

PBPA Podcast Transcript
Episode 36 – The Fair Use Defense to Copyright Infringement
(17:03 minutes)



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

You may have heard of the "fair use defense" where certain uses of copywritten material can be used without permission. Here at PBPA, we often get questions from clients about the fair use defense. There seems to be a rumor out there that nonprofits being charitable and not commercial entities can use the fair use defense at any time a copyright owner claims infringement. So what is the fair use defense really? Does it give nonprofits a golden ticket to use copywritten material? And how is a nonprofit supposed to even know when content is copywritten? In today's episode of the PBPA Podcast, Jennifer Sandlin will answer those questions and more as we review the fair use defense for nonprofits.

Sireesha ([00:59](#)):

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 ([02:11](#)):

Jennifer Sandlin is an associate with Eversheds Sutherland here in Atlanta. Jennifer counsils clients on a range of intellectual property matters, including the registration of trademarks and copyrights, IP transactions and licensing. And she also assists clients with the enforcement of IP rights through litigation. Clearly, a fantastic speaker for today's topic. Thanks so much for being here to speak with us today, Jennifer.

Jennifer ([02:41](#)):

Thank you for having me.

Sireesha ([02:42](#)):

To start off, do nonprofit organizations have special rights to use Copywritten works without permission

Jennifer ([02:50](#)):

Other than a very limited exception for public libraries? No. In general, the regular laws that surround copyrights that apply to everyone apply equally to nonprofits.

Sireesha ([03:02](#)):

So let's step back for a moment and define what is a copyright?

Jennifer ([03:08](#)):

A copyright is a bundle of rights that a copyright owner has. And so what a copyright is going to attach to is going to be an original work of authorship. Now that sounds complicated, <laugh>, but it's really simple. It can apply very broadly to any creative work. So you hear author and so you kind of wanna think a book or an article, but it's gonna apply to things like sculptures, to paintings, even to software code. So anything that is a creative endeavor and you make something new, you now have a copyright. And the bundle of rights that are going to apply, it's going to be, you are gonna be able to control the right to, uh, reproduce or copy the work, to adapt it, to distribute it, to publicly perform it, and to publicly display it. So the copyright owner can stop other people from doing those things, copying publicly, displaying it. And for those who do it without their permission, that is copyright infringement, which is legally actionable. So someone can sue you in civil court to either seek damages, money, for the infringement or to enjoin, which means to stop you from continuing to use their copyrighted work.

Sireesha (04:25):

So are there some times that copywritten material can be used without gaining the owner's permission?

Jennifer (04:34):

Yes, there are some exceptions to the general rule. Um, and one of these is what we're here to talk about today, which is statutorily provided. There is a statute specifically on this, and that is the fair use defense.

Sireesha (04:49):

Okay. So tell me more about the fair use defense.

Jennifer (04:53):

So the fair use defense is the idea that there are certain uses of a copyrighted material that are fair <laugh>. I know that sounds kinda simple, but the laws has decided that there's certain ways that we should be able to use other people's copyrighted work and that it isn't infringing upon the original owner's rights that they have in that work.

Sireesha (05:18):

Who decides what is fair, in this case?

Jennifer (05:22):

Really, it's always gonna come down to the courts <laugh>. We can, you know, sit down and go through the factors ourselves. You can talk to an attorney and they will go through those factors with you and look at the different facts that apply to your situation. But ultimately it's a legal question. And so in the end, if it really comes down to it, it will be a court that's gonna be deciding whether something was fair use or was not.

Sireesha (05:48):

Okay. Um, you mentioned, the factors. Can you tell us a little more about those fair use factors?

Jennifer (05:54):

Yes. So the fair use defense is a, what we call under the law "a balancing test". What that means is it's not nice cut and dry, there's not a checklist, and you go through it and in the end you say, "well, looky

there, <laugh> it is fair use!". Instead, there are a series of factors that you're going to look at and they're going to weigh in favor of fair use or they're going to weigh against fair use. So some of these factors that the courts are gonna look at is the purpose and character of the use. This is probably the most important of the factors. So in the statute that governs fair use, there is a list of specific uses that are envisioned to be fair use. So these are gonna be things like, um, news, commentary, parody teaching, scholarship and research. So the idea is that, again, we want people to be able to talk about books, we wanna be able to see movie reviews and not be infringing.

Jennifer ([06:49](#)):

And so those are kind of those, the paradigm of what would be fair use. So they're gonna look at that character. The courts have elaborated on this even more and said that they're gonna look for what's called "transformative", so that you're not just copying the work itself. And exactly as is said, you've transformed it into something else. You're giving more back to the public about this work than just it itself. The second factor is the nature of the copyrighted work. So they're gonna look at is it published or unpublished? And that doesn't mean published in the traditional sense. We think of it means literally just made public <laugh>. Did somebody make something and kind of keep it for themselves or do they put it out into the public for others to see? They're also gonna look at how much creative material is actually in the copyrighted work. So things like books and plays and movies have lots of protected elements to them. They're highly protected by copyrights. Whereas other things, maybe a compilation of data or maybe software code, you know, a lot of code is kind of standard. You have to do it a certain way to get a certain outcome that might be slightly less protected under copyright law. So they'll also kind of balance that as well. What is the actual copyrighted work that's being copied here?

Jennifer ([08:08](#)):

The third is gonna be the nature of the use. So is it for commercial use or for non-commercial use? And that doesn't necessarily mean "commercial", again, how we think. I know a lot of nonprofits will go, well, I'm nonprofit, so I'm not commercial at all, <laugh>. But there could be things about a nonprofit, the work they're doing that could still be commercial. Things like fundraising. There is a commercial benefit in that. Um, so that's gonna be taken into account as well.

Jennifer ([08:37](#)):

And last is gonna be the effect of this use on the market or the value for the copyrighted work. So if folks are going to be able to use the copy <laugh> there, that's gonna be a substitute for the original in a way, you're, you're pulling away value from the copyright owner that's also gonna weigh against fair use. So that's, um, kind of those main four considerations or factors that are used in a fair use analysis.

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

Yeah, and I'm glad and I appreciate that you mentioned what can be considered commercial, because that is something that often comes up for charitable entities. But what if a nonprofit is using the copy written material for educational purposes, like teaching others about their mission or if they're using it within part of their curriculum.

Jennifer ([09:33](#)):

Now, as we mentioned, teaching is one of the statutorily provided fair use, again, one of the paradigms, but again, it's gonna depend on how is the, the copyrighted work being used? It doesn't just say teaching equals fair use across the board. So let's imagine that there is a nonprofit and the purpose, the

the mission of this nonprofit, is to educate youth about music. So we could take, there's a, a single song, maybe they wanna use this song as part of their curriculum. They're going to put together, you know, take the sheet music and they're gonna pass it out to students, and students are gonna learn what are the different notes and learn how to read music. There's a good chance that's gonna be fair use. Again, it's for teaching purposes. You are transforming the work. It's, it's being used and beyond just listening to cool music. It's being as a teaching tool that educate youth about how to read music. There's not any commercial benefit to doing it. You're just doing it to, to educate. Good chance that's gonna be fair use.

Jennifer ([10:36](#)):

But you can have the exact same nonprofit and now they wanna put together a fundraising video in which they're gonna educate about, here's our mission, here's what we do, and this cool tune is gonna be playing in the background. And at the end they're gonna say, please go to our website and donate and, you know, help us keep doing our mission. That's gonna be a little dicier. That's probably not gonna be fair use. You didn't really transform the work. It's just there for your commercial benefit. It makes your video look cooler, makes it look slick and nice and entices people in. You're not really educating about the song. It's not, you're not transforming the work. Again, you're just educating about yourself. And it happens to be that this song is playing in the background. So that's again, the difference. It really needs to be, again, about transforming the work itself and then going through that factor analysis. If it's just you're copying it because it helps you <laugh>, that's probably not gonna be a fair use.

Sireesha ([11:34](#)):

Well, what if the nonprofit organization provides attribution? Like they say this material was provided by "x" other organization or person. If they note where the material is coming from, do they still have to go and get permission from the original, um, creator?

Jennifer ([11:56](#)):

Now again, today we're just given general advice. So this isn't legal advice. The answer is for any time when fair use is always going to be "It depends". Um, but when it comes specifically to attribution, no matter what, I would always recommend a giving proper attribution. Even if you feel really confident that, yeah, this is probably fair use, go ahead and say where you got it from. That's always a good way to go. However, attribution is not a get outta jail free card. Even if you know you haven't gone through the fair use analysis, you're just wanting to use the work and you provide that attribution, that's not gonna get you where you need to go. You're still going to need to be thinking about: is this copyright infringement? Are there any defenses here? And, and, and go through that analysis on your own. Um, anytime. We're always going to recommend that folks don't rely on fair use unless you have to <laugh>. It's always better to go out and, and get permission if you can before you use, um, a, a fair use defense because as we've noted today, it's a balancing test. It's not a nice clear cut answer. There's a lot of facts to take into account. It's very fact specific. So it is dicey territory anytime folks want to rely on it.

Sireesha ([13:11](#)):

And you provided some great ideas here already. Do you have any other suggestions for things that a nonprofit can do to avoid potential copyright infringement? If for example, they, want to use some material and incorporate it within their own curriculum, or if they want to use that great song on the background of a video that's on their website, what should they do?

Jennifer ([13:38](#)):

Certainly there are many different options. One is that there's lots of material that's out there in the public domain. When it's in the public domain. That's mean it's free for the public to use. Anybody can use it without having to seek permission. So there's lots of websites and different services out there that provide public domain music, public domain photos, um, and these are very searchable. So you can go and look for different things. One caveat to that is it's gonna be more limited. Um, there's just not gonna be quite as many options. So if you really have your eyes set on a certain song, on a certain text, on a certain photograph, then you're probably gonna wanna seek permission. And again, lots of services out there. There's things like, um, stock photo websites that you can go to and you can purchase either subscriptions or you can purchase kind of per item and they may have discounts for bulk.

Jennifer ([14:32](#)):

And so you can pick out the things you want and figure out what you know your budget is for it and, and go from there. And once you purchase through that, you're also purchasing the license, which means, again, the permission to use, um, this, this work, whatever it is. Again, a song, a photo, um, to use that commercially to use it, it on your website to use it. Uh, make sure you do read through the license and make sure that what your, your use is gonna be covered. Um, but, but likely it is these, these out there are out there, again, you're paying for that permission to, to use it from the copyright owner.

Jennifer ([15:04](#)):

And then the last one is, is just make it yourself <laugh>. You don't always have to go out there and, and find pre, you know, readymade things. Again, if you really know kind of what you want, you can do it yourself. You can have employees within your organization make it or you may hire an independent contractor, a photographer or website designer or something like that to make it for you. The only thing you do wanna watch out for there is still making sure that now you are the copyright owner. So you'll wanna make sure that you have, um, assignment agreements in place, especially if you are hiring outside folks. If you're getting, again, a contractor in to make this for you, make sure you have a written agreement and just make sure that it does say that they're going to assign the copyright over to you. And then you as the organization, you're the copyright owner, <laugh>, and now you control how that material is used so you are freely able to use it, and your materials again, as long as you are the copyright owner and you can stop others from using your copyrighted material, as well.

Sireesha ([16:06](#)):

This is all such great background and suggestions here. Jennifer, I really enjoyed this conversation. Thank you for being here today and for sharing your expertise with us.

Jennifer ([16:18](#)):

Thank you. It was such a pleasure.

Sireesha ([16:21](#)):

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.