



Prelude to Change: How the DMCA Affects Fundraising

A new copyright law will have a dramatic impact on fundraising.

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It's hard to imagine that giving a grant to a nonprofit organization, sponsoring a charitable event, or awarding a scholarship can put the donor at risk for a lawsuit. But it can.

The U.S. Copyright Act has always provided strong protection for owners of original works of copy. Recourse procedures against infringers of creative works and written forms of expression have almost always been upheld by federal courts. The Digital Millennium Copyright Act (DMCA) of 1998, however, dramatically changed the landscape for liability. And, as more legal actions unfold around its secondary and tertiary liabilities, the impacts on fundraising will be significant. Everyone in the fundraising loop is impacted.¹

We need only turn to the Napster fallout to grasp the repercussions for those who ask for money via a written request. A&M Records, the owners of copyrighted property, sued Napster for making software that facilitated infringement of the property. Claims were filed against the venture capital firm of Hummer Winblad for its role in funding the infringement. Napster filed a malpractice suit against the law firm of Cooley Godward for advising mp3.com that the software provider could assert defenses to copyright infringement. Everyone who

facilitated the infringement was seriously affected, and the costs were staggering.²

For fundraisers, the problem stems from using a written grant application, sponsorship proposal, scholarship application, or charitable request. These written requests for funding—if original—are protected by copyright and are valuable property to someone, especially if the request for funds is successful. If the owner of the property uses the same information again for financial gain—such as in other requests—no problem exists. However, if someone other than that owner uses the protected information—without written permission—and receives an award of funds, there is a significant problem. This action is deemed “copyright infringement” and is poised to create havoc throughout the fundraising community.

Fundraising depends largely on a request in written form. No matter how noble the cause, raising money is still for financial gain, and this is the net that will snare the wrongdoer.

In the digital environment, grant writers are at risk, as they are the “infringers” of copyright. They are the employees or consultants who use other people's copy to get money, via the grant, sponsorship, or donation request. Until

the DMCA came along, they were the primary targets of any misconduct actions by copyright owners. Few lawsuits were ever filed against them because it was difficult and expensive to track them down and they had little money to attach as a penalty. The Recording Industry Association of America, however, is now targeting active infringers of their copyrights, establishing many of the new legal rules by which grant writers must play when raising money.

Under the DMCA, a facilitator is at higher risk than the infringer. A “facilitator” of a copyright infringement can be held liable for the infringer's actions. A facilitator, in addition to the recipient of funds, can be any organization or individual that awards money to another organization or individual based on a written request containing infringed property. This now places at risk the universities, school districts, and organizations that gain financially from fundraising, as well as the foundations, corporate sponsors, scholarship agencies, executive directors, and charitable trusts that award the funds. And, if ongoing legal actions based on the DMCA play out in the wrong direction, a private contributor, a grant panel member, or a wealthy board member could be in the liability loop.

Who can be considered a facilitator of copyright infringement for either giving or gaining funds? Any of the following:

- public and private institutes of higher learning as well as public and private school districts through their numerous written requests for funding, scholarships, and sponsored projects
- public and private foundations that issue funds through written requests for project, organization, and personal support
- private corporations or local businesses, their management, and their boards of directors for giving monies in support of an event, project, sponsorship, or scholarship
- nonprofit organizations, their management, and their boards of directors (in some states) for obtaining funding through written requests
- individual members of a review board or committee that approves an award of funds.

The DMCA now provides a large net that can be cast widely by anyone who feels their copy has been misused for someone else's financial gain.

Managing Misconduct

Secondary and tertiary liabilities under the new act usually position a facilitator as having a "right and ability" to supervise infringing activity, as most employers do over their employees. They have a "direct financial interest" in the results of the activity, as most funding recipients do if funds are awarded from the action.

With this level of responsibility, managing a claim of infringement shouldn't be taken lightly, and turning a blind eye to the behavior isn't a defense. Any claim is serious and should never be regarded as frivolous. Organizational arrogance against a claimant or an obstinate reviewer will only complicate the process and will be more costly to the facilitator in the long run.

What should a facilitator do to manage the review of misconduct actions by

its employees in a request for funds? Within the DMCA there is a process that a claimant of infringement must use against a facilitator. The claim must be in writing and include all the following:

- physical or electronic signature of the copyright owner
- a description of the copyrighted work claimed to have been infringed
- a description of the infringing material and enough information to permit the facilitator to locate the material
- contact information, including address, telephone number, and e-mail address
- a statement by the copyright owner that use of the material is not authorized
- a statement that the information in the notification is accurate. (Any person who misrepresents allegations of copyright infringement is liable for damages, including attorney's fees.)

With this information, a reviewer can usually validate any infringement claim quickly. An employee or service provider, without needing legal involvement in most cases, can complete the review. Serious infringements, however, should always have the oversight of legal counsel.

Measuring Misconduct

If an unauthorized reuse is found after the DMCA process is followed, the next step is determining the financial loss. Most infringement claims will be minimal and can be settled without litigation by paying a small fee to the copyright owner.

If your grant request isn't funded, there's no financial gain, and a small rights fee of \$25 to the copyright owner will probably halt any further actions. You can also purchase rights to use the information in the future for a small fee, just as you can purchase the rights to using book illustrations or small amounts of data from publishers.

If your request is funded, on the other hand, the amount of loss is determined by using another model from commercial publishing. It is called the

"percent of use model" and is respected by the courts as a guide for settlement. To use this model, simply create a percentage by dividing the total volume of the funding request by the amount of infringed material. Then take the resulting percentage and divide it into the amount of financial gain. For example, if your grant award is \$2,000, and 10% of the written request contains infringed property, you owe the copyright owner \$200. Few copyright owners would pursue this amount through the courts. However, if the grant award is \$4,000,000, and 50% of the written application contains misused property, the damages would be great and probably worth the avenue of a legal action.

(Note: Most word processing programs have a word count feature for identifying the total number of words used in a document. By comparing the number of words for the infringed property to the total words in the request, a percent of use can be determined with simple math.)

This model could probably work for large grants or funding requests, but corporate sponsors face yet another problem. In addition to the dollar value of the sponsorship that is funded, corporations receive an identifiable value in return for their support. The industry uses a technique called "sponsorship impressions" to calibrate the "return on sponsorship" value for the support. This evaluation model could be used by a claimant against the sponsorship recipient as well as the sponsor to determine the amount of financial gain on both sides.

Chilling Effect or Business as Usual?

Will the DMCA cast a chilling effect over the fundraising and sponsorship process? Probably not. Will your organization face litigation costs if you ignore the growing problem of copyright infringement in funding proposals? Probably. Will everyone need to implement procedures to safeguard those who



provide resources for fundraising and sponsorship? Absolutely!

This is a new age for raising funds and finding sponsors. It can be a low-cost management process or—for those who want to do business as usual—an expensive nightmare. ■

Footnotes

¹ See “Copyright Basics,” U.S. Copyright Office (<http://www.copyright.gov/>) and “The Digital Millennium Copyright Act of 1998” (<http://www.copyright.gov/legislation/dmca.pdf>).

² Lemley, Mark A. and R. Anthony Reese, *Stopping Digital Copyright Infringement Without Stopping Innovation*, University of Michigan, School of Information, 2003 (http://intel.si.umich.edu/tprc/papers/2003/210/Stopping_Copyright_Infringement_Without_Stopping_Innovation.htm).

Suggested Readings

Law and Taxation, Nonprofit World CD-ROM (www.snpo.org).

Templeton, Brad, “Ten Big Myths about Copyright Explained” (<http://www.templetons.com/brad/copymyths.html>).

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Questions & Answers about Copyright Law

1. What is a copyright?

Copyright refers to original works of authorship fixed in any tangible medium of expression. Copyright law protects the following: literary works (including computer programs); musical works; dramatic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings.

Included in the category of “literary works” are grant, sponsorship, scholarship, and endowment proposals, and the written reports associated with these works.

2. What is copyright infringement?

Copyright infringement is the unauthorized use of a copyrighted item.

3. What is intellectual property?

Intellectual property is any unique product of human intellect with some value in the marketplace. Intellectual property laws cover ideas, inventions, literary creations, unique names, business models, industrial processes, and computer program code.

4. What is public domain?

A public domain work is one that isn’t protected by copyright. The reasons the work isn’t protected include:

- The term of copyright for the work has expired.
- The author failed to satisfy statutory formalities to perfect the copyright.
- The work is produced by the U.S. government.

5. If I’m in education and write grants, isn’t that always fair use?

No. Fair use provisions don’t apply when the “intent” of the information is for financial gain. A funding request is always for financial gain.

6. Who is actually covered by the Copyright Acts?

Anyone who violates any of the exclusive rights of a copyright owner is covered and can be sued in federal court. The term

“anyone” includes any state and any state officers or employees acting in their official capacity.

7. What are the penalties for copyright infringement?

Remedies for infringement can include:

- impounding and disposition of infringing articles
- damages and profits
- the copyright owner’s actual damages
- any additional profits of the infringer
- statutory damages
- costs and attorney’s fees.

8. Can a person be punished for claiming that a portion of a funding proposal is copyrighted when it isn’t?

Yes. Any person who knowingly makes a false representation of a material fact in any written statement filed in connection with the application can be fined up to \$2,500.

9. If copyright infringement is discovered in a funding request, do I have to return the grant?

Probably! The funding organization, which is also in the liability loop from the infringement action, may require you to return the award, even if some funds have already been expended. The financial impact, however, could multiply even further. Gone could be funds for research, teaching assistants, equipment, and any matching funds or sponsorships. You (or your organization) could also be excluded from applying for any grants in the future.

10. What if copyright infringement is discovered in my proposal, but I don’t get the grant? Is there still a copyright violation?

Yes! The fact that there is no financial gain may only relieve you from serious damages.