

“MOVIE” NIGHT MAY PRESENT COPYRIGHT ISSUES



It is a typical “Friday Night at the Movies” for the residents of the “Not-that-Hollywood” Condominium Association, Inc. Popcorn in hand... a crowded room in the clubhouse... but what is about to happen may send shivers down the patron’s spines... No, that isn’t a monster hiding behind the closet door. This Association is about to break the law and potentially subject the association to a fine, which could be up to a staggering \$150,000.00. (Scary movie music plays and patrons gasp...)

Many individuals, as well as associations, are under the mistaken impression that they are permitted to show films in the association’s clubhouse simply by virtue of the fact that they have purchased the film from a retail store. In fact, in most cases, this is only true when the film is in the “public domain” (the time in which a film can be publicly exhibited without obtaining either a license or the copyright holder’s express permission - one example of a work that is in the public domain is Charlie Chaplin’s 1917 classic titled “*Easy Street*”). Another common misconception is that the Association does not need to obtain a license, so long as admission is not being charged. This is, once again, simply not accurate.

Copyright violations are a legitimate concern that can carry significant penalties. Many associations show films purchased at retail stores in the association’s clubhouse without obtaining

a license or the copyright holder’s permission. In many cases, this constitutes a copyright violation known as “infringement”. Copyright infringement is the violation of a copyright owner’s rights, and is considered by many entertainment and legal industry professionals to be the equivalent of theft.

The owner of a copyrighted work, such as a movie, has certain exclusive rights that are associated with copyright ownership. In the case of a motion picture, one such right is the ability to “publicly perform” the film. A violation of the copyright holder’s right to publicly perform the film constitutes infringement. To perform or display a work “publicly” is defined by the Copyright Act as the performance or display of a work at a place open to the public or at any place where a substantial number of persons “outside of a normal circle of a family and its social acquaintances is gathered”.

Accordingly, the ultimate question is whether or not the showing of a film in an association’s clubhouse constitutes a “public performance”. A Florida Federal Court’s decision, captioned *Hinton v. Mainlands of Tamarac*, 611 F.Supp. 494 (S.D. Fla. 1985), held that the performance of copyrighted material in an association’s clubhouse was a “public performance” that obligated the Association to obtain a license. In the absence of obtaining the license, the Association was found to have

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infringed the copyright holder's right to publicly perform the copyrighted work. As a result, the Association was required to pay a fine.

However, the *Hinton* case is the only case of its kind, and although it is clear an association commits infringement under the facts in the *Hinton* case, the line between when an association can permissibly perform a copyrighted work (if at all) and when doing so will constitute infringement is not clear. Accordingly, the appropriate action for any association wishing to show a film is to obtain a license prior to doing so.

Associations wishing to obtain a license may do so by contacting a licensing agency, of which there are several. Many licenses that are offered are only good for one showing of a particular film. Obviously, obtaining licenses on an on-going basis creates an additional administrative burden. Accordingly, I would recommend that associations seeking to obtain a license obtain a "blanket license". A blanket license permits an association to show any movie under the licensing agency's catalogue for one flat fee. Blanket licenses are typically renewed on an annual basis and create less of an administrative burden for the association's management. Obtaining a license involves the payment of a nominal fee and prevents an Association from exposure for copyright infringement.

Please note, an association must be aware that any "blanket

license" obtained by the association is only effective for those movies under the licensing agency's catalog. If the association shows a film outside the licensing agency's catalog, without obtaining an additional license, the association can still be guilty of copyright infringement. In other words, obtaining a blanket license from one licensing agency will not necessarily permit the association to show every movie that is commercially available at a retail store.

Further, blanket licenses are typically only available where the association does not charge admission, or an admission equivalent, such as a "donation". An additional point for an association's consideration is whether or not the payment of the licensing fee by the association is a proper common expense. For some, playing films may lead to more "drama", than any recently released thriller is worth, but for many, "Friday Night at the Movies" is an association tradition that justifies a minimal effort to ensure its survival.

Associations wishing to ensure they obtain the proper license, the expense for the license is a proper common expense, and that the license terms are favorable should consult with their attorney prior to entering into a licensing agreement. In either event, the Association should take the necessary steps to ensure that the next "Friday Night at the Movies" won't result in the Association "Coming Soon to a Courtroom Near You..."



LOCKER ENVY



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In many community Associations, but particularly in condominium Associations, the developer often reserves the right to "assign" to particular units items such as parking spaces or garages, storage lockers, boat docks, and the like. In

this scenario, the Declaration often specifically establishes the ramifications of such developer assignment, typically providing that prior to such assignment these items are considered common elements, but upon such assignment automatically convert into *limited* common elements (to thereby serve only the unit to which assigned by the developer). Such developer assignment is also often conditioned upon a unit purchaser's payment of monetary consideration to the developer. Finally, any of these items which are not assigned by the developer remain common elements.

An initial question which often arises in this scenario is whether the Association, after the developer is out of the picture, may

itself assign these items to particular unit owners requesting same, to thereby similarly convert them to *limited* common elements serving only the units to which assigned. However, it also frequently arises that Declaration provisions specifically authorizing the Association to assign these items are lacking. A second question arises as to whether the Association can require monetary consideration from unit owners desiring such Association assignment. We address these issues below, using as an example storage lockers located beyond the bounds of the units, some of which the developer assigned to units whose owners paid monetary consideration to obtain such assignment.

As to the initial question, if the original Declaration of Condominium specifically states that the Association, after the developer's right to assign such items has expired, may "step into the developer's shoes" and itself assign these unassigned items to particular units as limited common elements, such Declaration provision would be expected to be valid. Nevertheless, Associations without such specific authorizing language can still usually effectuate a very similar result, simply by

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utilizing an Association's general power to regulate the common elements, by adopting a rule or policy dedicating (rather than assigning) such items to the specific use of a particular unit *without converting* these items to limited common elements.

That is, case decisions such as *Juno By The Sea North Condominium v. Manfredonia*, 397 So.2d 297 (4th DCA, 1981), and Division arbitration decisions such as *Stegeman v. Harbor Towers Owners Association*, Case No. 99-1036 (Draper, 1999), stand for the proposition that a condominium Association can dedicate to individual units "use rights" in certain items otherwise considered general common elements, as long as such Association action is fair and reasonable. However, a number of decisions in the wake of *Juno By The Sea* have cautioned that an Association may not *permanently* dedicate the use of a general common element to a particular unit, since such action would be tantamount to converting the general common element into a limited common element, without obtaining the unanimous unit owner and lienholder approval that 718.110(4), *Fla. Statutes*, appears to require. Hence, any Association dedication of "use rights" in common element items to a particular unit should not be made permanent, and should contain various provisions by which the Association can unilaterally terminate such dedication, in order to avoid a claim that the Association has improperly converted general common element property into limited common element property without obtaining the necessary membership approval.

As to the second question, if the Association is specifically authorized in the Declaration to "step into the shoes" of the developer and assign an item, such as a storage locker, as a limited common element to a unit, it is expected that the Association could condition such assignment upon the payment of monetary consideration by the unit owner(s) desiring same, pursuant to a case styled *Mayfair Engineering Co. v. Park*, 318 So.2d 171 (4th DCA, 1975). This case provides the following in regard to the right of a *developer* to "assign for consideration" a parking space as a limited common element to a unit owner willing to pay such consideration: "nor do we believe that [the Condominium Act] in any way prohibits the developer's right to reserve and *sell* the exclusive use of the thirty-five parking spaces". Hence, the Association would likewise be expected to have the authority to condition such assignment upon receipt of monetary consideration from a unit owner desiring same.

However, Association receipt of monetary compensation becomes more complicated in regard to an Association which does not have any clear authority to step into the shoes of the developer to assign storage lockers as limited common elements. The Association would certainly not be able to "sell" the use of a common element storage locker to a particular owner desiring same, since, without specific assignment rights in the Declaration, such action would be tantamount to converting a general common element into a limited common element. Nevertheless, pursuant to Section 718.111(4), *Fla. Statutes*, a condominium Association does have the authority to lease the common elements; provided that, an Association "may *not* charge a use fee against a unit owner for the use of common elements ... unless otherwise provided for in the Declaration of Condominium or by a majority vote of the Association *or* unless the charges relate to expenses incurred by an owner having exclusive use of the common elements ...".

Therefore, pursuant to this statute, the Association could *lease* common element storage lockers, parking spaces, boat docks, etc., to unit owners desiring the exclusive use of such items, with lease payments to the Association exceeding any Association expenses in this regard (e.g., for Association "profit"), *so long* as such action is either authorized in the Declaration of Condominium or is approved by a majority vote of the Association, and insofar as such leasing of these common element items to a particular owner is neither permanent nor so "ironclad" as to constitute a *de facto* conversion of a general common element into a limited common element. Hence, such action should be pursuant to a written lease between the Association and the unit owner, which contains various provisions by which the Association can, unilaterally and without penalty, terminate the lease, and the lease term should be limited (certainly no more than ten years on a renewable basis, etc.). Alternatively, if the Association does not desire to make any "profit", then pursuant to this statute the Association could "license" (rather than lease) the storage unit to a desiring unit owner, *so long* as any payment received from the unit owner does *not* exceed the "expenses incurred" to the Association for such licensing. That is, a benefit of licensing, rather than leasing, such common element items is that licensing would *not* need to be "provided for in the Declaration of Condominium or by a majority vote of the Association".

SEX OFFENDER REGISTRATION



The full text of the Adam Walsh Child Protection and Safety Act of 2006 can be found at

On July 1, 2008, the Department of Justice announced the final guidelines for Title 1 of the Adam Walsh Child Protection and Safety Act of 2006, known as the Sex Offender Registration and Notification Act (SORNA).

<http://www.govtrack.us/data/us/bills.text/109/h/h4472.pdf>. This law is designed to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote internet safety, and to honor the memory of Adam Walsh and other child crime victims.

For the full text of the national guidelines for sex offenders registration and notification go to:

http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf



FAILURE TO COMPLY WITH POLICY CONDITIONS RESULTS IN LOSS OF COVERAGE

Starling v. Allstate Floridian Insurance Company, 956 So.2d 511, (5th DCA 2007)

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Are you familiar with the procedures and requirements for filing an insurance claim after a casualty? Not knowing cost Ginger Starling dearly. She was not entitled to any insurance proceeds after a fire substantially destroyed her home and its contents.

The Allstate insurance policy contained a typical provision requiring the insured to submit a signed and notarized sworn statement and proof of loss within sixty (60) days of the date of the fire. "Proof of Loss" is a term used in the insurance industry to describe the document containing the details of the claim. It identifies the property or portions of the property that were damaged, in some cases includes the cause of the damage, the extent of the damage, and the estimated dollar amount of the damage. A proof of loss might consist of a claim form, written estimates for repairs, receipts for mitigation or clean up performed as well as receipts showing the value of personal property damaged or destroyed, sworn statements from the insured or other witnesses, photographs and other evidence.

Allstate's claim representative sent Ms. Starling the claim form with a letter reminding her of the requirement to submit the proof of loss within sixty (60) days from the date of the fire. Ms. Starling provided Allstate with a partial list of damages within the sixty (60) days, but did not complete the sworn statement and likewise failed to have the document she submitted notarized, as required by the policy. She participated in Examinations Under Oath ("EUO") by the insurance carrier and explained to Allstate representatives that she had not completed the entire proof of loss at the time of the EUO because she wasn't finished calculating the total value of the damaged items. She finally provided Allstate with the signed, notarized proof of loss almost ten (10) months after the fire.

While Allstate denied the claim for various reasons, it placed primary importance on the failure of the insured to comply with policy conditions. The Court (both at the trial level and on appeal) agreed and stated that Ms. Starling's material breach of the duty to comply with an important condition of the policy

"relieves the insurer of its obligations under the contract".

This case becomes particularly important for community leaders, especially with respect to condominium properties, as a result of the amendments to Section 718.111(1)(d), *Florida Statutes*, which provides, in relevant part:

An officer, director, or agent shall be liable for monetary damages ... if such officer, director, or agent breached or failed to perform his or her duties and the breach of, or failure to perform, his or her duties constitutes a violation of criminal law ... a transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or constitutes recklessness or an act or omission that was in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

In a case involving claimed violations of the Fair Credit Reporting Act, the U.S. Supreme Court defined recklessness as any action involving an "unjustifiably high risk ... that is either known or so obvious that it should be known." While there is a significant difference between recklessness and merely being careless, a finding of recklessness may be made without showing any "bad" intent, or malicious purpose. Black's Law Dictionary says conduct (or lack of conduct) may be considered "reckless" if the person responsible for the conduct disregarded or was indifferent to the consequences of their actions and/or their failure to act. Is the failure to read, understand and comply with insurance policy pre-conditions "reckless"? It certainly resulted in harm to Ms. Starling under these circumstances.

Insurance policies are confusing and compliance with all the conditions and procedures necessary to preserve a claim may be complicated. Knowing what types of losses the policies cover and the extent of the coverage of each policy is the first step to handling claims adequately. Understanding the policies and procedures for the different carriers providing coverage to an Association is a daunting task, but well worth the effort, not only when there is a claim, but to aid in the decision-making process at renewal time.

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