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COUNSELORS TO COMMUNITY ASSOCIATIONS

## **To Be Or Not To Be On Social Media:**

# **The Legal Ramifications of Community Associations and Social Networking**

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Social networking websites have exploded in popularity in the last decade. The social networking phenomenon has revolutionized the world's ability to communicate by providing a medium for users to conveniently exchange ideas and share information.

The increase in online communication provided by social media platforms has presented a myriad of legal issues for community associations. The use of social media can be an important part of an association's online presence. The "instant" quality of social media can be useful for community associations, or it can be a source of trouble.

### **The Social Networking Phenomenon**

A new study by the Pew Research Center indicates that as of February 2012, 66% of online adults use social networking sites.<sup>1</sup> According to Facebook's statistics, the site has more than 955 million active users, as of June 2012.<sup>2</sup> Social networking sites – like Facebook, Twitter, LinkedIn, and Google+, to name a few, are web-based services that provide a way for users to interact over the Internet. And, since smart phones with internet capabilities are rapidly gaining popularity, most of these social media sites are available at the touch of a button and accessible almost everywhere.

### **Tool or Legal Trap**

Many homeowner associations have begun to realize the great power of Facebook and other social networking websites. Users of these sites often log on daily to share information, pictures, informal product reviews and endorsements. This presents community associations with tremendous opportunities to communicate directly with their members and residents.

Community associations can use social networking websites as a medium to send important news, meeting reminders, notice of community events and other important documents. Use of social networking sites increase the level of interaction and is an open line of communication that can minimize disputes and promote a sense of community.

Social media, however, has the potential for misuse. Community associations need to understand

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<sup>1</sup> Brenner, Joanna. *Pew Internet: Social Networking*. 31 May 2012. Pew Research Center. Date Accessed: 10 July 2012. <http://pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx>.

<sup>2</sup> Statistics, Facebook.com, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Jul. 30, 2012).

the dangers presented by this kind of communication and user-generated content.

The main legal issues facing community associations regarding the use of social media are:

1. Trade names and trademark issues;
2. Content Based Defamation; and
3. Other tort actions.

### **Trade Names**

A trade name is the name, title, or designation under which a company does business.<sup>3</sup> A company may use a trade name for banking, billing, identification (e.g., yellow pages listing), and tax purposes. There are two types of names a company may use for these purposes: (1) The name provided with the state upon registration as an entity (e.g., in Articles of Incorporation); and (2) An “assumed” name, which differs from the name provided with the state upon registration and must be registered with the state separately.<sup>4</sup>

A company can register its trade name under state law and federal law. Registering a trade name puts the public on notice of the registrant's claim of ownership of the trademark. Also an advantage is the company will have a legal presumption of ownership nationwide of its mark, and the exclusive right to use the mark on or in connection with the goods or services listed in the registration.<sup>5</sup>

States have specific requirements for what qualifies as a trade name and registration requirements. For example, under Arizona law, trade name law can be found in A.R.S. § 44-1460, *et seq.* To protect its name, title, or designation, a community association can register its trade name in accordance with A.R.S. § 44-1460, *et seq.* This step involves submitting information to the Secretary of State, specifically:

1. The name and business address of the applicant for such registration (and the state of incorporation if a corporation);

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<sup>3</sup> The United States Patent and Trademark Office, *Trademarks Home*, (Jul. 9, 2012), <http://www.uspto.gov/trademarks/index.jsp>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

2. The name, title or designation to be registered;
3. The general nature of the business conducted by the applicant; and
4. The length of time during which the name, title or designation has been used by the applicant in his business operations in this state.

### **Why Register a Trade Name**

The registration of a trade name guarantees the community association certain protections under Arizona law. Only the community association, as the holder of the registered trade name, has the exclusive right to use the name<sup>6</sup> and may takes steps to protect the trade name. Moreover, once the trade name is registered, no other individual, group or community association may register the trade name. The registration of a community association's trade name is effective for 5 years, and is renewable and assignable.<sup>7</sup>

### **Trademarks**

A trademark is any word, name, symbol or device or any combination of these items that is adopted and used by a actor to identify goods made or sold by that actor and to distinguish the goods from goods made or sold by others.

When a company is using its trade name to identify its products or services, the name is functioning as a trademark, and trademark law must be considered. A company has a legal right to use a name as a trademark only to the extent that it does not infringe upon existing trademarks or dilute famous trademarks. Under Arizona law, dilution means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of either:

- (a) Competition between the owner of the famous mark and other parties.
- (b) Likelihood of confusion, mistake or deception. A.R.S. § 44-1441(A)(2).

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<sup>6</sup> A.R.S. § 44-1460.05.

<sup>7</sup> A.R.S. § 44-1460.02.

Keeping others from using confusingly similar names in the future also requires steps such as trademark registration, and diligent monitoring and defense of a company's trademarks.

Arizona trademark law can be found in A.R.S. § 44-1441, *et seq.* To protect their trademark, an Arizona community association can register its trademark in accordance with A.R.S. § 44-1441, *et seq.* This step involves submitting information to the secretary of state, specifically:

1. The name and business address of the person applying for such registration (and the state of incorporation if a corporation);
2. The goods or services in connection with which the mark is used, the mode or manner in which the mark is used in connection with such goods or services and the class in which such goods or services fall;
3. The date when the mark was first used anywhere, and the date when it was first used in this state by the applicant or his predecessor in business; and
4. A statement that the applicant is the owner of the mark and that no other person has the right to use such mark in this state.

The owner of a trademark can initiate a lawsuit for trademark infringement to prevent unauthorized use of that trademark. The registration of an Association's trademark is effective for 10 years, and is renewable and assignable. Although both state and federal law govern trademarks, federal law is the most extensive source of trademark protection. The main federal statute is the Lanham Act.<sup>8</sup>

### **Trademark infringement under the Lanham Act**

A company that owns the rights to a particular trademark can sue subsequent parties for trademark infringement under the Lanham Act.<sup>9</sup> The standard is "likelihood of confusion." The use of a trademark in connection with the sale of a good or service constitutes infringement *if it is likely to cause consumer confusion* as to the source, or as to the sponsorship or approval of such goods or services. In determining whether consumers are likely to be confused, courts look to a number of factors, including: (1) the strength of the mark; (2) the proximity of the goods or services; (3) the

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<sup>8</sup> 15 U.S.C. § 1051, *et seq.*

<sup>9</sup> 15 U.S.C. § 1051, *et seq.* specifically, 15 U.S.C. § 1114, 1125.

similarity of the marks; (4) evidence of actual confusion; (5) the similarity of marketing channels used; (6) the degree of caution exercised by the typical purchaser; (7) the defendant's intent in selecting its mark; and (8) likelihood of expansion of the product lines.<sup>10</sup>

Trademark infringement can arise in several ways. Facebook users are allowed to select “vanity URLs,” which are words appended to the end of the www.facebook.com URL (for instance: www.facebook.com/your.name). A company aiming to develop their own Facebook presence for the first time may find that another unauthorized user is squatting on the company’s vanity URL using the company’s trademark.

Also, unauthorized users might use a company’s trademarked logo or slogan in violation of the company’s intellectual property rights. Another way trademark infringement can arise is when a company finds that a Facebook App is misappropriating the company’s trademark by creating a Facebook application that claims to be sponsored or developed by the company itself.

There are several remedies available for successful plaintiffs in trademark infringement and dilution actions. Courts can award injunctions against further infringing or diluting use of the trademark.<sup>11</sup> Monetary relief may also be available in infringement cases, to cover (1) defendant's profits, (2) damages sustained by the plaintiff, and (3) the costs of the action.<sup>12</sup>

Additionally, damages may be trebled (meaning tripled) upon showing of bad faith. In a trademark dilution case, however, damages are available only if the defendant willfully traded on the plaintiff's goodwill in using the mark. Otherwise, plaintiffs in a dilution action are limited to injunctive relief.<sup>13</sup> Two main affirmative defenses to trademark infringement claim: fair use or parody.

### **Domain Names and Web Sites**

Internet domain names can be trademarks, and may be registered with the United States Patent and Trademark Office. Once a company registers their domain name, the domain name itself is used as a trademark, meaning it needs to designate the source of a product or service, not just the address

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<sup>10</sup> *Polaroid Corp. v. Polarad Elect. Corp.*, 287 F.2d 492 (2d Cir.), cert. denied, 368 U.S. 820 (1961).

<sup>11</sup> 15 U.S.C. § 1116(a).

<sup>12</sup> 15 U.S.C. § 1117(a).

<sup>13</sup> 15 U.S.C. § 1125(c).

of the website. The company, product name, or association needs to be the same or similar in order to claim trademark rights to the domain name. Domain names with product names or a company's name is a valuable part of establishing an Internet presence.

There are three types of domain disputes. The first type of dispute is "cyber squatting," meaning a company owns a trademark and someone without a right to the trademark is exploiting the company's mark in bad faith. The second type of dispute is when there are two trademark holders and only one domain name. The third type of dispute is when no one owns the trademark, but several want the brand. This last dispute occurs because not all domain names are trademark protected, but companies attempt to use trademark law, usually inappropriately, to resolve domain name issues.

A domain name trademark infringement case involving a homeowner's association is *Board of Directors of Sapphire Bay Condominium West v. Simpson*, 328 F.Supp.2d 571 (D.Virgin Islands 2004), and its affirmation by the Third Circuit Court of Appeals.<sup>14</sup> In *Sapphire Bay*, a condominium association Board of Directors sued an angry unit owner, Simpson, to enjoin his use of domain names utilizing the condominium's name. Simpson had registered for the domain name "sapphirebaycondos.com." Importantly, the plaintiff condominium association was a nonprofit corporation that did not have a formal registered trademark. It had been operating the name for many years pursuant to state registration.

The association sent a cease and desist letter to Simpson concerning his use of its trademark in his domain name and on his website. The efforts of the association failed, so the association filed a lawsuit "alleging willful Lanham Act violations and common law unfair competition, anti-dilution, tortious interference, trademark infringement, deceptive trade practice, and misappropriation claims."<sup>15</sup>

The District Court ruled in favor of the association and ordered that Simpson, the defendant condo-owner, "shall not use 'sapphirebaycondos.com' or any derivative thereof, as the domain name for any website under his ownership or substantial control."<sup>16</sup> Simpson appealed. The Third Circuit Court of Appeals used a three-part analysis to find that the association had alleged a valid claim under the Lanham Act. The Court looked at: (1) whether there was focus on the validity and legal

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<sup>14</sup> *Board of Directors of Sapphire Bay Condominium West v. Simpson*, 129 Fed.Appx 711, 2005 WL 1006922, 77 U.S.P.Q.2d 1629 (C.A.3d Virgin Islands 2005) (unpublished).

<sup>15</sup> 129 Fed.Appx. at 713.

<sup>16</sup> *Board of Directors of Sapphire Bay Condominium West v. Simpson*, 328 F. Supp.2d 571, 572 (D. Virgin Islands 2004).

protectability of the mark; (2) ownership of the mark; and (3) the likelihood of consumer confusion. The Third Circuit Court ruled in favor of the condominium association on each issue, also finding that the defendant's intent in creating the websites was to harm the association financially, so it considered the activity “commercial” in nature.

A similar case, *Nordic Inn Condominium Owner's Association vs. Ventolo*, concerns a community association dispute with a condominium unit owner over a domain name.<sup>17</sup> In *Nordic Inn*, a non-profit condominium association registered its name with the New Hampshire Department of State. A unit owner then registered the domain name “nordicinn.com,” which was confusingly similar to the association's trade name. The association registered a different domain name and promptly filed suit to enjoin the operation of the unit owner's domain name, on allegations the unit owner violated state law and the Federal Anticybersquatting Consumer Protection Act (ACPA).

The trial court granted the association's request for an injunction, but did not find the unit owner had violated the Federal Anticybersquatting Consumer Protection Act. The New Hampshire Supreme Court affirmed, explaining: “we conclude that any prejudice the defendants may suffer is outweighed by the interest in protecting the public from future confusion.”<sup>18</sup> The *Nordic Inn* Court found that the equities were in the association’s favor and explained that there was a clear showing of the likelihood of confusion. *Id.*

The Court’s finding in *Nordic Inn* is also consistent with the legislative history of the ACPA. The Senate Report accompanying the ACPA defines cyber squatters to include those who “register well-known marks to prey on consumer confusion by misusing the domain name to divert customers from the mark owner's site to the cyber squatter’s own site.”<sup>19</sup> Such is the case where defendants registered the association’s trade name as their domain name in order to take advantage of consumers seeking the association’s business.

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<sup>17</sup> *Nordic Inn Condominium Owner's Association vs. Ventolo*, 864 A.2d 1079 (N.H. 2004).

<sup>18</sup> *Id.* at 1088.

<sup>19</sup> S.Rep. No. 106-140, at 5-6; see also *Lucas Nursery and Landscaping, Inc. v. Grosse*, 359 F.3d 806, 809 (6<sup>th</sup> Cir. 2004).

## **Content Based Defamation**

Defamation law encompasses both written statements, known as libel, and spoken statements, called slander. Libel includes “defamatory statements that are written or communicated in such a way that they persist similar to the printed word; slander generally covers defamatory statements published orally or in a manner that is not likely to be preserved in a physical form or broadcast widely.”<sup>20</sup>

Generally, a cause of action for defamation requires: (1) a false and defamatory statement concerning another; (2) an unprivileged communication of that statement to a third party; (3) fault amounting to at least negligence on the part of the speaker; and (4) either actionability of the statement irrespective of special harm (*per se*) or the existence of special harm caused by the publication (*per quod*).<sup>21</sup>

## **Freedom of Speech and Community Associations**

An uneasy truce exists between defamation law and constitutionally protected speech. Defamation laws aim to protect individuals’ reputations, which clashes directly with another important societal value: freedom of speech. The scope of the First Amendment did not encompass defamation law until 1964 when the Supreme Court decided *New York v. Sullivan*.<sup>22</sup> The Court in *Sullivan* asserted that even false defamatory speech deserves some First Amendment protection, particularly in the realm of political debate.<sup>23</sup>

## **Community Associations and Defamation Claims**

It can be argued that board members have held themselves out in their community and made themselves something like elected officials. They have stepped into a position where there will be debate about what they have done and every decision will be scrutinized. When a candidate was slandered and sued for defamation, judges opined, “Like a tourist who runs with the bulls at

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<sup>20</sup> David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 Harv. C.R.-C.L. L. Rev. 261, fn. 95 (2010); See also ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 43-45, 96-98 (1980).

<sup>21</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>22</sup> *New York v. Sullivan*, 376 U.S. 254 (1964).

<sup>23</sup> *Id.*

Pamplona, a politician cannot complain should he be gored during the spectacle.” *Knight v. Jewett*, 3 Cal.4th 296, 11 Cal.Rptr.2d 2, 834 P.2d 696 (1992). Candidates in community association elections may be held to the same standard.

The community association should keep in mind that there is a defense to defamation suits. In response to a plague of lawsuits brought primarily to chill constitutionally protected speech, the term Strategic Lawsuit Against Public Participation (“SLAPP”) was created.<sup>24</sup> To be defined as a SLAPP, a claim generally must be: (1) A *civil* complaint or counterclaim, (2) filed against *nongovernment* individuals or organizations, (3) alleging injuries from their *communications to influence government actions* (communications to government officials, government bodies, or the electorate when it is voting on new laws through the initiative or referendum process), (4) on a substantive issue of some *public interest* or concern.<sup>25</sup> SLAPPs led to the enactment of Anti-SLAPP statutes.

Arizona’s Anti-SLAPP statute is codified in A.R.S. §12-751-52. The Arizona anti-SLAPP statute applies to legal actions involving “a party’s exercise of the right of petition.”<sup>26</sup> Arizona’s Anti-SLAPP statute gives defendants the ability to file a motion to dismiss claims infringing the exercise of this right of petition.<sup>27</sup> This law is narrow, protecting only statements made to government authorities. Therefore, in Arizona, Anti-SLAPP laws may not apply to community associations.

### **Other Torts**

Besides defamation, content posted on social networking sites has the potential to serve as the basis for other tort claims. To state a claim for violation of the constitutional right of privacy, a party must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under

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<sup>24</sup> Jerome I. Braun, Increasing SLAPP Protection: Unburdening the Right of Petition in California, 32 U.C. DAVIS L. REV. 965, 968 (1999).

<sup>25</sup> Chad Baruch, "If I Had a Hammer:" Defending SLAPP Suits in Texas, 3 Tex. Wesleyan L. Rev. 55 (1996) (citing George S. Pring & Penelope Canan, "SLAPPS"--"Strategic Lawsuits Against Public Participation" in *Government--Diagnosis and Treatment of the Newest Civil Rights Abuse*, 9 CIVIL RIGHTS LITIGATION & ATTORNEY'S FEE ANNOTATED HANDBOOK 359, 359-60 (Clark et al. eds., 1993)).

<sup>26</sup> A.R.S. § 12-752.

<sup>27</sup> A.R.S. §12-752.

the circumstances; and (3) a serious invasion of the privacy interest.<sup>28</sup>

Four different kinds of activities have been found to violate this privacy protection and give rise to tort liability. These activities are (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. Each of these four categories identifies a distinct interest associated with an individual's control of the process or products of his or her personal life.<sup>29</sup> To prevail on an invasion of privacy claim, the plaintiff must have conducted himself or herself in a manner consistent with an actual expectation of privacy.

In 2009, a California appeals court ruled that comments made in a blog were not subject to privacy protections and could be reprinted elsewhere without the blogger's permission.<sup>30</sup> In this case, a college student posted long disparaging comments about her hometown on her MySpace blog. A reader, who was the principal of the high school the student had attended, sent the comments to the local newspaper. Although the student removed the comments six days after posting them, the newspaper published the comments as a letter to the editor and attributed it to the student. The student sued, claiming that her blog was a private forum. The California court disagreed, finding that posting the comments on her blog "made [them] available to any person with a computer, and thus opened [them] to the public eye...No reasonable person would have had an expectation of privacy regarding the published material," the court added, noting that "the potential audience was vast."<sup>31</sup>

Other tort claims stemming from content posted on social media sites include intentional infliction of emotional distress or interference with advantageous economic relations. Incidents of cyber bullying are increasing and can also be the basis for criminal charges.

## **Conclusion**

Social media networks have the potential to dramatically increase communication in community associations and positively impact communities. Associations should, however, proceed cautiously.

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<sup>28</sup> *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319, 338, 64 Cal. Rptr. 3d 693, 165 P.3d 488 (2007).

<sup>29</sup> *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 24, 26 Cal. Rptr. 2d 834, 866 P.2d 633 (1994).

<sup>30</sup> *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125 (Cal. App. 5th Dist. 2009).

<sup>31</sup> *Id.* at 1130.

There are many legal ramifications of having an online presence. New problems come up constantly stemming from content posted on social media. So, “To be or not to be, on Facebook?” is a question community associations must answer for themselves. Following the suggestions on the attached handout will help associations protect themselves when entering into the world of social media.

## **COMMUNITY ASSOCIATION SOCIAL MEDIA BEST PRACTICES**

1. **Register trade name** – *on the State and Federal level*
  - i. **State** - See A.R.S. § 44-1460, *et seq.*
  - ii. **Federal** – See <http://www.uspto.gov/>
2. **Register trademark** – See A.R.S. § 44-1441, *et seq.*
3. Create a Social Media Committee that Will Monitor Relevant Media for Trademark or Trade name Infringement or Dilution.
4. **Develop a “Social Media Policy”**
  - i. Associations should develop a social media policy. The policy should address issues of who can view and/or post on the site, the kinds of messages allowable and prohibited, whether repeat offenders will be blocked, and whether the Board may remove offensive, false or potentially libelous posts. The Association should emphasize to owners and Board members that it is best to keep posts informational; the site should not be the Board’s editorial column.
5. **Terms of Use**
  - i. Associations should also include a Terms of Use page on their social media site.
  - ii. The Terms of Use should reflect the restrictions in the Social Media Policy

and include sections concerning Use of the Website, Purchases on the Website, Copyrights, Intellectual Property, Trademarks, Online Community Rules and Regulations, Links, Claims against the Association, Disclaimers, and Limitation of Liability.

**6. Privacy Controls**

- i. The Social Media Committee and Board Members should be designated as the administrators of the Association's social media site(s).
- ii. One important privacy control is requiring people to be approved before joining. Every person invited or approved to join would be required to read and accept the Terms of Use before they receive membership or approval to use the site.

**7. Defend trade name and trademarks**

- i. Contact the Infringing third-party
  1. By contacting the infringing party directly (if identifiable) – preferably through an attorney – the association may be able to generate resolution without the need for litigation.
- ii. Litigation
  1. If the dispute cannot be resolved, the association can bring a lawsuit. By asserting the association's legal rights in court, with the aid of an attorney, the association may be entitled to relief in the form of an injunction (stopping the infringement) or damages.

## DEFAMATION LAW SUMMARY

PLAINTIFF	LIABILITY STANDARD	DAMAGES	BURDEN OF PROOF
Public Official or Public Figure	Actual Malice	Compensatory Punitive Damages	Plaintiff must prove falsity
Private Figure in Matter of Public Concern	Negligence and Actual Injury	Compensatory (Actual Injury) Punitive (Actual Malice)	Plaintiff must prove falsity
Private Figure in Matter of Private Concern	Negligence	Compensatory (Actual Injury) Punitive Damages (do not require Actual Malice)	Burden on Defendant to prove Truth Defense

### Considerations in Defamation Law

1. Is it a public official or figure or is it a private individual?
2. If it is a private individual, is the speech on a matter of public concern?
3. If it is a private individual and the speech is a matter of public concern, are the requested damages compensatory or punitive?

This document is intended to provide general information. It does not and cannot provide specific legal advice. For additional information or answers to questions, you may contact Augustus H. Shaw IV, Esq. of Shaw & Lines, LLC at 480-456-1500 or send questions to [ashaw@shawlines.com](mailto:ashaw@shawlines.com).