

Top Ten

Current Key Copyright Issues and Pitfalls Affecting Nonprofits

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With decades of experience assisting nonprofit clients with copyright issues, we periodically like to offer refreshers on key copyright issues and highlight current trends we see nonprofit organizations encounter with copyrights. Below are some of the key copyright issues that we have found increasingly relevant to nonprofits of all sizes and types.

1. A COPYRIGHT AUTOMATICALLY EXISTS UPON CREATION.

A copyright is a type of intellectual property that exists once an original work of authorship is created. Copyright registration has significant benefits, as will be discussed below, but a copyright exists automatically even without a registration. This means a nonprofit routinely encounters copyrights it creates or that belong to others throughout the day, whether in print materials, power point presentations, photos, music, artwork, or software programs, and online, including on websites and social media. Every day, nonprofits create new copyrights and interact with copyrights of others.

2. A WORD ABOUT COPYRIGHT REGISTRATION.

As noted above, while registration is not necessary for a copyright to exist, it is highly recommended and should be treated as a best practice for more important content. First, nonprofits cannot file a copyright infringement action in court without a copyright registration. Second, if a nonprofit applies to register its copyrights before someone infringes them, the organization can seek more damages from the infringer if it decides to sue, including statutory damages (which are generally higher and easier to prove) and the court possibly ordering the infringer to pay the nonprofit's legal fees. With the leverage of having a registered copyright, cease and desist letters are much more likely to be effective and encourage the infringer to avoid litigation entirely.

Nonprofits do not automatically own copyright for works created by non-employees.

- 3. NONPROFITS DO NOT AUTOMATICALLY OWN COPYRIGHT FOR WORKS CREATED BY NON-EMPLOYEES.** Under federal copyright law, the individual who created the original and modestly creative material generally owns the copyright unless (1) the person created the material for their employer within the scope of their employment or (2) a properly written agreement exists that transfers copyright ownership. Simply paying the outside party does NOT mean the nonprofit owns the copyright. In the nonprofit context, this means service contracts with vendors and agreements with board members and other kinds of volunteers must include a provision to properly transfer ownership of the copyrights in the material created in the course of their work for the nonprofit. Documented ownership rights are critical in the event the organization seeks to combine with another organization or sell a program, establish its rights through a copyright registration, or stop another from using the material without authorization.

Similarly, if your organization obtains creative material from outside parties, the party that provides the content should stand behind the materials they provide. This means that they should offer assurance in contractual terms that the materials they develop are original (or third-party permissions have been obtained) and will not infringe anyone else's rights and, if this is not true, that your nonprofit can seek redress if the nonprofit is sued or receives a settlement demand due to materials given to the nonprofit by the outside party.
- 4. THERE IS NO BLANKET NONPROFIT FAIR USE EXCEPTION.** Generally speaking, one needs permission to use another's copyrighted material absent the work being in the public domain (roughly 100 years old as a rule of thumb, although there are nuances to this) or deemed to be "fair use." *And, contrary to what we find some nonprofits have always assumed, there is actually no blanket fair use exception for nonprofit use.* Rather, whether something falls within the fair use exception under copyright law is an extremely fact-specific analysis, although some nonprofit uses are more likely than others to be deemed a fair use. Lately the already once risky fair use exception has become even more risky in light of a string of court decisions finding no fair use: You can learn more [here](#),¹ [here](#),² and [here](#).³
- 5. OPEN-SOURCE MATERIAL OFTEN HAS RESTRICTIONS.** Given the risks to using content without owning it or without the necessary licenses, many nonprofits think it appears safe to use open-source material, and it indeed may be. But it is important to note that many pieces of content with an open-source license have restrictions that must be followed. For example, there are six different [Creative Commons licenses](#),⁴ and each provides different permissions and contains distinct restrictions to be followed to avoid violation of the license conditions. Recently, there was a [notable appellate court decision](#)⁵ that found an online news journal liable (and rejected its fair use defense) when the journal used a photo that the photographer offered free of charge and failed to include the attribution to the photographer that his open-source license required.
- 6. PHOTOS AND MUSIC.** Nonprofits should be especially careful not to use photographs, popular music, or other content on their websites, on social media platforms, and even in live performances, without the necessary licensing. It is extremely risky to take photos from the internet and use them on your website or social media platforms. Many photographers and news agencies work with companies that use technology to search the internet for the particular photographer's photos. We frequently see nonprofit organizations on the receiving end of settlement demands for using copyrighted photos without authorization—or without retaining proper documentation about the license it had. If the nonprofit

¹ <https://www.venable.com/insights/publications/2024/02/fourth-circuit-hands-photographer-a-clean-sweep>

² <https://www.venable.com/insights/publications/2023/05/the-supreme-courts-warhol-ruling>

³ <https://www.venable.com/insights/publications/2017/10/pendulum-may-be-swinging-away-from-fair-use>

⁴ <https://creativecommons.org/share-your-work/cclicenses/>

⁵ <https://www.venable.com/insights/publications/2024/02/fourth-circuit-hands-photographer-a-clean-sweep>

ignores this demand, the matter is typically then elevated to a law firm. In addition, many nonprofits frequently use popular music to promote an upcoming event or showcase a prior event. Typically, the nonprofit should have a license to use such music absent an extremely compelling fair use case. You can learn more about music licensing [here](#).⁶

7. AI. The arrival of AI presents great opportunities and significant challenges. First, much of the content an AI tool pulls from existing works to create a new work is owned by another copyright owner, who likely did not grant permission for use of their content to the nonprofit whose staff and representatives obtained it through an AI tool. This could expose your nonprofit to liability if the original owner of the content sees their material in a new work put out by the nonprofit. Given the heightened possibility nowadays that material has been

created with AI, consider having serious discussions with your staff, outside consultants, and vendors about the use of and the rules surrounding AI. Second, courts and the U.S. Copyright Office have been clear that only humans can create copyrights. Search the phrase “monkey selfie” on the internet, and you will always remember this rule after reading the articles and seeing the monkey’s grin. Because non-humans cannot own copyrights, material created solely by AI is not protected by copyright. This becomes a problem if the nonprofit does not technically own the copyright and cannot therefore register it, license/sell the material to others, or legally stop others from using the material without the nonprofit’s permission. There are, however, some scenarios where portions of the work could be owned by the nonprofit when it is created with AI, and this will depend on the contributions of the nonprofit staff member, or consultant, creating the final product. A detailed discussion by the Copyright Office on this issue can be found [here](#).⁷



8. COPYRIGHT ENFORCEMENT. It is often an important means of carrying out a nonprofit’s mission to widely disseminate the organization’s materials. Recipients may

assume, incorrectly, that because the material originated from a nonprofit, they can widely reproduce or distribute the materials without obtaining permission. At a certain point, many nonprofits should and do draw the line at certain uses. Ideally, nonprofits should make clear when they are granting broad permission and when others must seek and obtain permission before using the nonprofit’s materials. When another entity uses a nonprofit’s materials without permission and the nonprofit wishes to stop the unauthorized use, there are potentially a variety of ways to address it. Options range from a simple cease and desist letter to a more robust settlement arrangement, sending a DMCA takedown notice (as discussed below), proposing a licensing arrangement, or engaging in litigation, to name a few. In all cases a nonprofit organization will benefit from having clear and well-thought-out policies and protocols when it comes to permissions for the use of its copyrights and enforcing unauthorized use.

9. DMCA TAKEDOWN NOTICES. Nonprofits are strictly liable for copyright infringement for infringing material or user-generated content hosted or stored by the nonprofit, such as on their websites or other networks, whether or not they know the infringing material is there. Section 512 of the federal Copyright Act contains a mechanism to provide a “safe harbor” from this form of infringement liability to those nonprofits that follow all the necessary

⁶ <https://www.venable.com/insights/publications/2020/05/conducting-your-way-through-music-licensing>

⁷ <https://copyright.gov/docs/zarya-of-the-dawn.pdf>

statutory steps and put a “DMCA Takedown Notice” system in place for rights holders to have their unauthorized works removed efficiently. Nonprofits that fail to respond appropriately to a valid DMCA Takedown Notice lose their safe harbor from copyright infringement liability for the infringing material they are hosting and can face significant monetary damages, even if the infringement is unintentional. More information on the DMCA formalities and the requisite steps to preserve your safe harbor can be found in our previous articles [here](#),⁸ [here](#),⁹ and [here](#).¹⁰ In short, it is dangerous to ignore a legitimate DMCA Takedown Notice, because it can cost your organization significant amounts of money in terms of damages and legal fees for copyright infringement and diverting staff attention away from mission-related programs.

Conversely, nonprofit organizations may also be able to efficiently remove their content that another entity is using without permission, by sending a DMCA Takedown Notice. DMCA Takedown Notices also are statutorily required to contain certain specific statements or the recipient is entitled to ignore them. In addition, the DMCA does contain consequences for a nonprofit, or other entity, that sends a DMCA Takedown Notice with misrepresentations, so we recommend carefully evaluating any notices with counsel prior to sending them.

10. PUBLISHING ACTIVITIES. Increasingly, nonprofits are publishing books, journals, or other useful manuals in their areas of expertise, whether to give these away free of charge or, more commonly, to license or sell them to constituents or the general public. Publishing law is a very specialized industry, and we recommend that nonprofits seek qualified legal counsel when dealing with the publication of their journals, academic materials, or books, whether the organization decides to self-publish, perhaps with an outside distributor, or engages a professional publisher to publish, market, and sell the publication. You can learn more [here](#).¹¹

For questions about copyright or to learn more about Venable LLP, contact Linda at ljzirkelbach@Venable.com.



Meet Linda

Linda Zirkelbach has extensive experience representing prominent media companies and brand owners, best-selling authors, book and software publishers, scholarly journals, and nonprofits in intellectual property matters. Linda focuses on leading copyright and trademark enforcement actions for major companies, publishing law, strategic copyright counselling and clearance work, digital rights and complex Digital Millennium Copyright Act (DMCA) issues, and trademark strategy and disputes.

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⁸ <https://www.venable.com/insights/publications/2022/03/nonprofit-organizations-beware>

⁹ <https://www.venable.com/insights/publications/2020/07/dmca-512-report-key-findings>

¹⁰ <https://www.venable.com/insights/publications/2019/11/tis-the-season-act-in-time-or-your-nonprofit>

¹¹ <https://www.venable.com/-/media/files/publications/2016/06/key-trademark-and-copyright-issues-every-print-or/files/key-trademark-and-copyright-issues-every-print-or/fileattachment/key-trademark-and-copyright-issues-every-print-or.pdf?rev=1bce83da6c034ea5a4d736b20aa0949d&hash=F07A5DF57A2E756E187D7FF1F8E8EF5D>