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Collaborative Creations: Development and Use of Joint Works

The classic image of an artist is one of a person who labors alone, back bent over a masterpiece, toiling away in solitary brilliance. In the community arts world, we know that this is not always true — art can be a joyful, collaborative experience. From a legal perspective however, there are certain issues a nonprofit organization should be aware of when it works with others to create art. This Legal Alert is to help nonprofit organizations understand these “joint works” and identify potential legal issues.

This Legal Alert will answer common questions that a nonprofit organization should be asking about its collaborative creation process and then present hypothetical examples to identify typical problems, along with possible solutions.

Questions to Consider

What happens when artists create work together?

Other than beautiful art, there are a number of consequences under United States copyright law that could result from artists working together, including the creation of joint works, collective works, and derivative works. Each different classification has its own consequences in copyright law and could be the subject of its own Legal Alert; however, this Legal Alert will focus on joint works.¹

What is a joint work?

A joint work is created by two or more “authors”² who intend for their contributions to be merged into inseparable or interdependent parts. Certain types of work are more commonly made jointly, such as songs, movies, and operas, but ultimately, any copyrightable material can be a joint work. How a work is created is more important than the type of work itself.

How do you know if you are at risk of creating a joint work?

Joint works are made by two or more authors who intend for their own contributions to be merged into one work. To know if there might be more than one author, nonprofits should clearly identify who is contributing to a work and understand each individual's relationship to the organization. If there are multiple contributors to a work and each of the contributors retains an ownership interest in their own intellectual property, this could be a situation where a joint work is created.

¹ For further information regarding collective works and derivative works, see "Contributions to a Collective Work", FL 104, United States Copyright Office, at <https://www.copyright.gov/circs/>; and "Copyright Basics", Circular 1, at <https://www.copyright.gov/circs/>.

² Under copyright law, the creator of a work is referred to as an “author” regardless of the media in which the work is produced.

How do you know if a contributor will have an ownership interest in the final work?

The answer to this question depends on the contributor's relationship to the nonprofit.

- *Employees.* If the individual is an employee and is engaged in work within the scope of his or her employment, then the nonprofit organization will likely own such work as a work for hire.
- *Independent Contractors.* If the individual is not an employee of the nonprofit organization, then the individual or the entity that creates the copyrightable material will likely have an ownership interest in any material they help create.

Essentially, nonprofit organizations should be on alert whenever non-employees are contributing to the development of intellectual property with employees. Nonprofits should be aware that, depending on the circumstances, volunteers, interns, and program participants may be considered independent contractors under copyright law. If it is unclear whether an individual is an employee or an independent contractor, it is likely best for the nonprofit organization to consult an attorney so it can fully understand the implications from an intellectual property law perspective.

For example, a nonprofit organization should be aware that it might own a play jointly with its independent contractors if its employees work with independent contractors to write the script to the play. However, the analysis of whether or not a joint work has actually been created is far more nuanced than the foregoing scenario.

How do authors create a joint works?

If the nonprofit organization has employees and independent contractors creating work together, there are several additional factors to examine to determine if there is a risk a joint work could be created.

The main factor is the authors' primary intentions at the time the work is being created. If, at the time the contributions are being made, the authors primarily intend to make a contribution to a total work, then the combined work may be deemed a joint work. The timing of the intent is a key determining factor. If the author completes his or her contribution without intending to contribute it to a whole work, but then later allows it to be incorporated into another work, then it is unlikely that the resulting work will be considered a joint work (instead, it might be a collective work).³

Authors do not have to create their contributions at the same time in order to form a joint work. For example, a songwriter can compose lyrics without knowing who will compose the music, but intend that the lyrics will be set to music at some point. Then, in the future, when the songwriter has a friend compose music with the intention that it be used with the lyrics, the resulting song would be jointly owned.

The contributions of the joint authors do not have to be equal and can vary qualitatively (*i.e.*, how "good" or valuable the contribution is to the total work) and quantitatively (*i.e.*, how large the contribution is to the total work).

Overall, determining whether a work is a joint work is a fact-specific analysis and an intellectual property attorney should be consulted.

³ See "Calendar Fundraiser" below, for an illustrative example.

Why is it important to know if you have created a joint work?

While there are numerous issues that may arise when a nonprofit organization jointly owns a work with a third party, we have highlighted three of the main issues below.

- 1) *Joint Ownership.* When a joint work is created, the co-authors jointly own the entire work – not just his or her contribution to the work. Courts usually find that each co-owner owns a proportionate share of the joint work (*e.g.*, if there are three authors, each owns 33.3 percent of the work regardless of their input). The co-authors do not own their own contributions individually and cannot use their own contributions independently from the joint work.
- 2) *Duty to Account.* Each joint author has a duty to account to the other joint owners for a ratable share of any profit from the use or licensing of the joint work. The joint owners must distribute any such profits to the other joint owners in proportion to each joint owner's ownership rights. Joint owners can enter into a written agreement to waive this obligation.
- 3) *Right to Use and License.* While each joint owner can fully exploit their copyright rights (*i.e.*, by using, copying, preparing derivative works, distributing and performing the joint work) independently, joint owners cannot grant true exclusive licenses because one joint owner cannot prevent the others from granting licenses to third parties. From an economic perspective, this reduces the value of any exclusive license.

How do we handle joint works?

Generally, a nonprofit organization should seek to avoid creating a joint work. To avoid creating a joint work, a nonprofit organization should obtain complete ownership from all of the contributors to a work. Importantly, independent contractors should assign their ownership interest to the nonprofit organization pursuant to a written assignment agreement. An assignment provision should be included in a nonprofit organization's standard independent contractor agreement. In addition, while contributions by employees within the employee's scope of employment are typically owned by the organization as a matter of law, it is recommended that employees enter into a written agreement assigning any rights they have to the nonprofit organization. Oftentimes, these provisions are included within an employee's initial employment agreement with the organization.

We might already have created a joint work, what do we do now?

If you think you have created a joint work, and, especially if it is intellectual property that is valuable to the organization, you should consult an intellectual property attorney.

The attorney will help determine whether or not a joint work exists, and if so, negotiate with the other joint owners to obtain full ownership of the work for your organization. If the attorney is unable to obtain the necessary rights from each joint owner, all of the joint owners should consider entering into an agreement waiving the duty to account and clarifying each owner's ownership percentage.

When do we need to find an attorney?

Typically, it is easier to discuss the process of intellectual property development with an intellectual property attorney **prior to** engaging in any development activities. In this case, the attorney can help the nonprofit organization pre-plan the development process and draft the appropriate template agreements that all contributors are required to enter into prior to beginning their work. This manages the expectations of everyone involved and can help prevent any disputes later on.

Even if the development process has already begun or has been completed, an intellectual property attorney can assist in negotiating any assignment agreements with the other authors to obtain ownership of the copyrighted material.

Hypothetical Examples

In the following paragraphs, we are going to go through some potential scenarios that nonprofits may encounter. We will highlight some areas of concern and potential approaches a nonprofit can use to take on the scenarios.

Calendar Fundraiser

Hypothetical: An artists' collective, Artists Inc., is looking to raise funds to improve its space in the coming new year. Various artists who rent space from Artists Inc. decide that they would like to allow Artists Inc. to use some of their work that had been previously displayed at Artists Inc.'s gallery, arrange it into a calendar and sell it to the public as a fundraiser for Artists Inc. Artists Inc.'s sole employee gathers the submissions, selects the artwork to be used, and uses a service available online to put the calendar together. Artists Inc. then markets and sells the calendar to the public and collects the funds. One month into the sales, Tina, the artist whose work was used for February, tells Artists Inc. that she is going to allow another organization to create and sell miniature prints of her image. Artists Inc. is disappointed by this because it was planning on selling separate miniature prints of all the works when it completed the calendar sales.

Issues Raised and Potential Approaches:

- *Collective Work.* Here, it is unlikely that this will be considered a joint work. The various artists independently created the images without primarily intending them to be placed into a calendar. The calendar is likely a collective work, and Artists Inc. alone owns it, while each contributing artist retains ownership over the image he or she submitted.
- *Scope of License.* From the facts, it does not appear as though any of the artists entered into written license agreements allowing Artists Inc. to use their images in the calendar. While Artists Inc. probably has an implied license from each artist, it would be a best practice for Artists Inc. to obtain a written license agreement from each artist granting Artist Inc. the right to use each work in the calendar and for anything else it would like to do (such as selling miniatures of the individual prints).

Keeping the Score

Hypothetical: Shaun has been working over the past few years on a documentary film about the foster care system. He has spent countless hours shooting footage, researching, gathering interviews, and cutting and editing the film. Shaun knows his talents do not lie in music, so he reaches out to a musically talented friend to develop the score for the film. Rachel delivers a beautifully composed complement to the film. Just as Shaun completes the film, he receives an email from Rachel claiming that she should get 50 percent of any profits that the film generates.

Issues Raised and Potential Approaches:

- *Joint Work.* Rachel may be a joint owner of the film. Because she was not an employee, the work Rachel did for Shaun is not automatically owned by him. Shaun created the film knowing he would hire a musician to compose the score, and Rachel was hired with the primary intent of creating a score for the film. As a result, their merged efforts created the complete film, and

Rachel likely has a 50 percent ownership interest in the film. She likely has the right to use and license the film, and they both have a duty to account to the other for any profits he brings in through their own use and exploitation of the film.

- *Assignment Agreement.* Shaun should have asked Rachel to sign an agreement assigning any copyright interests she may have to him. Now that the work has already been created, an intellectual property attorney can assist Shaun in negotiating such assignment after the fact; however, Rachel is in the better negotiating position now that the work has been completed. Having contributors to films sign such agreements is a standard practice in the film industry and an intellectual property attorney can assist a nonprofit organization with drafting a template for each contributor to sign – preferably, BEFORE development work begins.

Choreographed Together?

Hypothetical: Members of a dance group, Dance Inc., that focuses on presenting information and inspiring dances to children, comes together every Thursday night to work on choreographing a dance together. All of the members of the dance group are employees of Dance Inc. and are on Dance Inc.'s payroll. One day, Tim, a younger brother of one of the employees, stops by a practice. Tim has some experience with dancing and makes a few minor suggestions to the choreographed actions; however, he mostly spends his time working with the team to perform the dance. Tim later asks if he will be credited for his contributions to the dance.

Issues Raised and Potential Approaches:

- *De Minimis Contributions and Physical Labor.* Before agreeing to credit Tim for any of his contributions, Dance Inc. should consider whether or not it wants to give Tim the impression that he has an ownership interest in the choreography. Dance Inc. may be able to argue that Tim's contributions were so insignificant that they were *de minimis* and do not give him an ownership interest. In addition, physical labor does not equal creative input. Just because Tim spent many hours practicing the dance with the crew, it does not automatically mean he is an author. While Dance Inc. may agree to credit Tim to maintain a good relationship with him, Dance Inc. should consider entering into a short written agreement with Tim clarifying that he does not have an ownership interest in the choreography.

A Collective Play

Hypothetical: Each year, an after-school theater group, Showtime Inc., takes its programs to a new school, where its employees guide the students in writing a play together. Sometimes, the students' parents and siblings join in on the writing process. Showtime Inc. does not keep track of all of the contributors to the work of the play. At the end of an eight-week program, the students have written a complex play exploring the issues facing children in their community. Showtime Inc. helps the students put on one performance, and afterwards, it takes the script and tries to license it out to other theater groups for a fee to perform at schools.

Issues Raised and Potential Approaches:

- *Joint Work.* Again, each of the contributors, young and old, have an argument to say that they were involved in the creation of a joint work. Here, they each worked to create a work that they intended to be merged into a single play. As a result, Showtime Inc. should be aware that these other creators may have an ownership interest in the work and therefore, have the ability to use and license the play themselves. Also, Showtime Inc. has a duty to account to the other co-owners, so will have to split any of its profits with all of the original contributors. It would have

been best for Showtime Inc. to obtain an assignment of ownership from all of the program's participants. If it is unable to do this, Showtime Inc. should at a minimum obtain a waiver from each participant regarding the duty to account.

- *Unknown Contributors.* Showtime Inc. has the unique problem of not knowing who all of its contributors are, and as a result, runs the risk that someone can come forward later, claiming they have an ownership interest in the work and asking Showtime Inc. to compensate them. To manage this risk, Showtime Inc. should keep a roster of all of the participants and require any such participants to enter into a written assignment agreement prior to allowing them to participate in the program. If Showtime Inc. can show that this is its general practice, it may be able to successfully argue that a claimant who is not included on their participant list did not participate in the activities. If Showtime Inc. does not do this, it will have to tolerate the risk that a previously unidentified co-owner will come forward and claim an ownership interest in the work.
- *Minors.* A minor can claim a copyright interest in a work. Showtime Inc. should consult an attorney about its ability under state law to enter into a written assignment agreement with a minor.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Judith Moldover at jmoldover@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

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