

Minimizing Liability from Association-Sponsored Online Communities

Q: What can we do to minimize liability from our association's online community message boards?

A: There are several steps to take to minimize liability risk for association-sponsored online message boards or other online forums.

Terms of Use Agreement

One important step is to require users to abide by rules or terms of use. Before being allowed access to the online forum, users should be required to "accept" or "agree" to terms of use (an "access agreement"). Requiring users to agree to the terms of an access agreement provides greater protection than simply posting notices and disclaimers. The access agreement should include the following provisions:

- No posting (commenting, uploading, downloading) any material that is defamatory, harassing, obscene or otherwise illegal.
- No posting any material that is protected by copyright without permission from the owner.
- No discussions about prices, fees, discounts, market shares, sales territories or other terms or conditions of trade, boycotts or any other activity that could be construed as anticompetitive or could lead to an inference of anticompetitive activity.
- Posted information will not be treated as confidential.
- The association has the right (license) to use posted information in any manner it sees fit.
- The association may remove (or refuse to post) anything it deems not in the best interests of the association.
- Limitations on the association's liability for anything posted on the forum.

The access agreement also should include a provision that the user agrees to indemnify the organization against liability associated with the user's failure to follow the rules.

Monitor the Message Boards

Another important step to minimize risk is to periodically monitor the message boards. The frequency of monitoring is up to the association based on its available resources. With a large volume of posts, it may not be practical or cost-effective to monitor every posting. Nevertheless, monitoring is important because it helps the association limit its exposure to liability from antitrust, defamation and intellectual property infringement claims.

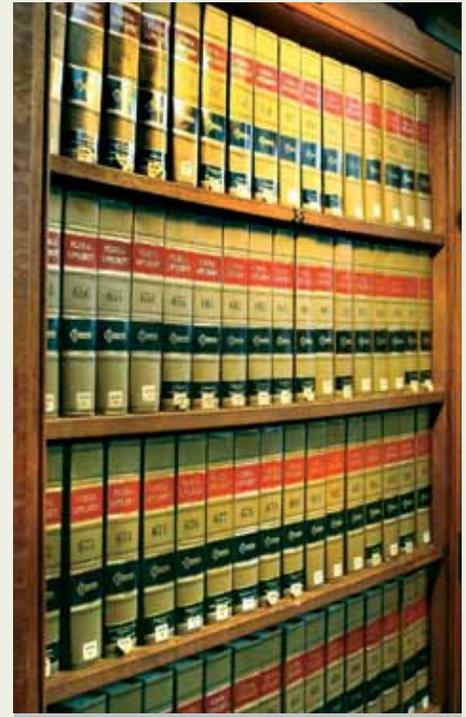
From an antitrust perspective, the organization should monitor the discussions on its sponsored, interactive sites. Even with access agreements prohibiting anticompetitive discussions, the association could be held liable for anticompetitive activity. By monitoring — and removing objectionable posts — the association can further minimize its potential exposure.

With respect to defamation or similar claims, monitoring is not required to obtain the immunity protections of the Communications Decency Act. The CDA is a federal law that protects hosts of online forums from liability for defamation, invasion of privacy and other tort claims for content posted by users.

Nevertheless, if the association becomes aware of defamatory or otherwise "illegal" statements on its site and consciously decides not to remove them, the organization won't be protected from liability. Instead, a court could treat the organization as if it had posted the wrongful statements itself. As a result, if the association monitors its online forums for other reasons (e.g., to watch for anticompetitive statements), as it should, it must remove all objectionable postings as soon as it becomes aware of them.

Minimize Copyright Infringement

Finally, to minimize potential liability exposure for copyright infringement claims, the association should avail itself of the protections of the Digital Millen-



nium Copyright Act. The DMCA is a federal law that provides a safe harbor limiting the liability of website hosts — such as associations sponsoring online communities — for contributory copyright infringement if they follow proper procedures to remove information from their sites that others claim is their copyrighted material. To qualify for the DMCA safe harbor, the association must post and follow "DMCA Notice and Takedown Procedures." The association also must designate an agent to receive notifications of claimed infringement by providing contact information to the Copyright Office and by posting such information on the organization's website in a location accessible to the public. **■**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.