The Manufactured Line:

How Nexus Doctrine and Clickwrap Enforceability Deny the Disabled and the Consumer From Opposite Directions

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Abstract

This Article identifies a single doctrinal maneuver operating across two unrelated bodies of law. In disability access law, the nexus doctrine under Title III of the Americans with Disabilities Act treats the absence of a physical place as a reason to deny coverage to a digital service. In consumer contract and copyright law, the rule that software is licensed rather than sold treats the presence of a physical copy as insufficient to confer ownership or control, because an amendable license governs the object the buyer holds. The two rules point in opposite directions, yet they resolve in the same direction, against the person and toward the firm. The physical and digital boundary, this Article argues, is not a neutral descriptive fact that courts discover. It is a normative lever that courts and firms deploy, and its deployment tracks power rather than principle. Part III develops the disability half through the Title III circuit split. Part IV develops the consumer half through the line running from shrinkwrap enforceability to *Vernor v. Autodesk*. Part V draws the symmetry and argues that the boundary's manipulability, rather than either doctrine standing alone, is the phenomenon worth naming. A short concluding Part proposes that courts treat the physical and digital line as a lever to be justified in each instance, not a fact to be honored by default.

Keywords: ADA Title III; nexus doctrine; public accommodation; clickwrap; first sale doctrine; digital ownership; licensed not sold; consumer contracts.

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Contents

I. Introduction

A boundary runs through modern American law that most courts treat as a fact of nature. On one side sits the physical: a store with a door, a disc in a box, a place a body can enter. On the other side sits the digital: a website, a download, a license delivered by reference. Judges reach for this boundary constantly, and they speak of it as though they were reporting the weather. This Article argues that the boundary is doing something very different from reporting. It is deciding cases, and it decides them in a pattern that neither doctrine that relies on it will admit.

The pattern is this. When a disabled plaintiff sues under Title III of the Americans with Disabilities Act for access to a service that lives online, a large group of courts asks whether the service is connected to a physical place. If it is not, the plaintiff loses. Here the absence of a physical place is fatal to the person seeking protection.[1] When a consumer buys a boxed piece of software or a game, takes the physical object home, and later objects that the seller has changed the terms or degraded the product, courts ask a different question and reach the same destination. The buyer holds a physical object, yet the buyer is told the object was licensed, not sold, and the license governs. Here the presence of a physical object is not enough to protect the person who paid for it.[2]

Notice what the boundary does across the two settings. In the first, its absence denies. In the second, its presence fails to protect. A line that operated as a neutral descriptive fact would not behave this way. A neutral line would sometimes favor the firm and sometimes favor the person, depending on which side of the line the facts happened to fall. This line does not do that. Whichever way the physical and digital distinction is drawn, and whichever party the drawing appears to favor on its face, the resolution lands on the same side. The disabled plaintiff loses because the place is absent. The consumer loses because the object is present but powerless. The firm prevails in both.

1. *See infra* Part III.
2. *See infra* Part IV.

This Article does not argue that either doctrine is wrong on its own terms, though each has been criticized at length by others. It argues something prior and more general. The physical and digital boundary is a lever, not a landmark. Courts and firms invoke it to sort outcomes, and the sorting follows power rather than principle. Once the two bodies of law are set beside each other, the shared maneuver becomes visible in a way it never is when either is studied alone. That juxtaposition is the contribution.

Part II states the claim precisely and distinguishes it from the ordinary observation that the law lags behind technology. Part III develops the disability half through the Title III circuit split over websites and physical places. Part IV develops the consumer half, tracing the line from the shrinkwrap cases through the rule that software is licensed rather than sold, with the game and its end user license agreement as the paradigm. Part V draws the symmetry and isolates the two asymmetries it produces, one in public outrage and one in doctrine. Part VI answers the strongest objections. A brief conclusion proposes a modest interpretive discipline: when a court is about to rest a decision on the physical and digital line, it should be required to say what work the line is doing and why that work is legitimate here, rather than treating the line as self-executing.

II. The Boundary as Doctrine, Not as Description

The claim of this Article is easy to misread as a familiar one, so it is worth stating what the claim is not. It is not the claim that law lags technology. That observation is true, common, and beside the point. Lag would predict random error. It would predict that as courts struggle to fit old categories to new facts, they would sometimes over-include and sometimes under-include, sometimes to the firm's advantage and sometimes to the person's. The phenomenon described here is not random. It is directional.

The claim is that the physical and digital distinction functions as a normative lever. A lever, in this sense, is a distinction that appears descriptive but performs allocation. It looks like it is telling you what a thing is. It is actually telling you who wins. The tell is directionality under inversion. If a single distinction is invoked in two settings, and in one setting the presence of the trait favors a party while in the other the absence of the very same trait favors the same party, then the distinction is not tracking the trait. It is tracking the party.

Consider a neutral analogue. The distinction between a written and an oral contract does real descriptive work, and it favors different parties in different cases. A plaintiff relying on the statute of frauds benefits when the contract is oral and therefore unenforceable against her. A plaintiff seeking to enforce a bargain benefits when the contract is written. The writing requirement favors whoever the writing happens to favor. No party has captured it. That is what a genuinely descriptive distinction looks like in operation.

The physical and digital line does not behave like the writing requirement. As the next two Parts show, it has been captured. Its presence and its absence both resolve toward the firm. The remainder of this Article is the demonstration.

III. The Disabled Are Denied by the Absence of a Place

A. The Statute and the Physical Place Assumption

Title III of the Americans with Disabilities Act prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods and services of any place of public accommodation.[3] The statute defines public accommodation by listing twelve categories of private entities, each introduced by examples and closed by an "other" clause that extends the category to unlisted entities of the same kind.[4] The recurring noun in the categories is "place." The recurring modifier describes what the place does. A category covers a bakery, grocery store, or other sales establishment; a museum, library, or other place of public display; a travel service or insurance office among service establishments.[5] The listed service establishments include businesses that in 1990 routinely operated by telephone and mail, without a customer ever entering an office.

3. 42 U.S.C. §12182(a).
4. 42 U.S.C. §12181(7).
5. *Id.* §12181(7)(E), (H), (F).

That drafting choice matters, because it undercuts the assumption that Congress meant to reach only walk-in businesses. A statute that lists travel services and insurance offices among covered establishments has already contemplated commerce that does not require a body in a room. The physical place assumption is not compelled by the text. It is imported into the text by a line of decisions.

B. The Circuit Split

The federal circuits divide on whether Title III requires a connection to a physical place, and if so, whether a digital service can satisfy that requirement only by tethering to a brick and mortar location.

The Ninth Circuit anchors the nexus camp. In *Weyer v. Twentieth Century Fox Film Corp.*, it read the statutory categories to require some connection between the good or service complained of and an actual physical place.[6] It applied that reading in *Robles v. Domino's Pizza, LLC*, holding that the pizza chain's website and app must be accessible because their inaccessibility impeded access to the goods and services of physical franchises.[7] The holding cuts both ways, and that is the point worth marking. A website tied to a physical store is covered. A website tied to nothing physical is, by the same logic, not. The nexus is the hinge, and the hinge is a place.

The Fifth Circuit joined the nexus camp in *Magee v. Coca-Cola Refreshments USA, Inc.*, holding that glass front vending machines are not sales establishments because they are not enumerated and are not spaces that individuals enter to use.[8] The Third Circuit's requirement descends from *Ford v. Schering-Plough Corp.*, which demanded a connection between the complained of service and an actual physical place.[9] The Eleventh Circuit briefly adopted the most restrictive position of any court in *Gil v. Winn-Dixie Stores, Inc.*, holding that websites are

6. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).
7. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).
8. *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016).
9. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998).

never places of public accommodation regardless of any nexus, before that decision was vacated as moot, leaving the reasoning as a signal rather than a holding.[10]

The other camp reads the statute by function. The First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England* held that Title III reaches entities in the statutory categories whether or not they operate through physical places, reasoning that a contrary reading would defeat the statute's purpose and could not be squared with its inclusion of remote operating services.[11] The Seventh Circuit signaled the same view in dicta by Judge Posner in *Doe v. Mutual of Omaha Insurance Co.*, describing the core of Title III as reaching the operator of a store, hotel, or website, whether in physical or electronic space.[12]

C. What the Boundary Does Here

Set the doctrinal detail aside and watch the boundary operate. In the nexus circuits, a disabled person who cannot use an online service has a claim if, and only if, the service can be tied back to a physical place a body could enter. The more completely a business has migrated to the digital, the less protection its disabled users receive. A purely online retailer, a streaming service with no theater, a bank with no branch: each becomes harder to reach precisely as it sheds the physical. The absence of a place is the reason the person loses.

This is a strange result for a statute enacted to open commerce to disabled people. The businesses hardest to reach in a wheelchair are not the only ones that exclude. A screen reader confronts an inaccessible checkout page whether or not there is a store behind it. Yet the doctrine makes the store behind the page the condition of the remedy. The physical, whose absence the disabled plaintiff cannot control, becomes the gate.

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10. *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277–81 (11th Cir. 2021), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021).

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

12. *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

IV. The Consumer Is Denied by the Presence of a License

The consumer half runs the boundary in reverse. Here the person holds the physical object, and the object still fails to protect him, because the law treats a license delivered with the object as the thing that governs.[13]

A. From Shrinkwrap to Clickwrap

The groundwork was laid in the shrinkwrap cases. In *ProCD, Inc. v. Zeidenberg*, the Seventh Circuit enforced license terms enclosed inside a software box and disclosed on the screen at first use, holding that a buyer who could review the terms and return the product if unwilling had assented to them.[14] The buyer's physical possession of the box did not displace the terms inside it. The terms rode along with the object and bound the person who opened it.

Digital contracting refined the enforceability line without disturbing the underlying move. Courts distinguished agreements a user must affirmatively accept from those buried in a link the user need never see. In *Specht v. Netscape Communications Corp.*, the Second Circuit refused to enforce arbitration terms available only through a submerged hyperlink, because a reasonable user would not have known she was assenting.[15] The Ninth Circuit followed in *Nguyen v. Barnes & Noble Inc.*, holding a browsewrap unenforceable for want of conspicuous notice.[16] Where notice is adequate and assent is manifested, however, courts enforce. In *Meyer v. Uber Technologies, Inc.*, the Second Circuit upheld a clickwrap presented with reasonable conspicuousness and an unambiguous manifestation of assent.[17] The doctrine matured into a notice and assent test. What it never revisited was the premise that a set of terms, once adequately presented, governs the buyer's relationship to a thing the buyer paid for and holds.

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13. *See generally* Aaron Perzanowski & Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (2016) (documenting how ostensible digital purchases convey licenses rather than ownership, and how that shift strips buyers of the incidents of property).

14. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452–53 (7th Cir. 1996).

15. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 31–32 (2d Cir. 2002).

16. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178–79 (9th Cir. 2014).

17. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75–80 (2d Cir. 2017).

B. Licensed, Not Sold

The premise reaches its sharpest form in the rule that software is licensed rather than sold. In *Vernor v. Autodesk, Inc.*, the Ninth Circuit held that a software user is a licensee rather than an owner where the copyright holder specifies a license, significantly restricts transfer, and imposes notable use restrictions.[18] The consequence is decisive. The first sale doctrine, which lets the owner of a lawful copy resell or lend it, and the essential step defense, which lets an owner run software she possesses, are both unavailable to a mere licensee.[19] A person can hold the disc, own the plastic, and still not own the copy in the sense the Copyright Act rewards. The physical object is present. The rights that presence would ordinarily carry have been contracted away by terms the object delivered.

The significance of *Vernor* is not that its three factors are exotic. It is that they are ordinary. Every mass market license specifies a license, restricts transfer, and restricts use. The test is therefore satisfied by the standard form itself.[20] The default, for practically all consumer software, is that the buyer is a licensee, and the tangible copy in the buyer's hands confers no ownership the law will protect.

C. The Game and Its Amendable Terms

The video game is the paradigm, because it is where the boundary's consumer side is most fully developed and most openly one directional. Game publishers distribute physical discs and also bind purchasers to end user license agreements. Courts have enforced those agreements against players and have held that circumventing a technical access control or breaching license terms can carry legal consequence. In *Davidson & Associates v. Jung*, the Eighth Circuit held that an emulator that circumvented an authentication handshake and let unauthorized copies play

18. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010).

19. *Id.* at 1107; *see* 17 U.S.C. §§109(a), (d), 117(a).

20. *See* Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We "Buy Now"*, 165 U. Pa. L. Rev. 315 (2017) (presenting empirical evidence that consumers understand a "buy" button to convey ownership, contrary to the license terms that in fact govern); *see also* Luohaoran Zhu, *The Vanishing Ownership: Reconstructing the First Sale Doctrine and Digital Exhaustion in the Age of Cloud Computing and NFTs*, 1 L. Econ. & Soc'y 58 (2025).

violated the anti-circumvention provisions and the governing agreement.[21] The important limit, developed by the Ninth Circuit in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, is that breaching a license covenant amounts to copyright infringement only where the breached term bears a nexus to an exclusive right of the copyright holder; otherwise it is a contract matter.[22] The two decisions together mark the shape of the terrain. The player is bound by the terms, and the terms, not the disc, define what the player may do.

The final turn is the amendment right. Consumer agreements routinely reserve the seller's power to change the terms, and the account, the update, and the community are conditioned on continued acceptance.[23] A player who declines the new terms loses access to the current build, to multiplayer, to progress already earned. Courts have policed the outer edge of this power. In *Douglas v. U.S. District Court ex rel. Talk America, Inc.*, the Ninth Circuit held that a party is not bound by amended terms posted without notice, because one cannot assent to a change one has no reason to know about.[24] Even where courts have found unilateral amendment unconscionable, the reasoning has turned on the absence of meaningful choice.[25] These are limits at the margin. They do not disturb the structure. Within the structure, the promise embodied in the physical object is contingent on terms the seller may revise, and the buyer's remedy for a revision he dislikes is to stop using the thing he bought.

D. What the Boundary Does Here

Watch the boundary again. The consumer holds the object. The object is physical, present, paid for. And the law routes around it. The disc is real, but the copy is licensed. The box is owned, but the terms govern. The purchase happened, but the terms may change. At each step, a digital

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21. *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639–41 (8th Cir. 2005).

22. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 940–41 (9th Cir. 2010).

23. *See* Péter Mezei & István Harkai, *End-User Flexibilities in Digital Copyright Law: An Empirical Analysis of End-User License Agreements*, 5 Interactive Ent. L. Rev. 1 (2022) (empirically analyzing the one-sided and amendable character of standard end user license agreements).

24. *Douglas v. U.S. Dist. Court ex rel. Talk Am., Inc.*, 495 F.3d 1062, 1066 (9th Cir. 2007).

25. *See Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172–73 (N.D. Cal. 2002) (finding an arbitration clause in a unilaterally amendable user agreement unconscionable).

instrument, the license, overrides the physical thing, the copy, in the buyer's hands. The presence of the physical does not protect. The presence of the physical is treated as beside the point.

V. The Symmetry, and Its Two Asymmetries

Set the two Parts side by side. In disability access law, the absence of a physical place defeats the person. In consumer law, the presence of a physical object fails to protect the person. The same distinction, run in opposite directions, delivers the same party to defeat. That is the manufactured line.

The word manufactured is deliberate. A natural boundary would not resolve this uniformly. If the physical and digital distinction were tracking some real feature of the world, we would expect it to favor consumers as often as firms, disabled plaintiffs as often as defendants, because the facts would sometimes fall on the protective side of the line. Instead the line is drawn, in each field, at the location that denies the weaker party. In disability law the protective threshold is set at the physical place, which the digital plaintiff lacks. In consumer law the protective threshold is set above the physical object, which the consumer has but which is declared insufficient. The threshold moves. What stays fixed is which side of it the person ends up on.

A. The Outrage Asymmetry

The same corporate practice draws public fury in one setting and a shrug in another, sorted by whose ownership is at stake. When a tractor manufacturer uses software locks to control repair of a machine a farmer bought, or when a carmaker gates a feature already built into a vehicle behind a later subscription, the objection is immediate and broad, and it is framed in the language of ownership. When a game publisher does the structurally identical thing, conditioning a purchased product on amendable terms and degrading it at will, the objection is dismissed as the complaint of gamers.[26] The practice is the same. The volume of protest tracks the perceived seriousness of the owner, not the character of the act.

B. The Doctrinal Asymmetry

The two fields disadvantage two easily dismissed groups through two different mechanisms. The disabled lose through a doctrine of coverage, the nexus requirement, which reads them out of the statute when their harm is digital. The consumer loses through a doctrine of contract and copyright, the licensed not sold rule, which reads his ownership down to a license. Different levers, one result. In each field, the person who can least afford to lose the protection is the person the boundary removes it from.

The point of naming the symmetry is not to collapse two doctrines that remain formally distinct. It is to make visible that the physical and digital distinction is available for capture in exactly this way, and has been captured, in fields that never cite each other. A phenomenon that appears twice, in unrelated law, through opposite operations, is not a quirk of either field. It is a property of the distinction itself.

VI. Objections and Responses

A. These Are Different Bodies of Law

The most immediate objection is that disability access and consumer contract are unrelated, governed by different statutes and different purposes, so that comparing them proves nothing. The response is that the disconnection is the evidence, not the flaw. If two fields that share no doctrine, no statute, and no set of litigants nonetheless deploy the same distinction to the same directional effect, the common element cannot be anything internal to either field. It has to be the distinction they share. The comparison does not assume a link between the fields. It discovers that the link is the line.

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26. *See* Xiaohua Zhu & Moonhee Cho, *Ownership vs. Access: Consumers' Digital Ownership Perceptions and Preferences*, 73 Aslib J. Info. Mgmt. 904 (2021) (finding a persistent gap between consumers' ownership expectations and the access-only reality of digital goods).

B. The Line Has Legitimate Functions

A second objection grants that the physical and digital distinction is used in both fields but insists that it has legitimate functions in each. The nexus requirement, one might say, keeps Title III tethered to the statute's text. The licensed not sold rule, one might say, protects the incentives copyright exists to secure. Grant both. Legitimate local functions do not explain the global pattern. A distinction can have a defensible role in a single field and still, when it appears across fields, resolve in a direction that no single field's rationale predicts. The objection defends each use in isolation. It leaves untouched the fact that the uses, taken together, run one way.

C. The Cases Are Not Uniform

A third objection notes that the doctrine is not monolithic. Some circuits reject the nexus requirement. Some agreements fail for want of notice. Some amendments are struck as unconscionable. All true, and the counterexamples matter. They show that the boundary is contestable, that courts can and sometimes do refuse to let it decide. That is a reason for optimism about the remedy proposed below, not a refutation of the pattern. The pattern is a tendency, a center of gravity, visible across the mass of decisions even though individual cases resist it. The existence of resistance is consistent with the existence of the pull.

VII. Conclusion

The physical and digital boundary is treated, across American law, as a fact that courts find. This Article has argued that it is closer to a lever that parties pull. In disability access law the lever is pulled by placing the protective threshold at a physical place the digital plaintiff lacks. In consumer law it is pulled by placing the threshold above a physical object the consumer has. The two settings run the distinction in opposite directions and arrive at the same place, with the firm ahead and the person behind.

The remedy suggested here is modest and interpretive. When a court is about to rest a decision on the physical and digital line, it should be required to state what work the line is doing in that case and why that work is justified, rather than invoking the line as though it decided itself. A distinction that has been shown to resolve directionally across unrelated fields has forfeited the presumption of neutrality. It should have to earn its keep, case by case, in the open. That is a small demand. It would change a great deal, because most of the boundary's power comes from being treated as obvious. Naming it as a lever is the first step toward asking who is pulling it, and for whom.