

PBPA Podcast Transcript
Episode 18 - Playing & Performing Music:
What Your Nonprofit Needs to Know About Music Licensing
(21:22 minutes)



Sireesha ([00:02](#)):

Nonprofits use music in many different situations: at fundraising events, in a video on social media or incorporated into educational materials. This music is copyrighted. So there are specific ways that music can and cannot be used. If you, even as a nonprofit, violate that copyright, the repercussions can be costly. In today's episode of the PBPA podcast, Becki Lee will talk to us about music licensing for nonprofits.

Sireesha ([00:39](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:50](#)):

Becki Lee is an intellectual property attorney with the law firm of Arnall Golden Gregory in Atlanta. She's a member of their entertainment and sports industry team, and is also a fantastic volunteer with PBPA. Becki, thanks so much for joining us today.

Becki ([02:07](#)):

Thank you for having me.

Sireesha ([02:08](#)):

So Becki, before we talk about the quirky world of music licensing, can we start off with a brief background on music ownership and copyright?

Becki ([02:19](#)):

Yes, of course. So copyright is a type of intellectual property that protects original works, and that can be anything from music to literature, art, movies, photos, any kind of original content. The only requirement for copyright protection is that it's fixed in a tangible medium. So, for example, as soon as you record a song or even play it live and it's being recorded, that recorded product is protected by copyright. And also when you write a, whether it's sheet music or lyrics, as soon as that's on paper, that part is also protected.

Sireesha ([03:06](#)):

So can't a nonprofit just use music from an independent artists that it hired? What do they need to know about music from, that they hear on the radio, for example.

Becki ([03:17](#)):

The answer is a little bit complicated. So, because there are two ways that music is protected by copyright, you also have to think about two separate kinds of licenses. So the sheet music or the lyrics or the underlying song, that's the composition, and that has a separate copyright. And then the sound recording has its own copyright. So for example, "I Will Always Love You" was written by Dolly Parton, but recorded by Whitney Houston or, and recorded by Whitney, and said, I'm sure some other people! But Dolly Parton still owns the copyright in the composition, even in the Whitney Houston version. So the Whitney Houston recording is a sound recording. And if you were to play that sound recording in a video or publicly at an event, you would have to make sure you had a license to cover the sound recording and the composition. And so obviously that's complicated because no one wants to track down who owns both of those copyrights.

Becki ([04:29](#)):

A lot of times the songwriter also has given part of their copyright to a publisher, and this is why PROs exist. I'm skipping ahead a little bit, but the short-ish answer to that is depending on the setting where you're using the song, you have to make sure all parts of it are licensed for all types of uses. So even though you're a nonprofit and maybe you're working with an independent artist, you have to make sure, in a live setting, for example, that that artist is only playing songs that they wrote and not covering anyone else's songs. And you need to make sure that there are no other writers involved that might not have given permission, for example. So, yes, to answer your question, it's possible for a nonprofit to directly license with an independent artist, but only under certain conditions.

Sireesha ([05:35](#)):

Okay. You mentioned a couple of things there that make this sound really complicated. You mentioned "performing rights organizations" or PROs. And let's talk about that a little more because you had said, as in your example of, "I Will Always Love You", if a nonprofit wants to play that song at a street festival or an event, how are they supposed to know who to get permission from and how are they supposed to go about doing that?

Becki ([06:03](#)):

Yeah. So this is sort of the double edge sword of performing rights organizations. For public performances because you're not using a sound recording because it's an artist playing something live, you really only need to worry about the public performance of the composition. And so what PROs do basically is they have songwriter members and they keep track of who has what type of song writing credit or publishing ownership, and almost every composition that's ever been released. And they help you, well, actually they don't help you track them down, they exist so that you don't have to track them down. So if you have a cover band playing for example, and they play 10 different songs by 10 different artists, there's 10 different publishers. It's crazy. So you pay a flat fee to the PRO and that money goes into a pot. That's kind of the benefit of the PRO is that you don't have to directly license each song, but it also means that they are going to be out there looking for people who are having live performers or playing music over loud speakers and trying to make sure that you're paying that blanket license fee to license that music.

Sireesha ([07:38](#)):

Okay. Before we speak more about those PRO licenses, let me ask you about another side of copyright that comes up often with nonprofits that we work with. They often say that, well, I can use it under "fair use" or because we're a nonprofit and it's an educational purpose. Can you tell me a little bit more about when a nonprofit uses music for those situations? Are they, are they exempt?

Becki ([08:07](#)):

They're not exempt and it is a common misconception. And it makes sense because if you hear the basic rules about fair use, you would think that if it's non-commercial or nonprofit, if it's to raise money that maybe it falls under some kind of fair use exception. Uh, the issue is that, uh, in the court's eyes, well, and then the statute actually in the copyright act, there are four factors to fair use and you have to look at all of them. So I'll just run through them really quickly. The first factor is the nature of the work. So for songs, for example, the works are very creative. It's not like a list of facts or dictionary or something like where you're putting somebody else's ideas or numbers onto a paper. It's a creative endeavor. So it has more protection than other kinds of work might have.

Becki ([09:06](#)):

The second factor is purpose and character of views, which is where the main question with nonprofits comes in. If it's not commercial, if it's educational, if it's commenting or criticizing, then that weighs in favor of fair use. But then you also have the amount and substantiality of the use. So if you're playing an entire song, then you've used the whole song, that factor weighs against you. The fourth is whether, how it affects the marketplace. So if the song is a market substitute for, for example, an authorized or licensed use of the song that also weighs against fair use. So if a nonprofit is holding a gala or something to raise money, maybe the second factor weighs heavily in their favor. But the other factors weigh against that. I don't know of any case law on this topic, but I know that how the PROs treat it for example is they will give you an exemption if you're holding a benefit for someone else. So if your fundraiser is, is your annual gala to raise money for your organization, you still have to pay the license fee. And if you're doing it on the other hand, for the benefit for someone else, you would have an exemption.

Sireesha ([10:31](#)):

The fair use doctrine that has to be reviewed on a case by case basis. And sometimes a nonprofit could use it and sometimes it can not. So let's talk a little bit more about the example that you talked about: if a nonprofit were to use music at a gala, for example, or a carnival for students. Tell me more about what happens in a situation where a nonprofit is trying to raise funds for themselves. not for a third party. Can you speak to us a little bit more about PRO contracts and one-off special events?

Becki ([11:04](#)):

Sure. So if you're at an event, if you're an organization that has multiple events during the year, you're most likely going to be contacted by a PRO if you don't already have a contract with them. And the way that it works is they have different license agreements for, if you have a museum or a retail establishment or gallery or something like that, you'll have some kind of a brick and mortar license for playing music over the loud speaker. If you only have one event per year, and it's always in the same place, then they'll probably make you pay per attendee. Or sometimes it's paid by how much money you bring in. There are some organizations that don't even reach the it's, you know, maybe they owe \$5 based on what the PROs fee schedule is and so the PRO, it makes you pay a minimum annual license fee.

Which is where some clients have been treated unfairly, in my opinion. Not to disparage the PROs, they do have a real purpose in the marketplace, but it can be frustrating for an organization that is spending, you know, a huge chunk of their annual budget on PRO license fees. So there are also special event licenses. So if you're holding your event in different places each year, then you can get a one-off license instead of paying a yearly license. And it's possible that the venue where you're holding the event already has a license in place that covers your music. So it's important to talk to your event planner, if you have one, because they might know. Or the venue manager, ask them if they already pay a blanket license fee, and then you may not need to worry about it.

Sireesha ([13:09](#)):

You know, Becki, many of our listeners are smaller organizations using music at special events. We're not talking about major productions here. So how does the music industry know when an organization is using their music without a license?

Becki ([13:26](#)):

Well, that's an interesting question. I know we talked about this a little bit before, but it's so funny to me because when I first learned about it, I didn't think it was real. But 10, 20 years ago, I don't know how long the practice has been going on. The PROs send independent contractors out to bars and restaurants and other venues to see, does that venue have a jukebox? Are they playing songs some other way over loud speakers? Do they have cover bands playing at their establishment? And they write that down. They report it. The PRO starts calling the venue and saying, why aren't you paying us blanket license fees? And then they keep calling and they keep calling and they keep calling. It doesn't happen as much with nonprofit organizations that was more practice for venues, restaurants, bars, et cetera. But they will go online and look at how you're using music. So for example, we had a client recently who had publicized their event, as you would, and mentioned that they have live music. And so that's all it takes for the pro to say, okay, well, this person is not, or this company is not paying us licensing fees, but they have live music at their events. So I'm going to start calling them until they pick up the phone.

Sireesha ([14:52](#)):

And we'd bring that up so our listeners are aware of kind of what risks are involved and how sometimes this can sound like something that's just theoretical and wouldn't apply to them. But, but it's real. Now Becki, let me ask you about what happens when a nonprofits not playing the music themselves. What if they hire a DJ or a band to play the music? Is the nonprofit still responsible for obtaining a license from the PRO?

Becki ([15:20](#)):

Yes, they are. The artists are not responsible for handling the licenses, even if it's a DJ because the DJ doesn't know. Most likely the DJ is playing at venues that are already paying the license fee. And so it's the venue owners responsibility to make sure that their licensing for that public performance of the song, the artist is the one that theoretically is getting paid to play the song, or maybe would normally directly be paying the songwriters if it weren't for a PRO. So that's usually not on them. It's usually on the venue owner. And so then by extension that sometimes falls on the nonprofit. If they're holding the event and a venue that's not covered.

Sireesha ([16:09](#)):

I guess that is one reason why non-profits should look closely at their contracts, with their artists and with their venues, just to confirm and verify it that they do in fact, have the proper licensing rights to use the music that they plan to play at the event.

Becki ([16:24](#)):

Yeah, exactly. And kind of to a question that you asked earlier, we just had a client where their event was so small that they do have the ability to control whether the artists play original songs or not. So what we ended up doing was putting a little one-page agreement that says you, the artist represent and warrant that you are only playing original songs written by you. You're not playing any cover songs. You'll give us a set list because you want to have those receipts to show. In fact, what we did, directly license with this person and they only sing their songs. I don't normally put that out as a solution because if you have a DJ, for example, you can't do that. And a lot of times it's hard to, if you have a big lineup, control the artists to say, really don't play a cover song. You know, it's logistically, you've got one more thing now on your list that you've got to make sure they actually didn't play any other cover songs and gather set lists from them, et cetera. And you know, when you're planning an event, there are a hundred thousand things going on and that's not something you may have the capacity to monitor.

Sireesha ([17:43](#)):

And so, Becki, my last question is, you know, why would a major industry like music come after a small nonprofit? Wouldn't there be exceptions for violating the pro license? If an organization just uses a song once or in a non-commercial setting,

Becki ([18:02](#)):

I guess the risk is low that you may get sued for one song one time. But, well, I would say practically, the risk is low, but theoretically, you're still infringing someone's copyright and using their music without paying them a license fee. So even though it is the PROs who are really enforcing this, because that's how they get their revenue, the artist is the one in theory, who's not getting paid for their song being played. And so, yes, I mean, I can see where a lot of nonprofits think this is really not a big deal and maybe it's not in certain situation situations, but it's still copyright infringement. So you just have to be really careful. And I will say this though, if a PRO comes to you, call PBPA first, before you sign a contract, because we have, you know, the PROs have very convincing people on the other end of the phone, telling you these, these huge risks that you're taking and you have to do this. They're almost like debt collectors, and they will get you to sign a contract. And the contract renews itself automatically, if you don't terminate. And we just had a situation where we had to ask multiple times for them to terminate the contract and they kept saying, are you sure, are you sure, are you sure? Kind of like when you're trying to terminate a gym contract or a phone contract or something like that. So I would say if a PRO presents you with an annual contract, be very careful call, PBPA call your buddy, who's a lawyer down the street, or something. And really consider whether you need to sign an annual contract or whether you can cover yourself some other way.

Sireesha ([20:06](#)):

So in conclusion, yes, even nonprofits have to pay a license to use music, generally speaking.

Becki ([20:14](#)):

Right.

Sireesha ([20:15](#)):

Becki, thank you for clarifying when and how the concept of fair use and educational purpose actually apply to nonprofits and for breaking down the incredibly complex world of music licensing.

Becki ([20:30](#)):

It's my pleasure. It's not something that I probably will ever understand fully for the rest of my life, but we're all just doing our best.

Sireesha ([20:40](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.