Chatting Up a Storm: Noah v. AOL Time Warner and Extending Federal Civil Rights Liability to Internet Chat Rooms

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Many people today view the Internet as an integral part of everyday life. Online shopping, e-mailing friends, even filing electronic tax forms demonstrate the Internet's growing influence in transforming societal habits around the world. As the Internet continues to break barriers in traditional notions of communication, disagreements emerge on how best to regulate this developing medium. Indeed, some of the hot communications topics today (e.g., online privacy, copyright, spam) center on the debate between preserving the Internet's unfettered nature and imposing greater government oversight.

One of the most challenging questions courts now face concerns the Internet's exact legal definition. Does it constitute a mere collection of wires and processors or an actual, tangible location subject to traditional federal and state laws?

Noah v. AOL Time Warner represents a good example of this dilemma. Here, a plaintiff attempted to sue America Online ("AOL") for violating Title II of the Civil Rights Act ("Title II") by failing to remove hate messages in their Islamic topic chat rooms. The court ultimately rejected this argument, holding that chat rooms do not constitute a physical "place of public accommodation under Title II." It also found that the Communications Decency Act of 1996 (the "CDA") gave Internet Service Providers ("ISPs"), such as AOL, "publisher" immunity from the potentially libelous messages of its members.

Noah raises a fundamental issue of whether Internet chat rooms should "escape" federal regulation simply because of their non-physical characteristics. Some suggest that this serves as bad precedent, since laws like the Civil Rights Act enforce against a particularly divisive social evil—racial discrimination. Others disagree with this interpretation and point to our nation's traditional protection of free expression and the dangers of...
imposing content discrimination to satisfy the "views of the majority." Finding the balance between these two competing arguments poses a difficult challenge, especially when applying this problem to the metaphysical chat room environment. This Note argues that the *Noah* opinion correctly refrained from applying Title II to the chat room environment. Although chat rooms closely resemble traditional Title II outlets of societal interaction, they still do not adequately fit into the statutory definition of a physical "place of public accommodation." In addition, applying traditional Civil Rights laws in this particular case may be inappropriate. Since Congress passed Title II in a different place and time, lawmakers could never account for the development of new, freely accessible platforms like Internet chat rooms or the subsequent legislation designed to protect it.

More importantly, imposing hate speech censorship duties on ISPs raises freedom of speech concerns, as chat rooms now represent a valuable forum for the public exchange of ideas. While private ISPs are free to censor postings on their own, forcing them to do so through government regulation may amount to an unconstitutional form of content regulation.

Part I of this Note summarizes the relevant legal history leading to *Noah*'s decision and describes the statutory interpretations applying to chat rooms. Part II gives a brief overview of *Noah v. AOL Time Warner* and the court's rationale for dismissing Noah's complaint. Part III provides an analysis of the court's argument and demonstrates how public accommodation law, the CDA, and First Amendment principles all prevent Title II liability. Finally, Part IV concludes by offering both predictions and possible solutions to the ongoing debate.

I. STATUTORY AND LEGAL DEVELOPMENTS PRIOR TO NOAH

Understanding *Noah v. AOL Time Warner* requires a basic knowledge of the three main issues presented in the case. Section A begins this overview by describing Title II of the Civil Rights Act and the subsequent legal interpretations of a "place of public accommodation." Section B analyzes the CDA and illustrates how its language grants ISPs a broad liability loophole regarding the online chat room postings produced by its members. Finally, Section C examines the legal history of hate speech and how the First Amendment affects the government's ability to censor these statements.

A. Title II of the Civil Rights Act

In 1964, Congress passed Title II of the Civil Rights Act, which attempted to stop the widespread practice of excluding African-Americans from access to public areas. *Daniel v. Pau* best summarized Title II's purpose by recalling Congress's intent of "remov[ing] the daily affront and..."
humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.\footnote{Id. at 307-08 (quoting H.R. Rep No. 914, at 18).} Consequently, courts have generally adopted a broad view when interpreting the statute.\footnote{See id. at 307 ("But it does not follow that the scope of §[2000a] (b) (3) should be restricted to the primary objects of Congress' concern when a natural reading of it language would call for broader coverage.").}

Title II consists of two primary parts: Section A, which deals with its "equal access" provision and Section B, which describes its "interstate commerce" requirement.\footnote{42 U.S.C. §2000a. The title of the section is "Protection against discrimination or segregation in places of public accommodation."} Section A defines "equal access" as follows, "[A]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."\footnote{42 U.S.C. §2000a(b).} Section B goes on further to state that "places of public accommodation," which include "lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; [or] places of exhibition or entertainment,"\footnote{Id. §2000a(b)-(c) ("For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States.").} must also "affect interstate commerce" to be covered by this section.\footnote{42 U.S.C. §2000a(b).}

1) A Physical "Place of Public Accommodation"

What exactly is a "place of public accommodation?" Title II defines "place" within four specified categories: (1) "establishment[s] which provid[e] lodging to transient guests," (2) "facilit[ies] principally engaged in selling food for consumption on the premises; gasoline stations; [or] places of exhibition or entertainment,"\footnote{See Noah v. AOL Time Warner Inc., 261 F. Supp.2d 532, 542-43 (2005) (citing Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993) and Clegg v. Cult Awareness Network, 18 F.3d 752 (9d Cir. 1994)) ("[T]he issue is whether one can extend the definition of "place" beyond the written word.").} (3) "place[s] of exhibition or entertainment," or (4) the catch all provision—"any establishment . . . which is physically located within the premises of any establishment" listed in this statute.\footnote{Id. §2000a(b)-(c) ("For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States.").} Despite this seemingly clear definition, courts remain split on whether one can extend the definition of "place" beyond the written word.\footnote{See, e.g., Welsh, 993 F.2d 1267; Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).}

One such disagreement concerns the "physical" aspect of the term "place of public accommodation."\footnote{Welsh, 993 F.2d at 1268 ("[Plaintiff] Elliott Welsh and his seven-year-old [sic] son Mark have brought suit asking the United States Courts to force the Boy Scouts of America to accept Mark as a member despite the fact that he refuses to comply with its Constitution and By-laws and affirm his belief in God.").} The majority of Title II cases have dealt with the denial of access to actual physical places.\footnote{Welsh, 993 F.2d at 1268 (citing Appellants' brief).} Nevertheless, some plaintiffs have tried to impose Title II jurisdiction on non-physical places (e.g., membership organizations) by relying on a broader interpretation of the statutory language.\footnote{Welsh, 993 F.2d at 1269; Dale, 530 U.S. 640 (2000).} Perhaps the most recent examples of these attempts were the Title II cases against the Boys Scouts of America for its stringent membership policy.\footnote{Welsh, 993 F.2d at 1268-69; Dale, 530 U.S. at 645.}

In Welsh v. Boy Scouts of America and Boys Scouts of America v. Dale, the plaintiffs alleged that the Boy Scouts violated Title II by denying them membership based on religion\footnote{Welsh, 993 F.2d at 1268 ("[Plaintiff] Elliott Welsh and his seven-year-old [sic] son Mark have brought suit asking the United States Courts to force the Boy Scouts of America to accept Mark as a member despite the fact that he refuses to comply with its Constitution and By-laws and affirm his belief in God.").} and sexual preference.\footnote{Welsh, 993 F.2d at 1269; Dale, 530 U.S. 640 (2000).} Both sought to define the Boy Scouts membership organization as a "place of public accommodation" by claiming that a broad reading of "place of exhibition or entertainment" included the group within Title II.\footnote{Welsh, 993 F.2d at 1268 ("[T]he fact that [the Boy Scouts] offer entertainment to the public at various locations, all of which are 'places,' . . . subjects them to the strictures of Title II."\footnote{Welsh, 993 F.2d at 1269; Dale, 530 U.S. 640 (2000).} The court in Welsh rejected this argument, holding that the
definition of “place” must be drawn from the statute’s enumerated categories. As such, the court noted that Title II mostly referenced physical facilities and did not include membership organizations, like the Boy Scouts, within its definition of “places of public accommodation.”

The majority in Welsh found that equating a membership organization with a “place of public accommodation” required “a close connection to a particular facility.” The court reasoned that only Congress had the authority to alter the statute’s literal meaning with the plaintiff’s expansive view. The majority further noted that a broad Title II interpretation only applied to situations involving “denial of access to public facilities.” Since the Boy Scouts were never tied to one particular physical facility, they could not be considered a “place of public accommodation.”

In Dale, the Supreme Court briefly touched upon the “physicality” requirement of a “place of public accommodation.” Although Dale addressed a different law and issue (a New Jersey public accommodation statute and freedom of association) than Welsh (Title II and religious discrimination), the Court nonetheless criticized the New Jersey Supreme Court for not linking a non-physical membership organization to “[a] place of public accommodation.” The Court noted that many Federal Circuit decisions like Welsh appeared to mandate a physical facility requirement in Title II cases. Thus, the majority found the state court’s broader reading of “place of public accommodation” was the exception to the norm.

The Ninth Circuit in Clegg v. Cult Awareness Network also agreed with Welsh’s reasoning. The appellate court held that a Cult Awareness group did not constitute a “place of public accommodation” because defining a membership organization as such would “obfuscate the term ‘place’ and render nugatory the examples Congress provides to illuminate the meaning of that term.” Although the Cult Awareness Network offered the public a variety of goods and services (i.e., pamphlets and social awareness), the membership organization was not tied to any physical facility such as a restaurant, recreational facility, or theater. Since the defendant association never denied the plaintiff access to a physical establishment, the Clegg court found that Title II never applied to the plaintiff’s discrimination case.

Despite the abundance of decisions that followed Welsh and Clegg’s reasoning, some Circuits endorsed a broader interpretation of “place of public accommodation.” This mainly occurred in public accommodation cases dealing with the Americans with Disabilities Act (“ADA”). Although a different statute, Title III of the ADA has an “equal access” anti-discrimination provision almost identical to Title II. More notably however, the ADA has a more expansive list of “places or public accommodation,” with twelve categories as opposed to Title II’s four. This includes Title II’s specified locations (lodgings, restaurants, and membership organization like the Boy Scouts to a “place of public accommodation”).

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39 Id. (“The clear language of the statute mandates a different conclusion, for we must always be cognizant of the fact that ‘the legislative purpose is expressed by the ordinary meaning of the words used.’” (quoting Richards v. United States, 369 U.S. 1, 9 (1962))).

40 Id.

41 Id. at 1275.

42 Id. at 1271 (“Only after Congress has had the opportunity for deliberation and reflection should a radical change of the nature the plaintiffs propose be enacted.”).

43 Id. at 1270 (“It is only in this context—denial of access to public facilities—that courts must interpret Title II broadly.” (citing Daniel v. Paul, 395 U.S. 298, 307-08 (1969))).

44 Id. at 1272.

45 See Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that a New Jersey public accommodation law violated the First Amendment rights of the Boy Scouts by forcing the organization to admit a gay Scoutmaster).

46 Id. at 657.


48 Id. (illustrating that both Dale and Noah find that the New Jersey decision represents the only case linking a
theaters) along with other facilities such as retail stores, transportation centers, and zoos.57

In Carparts Distribution Ctr. Inc. v. Automotive Wholesalers Assoc. of New England Inc.,58 the First Circuit held that "places of public accommodation" are not limited to "actual physical structures."59 The court found the ADA definition of "place of public accommodation" ambiguous, focusing particularly on the inclusion of "travel service" within the statute and noting that the term could either represent an actual travel agency or a non-physical toll-free telephone travel "club."60 The court further concluded that the ADA's "broad sweep" supported a comprehensive breakdown of any barriers to a disabled person61 and that imposing a restrictive view would "seriously frustrate Congress's intent" with the ADA.62 Thus, the lack of "physical boundaries or physical entry" to the ADA's Title III public accommodation definition permits a finding that a trade association, which administers an employee insurance plan, could qualify as a "place" despite its non-physical nature.63

Like the First Circuit, the Seventh Circuit in Doe v. Mutual of Omaha Insurance Co.,64 appeared to endorse the idea of a broader "place of public accommodation" definition.65 In fact, it seemed to extend its provisions significantly beyond the physical world.66 In holding a health insurance policy subject to the ADA's Title III, the court in Mutual of Omaha found that the statute extended not only to "[hotel[s], restaurant[s], [and] dentist's office[s]]" but also to "website[s], or [any] other facility (whether in physical space or in electronic space)."67 Thus, the ruling would seem to suggest that any Internet product, whether a website or even a chat room, could be considered a "place of public accommodation."68

However, some ADA courts rejected Mutual of Omaha's broader definition, and similar to the Title II cases focused on the physical aspect of a "place of public accommodation."69 In Access Now Inc. v. Southwest Airlines Co.,70 the court held that Southwest's ticketing website did not violate Title III, even though it was not fully accessible to blind people.71 The court relied on the Eleventh Circuit's holding in Rendon v. Valleycrest Prod. Ltd.,72 which stated that the ADA to apply, a "nexus" must exist "between the challenged service and the premises of the public accommodation."73 Thus, since the Southwest website was not a physical location, no tangible relationship existed that could link Title III's "equal access" requirement with the plaintiffs' discrimination allegation.74

2) A "Place of Public Exhibition or Entertainment"

Besides the "physicality" issue, courts also split

57 42 U.S.C. §12181(7)(F); see also Carparts Distribution Ctr. Inc., 37 F.3d at 19.
58 37 F.3d 12 (1st Cir. 1994).
59 Id. at 19 ("This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures."). (emphasis added).
60 Id. ("It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.").
61 Id. (citing 42 U.S.C. §12101(b) (2000) and the Congressional legislative history in H.R.Rep. No. 485, pt.2, at 99 (1990)).
62 Id. at 20 (arguing that Congress did not set a limit to physical facilities when passing the ADA and that doing so would contradict its intention to open up all facilities to disabled people).
63 See id. Although the Court did not decide whether the defendant's insurance plan was in fact a "place of public accommodation," it found that the district court could not dismiss plaintiff's claim simply because the plan was a "non physical" entity. Id.
64 179 F.3d 557 (7th Cir. 1999).
65 Id. at 564-65.
66 See id. at 559 (citing Carparts and broadening its public accommodation definition to the electronic world).
67 Id.
68 Id.; see also Noah v. AOL Time Warner Inc., 261 F. Supp.2d 532, 544 n.11 (E.D. Va. 2003) (emphasizing Mutual of Omaha's use of "web site" and "electronic space").
69 See Noah, 261 F. Supp.2d at 543-44 (pointing to ADA cases requiring a physical facility; Parker v. Metropolitan Life Insurance Co., 121 F.3d 1006 (6th Cir. 1997), Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000).
70 227 F. Supp.2d 1312 (S.D. Fla. 2002).
71 Id. at 1321 ("[T]he Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in Rendon"); see also Noah, 261 F. Supp.2d at 544.
72 294 F.3d 1279 (11th Cir. 2002) (holding that the "Who Wants to Be a Millionaire" game show violated Title III by not making their telephone screening game accessible to the deaf). The court found a Title III "nexus" between the telephone service and a physical facility because the telephone device served as a necessary conduit for participants to enter the television studio. Id.
73 Access Now Inc., 227 F. Supp.2d at 1321 (quoting Rendon, 294 F.3d at 1284 n.8).
74 Id. ("Thus, because the Internet website, southwest.com, does not exist in any particular geographic location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.").
on what exactly constitutes a “place of public exhibition or entertainment” within Title II.\textsuperscript{75} The statute defines a “place of entertainment” as one which “affects interstate commerce” by “customarily present[ing] films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce.”\textsuperscript{76} Examples include a “motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment.”\textsuperscript{77} Despite the language’s apparent plain meaning, many courts see the wording as “obscure” and tend to adopt a broad meaning of the term “entertainment.”\textsuperscript{78} Thus, courts not only include movie houses, but also swimming pools\textsuperscript{79} and snack bars in recreational parks.\textsuperscript{80}

In Daniel v. Paul, the Supreme Court extended Title II’s “entertainment” interpretation to include both direct and indirect forms of entertainment.\textsuperscript{81} Not only did Title II apply when the establishment’s customers were “spectators,” it also applied to situations where customers provided the entertainment through utilization of the establishment’s facilities, such as access to a lake or snack facilities.\textsuperscript{82} Thus, anytime a “place of public accommodation” either offers the entertainment or provides the means of entertainment, it will be subject to Title II’s anti-discriminatory access provisions.\textsuperscript{83}

The Ninth Circuit in United States v. Baird\textsuperscript{84} took Daniel’s holding a step further. The court found that a 7-Eleven retail convenience store, which by itself may not qualify as a Title II establishment, became a “place of entertainment” by merely possessing two video arcade games within its premises.\textsuperscript{85} Since “people play video games to amuse themselves,” their presence within the 7-Eleven automatically brought a Title II obligation to the store’s owners.\textsuperscript{86} The court stated that it did not matter whether the video games constituted a “peripheral” component of the store’s activities.\textsuperscript{87} Any “entertainment” aspect within a public facility would come under Title II since the statute’s goal of providing “equal access” would be frustrated otherwise.\textsuperscript{88} However, even this expansive view has some limitations.

In Halton v. Great Clips Inc.,\textsuperscript{89} an Ohio district court held that a hair salon was not subject to Title II’s provisions despite being located in a shopping center.\textsuperscript{90} Even though Title II “covered” establishments (restaurants) surrounded the hair salon, the court did not feel justified in extending Title II liability for actions beyond the salon owner’s control.\textsuperscript{91} Although the hair salon’s owners decided to locate in a shopping mall, they could not influence who the other tenants would be (i.e., “recreational” establishments).\textsuperscript{92} Despite the legal precedent of broadly reading “entertainment,” the court found no “entertainment” activities within the hair salon, reasoning that Congress could have easily amended “public accommodation” to include retail stores within the statute.\textsuperscript{93}
Without the reference, the court was hesitant in interpreting Title II otherwise.94

Like Halton, Welsh did not automatically interpret “place of exhibition or entertainment” broadly.95 Even though the “[Boy Scouts] offer[ed] entertainment to the public at various locations, all of which are ‘places,’”96 the Seventh Circuit declined to link a “membership organization” as a “place of entertainment.”97 The court reasoned that Title II’s purpose was to “regulate facilities as opposed to gatherings of people.”98 Thus, the phrase “places of entertainment” applies to actual places rather than mere “entertainment gatherings.”99 Courts may broadly interpret “places of entertainment,” just as long as they somehow connect to physical places.100 Most membership organizations however, do not fit into this category.101

### B. The Communications Decency Act: An ISP Loophole?

In 1996, Congress passed the CDA,102 which originally regulated obscene materials103 and granted ISPs publisher immunity from the defamatory Internet messages of its members.104 Several civil liberties organizations, notably the American Civil Liberties Union (“ACLU”), immediately attacked the “obscene material” content regulation section.105 This resulted in the Supreme Court declaring it “facially overbroad” and “unconstitutional.”106 However, Section 230 (the ISP publisher immunity) remained intact and was subsequently upheld in several federal and state court cases.107

1) **Section 230: Protecting the Internet’s Forum of Discussion**

Congress passed Section 230 in recognition of the Internet’s expanding influence within American society.108 It noted the Internet’s “unique” role in providing a “forum for a true diversity of political discourse [or] cultural development”109 and the subsequent federal importance in “preserv[ing] [its] vibrant and competitive free market nature.”110 Thus, Congress provided that no ISP “shall be treated as the publisher or speaker of any information provided by another information content provider.”111 By enacting this provision, Congress sought to both protect the Internet’s role as an unencumbered arena of public discussion112 and to encourage ISPs to self-regulate by removing federal constraints.113

Section 230 did lay out four important exceptions that would not absolve ISPs from federal and state liability.114 The statute would have no effect on any criminal law procedures (e.g., child sexual exploitation),115 or on intellectual property cases, such as copyright violations.116

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94 Id. ("This inaction by Congress could not be a mere oversight or an expectation that courts would broadly interpret the statute to include basically any type of establishment because Congress has subsequently defined 'public accommodation' more broadly.").

95 Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1269 (7th Cir. 1993).

96 Id.

97 Id. at 1270 (arguing that the purpose of Title II did not include regulating social groups).

98 Id. at 1269.

99 See id. (noting that the Boy Scouts constituted a group of people not an actual place).

100 See id. at 1270 (discussing when courts may use a broad interpretation in Title II with regard to physical locales).

101 Id.; but see Welsh, 993 F.2d at 1272 (summarizing occasions when membership organizations were “places of public accommodation” under Title II due to their close association with physical facilities (e.g., a YMCA health club in Smith v. YMCA of Montgomery, 462 F.2d 634 (5th Cir. 1972), where the club membership allowed access to a gym/pool)).


103 Id. §223(a), (d) (prohibiting the transmission of obscene materials to known minors over the Internet).

104 Id. §230.

105 See Reno v. ACLU, 521 U.S. 844 (1997) (holding that these CDA provisions were content-based blanket restrictions which were facially overbroad and in violation of the First Amendment).

106 Id. The Court believed that the statute’s definition of “indecent” and “patently offensive” was too vague and ambiguous, making enforcement actions by the government arbitrary and unconstitutional in a number of cases. Id.


109 Id. §230(a)(3).

110 Id. §230(b)(2).

111 Id. §230(c)(1).

112 Id. §230(b)(1).

113 Id. §230(c)-(d).

114 Id. §230(e).

115 Id. §230(e)(1).

116 Id. §230(e)(2).
laws consistent with Section 230's provisions still applied as well as actions under the Electronic Communications Privacy Act of 1986. So while Congress encouraged the Internet's development, it did not grant ISPs total immunity. Instead, it tried to find an appropriate balance between protecting free expression and the enforcement of existing federal laws.

2) The Court's Interpretation of Section 230 of the CDA

Prior to the CDA's enactment, courts relied on their own judgment in determining whether an ISP should bear responsibility for their members' libelous or obscene statements. In Cubby Inc. v. CompuServe Inc., a New York Federal District Court denied a plaintiff's libel claim because CompuServe, acting as a "distributor" rather than a "publisher," never knew about the defamatory postings on the ISP's "Journalism" bulletin board. In contrast, Stratton Oakmont Inc. v. Prodigy Services Co. found an ISP accountable when it made a "conscious choice" to regulate the content of its bulletin boards, yet through inadvertence failed to properly screen a member's libelous postings. Thus, once the ISP decided to regulate the bulletin board, the court found "publisher" liability for their members' Internet messages.

The CDA resolved this debate by overruling Stratton Oakmont with Zeran v. America Online, Inc., which became the signature case affirming the statute's ISP exception. In Zeran, the Fourth Circuit pointed to Congress's intent with the CDA to "not deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." The court noted that Congress specifically removed "publisher" liability from ISPs to encourage self-regulation, and that Section 230's provisions equally applied to "distributor" liability. In other words, an ISP will not be held liable for its members' defamatory statements, whether they are aware of them or not.

The Fourth Circuit in Zeran emphasized the futility of attempting to impose automatic liability on ISPs. The court reasoned that the Internet, as opposed to print publishing, has thousands of messages posted every minute, thereby making it virtually impossible for ISPs to monitor postings effectively. Therefore, Congress created Section 230 to encourage ISPs to creatively attack the problem themselves, without resorting to shutting down their posting services to avoid liability. Thus, the plaintiff in Zeran could not hold AOL accountable for failing to speedily remove libelous statements from their online bulletin boards.

Most jurisdictions adopted Zeran's stance, including state courts like Florida in Doe v. America Online, Inc. In Doe, the Florida Supreme Court held that Section 230 of the CDA pre-empted Florida law in permitting "distributor" liability against AOL for failing to remove written chat room messages advertising child pornography products. Although a publisher may be respon-
possible under Florida tort law if they knew about the defamatory statements, the court would not extend liability to AOL since under the CDA, they were neither liable as a "publisher" nor recognized as a "distributor" of the information. Therefore, both Zeran and the CDA rendered the plaintiff's complaint invalid, since AOL neither participated in nor endorsed the defamatory chat room messages in question.

The dissent in Doe, however, questioned this CDA interpretation. Justice Lewis attacked the analysis in Zeran, arguing that the CDA only applied in cases where ISPs had no notice of the third party defamatory messages. Justice Lewis also pointed to the "publisher/distributor" distinction in tort law and reasoned that the CDA's language only exempted AOL from "publisher" but not "distributor" liability. Because AOL knew about the chat room messages and did nothing about them, the ISP should not "reap the economic benefits flowing from the activity." Moreover, Lewis reasoned that the CDA was meant to encourage freedom of expression, not enable the child pornography industry—an area specifically excluded from First Amendment protection.

Overall, courts overwhelmingly endorse Zeran's reading of the CDA and grant ISPs both "publisher" and "distributor" liability. Nevertheless, Justice Lewis’s dissent suggests that the interpretation may be open to argument, leaving the subject open to further circuit debate.

C. Hate Speech and the First Amendment: An Overview of the Case Law

Since most of the prior Internet cases dealt with libel, a discussion of hate speech and the First Amendment will be helpful due to the nature of Noah’s chat room messages. The First Amendment, except under certain limited circumstances, has historically protected hate speech, or speech offensive to a particular race, religion, or ethnic group. Chaplinsky v. New Hampshire describes the unique situation when First Amendment protections do not apply, mainly when hate speech constitutes "fighting words" or speech "by their very utterance inflict injury or tend to incite an immediate breach of the peace." In Chaplinsky, the Court recognized a New Hampshire statute's legitimate goal in protecting the public from unnecessary violence (group “fighting words”) while still recognizing a citizen's rights to legitimate free expression. In other words, the State may have a compelling interest in banning speech designed to incite a riot, but may not in speech having no effect on public safety.

party posted child pornography images because these forms of communications do not have any First Amendment protections and may be illegal under federal and state criminal laws. See New York v. Ferber, 458 U.S. 747, 764 (1982).

137 See id. at 1017. The court linked the actions Doe requested with the immunities granted by the CDA to ISPs.

138 See id. ("[l]t is precisely the liability based upon negligent failure to control the content of users’ publishing of allegedly illegal postings on the Internet that is the gravamen of Doe’s alleged cause of action.") (emphasis added).

139 See id. at 1019. The dissent argued that the CDA does not "totally exonerate and insulate an ISP from responsibility where, as here, it is alleged that an ISP has acted as a knowing distributor of [child pornography] material . . . by taking absolutely no steps to curtail continued dissemination . . . when it had the right and power to do so." Id.

140 Id. at 1020-23.

141 Id. at 1024-25 (believing that the majority's interpretation of the CDA "flies in the face of the very purpose" of the CDA by rewarding complacency).

142 Id. at 1026-27.

143 See, e.g., Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (holding that an ISP could not be held liable for allowing its subscribers access to alleged defamatory statements posted on the Drudge Report website); Ben Ezra, Weinstein & Co. v. Am. Online Inc., 206 F.3d 980 (10th Cir. 2000) (holding that the CDA granted AOL immunity from an inaccurate stock price quotation provided by a third party financial information source); Doe v. Am. Online Inc., 783 So. 2d 1010 (Fla. 2001) (reaffirming a lower court decision dismissing a plaintiff's state negligence claim regarding a third party posting in one of the ISP's Internet chat rooms).


145 See generally Michael Siegel, Comment, Hate Speech, Civil Rights and the Internet: The Jurisdictional and Human Rights Nightmare, 9 ALB. L.J. SCI. & TECH. 375 (1999) (pointing to the differences between the United States and other foreign countries (Germany and Singapore) in regulating hate speech and how the United States traditionally guards its citizen's free expression from government oversight).

146 Id. (quoting Human Rights Watch’s definition of hate speech).

147 315 U.S. 568 (1942).

148 Id. at 572 (determining that fighting words are "no[t] [an] essential part of any exposition of ideas").

149 See id. at 573.

[We] are unable to say that the limited scope of the statute as this construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.

Id. (emphasis added).

150 See id. at 573.
1) “Mode” v. “Content:” First Amendment Protections Specific to Hate Speech

Such was the case in R.A.V. v. City of St. Paul\(^{151}\) where the Supreme Court held that a municipal ordinance banning hate speech was facially invalid because it banned both unprotected “fighting words” and speech, which by itself does not “inflict[] injury or tend[] to incite immediate violence.”\(^{152}\) The Court reasoned that while the government has the power to regulate fighting words that have the tendency to promote violence (the mode of speech), it cannot regulate their belief of a particular idea (the content of the speech).\(^{153}\)

Because the St. Paul statute banned racially motivated hate speech in all forms (whether they incited violence or not), the Court believed it served as a form of content regulation of a person’s ideology.\(^{154}\) Although hate speech by itself serves no public interest, the majority felt that the government could not censor the words solely due to its distastefulness.\(^{155}\) The Court reasoned that the First Amendment protects the full expression of ideas, whether those ideas are condemned by the majority or preserved by a minority.\(^{156}\)

2) Public Accommodation Laws and Conflicts with the First Amendment

By recognizing Chaplinsky and R.A.V.’s First Amendment limitations, one could question the applicability of public accommodation laws, like Title II of the Civil Rights Act, in community forums. Specifically, can the government use these laws to effectively censor the expressive content of individual citizens? Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston\(^{157}\) dealt with this issue in the context of allowing a private St. Patrick’s Day Parade organizing committee the right to exclude a Gay/Lesbian/Bisexual group.\(^{158}\) In Hurley, the plaintiffs alleged that the parade committee violated the Massachusetts public accommodation law, which extended the definition of “equal access” to include sexual preference.\(^{159}\) While the state supreme court agreed with the plaintiff,\(^{160}\) the United States Supreme Court did not, holding that the Massachusetts public accommodation law violated the parade committee’s rights to free expression.\(^{161}\)

The Court reasoned that the parade committee was not banning gay, lesbian, and bisexual people from participating in the parade, but banning their use of a Gay/Lesbian/Bisexual banner.\(^{162}\) The majority noted that the First Amendment allows private individuals to freely “tailor their speech, apply[ing] not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”\(^{163}\) In other words, government laws can neither interfere with this right, nor influence a private party’s decision to endorse or ban one’s expressive content.\(^{164}\) By forcing the parade committee to alter the content of their parade, the Court found a form of content discrimination, which is expressly forbidden by the First Amendment.\(^{165}\)

\(^{152}\) Id. at 380-81 (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991) (citing Chaplinsky, 315 U.S. at 572).
\(^{153}\) Id. at 386-391.
\(^{154}\) Id. at 393-94 (“Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.”).
\(^{155}\) Id. at 392 (arguing that “the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content”).
\(^{156}\) Id. at 395-396.
\(^{157}\) See id. at 579. ([T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.).
\(^{158}\) Id. at 573.
\(^{159}\) See id. (“This use of the State’s power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”).
II. NOAH V. AOL TIME WARNER PUBLIC ACCOMMODATION LAW AND THE CHAT ROOM

In July 2000, plaintiff Saad Noah cancelled his AOL Internet service account “in protest.” He allegedly complained to America Online management, including CEO Steve Case, of several offensive Internet postings in an AOL chat room devoted to Islamic topics. After AOL allegedly failed to remove or address these derogatory messages, Mr. Noah decided to cancel his membership.

In September 2002, Noah filed a suit in Federal District Court of the Eastern District of Virginia. He alleged that AOL’s failure to remove these messages constituted, inter alia, (1) a violation of Title II of the Civil Rights Act and (2) a breach of AOL’s Terms of Service and Membership Agreement by not policing and/or monitoring its chat rooms for offensive remarks. Since the messages specifically dealt with discriminatory remarks about Islam, Noah alleged that AOL’s failure to remove them violated his equal enjoyment of a “place of public accommodation”—AOL’s chat rooms.

Judge Ellis disagreed with Noah’s contentions and dismissed his suit for failure to state a valid claim. Judge Ellis found that Noah’s Title II allegation failed for two separate reasons. First, AOL as an ISP was granted immunity for its members’ Internet messages under Section 230 of the CDA. Quoting Section 230’s statutory language and Zeran v. America Online extensively, Judge Ellis reasoned that AOL fulfilled Section 230’s “interactive computer service provider” requirement and did not have any role in producing the offensive postings in question. Since Noah’s Title II claim treated AOL as a publisher, the court dismissed his suit because the CDA specifically exempted ISPs from publisher liability for the third party postings in AOL’s chat rooms.

In addition, the opinion stated that the CDA applied to Federal Civil Rights claims and did not come under Section 230’s four exceptions. Although the hate speech in question did not contribute to the “diversity of political discourse,” Judge Ellis noted that Section 230 balanced out Congress’s concerns for protecting a citizen’s freedom of speech with the expense and potentially devastating effect liability would impose on the Internet’s development. Therefore, the CDA shielded AOL from responsibility for the third party content of their chat rooms.

Besides the CDA, Judge Ellis stated that Noah’s suit failed because chat rooms are not “places of public accommodation” within the meaning of Title II. He noted that Title II’s plain language and the majority of case law held that a “place of public accommodation” be physical in nature. Although some federal circuits ruled that a “place of public accommodation” could be non-physical, Judge Ellis felt that this applied only to ADA cases, not Title II. He also relied on a similar ADA case, Access Now, Inc. v. Southwest Airlines, Co., which ruled that an Internet website was not a “place of public accommodation” because of its non-physical characteristics. Without a physical component, the Judge found that chat rooms do not fit into any of them.

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167 Id. at 535.
168 Id.
169 Id. at 536.
170 Id.
171 Id.
172 Id. at 532.
173 Id. at 537.
174 Id. (citing 47 U.S.C. §230(c)(1) (2000) and quoting Zeran, “Thus, the ‘plain language’ of §230 ‘creates a federal immunity to any cause of action that would make [ISPs] liable for information originating with a third-party user of the service’”) at 327, 330 (4th Cir. 1997)).
175 Id. at 538.
176 Id. at 539. (“[A]s the Fourth Circuit made clear in Zeran, all suits seeking to place a service provider in a publisher’s role in this manner are barred under §230.”).
177 Id. (discussing the four relevant statutory exemptions to CDA immunity and concluding that Noah’s civil rights claim did not fit into any of them).
178 Id. at 540 (quoting §230(a)(3) of the CDA).
179 Id. (“Nonetheless, §230 reflects Congress’s judgment that imposing liability on [ISPs] for the harmful speech of others would likely do more harm than good, by exposing [them] to unmanageable liability and potentially leading to the closure or restriction of such open forums as AOL’s chat rooms.”).
180 See id.
181 Id.
182 Id. at 540-45 (citing Welsh, Clegg, Parker, Ford v. Schering-Plough Corp, 145 F.3d 601 (3d Cir. 1998), and Access Now).
183 Id. at 543 (noting how the First Circuit in Carparts and the Seventh Circuit in Mutual of Omaha found no mandatory requirement for a physical “place of public accommodation”).
184 Id. at 543, n.9; see also discussion of the Title II/ADA analogy infra Part III.A.2.
185 Id. at 544; see supra notes 69-74 and discussion of the Access Now, see also Hudson, supra note 16.
not fit into Title II's definition of a "place of exhibition or entertainment."\(^\text{186}\)

Lastly, Judge Ellis dismissed Noah's breach of contract claim.\(^\text{187}\) By carefully analyzing the language of the ISP's Terms of Service ("TOS"), he noted that AOL only promised to enforce violations "at its sole discretion."\(^\text{188}\) The TOS also disclaimed the ISP from the failure to remove inappropriate content.\(^\text{189}\) Having addressed and dismissed all of the plaintiff's issues, Judge Ellis threw out Mr. Noah's suit.\(^\text{190}\)

III. ANALYZING NOAH: HOW TITLE II PUBLIC ACCOMMODATION LAW, THE CDA, AND FIRST AMENDMENT PRINCIPLES ALL LEAD TO NO LIABILITY

Noah v. AOL Time Warner focuses on a simple, yet unresolved issue: how the courts should classify Internet forums.\(^\text{191}\) Proponents and opponents of Title II inclusion present compelling arguments: from the need to preserve important and necessary anti-discrimination laws,\(^\text{192}\) to not hampering the development and viability of an increasingly important communications medium.\(^\text{193}\) Resolving this debate rests largely on how one ultimately views the Internet, and by extension, chat rooms. Does it represent a convenient substitute to a physical location\(^\text{194}\) or a separate sphere altogether?\(^\text{195}\)

This Note argues for the latter and emphasizes how traditional federal laws, such as Title II, do not apply to this electronic medium. Doing otherwise ignores some of the vital elements needed for a valid Title II claim: a "physical" facility\(^\text{196}\) and a "discriminatory intent."\(^\text{197}\) Congress may have intended a broad interpretation of the Civil Rights Act,\(^\text{198}\) but applying it to cyberspace goes too far by contradicting the subsequent case law's strict adherence to the "physical" world.\(^\text{199}\) More significant than Title II's language, chat rooms also escape federal content oversight because of the government's traditional protection of the Internet's development and the possible conflict with the First Amendment. Forcing ISPs to censor discriminatory messages goes against the goals behind the CDA\(^\text{200}\) and interferes with the chat room's growing importance as an avenue of public discussion.\(^\text{201}\)

A. Chat Rooms Are Not "Places of Public Accommodation" under Title II

1) Let's Get Physical! Title II's Main Requirement of an Actual Facility

The Internet, by its basic definition, does not

\(^{186}\) Noah, 261 F. Supp.2d at 544-45.

\(^{187}\) Id. at 545. ("Plaintiff's breach of contract claim must likewise be dismissed because the contractual rights plaintiff claims are simply not provided for in AOL's Member Agreement.").

\(^{188}\) Id.

\(^{189}\) Id. ("The Membership Agreement states that while AOL 'reserve[s] the right to remove content that, in AOL's judgment, does not meet its standards or does not comply with AOL's current Community Guidelines . . . AOL is not responsible for any failure or delay in removing such material.'").

\(^{190}\) Id. at 546.


\(^{192}\) See Tara Thomson, Comment, Locating Discrimination: Interactive Web Sites as Public Accommodations Under Title II of the Civil Rights Act, 2002 U. CHI. LEGAL. F. 409 (2002) (arguing that chat rooms are "places of public accommodation" under Title II and that the law would be subverted if not extended to the Internet).


\(^{194}\) See Thomson, supra note 192, at 436-40 (finding that the Internet's infrastructure equipment (servers) constitute actual facilities).

\(^{195}\) See Zeran, 129 F.3d at 334 (quoting Reno v. ACLU, 521 U.S. 844, 850 (1997) ("[I]t is 'a unique and wholly new medium of worldwide communication.'"); see also Noah, 261 F. Supp.2d at 544 ("[A] chat room does not exist in a particular physical location, indeed it can be accessed almost anywhere.").

\(^{196}\) See discussion of Welsh, Clegg, Access Now, and Noah and their holdings for a "physical" place of public accommodation supra Part I.A.1.

\(^{197}\) See infra notes 278-84 and accompanying text, which discusses Akiyama and Boyle's "discriminatory intent" requirement for a valid Title II claim.

\(^{198}\) See supra notes 81-83 and accompanying text that summarizes Daniel v. Paul's broad interpretation of a "place of entertainment."

\(^{199}\) See Noah, 261 F. Supp.2d at 544 ("In sum, whether one relies on the Title II case law or looks to the broader ADA definition of public place of accommodation, it is clear that the logic of the statute and the weight of authority indicate that "places of entertainment" must be actual physical facilities.").

\(^{200}\) See discussion supra Part I.B.2 (describing Zeran, Doe v. Am. Online, and Noah and their opinions describing Congress's intent in passing the CDA).

\(^{201}\) See discussion infra Part III.C (arguing that chat rooms help promote the expansion of public ideas and viewpoints).
have a designated physical location, but instead exists on the computers and telephone networks of the world’s communications backbone.\(^{202}\) Equating it as a “place” appears to confine its very essence, since the Internet, unlike physical structures, can expand indefinitely, unburdened by any geographical barriers.\(^{203}\) Thus, Judge Ellis was correct in ruling that Internet chat rooms fail Title II’s primary requirement of either being an actual facility or at least connected to one.\(^{204}\) It is hard to imagine that Congress intended Title II to cover existential “places” like the Internet, a community made up of light waves and electronic impulses.\(^{205}\)

Examining the statute itself proves that Title II clearly applies solely to physical locations.\(^{206}\) As Noah points out, the statute primarily refers to, or gives examples of, actual facilities in its four categories: lodging establishments, eateries, physical entertainment venues, or establishments physically located within a “covered establishment.”\(^{207}\) Of course, one can postulate that Title II should not be read so literally and that chat rooms could serve as “quasi-physical” locations in cyberspace.\(^{208}\) They are, after all, chat rooms. But several circuits already rejected a non-physical definition for “places of public accommodation,” arguing like Judge Ellis that “Congress intended [Title II] to reach only the listed facilities and other similar physical structures.”\(^{209}\) Both Welsh and Clegg declined to extend Title II to two non-physical membership organizations: the Boys Scouts\(^{210}\) and Cult Awareness Group.\(^{211}\) Without the connection to a specific physical facility, the Welsh and Clegg courts reasoned that it would usurp Congress’s legislative powers by independently reading Title II so broadly.\(^{212}\) Federalism concerns between the judiciary and legislative branches also mandate a cautionary approach before courts attempt to read a statute beyond its “plain meaning.”\(^{213}\)

These attempts at restraint appear to contradict the Supreme Court’s broad reading of Title II in both Daniel v. Paul and Miller v. Amusement Enterprises.\(^{214}\) After all, amusement parks\(^{215}\) and recreational parks\(^{216}\) were not listed as examples in Title II’s statutory language. But as Welsh and Noah point out, these broad readings only applied to “facilities” that were already “physical.”\(^{217}\) Indeed, while the term “entertainment” can certainly be seen as “ambiguous,”\(^{218}\) the term “physical” seems straightforward.\(^{219}\) For this reason, Welsh and Clegg could not justify labeling a non-physical membership club as a “place of public accommodation” when these groups’ main purposes had nothing to do with an actual “place.”\(^{220}\)

Therefore, if Welsh and Clegg would not extend Title II to non-physical membership clubs, it stands to reason that a link cannot be made to a non-physical Internet service like AOL’s chat

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\(^{202}\) See generally Reno, 521 U.S. at 849-853 (providing a brief overview and history of the Internet’s development).

\(^{203}\) See id.


\(^{205}\) See Hudson, supra note 16.

\(^{206}\) Id.; see also 42 U.S.C. §2000a (2000); Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1269-70 (7th Cir. 1993); Clegg v. Cult Awareness Network, 18 F.3d 752, 755-56 (3d Cir. 1994).

\(^{207}\) Noah, 261 F. Supp.2d at 541-42 (listing the examples given in §2000a, all of which are actual not “virtual” facilities).

\(^{208}\) See Thomson, supra note 192 at 439-40 (arguing that chat rooms have elements of “placeness” because of the Internet’s physical servers and networks).

\(^{209}\) Noah, 261 F. Supp.2d at 542 (citing Daniel, Welsh, and Clegg).

\(^{210}\) See discussion of Welsh supra notes 41-44 (holding that membership organizations not connected to physical facilities failed Title II’s statutory requirement).

\(^{211}\) See supra notes 49-52, discussing Clegg’s holding which followed Welsh’s reasoning of a mandatory physical facility requirement.

\(^{212}\) See Welsh, 993 F.2d at 1270 (“We refuse to read into the statute what Congress has declined to include.”); See also Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (3d Cir. 1994).

\(^{213}\) See Welsh, 993 F.2d at 1271 (“Certainly, federal judges must not reach out and grasp at straws in an attempt to rewrite the laws duly enacted by the legislative branch of government, the Congress.”). See also Access Now Inc. v. Southwest Airlines Co., 227 F. Supp.2d 1312, 1318 (S.D. Fla. 2002) (“... [C]ourts must follow the law as written and wait for Congress to adopt or revise legislatively.”).

\(^{214}\) See supra notes 21-22 and accompanying text (discussing Daniel v. Paul and the need for effective enforcement against segregation and racism).

\(^{215}\) See Miller v. Amusement Enterprises Inc, 394 F.2d 342 (5th Cir. 1968).


\(^{217}\) See Welsh, 993 F.2d at 1270; see also Noah v. AOL Time Warner Inc., 261 F. Supp.2d 532, 542 (2003).

\(^{218}\) See Daniel, 395 U.S. at 307-08 (arguing that Congressional intent implied a broad reading of the term “entertainment” which did not restrict an understanding to the statutory language).

\(^{219}\) See Welsh, 993 F.2d at 1269 (arguing that “the clear language of the statute mandates a different conclusion” from the plaintiff).

\(^{220}\) Id. at 1272; Clegg, 18 F.3d at 756 (highlighting the cautionary approach courts should take before interpreting beyond Congress’s “plain meaning”).
rooms. Both groups share similar traits in that they are not connected to a particular physical location. Instead, they serve the primary purpose of bringing people together as a group rather than under an actual facility. Unlike the Boy Scouts, the Cult Awareness Group, or Daniel's recreational park, AOL's chat room participants have no physical interaction with each other and do not meet in any actual facilities—like private homes or community centers. Thus, Judge Ellis reasonably inferred that AOL's chat rooms were outside Title II's scope in regulating physical "places of public accommodation." Proponents of Title II inclusion argue that chat rooms do in fact fulfill the physicality requirement. They reason that chat rooms are in fact connected to actual facilities, since physical servers and computer networks make up the Internet. While this argument looks promising, recent Internet court decisions appear to hold the opposite. For example, Judge Ellis notes that Torres v. AT&T Broadband LLC rejected the notion that an on-screen cable guide was a "place of public accommodation" simply because of its digital cable transmission equipment. Since "in no way does viewing the system's images require the plaintiff to gain access to any actual physical public accommodation," Torres reasoned that the equipment was not akin to a "place of public accommodation." Access Now v. Southwest Airlines reached a similar conclusion in refusing to equate a website or any other "virtual" place as a physical facility.

More importantly, this "server theory" appears to fail because servers, or any computer connected to them, are not necessarily accessible to the public. Indeed, AOL customers cannot physically access the company's servers at all. These facilities represent proprietary equipment only accessible to AOL employees, not AOL customers. In fact, thousands of private computers and network servers make up Internet. Therefore, if the facilities being linked (individual computers and servers) are not open to the public, they cannot be "places of public accommodation." Finally, applying the server theory to Title II public accommodation law may have some impractical and potentially burdensome consequences to the growing use of interactive electronic connectivity devices. So much of today's new communications technology, from text messaging services via Personal Digital Assistants ("PDAs") to the Video-on-Demand feature of digital cable companies, utilize virtual networks similar to Internet chat rooms. If one applied the
server theory, a consumer’s TiVO on-screen television guide, Blackberry e-mail account, or X-Box’s online interactive video game service may all be considered “place[s] of public accommodation.” Although the Torres holding seems to suggest otherwise (the services’ physical servers are not open to the public), applying the server theory to the modern marketplace has broad implications and places in doubt the argument that Congress really intended Title II’s provisions to extend beyond the physical world.237

2) Carparts and Doe v. Mutual of Omaha: A Shaky Title II Comparison

By citing similar decisions under the ADA’s Title III public accommodation statute, Noah claimed that Title II did not necessarily require a physical component.238 But can one really use these ADA case holdings in arguing Title II cases?239 As Judge Ellis indicated, the basis of Mr. Noah’s broad interpretation theory rested on the ADA’s Title III statutory language, not on Title II.240 Thus, he noted, it may be inappropriate to analogize the ambiguities, as “the Civil Rights Act does not include a ‘travel service,’ ‘insurance office,’ or ‘other service establishments’ in its definition.”241 To Ellis, Title II may therefore have a more solid physicality requirement than the ADA.242

In addition, the ADA has a much more extensive list of categories than Title II, implying a broader intent compared with the Civil Rights Act.243 While certainly similar in nature, combating discrimination against disabled people emphasizes different goals and problems than discrimination against a cultural group.244 For example, disabled people often face physical accessibility issues (e.g., no adequate ramps)245 that an ethnic group, like Asian Americans, rarely deals with. It may be for this reason that Congress created a more extensive list of categories in the ADA, since the two statutes’ discrimination history developed differently.246

Doubt also remains as to whether courts that accept the Carparts and Doe v. Mutual of Omaha ADA holdings would use the same broad interpretation in Title II cases.247 The Seventh Circuit decided both the Welsh and later Doe v. Mutual of Omaha appellate court cases;248 yet, Mutual of Omaha does not mention Welsh in its opinion.249 If the Seventh Circuit truly believed in a broad public accommodation theory for both Title II and the ADA, why did it not overrule Welsh’s “physical” requirement when deciding Mutual of Omaha? This suggests that the two laws are not necessarily analogous and should be interpreted using different standards.250 Even a cursory look at the totality of

236 Cf. Thomson, supra note 192 at 435-40. Applying the server theory, one could analogize TiVO’s online TV scheduling database or the Blackberry user’s e-mail servers as physical facilities. See TiVO, at http://www.tivo.com/1.3.1.asp (last visited Feb. 10, 2004) (describing TiVO’s dial-up service, which updates the unit’s scheduling function), and Blackberry Wireless, at http://www.blackberry.com/products/service/email.shtml (last visited Feb. 10, 2004) (explaining the Blackberry mobile e-mail service).

237 See supra notes 229-31 and accompanying text, which discusses the Torres decision and how utilizing one’s digital cable box did not require access to the company’s transmission facilities.

238 Noah, 261 F. Supp. 2d at 543.

239 But see Thomson, supra note 192 at 428-430 (arguing that one may analogize ADA case law with Title II cases).

240 Noah, 261 F. Supp. 2d at 543 n.9 (noting how Carparts relies strictly on the ADA language, which is different from Title II’s). Id.

241 See id. at 543 (“Thus, it appears that the weight of authority endorses the ‘actual physical structure’ requirement in the ADA context as well.”).

242 See 42 U.S.C. §12187(7) (2000); see also discussion of the category differences between ADA and Title II supra notes 56-57.


244 See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (discussing the “access” component of Title III and providing examples of a proper ADA suit (e.g., wheelchair ramp and elevator accessibility issues)).

245 Cf. Thomson, supra note 192 at 435-40.

246 Justice Brennan’s discussion of congressional Title II intent in Daniel, 395 U.S. at 307 (“[T]o move the daily affront and humiliation involved in discriminatory denials of access to [public] facilities . . .”) (quoting H.R. REP. No. 88-914, at 18 (1964)), with the ADA as discussed in Carparts, 37 F.3d at 19 (“[T]o bring individuals with disabilities into the economic and social mainstream of American life . . .”) (quoting H.R. REP. No. 101-485, at 99 (1991)). This by itself reflects a more extensive policy aim with the ADA.


248 Welsh was decided on May 17, 1993, while Mutual of Omaha was decided on June 2, 1999. See Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999).

249 See Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999).

ADA public accommodation cases reveals a split in deciding the necessity of the physicality component.  

3) Chat Rooms: Social Group or “Place of Entertainment”?

Besides the physicality element, chat rooms could also fail the “place of public accommodation” designation due to the online forum’s misapplication as a “place of exhibition or entertainment.” Though courts tend to view “entertainment” broadly, this does not necessarily mean that a chat room serves a “recreational” function. In fact, one could argue that chat rooms more likely resemble a social membership club, similar to the Boy Scouts in Welsh, thus falling out of Title II’s “place of entertainment” category.

Welsh noted that by passing Title II, Congress did not intend to regulate a “wide spectrum of consensual human relationships.” Membership clubs, like the Boys Scouts, can certainly provide many “recreational” activities. However, the Scouts still did not fall under Title II’s jurisdiction because they did not function as a ‘ticket’ to admission to a [physical] facility or location.

Thus, the focus of these exempted groups was “interaction” with people rather than access to entertainment.

Like the Boy Scouts, a court could view chat rooms as more of a discussion group, especially in the rooms focusing on particular topics like Islamic culture. The primary purpose of these chat rooms centers on “cultural enrichment” and gathering people of similar backgrounds rather than acting as a physical location offering recreational activities. Some members might even consider themselves part of a family or even a support network like Alcoholics Anonymous, distinctions far removed from a “place of entertainment.” Defined in this manner, chat rooms could fulfill Welsh’s membership club exemption, thus freeing them from Title II regulation.

Still, some critics could point to chat rooms’ close connection to other online entertainment products, thus coloring them as a “place of entertainment.” United States v. Baird already holds that a facility containing even a small amount of recreational activities makes them a “place of entertainment.” However, Baird focused on a video game already within a 7-Eleven store’s premises. Since most chat rooms are located in a segregated section of the website, the peripheral “entertainment” products might not matter. As demonstrated in Halton v. Great Clips, a non-entertainment facility (i.e., a hair salon) does not necessarily fall under Title II even though it was located in a shopping center with some “recreational” or “covered” facilities (i.e., restaurants in Halton’s case).

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251 Id. at 543-44 (highlighting the ADA circuit split over the physicality issue).
252 See Welsh, 993 F.2d at 1269-70. Cf. Thomson, supra note 192, at 442-445 (arguing that chat rooms are “places of entertainment” with the presence of stylized scripts, icons, and proximity to online gaming options).
253 Id.; see also Daniel v. Paul, 395 U.S. 298, 305-08 (1969) (holding that a lakeside club offered “recreational activities” with access to a snack bar and swimming/boating facilities).
254 See Welsh, 993 F.2d at 1269-76. But see Thomson, supra note 192, at 443-44 (arguing that chat rooms fall out of the “social relationship” distinction by being analogized to “coffee houses,” “dance clubs,” and other areas of social interaction).
255 See Welsh, 993 F.2d at 1270.
256 Id. at 1269. Plaintiff in Welsh claimed the Boy Scouts “offered entertainment to the public at various locations, all of which are ‘places.’” Id.
257 Id. at 1272.
258 See id. at 1275 (“While it is true that ‘people’ and not ‘places’ are the source of discrimination, in Title II Congress focused exclusively on prohibiting discrimination in places of public accommodation and not in every conceivable social relationship.”).
260 Compare the function and activities of the AOL chat room in Noah, 261 F. Supp.2d at 534-35 with the Lakeside recreational park in Daniel v. Paul, 395 U.S. 298, 305-08 (1969), which offered a lakeside snack bar as well as boating and swimming facilities.
261 See id.
262 See Welsh, 993 F.2d at 1278 (“Man is a human being who has a sociological need to join with others in order to develop his full being and to fulfill his need for companionship as well as enjoyment. Congress, in drafting Title II certainly did not intend to interfere with the development of the whole man.”).
263 See discussion of United States v. Baird supra notes 84-88; see also Thomson, supra note 192, at 444 (arguing that chat rooms could better fit the “entertainment” description if chat rooms combined online gaming and other recreational options within their service platform).
264 85 F.3d 450, 454 (9th Cir. 1996).
265 See id. at 453-54.
266 See Halton v. Great Clips Inc., 94 F. Supp.2d 856, 863 (N.D. Ohio 2000). A chat room could be seen as a separate store of the ISP like Halton’s hair salon within a shopping center containing Title II covered establishments.
267 Id. (finding that Title II’s catch-all provision (§2000a(b)(4)) did not apply since the hair salon did not have “exclusive control” over the makeup of the shopping center’s tenants).
Nevertheless, courts might not find chat rooms analogous to the Great Clips hair salon because Halton’s defendant had no control over the activities or tenants of the shopping center. On the other hand, large ISPs like AOL often own and control both the chat room as well as other “entertainment” products. Fortunately, Title II still requires proximity or some connection to a physical “place of exhibition or entertainment,” so Internet chat rooms still fail the statute’s definition.

B. An Inherent Immunity: How Chat Room Accessibility and the CDA’s Provisions Help Prevent Title II Applicability

Besides the “[physical] place of public accommodation” distinction, Title II may not apply to chat rooms because of the Internet’s “democratic” nature and its traditional protection by the government. One of the primary reasons behind the enactment of Title II was to ensure equal access to people of all races and beliefs. Thus, Title II may not necessarily apply to chat rooms because they are largely open to anyone with Internet access. In addition, Zeran and Noah point to protective government laws like the CDA, which grant ISPs significant immunity from traditional forms of federal regulation (e.g., Title II). Thus, the law has the potential to preempt a Civil Rights lawsuit from ever going to trial in a chat room case.

I) How the Chat Room’s Open Nature Provides “Equal Access” To Everyone

“Discriminatory intent” represents one of the most crucial elements of a successful Title II suit. In Akiyama v. U.S. Judo Inc., a federal district court in Washington dismissed the plaintiff’s Title II case because he could not prove that a judo club’s bowing requirement constituted deliberate religious discrimination. The court reasoned that Title II’s language required an “intentional” act of discrimination and that failure to accommodate a person’s religious beliefs completely did not rise to that level. Boyle v. Jerome Country Club reached a similar holding, finding that a golf club’s decision to hold a tournament on Sunday did not discriminate against the plaintiff’s Mormon religion. Since the defendant had a valid non-discriminatory reason for the decision—financial constraints, the plaintiff failed to establish the necessary “discriminatory intent.”

Taking this into account, the case for Title II application to chat rooms appears weak. After all, admission into most chat rooms does not require the disclosure of racial or religious affiliation, with most only asking users to choose a user identification and password. While some registration forms may require additional information, a person’s religious beliefs or race rarely causes an ISP to deny them access to a chat room. In fact, most ISP services like AOL encourage their Internet users to behave responsibly and avoid any

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268 See id.
270 See supra Part III.A.1 (discussing the “physical” facility requirement of Title II).
271 See Reno v. ACLU, 521 U.S. 844, 851-52 (1997) (describing the overall composition of the Internet and the explosion of communications mediums and public expression it has spawned).
272 See supra notes 104-113 and accompanying text (discussing the history of the CDA’s passage and the policy behind granting ISPs “publisher” immunity).
273 See United States v. Baird, 85 F.3d 450, 454-55 (9th Cir. 1996) (describing how Title II was meant to cure the “great evil” of denying African Americans, Jews, and Native Americans access to public areas because of their race).
275 See supra notes 126-134 and accompanying text (discussing the broad “publisher” immunity the CDA grants ISPs).
276 See Noah, 261 F. Supp.2d at 539.
279 Id. at 1186-87. The plaintiff claimed that the judo club’s requirement for him to bow at inanimate objects before tournament matches discriminated against his religious beliefs. Id.
280 Id. at 1185-86 (discussing how in both “disparate impact” and “disparate treatment” Title II cases, the plaintiff must prove a deliberate “discriminatory intent” by the defendant).
282 Id. at 1432 (finding that enough proof did not exist establishing that the club’s decision stemmed from discrimination against Mormons).
283 Id. at 1431.
284 See Thomson, supra note 192, at 441 (describing the process of signing up for an AOL, Yahoo, and MSN IDs).
285 See AOL registration website, at http://my.screen name.aol.com (requiring only a user name, password, birth- day, and e-mail address. There is no mandatory requirement
language or behavior that may disparage a person’s particular race or faith. Thus, the relatively open membership process and lack of any religious or racial profiling suggests that ISPs could not easily develop a “discriminatory” intent to deny admission into their Internet forums. If access represents a primary component of a Title II suit, the non-selectivity of chat room admission seems to disprove the element of a “discriminatory intent.”

2) The CDA: Consistently Seen by Courts as a Barrier to Third Party ISP Liability

More significant than a chat room's open nature or even Title II itself, the CDA presents a formidable barrier to holding ISPs liable for the hateful postings of its members. As Judge Ellis points out in Noah, the few legal cases dealing with the issue have all reached similar conclusions in finding no third party liability. A careful analysis of Section 230's language reveals a deliberate attempt at shielding ISPs from government enforced monitoring systems to censor potentially defamatory messages. Therefore, it does not make sense for courts to impose Title II on chat room messages since this essentially requires ISPs to perform a censoring duty that Congress specifically exempted.

Critics, like Justice Lewis in Doe v. America Online, point to the publisher/distributor liability tort distinction and believe that ISPs have an implied responsibility to screen out libelous messages in which they have notice. This situation fits into Mr. Noah's case, as he sent several e-mails complaining about the chat room's discriminatory messages to AOL management. Unfortunately, it also highlights a rather obvious inconsistency: would Congress pass a law giving ISPs "publisher" liability yet require responsibility indirectly through "distributor" liability?

This reasoning seems to contradict the CDA's intent of removing barriers to the Internet's growth and development. As Zeran notes, the potentially burdensome requirement of monitoring thousands of messages a day was a central finding behind the CDA's passage. ISPs would probably face financial ruin or as Noah points out, shut down their chat rooms before they accept liability as distributors. Therefore, Zeran represents the better CDA interpretation as it preserves the law's spirit in shielding ISPs from liability concerns of third party actions in which they had no involvement.

In fact, the potential for burdening the Internet's development could demonstrate a lack of "discriminatory intent" when ISPs fail to censor discriminatory chat room messages. AOL's lack of monitoring and alleged unwillingness to remove the messages could have nothing to do with

(4th Cir. 1997) (discussing the CDA's statutory language). See id. Requirements the monitoring of messages for instances of racial discrimination seems similar to Zeran's analogy of "editing" one's product as a publisher. See id.

Doe v. Am. Online Inc., 783 So.2d 1010, 1019-25 (Fla. 2001) (Lewis, J. dissenting) (highlighting the absence of a Congressional grant of "distributor" immunity within the CDA's language).

See Noah, 261 F. Supp.2d at 535.

See Zeran, 129 F.3d at 331-34 (holding that §230's language treats publishers and distributors equally when granting ISPs defamation immunity).


See Zeran, 129 F.3d at 333 (describing the problems ISPs could face if forced to monitor all their members' messages).

See Noah, 261 F. Supp. at 540.

See Zeran, 129 F.3d at 333 (arguing that the plaintiff could not equate AOL as a distributor without first finding it as a publisher - either way, the CDA grants ISPs immunity from both).

Mr. Noah’s religious beliefs.\textsuperscript{302} The cost in effectively removing all potentially harmful messages from chat rooms could be significant,\textsuperscript{303} since \textit{Zeran} points out that members post hundreds of messages every hour.\textsuperscript{304} With the current technology, an ISP could not possibly filter out everything.\textsuperscript{305} Their current difficulty in curbing e-mail spam only emphasizes the point.\textsuperscript{306} Therefore, the CDA’s rationale could be analogous to Boyle’s Sunday golf tournament in that AOL and ISPs have a legitimate non-discriminatory reason (i.e., financial constraints)\textsuperscript{307} for having an unmonitored chat room.\textsuperscript{308}

C. Title II, Chat Rooms, and the First Amendment: A Conflict in Authority?

Even if courts concluded that Title II’s “place of public accommodation” language included chat rooms, the First Amendment would remain a final hurdle to suits like Mr. Noah’s.\textsuperscript{309} Since chat rooms provide a convenient forum for public discussion, the question remains as to whether the federal government has the authority to force ISPs to censor their members’ messages.\textsuperscript{310} After all, one could view the Internet as the “new American street corner”\textsuperscript{311} where people can freely express their ideas and beliefs, however enlightened or unseemly.\textsuperscript{312} Therefore if chat rooms both facilitate and encourage free expression, why should they not enjoy the same First Amendment protections as any other fora of public discussion?\textsuperscript{313}

1) Chat Rooms and Hate Speech: Protected or Unprotected Free Speech?

In \textit{Chaplinsky v. New Hampshire}, the Court recognized that not all forms of free speech are worthy of constitutional protection from government regulation.\textsuperscript{314} One could certainly put hate speech in this category since it neither serves a valid public function nor enlightens the public’s views.\textsuperscript{315} However, the court in \textit{R.A.V.} noted that some forms of hate speech might be within a citizen’s First Amendment rights.\textsuperscript{316} Therefore, lawmakers should be cautious when crafting statutes involving content regulation as legislators may inadvertently violate the Constitution in their quest to regulate the method in which citizens express their views.\textsuperscript{317}

Recognizing this principle, one could argue that censoring hate speech within chat rooms could be a form of impermissible content regula-
Specifically, if the “hate speech” postings in Noah’s AOL chat rooms do not implicate an “immediate” threat of harm, can they be validly erased through court enforcement of Federal Civil Rights laws? The messages in question certainly used threatening language to all of the chat room’s participants. But could AOL’s Muslim members reasonably consider the postings an “immediate threat” to their safety? After all, messages posted in chat rooms are usually anonymous (absent a descriptive user ID), do not indicate a member’s location, and can be written from anywhere and at anytime in the world. Although the postings constitute a particularly dismaying chat room posting at issue; see also Chaplinsky, 315 U.S. at 571-72 (discussing the legal history of hate speech on the Internet and how the United States and other world governments balance out free speech concerns).

The messages did not appear to threaten any particular person or indicate an immediate possibility of violence because they came from an anonymous poster who did not pose a significant threat to one particular member. Absent this “fighting words” exception, it would seem inappropriate to force AOL to censor these protected forms of speech through the Civil Rights Act.

Not all forms of chat room speech will necessarily receive the requisite First Amendment protection. For example, federal or state laws may regulate certain forms of Internet harassment if they threatened the immediate safety of a particular group or person. In addition, unprotected free speech (e.g., posting images of child pornography) is still not subject to any First Amendment protections, even in chat rooms. Nevertheless, courts should walk a fine line before permitting Title II to become a backdoor for the censorship of protected speech in chat rooms.

2) Title II Chat Room Oversight and Hurley: A Possible Form of Government-Sponsored Content Regulation?

One can analogize the facts in Noah to a similar situation in Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston. If the Supreme Court did not allow a broad Massachusetts public accommodation law to indirectly influence a private party’s speaker rights, it follows that courts cannot force an ISP to remove protected hate speech messages via Title II. Enforcing the Civil Rights Act this way appears to turn the anti-discrimination law into an unconstitutional form of names/identities.

Compare Noah’s chat room postings, Noah, 261 F. Supp.2d at 555 with Chaplinsky, 315 U.S. at 571-72. Because the AOL chat room postings lacked Chaplinsky-like “fighting words,” there does not appear to be a basis for sidestepping the First Amendment. See Chaplinsky, 315 U.S. at 571-72 (discussing how libel, obscene statements, and “fighting words” do not carry any First Amendment protections).


Compare Noah’s chat room postings, Noah, 261 F. Supp.2d at 555 with Chaplinsky, 315 U.S. at 571-72. Because the AOL chat room postings lacked Chaplinsky-like “fighting words,” there does not appear to be a basis for sidestepping the First Amendment. Compare Noah, 315 U.S. at 571-72. The imposition of Mr. Noah’s Title II censorship duty on AOL could be analogized to the imposition of the Massachusetts public accommodation law on Hurley’s St. Patrick’s Day Parade Committee. See Noah, 261 F. Supp.2d at 545 n. 12 (“Finally, construing Title II as plaintiff requests, to require that AOL censor or limit the speech of its members, may well cause the statute to run afoul of the First Amendment.”).
content regulation.\textsuperscript{333} While Title II certainly aimed at preventing discriminatory access to public facilities, its purpose was not to control the expression of people's ideas.\textsuperscript{334} Thus, forcing ISPs to monitor their chat rooms for potentially discriminatory messages seems like an indirect form of government-sponsored censorship.\textsuperscript{335}

This interpretation in no way destroys the effectiveness of either Hurley's state law or Title II.\textsuperscript{336} As Hurley noted, the private party could not deny access to the participants simply because of their sexual orientation.\textsuperscript{337} This probably extends to ISPs like AOL, who could not deny plaintiffs like Mr. Noah access to their chat rooms solely based on a member's religious faith.\textsuperscript{338} However, both the Massachusetts law and Title II cannot serve as a form of content regulation by forcing private parties to "tailor" their forums into a more acceptable message.\textsuperscript{339}

Expanding this point, enforcing Title II in the chat room environment may quash the Internet's overall purpose, or worse, contribute to their possible demise.\textsuperscript{340} People would probably not express their views so freely in this electronic forum if they knew ISPs would subsequently edit them.\textsuperscript{341} However, monitoring chat rooms for hate speech does not entirely depend on federal oversight.\textsuperscript{342} ISPs, unlike the government, can still censor messages on their own accord since they are not state actors.\textsuperscript{343} However, forcing them to censor via a federal law raises a different issue altogether, and brings into question whether courts are interpreting Congress's intent correctly.\textsuperscript{344}

As stated earlier, Congress in Title II wanted "to remove the daily affront and humiliation involved in discriminatory denials of access to [public] facilities."\textsuperscript{345} Reading the statute plainly does not imply a mandate to make public facilities "content neutral."\textsuperscript{346} Indeed, interpreting it this way would frustrate the aims of the CDA, Hurley, and Reno by discriminating against one form of content for another.\textsuperscript{347} A better solution would be adopting the CDA's methodology and giving ISPs room to invent their own efficient solutions in solving the problem.\textsuperscript{348}

D. Can Title II Ever Apply to the Internet Chat Room Environment?

The question remains as to whether ISPs can ever utilize Title II's "physicality" requirement, the CDA, or the First Amendment to avoid every discrimination lawsuit dealing with their chat rooms.\textsuperscript{349} For example, could ISPs use the same

\textsuperscript{333} See Hurley, 515 U.S. at 572-73. Literal compliance with Title II's anti-discrimination provisions in this suggested manner would require AOL to screen out potentially divisive postings to ensure an "open access" and "content neutral" environment.

\textsuperscript{334} See discussion of Congress's intent when passing Title II supra Part IA.

\textsuperscript{335} See Hurley, 515 U.S. at 572-73; Noah, 261 F. Supp.2d at 545 n. 12. By forcing AOL, via Title II, to screen out hate speech postings in its chat rooms, the ISP would appear to become the Federal Government's de facto "agent."

\textsuperscript{336} See Hurley, 515 U.S. at 572. The policies behind the Noah and Hurley decisions do not endorse the idea of allowing AOL or the Boston Committee permission to deny Muslim/gay people access to the chat room/parade. See Noah, 261 F. Supp.2d at 535-36; 540-45.

\textsuperscript{337} See Hurley, 515 U.S. at 572 ("Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals to various units admitted to the parade . . . . Instead, the disagreement goes to the admission of OLIB unit carrying its own banner. . . .").

\textsuperscript{338} See Noah, 261 F. Supp.2d at 535-36 (E.D. Va. 2003). Mr. Noah never conclusively established that AOL denied him access to their chat rooms because he was Muslim. In fact, he terminated his account on his own accord. \textit{Id. But} see discussion \textit{infra} Part III.D (posing the question as to whether ISPs could use the "physicality" or CDA defense in bypassing Title II's "equal access" provisions).

\textsuperscript{339} Imposing the laws by requiring censorship duties on the defendants in Noah and Hurley would effectively control the speech content of their forums. See Hurley, 515 U.S. at 572-73.

\textsuperscript{340} See Zeran v. Am. Online Inc., 129 F.3d 327, 333 (4th Cir. 1997) ("Thus . . . liability upon notice has a chilling effect on the freedom of Internet speech."); see also Noah, 261 F. Supp.2d at 540.

\textsuperscript{341} See Zeran, 129 F.3d at 333.


\textsuperscript{343} See \textit{id.} at 445; see also Noah, 261 F. Supp.2d at 546 (dismissing Mr. Noah's First Amendment claim because AOL is a private party).

\textsuperscript{344} See Hurley, 515 U.S. at 571-72 (denying the use of state power to interfere with "speaker's autonomy to choose the content of his own message").


\textsuperscript{346} See 42 U.S.C. \$2000a(a) (2000).

\textsuperscript{347} See discussion of CDA, Hurley, and Reno supra Part III.B-C (emphasizing First Amendment concerns when rationalizing their holdings).

\textsuperscript{348} See Zeran v. Am. Online Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Another important purpose of \$230 was to encourage [ISPs] to self-regulate the dissemination of offensive material over their services"); see also 42 U.S.C. \$2000(b) (2000).

\textsuperscript{349} See Noah, 261 F. Supp.2d at 539 (arguing that the CDA provides ISPs immunity from federal civil rights claims
defenses in denying a racial/religious minority access or admission to its chat rooms? While this possibility seems remote due to the non-selectivity and relative anonymity with the chat room registration process, an ISP could theoretically avert a Title II access lawsuit simply by claiming that "virtual" forums are not subject to the statute's provisions.\textsuperscript{551}

Access Now suggests that Congress could avert this possibility by including Internet mediums, like chat rooms, within the statutory definition of "places of public accommodation" in both the ADA\textsuperscript{552} and Title II.\textsuperscript{553} However, a simple amendment of Title II's language will likely neither resolve the free speech issues addressed in RAV and Hurley nor bypass the CDA publisher immunity in non-access cases like Mr. Noah's.\textsuperscript{554} Nevertheless, some limited situations may exist where a chat room plaintiff could utilize the "new" Title II's anti-discrimination provisions while still respecting the CDA and the First Amendment.

For example, court interpretation of this expanded Title II could limit Internet applicability solely to cases where plaintiffs proved a discriminatory denial of access.\textsuperscript{555} Instead of focusing on the chat room's third party postings or any ISP duty to edit their content,\textsuperscript{556} the amended law should only apply to cases where ISPs arbitrarily denied a protected class admission or registration.\textsuperscript{557} In this regard, the CDA and the First Amendment will likely not be an issue, as the complaint deals with ISP discriminatory conduct rather than chat room message content.\textsuperscript{558} By limiting Title II chat room enforcement as such, courts will likely be able to "remove the daily affront and humiliation involved in discriminatory denials of access\textsuperscript{559} and still protect ISPs from burdensome censorship duties.

However, even this amended Title II example could face additional conflicts. The present Title II law still grants a "private club" exception that excludes federal liability for non-public "places of accommodation."\textsuperscript{560} The line between public and private areas appears blurry in the Internet, as many private webmasters depend on public ISP networks to maintain their website's accessibility to the outside world.\textsuperscript{561} Will the ISP bear the liability burden if a private webmaster denies racial/religious minorities access to their private chat room just because the ISP hosts their private website?

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\textsuperscript{551} Over a chat room's third party postings). The court does not address whether the CDA could be used to escape Title II suits that address ISP behavior rather than the actions of the ISP's individual members.

\textsuperscript{552} See supra Part III.B.1 (discussing the open nature of the chat room/Internet medium).

\textsuperscript{553} Under this theoretical suit, the defendant ISP could argue it was not subject to Title II because Internet chat rooms are not "physical" facilities. See discussion supra Part III.A.1 (describing Title II's physicality requirement and the majority of court decisions approving such an interpretation).

\textsuperscript{554} See Access Now Inc. v. Southwest Airlines Co., 227 F. Supp.2d 1312, 1318 (S.D.Fla. 2002) (arguing that Congress has the sole power in revising the ADA language to include the Internet as a "place of public accommodation").

\textsuperscript{555} Hudson, supra note 16 (quoting Robert O'Neil, Director of Thomas Jefferson Center for the Protection of Free Expression, "A legislature could repackage places of public accommodation to include online places if they choose.")

\textsuperscript{556} Even if Mr. Noah could link a chat room to a "public place of accommodation," he would still have to prove that AOL denied him equal access to the chat room and that forcing AOL to censor the third party messages does not constitute an unconstitutional form of content regulation. See discussion of "discriminatory intent" and the First Amendment conflicts with content regulation supra Parts III.B, III.C.

\textsuperscript{557} See 42 U.S.C. §2000a(a) (2000) (describing Congressional intent in providing "equal access" to all persons in the "full and equal enjoyment of goods, services . . . ."); see also Daniel v. Paul, 395 U.S. 298 (1969) (holding that a lakeside recreational park could not deny African-African residents of Little Rock, Arkansas access to their facilities), and Miller v. Amusement Enterprises Inc, 394 F.2d 342 (5th Cir. 1968). These cases dealt with a facility operator denying a Title II protected class access to their public facilities.

\textsuperscript{558} See Noah v. AOL Time Warner, 261 F. Supp.2d 532, 535-56, 541 (E.D. Va. 2003). Although Mr. Noah claims he received "disparate discriminatory treatment" by AOL, the crux of his argument centers on AOL's alleged refusal to remove the discriminatory third party messages from the ISP's chat rooms. See id.

\textsuperscript{559} See id. at 537. The court found AOL to be an improper defendant in Mr. Noah's lawsuit because his complaint made "no reference whatever . . . to any acts or conduct by AOL Time Warner alleged to be violative of any legal duty owed to the plaintiff." By focusing on chat room access issues, a proper Title II claim would center on the actions undertaken by the ISP (they largely control admission to their forums) and not a third party. See id.

\textsuperscript{560} Cf. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Zeran v. Am. Online Inc, 129 F.3d 327 (4th Cir. 1997). In this hypothetical, the lawsuit does not deal with R.A.V.'s government-sponsored content regulation or any form of bulletin board censorship as seen in Zeran.

\textsuperscript{561} Daniel, 395 U.S. at 307-08 (quoting H.R. REP. No. 88-914, at 18 (1964)).
This public/private dilemma seems remarkably similar to the "publisher/distributor" discussion last seen in the CDA-related case law. An ISP could argue that they should not bear Title II responsibility over private chat rooms, since they have no ability to control their customers' private actions. Like the defendant in Blumenthal v. Drudge, the hypothetical ISP simply provides web space and does not have any direct involvement with the discrimination in question. Indeed, forcing ISPs to monitor private websites would run into the same conflicts present in public chat rooms: the CDA's ISP "publisher" immunity and the First Amendment barrier to content regulation. Of course, the hypothetical plaintiff would still be free to sue the private website solely.

In summation, an amended Title II (which included chat rooms) would still need to consider the broader implications of expanding applicability to the Internet. Congress might instead hold off and pass a more specific Internet anti-discrimination law, which limits itself to accessibility concerns and fleshes out the private/public overlap within the Internet's network structure. In any case, a thorough debate for either expanding old or creating new legislation probably assists courts in preventing potential loopholes that a rushed Title II amendment likely produces.

IV. CONCLUSION: THE FUTURE OF CHAT ROOM MONITORING

Removing Title II jurisdiction from Internet chat rooms will not necessarily turn it into a "haven for hate speech." Indeed, the private sector still has a number of potential solutions available that are free from Noah's government-sponsored constraints. In this regard, one wonders whether ISPs are using the CDA and First Amendment protections to avoid any responsibility in ameliorating the often uncontrolled and rowdy nature of chat room discussion. After all, AOL could have easily avoided Mr. Noah's lawsuit by removing the discriminatory messages after receiving his alleged e-mail complaints.

Recent developments seem to suggest a more proactive stance, as major ISPs like MSN have closed their previously open Internet chat rooms to the general public. While this adds to Zeran and Noah's fears of these forums' eventual closure, it could be a positive step in that ISPs can more effectively manage their chat rooms for content and taste. Plaintiffs like Mr. Noah may best be served by these changes, as they would not have to depend on Title II for a more pleasant Internet experience.

Of course, time might be the ultimate judge in controlling chat room conversation. Eventually,
technology and the financial burden might im-
prove so that Congress may feel justified in repeal-
ing the CDA. In addition, ISPs may not have the 
same "distributor" immunity and be forced to re-
move indecent messages of which they have rea-
sonable notice. Of course, this may never happen 
so courts should be cautious before attempting to 
extend traditional federal regulation into the 
cyberspace medium.