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WEBSTER, CHAMBERLAIN & BEAN, LLP – NONPROFIT ALERT

Copyright Considerations and Best Practices

This memorandum provides information on best practices to protect your copyrighted works and to minimize liability exposure for your organization. A copyright protects works of authorship. In general, copyright is the exclusive right of a creator of a creative work (e.g. a book, article, report, photograph, painting, sculpture. Etc.) to exploit that work. A copyright is created as soon as pen is put to paper, brush is put to canvass, a photograph is captured – i.e., when someone’s original creative expression is fixed in a tangible medium. As the owner of a copyright, you are granted certain rights which you and you alone have the sole authority to exploit or license to others, which include:

--The Right to Reproduce – No one other than the copyright owner has the right to make any copies of the work.

--The Right to Distribute Copies to the Public – Only the copyright owner can make a work available to the public by sale, rental, lease, or lending. This right allows the owner to prevent the distribution of copies of their work without permission.

--The Right to Publicly Perform the Work - This right gives the copyright holder the ability to control the public performance of the work.

--The Right to Publicly Display the Work – Only the copyright owner can publicly display their work. It is this right that would prevent you from taking someone else’s photographs and displaying them on your web site without proper permission.

--The Right to Create Derivative Works – Only the copyright owner has the right to create derivative works, i.e., adaptations such as translations, revised works, abridged works, etc. based off the original.

What follows is a set of principles and best practices to consider when dealing with copyrighted works in an effort to protect your copyrighted works and minimize liability exposure:

1) **The general rule of copyright is “she/he who creates, owns.”** In a situation where a writer drafts a paper or book, a speaker creates a presentation, a photographer takes a photograph, an artist creates a sculpture, etc., this person owns the copyrights to those creations. However, there are two general exceptions to this rule. First, when an employee creates a work within the scope of their regular job duties, the copyright to that work belongs to the employer, not the employee. Second, when a work is commissioned or ordered from a third party, copyright rights can be assigned to the commissioning (non-creating) party through written agreement.

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Best Practice Tip 1: In all contracts, you should make sure there is language granting you copyright ownership of all work product created under the contract. Contracts should also contain license language permitting you to use any pre-existing intellectual property that the contractor may have incorporated into the work product.

Best Practice Tip 2: If your volunteers such as officers, directors, work groups, members, etc. (i.e. non-employees) create work product for you, for instance, a volunteer work group creates a study or white paper, each volunteer should be required to sign a form assigning copyright to the organization. Ideally, this should be done before work on the work product begins.

2) **Just because something is available on the Internet, it is not free for all to use.** Use of third party materials without permission is biggest source of legal claims against non-profits. If a work is not owned by your organization, in general your employees, volunteers and members must obtain permission to use third party materials whether available on the Internet or otherwise.

Best Practice Tip 3: If you see a picture, article, video or other content that you would like to use, you should do some research to find the copyright owner and then contact the copyright owner for permission. Any permission should be obtained in writing and all permissions should be kept on file in case there are any questions that arise later.

Best Practice Tip 4: Good sources for stock content that can be licensed for your use can be found online in places like Creative Commons or stock photo web sites like iStock Photo or Shutterstock which offer free or low-priced images and content that can be used. Save all records pertaining to your licensing of such content in case questions arise.

Best Practice Tip 5: If you use content from stock content sources like Creative Commons, iStock Photo, or Shutterstock, register with those services if appropriate, make appropriate payment if needed and review and follow all license terms closely. There are certain requirements and restrictions set by the owners of content (for instance, attribution, prohibitions against commercial use, etc.) which differ from owner-to-owner, content-to-content. Some owners strictly enforce the terms of these agreements.

Best Practice Tip 6: Even if not required, you should always attribute to the source of the licensed content as a courtesy. Unless you are required by the terms of the license to use a particular format (for instance, Creative Commons licenses have a particular format and many times requires you to provide a link to the original), you can use the following language or similar:

“Copyright © <Insert Name of Owner>. All rights reserved. Reproduced under license for limited use by <Insert Name of Your Organization>.”

This shows that you are mindful and respectful of copyright rights. Please note that if you do not have a license to use given content, attributing to the source of the content will not absolve you from copyright liability.

3) **Do not assume that all government works are in the public domain and free to use.** Generally, works of the United States Government are not subject to copyright and are free for all to use. However, there are cases where a private citizen or company retains ownership of content used by the U.S. government (for instance, the work was created as a result of a government grant). There are also cases where the U.S. Government can receive and hold copyrights transferred to it by assignment, bequest, or otherwise.

Best Practice Tip 7: Before using content from the U.S. Government, you should confirm that the work was indeed created by the U.S. Government and is not subject to copyright.

Best Practice Tip 8: Unlike the federal government, works created by state, county and municipal governments can retain copyright. If you use any content created by a state, county or municipal government, you should contact the appropriate agency and request a license.

4) **Fair use can sometimes permit use of content without a license in limited circumstances, but do not rely on fair use in lieu of a proper license.** Fair use is a defense, not a right. Generally, the use of copyrighted content for purposes such as criticism, comment, parody, news reporting, or educational purposes such as teaching, scholarship or research can act as a defense against claims of infringement under specific circumstances. For the purposes of most, if not all organizations, only usage for criticism, comment and potentially parody would apply. Educational fair use mainly applies to primary/secondary school and university usage and contemplates either a student making copies for a research paper or a teacher/professor making just enough copies of an article or short story for his or her class. However, if you were writing a book and reproduced small snippets from other sources to criticize or comment on the positions/information taken in those snippets, this would be a fair use. For example, if someone writes a white paper on a public policy position that you do not agree with, you can use small snippets from that white paper in a review criticizing the positions taken in that paper.

It should be noted that fair use turns on a quantity/quality analysis. If you use too much of the source material, or if the portion you use (no matter how small) gives away the central idea of the work such that the person reading your criticism/comment does not have to read or purchase the underlying work to get the general idea, fair use may not be available as a defense.

Best Practice Tip 9: Fair use is a fact specific inquiry and judicial rulings on this issue vary from court-to-court. When at all possible, obtain a license to use any content that is not your own. If you believe that your use of third party material would qualify as a fair use, you should discuss and review with legal counsel before publication.

5) **Federal registration of copyrights is recommended to aid in enforcement of rights.** Creating work product provides “common law” copyright and your rights of

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copyright ownership; however, federal copyright registration provides additional benefits that aid in the enforcement of copyrights such as:

--The right to pursue a copyright infringement claim in federal court (registration is required to bring suit).

--Evidence of ownership and validity of the copyrights in the work.

--The ability to collect statutory damages of up to \$30,000 per infringement (\$150,000 per infringement if intentional) without proving actual damages, so long as the work is registered within 3 months of first publication or prior to an infringement.

--The ability to collect attorney's fees, so long as the work is registered within 3 months of first publication or prior to an infringement.

--The ability to record the registration with U. S. Customs and Border Protection to prevent the importation of infringing copies.

Best Practice Tip 10: Federal copyright registration is relatively inexpensive (generally a \$65 filing fee) and completing the application is not time intensive, so the potential benefits of federal registration far outweigh the expense in time and money. When at all possible, you should register your works with the U.S. Copyright Office. If you do not want to register everything, pick those works that are most important/influential that would be foreseeably used/cited by others in their work.

6) **Place proper notices on copyrighted works.** Though not required under the U.S. Copyright Act to maintain copyright protection, a copyright notice should be placed on your copyrighted works. Such a notice provides the public with actual notice of your rights and to obtain remedies under certain international treaties, a copyright notice is required. Copyright notices should be in the following format:

© 20__ <Insert Organization Name>. All Rights Reserved. No part of this work may be reproduced or transmitted in any form or by any means, electronic or mechanical, including but not limited to photocopy, recording or any other information storage or retrieval system known now or in the future, without the express written permission of <Insert Organization Name>.

For books, an appropriate place would be on the inside copyright and acknowledgements page. For papers and reports, the notice can appear on the cover sheet.

7) **Insurance against intellectual property infringement should be maintained.** It is advisable to maintain adequate insurance coverage against third party claims of copyright and trademark infringement, especially if you have an Internet presence and publish content.

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Best Practice Tip 11: In many cases, coverage for intellectual property claims are not covered in stock D&O and E&O coverages. These claims must be covered by endorsements purchased on a separate basis. You should confirm each year that your policies contain endorsements that cover not only damages for claims of copyright and trademark infringement, but legal defense costs as well.

8) **Do not delay to act if you receive a demand letter.** If you receive a cease and desist/demand letter from someone alleging copyright infringement, do not delay in taking appropriate action.

Best Practice Tip 12: If you hear from third parties alleging unauthorized use of copyrighted materials, you should notify legal counsel as soon as possible. In some cases, a delay in reporting can result in increased demand amounts as more legal fees are expended by the copyright owner following up on demands and preparing legal filings. Significant delays may prompt your insurance company to deny coverage. In cases where you may have properly licensed stock images from a stock image provider and you receive a demand letter from a third party alleging infringement, some stock photo provider licenses have strict time periods to report demands (sometimes it can be a matter of days), so they may deny you indemnification.

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David M. Abrahams | dabrahams@wc-b.com | (202) 785-9500

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