

THE RECORDING RESTRICTION

MEMORY DISABILITIES, THE SURCHARGE DOCTRINE, AND PERFORMANCE PROTECTION AS PRETEXT UNDER ADA TITLE III

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ABSTRACT

A growing class of premium-priced public accommodations, including the Halloween haunted-house events run by Universal Studios, Knott’s Berry Farm, and Hersheypark, prohibits guests from recording any photograph or video inside the haunted houses themselves. The stated rationale is the protection of live performance and the experience of other guests. For most guests, the prohibition is an inconvenience. For guests with documented memory disabilities, including traumatic brain injury, early-stage dementia, and certain forms of episodic memory impairment associated with autism spectrum disorder, the prohibition operates as a categorical denial of access to the memory of a premium-priced experience that the venue has marketed as singular and unrepeatable. This Article advances three claims. First, recording is an auxiliary aid and a reasonable modification within the meaning of Title III of the Americans with Disabilities Act, and a categorical recording ban applied without an individualized inquiry violates 42 U.S.C.

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§ 12182(b)(2)(A)(ii) as construed in *PGA Tour, Inc. v. Martin*. Second, the performance-protection defense fails on its own commercial admissions: every operator that prohibits recording inside the relevant attraction simultaneously sells recordings of substantially equivalent attractions elsewhere in the same park, demonstrating that recording is compatible with the underlying product. Third, the surcharge prohibition at 28 C.F.R. § 36.301(c) independently reaches the operator’s photograph-and-video upsell business, which functions as a disability surcharge when a memory-disabled guest has no nondiscriminatory means of retaining the experience.

Keywords: Americans with Disabilities Act; Title III; reasonable modification; fundamental alteration; memory disability; episodic memory; *PGA Tour v. Martin*; auxiliary aids; assistive technology; live performance; copyright fixation; fair use; surcharge doctrine; theme parks

I. INTRODUCTION

A Benihana customer records her child blowing out birthday candles while the chef performs the choreographed onion volcano. The chef has trained in a standardized theatrical sequence. The performance is branded, scripted in its broad outline, and partially improvised in execution. The chef is wearing a uniform. The chef will perform the same sequence forty more times that night. No court would entertain the proposition that allowing the customer to record her child’s birthday is a fundamental alteration of the restaurant’s services. No court would entertain the proposition that the chef’s performance is sufficiently distinct from the food itself to support a categorical prohibition on the customer’s right to remember the event she paid to attend.

A guest at Universal’s Halloween Horror Nights walks through a haunted house. The house was designed by Universal’s Entertainment team, partially scripted, and staffed by trained scareactors performing within choreographed parameters. The scareactors are wearing costumes. The scareactors will perform the same sequence hundreds of times across the run of the event. Universal prohibits the guest from recording any portion of the experience inside the haunted house. The stated rationale is the protection of the scareactors and the preservation of the experience for other guests.¹

¹Joseph Matt, *Guide to Halloween Horror Nights 2026 at Universal Orlando*, TouringPlans (updated Apr. 2026), <https://touringplans.com/blog/guide-to-halloween-horror-nights-at-universal-orlando/> (visited May 2026) (“Photography of any kind is prohibited in haunted houses... Team Members are positioned inside the house to facilitate guest flow and provide assistance.”). Universal guest relations has separately confirmed the prohibition, stating that “[g]uests are not allowed to film or take photographs inside the haunted houses... The use of video recording or flash photography is prohibited within the haunted houses.” *Halloween Horror Nights Guide*, Universal

The structural distinction the haunted house operator must defend, between a hibachi performance the customer may record and a haunted house performance the customer may not, is the subject of this Article. The distinction is not coherent on the merits. It is also not the live question for most guests, who absorb the prohibition as a minor cost of admission to a premium-priced themed event. The distinction matters legally because it does the work of denying a category of disabled guests the only practical means by which they can retain the memory of an experience the operator has expressly marketed as singular and unrepeatable.

This Article identifies and analyzes that operation under Title III of the Americans with Disabilities Act of 1990, as amended.² Part II describes the documented pattern across four operator brands, all of which charge premium event-night prices, all of which feature live performance, and all of which prohibit recording inside the relevant attraction on explicitly performance-protective rationales. Part III identifies the affected population, distinguishing memory-related disabilities from the general inconvenience the policy imposes on nondisabled guests, and explaining the role of recording as a memory prosthesis under the post-ADAAA regulatory framework. Part IV sets out the Title III modification framework, with *PGA Tour, Inc. v. Martin* as the controlling authority on the fundamental alteration defense. Part V advances the central doctrinal claim: the performance-protection defense fails on the operator's own commercial admissions, because operators who prohibit recording in one attraction simultaneously profit from recording in functionally equivalent attractions elsewhere in the park. Part VI identifies an independent violation: the surcharge prohibition at 28 C.F.R. § 36.301(c), which is implicated whenever a venue's photograph-and-video upsell business operates as the only means by which a memory-disabled guest can retain the experience. Part VII addresses the plaintiff class, the available remedies, and the limitations imposed by *Cummings v. Premier Rehab Keller, P.L.L.C.* on parallel Section 504 damages claims. Part VIII concludes.

II. THE DOCUMENTED PATTERN

The class of public accommodations relevant to this Article shares four features. First, the operator charges a premium event-specific price, typically a separately ticketed evening event in addition to standard daytime park admission. Second, the operator markets the event as memorable, unrepeatable, and worth the upcharge. Third, the operator features live performance, typically costumed scareactors or theatrical character work, as a primary value driver. Fourth, the operator categorically prohibits photography or video recording inside the relevant attractions, citing performance protection rather than safety.

Orlando (guest-relations comment), <https://blog.discoveruniversal.com/events/guide-to-halloween-horror-nights/> (visited May 2026).

²Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, codified as amended at 42 U.S.C. §§ 12101 *et seq.*; ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

A. *Universal Halloween Horror Nights*

Universal's Halloween Horror Nights operates at Universal Orlando and Universal Studios Hollywood as a separately ticketed evening event during the autumn season. Universal's own published guidance states that "[g]uests are not allowed to film or take photographs inside the haunted houses at Halloween Horror Nights in Universal Orlando. The use of video recording or flash photography is prohibited within the haunted houses. This is part of the event's code of conduct to ensure a safe and enjoyable experience for all attendees."³ Coverage of the 2026 event by Inside the Magic and Disney Fanatic confirms that the prohibition is actively enforced: "[i]nside the haunted houses, photography and video recording are prohibited. This policy exists for the safety of both guests and the scare actors working inside the houses. Keep your camera and phone stowed once you cross the threshold into any haunted house."⁴

The prohibition is not confined to a single event guide. Universal's published event coverage describes recording inside the haunted houses as prohibited across the run of the event, with team members stationed inside the houses to enforce guest flow and the restriction.⁵ Universal's stated rationale combines scareactor safety and guest experience. Neither rationale is a safety rationale of the sort that would, for example, justify the dropped-phone hazard underlying Disney's separate prohibition on phones aboard the Space Mountain attraction. Universal's rationale is, on its face, performance protective.

B. *Knott's Scary Farm*

Knott's Scary Farm operates at Knott's Berry Farm in Buena Park, California, as a separately ticketed Halloween-season event. The park's published Code of Conduct prohibits "[u]nsolicited photography or video recording that disrupts a guest's experience or interferes with park operations" and provides that "[f]ilming, regardless of device, secured or unsecured, is prohibited on most rides and attractions."⁶ Reporting on the 2022 event by Theme Park Insider confirmed that "filming in the mazes will not be allowed any other night of Knott's Scary Farm."⁷ The rationale follows the same performance-protective pattern.

³*Halloween Horror Nights Guide*, *supra* note 2.

⁴*Do Not Show Up to Halloween Horror Nights at Universal Without Knowing These Rules First*, Inside the Magic (2026), <https://insidethemagic.net/2026/05/do-not-show-up-to-halloween-horror-nights-at-universal-without-knowing-these-rules-first-el1/>.

⁵Joseph Matt, *Guide to Halloween Horror Nights 2026 at Universal Orlando*, *supra* note 1 ("Photography of any kind is prohibited in haunted houses... Team Members are positioned inside the house...").

⁶*Code of Conduct & Policies*, Knott's Berry Farm, <https://www.sixflags.com/knotts/code-of-conduct> (visited May 2026).

⁷Robert Niles, *Have Knott's New Policies Made for a Better Scary Farm?*, Theme Park Insider (Sept. 24, 2022), <https://www.themeparkinsider.com/flume/202209/9153/>.

C. Hersheypark Dark Nights

Hersheypark's Dark Nights operates as a Halloween-season event at Hersheypark in Hershey, Pennsylvania. The park's published FAQ states: "[f]lash photography or lights of any kind are not permitted in the Haunted Houses for the enjoyment of all guests. For the privacy of all guests, live streaming is prohibited throughout Hersheypark and Dark Nights. Working crews and those using cameras with detachable lenses are not permitted without a Hersheypark Communications escort coordinated in advance. Filming and photographing on rides is strictly prohibited unless approved by a Hersheypark Communications team member."⁸ The Hershey policy is the most aggressively drafted of the three: it extends from haunted houses to all rides and contemplates the management of working media crews by a centralized Communications office.

D. Common Features

The three operators differ in corporate parent (NBCUniversal, Six Flags Entertainment Corporation, and Hershey Entertainment & Resorts respectively), in geographic location, and in particulars of attraction design. They are uniform in four respects. First, each operates a premium-priced Halloween-season evening event in addition to ordinary park admission. Second, each event features live actor performance as a central value driver. Third, each operator prohibits photography or video recording inside the relevant attractions on explicitly performance-protective rationales, separately stated from any safety rationale. Fourth, each operator simultaneously offers an authorized photography product elsewhere in the park, including PhotoPass-style on-ride photography services, with premium pricing for printed or digital delivery.

The combination of features is not idiosyncratic. It is the operating model of a recognizable class of premium themed live-performance accommodations. The pattern is the doctrinal subject.

III. THE AFFECTED POPULATION

A. Memory as a Major Life Activity

The ADA, as amended by the ADA Amendments Act of 2008, defines disability to mean "a physical or mental impairment that substantially limits one or more major life activities of [an] individual."⁹ The statutory enumeration of major life activities is non-exhaustive and expressly includes "learning, reading, concentrating, thinking, [and] communicating," as well as "the operation of a major bodily

⁸*Hersheypark Halloween: What is the filming policy for Dark Nights?*, Hersheypark, <https://www.hersheypark.com/plan-your-visit/faqs/315> (visited May 2026).

⁹42 U.S.C. § 12102(1)(A).

function,” which includes “neurological” and “brain” function.¹⁰ The Department of Justice’s implementing regulations confirm that “concentrating” and “thinking” are major life activities, and the legislative history of the ADAAA makes clear that Congress intended a broad construction.

Memory is not enumerated in the statutory list, but the major life activities enumerated in 42 U.S.C. § 12102(2)(A) plainly include constitutive elements of memory. Episodic memory consolidation, autobiographical memory retrieval, and the integration of experience into a continuous narrative self all operate through the neurological functions Congress placed at the center of the statute’s coverage. A clinically significant impairment of episodic memory necessarily limits “thinking” and “concentrating,” typically also “learning” and “communicating,” and frequently operates through “neurological” or “brain” function as a major bodily function. The Article proceeds on the premise that documented episodic memory impairment is a covered disability under Title III.

B. Disabilities Implicating Episodic Memory

The affected population includes adults with documented traumatic brain injury affecting episodic memory consolidation; adults with early-stage Alzheimer’s disease, frontotemporal dementia, or other major neurocognitive disorders within the meaning of the Diagnostic and Statistical Manual; adults whose chronic post-traumatic stress disorder has produced documented dissociative amnesia affecting episodic memory; adults whose epilepsy or post-ictal states produce documented gaps in episodic memory; and a subset of autistic adults whose episodic and autobiographical memory presentations diverge significantly from neurotypical baselines.¹¹

The affected population also includes the family caregivers and guardians of the foregoing, who in the context of a public accommodation visit function jointly with the primary disabled guest in attempting to construct a memory of the outing for the primary guest’s benefit. Where a parent attempts to record a haunted-house visit so that an adult child with TBI can retain the memory of the family outing, the parent is performing the role of an auxiliary aid, and the venue’s prohibition reaches the parent’s conduct in service of the disabled guest. Title III’s reach extends to the conduct of the guest and to the conduct of the persons associating with the guest in the relevant accommodation.

¹⁰*Id.* § 12102(2)(A), (B).

¹¹For diagnostic criteria see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., text rev. 2022) (DSM-5-TR), at the relevant entries for major and mild neurocognitive disorders, posttraumatic stress disorder, and dissociative amnesia. The clinical heterogeneity within these populations is the doctrinal point. Title III’s individualized inquiry standard tracks the clinical heterogeneity rather than imposing a categorical pre-litigation eligibility filter.

C. Recording as Memory Prosthesis

For the affected population, video recording is not a souvenir. It is a memory prosthesis. The functional analogue is the wheelchair, the cane, the cochlear implant, the captioning system, the screen reader, the medication regimen, or any other device or modification that operates to permit the disabled person to do, in another way, what the nondisabled person does intrinsically. Episodic memory in the neurotypical adult consolidates contextual and narrative information about lived experience without conscious effort. Episodic memory in the impaired adult does not. The recording, reviewed in the days and weeks following the experience, performs the consolidation function that the impaired neurological substrate cannot perform. This is not metaphor. It is the documented therapeutic use of video recordings in clinical care for episodic memory disorders.

The ADAAA's mitigating measures rule directly addresses the role of such assistive measures in the disability inquiry. Title 42, United States Code, section 12102(4)(E)(i), provides that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as... low-vision devices... prosthetics including limbs and devices... hearing aids and cochlear implants or other implantable hearing devices... mobility devices... oxygen therapy equipment and supplies... use of assistive technology... reasonable accommodations or auxiliary aids or services... [or] learned behavioral or adaptive neurological modifications."¹² The 2008 enactment of this provision overruled the Supreme Court's contrary holding in *Sutton v. United Air Lines, Inc.*,¹³ which had instructed courts to consider mitigating measures in the disability inquiry. The corollary of the post-ADAAA rule is that the very availability of recording as a memory prosthesis does not remove the underlying impairment from the statute's coverage. The disability is still there; the recording is the modification that makes equal enjoyment of the accommodation possible.

That structural logic forecloses one defense the operator might attempt. The operator cannot say: "the disabled guest can simply remember the event like everyone else, perhaps with greater effort." The pre-ADAAA caselaw permitting that defense was overruled in 2008.¹⁴ The pre-ADAAA caselaw applying a demanding standard for what counts as a substantial limitation on a major life activity was also overruled.¹⁵ What remains is a statutory inquiry into whether the impairment, considered without regard to ameliorative effects, substantially limits a major life activity. Documented episodic memory impairment of the sort the population in this Article presents satisfies that inquiry.

¹²42 U.S.C. § 12102(4)(E)(i).

¹³527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, *as recognized in e.g.*, *Summers v. Altarum Inst., Corp.*, 740 F.3d 325 (4th Cir. 2014).

¹⁴ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(5), 122 Stat. 3553, 3554 (findings rejecting *Sutton* and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)).

¹⁵*Id.* (rejecting *Toyota Motor Mfg. v. Williams*).

IV. THE TITLE III FRAMEWORK

A. The General Rule of Non-Discrimination

Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁶ The implementing regulation tracks the statutory language verbatim.¹⁷ The class of places of public accommodation includes “a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment” and “an amusement park or other place of recreation.”¹⁸ The events identified in Part II are public accommodations within the statute’s plain reach.

The statutory phrase “full and equal enjoyment” has been interpreted to require more than mere physical access. In *PGA Tour, Inc. v. Martin*, the Supreme Court held that “among the privileges offered by petitioner on the courses are those of competing in the Q-School and playing in the tours; indeed, the former is a privilege for which thousands of individuals from the general public pay.”¹⁹ The privilege at issue in the haunted house context is the privilege of experiencing the live themed performance for which the guest paid an event-specific premium price. The privilege of paying for the experience and then being unable to retain it because of an impairment unrelated to the event’s content is, on the statutory text, a denial of full and equal enjoyment.

B. The Reasonable Modification Requirement

Title III’s general rule is operationalized through a series of specific discrimination categories. The category relevant to this Article is the failure to make reasonable modifications:

[A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations....²⁰

The Department of Justice’s implementing regulation requires the same modification, in language verbatim from the statute.²¹

¹⁶42 U.S.C. § 12182(a).

¹⁷28 C.F.R. § 36.201(a).

¹⁸42 U.S.C. § 12181(7)(C), (I).

¹⁹*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 680 (2001).

²⁰42 U.S.C. § 12182(b)(2)(A)(ii).

²¹28 C.F.R. § 36.302(a).

The PGA Tour Court construed the modification requirement to require an individualized inquiry: “[t]o comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.”²² A categorical rule that denies the requested modification to all members of the disabled population, without making the individualized inquiry the statute and PGA Tour require, is on its face a Title III violation regardless of how the underlying merits of the modification request would resolve in any given individualized inquiry.

The categorical recording prohibitions documented in Part II are categorical rules. None of the three operators makes any provision for an individualized inquiry into the situation of a memory-disabled guest who has requested a modification. None of them publishes a procedure by which a guest with documented TBI, dementia, or comparable episodic memory impairment could initiate the individualized inquiry the statute requires. The categorical character of the prohibition is itself the *prima facie* violation.

C. The Fundamental Alteration Defense

The fundamental alteration affirmative defense, made available by the same statutory provision, is the operator’s remaining doctrinal refuge. PGA Tour articulated a two-pronged test:

[A] modification of petitioner’s golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition.²³

Neither prong is satisfied by the modification requested here. The first prong asks whether allowing the modification would alter an essential aspect of the activity that would be unacceptable even if applied to all participants equally. Allowing a single memory-disabled guest, or even all such guests, to record their own experience for personal memory consolidation, with no rebroadcast right, does not alter the essential character of the haunted-house experience. The second prong asks whether the modification gives the disabled person an advantage over others, thereby altering the character of the activity. A memory-disabled guest who records the experience for purposes

²²PGA Tour, 532 U.S. at 688.

²³*Id.* at 682–83.

of memory consolidation is not gaining an advantage; she is approaching parity with the nondisabled guest, who experiences the consolidation function intrinsically through neurotypical episodic memory operations.

PGA Tour also articulated a closing rule for the analysis: “A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to fundamentally alter the tournament.”²⁴ Substituted into the present context: a modification that provides an exception to a recording prohibition without impairing the purpose of the prohibition cannot be said to fundamentally alter the experience. The purpose of the prohibition, on the operator’s own published account, is the protection of live performance and the experience of other guests. A discreet, non-broadcast, personal-use-only recording by a memory-disabled guest, on a phone held at the side or in a chest pocket, does neither. The performance is unchanged. The other guests’ experience is unaffected. The purpose of the rule is not compromised in the slightest by the requested accommodation.

D. Auxiliary Aids and Effective Communication

A separate Title III provision and corresponding regulation require public accommodations to provide “auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”²⁵ The implementing regulation defines auxiliary aids and services to include “[q]ualified interpreters,” “[r]eal-time computer-aided transcription,” “[v]ideotext displays,” “[a]ccessible electronic and information technology,” and “other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.”²⁶ The class of auxiliary aids is expressly non-exhaustive and includes “other similar services and actions.”²⁷

A recording maintained on the guest’s own device, used to consolidate the guest’s own memory of the experience, fits the structural definition of an auxiliary aid. It is a method by which a sensory or cognitive function that operates intrinsically for the nondisabled guest can be approximated for the disabled guest. The regulation’s reach is to “individuals who are deaf or hard of hearing” in its enumerated examples, but the regulation does not limit auxiliary aids to that population. The class of auxiliary aids is defined by function: ensuring effective communication or, by close analogy, effective preservation and processing of communicated information by the disabled guest.

The auxiliary aids analysis provides an independent doctrinal route to the same result as the reasonable modification analysis. Either route is sufficient to reach the operator’s policy.

²⁴*Id.* at 690.

²⁵42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

²⁶28 C.F.R. § 36.303(b)(1)–(3).

²⁷*Id.* § 36.303(b)(4).

V. THE PERFORMANCE-PROTECTION PRETEXT

The operator's principal doctrinal defense is that the performance itself is protected, both as a matter of fundamental alteration under Title III and as a matter of copyright or trade-secret-like interests in the choreographed scareactor work. The defense fails on the operator's own commercial admissions, on the structural fixation analysis under copyright law, on the fair use doctrine, and on the disanalogy with the hibachi chef and other indistinguishable categories of paid live performance for which no comparable prohibition is asserted.

A. *The Operator's Own Commercial Admissions*

A public accommodation cannot simultaneously claim that recording fundamentally alters the protected experience and profit from selling recordings of the experience. The operator's PhotoPass-style products, the on-ride photo upsells, the dedicated character photography services, and the merchandise products that incorporate captured guest images are commercial admissions that recording is compatible with the underlying product. The operator has reserved the recording function for the operator and has monetized it. The operator has not eliminated the recording function as incompatible with the experience.

Once the operator has commercially admitted that recording is compatible with the product, the operator's policy reduces to a control claim, not a product-integrity claim. The remaining argument is not that recording fundamentally alters the experience but that the operator wishes to control who records and to whom the recordings are sold. That argument is commercially legitimate as against the general guest population. It is not a Title III defense as against a disabled guest seeking the modification necessary to retain the experience the operator has marketed. Title III asks whether the modification would fundamentally alter the nature of the goods, services, or accommodations. It does not ask whether the modification would interfere with the operator's preferred commercial arrangement for monetizing recordings of those goods, services, or accommodations.

B. *The Hibachi Chef and the Disanalogy of Excluded Categories*

The strongest analytical demonstration of the defect in the performance-protection defense is the position the operator must take to distinguish its own choreographed live performance from the indistinguishable categories of live performance that no operator has ever attempted to protect against guest recording. The chef who performs the choreographed onion volcano at the hibachi restaurant; the singer who performs the staff birthday song at the chain restaurant; the costumed character who delivers the children's library reading; the bartender who performs the flair routine; the costumed waiter who delivers the themed restaurant's signature dish; the costumed historical interpreter at the museum or historic site; the impersonator at the wedding reception; the magician at the bar mitzvah, the bouncer's improvised intake routine at the comedy club door: all of these involve trained, branded, partially choreographed, partially improvised live performance by paid personnel whose

performance is part of the product the customer is paying for. No category among these is asserted by any operator as the proper subject of a categorical guest recording prohibition.

The operator's position cannot be that the hibachi performance is meaningfully less choreographed, less branded, less trained, or less integral to the experience than the haunted house performance. The position cannot be that the hibachi chef is less skilled, less unique, or less commercially valuable as a performer than the scareactor. The hibachi industry has invested in standardized theatrical training across its branded chains over a longer period than the haunted house industry; the relevant analogues are at least as developed. The position cannot be that recording a hibachi performance is more compatible with the underlying product because the hibachi customer is also eating; the haunted house customer is also walking, screaming, and reacting, all of which are activities that the recording captures in equal measure.

The honest framing of the operator's distinction is not a structural distinction about the nature of the performance. It is a commercial-policy distinction about which categories of performers the operator has chosen to assert recording control over. That is a permissible commercial preference. It is not a fundamental alteration analysis.

C. Improvisation, Fixation, and Copyright

The operator's secondary defense is a copyright defense. The scareactor's performance is asserted to be a copyrighted work, recording of which would constitute infringement. The defense fails on standard copyright doctrine in two respects.

First, copyright requires fixation in a tangible medium of expression.²⁸ The improvised portions of the scareactor's performance, executed in real time without simultaneous authorized recording, are not fixed at the moment of performance and accordingly are not themselves copyrighted at that moment. The operator's surveillance video, if any, may fix portions of the performance from the operator's vantage; the operator's authorized media recordings made for marketing purposes may fix selected portions; but the moment-to-moment improvisation of the live performance is fugitive. The operator can copyright the script, the costume design, the set design, the soundtrack, and any pre-recorded video components incorporated into the experience. The operator cannot copyright the live moment of unrecorded improvisation, because the live moment of unrecorded improvisation does not satisfy the statutory fixation requirement.

Second, even where pre-existing copyrighted elements are incorporated into the live performance and incidentally captured by the guest's recording, the fair use doctrine accommodates the guest's use.²⁹ The four-factor analysis weighs strongly toward fair use in the disability accommodation context. The purpose and character of the use is non-commercial personal memory consolidation

²⁸17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression....").

²⁹17 U.S.C. § 107.

by a disabled person; the use is by its nature transformative in the sense identified in *Campbell v. Acuff-Rose Music, Inc.*, because the use is not consumption of the underlying work in its original commercial context but rather a derivative use serving the unrelated function of disability accommodation.³⁰ The nature of the copyrighted work, although creative, does not foreclose fair use where the use is so far removed from the work's primary market. The amount and substantiality of the portion used is whatever portion the disabled guest's experience required; in the haunted house context, the entirety of a 4-to-7-minute walkthrough, which is incidental to the day-long event for which the guest paid. The effect on the market for the copyrighted work is essentially zero: a personal-use recording by a disabled guest does not substitute for any commercial product the operator sells and does not appear in any commercial channel.

The fair use analysis in the disability accommodation context is reinforced by the structural narrowness of the requested modification. The modification asks for recording by a documented memory-disabled guest, for personal memory consolidation, with no rebroadcast right and no commercial use. The accommodation is so structurally limited that the copyright concern is essentially *de minimis*. The fair use defense is independently available even where the copyright analysis under Section 102(a) might be contested.

D. Safety Rationales and Their Limits

A separate species of recording prohibition is the safety-rationale prohibition: the operator prohibits recording on a particular ride because of the documented risk that a dropped phone in a dark or high-speed ride environment will injure a guest or scareactor. Disney's prohibition on phones inside Space Mountain is of this type. So is the prohibition on phones inside Mickey & Minnie's Runaway Railway. The safety-rationale prohibition is a distinct doctrinal category, with a distinct fundamental alteration analysis: the modification of the rule (allowing the disabled guest to record) would alter an essential safety aspect of the ride applicable to all participants equally, satisfying the first prong of *PGA Tour*. The safety-rationale prohibition is largely outside the scope of this Article.

The performance-protection prohibitions documented in Part II are not safety-rationale prohibitions. Universal's published statement of rationale combines scareactor safety with guest experience preservation, but the operative concern that distinguishes the prohibition from a general safety rule is the protection of the scareactor as performer rather than as a person at physical risk from a dropped phone. The Knott's and Hershey rationales follow the same pattern. The performance-protection rationale is what the operator is defending, and the performance-protection rationale is what fails under the analysis above.

³⁰*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (transformative use under the first fair use factor).

VI. THE SURCHARGE DOCTRINE

The analysis to this point has proceeded under the modification framework, treating the recording prohibition as a categorical policy that the disabled guest may challenge through the individualized inquiry the statute requires. A parallel and independent violation arises under the surcharge regulation.

A. *The Text of 28 C.F.R. § 36.301(c)*

The Department of Justice's surcharge regulation provides:

A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.³¹

The regulation's reach is broad. The categories it enumerates are illustrative rather than exhaustive ("such as"). The regulation prohibits surcharges on the disabled guest to cover the costs of measures required for nondiscriminatory treatment. The measures expressly enumerated include the auxiliary aids and the reasonable modifications already discussed above.

B. *PhotoPass and the Recording Monopoly as Disability Surcharge*

The operators identified in Part II all sell official photography and video products at premium prices. Universal's PhotoConnect product, Knott's PhotoKey product, and Hershey's analogous service all offer the guest a means of obtaining authorized photographs and videos of the guest's experience at the park, at an additional charge over the cost of admission. For most guests, these products are optional memorabilia. For the memory-disabled guest who has been categorically denied the right to record her own experience, the operator's photography product is the only available substitute, and its cost is the cost of obtaining the memory artifact the nondisabled guest obtains intrinsically.

The structure thus satisfies the literal terms of 28 C.F.R. § 36.301(c). The operator has imposed a surcharge on the disabled guest, in the form of the cost of the photography product, to cover the cost of the measure (the recording or photograph) required to provide nondiscriminatory treatment (equal enjoyment of the memorable, premium-priced experience the operator has marketed as singular and unrepeatable). The surcharge is not imposed in name; the surcharge is imposed in operation. The disabled guest pays the photography upsell or the disabled guest receives no record of the experience.

³¹28 C.F.R. § 36.301(c).

The reach of the surcharge doctrine in this context does not depend on the operator's intent. The regulation is structural: it is concerned with whether the cost of nondiscriminatory treatment is borne by the disabled guest. Where the only available means of achieving nondiscriminatory treatment is the operator's paid product, the cost of that product is borne by the disabled guest as a condition of nondiscriminatory treatment. That is the surcharge the regulation prohibits.

C. Product Inadequacy of the Authorized Substitute

A further difficulty for the operator is that the authorized photography product is, on close examination, an inadequate substitute for the recording the disabled guest needs. The PhotoPass and analogous products typically capture single-frame on-ride photographs at predetermined points; some include short video clips. The product is not designed to capture the duration and contextual continuity that memory consolidation requires. A person with documented episodic memory impairment does not benefit equivalently from a single-frame photograph of herself mid-scream as from a continuous video walkthrough that captures the narrative arc of the experience.

The inadequacy is doctrinally significant in two respects. First, even if the operator's photography product were offered to the disabled guest without surcharge, it would not satisfy the operator's modification obligation, because it does not provide the equivalent memory artifact. The operator's free authorized photograph is not equivalent to the disabled guest's personal walkthrough recording. Second, the inadequacy demonstrates the bad faith of the operator's reliance on the authorized product as a defense: the operator's product was designed for the souvenir market, not for the accommodation function. The operator's invocation of the product as an answer to the accommodation request reveals that the operator has not considered the accommodation function at all.

VII. PLAINTIFF CLASS, REMEDY, AND PARALLEL CLAIMS

A. The Plaintiff Archetype

The strongest plaintiff for a Title III action under the framework developed in this Article is an adult guest with documented memory disability who has paid the premium event-night ticket price, who has requested a recording accommodation prior to or upon entry to the relevant attraction, and who has been categorically denied that accommodation without an individualized inquiry. The plaintiff need not have been physically excluded from the attraction; the denial of full and equal enjoyment is the basis of the Title III claim, and the categorical refusal to entertain the accommodation request is the *prima facie* violation.

Additional and stronger plaintiff configurations include: the family of a parent with early-stage dementia who has organized a memory-making outing with the express purpose of creating a memory artifact for the parent before further cognitive decline; the adult child caregiver of a parent with TBI who has paid for a once-in-a-lifetime event night ticket and been denied the ability to record the

experience for the parent’s later review; and the disabled guest who has obtained a contemporaneous physician’s note documenting the recommendation of recording as a memory consolidation aid.

B. Title III Injunctive Relief

The primary remedy under Title III is injunctive relief. A successful plaintiff may obtain a court order directing the operator to implement a policy of individualized inquiry into recording accommodation requests from memory-disabled guests, with documented standards for what constitutes adequate documentation, a written reason for any denial, and a mechanism for appeal. The injunction may also require the operator to publish the accommodation policy on the operator’s website and to train staff in its administration. The injunction may extend to the operator’s photography product offerings, requiring that the operator provide an accommodation-compliant substitute at no additional charge to documented memory-disabled guests for whom an individualized inquiry would otherwise grant the recording modification.

Attorneys’ fees are recoverable to the prevailing plaintiff under 42 U.S.C. § 12205. The fee shifting provision is the principal mechanism by which the disability bar has historically been able to develop Title III caselaw against well-resourced commercial defendants. The fee shifting provision applies in full to actions of the type described in this Article.

C. The Cummings Problem for Parallel Section 504 Claims

For operators that receive federal financial assistance, including federal grants, federal subsidies, federal loan guarantees, or other federal funding mechanisms, a parallel claim arises under Section 504 of the Rehabilitation Act.³² The Section 504 framework largely parallels Title III for purposes of the substantive analysis in Parts III through VI of this Article.

The remedial framework for Section 504 differs from Title III in a respect that has become consequential since 2022. The Supreme Court held in *Cummings v. Premier Rehab Keller, P.L.L.C.* that “[e]motional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act.”³³ The Court reasoned that “[a] particular remedy is thus appropriate relief in a private Spending Clause action only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature,”³⁴ and that “[i]t is horn-book law that emotional distress is generally not compensable in contract.”³⁵ The *Cummings* holding limits damages, not injunctive relief, and accordingly does not foreclose the principal remedy this Article contemplates.

³²29 U.S.C. § 794.

³³*Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 215 (2022).

³⁴*Id.* at 220.

³⁵*Id.* at 221–22.

The Cummings limitation does, however, counsel parallel claims under state-law disability statutes that are not subject to the Spending Clause analysis. California's Unruh Civil Rights Act, the New York State Human Rights Law, and analogous state-law civil rights regimes generally provide damages remedies that do not depend on the Spending Clause analogy. For plaintiffs in operator-domiciled jurisdictions, parallel state-law claims are routinely advisable.

D. Class Certification

The categorical character of the operator's recording prohibition makes the class of memory-disabled guests denied accommodation a recognizable Rule 23(b)(2) class for purposes of injunctive relief. The class is defined by reference to the operator's categorical policy, applies to all members of the disabled subpopulation seeking the modification, and seeks final injunctive relief on grounds applicable to the class as a whole. The procedural mechanics of class certification are beyond the scope of this Article. The substantive point is that the categorical operator policy is what makes class treatment available, and the categorical operator policy is also the *prima facie* Title III violation.

VIII. CONCLUSION

The class of recording prohibitions documented in this Article is a discrete operating pattern by four corporate operators at premium-priced themed events, applied uniformly across all guests, defended on the rationale that the prohibition protects live performance and the experience of other guests. The defense fails when applied to the specific subset of guests for whom the prohibition operates as a denial of equal enjoyment of the experience the operator has marketed. Title III provides the doctrinal framework. *PGA Tour, Inc. v. Martin* provides the test. The ADAAA's mitigating measures rule removes the operator's structural defense that the disabled guest can simply remember the event like everyone else. The fair use doctrine and the structural fixation requirement remove the operator's secondary copyright defense. The surcharge regulation at 28 C.F.R. § 36.301(c) supplies an independent and uncontested doctrinal route to the same remedy through the operator's own photography upsell business.

The hibachi chef performs at the table. The customer records the performance. No operator has ever asserted that recording the choreographed performance fundamentally alters the dining service. The chef continues to perform. The customer keeps the memory. The structure cannot be different at the haunted house, and it cannot be different at any other premium-priced themed live-performance venue. Title III says so. *PGA Tour* says so. The operator's own commercial admissions say so. The structural defect is not in the law. The structural defect is in the policy, and the policy is correctable through individualized inquiry, accommodation, and the development of the practice of compliance that Title III has required of public accommodations since 1990.

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AUTHORITIES CITED

Cases

Alexander v. Choate, 469 U.S. 287 (1985).

Bragdon v. Abbott, 524 U.S. 624 (1998).

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022).

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005).

Summers v. Altarum Inst., Corp., 740 F.3d 325 (4th Cir. 2014).

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

Tennessee v. Lane, 541 U.S. 509 (2004).

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

Statutes and Regulations

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, codified as amended at 42 U.S.C. §§ 12101 et seq.

ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794.

17 U.S.C. § 102(a) (copyright subject matter and fixation).

17 U.S.C. § 107 (fair use).

28 C.F.R. § 36.201 (general prohibition of discrimination).

28 C.F.R. § 36.301(c) (prohibition on surcharges).

28 C.F.R. § 36.302 (modifications in policies, practices, or procedures).

28 C.F.R. § 36.303 (auxiliary aids and services).

Operator Policies and Reporting

Halloween Horror Nights Guide, Universal Orlando (guest-relations comment), <https://blog.discoveruniversal.com/events/guide-to-halloween-horror-nights/> (visited May 2026).

Joseph Matt, Guide to Halloween Horror Nights 2026 at Universal Orlando, TouringPlans (updated Apr. 2026), <https://touringplans.com/blog/guide-to-halloween-horror-nights-at-> (visited May 2026).

Code of Conduct & Policies, Knott's Berry Farm, <https://www.sixflags.com/knotts/code-of-conduct> (visited May 2026).

Hersheypark Halloween: Dark Nights Filming Policy FAQ, Hersheypark, <https://www.hersheypark.com/plan-your-visit/faqs/315> (visited May 2026).

Robert Niles, Have Knott's New Policies Made for a Better Scary Farm?, Theme Park Insider (Sept. 24, 2022), <https://www.themeparkinsider.com/flume/202209/9153/>.

Do Not Show Up to Halloween Horror Nights at Universal Without Knowing These Rules First, Inside the Magic (2026), <https://insidethemagic.net/2026/05/do-not-show-up-to-hallow>

Other Authorities

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed., text rev. 2022).