Protecting Your Copyright and Avoiding Infringement of Others – Live Q&A

Presenter:
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Host:
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Session Agenda

- Copyright defined and what is protectable
- What is not copyrightable
- Legal basis for protection
- Public policy behind law and how it informs protections
- Copyrightable IP nonprofits are likely to create, should they protect it if they do, how, and what to do if it is infringed
  - Copyrightable works – most nonprofits create them but it may or may not be worth registering based on value
- Copyrightable IP nonprofits are likely to infringe, how to avoid that, and what to do if you have infringed

NIA Member:
Arlington Philharmonic Association
Arlington, VA
Poll

How many of you have been threatened with or included in a trademark/copyright infringement case?
Intellectual Property (IP) and Protectable IP

**IP** - A work of intellectual creativity or invention that has economic value

**Protectable IP** - A work of intellectual creativity or invention that enjoys a legal basis for the owner to restrict use by others

Not a right to do something, instead a right to stop others from doing something
Copyright – right under law to prevent others from copying, transmitting, presenting or making derivatives of anything fixed by the author in a permanent medium

Patent Right – right granted once a patent has issued to prevent others from making, using, or selling
Intellectual Property Categories

• Trademark, service mark – right to stop others from associating the mark with goods or services
  ▪ AMS (acronym), Alliance Member Services (full words)
  ▪ the image
  ▪ ay’emes, niak (the sounds)
  ▪ Colors combined with sounds and words

• Trade Secret – secret used to gain economic advantage and a right to stop others from using it without permission
Copyright

• Must be a modicum of creativity; you cannot copyright something too short. Use trademark for that.

• Must be fixed in a permanent media

• Pure data cannot be copyrighted so use trade secret for that (e.g. customer lists, tables of numbers)

NIA Member:
Big Friend Little Friend
of the Mitchell Area
Mitchell, SD
Copyright

• US Constitution Copyright Clause is the basis for protection for creator/author and subsequent owners

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

• POLICY – encourage creative works; deal – exclusive use in exchange for creative work that can inspire others
Copyright

- Methods of doing something cannot be copyrighted so use patents for that (method to calculate a premium)

- If it is a derivative work, a license is needed

- Derivative works are based on, derive from, or incorporate an already copyrighted work
Copyright

• Registration not required

• Some rights arise when the creative work is fixed in a permanent medium and it is considered protected by copyright law as soon as it is fixed
Copyright

Registration provides:

- Presumption of ownership in legal proceedings
- Remedies if you win: Equitable (court order to stop) and Legal ($)
- Can help to mention in a cease and desist letter prior to legal action

Registration requires:

- Fee
- Deposit the work
- Work be copyrightable subject matter
Infringement Defined

• Unlicensed use of the intellectual property of another

• Copyright looks for similarity and if you had access to the item

• Defenses
  ▪ Independent creation
  ▪ Fair use
Protecting Copyrighted Works of Your Organization

• General rule is register it if unauthorized use, copying, and/or distribution would undermine your business model

• Even more so if it cost a lot of time and money to create

• Still some protection for things that you don’t register
Protecting Copyrighted Works of Your Organization

If you see unauthorized use, the general first response is to send a cease and desist letter regardless of damages (economic or non-economic).

Bringing a lawsuit can be expensive, is best done by a specialized attorney, and will likely only make sense if there is significant damages (economic or non-economic).
Copyright Infringement

• Unlicensed use of the copyrighted work(s) of another
  – Copied, published something without knowing the source
  – Copied, published something where the source is known but no permission or improper permission
  – Used without knowing what a copyright is

• Legal test
  – Similarity
  – Access to the copyrighted work

NIA Member:
HomeFront
Lawrenceville, NJ
Avoiding Infringement Risks

- Website
- Brochures
- Social Media posts
- Email
- Events
  - collateral and communication during event
If You Discover You Are Infringing

Stop immediately!

NIA Member:
Uncommon Good
Claremont, CA
If You get a Cease and Desist Letter or are Otherwise Accused of Infringing

- **Unlicensed use of the copyrighted work(s) of another**
  - Copied, published something without knowing the source
  - Copied, published something where the source is known but no permission or improper permission
  - Used without knowing what a copyright is

- **Legal test**
  - Similarity
  - Access to the copyrighted work
Primary Points

- IP Rights are rights to stop others from doing something
- Protect your IP if the cost of protection is small compared to the cost of creation and the risk of infringement
- Avoid infringing the copyrighted works of others
- Seek specialized legal advice because specialized knowledge if nearly always required to protect your IP and to address infringement of the IP of others.
Seeking Sound Legal Advice

• Find the legal clinic at your local law school

• You are a nonprofit
  ▪ Seek out pro-bono help from top law firms who have leaders in IP law
  ▪ They are looking for pro-bono work like this

• Hire attorneys that are specialists in IP
Additional Questions

AI:
- How does the use of AI impact copyright?
- What should nonprofits be aware of when using AI tools?
- Ramifications of using AI-generated artwork?
- Risks associated with using AI?

Indemnification:
- Can you speak about indemnity agreements?
- What would be considered a balanced policy for an indemnification clause?
Further Resources

Access free to use copyrighted materials:

- https://creativecommons.org/
- https://www.pexels.com/creative-commons-images/
- https://pixabay.com/
- https://unsplash.com/

USPTO resources:

- https://copyrightalliance.org/education/copyright-law-explained/
- https://www.uspto.gov/trademarks-getting-started/trademark-basics

Trademark further information:

- https://www.inta.org/TrademarkBasics/Pages/TMBasics.aspx
<table>
<thead>
<tr>
<th>Eligible Subject Matter</th>
<th>Trademark</th>
<th>Copyright</th>
<th>Patent</th>
<th>Trade Secret</th>
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</thead>
<tbody>
<tr>
<td>Source identifiers, the form of which is virtually unlimited, including words, designs, logos, slogans, sounds, colors, product configurations, and product packaging</td>
<td>Works of authorship (i.e., literary, musical, dramatic, pantomimes &amp; choreographic, pictorial, graphic, &amp; sculptural, audiovisual, sound recordings, architectural)</td>
<td>Inventions (i.e., processes, machines, manufactures, and compositions of matter; ornamental designs)</td>
<td>Commercially sensitive information (e.g., secret formulas, patterns, compilations, programs, devices, methods, techniques, or processes)</td>
<td></td>
</tr>
<tr>
<td>Distinctiveness (i.e., ability to act as source identifier)</td>
<td>Originality and fixation in a tangible medium</td>
<td>Novelty, nonobviousness, utility, adequate written description</td>
<td>Actual secrecy, reasonable efforts to maintain secrecy, independent economic value</td>
<td></td>
</tr>
<tr>
<td>First to use in commerce (either actual or constructive)</td>
<td>Author or author's assignee</td>
<td>Inventor or inventor's assignee</td>
<td>Developer or developer's assignee</td>
<td></td>
</tr>
<tr>
<td>Use of a similar mark likely to cause confusion in the marketplace as to the source of a product and/or service</td>
<td>Reproducing, adapting, distributing, performing, or displaying a work without authorization</td>
<td>Make use, sell, offer to sell, or import.</td>
<td>Acquisition, use, or disclosure without authorization</td>
<td></td>
</tr>
<tr>
<td>Injunctive relief; damages including lost profits, infringer's profits, or a reasonable royalty</td>
<td>Injunctive relief; damages including lost profits, infringer's profits, a reasonable royalty, or statutory damages</td>
<td>Injunctive relief; damages including lost profits, an established royalty or reasonable royalty, or enhanced damages</td>
<td>Injunctive relief; damages including lost profits, infringer's profits, or a reasonable royalty</td>
<td></td>
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<tr>
<td>First sale doctrine, fair use</td>
<td>Merger, fair use, first sale doctrine, compulsory licensing</td>
<td>Exhaustion, reasonable repair</td>
<td>Independent development</td>
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Thank you for your participation!

Chris Reed
General Counsel and Chief Risk Officer

www.insurancefornonprofits.org