connection between a store and website that affects the enjoyment of the goods and services of a store may be sufficient to find a nexus.”<sup>90</sup> More importantly, with regard to the different types of business structures, *Target* does not even resolve the question of whether Title III can cover online-based companies like Redbox, which have a physical presence in a place of public accommodation.<sup>91</sup> In addition, *Target* does not consider whether virtual companies Netflix or Amazon.com, “which [themselves have]

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<sup>87</sup> *Id.* at 301–02. For more on why defining the degree of “integration” matters, see discussion *infra* Part II.F.

<sup>88</sup> Bashaw, *supra* note 17, ¶ 13 (alteration in original) (emphasis added).

<sup>89</sup> DuPree, *supra* note 17, at 291. Blockbuster, LLC is illustrative of a scenario where a retailer clearly owns and operates a website that bears *less* “integration” to its brick-and-mortar retail stores because consumers primarily utilize its website for a DVD-by-mail service. See *infra* text accompanying notes 205–08. This is especially so when compared to Apple, Inc., which offers the same deals and products on both its store site and brick-and-mortar stores. See *infra* text accompanying notes 200–04.

<sup>90</sup> DuPree, *supra* note 17, at 293 (emphasis added). This interpretation could arguably extend coverage to separately owned websites with a presence in a public accommodation. Key examples of this could be Redbox and perhaps Facebook because either websites’ inaccessibility could create a separate benefit, or prevent full and equal enjoyment of goods and services of a particular public accommodation. See 42 U.S.C. § 12182(b)(2)(A)(i)–(iii) (2006); discussion *infra* Parts IV.B–C. The problem here again is the court’s failure to specify a minimum degree of “integration;” thus, it is a bit unclear whether other courts can even view analogous business set-ups to that in *Target* as having a heavily integrated website. See discussion *infra* Parts III.B.1, IV.A. Based on the *Target* court’s examples of acceptable integrated website functions, however, the “nexus” approach could cover a company that owns and operates brick-and-mortar stores and a website with “dual functions,” meaning it offers the same products, deals, store information, or online coupons to use in the store. See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006). Examples include Apple, Best Buy, Walmart, and perhaps Blockbuster because all own and operate websites and brick-and-mortar retail stores that make available the same products on both the site and the store, as well as have store locators, coupons, and information on the site. See, e.g., *In-Store Coupons*, WALMART, <http://coupons.walmart.com/> (last visited Jan. 27, 2012).

<sup>91</sup> See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954–56 (N.D. Cal. 2006). An entity like Redbox and perhaps Facebook would fall somewhere in between completely virtual and retailer-companion sites, but arguably closer to *Target*. See discussion *infra* Part IV.

no physical presence but [do] link to and list products for sites that do have physical presences, such as Target, must be ADA compliant.”<sup>92</sup> Such ambiguity is just one of the reasons that this Comment focuses on redefining the contours of the “nexus” approach and using a scenario where a website is separately owned, but appears to act as doorway to a separately owned retail store in a similar manner to the website in *Target*.<sup>93</sup> Therefore, while *Target* is a critically important step in the process, it is clearly not the last step.<sup>94</sup>

*D. 2011: A Facebook Odyssey*

In 2011 courts addressed the “nexus” approach’s ambiguous state when multiple major corporations were sued under Title III for disability discrimination.<sup>95</sup> *Young v. Facebook, Inc.* stood out amongst

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<sup>92</sup> Bashaw, *supra* note 17, ¶ 13 (alteration in original). Interestingly, Netflix announced plans for a new way for its Canadian and Latin American customers to connect to their Facebook accounts via an integrated system, so that customers can share what they are watching on Netflix and see what their friends are watching all through Facebook. Tom Willerer, *Watch This Now: Netflix and Facebook*, NETFLIX U.S. & CAN. BLOG (Sept. 22, 2011, 10:23AM), <http://blog.netflix.com/2011/09/watch-this-now-netflix-facebook.html>. Netflix, like many other big companies, actually uses Amazon Web Services to power its website. Michael Noer & Nicole Perloth, *The World’s Most Powerful People*, YAHOO! FIN. (Nov. 21, 2011, 1:35PM), <http://finance.yahoo.com/news/the-world-s-most-powerful-people.html?page=all>. This Comment will not engage in this extra step consideration, meaning whether a completely removed website can be linked to another website that is sufficiently integrated to a regulated public accommodation; however, such considerations of an endless array of deeply complex relationships is just another reason why courts should establish a minimum degree of “integration” under the “nexus” approach.

<sup>93</sup> The fact that *Target* does not consider at what point a website can become a service is one of the most troubling ambiguities for both companies with common ownership of a website and place of public accommodation and for a separately owned website that could be sufficiently integrated to a public accommodation. With regards to the latter, the critical inquiry is not only the minimum degree required but also whether a “nexus” is possible at all; it is clear that this scenario can exist given companies such as Redbox and Facebook.

<sup>94</sup> See DuPree, *supra* note 17, at 291.

<sup>95</sup> In addition to Karen Beth Young’s suit against Facebook, Sony Corporation was sued under Title III of the ADA pursuant to the “nexus” approach. See *Stern v. Sony Corp.*, No. CV 09-7710 PA, 2010 U.S. Dist. LEXIS 144042 (C.D. Cal. Feb. 8, 2010), *aff’d* No. 10-55348, 2011 U.S. App. LEXIS 23431 (9th Cir. Nov.17, 2011). The plaintiff alleged that his visual-processing impairments prevented him from fully enjoying Sony’s video games, which are played over Internet connections, and thus also the conventions that Sony holds in connection with such games. *Id.* at \*1, \*8–9. Specifically, the plaintiff argued that a “nexus” existed between the video games and the conventions because his inability to enjoy and acquire knowledge of the games had deterred him from attending such conventions. *Id.* at \*8–9. The *Stern* court found the Title III claim to fail because the plaintiff did not allege that Sony was using its games to screen out the disabled from fully enjoying its conventions. *Id.* at \*9. The court explicitly distinguished both the *Rendon* and *Target* cases, finding no

these suits for two primary reasons.<sup>96</sup> First, the plaintiff advanced a “nexus” argument that reopened website “integration” questions due to its similarity to the argument accepted by the *Target* court.<sup>97</sup> Second, the case also generated a new interest in determining whether a web-based company could “operate” a separately owned place of public accommodation when its website appeared to meet

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allegations of a similar inaccessibility as seen in such cases. *Id.*

The Ninth Circuit affirmed, finding that the plaintiff failed to allege sufficient “integration” between Sony’s games and a facility owned, leased, or operated by the company. *Stern v. Sony Corp. of Am.*, No. 10-55348, 2011 U.S. App. LEXIS 23431, at \*2 (9th Cir. Nov. 17, 2011). Overall, the Ninth Circuit found that the connection between video games and marketing events associated with such games was “too tenuous” despite being hosted by the same company. *Id.* at \*3. This decision appeared to reaffirm the theory that a challenged service must actually act as an intangible barrier to entry and not merely as a deterrent to entering a public accommodation.

The popular web-based rental-service-subscription company Netflix is currently also involved in a Title III suit as of 2011 for failure to implement closed captioning for the majority of its movies, which customers “stream instantly” over the Internet. Terry Baynes, *Netflix, Time Warner Sued by U.S. Deaf Groups*, REUTERS (June 17, 2011, 6:48PM), <http://www.reuters.com/article/2011/06/17/netflix-lawsuit-idUSN1711044420110617>. Whether Netflix will be subject to liability under Title III is presently unclear given the ambiguity in the current law and the unique nature of the Internet-based company. Netflix has further complicated matters by, as of September of 2011, separating its DVD-by-mail service from its instant streaming services. At one point, Netflix made an announcement that it would also go as far as to rename its DVD-by-mail service—where the company began—“Qwikster,” appoint a new CEO to run Qwikster, create a separate domain name, and force customers to hold separate accounts regardless of whether they have both services or just one. Elizabeth A. Harris, *Netflix To Break Business in Two*, N.Y. TIMES BLOG (Sept. 19, 2011, 2:16 AM), <http://mediadecoder.blogs.nytimes.com/2011/09/19/netflix-c-e-o-apologizes-for-handling-of-price-increase/?ref=elizabethaharris>; Reed Hastings, *An Explanation and Some Reflections*, NETFLIX U.S. & CAN. BLOG (Sept. 18, 2011, 8:59 PM), <http://blog.netflix.com/2011/09/explanation-and-some-reflections.html>. Effectively, Qwikster would have become a wholly owned subsidiary of Netflix; however, the company has since scrapped such plans to re-name its DVD-rental service following extremely negative consumer and economic response. Brian Stelter, *Netflix, In Reversal, Will Keep Its Services Together*, N.Y. TIMES BLOG (Oct. 10, 2011, 8:00 AM), <http://mediadecoder.blogs.nytimes.com/2011/10/10/netflix-abandons-plan-to-rent-dvds-on-qwikster/>.

<sup>96</sup> 790 F. Supp. 2d 1110 (N.D. Cal. 2011). It should be noted that the challenged services in the *Stern* case were the video games, not the Internet connections such games operate on, and the “nexus” argument advanced did not allege inaccessibility *per se*; rather, it alleged a deterrence effect on the ability to fully and equally enjoy the services of a public accommodation. *Stern*, 2010 U.S. Dist. LEXIS 144042, at \*8–9. It is for the latter reason, the deterrence effect, that the court distinguished the *Rendon* and *Target* cases and found the claim to fail. *Id.* at \*9. Additionally, the Netflix Title III suit is presently on-going and involves an entity that a court is likely to view as completely virtual, unlike a company like Redbox.

<sup>97</sup> See *Young*, 790 F. Supp. 2d at 1115; discussion *infra* Part II.D.2.

*Target's* “integration” concepts.<sup>98</sup>

### 1. Gift Card “Integration”

In *Young v. Facebook, Inc.*, Karen Beth Young alleged that Facebook deactivated her account because of her bipolar disorder, a Title III-covered disability,<sup>99</sup> and deprived her of full and equal enjoyment and usage of the gift cards it provides through retail stores.<sup>100</sup> The plaintiff appeared *pro se* and argued that a “nexus” existed under the *Target* framework because facebook.com was sufficiently integrated with various retail stores across the country.<sup>101</sup> The plaintiff premised her “integration” argument on the fact that

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<sup>98</sup> See discussion *infra* Parts III, IV.B–C. *Young* serves as the basis for the question this Comment presents—establishing a “nexus” when a service and a public accommodation lack common ownership but appear to bear analogous “integration” to that in *Target*. Young’s “nexus” argument seems to give rise to the idea of a web-based company with some physical presence in a place of public accommodation. See *infra* note 100.

<sup>99</sup> See 42 U.S.C. § 12102(1) (2006).

<sup>100</sup> *Young*, 790 F. Supp. 2d at 1115 (alteration in original) (emphasis added) (“[S]he contends that the alleged discrimination on Facebook’s website deprives her of full and equal access to the goods and services provided by Facebook through physical retail stores.”); Amended Complaint, *supra* note 31, at 2 (alteration in original) (“Plaintiff has been denied full use and enjoyment of goods and services of consumer retail stores contracted with Facebook.com [and she] can not participate in or benefit from merchandise sales and public interactions.”); see also Amy E. Bivins, *Facebook Defeats ADA Suit Involving Account Termination, Site Not “Public Accommodation*, 16 ELEC. COM. & L. REP. (BNA) 887 (2011). Young’s allegation of discriminatory conduct was grounded in Facebook’s management of her account, which prevented equal enjoyment of goods and services at brick-and-mortar stores that sell its gift cards. Amended Complaint, *supra* note 31, at 5. Her specific claim was that Facebook failed to provide “reasonable customer services to assist individuals with mental disabilities.” *Young*, 790 F. Supp. 2d at 1114.

The plaintiff had sent friend requests to thousands of people she believed would be interested in her advocacy on cancer-related issues, as she had created several forums and pages on facebook.com. *Id.* at 1113. Facebook deactivated her account for the first time for “behavior identified as potentially harassing or threatening to other Facebook users, including sending ‘friend’ requests to people she did not know, regularly contacting strangers, and soliciting others for dating or business purposes.” *Id.* at 1114. Young made numerous inquiries to Facebook, citing her bipolar disorder and reasons for engaging in such behavior, but received no responses. *Id.* After making a trip from her home in Maryland to Facebook’s California headquarters, Facebook forced Young to leave a written request, which it responded to by reactivating her account with a warning. *Id.* Facebook permanently deactivated Young’s account for violating its Statement of Rights and Responsibilities; however, Young was unsatisfied as this was allegedly in response to her mere request for further clarification and for a personal meeting. *Id.*; see also *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last updated April 26, 2011).

<sup>101</sup> *Young*, 790 F. Supp. 2d at 1115. As a side note, retail stores are places of public accommodation under Title III. 42 U.S.C. § 12181(7) (2006).

Facebook used such stores for the benefit of selling its gift cards, which purchasers could only redeem for a virtual currency called Facebook Credits to use for online games and other applications.<sup>102</sup> Specifically, the plaintiff alleged that her account deactivation meant that, while she could still buy Facebook gift cards from retail stores, she could no longer *use* the gift cards because the only way to redeem their value required access to facebook.com.<sup>103</sup> The plaintiff referenced Facebook's advertisement and promotion of its website at the brick-and-mortar stores to bolster the "integration" argument and the idea that the company had a presence in such stores.<sup>104</sup> The plaintiff also listed the Best Buy rewards program as a specific "integration" example because purchasing a specific value of Facebook gift cards from Best Buy retail stores gave the member reward points that could then be used to purchase *any* store merchandise.<sup>105</sup> Ultimately, the court was unable to assess the

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<sup>102</sup> *Young*, 790 F. Supp. 2d at 1115; Amended Complaint, *supra* note 31, at 5. Facebook, Inc. first announced it would be "coming to a store near you" back in September 2010. Jon Swartz, *Target to Sell Facebook Credits Gift Cards*, USA TODAY (Sept. 1, 2010, 10:01 AM), [http://usatoday30.usatoday.com/tech/news/2010-09-01-target01\\_ST\\_N.htm](http://usatoday30.usatoday.com/tech/news/2010-09-01-target01_ST_N.htm). Facebook, Inc. previously only had arrangements with online-payment providers PayPal and MOL, so members could only purchase Facebook Credits directly from facebook.com. *Id.* Although Facebook gift cards are now available in a vast amount of retail stores, the fact that Swartz's article singles out Target just makes it all the more bittersweet for the *Young* decision in the shadow of *Target* years earlier. Facebook gift cards—which purchasers can redeem for "Facebook Credits" to be used in conjunction with member accounts—are not only available in all of Target's retail stores but also on Target.com as well. *Id.*; *Facebook Credits Gift Cards-\$25*, TARGET, <http://www.target.com/p/Facebook-Credits-Gift-Card-25/-/A-12906868> (last visited Jan. 27, 2012). Facebook members purchase the gift cards to use them on facebook.com for "social games, applications and virtual goods." Swartz, *supra*. Facebook defines such credits as "a virtual currency you can use to buy virtual goods in any games or apps of the Facebook platform that accept payment." *Help Center About Facebook Credits*, FACEBOOK, <http://www.facebook.com/help/?page=132013533539778> (last visited Jan. 27, 2012). Facebook Credits can now also be used to rent various movies which can be watched on facebook.com. *Facebook Credits Page*, FACEBOOK, <http://www.facebook.com/giftcards>.

<sup>103</sup> Amended Complaint, *supra* note 31, at 7. *Cf.* *Stern v. Sony Corp.*, No. CV 09-7710 PA, 2010 U.S. Dist. LEXIS 144042 (C.D. Cal. Feb. 8, 2010), *aff'd* No. 10-55348, 2011 U.S. App. LEXIS 23431 (9th Cir. Nov. 17, 2011) (finding deterrence effect was not enough to constitute deprivation of full and equal enjoyment of usage of goods or services of places of public accommodation).

<sup>104</sup> Amended Complaint, *supra* note 31, at 6.

<sup>105</sup> *Id.* at 5 (emphasis added) ("Facebook, Inc. Gift Card purchases *directly* translate to Rewards program points which in turn translate to *physical merchandise* of choice for consumers."); *see also Best Buy Reward Zone*, BEST BUY, <https://myrewardzone.bestbuy.com/rewarded/?cshid=0sBF0d6fFD9ZVJ3SxBji.5381> (last visited Jan. 27, 2012). This is a prime example of some level of "integration" between a separately owned websites and places of public accommodation, or even a commercial presence of the website in the public accommodation, because of the

“integration” argument because of the plaintiff’s failure to assert Facebook’s ownership, leasing, or operation of a place of public accommodation—a Title III statutory requirement.<sup>106</sup>

*Young* was a missed opportunity to ensure consistent application of the “nexus” approach to websites because the court could have either bolstered or re-characterized the *Target* “integration” analysis.<sup>107</sup> If the plaintiff had alleged that Facebook had a presence in the retail stores that sell its gift cards, and that this somehow translated into “operation” of such places, then the court may have been able to consider some of the ambiguity surrounding the necessary degree of “integration” under the “nexus” approach.<sup>108</sup> Instead, *Young* was just another example of the unsettling decisions that Title III litigations have produced, especially for *pro se* litigants.<sup>109</sup>

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separate benefit afforded to consumers that are able to redeem the value of store-bought gift cards. See DuPree, *supra* note 17, at 291.

<sup>106</sup> *Young*, 790 F. Supp. 2d at 1116 (emphasis added) (“While the retail stores that sell Facebook gift cards may be places of accommodation, *Young* does not allege that Facebook, Inc. ‘owns, leases (or leases to) or operates’ those stores.”); see also 42 U.S.C. § 12182(a) (2006).

<sup>107</sup> Compare *Young*, 790 F. Supp. 2d at 1115 (finding website’s inaccessibility to deny full and equal enjoyment of and participation in utilizing the value of gift cards sold by brick-and-mortar stores), with *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954–55 (N.D. Cal. 2006) (finding website’s inaccessibility to deny the ability to enjoy all of the services of the brick-and-mortar stores).

<sup>108</sup> The plaintiff could have urged the court to interpret the language “affect commerce” under Title III in a manner to reflect the assertion that Facebook’s services are provided through retail stores. See 42 U.S.C. § 12181(7) (2006). Alternatively, she could have argued for a particular definition of “operates” by looking to other legal contexts. See discussion *infra* Part III.A.2. It is quite apparent, however, that *Young* would not have won on an ownership type of argument as Facebook does not own any physical retail stores. See *Facebook Info. Co. Overview*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Jan. 27, 2012) (listing other ways to connect with Facebook, Inc.—none of which indicate any type of brick-and-mortar store).

<sup>109</sup> Cf. *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d 946 (ruling in favor of attorneys for national advocacy organization for the blind pursuing Title III claim); see Eagan, *supra* note 30. *Young* was unsettling because the court essentially dismissed the claim due to an inexperienced *pro se* litigant’s failure to assert a statutory element. *Young*, 790 F. Supp. 2d at 1116; *Reed v. YMCA*, No. 3:07-0765, 2008 U.S. Dist. LEXIS 119311, at \*1 (M.D. Tenn. 2008); see also Kashmir Hill, *California Judge Scoffs at Karen Beth Young’s Facebook Banning Lawsuit*, FORBES (Sept. 8, 2010, 12:33 PM) (alteration in original), available at <http://www.forbes.com/sites/kashmirhill/2010/09/08>

[/california-judge-scoffs-at-karen-beth-youngs-facebook-banning-lawsuit/](http://www.forbes.com/sites/kashmirhill/2010/09/08/california-judge-scoffs-at-karen-beth-youngs-facebook-banning-lawsuit/) (“[The judge] voiced extreme skepticism about *Young*’s complaint . . . explaining in the order that he has the right to [dismiss] ‘if it appears from the face of the proposed complaint that the action is frivolous or without merit.’”); Kashmir Hill, *Maryland Woman Sues After Being Banned by Facebook*, FORBES (Sept. 1, 2010, 1:33 PM), available at <http://www.forbes.com/sites/kashmirhill/2010/09/01/maryland-woman-sues-after-being-banned-by-facebook/> (“Since it’s a *pro se* complaint—*Young* does not have a

## 2. *Young's* Analogy to and Potential Reinforcement of *Target*

Karen Beth Young may have succeeded in her “nexus” argument given its analogy—in terms of “integration”—to the argument that the *Target* court accepted.<sup>110</sup> In *Target*, the court found Title III to cover specific target.com benefits that included the ability to “access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store.”<sup>111</sup> Similarly, in *Young*, the plaintiff had argued that facebook.com allowed its users “to peruse sale items, products, discounts and other consumer offers,” and that Facebook utilized promotions and coupons tied to its gift cards both online and in particular retail stores.<sup>112</sup> More importantly, facebook.com had a store locator so that members could find a local gift card retailer,<sup>113</sup> which was a function similar to target.com’s information on store locations and hours.<sup>114</sup> Therefore, *Young* was to some extent reconcilable with *Target* because the “integration” was similarly deep and complex.<sup>115</sup>

While *Young's* integration considerations were different in certain respects from those in *Target*, it is unlikely that these differences would have led to the dismissal of the “nexus”—putting aside the issues of ownership and operation with a web-based company. Facebook deprived Young of access to its website’s “social networking” capability, a function that on the surface appeared distinct from the ability to redeem Facebook gift cards and the alleged discriminatory conduct.<sup>116</sup> The discriminatory conduct, however, was indeed connected to the website’s overall functionality because Facebook intended for the usage of Facebook Credits to purchase and play games with other members on facebook.com to be a significant part of social networking.<sup>117</sup> When Facebook deactivated

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lawyer—it’s a bit messy . . .”). *But see* Eric Goldman, *Facebook User Loses Lawsuit Over Account Termination—Young v. Facebook*, TECH. & MKTG. L. BLOG (May 19, 2011, 1:29PM), <http://blog.ericgoldman.org/archives/2011/05/> (noting that the *Young* court expressed sympathy for the *pro se* plaintiff’s circumstances despite its ultimate dismissal of the plaintiff’s claims).

<sup>110</sup> See *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949, 956.

<sup>111</sup> *Id.* at 950.

<sup>112</sup> Amended Complaint, *supra* note 31, at 7.

<sup>113</sup> See *Facebook Credits Page*, *supra* note 102.

<sup>114</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 950. This was one of the functions the *Target* court found Title III to cover. *Id.*

<sup>115</sup> See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011).

<sup>116</sup> *Id.*

<sup>117</sup> See Doug Gross, *The Facebook Games That Millions Love (and Hate)*, CNN TECH

Karen Beth Young's account it not only took away her ability to write a wall post,<sup>118</sup> poke,<sup>119</sup> or make a status update,<sup>120</sup> but also took away her ability to purchase Facebook Credits online, use them for games, and find or redeem the value of gift cards.<sup>121</sup> While Young then had no reason to purchase gift cards from stores, the remaining one billion plus members purchased and utilized the value of the cards without issue.<sup>122</sup> Even though Facebook offered different methods for the purchase of Facebook Credits—store gift cards versus facebook.com—users ultimately sought the same item.<sup>123</sup> Therefore, the account deactivation created an intangible barrier to the enjoyment of a good because, while Young could purchase Facebook Credits in stores, she could not use them at all.<sup>124</sup> This is exactly the type of discrimination that Title III's drafters aimed to prevent.<sup>125</sup>

#### E. Redbox as a Potential Bridge from Target to Young

Courts may have a new opportunity to clarify both "integration" and "operation" under the "nexus" approach because a blind advocacy group filed a Title III suit in 2012 against Redbox, a

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(Feb. 23, 2010), [http://articles.cnn.com/2010-02-23/tech/facebook.games\\_1\\_mark-pincus-video-games-facebook?\\_s=PM:TECH](http://articles.cnn.com/2010-02-23/tech/facebook.games_1_mark-pincus-video-games-facebook?_s=PM:TECH) (discussing overwhelming popularity of social-gaming). *But see* Tricia Duryee, *Not that Many People Play Facebook Games After All*, ALL THINGS DIGITAL (Oct. 18, 2011, 2:17 PM), <http://allthingsd.com/20111018/not-that-many-people-play-facebook-games-after-all/> (discussing how Facebook's shift from counting visitors to only counting actual authorized users when assessing data on how many members play its games shows much less active users).

<sup>118</sup> Kevin Der, *Facebook Is Off-The-Wall*, THE FACEBOOK BLOG (July 27, 2007, 10:05PM), <http://blog.facebook.com/blog.php?post=3532972130>.

<sup>119</sup> Michael Arrington, *85% of College Students Use Facebook*, TECHCRUNCH (Sept. 7, 2005), <http://techcrunch.com/2005/09/07/85-of-college-students-use-facebook/>.

<sup>120</sup> Claire Suddath, *Facebook Wants to Read Your Mind*, TIME (Mar. 13, 2009), available at <http://www.time.com/time/business/article/0,8599,1885010,00.html>.

<sup>121</sup> *Help Center Purchasing Facebook Credits*, FACEBOOK, <http://www.facebook.com/help/147215735350834/> (last visited Nov. 4, 2012) (alteration in original) ("You can purchase Facebook Credits directly from within an app . . . [or] go to the Payments tab in your Account Settings.").

<sup>122</sup> See Amended Complaint, *supra* note 31, at 7 ("Facebook, Inc. denies Plaintiff access to goods, services and information made available by retail stores by preventing Plaintiff from being a registered member of Facebook."); see also Guynn, *supra* note 29.

<sup>123</sup> See Amended Complaint, *supra* note 31 at 7; Swartz, *supra* note 102.

<sup>124</sup> See discussion of Facebook "integration" under the "Backdoor Nexus" approach *infra* Part IV.C.

<sup>125</sup> See 42 U.S.C. § 12182(a)–(b) (2006); Mook, *supra* note 7, at 6 (alteration in original) (citing Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006)) ("Title III of the ADA [does] not create a dichotomy between 'those services which impede physical access to a public accommodation and those merely offered by a facility.'").

company that operates through both a website and interactive kiosks residing in retail stores.<sup>126</sup> While Redbox's interactive kiosks are the challenged service in this case, as opposed to redbox.com, the court's ultimate decision may provide an answer to the minimum "integration" that the "nexus" approach requires, as well as whether a web-based company with a physical presence can "operate" a place of public accommodation.<sup>127</sup> The court can address the required degree of "integration," and then apply that determination to future litigation involving redbox.com, because the plaintiffs allege that the kiosks are "services of" the retail store spaces that Redbox controls.<sup>128</sup> Even though Redbox does not own a physical space, the court can also address "operation" because the company's kiosks give it a clear presence in a portion of a physical space that it controls.<sup>129</sup> Redbox therefore may act as a bridge between *Target* and *Young* because it is one step above a "companion website" like *Target*, but one step below a completely virtual space like Amazon or perhaps Facebook.<sup>130</sup>

#### F. Why the Degree of "Integration" Matters

Since the *Target* court, like Title III's drafters, does not specify the required degree of "integration," current application of its reasoning remains challenging even to analogous scenarios like *Young* or Redbox.<sup>131</sup> It is critical to resolve the uncertainties

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<sup>126</sup> Compl. for Violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et. seq.*, the Unruh Civil Rights Act, Cal. Civ. Code § 51, *et. seq.*, and the California Disabled Persons Act, Cal. Civ. Code §§ 54–54.3, Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail, LLC, No. C12-00195 LB (N.D. Cal. Jan. 12, 2012), *available at* [www.dralegal.org/downloads/cases/Redbox/Complaint.doc](http://www.dralegal.org/downloads/cases/Redbox/Complaint.doc) [hereinafter Redbox Complaint]; *see* discussion *infra* Part IV.B.

<sup>127</sup> Redbox Complaint, *supra* note 126.

<sup>128</sup> *Id.* at 10. The critical inquiry is not whether any relationship exists between Redbox and the retail stores or supermarkets where its kiosks happen to reside; rather, it is the existence of a portion of a Redbox-controlled physical space that is vital to both the "integration" and "operation" inquiries. *See* discussion *infra* Part III.A.2.ii.

<sup>129</sup> *See* Redbox Complaint, *supra* note 126, at 10. Note, however, the plaintiffs in the Redbox 2012 litigation also allege the kiosks themselves are places of public accommodation. *Id.* In conjunction with its filing of a motion to dismiss the plaintiffs' claim, co-defendant Save Mart Supermarket actually argues that it does not control the particular spaces that it provides to Redbox for the rental kiosks, thus supporting the notion that Redbox "operates" a portion of a place of public accommodation. Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail, LLC, No. C12-0195, 2012 U.S. Dist. LEXIS 70007, at \*6 (N.D. Cal. May 18, 2012). The Northern District of California has since denied Save Mart's motion to dismiss for failure to state a claim. *Id.* at \*12–13.

<sup>130</sup> *See* discussion *infra* Part IV; *infra* Figure 1.

<sup>131</sup> 42 U.S.C. § 12182(a) (2006); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110,

surrounding the necessary degree of “integration” because computers today can provide a virtual door to both business structures like that of *Target*, and also to web-based companies with some kind of presence in a place of public accommodations.<sup>132</sup> Refinement of the “nexus” approach with greater attention paid to defining the required degree of “integration” is especially necessary when it is unclear whether a particular website can be classified as a service of a public accommodation, as a result of either questions of ownership and control or the business enterprise’s structure.<sup>133</sup>

If courts do not modify the “nexus” approach, then Title III’s application to inaccessible business websites will often depend on “judicial interpretation[s] of *Target*.”<sup>134</sup> Such interpretations would focus on defining the degree of “integration” in a specific case, but without any type of specific factors to consider.<sup>135</sup> The danger in relying upon judicial interpretation of *Target* without a specific set of criteria is the possibility of inconsistent results for virtually identical business/website set-ups and the potential finding that Title III does not cover websites with a physical presence in a public accommodation.<sup>136</sup> If, however, courts use *Target*’s Title III-covered

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1115 (N.D. Cal. 2011); DuPree, *supra* note 17, at 291.

<sup>132</sup> Application of the *Target* court’s reasoning to virtually identical scenarios, as well as the extension to web-based companies that nonetheless have a physical presence in a public accommodation, is unclear and troublesome. For example, Apple and Blockbuster have set-ups akin to that of *Target*, in that the former companies both own and operate brick-and-mortar stores across the country and a companion website. See discussion *infra* Part IV.A. Utilizing the *Target* court’s example of Title III-covered website functions alone, it appears that a plaintiff could establish a “nexus” for such set-ups if these websites ever became inaccessible to the disabled. But whether the *Target* court’s examples alone will constitute sufficient “integration” is an inference at best because the court did not specify a minimum degree of information. DuPree, *supra* note 17, at 290–91. Blockbuster is perhaps a weaker example than Apple because even though Blockbuster operates a DVD-by-mail service analogous to Netflix that customers can manage online, it is stronger than Netflix because of the unitarily owned brick-and-mortar Blockbuster stores. See *supra* note 89. Whether or not *Target* would fit a scenario where blockbuster.com is less integrated to its brick-and-mortar counterparts is unclear without elaboration of the language in *Target*. But see discussion *infra* Part IV.A.

<sup>133</sup> See Bashaw, *supra* note 17, ¶ 13. “Business enterprise’s structure” refers either to retailers with both brick-and-mortar stores and a companion website or to web-based businesses with some physical presence in a public accommodation.

<sup>134</sup> DuPree, *supra* note 17, at 293 (alteration in original) (emphasis added).

<sup>135</sup> See *id.*

<sup>136</sup> See *id.* at 293–94. Even moving beyond the ownership issues in *Young*, it is difficult to tell if, despite its similarities to *Target*, the *Young* court would have correctly applied *Target* for the “integration” element to reflect such similarities when the defendant is a web-based company with a physical presence—as opposed to a

website functions and other similar types of functions, then a spectrum of the possible degrees of “integration” will account for these entities.<sup>137</sup>

Defining the “nexus” approach with greater specificity will avoid a misinterpretation that leads to a web-based company with a physical presence like Redbox being grouped with completely virtual entities such as Amazon or Netflix that already fall outside of Title III.<sup>138</sup> Doing so will also help clarify Title III’s applicability to a company like Facebook because courts could view such an entity as either completely virtual or just another example of a website with less “integration” to a physical space.<sup>139</sup> Therefore, courts should carefully refine the “nexus” approach and make “integration” a top priority when assessing whether a “nexus” exists because the approach’s purpose is to link the website to a place of public accommodation when inaccessibility to the former can impede enjoyment of or participation in the latter.<sup>140</sup>

While defining the degree of “integration” is critical, defining it does not complete the “nexus” inquiry because *Target* does not account for another Title III problem that the *Young* court faced: ownership/operation/leasing.<sup>141</sup> Courts must consider this other

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brick-and-mortar company with a secondary website.

<sup>137</sup> Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006); see *infra* Part IV.A. This point ties in directly to the aforementioned concerns regarding application of *Target* not only to web-based companies, or websites one step removed from their brick-and-mortar companions, but to businesses with virtually identical set-ups in the absence of a specified degree of “integration” needed. See DuPree, *supra* note 17, at 290–91.

<sup>138</sup> See DuPree, *supra* note 17, at 301–02.

<sup>139</sup> See *id.* at 291; see also discussion *infra* Part IV.C. The suggestion that facebook.com cannot even have some type of a physical presence in a public accommodation is a bit draconian given its pervasiveness all over the world. Facebook has even been called an addiction or compulsion due to its overwhelming influence on everyday life. See Elizabeth Cohen, *Five Clues That You are Addicted to Facebook*, CNN HEALTH (Apr. 23, 2009), [http://articles.cnn.com/2009-04-23/health/ep.facebook.addict\\_1\\_facebook-page-facebook-world-social-networking?\\_s=PM:HEALTH](http://articles.cnn.com/2009-04-23/health/ep.facebook.addict_1_facebook-page-facebook-world-social-networking?_s=PM:HEALTH) (alteration in original) (“[T]herapists say they’re seeing more and more people . . . who’ve crossed the line from social networking to social dysfunction.”).

<sup>140</sup> See, e.g., *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 954–55.

<sup>141</sup> See *id.* at 949 (noting how Target owns and operates both the brick-and-mortar store locations and target.com, and therefore not addressing the Title III requirement of ownership, operation, or leasing). *Young* is valuable not only due to its intriguing “integration” argument but also because it presents both an argument for “integration” and questions surrounding the element of common ownership and operation. *Young* demonstrates the need to define and assess the level of emphasis for the requirement of “operation” under Title III—specifically when the unique nature of the Internet is implicated— as this was arguably the “straw that broke the camel’s back” in said case. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1116

element because, in addition to its presence in Title III's statutory language and its potential to bolster the "nexus" test, the failure to agree on a consistent interpretation of "operation" can still hinder a "nexus" claim, even with a clear depiction of "integration."<sup>142</sup> The way in which courts define this requirement when a web-based entity's site creates a virtual door to a store—a door that the retailer does not own—will determine the entity's Title III status.<sup>143</sup>

### III. "OPERATION" AND THE "BACKDOOR NEXUS" APPROACH

Since there is presently no case law specifying factors to consider when a noncompliant virtual space creates a doorway to a separately owned physical space that is compliant, this section will first address the different ways that courts have defined "operation" through generalized approaches and analogous contexts.<sup>144</sup> This initial discussion will introduce concepts that this Comment's proposed standard ultimately incorporates.<sup>145</sup> This section will then set forth the "Backdoor Nexus" approach's two-prong framework, beginning with "integration" and then "operation."

#### A. Defining "Operation"

##### 1. General Approaches

Generalized approaches to defining "operation" will not, by themselves, account for web-based entities because the Internet is a dynamic and complex medium of communication.<sup>146</sup> Courts often

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(N.D. Cal. 2011).

<sup>142</sup> 42 U.S.C. § 12182(a) (2006); discussion *infra* Part III.A.2.

<sup>143</sup> See discussion *infra* Parts III.B, IV.

<sup>144</sup> See *supra* note 26; see also *infra* Figure 1. This Comment will give primary attention to Title III's "operation" requirement in order to maintain focus on the disparate-ownership scenario—as seen in *Young*. This is not meant to suggest that ownership or leasing is any less important but rather that courts will be more likely to scrutinize "operation," and "operation" is a better fit for this scenario. Moreover, as a general matter Title III does not accord any type of elevated status for ownership. *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 872–73 (9th Cir. 2004) (alteration in original) (emphasis added) ("[L]imiting the reach of the statute to *owners* . . . would conflict with § 42 U.S.C. 12182(b) . . ."); *Leonard v. Israel Discount Bank*, 967 F. Supp. 802, 804 (S.D.N.Y. 1997) (emphasis added) ("The legislative history of the ADA confirms that Title III, as its plain meaning tells us, was intended to regulate owners *and* lessees of places of public accommodation.").

<sup>145</sup> See discussion *infra* Parts III.A.2–B.

<sup>146</sup> See generally JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (Oxford Univ. Press, 2006) (discussing the never-ending clashes between the Internet as a communication medium and the governmental attempts to regulate it). In these circumstances, the absence of a definition of an explicit statutory term—"operates"—is just as troublesome as an

utilize dictionary definitions as a default measure for defining legal terms; however, such definitions are insufficient because they often generate more questions.<sup>147</sup> The term “operate” is no exception because its plain meaning is “to control or direct the functioning of,” but there is no indication as to what constitutes “control” or “direction” nor how much control or direction is sufficient to constitute “operation.”<sup>148</sup> To deal with the problems inherent in dictionary definitions, courts often attempt to supplement dictionary definitions by utilizing broad agency principles.<sup>149</sup> They generally focus on authoritative and discretionary factors, as well as the right to control and the appearance of control.<sup>150</sup> But the specific context

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ambiguous judicial term already mentioned—“integration.” This Comment will not only assess the sufficiency of the degree of “integration” through comparisons to analogous and dissimilar business set-ups along a spectrum, but will also evaluate the possible definitions of “operates” through comparisons to other scenarios.

<sup>147</sup> Courts that take the dictionary approach construe a term “in accord with its ordinary and natural meaning.” *E.g.*, *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995) (citing THE RANDOM HOUSE COLLEGE DICTIONARY 931 (Rev. ed. 1980)) (“To ‘operate’, in the context of a business operation, means ‘to put or keep in operation.’”). The exact issue in *Neff* was whether American Dairy Queen’s “contractual rights under the . . . franchise agreement demonstrate that ADQ ‘operates’ the San Antonio Stores.” *Id.* at 1065. The court was hesitant to “bend ‘operates’ too far beyond its natural meaning . . . .” *Id.* at 1069.

<sup>148</sup> *Id.* at 1066 (alteration in original) (citing WEBSTER’S II: NEW RIVERSIDE UNIVERSITY DICTIONARY 823 (1988)); *Dahlberg v. Avis Rent a Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1102 (D. Colo. 2000).

<sup>149</sup> *See, e.g.*, *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 874–78 (9th Cir. 2004) (finding the term “operates” to be very expansive, considering the distinction between public and private ownership, examining the level of control exercised, and discussing the effect of a short-term operation of a public accommodation).

<sup>150</sup> *See, e.g.*, *Dahlberg*, 92 F. Supp. 2d at 1101 (finding control over “day-to-day operations” to be a factor for Title III “operation”); *Coddington v. Adelphi Univ.*, 45 F. Supp. 2d 211, 215 (E.D. NY 1999) (“The term ‘operate’ has been interpreted as being in a position of authority and having the power and discretion to perform potentially discriminatory acts.”); *see also* *Howe v. Hull*, 873 F. Supp. 72, 77 (N.D. Ohio 1994); *Reed v. YMCA*, No. 3:07-0765, 2008 U.S. Dist. LEXIS 119311, at \*4 (M.D. Tenn. July 22, 2008) (considering factors of “operation” such as organization documents, direction of operations, or direct involvement in the wrongful conduct). Courts typically focus on such factors in the franchisor liability context. *See* Kathleen Pearson, *Let’s All Go to the Dairy Queen Without Margo!: The Liability of Franchisors Under Title III of the Americans with Disability Act After Neff v. American Dairy Queen Corp.*, 101 DICK. L. REV. 137, 145–47 (1996) (discussing how the right to control the work of an agent is critical, that establishment of such relationship is a matter of fact, and that apparent agency is another consideration courts could use to impose liability if the customer reasonably relied on the franchisee’s apparent authority); *see also* discussion *infra* Part III.A.2. For a more in-depth overview of agency conceptions in the franchisor context, including the typical control factors that courts consider, *see* Randall K. Hanson, *The Franchising Dilemma Continues: Update on Franchisor Liability for Wrongful Acts by Local Franchisees*, 20 CAMPBELL L. REV. 91, 93–98 (1997). While

often dictates the determination and application of such factors.<sup>151</sup> Therefore, in order to fill the gaps left open by these general approaches, courts should use concepts derived from analogous contexts to define “operation” in the Internet context.<sup>152</sup>

## 2. Concepts Derived from Analogous Contexts

With the increasing complexity of a web-based company’s structure, it is important to consider concepts from scenarios that involve two separately owned entities whose businesses nonetheless become intertwined.<sup>153</sup>

### i. Specific Control Over the Demanded Modification

A plaintiff can establish “operation” of a noncompliant place of public accommodation under Title III upon a showing of specific control over the inaccessible service or the demanded modification.<sup>154</sup> This type of “operation” primarily exists in the franchising context which, despite invoking the same statutory authority, has yet to

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customers are aware that, for example, Redbox is a separate company from Shop Rite, customers are likely to at least assume that the companies have some type of business relationship that allows Redbox kiosks to occupy a particular portion of supermarket, and that Redbox is responsible for that particular area. *See* discussion *infra* Parts III.B.2.ii, IV.B.

<sup>151</sup> *See* Pearson, *supra* note 150, at 143 (discussing how the Department of Justice has supported the theory of extending liability to the franchisor by arguing that ADA operator status is a question of fact).

<sup>152</sup> Unique mediums create unique forms of discrimination—closing a virtual door to a store or creating a separate benefit—that warrant different theories. *See* GLYNN, ANROW-RICHMAN & SULLIVAN, *supra* note 39, at 509.

<sup>153</sup> *See* Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 793 (8th Cir. 2009) (internal quotation marks omitted) (explaining that the “degree of interrelation between the operations” of two entities is a critical factor for determining whether they are actually operating as one entity); Richards, *supra* note 11, at 521 (“Some commentators have predicted the Internet becoming the absolute standard for businesses . . .”). The “nexus” argument in *Young* implicated a connection between two distinct entities—Facebook and a separately owned commercial retail store. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011). The aforementioned Netflix 2011 announcement regarding the formation of Qwikster is a prime example of the overlap between role of the corporate form and the unique nature of the Internet. *See supra* note 95.

<sup>154</sup> *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1066–67 (5th Cir. 1995); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, No. 11-CV-30168, 2012 U.S. Dist. LEXIS 84518, at \*11 (D. Mass. June 19, 2012) (citations omitted). *Neff* employs a “prevalent theor[y for determining] who is an operator under the ADA.” *United States v. Days Inn*, 22 F. Supp. 2d 612, 616 (E.D. KY 1998) (alteration in original); *see also* Pearson, *supra* note 150, at 138 (*Neff* is a “test case on the liability of franchisors under Title III.”). For further background of *Neff* and the liability of franchisors under Title III of the ADA, *see generally* Pearson, *supra* note 150.

overlap with Title III website litigation.<sup>155</sup> Courts have not considered this type of “operation” in the Internet context because franchising cases generally involve a *physical* barrier to only one space—a noncompliant physical place of public accommodation.<sup>156</sup> Title III Internet cases involve two spaces, one physical and one virtual, but the demanded modification in these cases is located in the virtual space—as opposed to in the place of public accommodation.<sup>157</sup> Adapting this aspect of “operation” into the “Backdoor Nexus” approach, however, will ensure that the nature of the barrier and the number of spaces involved do not circumvent liability in contravention of Title III’s statutory language.<sup>158</sup> Thus, if a plaintiff

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<sup>155</sup> Unlike Title III franchising litigation, Title III website litigation has had a clear disparity in results. Compare *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) (finding Title III to cover inaccessible website), with *Young*, 790 F. Supp. 2d 1110 (dismissing Title III claim involving inaccessible website without considering the merits of the “nexus” argument), and *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (finding Title III to be inapplicable to inaccessible website).

<sup>156</sup> There does not appear to be any Title III case that implicates franchising relationships and intangible discriminatory barriers; the majority of such cases implicate only physical or architectural barriers. *E.g.*, *Neff*, 58 F.3d 1063; *Lieber v. Macy’s West, Inc.*, 80 F. Supp. 2d 1065, 1081 (N.D. Cal. 1999). This is surprising considering that the Internet has a commanding presence, as it now provides society with virtual goods, services, currencies, and even doors. For example, Facebook Credits are “a virtual *currency* you can use to buy virtual *goods* in any games or apps of the Facebook platform . . . .” *Help Center About Facebook Credits*, FACEBOOK, *supra* note 102 (emphasis added). Also, target.com acts as a door to the brick-and-mortar Target retail stores. *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 955 (“The challenged service here is heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores.”). Moreover, another reason courts may not have extended this definition of “operation” is the fact that there is currently no scenario where a web-based company has entered into some type of franchising arrangement. But this scenario is possible down the line because web-based companies like Amazon have been branching out in recent years, beyond the traditional online order/warehouse system. *See, e.g.*, Michael Noer & Nicole Perloth, *supra* note 92 (noting how Amazon is “exerting increasing power over the publishing business through the Kindle,” which several major retail stores like Target sell). Further, there already exists a chain of brick-and-mortar stores called “iSold It” that sell merchandise on the web-based company eBay through the stores.

<sup>157</sup> *E.g.*, *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d 946.

<sup>158</sup> *See* Kenneth Kronstadt, *Looking Behind the Curtain: Applying Title III of the Americans with Disabilities Act to the Businesses Behind Commercial Websites*, 81 S. CAL. L. REV. 111, 131 (2007) (“Title III does not require that the public must physically enter any such ‘place’ to be protected against discrimination.”). *Rendon* and *Target* both explicitly state that Title III covers intangible barriers to a place of public accommodation, and, therefore, the discrimination’s nature and location cannot defeat a claim that demonstrates sufficient “integration.” *See supra* Parts II.A.2, B. Further, the *Neff* court held that, although outside the scope of a Title III franchising case, control of “non-structural” aspects—*e.g.* accounting, trademarks, etc.—“may be relevant in other contexts . . . [if it relates] to the allegedly discriminatory

can demonstrate a defendant's ownership or control of the noncompliant virtual space that is now a "service of" the physical space, then the control that is exercised over that space may carry over to the physical space—so long as a plaintiff can first satisfy "integration."<sup>159</sup>

ii. Limited Occupation

Commercial landlord-tenancy contributes an important step to defining "operation" because the nature of an occupant's association with the discriminatory conditions is more important than the duration of the occupation and the size of the space.<sup>160</sup> Under Title III, either a landlord, its temporary tenant, or both can be responsible for ADA compliance of a place of public accommodation,

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conditions . . ." *Neff*, 58 F.3d at 1067 (alteration in original); see also Pearson, *supra* note 150, at 144. This Comment will adapt the specific-control concept to fit the disparate-ownership scenario because courts in Title III franchising cases typically consider whether a non-owning entity has "in some way *actually cause[d]* the [owner] to comply or not to comply with the ADA." *Days Inn*, 22 F. Supp. 2d at 616 (alteration in original) (emphasis added).

While some commentators take the view that holding franchisors liable would provide a possible disincentive for the franchisee to comply with the ADA, this point only has muster when it is the franchisee who has failed to comply with the ADA. See Pearson, *supra* note 150, at 143. When the entity that a plaintiff is attempting to hold liable under Title III is the one who has failed to comply with the mandates of the ADA, then this point is clearly inapplicable; in *Young*, it was Facebook itself, while not a "franchisor," which created the alleged discriminatory condition. *Young*, 790 F. Supp. 2d at 1114. As a side note, if a case implicates a parent-subsidiary relationship, courts are similarly loath to extend liability to the parent company; however, if the parent is "linked to the alleged discriminatory action," then it can be held liable. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 795 (8th Cir. 2009).

<sup>159</sup> See discussion *infra* Part III.B. The *Neff* court considered whether limited control over a franchisee store could translate into "operation" under Title III. *Neff*, 58 F.3d at 1066. Traditionally, the entity controlling a service of a place of public accommodation also controls the place itself. See, e.g., *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d 946. It is unclear, relying upon *Neff* alone, what will happen when the demanded modification is not actually part of the place of public accommodation. For example, in *Young*, the demanded modification was access to the website facebook.com. *Young*, 790 F. Supp. 2d at 1115. Even though Facebook owned the service, the plaintiff alleged that the inaccessibility affected a good sold in a separately owned retail store. *Id.* It may be the case that "integration" and "operation" are intertwined under this standard from *Neff*, such that if the demanded modification is actually off-site, but nonetheless connected to the public accommodation, then the claim is successful. See discussion *infra* Parts IV.B–C. In other words, if a separately owned service bears a "nexus" to a place of public accommodation, then the idea is that the entity controlling the service, which is creating the discriminatory conditions, can "operate" the place if other criteria are met.

<sup>160</sup> See *supra* note 36. Normally the landlord-tenant context is more suitable for the lease requirement of Title III. See 42 U.S.C. § 12182(a) (2006).

depending on who creates the discriminatory condition and whether they are using the occupied or controlled space to engage in commerce.<sup>161</sup> Likewise, the Supreme Court supports the proposition that “under [Title III], a place of public accommodation may be ‘operated’ by entities who do not own the facility and use it for a limited time period only.”<sup>162</sup> Courts can hold a non-owning entity liable as an operator so long as the entity uses a place of public accommodation during the same time period in which the discriminatory conditions occur.<sup>163</sup>

The conception that an entity can operate a place for a limited time begets the important consideration as to whether, like a leasing tenant, a web-based company can engage in commerce through a limited *space* of a place of public accommodation under Title III.<sup>164</sup>

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<sup>161</sup> See *Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047, 1053–54 (S.D. Cal. 1998) (“Under the ADA, liability attaches to landlords and tenants alike.”); 28 C.F.R. § 36.201(b) (2011) (alteration in original) (“[The ADA covers] both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation . . .”); AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES, III-1.2000.B (1994 Supp.), [hereinafter “TITLE III TECHNICAL ASSISTANCE MANUAL”], available at <http://www.usdoj.gov/crt/ada/taman3up.html> (“The fact that a landlord in a particular case is not covered by the ADA does not necessarily negate Title III’s coverage of private entities that lease or operate places of public accommodation within the facility.”); Paul V. Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1127 (1995) (“Both parties remain subject to liability.”).

<sup>162</sup> *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 874 (9th Cir. 2004) (alteration in original) (discussing *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001)). Under the ADA, “operation” is an extensive term that includes “sublesses, management companies, and any other entity that . . . operates a place of public accommodation, even if the operation is for a short time.” *Id.* (alteration in original) (emphasis added) (citing 28 C.F.R., ch 1, pt. 35, app. B, at 628 (1999)).

<sup>163</sup> *Dahlberg v. Avis Rent a Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1105 (D. Colo. 2000). With a workable definition of “operates,” the *Young* court could have held Facebook liable if it had a presence in retail stores during the time of the alleged discriminatory conduct. See discussion *infra* Part IV.C.

<sup>164</sup> See, e.g., *Disabled Rights Action Comm.*, 375 F.3d at 878. In this case, the Ninth Circuit considered whether the Las Vegas Events group “operated” the public-accommodation center when it sponsored rodeos; effectively, the group was operating a whole space but during a limited time. *Id.* Courts would have to recognize that the size of such space is not dispositive when considering whether an entity’s operations affect commerce in a place of public accommodation. The ADA’s public-accommodation provision explicitly requires the engaging of commerce through the particular space irrespective of the size of such space. 42 U.S.C. § 12181(7) (2006).

As a business entity’s structure has evolved, so has its ability to affect commerce. See *supra* note 6. With the nature of web-based companies and the current ambiguities surrounding “integration,” the “nexus” approach will become a

For example, many web-based companies have a “presence” in places of public accommodation, but such presence is more apparent in companies like Redbox that use a physical mechanism to provide services, as opposed to more virtual companies that do not.<sup>165</sup> These companies create discriminatory conditions that may impact a limited space that they occupy or control, but that another company owns; this is in some ways likened to the landlord and tenant scenario.<sup>166</sup>

There is no current authority that directly addresses the “operation” of a limited space, like part of a retail store; however, pertinent Title III sources may support the theory.<sup>167</sup> A place of

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mere illusion if it is not refined. On the other end, there is a concern for placing less emphasis on “operation” based on a plain reading of Title III. *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 967 (9th Cir. 2006) (emphasis added) (“The statute says nothing about liability by persons who *could* operate a place of public accommodation.”); *see also* Pearson, *supra* note 150, at 148 (distinguishing franchisor liability under Title VII from liability under the ADA because the ADA “bases liability on status as an operator”). Greater emphasis on the requirement of “operation” may be better left for those arguments where a plaintiff asserts that a website is a place of public accommodation itself. *E.g., Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

<sup>165</sup> Redbox is one such example of operating a limited space because its business structure is built around rental kiosks that Redbox owns and operates but that are located within a particular part of a retail store—a regulated public accommodation. *Media Center Facts About Redbox*, *supra* note 40. Additionally, courts can apply the “nexus” approach to concrete spaces like airline ticket counters; however, there is no disparate-ownership scenario regarding a ticket counter and surrounding airline facility. *See* Khouri, *supra* note 2, at 338 (discussing the *Access Now* case). It is more difficult to establish a physical presence for companies like Facebook and Amazon because they provide trademarked goods in retail stores as opposed to setting up a physical mechanism to retrieve such goods or services.

<sup>166</sup> *E.g., Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail, LLC*, No. C12-0195, 2012 U.S. Dist. LEXIS 70007, at \*6 (N.D. Cal. May 18, 2012) (“Save Mart does not control the design or operation of the kiosks, and has no power to change them.”); *see supra* notes 161–63 and accompanying text; *see also* discussion *infra* Part IV.

<sup>167</sup> *See, e.g.,* 28 C.F.R. § 36.104 (2011). Regardless of the presence of sources, it is nearly impossible to imagine a world where “temporary” does not include limited spaces that could subject such entities to Title III liability. If the overarching space of the place of public accommodation is the only area subject to Title III regulation, this may create a complete risk allocation to the public accommodation’s owner for all discriminatory conduct occurring within any sub-divisions. “Operation” of a limited space may be akin to leasing an office space in a building or corporate park. *See* TITLE III TECHNICAL ASSISTANCE MANUAL, *supra* note 161 (setting forth an example where Title III covers private entities that rent and operate spaces as retail stores in a building owned by an executive agency). Operators of a small space such as an office within a corporate park could escape liability through such sub-division, and the risk would be shifted completely to the building owner. Such shifting would contravene the landlord-tenant regime under Title III wherein both a landlord and tenant can be subject to Title III liability. *See Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047, 1053–54 (S.D. Cal. 1998); 28 C.F.R. § 36.201(b) (2011).

public accommodation is a “facility, operated by a private entity, whose operations affect commerce,”<sup>168</sup> and the Code of Federal Regulations defines a “facility” to include “all or *any portion* of buildings [or] structures . . . .”<sup>169</sup> Moreover, the ADA can classify specific portions of a business as a place of public accommodation.<sup>170</sup> Incorporating this concept into the proposed framework will allow for an entity like Redbox, which links its website to the kiosks that provide its rental services, to “operate” a limited space of a public accommodation because its kiosks physically occupy part of that place.<sup>171</sup> Redbox can essentially serve as a “bridge” to unite Title III franchising cases with the Internet context, especially in a scenario like *Young*.

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<sup>168</sup> § 12181(7).

<sup>169</sup> § 36.104 (alteration in original) (emphasis added).

<sup>170</sup> GOREN, *supra* note 6, at 68, 146. Furthermore, when a “portion of a facility containing a primary function is altered, the path of travel to that portion . . . must also be made readily accessible . . . .” *Id.* at 72. The term “primary function” is defined as a “major activity for which the facility is intended . . . .” *Id.* (citations omitted) (internal quotation marks omitted). The concept of separating limited spaces within one encompassing space has also been suggested in the private residency context. *See* 28 C.F.R. § 36.207(a) (2011) (alteration in original) (emphasis added) (“[T]he portion of the residence used exclusively as a residence is not covered . . . but that portion *used exclusively in the operation* of the place of public accommodation or that portion used both for the place of public accommodation and for residential purposes is covered . . . .”).

<sup>171</sup> *See* discussion *infra* Part IV.B.2.

**Figure 1: The Four Quadrants of Title III Liability**<sup>172</sup>

	<b>Noncompliant Physical Space Only</b> <sup>173</sup>	<b>Noncompliant Virtual Space w/ Compliant Physical</b> <sup>174</sup>
<b>Unitary Ownership/Control of Physical Space</b>	✓	✓ [ <i>Target</i> ]
<b>Separate Ownership/Control of Physical Space</b>	✓ [Title III Franchising Cases]	? [ <i>Young</i> ]

↖Redbox<sup>175</sup>↗

*B. “Backdoor Nexus” Framework for Establishing “Integration” and “Operation”*

This section sets forth the proposed two-prong analysis for the “Backdoor Nexus” approach. The first prong—“integration”—urges courts to re-characterize *Target* by adopting a totality of the circumstances approach because they have been unable to consistently apply the ambiguous concept of “integration” to similar factual scenarios.<sup>176</sup> Utilizing such an approach will force courts to

<sup>172</sup> This figure portrays all of the scenarios under Title III that implicate the two types of spaces—physical and virtual—that are commonly involved and the issues of unitary versus separate ownership and operation. See *infra* notes 173–74.

<sup>173</sup> Most Title III claims have involved a single entity that owns or controls a physical space; however, many Title III claims have also involved an entity that controls but does not own a physical space. *E.g.*, *Disabled Rights Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004); *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995).

<sup>174</sup> In the Internet context, plaintiffs have used the “nexus” approach to establish Title III claims against an entity that owns and controls *both* a physical and virtual space (the virtual space being the retailer website which acts as another “door” to the store). *E.g.*, *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006). The question arises, however, whether the “nexus” approach can allow Title III to reach a separately owned or controlled virtual space that also appears to act as a “door” to a physical space; this is the question that this Comment considers.

<sup>175</sup> Redbox may be the bridge to the “separately owned noncompliant virtual with compliant physical spaces” quadrant because it is a company with both a website and physical kiosks in places of public accommodation. Redbox may be one step above *Target* but one step below *Young*. See application of “Backdoor Nexus” approach *infra* Part IV.B.2.

<sup>176</sup> The *Target* court found a sufficient “nexus” because the challenged service was heavily integrated with, and operated as a gateway to, the brick-and-mortar stores. *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 955. But the court did not further elaborate on how future courts can determine whether such “integration” exists between a

scrutinize websites with functions that are similar to target.com, even if such sites only have a physical presence in a separately owned public accommodation.<sup>177</sup>

The second prong—“operation”—will use the specific control and limited occupation concepts to collectively set forth a definition that courts can apply to web-based companies. This interpretation will dynamically reflect the commercial presence that these entities can have in a place of public accommodation in order to prevent them from having “*carte blanche* to discriminate against persons with disabilities when selling their goods and services.”<sup>178</sup>

### 1. First Prong: “Integration”<sup>179</sup>

#### i. The *Target* Factors as a Sliding Scale

Courts should explicitly adopt the *Target* court’s examples of Title III-covered website functions as a checklist or sliding scale in order to account for the inherent variability of a totality of the circumstances approach.<sup>180</sup> Each of these functions has an element of

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website and a public accommodation. *See id.* Moreover, it is unclear whether the website must act as an actual virtual door, or merely if it must have a strong connection to the place of public accommodation. *See supra* Part II.C.

<sup>177</sup> Compare *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1116 (N.D. Cal. 2011) (not considering the “nexus” argument because of the plaintiff’s failure to assert an argument regarding ownership, leasing, or operation, in spite of facebook.com having information on store locations and hours where it sells its gift cards and serving as the location where customers must redeem the value of store-bought gift cards), with *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949 (finding target.com—a site that Target indisputably owned and operated—to be sufficiently integrated with Target retail stores because customers could obtain store location and hours information, refill prescriptions, order photographs for in-store pick-up, and print coupons to redeem at stores).

<sup>178</sup> GOREN, *supra* note 6, at 128. This Comment takes the position that courts have not been dynamically interpreting Title III’s public-accommodations provision to preserve the statute’s purpose in the face of evolving technology. *See* *Carpenter Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n*, 37 F.3d 12, 20 (1st Cir. 1994) (explaining that the congressional intent is for Title III to keep the disabled in the “social mainstream”). The phrase “dynamically interpreting” is not meant to indicate that virtual places should themselves be considered places of public accommodation, but rather that courts have placed so much focus on the “place” aspect of the public-accommodation provision and not enough on the “affects commerce” aspect. *See* 42 U.S.C. § 12181(7) (2006).

<sup>179</sup> This Comment’s proposed “integration” standard is equally applicable to both a separately owned website and a unitarily owned website. *See, e.g., Young*, 790 F. Supp. 2d 1110; *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d 946.

<sup>180</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949. A totality of circumstances approach may, like *Target*’s current state, lead to a continuum in which circuit courts must ultimately define different points; however, adding specific factors to such an analysis will provide a more concrete standard than the unformulated one that *Target*

“duality,” meaning that the website allows consumers to engage in specific actions that they can also perform in the store, or that the site affects the enjoyment of other goods and services of the store.<sup>181</sup> The following website functions are examples of the types of dual-use functions that courts should consider: (1) accessing store information; (2) refilling a prescription or ordering photographs for in-store pick-up; (3) printing online coupons redeemable in the store; and (4) obtaining products offered both online and in the store.<sup>182</sup> The *Target* court’s enumeration of such functions is the only indicator it gave of what may constitute a heavily integrated website; however, the court did not indicate whether any single factor is dispositive.<sup>183</sup> Therefore, the more of these or other dual-natured functions that a website possesses, the more likely courts will view it as a doorway to a public accommodation.<sup>184</sup>

ii. Additional “Backdoor” Factors from *Young*

The inquiry, however, would not end with the *Target* factors because incorporating additional factors from *Young* will create a spectrum that parallels the structure of the implicated business.<sup>185</sup> A plaintiff would need to demonstrate more to establish a “nexus” when the litigation implicates a website of a completely virtual company and less when it involves a retailer-companion website—as in *Target*.<sup>186</sup> When the defendant is a web-based company with some type of physical presence in a place of public accommodation, courts must also consider the degree to which the inaccessible website affects enjoyment of the goods and services provided by the separately

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creates. *See* DuPree, *supra* note 17, at 291.

<sup>181</sup> *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 949.

<sup>182</sup> *Id.* The court found that online-only deals or products would not affect enjoyment of goods and services in the brick-and-mortar stores because they lack duality. *Id.* at 956.

<sup>183</sup> *Id.* at 949, 956.

<sup>184</sup> *See* discussion *infra* Part IV.

<sup>185</sup> *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011); *see also supra* Part II.D. Consideration of the *Target* factors should be obligatory, but such factors have more of a preliminary value. There are several types of business structures that can exist, ranging from a completely virtual—or web-based—company to a brick-and-mortar retail outlet with a companion website. Amazon.com is an example of a completely virtual company because it does not have an apparent physical presence in any place of public accommodation. *See* AMAZON.COM, <http://www.amazon.com> (last visited Mar. 17, 2012). Target Corp. is an example of a retail outlet with a companion website. *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d 946. Facebook, Inc. could be an example of a structure in between these set-ups because it is a web-based company with a presence in various retail stores.

<sup>186</sup> *See* discussion *infra* Part IV.

owned place. For instance, in *Young*, facebook.com's inaccessibility completely prevented the plaintiff from using—although not from purchasing—the Facebook gift cards that retail stores sold.<sup>187</sup> Moreover, courts must consider whether purchasing the web-based entity's products in a store gives a customer any type of reward points or store credit redeemable for the purchase of any store merchandise.<sup>188</sup>

### iii. Recap of First Prong

A court's consideration of these factors will account for both companion websites—virtual front doors—and websites that create a virtual backdoor to a place of public accommodation.<sup>189</sup> For the companion websites like target.com, a plaintiff can satisfy “integration” when customers can at least engage in “dual” functions such as: (1) accessing store information; (2) refilling a prescription or ordering photographs for store pick-up; (3) printing online coupons redeemable in the store; and (4) obtaining products offered both online and in the store.<sup>190</sup> For all other websites, a plaintiff must establish all of these types of functions plus the *Young* factors, such as the existence of a mutually beneficial rewards program or that a website's inaccessibility actually deprives a plaintiff of the ability to use a product or service that the company offers both on its website and in the store.<sup>191</sup>

## 2. Second Prong: “Operation”

### i. Step One: Control of Heavily Integrated Inaccessible Websites

Once a plaintiff establishes “integration” between a website and

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<sup>187</sup> *Young*, 790 F. Supp. 2d at 1115; Amended Complaint, *supra* note 31, at 5; *see supra* Part II.D.

<sup>188</sup> *See supra* note 105 and accompanying text.

<sup>189</sup> Target.com is an example of a virtual front door because Target owns and operates it, and it has dual-natured functions. *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 948–49. *Young* presents a potential example of a virtual back door because Facebook, Inc. does not own a brick-and-mortar store but its website nonetheless prevents full and equal enjoyment of the goods that it provides through various stores. *Young*, 790 F. Supp. 2d 1110. A business's structure alone should not cause courts to overlook the presence of the type of discrimination that Title III aims to prevent. Moreover, a vital aspect of *Target* is the court's explicit affirmation that Title III is applicable to off-site discrimination and intangible barriers that create such discrimination, such as a medium of communication. *See Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 953–55.

<sup>190</sup> *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 949.

<sup>191</sup> *See* Amended Complaint, *supra* note 31, at 5.

a place of public accommodation, the first step under the “Backdoor Nexus” Approach’s second prong is that the web-based company must itself be responsible for the wrongful conduct. To be liable as a Title III operator, the company must first control (or own) an inaccessible website—meaning that it is a noncompliant virtual space.<sup>192</sup> This step is important because the common thread in Title III franchising cases is determining whether a non-owning entity has control over the accessibility barriers to a place.<sup>193</sup> If the plaintiff demonstrates that the defendant controls the website, then courts can extend this control to some type of control over the place provided that the plaintiff meets the remaining steps.

ii. Step Two: Commercial Presence in a Place of Public Accommodation

The second and most important step is that a plaintiff must establish the company’s commercial presence in a separately owned place of public accommodation by showing that the entity is engaging in commerce through some aspect of the place.<sup>194</sup> To “engage in commerce,” the web-based entity must provide a trademarked good or service in a place of public accommodation; however, the good or service must actually occupy a portion of the place.<sup>195</sup> The presence factor will be stronger for companies like Redbox that control and utilize some type of *physical* mechanism to provide such goods and services in a place—like a kiosk.<sup>196</sup>

iii. Step Three: Prevention of Usage of Product or Service

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<sup>192</sup> See, e.g., *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d 946 (involving a single entity that owns and operates both a noncompliant virtual space and a compliant physical space).

<sup>193</sup> See *supra* Parts III.A.2.i–ii.

<sup>194</sup> This would include a kiosk or perhaps the section where gift cards are sold. See discussion *infra* Part IV.B–C.

<sup>195</sup> Web-based companies identify themselves to the public through a trademark—like Facebook does with its gift cards. See *supra* note 102. Moreover, even though “customers contract for liability on the basis of trademark, [they] receive liability (or fail to receive it) on the basis of entity structure.” Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1113 (2002) (alteration in original).

<sup>196</sup> See discussion *infra* Part IV.B.2. Airline ticket counters are an example of a concrete space within a place of public accommodation. See *supra* note 165. Moreover, kiosks themselves have been the subject of disability discrimination suits when they are inaccessible to blind individuals, with the argument that a kiosk is a “service of” a place of public accommodation. See *supra* Part II.E. For disability discrimination suits involving airline websites and kiosks, see, e.g., *Foley v. JetBlue Airways, Corp.*, No. C 10-3882, 2011 U.S. Dist. LEXIS 85426 (N.D. Cal. Aug. 3, 2011).

### Establishing Presence

The second prong's final step is that the website's inaccessibility must either create a separate benefit for those able to use the site, or hinder enjoyment and use of the trademarked good or service that establishes the web-based entity's commercial presence in the place of public accommodation. The website's noncompliance will be even stronger if the discriminatory effect on the trademarked goods or services reaches other services or store merchandise that other companies provide.<sup>197</sup> This step is critical because the effect of the noncompliance must reach beyond the borders of virtual space and enter the physical space.<sup>198</sup>

#### iv. Recap of Second Prong

After satisfying the "integration" prong, a plaintiff can establish a web-based entity's "operation" of a place of public accommodation by meeting the following steps: (1) ownership or control of an inaccessible website; (2) existence of the web-based entity's commercial presence by showing that the entity engages in commerce through a limited space of a place of public accommodation; and (3) creation of a separate benefit, for those able to use it, or hindrance of use or enjoyment of the trademarked product or service that establishes the commercial presence in a public accommodation.

### IV. APPLICATION OF THE "BACKDOOR NEXUS" APPROACH

In order to demonstrate how the "Backdoor Nexus" approach accounts for the interaction between physical and virtual spaces, this section will apply the proposed framework for "integration" and "operation" to *Target*, *Young*, and *Redbox*—an entity that may "bridge" the two. This approach's application will demonstrate how a plaintiff can establish "integration" for unitary ownership scenarios, such as retailer-companion websites or "one-step-removed" websites

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<sup>197</sup> While this element is similar to one of the *Young* factors, namely the rewards program example, it is also suitable for establishing a non-owning entity's presence because of its website's effects on unconnected products that the same store sells.

<sup>198</sup> See, e.g., *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011). If facebook.com's inaccessibility only hindered the ability to social network, then the discrimination would not be effectuated through the public accommodation. But since the inaccessibility actually prevented a customer from using a gift card purchased at a retail store, the discrimination extends through the public accommodation. The same can be said more strongly for *Redbox*. See *infra* Part IV.B.2.

with slightly different functions than their store counterparts.<sup>199</sup> It will also show how websites like Redbox and Facebook can be integrated with separately owned places of public accommodation. More importantly, the application to web-based entities with a commercial presence, ranging from a physical mechanism providing services in a limited space to a completely virtual presence, will reveal how courts can approach “operation.”

#### A. Target and Companion Website Scenarios

##### 1. “Integration”

Since the proposed totality of the circumstances approach is built around the usage of *Target’s* Title III-covered website functions, a brick-and-mortar store with a companion website should easily meet the proposed “integration” standards. Apple is an example because it has both brick-and-mortar Apple Stores and the Apple Store Online.<sup>200</sup> Apple’s website exhibits numerous “dual” functions because it allows customers to do the following: (1) view and purchase the same products in stores;<sup>201</sup> (2) use “personal pickup” to order products for in-store retrieval;<sup>202</sup> (3) access a store locator with hours of operation information;<sup>203</sup> and (4) schedule in-store appointments with members of the Genius Bar.<sup>204</sup>

The more that a website’s functions deviate from those of the store, the more factors from *Target*—and possibly *Young*—a plaintiff must demonstrate. For example, Blockbuster Video, which has long provided its rental services through brick-and-mortar stores, has

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<sup>199</sup> See *supra* notes 89, 132, 137. The Internet is dynamic and not every retailer website will function the same way despite a clear common ownership. Therefore, a totality of circumstances approach would account for the variability in websites’ designs and functions.

<sup>200</sup> *Apple Store Online*, APPLE STORE, <http://store.apple.com/us> (last visited Jan. 27, 2012). Between the online store and the countless brick-and-mortar shops around the world, Apple has a very pervasive presence, having even opened an elegantly designed Apple Store in Grand Central Station in New York. Elizabeth Lazarowitz, *Apple Store Opens in Grand Central*, NY DAILY NEWS (Dec. 8, 2011), available at [http://articles.nydailynews.com/2011-12-08/news/30492743\\_1\\_apple-store-landmark-status-grand-central-terminal](http://articles.nydailynews.com/2011-12-08/news/30492743_1_apple-store-landmark-status-grand-central-terminal).

<sup>201</sup> *Apple Store Online*, *supra* note 200.

<sup>202</sup> *Personal Pickup*, APPLE STORE, [http://www.store.apple.com/us/browse/home/personal\\_pickup](http://www.store.apple.com/us/browse/home/personal_pickup) (last visited Feb. 9, 2012).

<sup>203</sup> *Store Locator*, APPLE STORE, <http://www.apple.com/retail/> (last visited Jan. 6, 2013).

<sup>204</sup> *Genius Bar*, APPLE STORE, <http://www.apple.com/retail/geniusbar/> (last visited Feb. 8, 2012).

added a companion website in recent years.<sup>205</sup> But blockbuster.com has some functions more akin to Netflix's DVD-by-mail service than to target.com.<sup>206</sup> Even though patrons can use blockbuster.com to locate specific brick-and-mortar stores<sup>207</sup> and review their video inventories,<sup>208</sup> one of the website's main purposes is to enable customers who subscribe to Blockbuster's independent DVD-by-mail service to manage their accounts.<sup>209</sup> The site does, however, allow members of the DVD-by-mail service to return movies directly to the brick-and-mortar store and exchange them for different ones.<sup>210</sup> Pursuant to *Target*, Title III will not cover blockbuster.com functions that are geared toward the DVD-by-mail service because the statute only applies to functions that have an effect on the enjoyment or usage of goods and services that the retail stores offer.<sup>211</sup> Therefore, while blockbuster.com should also satisfy the "integration prong," a plaintiff may need to show some more factors on the sliding scale because one of the website's primary functions is to provide a DVD-by-mail service, as opposed to acting as a door—at least a front door—to the brick-and-mortar stores.

## 2. "Operation"

For companion website scenarios, the "operation" prong is not an issue because the retailer indisputably owns and operates such websites.<sup>212</sup>

### B. Redbox Scenario

#### 1. "Integration"

Redbox, the long-time rival of rental company Netflix, is a more difficult scenario than *Target* because it involves a company that

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<sup>205</sup> BLOCKBUSTER, [www.blockbuster.com](http://www.blockbuster.com) (last visited Oct. 28, 2011).

<sup>206</sup> See *supra* notes 89, 132. Blockbuster now also allows for online streaming like Netflix. *How On Demand Works*, BLOCKBUSTER, <http://www.blockbuster.com/download/ondemand101> (last visited Feb. 8, 2012).

<sup>207</sup> *Find a Blockbuster Store Near You*, BLOCKBUSTER, <http://www.blockbuster.com/stores/storelocator> (last visited Feb. 8, 2012).

<sup>208</sup> *Check for In-Store Rental*, BLOCKBUSTER, <http://www.blockbuster.com/browse/stores/storelocator/findStoresWithTitleAvailability> (last visited Feb. 8, 2012).

<sup>209</sup> *How Blockbuster Online Works*, BLOCKBUSTER, <http://www.blockbuster.com/howitWorks> (last visited Feb. 8, 2012).

<sup>210</sup> See *id.*

<sup>211</sup> See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006). But see *supra* text accompanying note 210.

<sup>212</sup> E.g., *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 949 ("Target.com is a website owned and operated by Target."); see also *In-Store Coupons*, *supra* note 90.

functions by means of a website and in-store interactive kiosks across the country, as opposed to a brick-and-mortar retailer with a companion website.<sup>213</sup> Redbox.com should still pass the “integration” phase, however, because it allows customers to perform the following dual-natured functions: (1) reserve movies online for in-store *kiosk* pick-up;<sup>214</sup> (2) find a Redbox location;<sup>215</sup> (3) acquire promotional codes to use at the kiosks for free or discounted rentals;<sup>216</sup> and (4) conduct inventory searches of any kiosk location.<sup>217</sup> Therefore, the website is comparable to both *target.com* and *blockbuster.com*, and meets all of the *Target* factors—and more—under the “Backdoor Nexus” approach.<sup>218</sup>

In addition to *redbox.com*’s dual-natured functions, the degree to which the site’s inaccessibility can affect Redbox’s services presents a strong case for “integration.” Specifically, the website’s inaccessibility to the disabled can create a separate or unequal benefit in violation of Title III for those still able to access it.<sup>219</sup> If a disabled individual could not access *redbox.com*, then that individual would be unable to locate the nearest kiosk or check a specific kiosk’s inventory without physically entering the place of public accommodation.<sup>220</sup> More importantly, the disabled individual may be unable to rent a specific movie because another person can instantly reserve this movie online before the disabled individual sets foot in

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<sup>213</sup> Redbox allows consumers to select DVDs and Blu-Rays to rent both online via its website and offline via its kiosks. *Media Center Facts About Redbox*, *supra* note 40. The kiosks are always located either inside or directly outside of—and attached to—various supermarkets and stores, such as Shop Rite and Walgreen’s.

<sup>214</sup> REDBOX, [www.redbox.com](http://www.redbox.com) (last visited Feb. 8, 2012).

<sup>215</sup> *Find a Redbox Location*, REDBOX, <http://www.redbox.com/locations> (last visited Feb. 8, 2012).

<sup>216</sup> *Help Center*, REDBOX, <https://redbox.custhelp.com/app/home> (last visited Feb. 8, 2012). Customers can also purchase “Redbox Gifts” redeemable for kiosk promo codes. *Redbox Makes Giving This Holiday Season Easy With New Redbox Gifts*, REDBOX (Dec. 12, 2011), [http://www.redbox.com/release\\_20111212](http://www.redbox.com/release_20111212).

<sup>217</sup> *All Movies*, REDBOX, <http://www.redbox.com/movies> (last visited Feb. 8, 2012).

<sup>218</sup> *See Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006) (“Through *Target.com*, a customer can access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store.”); *supra* Part IV.A.1.

<sup>219</sup> The creation of a separate or unequal benefit is one type of disability discrimination that Title III expressly prohibits. 42 U.S.C. § 12182(b)(1)(A)(ii)–(iii) (2006). *Young* implicates a different type of prohibited discrimination because *facebook.com*’s inaccessibility prevents any participation or enjoyment of a particular good that is offered through a place of public accommodation. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011).

<sup>220</sup> *See supra* notes 215, 217.

the door and approaches the kiosk.<sup>221</sup> Therefore, although Redbox does not own any place of public accommodation, it should meet the “integration” prong because its customers can use its website to perform functions akin to walking through the front door of a store and selecting a movie directly from the kiosk.<sup>222</sup>

Difficulty in applying “integration” may arise, however, from the fact that the overall functionality of redbox.com is essentially limited to streamlining the movie-selection process at kiosks—movies can only be physically obtained from the kiosks themselves.<sup>223</sup> Even if customers reserve movies online, they must still swipe a credit card in the kiosk payment slot to commence the actual payment.<sup>224</sup> Viewed in a different way, however, this fact may keep Redbox closer to *Target* because it ensures that the actual commercial transaction is occurring within the place of public accommodation as opposed to solely in the virtual space.<sup>225</sup> Moreover, one blind advocacy group has gone a step further in arguing that Redbox’s kiosks are places of public accommodation because they are “rental establishments” under Title III.<sup>226</sup> If courts accept this argument, then they could easily view redbox.com as a companion website to Redbox kiosks based on its dual functions.<sup>227</sup> Another argument is that Redbox kiosks are a “service of” the sales establishments in which they reside.<sup>228</sup> If courts acknowledge this argument, they could consider redbox.com to be its own service or a component of Redbox kiosks.<sup>229</sup>

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<sup>221</sup> Cf. Redbox Complaint, *supra* note 126 (alleging inaccessibility to Redbox kiosks themselves creates a separate benefit for those who are not blind or visually impaired due to the touch screen rental process of the kiosks); see also *Media Center Facts About Redbox*, *supra* note 40.

<sup>222</sup> Cf. *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006).

<sup>223</sup> *How Redbox Works*, REDBOX, <http://www.redbox.com/howitworks> (last visited Feb. 8, 2012). One potential twist, however, is the announcement of a joint venture between Redbox and Verizon to provide a future online streaming service akin to Netflix. Ben Fritz, *Redbox and Verizon to Create Streaming Movie Service*, LOS ANGELES TIMES (Feb. 7, 2012), available at <http://articles.latimes.com/2012/feb/07/business/la-fi-ct-verizon-redbox-20120207>. Even though Verizon would be this service’s primary owner, this collaboration could potentially move Redbox a bit closer to blockbuster.com or further toward Netflix. See *id.*

<sup>224</sup> *Media Center Facts About Redbox*, *supra* note 40.

<sup>225</sup> See discussion *infra* Part IV.B.2.

<sup>226</sup> Redbox Complaint, *supra* note 126, at 10; see also 42 U.S.C. § 12181(7)(e) (2006); *supra* Part II.E.

<sup>227</sup> See *supra* notes 214–16 and accompanying text.

<sup>228</sup> Redbox Complaint, *supra* note 126, at 10.

<sup>229</sup> See discussion *infra* Part IV.B.2.

## 2. “Operation”

An entity that is structured like Redbox may serve as the bridge for “operation” between Title III franchising cases and Title III Internet cases because its in-store interactive kiosks give it a true commercial presence within a place of public accommodation. Redbox easily meets the “operation” prong’s first step because it would be responsible for any wrongful conduct since it owns and/or controls a website that is heavily integrated with a place of public accommodation.<sup>230</sup> While the second step is the most difficult, Redbox has a strong presence in a place of public accommodation because patrons access its rental services through physical mechanisms—the kiosks—that are located within a particular part of a retail store but remain under Redbox’s ownership or control.<sup>231</sup> Therefore, in addition to providing a trademarked service that *physically* occupies and commercially transacts with customers in a limited space of a retail store, Redbox also maintains control over that space.<sup>232</sup> Moreover, Redbox’s kiosks have functions that correspond with the surrounding retail stores because both utilize a “self-service” model that allows customers to independently browse items for purchase.<sup>233</sup> Redbox may indeed act as a bridge between Title III franchising and Title III Internet cases because the former cases characterize “operation” in the context of control over a physical space, and Redbox exerts a similar control through its kiosks that are attached to a portion of a physical space.<sup>234</sup>

Redbox also meets the “operation” prong’s third step because redbox.com’s inaccessibility to the disabled directly impacts the trademarked service that establishes Redbox’s commercial presence in a place of public accommodation—the kiosks.<sup>235</sup> Specifically, such inaccessibility would create an unequal or separate benefit for those able to access the site. Since customers can use redbox.com to instantly locate and reserve a specific movie, they can complete the

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<sup>230</sup> *Terms and Conditions*, REDBOX, <http://www.redbox.com/terms> (last updated June 1, 2011) (alteration in original) (“These terms apply to Redbox.com . . . which is owned or controlled by Redbox Automated Retail, LLC . . .”).

<sup>231</sup> *Terms and Conditions*, *supra* note 230.

<sup>232</sup> *Id.*

<sup>233</sup> *See Lieber v. Macy’s West, Inc.*, 80 F. Supp. 2d 1065, 1081 (N.D. Cal. 1999) (discussing how most major retail stores generally operate via the “self-service” model, meaning customers are expected to obtain merchandise by independently browsing and/or searching through the display areas for an item that they wish to purchase).

<sup>234</sup> *See supra* notes 156, 159, 165 and accompanying text.

<sup>235</sup> *See How Redbox Works*, *supra* note 223.

rental process in just two steps: (1) touching the button “online rental pickup” and (2) swiping the credit card used for reservation.<sup>236</sup> Those who are unable to access the site, however, are at a disadvantage because they must use the less efficient seven-step kiosk process.<sup>237</sup> More importantly, before or during the movie selection at a kiosk, a website user can instantly bypass the kiosk user by reserving the same movie at the same location. Redbox satisfies the “operation” prong because it owns or controls a website that, when inaccessible, creates a separate benefit for those who use its services, which Redbox provides through a physical, commercial mechanism that occupies part of a retail store.

### C. Young Scenario and Other Completely Virtual Entities

#### 1. “Integration”

*Young* is a much more difficult scenario than *Target* and Redbox because Facebook is a completely virtual company like Amazon. Facebook may, however, meet the “integration” standard because its website possesses some of the *Target* factors and additional dual-natured functions. Facebook.com allows users to perform the following functions: (1) locate a retail store that sells Facebook gift cards; (2) redeem the value of Facebook gift cards purchased in stores; and (3) purchase Facebook Credits online.<sup>238</sup> The website only possesses two of the *Target* factors, accessing store information and offering the same product both online and in the store.<sup>239</sup> Facebook does not strongly meet these factors, however, because it only offers one product, as opposed to offering multiple products online and in stores.<sup>240</sup>

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<sup>236</sup> *Media Center Facts About Redbox*, *supra* note 40 (alteration in original) (“Consumers can pick up reserved movies or games in just seconds by following these simple steps.”).

<sup>237</sup> Customers first have to touch the button “rent a movie,” browse titles for selection, “add to cart,” press “check out,” swipe a card, enter the card zip code, and enter an e-mail address. *Id.*

<sup>238</sup> *Facebook Credits Page*, *supra* note 102.

<sup>239</sup> *See id.*

<sup>240</sup> *Cf. Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006). A company like Amazon may have a slightly stronger level of “integration” because not only does its website sell a surplus of products, but Amazon sells its Kindle e-readers and gift cards in various retail stores across the country. *Participating Retailers*, AMAZON.COM, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000465651> (last visited Feb. 9, 2012). Like Facebook gift cards, consumers can only use the Kindle and Amazon gift cards in conjunction with the company website. *Amazon.com Gift Cards*, AMAZON.COM, <http://www.amazon.com/gp/gc> (last visited Feb. 9, 2012). Moreover, Amazon has a mobile price-comparison

Since Facebook is a virtual entity, it needs to meet more of the *Target* factors and additional dual-natured functions to be on the heavily integrated side of the sliding scale. The degree to which the connections between facebook.com and a place of public accommodation affect the enjoyment and usage of the Facebook gift cards is substantial.<sup>241</sup> As alleged in *Young*, facebook.com’s inaccessibility does not merely *hinder* enjoyment or usage of Facebook gift cards—it completely prevents it.<sup>242</sup> Those who purchase Facebook gift cards can only redeem the cards’ values online and, thus, the site’s inaccessibility results in the inability to use them.<sup>243</sup> Moreover, the Best Buy rewards program creates a connection between purchasing Facebook gift cards and purchasing other store merchandise.<sup>244</sup> If facebook.com denies access to a disabled individual, then that individual is much less likely to purchase Facebook gift cards and, thus, does not acquire reward gift certificates to purchase any other Best Buy products.<sup>245</sup> Therefore, while facebook.com could potentially meet the “integration” prong, the “integration” is not as strong as retailer-companion sites and redbox.com, both of which meet most of the *Target* and additional dual-natured functions.

## 2. “Operation”

Even if facebook.com meets the “integration” prong, it is unlikely that Facebook will satisfy the “operation” prong because its commercial presence is weak at best.<sup>246</sup> Facebook satisfies the “operation” prong’s first step because it owns and controls a website that, if inaccessible, is integrated with the retail stores that provide its gift cards for purchase.<sup>247</sup> While Facebook provides a trademarked

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application that, while meant to work in competition with retailers, is an extension of its website that customers can use in physical stores. Shan Li, *Furor Surrounds Amazon’s Price-Comparison App*, LOS ANGELES TIMES (Dec. 9, 2011), available at <http://articles.latimes.com/2011/dec/09/business/la-fi-amazon-app-20111210>. If retailers participated in Amazon’s price-comparison application, as opposed to competing with Amazon, in order to offer customers the lowest prices, then perhaps this could be indicative of both “integration” and presence.

<sup>241</sup> See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011); see also Amended Complaint, *supra* note 31, at 7.

<sup>242</sup> Amended Complaint, *supra* note 31, at 5.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See *id.*

<sup>246</sup> Cf. discussion of Redbox “operation” *supra* Part IV.B.2; see also *supra* Part III.B.2.ii.

<sup>247</sup> *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1113–15 (N.D. Cal. 2011).

good through a place of public accommodation, the second step will be very difficult because the company does not use any type of physical mechanism, like a kiosk, to provide its goods.<sup>248</sup> Even if courts are willing to view the aisles or shelves that contain Facebook's gift cards as physical mechanisms, Facebook does not control such spaces like Redbox controls its kiosks.<sup>249</sup> Facebook does have some presence in the retail stores that sell its gift cards, such as its advertising and promotion and its participation in the Best Buy rewards program.<sup>250</sup> But this presence is much weaker, and therefore insufficient under the second prong, than other web-based companies like Redbox that have a *physical* commercial presence.

If Facebook had a strong enough presence to satisfy the second step, it would meet the third step because facebook.com's inaccessibility would completely prevent use of the trademarked good that established its commercial presence—Facebook gift cards.<sup>251</sup> Moreover, the discriminatory effect on the Facebook gift cards would reach other store merchandise because of Facebook's participation in the Best Buy rewards program, even creating an unequal benefit for those able to redeem the value of such cards.<sup>252</sup>

## VI. CONCLUSION

The recent history of website litigation demonstrates the need for a new theory to reconcile Title III, and in particular the “nexus” approach, with the modern reality of places of public accommodation. Even though *Target* was only a district court case, it became a catalyst for a whole new class of Title III suits, especially in the Northern District of California.<sup>253</sup> The year 2011 was the first significant period for Title III website litigation since *National Federation of the Blind v. Target Corp.* extended application of the “nexus” approach to websites. It was a year ripe for revisiting the issue of Title III's applicability to the Internet and strengthening the “nexus” approach because several major web-based companies like

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<sup>248</sup> See Amended Complaint, *supra* note 31, at 5.

<sup>249</sup> See *Terms and Conditions*, *supra* note 230.

<sup>250</sup> See Amended Complaint, *supra* note 31, at 6 (“Defendant advertises and promotes Facebook, Inc. with InComm, Zynga and Facebook Applications at physical brick and mortar stores.”).

<sup>251</sup> See *Young*, 790 F. Supp. 2d at 1115.

<sup>252</sup> The ability to redeem the value of Facebook gift cards may create a separate or unequal benefit because website users are more likely to buy the gift cards and earn reward points to purchase other merchandise. See Amended Complaint, *supra* note 31, at 5; *Best Buy Reward Zone*, *supra* note 105.

<sup>253</sup> See *BALLON*, *supra* note 21.

Facebook, Netflix, and Redbox were sued under Title III of the ADA.<sup>254</sup> But instead, the courts denied relief to another disabled individual despite the presence of a “nexus” argument reminiscent of that in *Target*.<sup>255</sup>

This Comment utilizes the 2011 *Young v. Facebook, Inc.* decision and the 2012 suit against Redbox as examples of a potentially recurring scenario that courts will face in future Title III litigation. Courts will undoubtedly continue to face arguments from plaintiffs who are seeking to establish a “nexus” between a noncompliant virtual space that is heavily integrated with a separately owned compliant physical space.<sup>256</sup> The “Backdoor Nexus” approach demonstrates a potential solution that may move courts one step closer to implementing their “judicial willingness” to bring websites within Title III’s coverage.<sup>257</sup>

This method calls for courts to implement a two prong framework for assessing “integration” between websites and places of public accommodation, and a web-based entity’s potential “operation” of such places. The first prong, focusing on “integration,” is a totality of circumstances approach that consists of *Target*’s Title III-covered website functions and additional dual-natured factors from *Young*. The more dual-natured functions that a website possesses, the more likely courts will view it on the sliding scale as a doorway to a place of public accommodation. The second prong, “operation,” consists of three steps that assess whether a web-based entity: (1) has control or ownership of an inaccessible website; (2) provides goods or services through a limited space of a place of public accommodation; and (3) has an inaccessible website that creates a separate benefit or hinders enjoyment of the good or service that establishes its commercial presence in a place of public accommodation.

Recent Title III suits against major web-based companies like Netflix and Redbox suggest the types of Title III cases that are on the horizon.<sup>258</sup> With a methodical approach like the one this Comment proposes, courts can subject retailer-companion websites like that in *Target* or Apple to Title III liability for ADA noncompliance.

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<sup>254</sup> See Baynes, *supra* note 95.

<sup>255</sup> See *Young*, 790 F. Supp. 2d 1110.

<sup>256</sup> See, e.g., Redbox Complaint, *supra* note 126.

<sup>257</sup> See DuPree, *supra* note 17, at 290–91.

<sup>258</sup> The Title III litigation involving Netflix is still underway. See *supra* note 95. Moreover, Redbox is the example of what is to come because it is a company with a website and a physical kiosk that occupies a limited space within a statutorily accepted place of public accommodation. See Redbox Complaint, *supra* note 126.

Moreover, Title III will cover noncompliant web-based companies like Redbox that do not own a place of public accommodation but have a physical presence in such places. The liability of completely virtual entities like Amazon is still difficult to assess, but the “Backdoor Nexus” approach accounts for these entities while ensuring that the “nexus” approach remains contoured to commerce that is engaged in through a place of public accommodation. Although the “Backdoor Nexus” approach ultimately does not remedy the injustice of *Young*, this is not an indicator that Congress did not intend for Title III to reach completely virtual entities. This approach is aimed at addressing the extent to which *Target* can accommodate situations where the disabled cannot enter a physical space’s “doors.”<sup>259</sup> In order to determine whether Title III can cover Facebook, courts will need to reach even further into the virtual world and reinterpret the public-accommodation provision by addressing the issue that this Comment has excluded—the Internet itself as a place of public accommodation.<sup>260</sup>

The “Backdoor Nexus” approach will ultimately help courts finally recognize the unique and evolving nature of the Internet and the types of discrimination it may create in a place of public accommodation. The word “place” is a “term of art” and warrants the application of different theories that reflect the nature of its doors—whether physical, virtual, front, or back.<sup>261</sup> Until courts resume their role as gatekeeper, plaintiffs will be at a disadvantage—not because of their own disability but because of a disability in the current state of the law.

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<sup>259</sup> This objective is in line with Title III’s purpose to ensure access to places of public accommodation. Colker, *supra* note 5, at 402.

<sup>260</sup> See *supra* notes 17, 18 and accompanying text. The United States District Court for the District of Massachusetts has taken one of the most recent steps toward addressing this issue by finding that Netflix’s “Watch Instantly” video-streaming website itself is a Title III place of public accommodation, applicable under the statutory categories of either service establishments, places of entertainment, or rental establishments. Nat’l Ass’n of the Deaf v. Netflix, Inc., No. 11-CV-30168, 2012 U.S. Dist. LEXIS 84518, at \*9 (D. Mass. June 19, 2012).

<sup>261</sup> See GLYNN, ANROW-RICHMAN & SULLIVAN, *supra* note 39, at 509.