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Intellectual Property Legal Checklist

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In addition to the day-to-day management issues that seniors housing operators handle, they also encounter a number of intellectual property issues. Some of these issues are obvious, but other issues may be less apparent. This article will help to outline some of the key intellectual property issues facing operators, and the best practices for dealing with those issues.

Advertising

Whether by traditional print advertising or through a web site on the Internet, advertising is an important tool for any business to reach current clients and to develop new ones. For seniors housing operators, advertising, particularly through a web presence, has become almost a necessity due to the dramatic growth in the use of the Internet by seniors and their families to obtain information about housing and long-term care options. Advertising agencies and web experts can assist in providing businesses with the right mix of style, form, and function. But even good advertising campaigns can present potential legal problems of which a company should be aware.

a. Copyright issues

If you are a seniors housing operator, it's important to protect the original material that you have developed and to make certain that you have permission to use any material developed by others.

First, make sure that any agreement you enter into with your advertising agency or a web site developer expressly grants you ownership of the copyright in any material developed for your business. Next, it is a good idea to include a copyright notice on your materials and web site. The copyright notice consists of the word "Copyright" followed by the familiar "©" symbol and then the copyright owner's name and year of publication. The copyright notice also should help to undermine any claim of innocent infringement by a party that misuses your material. To obtain copyright protection, you do not need to file a formal copyright registration. However, registration is especially important if your materials contain original material that would be of obvious value to an infringer or if you need to file suit to enforce your rights. If you use any material designed or created by another party, such as text, graphics,

music, or photographs, you must obtain permission from that party. Permission is ordinarily granted in the form of a license. The exact license will vary, depending on the type of material involved and the particular use being made.

b. Photographs

Seniors housing operators often use photographs of people, including residents, in their advertising or on their web sites. Regardless of who appears, the company should obtain appropriate written permission. This may come from an outside agency that sells the photographs or from residents themselves. Keep in mind, you need both permission to use a photographic image from whomever owns the copyright in the photograph and releases from the subjects of the photograph. Also, be careful about obtaining material from the Internet without receiving permission of some kind from the source to use it.

Seniors housing communities are generally subject to the federal Fair Housing Act. If you post photographs or drawings of people in your advertising or on your company's web site, you must portray individuals who represent a cross-section of the community in which the particular seniors housing property is located. It's important to do this so that your advertising or web site does not imply any form of discrimination based on race, ethnicity, or national origin. Although not strictly necessary, it's a good practice to identify your property as being in compliance with the Act by including the "🏠" logo on your materials or web site. You may also want to include the "♿" logo as well, in order to denote compliance with the Americans with Disabilities Act.

c. Trademark Issues

Remember to use trademark symbols to identify names and logos you own. The "®" symbol denotes a federally-registered mark. If you have not registered your mark with the federal authorities, you could still give notice to viewers that you claim trademark or service mark rights by placing a TM or SM next to your mark. Before using anyone else's marks, you should be sure to have permission to use them in your advertising or on your web site, or that you are not using them in a way that will infringe upon that person's trademark rights. If you have any questions regarding how to protect your own mark or how to use the marks of another business properly, you should consult an attorney with trademark expertise.

d. Web site Issues

Other important issues to consider for your web site include having terms of use and privacy policies.

(i) Terms of Use/Linking

Many web sites contain a separate page entitled "Terms of Use." This page typically includes policies with respect to activities such as downloading, copying, or linking, a notice regarding the owner's trademarks and, if not obvious elsewhere on the site, a disclosure of the legal name and business address of the operator. Terms of Use should include a notice that the web site's usage guidelines may change over time and an instruction that viewers should periodically review the posted Terms when they visit the site.

In addition, the Terms of Use should include any appropriate disclaimers regarding the material posted on the site. For example, a web site that provides links to other web sites should state

that the links are offered as conveniences and are not intended to denote affiliation with or endorsement of those other sites, unless the contrary is true. In addition, if you don't want others linking to your web site, you must state this affirmatively in the Terms of Use. (Likewise, before establishing links between your web site and another, you should check that web site's Terms of Use to make sure that that site's owners allow such links.) Finally, the Terms of Use should also include a disclaimer with respect to the accuracy, nature, content, or completeness of the material contained on the web site, and should expressly disclaim any and all warranties of the fitness of the site's content for any purpose.

(ii) Privacy Policies

Some states require web site owners to develop and maintain certain privacy policies in connection with their web site. Under California law, for example, a seniors housing operator must conspicuously post an on-line privacy policy that identifies any category of personally-identifiable information collected about individuals who visit or use the web site. For example, a visitor who is interested in a company's services might be asked to provide information such as his or her name, address, age, and likely senior housing or long-term care needs. A web site page that requests such information must give the consumer an opportunity to review the information obtained and to request changes. The policy must also identify the categories of third parties with whom the information may be shared.

In addition, a seniors housing community that is considered to be a "covered entity" under the HIPAA privacy rules must make a special posting on any web site that it maintains. This applies to any community that provides health care services for which it bills and receives payment electronically using the standard code sets that have been created under HIPAA. This will include most communities that provide skilled nursing on their premises. Under the HIPAA privacy rules, such a community must post its "Notice of Privacy Practices" ("NPP") on its web site. An NPP that meets HIPAA requirements will state that it is itself subject to revision and that any amendments will apply to both current and past protected health information. Of course, if the NPP changes, then the revised version must be posted immediately on your web site.

Other Copyright Issues

There are several other issues that seniors housing operators encounter but may not even know it.

a. Unauthorized Copying

Making a copy of a copyrighted work without the authorization of the copyright owner is considered an infringement. And, it makes no difference if you innocently believed that the work was not copyrightable, or thought that you had the permission of the copyright owner (when in fact you did not), or if you mistakenly believe that copying the work was permitted by law. Unless you fall within one of the very narrow statutory defenses—and there are few—the penalties can be severe. A court can award anywhere from as little as \$200 per work (for infringements that are truly innocent) up to \$150,000 per work (if the court believes that the copying was willful), plus attorneys' fees.

To minimize the risk, you should first become educated about copyright law. You should also make sure that when photocopying materials, you either own the copyright in the materials, have authorization from the copyright owner to make the copies, or that the materials are in the public domain and available for copying by all. A copyright attorney can help you determine whether you have the right to make copies of materials or how you go about obtaining the appropriate permissions.

b. Motion Pictures and Music

Many people believe that copyright law only covers things like books and magazine articles. However, the copyright law does not just protect textual works; it also extends to all kinds of works of art including paintings, drawings, photographs, diagrams, motion pictures, music, and choreography.

Seniors housing operators, therefore, must also be familiar with the copyright law when it comes to showing movies or playing music for the residents of a community. Most people believe that if the community simply rents or purchases a DVD from a local video store, the community can show it to all or several of the residents without any problem. Similarly, many people believe that it is not a violation of the copyright law for a community to broadcast a music CD over a speaker that filters throughout the common areas of the community.

However, showing movies or playing a music CD in public actually requires permission from the copyright owner. This is because under the copyright law, the purchase of a DVD or CD is for your personal use as a consumer and should be shown or played only within your normal circle of friends or family (e.g., at your home). When movies or music are performed in a business environment, or retirement community, for example, where there are several people outside of your personal circle of friends or family, permission is necessary.

Fortunately, rather than requiring businesses to obtain the permission of every copyright holder for every movie or CD they play, there are licensing organizations that can grant you a license covering multiple movies or CDs. These licensing organizations collect license fees on behalf of the copyright holders they represent. They then use the fees to compensate the copyright holders for the use of their works. Examples of licensing organizations for movies are: Motion Picture Licensing Corporation (www.mplc.com) and Swank Motion Pictures (www.swank.com). Similarly, BMI (www.bmi.com), American Society of Composers, Authors and Publishers (ASCAP) (www.ascap.com) and SESAC (www.sesac.com), can grant licenses on behalf of different songwriters, composers and music publishers. Obtaining the proper license will help keep you in compliance with the copyright law.

Indeed, in all of the areas discussed above, a little bit of preventive care will go a long way toward protecting your company's intellectual property for the long term and the company from third party claims.

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