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Illegal Downloads …

Can They Cause Your Downfall?

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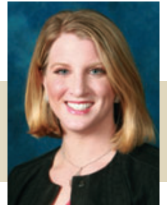

As more and more Associations begin to offer Wi-Fi HotSpots ("HotSpots") in their common areas, it is important for those same Associations to protect themselves from the potential risks and liabilities from such Hotspots. A newspaper article identified a condominium association that was sued because the association's IP address downloaded pornographic movies without payment. The company identified the IP address because that pornographic website was accessed by someone using that association's WiFi hotspot.

Possible liability for illegal downloads extends further than just pornographic movies, regular movies, TV shows, music, or other files. There are also questions about liability for:

(i) cyber crimes committed by a third party using the access point;

(ii) content provided to third party users through the HotSpot;

(iii) theft of information from a user because the access is not secure; or

(iv) harm to children lured by a predator through unsupervised use of the HotSpot.

"The media has reported instances in which Wi-Fi networks were used to access or distribute illegal materials over the Internet. A Wi-Fi network operated by an AT&T Wireless subscriber was reportedly used by a neighbor of the subscriber to distribute an illegally copied version of a movie. In Canada, a man was arrested for allegedly accessing child pornography from his car, using a Wi-Fi network from a nearby house. A "war spammer" reportedly reached a deal with Federal prosecutors to plead guilty to violations of the Federal CAN-SPAM Act after allegedly sending large volumes of commercial e-mail through open Wi-Fi access points. In such circumstances, when law enforcement attempted to trace such activity, the trail would end with your account."[1]

At this time, there are no cases that explicitly hold a public Wi-Fi operator liable for the acts of one of the HotSpot users. That being said, there are numerous *attempts* to go after the Wi-Fi operator (such as the ones discussed above, including associations) since the HotSpot operator is traceable through its IP address. Interestingly, failure to secure a HotSpot has become illegal in other countries. Just last year, Germany's top criminal court ruled that Internet users *must* secure their wireless connections to prevent others from illegally downloading data. England and the State of New York are currently considering similar legislation.

The fact is, rather than expose Wi-Fi operators to the risks and liabilities of an open network; the easiest thing to do is **secure it**. As a general matter, until the courts and legislatures better define the legal status of Wi-Fi arrangements, the Association, as the HotSpot operator, can mitigate its liability by implementing a secure network using some or all of the following steps:

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[1] Benjamin D. Kern, Whacking, Joyriding and War-Driving: Roaming Use of Wi-Fi and the Law, 21 Santa Clara Computer & High Tech. L.J. 101, 114 (2004)

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ADA Requirements for Building Renovations

Important Information for Community Associations That Qualify as Public Accommodations

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The Americans with Disabilities Act of 1990 (the "ADA"), codified in 42 USC § 12101, et seq., as amended, prohibits discrimination against individuals with disabilities in employment (Title I), public services (Title II), and public accommodations (Title III). For community associations that qualify as a "place of public accommodation," it is important that they continually comply with the applicable ADA requirements in Title III, particularly when they intend to undertake building renovations.[1]

Existing Facilities

At the outset it should be noted that even if no building changes are planned, an association that is a place of public accommodation may have to make the facility more accessible. With respect to facilities, or portions thereof, which were constructed or altered prior to the enactment of the ADA (existing structures), the ADA defines "discrimination" as "a failure to remove architectural barriers ... in existing facilities, ... where such removal is readily achievable." The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." Of course, what seems difficult or expensive to the association may not seem that difficult or expensive to an enforcement agency. If removal is not readily achievable, then the association must make its goods or services available to the disabled through alternative methods, if such alternative methods are readily achievable.

The obligation to remove architectural barriers is continuing, and whether a particular removal is "readily achievable" will involve some consideration of the cost involved and the financial ability of the association. The Department of Justice adopts implementing regulations for Title III, and has adopted the ADA Standards for Accessible Design. According to these standards, examples of changes that are readily achievable include:

- installing ramps,
- making curb cuts in sidewalks,
- rearranging furniture,
- widening doors,
- creating designated accessible parking spaces, and
- removing high pile carpeting

Alterations to the Facilities - Higher Standard Applies

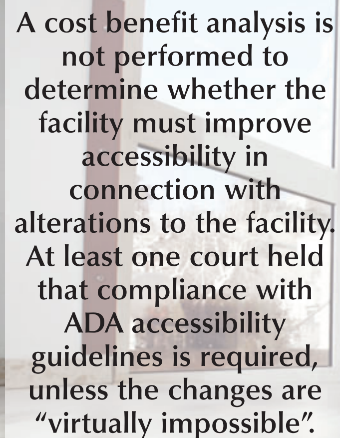
When an association that is a public accommodation proposes changes to its existing facilities, a different and heightened standard applies. The term "discrimination" includes "with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Alterations must be constructed in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General)."

Therefore, one important question is whether an association's proposed modification is an "alteration" that triggers the necessity of complying with the ADA design standards. Although the ADA does not define the term "alter", the DOJ regulations do define an "alteration" as any "change to a place of public accommodation or commercial facility that affects or could affect the usability of the building or facility or any part thereof." The regulation further clarifies that an "alteration" includes but is not limited to remodeling,

[1] Although the applicability of the ADA to a particular community association is beyond the scope of this article, there is support from several federal district courts for the proposition that residential condominiums and apartments are not "public accommodations" for purposes of the ADA. In addition, the Department of Justice has published a Technical Assistance Manual on Title III of the ADA, linked here: http://www.ada.gov/taman3.html, which states that "title III does not apply to strictly residential facilities", and would not apply to common areas within a residential facility that are limited exclusively to owners, residents, and their guests.

renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions, but does not include normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems unless they affect the usability of the building or facility. In Roberts v. Royal Atl. Corp., a case involving a residential cooperative that was operated as a resort, the court concluded that the "gutting to the studs" of the kitchens and bathrooms was an alteration that triggered ADA compliance. The factors to consider in determining whether a modification is an "alteration" for purposes under the ADA include:

1. The overall cost of the modification relative to the size (physical and financial) of the facility or relevant part thereof;
2. The scope of the modification (including what portion of the facility or relevant part thereof was modified);
3. The reason for the modification (including whether the goal is maintenance or improvement, and whether it is to change the purpose or function of the facility); and
4. Whether the modification affects only the facility's surfaces or also structural attachments and fixtures that are part of the realty.



The next important question regarding an association's proposed modification is whether the proposal satisfies the requirement that it be readily accessible to and usable by individuals with disabilities "to the maximum extent feasible." According to the Roberts decision, the "maximum extent feasible" requirement does not involve any judgment regarding costs and benefits, but instead requires accessibility except where providing it would be "virtually impossible" in light of the "nature of an existing facility."

New 2010 Standards and the Safe Harbor

Finally, it should also be noted that there are some differences between the DOJ's 1991 Standards and the new 2010 Standards. As an example, the 1991 Standards provided for light switches to be installed at 54 inches, and the 2010 Standards lower the height to 48 inches. If an association's light switches were installed to comply with the 1991 Standard, or lowered to comply with the 1991 Standard as a barrier removal, then unless an alteration occurs, the light switches are in the "safe harbor" and need not be moved.

Elements that were not addressed in the 1991 Standards but included in the 2010 Standards do not fall into the 'safe harbor'. As an example, while the 1991 Standards did not address recreational facilities such as swimming pools, the 2010 Standards do contain requirements for making swimming pools accessible. Therefore, on or after March 15, 2012, which is the compliance deadline for the 2010 Standards, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so. Therefore, if your association is subject to the ADA and has a pool that has not been made accessible, you should start thinking about when it will be "readily achievable" to do so.

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Splash Page. The Association should consider implementing a Wi-Fi HotSpot access point webpage that can contain a use agreement and disclaimer (sometimes called a "splash page") that requires the user to click through an agreement before enabling access. The use agreement and disclaimer can disclose appropriate terms and conditions of use, which prohibit and do not authorize, for example, illegal activity, copyright violations, pornographic or corrupt content, spam, solicitations, advertising, or use of the service by unsupervised minors.

Controlled Sign-Ins. A controlled sign-in or password access system may be appropriate and increase security and protection for the users. The Association may consider setting up username and passwords for every single unit for purposes of tracking usage.

Content Filtering. Content filtering software may also be an appropriate solution. The Association can invest in third-party software to prevent access to suspect websites including pornography or known illegal download sites. The content filtering solution blocks unwanted sites from reaching the user's computer by redirecting the browser to a warning page whenever the user tries to access the blocked content. One disadvantage of content filtering is over-blocking, where the software filters out acceptable material, such as health related information. Still, the Association may still accept over-blocking just to prevent exposure to other sites. Also, it is important to note that content filtering is not full-proof as, in general, the filter can be bypassed entirely by tech-savvy individuals.

Please contact your Association Attorney immediately if you receive one of these letters. Ignoring the demand will only make it worse.

USING VOLUNTEERS

What policies do you have in place?

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Many condominium, cooperative and homeowners associations utilize resident volunteers to perform work within the community. In the current economic climate, this practice has become even more prevalent as a cost saving measure. The use of volunteer labor, while reducing maintenance costs, presents certain legal exposure and liability to the association. This is not to say that all associations should discontinue this practice. However, every association should be aware of the legal consequences and exposure.

Some associations utilize volunteers to perform routine maintenance and repair services while others engage volunteers for administrative services. Associations may be liable for injuries suffered by volunteers while performing such services. In addition, the association may be liable for injuries to third parties if the services are not performed properly. Therefore, the association should impose strict guidelines and exercise oversight when utilizing volunteers.

In this regard, volunteers should not be utilized for hazardous activities such as climbing ladders, using power equipment or performing strenuous labor. The association should supervise all volunteer work carefully as the association may be exposed to liability not only to the volunteer, but also to others for breach of its duty to maintain the common elements. In addition, volunteers should not perform tasks which require a licensed professional or building permit such as electrical or plumbing work since this may not only impose liability but also void insurance coverage.

The association may be exposed to additional liability by using volunteers as opposed to employees and independent contractors. If a volunteer is injured while performing services and it is shown that the association was somehow negligent, the volunteer may pursue a claim against the association for negligence and the resultant liability is not limited by statute. With regard to employees, however, the association can and should cover itself with workers compensation insurance. Under the Workers Compensation Act, the employer's liability for employee injuries is limited to specific amounts and the employer is generally immune from liability for other causes of action. With regard to independent contractors, the association should contract for workers compensation insurance as well as indemnification and hold harmless protection.

Many associations also utilize volunteers for security patrols or neighborhood crime watches. In this regard the association should only use volunteers as a means of notifying the proper authorities when a crime is being committed. The volunteers should not attempt to apprehend any suspects or directly intervene during a crime. By limiting the scope of the volunteers' duties, the association will reduce the likelihood of injury to third parties or to the volunteer himself. In using volunteers for administrative matters such as office work, the Board should specifically define responsibilities and should monitor the administrative staff in order to ensure that they properly perform their duties and do not exceed the scope of their authority. In addition and perhaps most importantly, the association should confirm with its insurance professionals that all volunteers are covered by the association's insurance.

While the decision to use volunteers is a business judgment to be made by the Board of Directors, if the exposure to liability for injuries to either the volunteer or third parties outweighs the benefits incurred, then volunteers should not be used. However, if the Board makes the decision to utilize such volunteers, please consider using a waiver releasing the association from liability in this regard. Although these waiver forms do not necessarily release the association from all liability under Florida law, they are legally advisable.

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