From the Law Offices of
PERKINS & ANCTIL P.C.
ATTORNEYS AT LAW

*Winter 2017*

L A W  Q U A R T E R L Y

IN THIS ISSUE



## ANNOUNCEMENTS

Perkins & Anctil is pleased to welcome our new Associate Attorney Daniel M. López! Daniel comes to us with four years of legal experience in the Bankruptcy, Foreclosure, Small Claims and Document Review sectors. He attended Villanova Law School in Pennsylvania, earning his JD in 2012. Prior to that, Daniel went to Boston College where he was a member of the swimming and diving team. He lives in Medford, MA and will be assisting Managing Partner Rob Anctil with Real Estate work and David Chenelle with Bankruptcy amount other matters.

## New Notary Rules

***By: Rhonda L. Duddy, Esq.***

New notary rules will go into effect in Massachusetts on January 4, 2017. Governor Baker signed Chapter 289 of the Acts of 2016 on October 6, 2016, which further regulates notaries public in an effort to protect consumers.

The new legislation establishes standards of conduct and provides guidance and requirements, as well as sample acknowledgements for notaries public. Those holding commissions should review the requirements carefully to ensure that they will continue to be in compliance.

Particularly of interest to members of the Massachusetts Real Estate Bar Association, Section 17(a) of the Act states:

> A notary public shall not advise clients, offer legal advice or represent or advertise the notary public as a legal specialist or consultant unless the notary public is an attorney licensed to practice law in the Commonwealth.

Non-lawyer notaries are prohibited from conducting real estate closings in Massachusetts and the Real Estate Bar Association works diligently to combat the unauthorized practice of law and believes that home buyers are particularly susceptible to individuals who are not qualified to give legal advice.

To further protect consumers and clear up any misconceptions, Section 21 of the act states:

> A notary public who is not an attorney who advertises notarial services in a language other than English shall include in the advertisement, notice, letterhead or sign the following statement prominently displayed in the same language: 'I am not an attorney and I have no authority to give advice on immigration or other legal matters.'

Additionally, "A notary public who is not licensed to practice law in the Commonwealth shall not make a literal translation of the notary public's status as 'licensed' or as a 'notary public' into a language other than English without regard to the true meaning of the word or phrase in that language or use any other term that implies that the notary public is an attorney so licensed, in any document, including an advertisement, stationery, letterhead, business card or other written broadcast material describing the notary public or the notary public's services."

The new legislation also established penalties for misconduct. Section 18(a) authorizes the attorney general or district attorney to prosecute any person committing a violation. Revocation of the notary's appointment, fines and/or imprisonment may be imposed. There is also a new private right of action stating that if the court finds that a person so convicted either knew or should have known that the conduct would be in violation, punitive damages including attorney's fees and court costs as well as relief under Chapter 93A, the Consumer Protection Act, could be imposed.

The role of a notary public is clearly defined in Chapter 289 of the Acts of 2016 and should be understood and adhered to by all who are commissioned. The complete text of the new rule can be found at https://malegislature.gov/laws/sessionlaws/acts/2016/Chapter289.

## Ignorance is Not Always Blissful

***By: Scott J. Eriksen, Esq.***

As association advisers, we are too well aware that what we don't know ***can***, in fact, hurt us. Perhaps one of the greatest challenges facing community association professionals and board members is the wide variety of issues and laws applicable to association activities. That is, like most businesses and individuals, community associations are subject to the pitfalls common to various specialty laws. On such area of specialty laws in particular deserves mention: intellectual property ("IP") law.

The interplay of IP law in the context of condominium life is something that can, and does, come up more often than one may imagine. Yet few board members and managers are likely fully aware of the potential exposure for violations. In fact, the penalties for infringement of IP law are often significant, to say nothing of costs of defending against claims made by IP owners.


While it is unreasonable to expect that all volunteer board members can become an expert in every area of the law which may potentially impact their communities, our role as advisers is to arm our clients and the community with as much information as possible to avoid traps for the unwary. To this end, we offer the following (hopefully) entertaining case study for your consideration:

Disco-lovers on the Board of Grooveland Condominium, a fifty-five and over community association, decide to host a Seventies-themed mixer in the condominium clubhouse. At just $5.00 a participant, the event is sure to be a smash. Flyers are posted throughout the community in advance, and even at local yoga studios, coffee houses and the roller-rink. The Board spare no expense, bringing in a parquet dance floor, disco ball, drinks and the grooviest DJ in town – Stevie Spins. Stevie Spins had the greatest collection of disco in the tri-state area and the tunes play for hours as the residents hustle and bump. All the classics are spun out: Stayin' Alive, Hot Stuff, I Will Survive, etc. As the night is winding down, of the Board members notices a dark figure slipping out of the party into the night. When she goes over to introduce herself, he hands her his card: John Shaft, Broadcast Music Inc. (BMI). "Great party. You'll be hearing from us soon," Shaft grins as he disappears into the night.

So what gives? Is Shaft on to something? It is true that the Board members, groovy as they are, have not obtained any licenses for the songs DJ Spins played at their party. In fact, like much of the public, they'd never even heard of BMI (or ASCAP or SESAC) (three "Performing Rights Organizations or PROs) before that fateful night. But this wasn't some Woodstock-level concert they'd just put on – just a community event. Surely this small-time function couldn't lead to an infringement suit, right? And besides, they assume, DJ Spins had to have been properly licensed. What a drag it would be if the association's Seventies shindig were to transform into a six-figure lawsuit.

Unfortunately for our Board, they may have danced their way right into an infringement inferno. Generally speaking, the Copyright Act (Title 17 of the, United States Code, the "Act") requires an association to have the proper licenses for any public performance of protected music. No one disputes that the popular Seventies hits played at the party were "copyrighted" materials – that is "original works of authorship fixed in any tangible medium of expression" including musical works and sound recordings. However, the Board argues that the clubhouse is not a "public" place – the association property is privately owned – and thus DJ Spins' tunes were not performed in violation of the act.

BMI vehemently disagrees, and likely has the better of the argument. According to the Act, to perform a work 'publicly' means: (1) to perform or display it 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; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public…" [Emphasis added]. The case law and Legislative history of the Act bolsters BMI's claim. According to Senate Report No. 94-

473, p. 60, "performances in 'semipublic' places such as clubs, lodges, factories, summer camps and schools are 'public performances' subject to copyright control." Another key factor in BMI's favor here is that some of the attendees were not condominium residents, but individuals who picked up the flyer from locations off of condominium property.

Perhaps the most condemning fact against the association is that all of the attendees paid fees to get their groove on. In this regard, the board is unable to avail itself of a hopeful reading of Hinton v. Mainlands of Tarmac (611 F. Supp. 494 (S.D. Fla. 1985)) which suggests that if the attendees are only community residents, and no feeds are charged, the performance may not constitute a "public performance" for the purposes of pursuing an infringement claim.

When it appears to the Board that playing copyrighted materials at their function may well have been a potentially infringing "public performance," they turn to DJ Spins. But Spins, savvy with the moves, turns the tables. "Yes," he says, "I was the one playing the tunes, but you – association – were responsible for obtaining the licenses." The Board, incredulous, consults with their counsel who echoes Spins' conclusion. The community association is ultimately responsible for ensuring copyright license are obtained. This is true because the association controls the clubhouse – the venue – at which the performance took place. Counsel informs the Board that while indemnification provisions in Spins' contractual agreement may have helped to mitigate liability, it would not be a substitute for obtaining proper licenses from the appropriate Performance Rights Organization (PRO). Counsel further advises the Board that, in the case of music, it is important to review the catalogs of each of the three major music PROs – BMI, ASCAP and SESAC – in order to ensure that the next time the records spin, the Board's "tracks" are covered.

Again, no one should expect that board members will become experts in the myriad complex legal arenas in which an association may find itself, but even a little knowledge can go a long way. The next time your association is thinking about hosting a function and playing or displaying copyrighted materials, it may behoove you to consult with your adviser first.

## New Smoke Detector Regulations In Massachusetts

***By: Daniel M. López, Esq.***

When there is smoke there is typically a fire. That age old warning should be enough for us to make fire safety a priority, but fire safety, smoke detectors and carbon monoxide detectors are typically the last thing on everybody's mind until they are chirping for a new battery in the middle of the night or until a tragedy strikes which reminds us all of its importance. Unfortunately, this time, we have all been reminded of the importance through the tragedy in Oakland, California where a fire ripped through a warehouse killing dozens and the massive 10-alarm fire in Cambridge, Massachusetts which extended to as many as eleven buildings. Luckily, nobody was killing in the Cambridge fire.

Both of these tragedies have caught the attention of the nation and as a result the change to Massachusetts smoke detector laws, which went into effect on December 1, 2016 could not be timelier. The new regulations apply to both single family homes and multi-family homes built prior to 1975. The new regulations require smoke detectors in the following locations:

1. On every habitable level of the residence;
2. On the ceiling outside of each separate sleeping area;
3. On the ceiling at the base of each stairway;
4. If located within 20 feet of a kitchen or bathroom (containing a bathtub or shower), the detector must use photoelectric technologies;
5. If located more than 20 feet from a kitchen or bathroom (containing a bathtub or shower), the detector must utilize either (a) a dual detector (containing both ionization and photoelectric technologies) or (b) two separate sensors, one ionization and one photoelectric.
6. In two-family dwellings, smoke alarms are required in common areas shared by residents.



Additionally, the new regulations dictate that the smoke detectors have certain features which include the following:

1. The smoke detectors must contain a hush feature to silence nuisance alarms.
2. May be battery-powered, hardwired, or a combination of both.
    - New battery-powered alarms must have 10-year, sealed, non-rechargeable, non-replaceable batteries.
    - Battery-powered alarms that are more than 10 years older, or have

expired must be replaced with 10-year, sealed, non-rechargeable, non-replaceable, battery-powered ones.

To see all of the changes made to the smoke detector regulations please see the Massachusetts Smoke Alarm Regulations – 527 CMR 1.00:13.7.

These new regulations are important to keep in mind not only because they will keep you safe, but also because compliance with them will be necessary in order to sell or transfer residential property. As many already know a smoke certification is required by the local fire department before residential real property can be sold. Therefore, compliance with these new regulations is a must if you want to sell your property after December 1, 2016.

## Perkins & Anctil is Going Green!

We are in the process of reducing our use of paper and would like to offer clients the option of receiving their bills electronically.

Interested parties should contact Samantha Gray at sgray@perkinslawpc.com. Please provide her with your desired email address and billing contact person.

Thanks for your help!

## About Our Law Firm

Perkins & Anctil, P.C. is a leading firm in all facets of real estate law. Our diverse and robust experiences includes all aspects of condominium and community association law, real estate conveyancing (including the representation of numerous local and national lenders), developer representation (from municipal approval process through the sale of property), landlord-tenant matters and real estate litigation. In addition we offer years of industry knowledge in general litigation and bankruptcy cases, as well as a full spectrum of employment related matters. Our attorneys have been acknowledge for their expertise in Massachusetts, New Hampshire and throughout the country. We encourage you to set up an initial complimentary meeting with us. www.perkinslawpc.com

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