

The Recording Restriction

Memory Disabilities, the Surcharge Doctrine, and Performance Protection as Pretext Under ADA Title III

A hibachi customer records her child's birthday while the chef performs, and no court would call that a fundamental alteration. A guest at a haunted house is forbidden to record the same kind of performance, and for guests with memory disabilities the prohibition deletes the only record of an experience sold as unrepeatable.

BENIHANA, RECORDING PERMITTED

Chef: branded, scripted, improvised in execution. Uniform. Will perform the same sequence forty more times tonight.

Customer records child's birthday. No court would entertain the proposition that recording fundamentally alters the dining service.

HALLOWEEN HORROR NIGHTS, RECORDING BANNED

Scareactors: branded, scripted, in choreographed parameters. In costume. Will perform the same sequence hundreds of times across the run of the event.

Guest is prohibited from recording. Stated rationale: protection of live performance and the experience of other guests.

The structural distinction is not coherent on the merits. It matters legally because it denies a category of disabled guests the only practical means of retaining a premium-priced, marketed-as-unrepeatable experience.

PART I

The Pattern and the Population

A class of premium venues, and the guests the ban shuts out

The venues at issue share four features. The fourth is the ban.

1

A premium, event-specific price, typically a separately ticketed evening event on top of daytime admission.

2

Marketing that sells the event as memorable, unrepeatable, and worth the upcharge.

3

Live performance, costumed scareactors and theatrical character work, as a primary value driver.

4

A categorical recording ban inside the attractions, justified by performance protection, not safety.

For most guests, an inconvenience. For guests with memory disabilities, a categorical denial.

Traumatic brain injury. Early-stage dementia. Episodic memory impairment associated with autism spectrum disorder. For these guests, recording is the only practical means of retaining an event the operator marketed as singular and unrepeatable.

The ADAAA's mitigating measures rule removes the operator's structural defense: the disabled guest cannot simply "remember the event like everyone else." That capacity is the very one the disability impairs.

RECORDING AS AUXILIARY AID

28 C.F.R. § 36.303 requires covered entities to furnish auxiliary aids to ensure effective communication. A personal recording device is an auxiliary aid that substitutes for an impaired memory function. The prohibition categorically removes it without individualized inquiry.

REASONABLE MODIFICATION

28 C.F.R. § 36.302 requires reasonable modifications unless the entity demonstrates fundamental alteration. PGA Tour, Inc. v. Martin: the inquiry is whether the modification preserves the essential character of the activity. Nothing in the recording of a haunted house alters the haunting.

PART II

The Title III Case

The framework, the pretext, the surcharge, and the plaintiff

III

SECTION IV · 42 U.S.C. § 12182(A) · PGA TOUR, INC. V. MARTIN, 532 U.S. 661 (2001)

Full and equal enjoyment requires more than getting through the door.

The statute reaches a place of exhibition or entertainment and an amusement park by its plain terms. The events at issue are public accommodations within that reach. The phrase “full and equal enjoyment” has never meant mere physical access.

THE MARTIN STANDARD

A reasonable modification must be made unless it would alter the essential character of the activity. Recording a haunted house does not change the haunting; the scareactors perform the same sequence either way.

The performance-protection defense fails four times over.

COMMERCIAL ADMISSION

The operator sells recordings of equivalent performances elsewhere in the park.

FIXATION

An improvised live scare is not fixed in a tangible medium, so the copyright interest the ban invokes is thin to absent.

FAIR USE

A personal, non-commercial memory recording is the paradigm case the fair-use doctrine protects.

DISANALOGY

The hibachi chef, the magician, the street performer: indistinguishable paid live performance, no comparable ban.

THE PERFORMANCE-PROTECTION DEFENSE FAILS ON THE OPERATOR'S OWN COMMERCIAL ADMISSIONS

The operator sells recordings of substantially equivalent performances elsewhere in the same park.

Universal prohibits recording inside haunted houses. Universal simultaneously operates photo-purchase systems on its roller coasters, where recorded performances are sold rather than prohibited.

The operator's own revenue stream is its own confession: recording is compatible with the live performance product. The defense that recording would fundamentally alter the attraction collapses against the operator's own commercial design.

THE SURCHARGE DOCTRINE

28 C.F.R. § 36.301(c): a covered entity may not impose a surcharge on a disabled individual for the costs of measures required to provide nondiscriminatory treatment.

When the photography upsell is the only means by which a memory-disabled guest can retain the experience, the upsell price is a disability surcharge. The regulation reaches it independently of the modification analysis.

FIXATION, § 102(A)

Copyright subsists only in works fixed in a tangible medium of expression. An improvised live scare, performed and gone, is not fixed. There is little or no copyrighted work for the guest's recording to infringe.

FAIR USE, § 107

Even where a fixed choreography exists, a personal, non-commercial recording made as a memory aid is the paradigm of fair use. Campbell v. Acuff-Rose centers the purpose and character of the use, and a private memory artifact does not compete with the operator's market.

When the upsell is the only way in,
the upsell price is a surcharge.

A public accommodation may not impose a surcharge on an individual with a disability to cover the cost of measures, such as auxiliary aids and reasonable modifications, required to provide nondiscriminatory treatment.

For the guest who cannot retain the event without a recording, the operator's photography product is not a souvenir. It is the accommodation, priced and sold. The surcharge regulation reaches that independently of any fundamental-alteration finding.

The violation is the categorical refusal to entertain the request, not a physical exclusion.

The strongest plaintiff is an adult guest with a documented memory disability who paid the premium ticket, requested a recording accommodation before or upon entry, and was denied without any individualized inquiry. The denial of full and equal enjoyment is the basis of the claim. No prior physical exclusion is required.

A STRONGER CONFIGURATION

The family of a parent with early-stage dementia, organizing a memory-making outing for the express purpose of creating a memory artifact before further cognitive decline. The recording is the entire point of the visit.

CONCLUSION

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 since 1990.

THE MODIFICATION TEST

PGA Tour v. Martin says so. The hibachi chef performs. The customer records. No fundamental alteration. The chef continues to perform. The customer keeps the memory.

THE COMMERCIAL ADMISSION

The operator's own upsell business says so. The structure cannot be different at the haunted house.

THE STATUTE

Title III says so. The statute has required compliance since 1990. The practice of compliance is what remains to be developed.

