APRIL 2024 | VOLUME 28 | NUMBER 1

Condo Lifestyles©

THE SOURCE FOR INFORMATION ON COMMUNITY ASSOCIATIONS, CONDOS, TOWNHOMES, CO-OPS & HOAS $8.95

by Laura L. Marinelli, Esq. and Marc E. Fineman, Esq. – Levenfeld Pearlstein, LLC
For more information, contact Laura Marinelli: lmarinelli@lplegal.com - 312 476-7595
or Marc E. Fineman: mfineman@lplegal.com - 312 476-7558

What Community Associations Need to Know to Avoid Common Social Media and Intellectual Property Pitfalls

We know that community associations, their managers, and boards, are busy trying to run the day-to-day operations of their buildings and communities. With that responsibility comes the need to adapt to ever-changing technologies and the impact of social media on our world.

In recent years, we have seen our association clients and their residents utilize social media and the internet for multiple purposes, including communications with residents and owners, notice of community events, discussion boards for residents and owners, promotion of the community and building for potential buyers, and on and on. While this technology and the ability to reach large amounts of individuals with the stroke of a key has created some efficiencies for our associations, it has also opened the door to potential liability for improper use of materials protected by intellectual property. Nearly every creative work is automatically protected by intellectual property—photos, stories, graphics, social media posts, etc. So, the potential risk can be significant.

Our Community Association Group partnered with our highly recognized Intellectual Property Group to consider the legal issues that community associations in Illinois may encounter and provide sound, easy-to-follow recommendations to avoid potential problems.

Below you will find some guidance for community associations to avoid common pitfalls:

"We found it on the internet (or we took it from a social media post), so it's okay to use on our association's website or in our newsletter." In reality, that usually is not the case.

Putting content on the internet or social media does not dedicate it to the public domain, and the intellectual property rights in that content remain intact. This is a challenging concept in the social media age when there is so much sharing of content.

As a general rule, associations should not copy and reuse content found on the internet or social media. Copyright owners are getting more and more creative and hiring law firms and enforcement agents who use AI to search the internet for infringements. Associations have been a recent favorite target.

The best practice is to use original content (and get ownership assignments from the creators of such content) or to license content from legitimate sources.

"We paid someone to create our website or to develop content for us, so the association owns it as a work made for hire." This is one of the biggest intellectual property misconceptions.

The phrase "work made for hire" often is used colloquially to describe a situation when someone is retained to create or develop something. However, the phrase can

be deceptive, even when used in legal agreements. If associations are not careful, they will not own the intellectual property rights to what is created for them.

"Work made for hire" has a relatively narrow application. First, it only covers works that are protected by copyright–that is, original works of authorship, such as those creative works mentioned above. It does not apply to other types of intellectual property, such as patents (for inventions), trademarks, or trade secrets.

Second, it applies only when (a) an employee creates an original work of authorship within the scope of their employment, or (b) an original work of authorship is specially ordered or commissioned for use as one of a limited number of categories of works and the parties agree in writing that such work is a work made for hire.

The vast majority of works that typically are created for an association by outside contractors, consultants, designers, and even members will not satisfy the "work made for hire" test and, therefore, will not be owned by the association.

The best practice is to use written agreements with the creators of all content, and for those agreements to include an express assignment of intellectual property rights.

"We don't need to conduct a trademark search or to protect the name of our association or building because our association is registered with the Secretary of State." Again, this is a common misconception.

Successfully forming an association with a Secretary of State does not mean that the association's name is cleared to use from a trademark perspective.

The Secretary of State standards for approving an association name differ from the standards used to determine trademark infringement. In many states, an association name will be approved by the Secretary of State if it is "distinguishable" from other names. Sometimes this means just being a letter or two different.

However, the standards for trademark infringement are significantly different and focus on whether two names are likely to create confusion. Additionally, associations or buildings in other states could have federal (nationwide) trademark protection for their names that may be infringed by using the same or similar name just in Illinois or any other state.

The best practice is to conduct trademark searches, especially if an association will be providing products and/or services to others using its name or the name of the building. Trademark registrations also should be considered, when appropriate, to protect the name of the association and/or the building. ■