PBPA Podcast Transcript
Who Own's Nonprofit's Materials?
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(26:00 minutes)

[00:00:01] **Sireesha:** Your nonprofit has worked hard to create great content: newsletters, curricula, photos, videos, and more. Now you want to control how it's used and shared. But who actually owns it? In this episode of the PBPA Podcast, we talk with Megan Fitzgerald and James Trigg about what qualifies for copyright protection, how ownership differs depending on whether the work was created by staff, volunteers, or contractors, and how to protect your copyright.

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.

Megan Fitzgerald is an associate at Kilpatrick, where her practice focuses on copyright and trademark disputes. Megan also has a background helping creatives through multiple arts-based legal nonprofits.

James Trigg is a partner at Kilpatrick, where he focuses on copyright and trademark law. James has been consistently recognized by leading legal publications, including The Legal 500, World Trademark Review, and The Best Lawyers in America, which named him a Georgia Lawyer of the Year. He's also been a dedicated volunteer with PBPA since 2012.

I'm thrilled to have not one, but two copyright gurus here to join me for our conversation today. Thank you so much for being here today, Megan and James.

[00:02:42] **Megan:** Thank you for having us.

[00:02:43] **James:** Thank you. Great to be here.

[00:02:46] **Sireesha:** So let's start very big picture. Megan, could you start us off by helping us understand what qualifies for copyright protection?

[00:02:58] **Megan:** Yes. Copyright protection can cover any original work of authorship fixed in a tangible medium of expression. So what does that mean? An original work is just anything that is independently created with at least a minimal degree of creativity. Uh, and there is a lot of case law that really breaks down when they say minimal degree of creativity, they mean it. It does not have to be the next museum-worthy masterpiece just a little bit of creativity suffices.

And a fixed, intangible medium of expression, uh, means that it's sufficiently permanent or stable. Um, it's written down, recorded, more than just transitory. So for example, if you have a play, if you've written down the script, if you've recorded the performance, those would be copyrightable.

But if you're maybe doing an improv show where there was no script and no one recorded it, that's transitory and would not necessarily qualify for copyright protection. There are many ca- um, categories of works that, that would qualify, including literary works; musical works, including lyrics; dramatic works that can include the accompanying music; choreography is a fun one people don't necessarily think of; um, pictures, paintings, illustrations, sculptures; movies; other audio visual works; sound recordings; and another fun one is architectural works, uh, that people don't necessarily think of at first.

Uh, and to get that copyright protection in the United States, you don't need to register. That certainly is something that has its own set of advantages, uh, which I believe James will talk about a little bit later today. But the copyright protection applies as soon as the work is put in that fixed medium.

Now the protection does not cover facts, procedures, processes, uh, methods, discoveries, or ideas. So that is an important distinction

[00:05:07] **Sireesha:** Can we talk a little bit more about ideas? Uh, we have clients who often share with us that they have an idea and they wanna copyright it. Um, so James, can you give me a better understanding, what's the difference between idea and then something that's protectable?

[00:05:24] **James:** So copyright law is clear, as Megan just said, that, uh, it does not extend to ideas, concepts, methods, things of that nature. There is a term that is often used in copyright cases called the idea-expression dichotomy. This means that a general idea or general concept, a way of doing things is not protectable, but the specific expression of that idea can be protectable under copyright law.

One example is, let's say that a nonprofit has hired a programmer to write a piece of source code that can be used by nonprofits to track donors, to follow up with donors, to enhance engagement with donors. And that particular source code has specific text associated with it, has a particular organization. Uh, the screen displays of that source code have certain eye-catching graphics that are associated.

In connection with that work, the nonprofit cannot protect the idea of a software program that tracks donor engagement. Um, that's sort of the idea level of that particular creation. And another nonprofit could develop its own software program to perform this particular type of function. But what the nonprofit can protect is the way that the idea for that program has been expressed, so the specific text of the program, the specific visuals, the specific combination and organization of elements. Those expressions of that concept are something that copyright law can attach to.

[00:07:36] **Sireesha:** Okay. Yeah, that makes sense. And now I'm wondering, what is the difference in terms of ownership based on who creates the content? For example, if an employee creates something during their job, does the nonprofit automatically own it?

And what if that same employee is working outside of work hours or is working on something kind of, quote unquote, "On the side"? Who owns the content in that situation?

[00:08:10] **Megan:** For employees, the baseline rule is generally that works created by regular employees within the scope of their employment, uh, those works belong to the employer.

Now, that certainly leaves, leaves some potential gray area. Uh, you need the employee to have a very clearly defined scope of employment and in particular, well, are they using resources of the employer in creating this? Is it related to the work of the, the nonprofit that they're working for?

There are a lot of areas that it is worth clearly identifying in any employment agreement. But the baseline rule, um, would put those works created by employees clearly within their job description as belonging to the employer. Um, and this is actually one of the specific definitions of work for hire, which is a term that is very frequently tossed around, um, that has a pretty narrow actual definition. One of those baseline definitions is a work created by an employee fully within the, the scope of their employment

[00:09:31] **Sireesha:** Now let's talk about volunteer. What if a nonprofit has a volunteer that creates, um, material such as a logo, a curriculum, or a video? Who owns that, the nonprofit or the volunteer?

[00:09:47] **Megan:** Generally, that will be the volunteer. Outside of any specific agreements designating otherwise , that default ownership will be with the volunteer, uh, since they are not an employee under the traditional legal definition. Even if it's a nonprofit where volunteers are function- functioning in a very employee-like role, uh, that is still an important legal distinction.

[00:10:14] **Sireesha:** Okay. So the default would be that the volunteer would own it unless they do something specifically otherwise. And we'll talk more about that later. Now let's talk about what if the creator of the work is a contractor or a freelancer, such as a graphic designer, photographer, consultant. Who owns the copyright in that case?

[00:10:39] **Megan:** This tends to fall a little bit in the middle. The default here is still if there is no written agreement, the default ownership would be with that contractor or freelancer. However, these situations you are much more likely than a volunteer to have some sort of formal agreement in place, and that agreement very likely will designate the copyright ownership one way or another.

This is, this is an area where, uh, it's important to revisit the work for hire concept. A lot of people will want to make an agreement with a contractor that may use that term, but that term only applies under certain specific circumstances. Uh, one which we touched on is the employer-employee relationship.

Um, but in a contractor or freelancer relationship, you would have to be talking about a work specifically ordered or commissioned for use as a contribution to one of a specific category of enumerated works. So in a lot of those contractor or freelancer situations and relationships you might be better off rather than just calling it a work for hire and assuming that you're covered.

Uh, you might want to really think about what you're trying to get. Would you like an assignment of copyright? Would you like some specific designation of who has which rights, from the copyright and ability to use the work in certain ways, um, and really enumerating that more, more specifically

[00:12:14] **Sireesha:** So Megan, what language should be in the contract to give full assurance to the nonprofit that they will be the owner of whatever it is that they are paying for?

[00:12:27] **Megan:** It can be very situation specific depending on how the organization wants to use the material, what type of material they're talking about. For example, yeah, I can imagine if a, a nonprofit is working with an artist for maybe a piece of artwork that they want to be able to use that might be something where they don't necessarily need or want a full assignment of the copyright, but might want some sort of license to use the work in the specific ways that they're hoping to use it, while still allowing that artist to retain certain ownership and control of the work.

In other situations, it may be important for the nonprofit to have that full ownership and get a full assignment of the copyright from the creator of the work. The main thing is to make sure that there is clarification of what exactly is covered and who retains what rights. That is useful to have, uh, as both just a baseline for what the nonprofit would typically want from its volunteers or its contractors, and going back to the employee situation, it may be worth including provisions for employees to really clarify what is and is not within the scope of their employment.

And really with this, the more detail that you do have written out that clearly explains what rights are at issue, who retains them, who can use the work in what ways, the better off all of the parties involved are. And in addition to the copyright, there are also moral rights, which can, uh, be sort of adjacent to copyright in terms of even if you have assigned the copyright to the organization, the creator may have some rights about how you're able to use it or edit the image or graphic if you're going to maybe do a couple of variations of it, or whether you have to credit and attribute them on displays of the work.

And so that's another adjacent category of rights that's important to think about

[00:14:37] **Sireesha:** Yeah, that's really interesting, and it's good to know that there's a variety of options for nonprofits in terms of who owns it. Kind of a shared ownership is an, also an option. I know some of our organizations that we represent sometimes are hesitant to bring this up with the creator. Sometimes they don't wanna step on toes, or they make an assumption that, "Hey, you're a volunteer. You're volunteering with us, so that means that we'll be able to have full ownership or, or right to use whatever content you're creating." But it's good to know that there are options, and this is definitely something that nonprofits should not shy away from and seek clarification on.

James, what about if we're in a situation where a nonprofit co-creates material? They're, if they're working with another partner organization to create a curriculum or toolkit or report. In that sort of situation, how does ownership look?

[00:15:40] **James:** So when co-creators are collaborating to create a joint work, in other words, a work that incorporates contributions from more than one creator, the default rule in that circumstance is that each co-creator who has contributed copyrightable content to that work is considered to be a co-owner of the copyright.

Um, copyright law, at least not as a default rule, copyright law does not assign percentage ownership shares based on, for example, the amount of contribution or the importance of the contribution that each contributor made. If there were four contributors to a work and one of them did eighty percent of the work and one of them did ten percent, and the other two did five percent apiece, in the eyes of copyright law, they would each just be co-owners of the entirety of the work in, in equal shares. And so the fact that the person who did or the entity that did eighty percent of the work may have done most of the work, it doesn't give them, by default, a greater copyright ownership interest.

An interesting thing about that particular scenario is that when a work has been jointly created by multiple creators and you have this joint ownership, each joint owner is actually free to go out and grant non-exclusive licenses, to third parties to use the work without getting the permission of the other co-owners.

Um, the one caveat to that is that if one of the co-creators ends up receiving revenue as a result of that licensing activity, they're obligated to share or to account to their co-owners for their relative proportions of the revenue.

So let's, let's say that four co-creators come together to write a song, for example. And one of the co-creators then goes and licenses that song to a popular singer, and they get paid a hundred thousand dollars for the rights to use the song. The co-creator who issues that license, again, doesn't have to get the permission of the other creators to grant the license, but they do have to share in that hundred thousand dollars that they made off of licensing.

Sireesha, as you might imagine, um, from what I just described, co-creation scenarios can often get really thorny and can get really complicated. And going back to the theme of the previous discussion about assignments of copyright and getting things as detailed in writing as you possibly can, I think co-creation is another area where having a written understanding that clearly delineates who's going to own what and who can do what with the work, having a written agreement that covers those things really works to the benefit of everyone.

[00:19:05] **Sireesha:** Once again, don't assume. Talk, talk in detail and hash out details with your co-creators. So for my last question, James, I'm wondering, once a nonprofit has-- is confident that it owns this material, what additional steps, if any, should it take to ensure that they continue to maintain their copyright or to protect their copyright going forward?

[00:19:34] **James:** So there's one very easy, thing that, that any copyright owner can do, and that is simply to use a copyright notice in connection with any sort of public dissemination or display of the work. The copyright notice, as most listeners probably know, is the letter C with a circle around it, the year that the work is first published, and then the name of the owner.

And, typically there's a way, if it's a work that's being disseminated online, you can drop that copyright notice, for example, on the footer of a webpage. If it's a set of printed materials, um, the copyright notice can be placed, for example, on the title page or on the credits page of the written materials. It's normally pretty easy to figure out a, a logical place to put that notice, and that notice is a great way to signal to the world that this is proprietary material in which someone is claiming ownership.

Now, I wanna emphasize that one does not forfeit copyright ownership or waive copyright ownership in any way if they don't use a copyright notice.

Interestingly, in the United States, that used to be the law. Publication of a work without notice would actually result in forfeiture of copyright ownership, which you can imagine that's a very draconian result for someone who might not have been sophisticated, who just mistakenly neglected to use a copyright notice. That is no longer the law in the United States, and publication or dissemination of a work without notice does not forfeit copyright, but it is nonetheless still best practice to use a copyright notice where possible

The other thing that a copyright owner can do to protect their rights in a work that is perhaps somewhat more involved than just simply using a copyright notice is to apply to the copyright office for registration of that work.

Megan mentioned earlier that you don't have to have a registration in order to have a copyright. Copyright attaches to a work as soon as that work is fixed in a tangible form. But registration of a copyright with the copyright office can carry a number of significant advantages for the copyright owner.

Um, I think most notably, registration of a work preserves the copyright owner's access to certain types of remedies in litigation if they ultimately find themselves in a situation where they have to enforce that copyright against an infringer. And specifically, timely registration of a work, and by timely, I generally mean timely means the work has been registered before an infringer has infringed it. That registration will protect the copyright claimant's ability to, number one, get access to a type of damages under the Copyright Act called statutory damages, which can sometimes be easier to prove and establish than having to prove how they were actually damaged or having to prove the infringer's profits, which are other types of remedies one can get in copyright litigation.

So the preservation of access to statutory damages is a really important benefit of registration. And then the second thing, a-and I think perhaps just as important as statutory damages, maybe even more so, is timely registration preserves the copyright owner's ability to recover their attorney's fees if they have to sue and they prevail.

Sometimes copyright cases can be really expensive to pursue. It's not unusual for a copyright case that goes to trial to cost half a million, three-quarters of a million, or a million dollars or more. And in a case where the damages may not be that significant, um, the ability to get attorney's fees in addition to recovery of damages can be really important to a copyright owner.

[00:24:05] **Sireesha:** Well, thank you both so much. I really enjoyed this conversation. It has included so much great knowledge and insight into copyrights. And with this information, I think nonprofits can better understand their intellectual property so they can better serve their communities. Thank you, James and Meghan, for sharing your time and expertise with us today.

[00:24:29] **Megan:** Absolutely. Thank you so much for having us. I always enjoy getting the chance to share some knowledge in this area.

[00:24:36] **James:** Uh, very much our pleasure. And one other quick thing about copyright registration. It's not super expensive to do. The filing fee is actually just $65, and the copyright office website is pretty user-friendly in terms of walking people through the steps of how to do it.

So I just wanted to add that, that final note with regard to copyright registration, is that it is think it's a process that is very much accessible to the layperson.

[00:25:04] **Sireesha:** I'm glad you mentioned that James, 'cause we do actually have an article that kind of walks through the steps, so I can include that in the show notes for any listeners who are interested.

Thank you, guys.

[00:25:15] **James:** Thank you.

[00:25:18] **Sireesha:** 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.