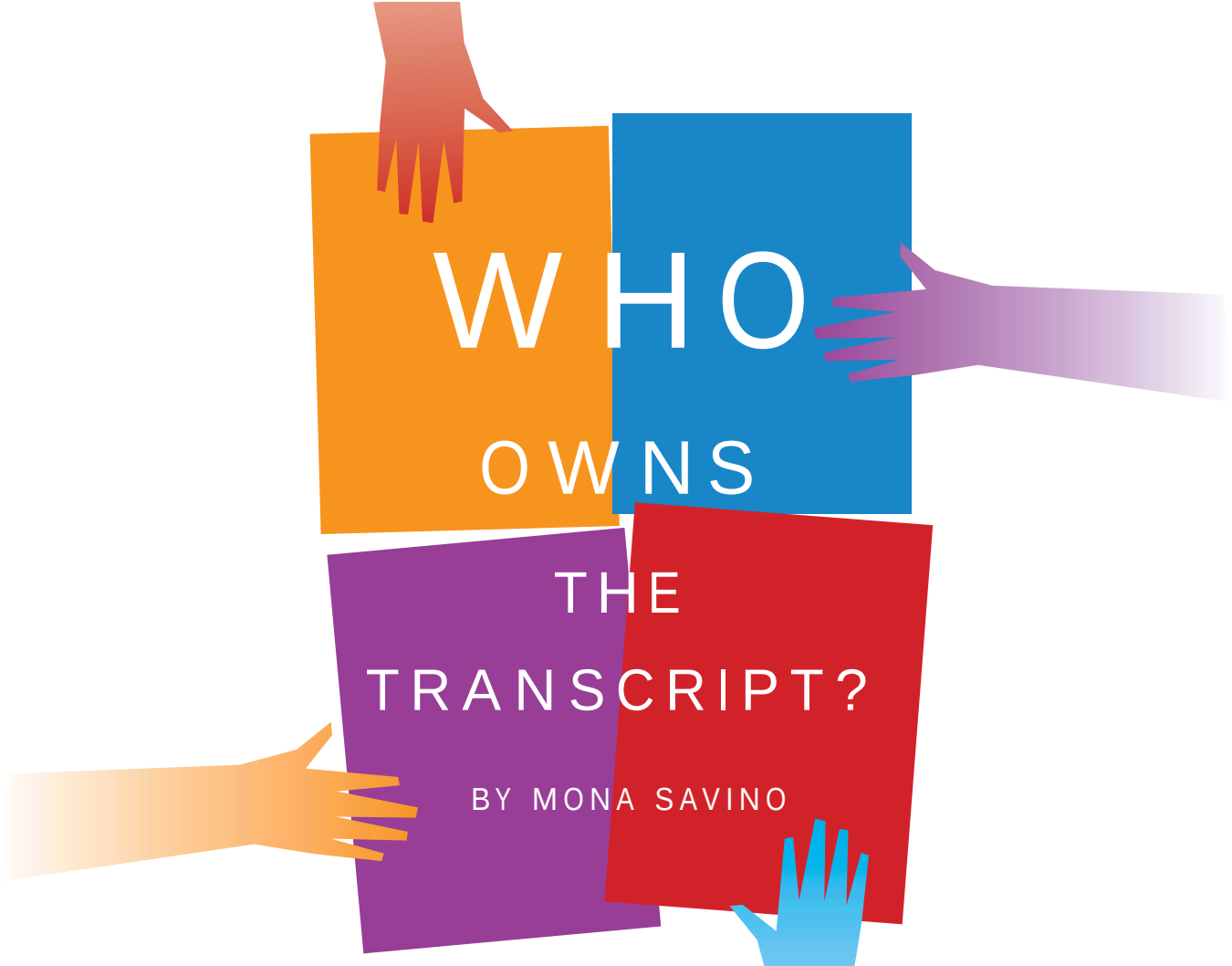

WHO OWNS THE TRANSCRIPT?

BY MONA SAVINO

Another deposition finished. After hours of technical testimony, the attorneys are finally through with questioning the deponent. As the reporter is packing up her equipment, she confirms with the noticing attorney an order for the original plus one. The opposing attorney does not place an order. As the reporter leaves the room, she hears the noticing attorney agreeing to give a copy of the transcript to the opposing attorney.

Putting yourself in her shoes, you think, "They can't do that without my permission!" But is that really the case? Aside from turning red and blowing smoke out of your ears, is there anything you can do to prevent this sharing of copies — otherwise referred to by many reporters as "unauthorized copying"?

About the Author

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There are several arguments that reporters rely on to support the view that their permission is needed before someone can lawfully copy a transcript. One argument is that copyright law protects the transcripts. Another is that federal or state rules of procedure require a person to obtain copies from the reporter, thereby giving the reporter ownership rights in the transcript and enabling the reporter to dictate who may obtain the copies. Lastly, that a person who copies the transcript without paying for it, or allows others to do so, commits a theft of the reporter's services. This results in the person owing compensation to the reporter.

Copyright Protection

Just what does the term "copyright" mean? Copyright is a form of protection provided by the U.S. Copyright Act of 1976 to the authors of "original works of authorship." The Act gives the owner of a copyright several types of protection, one being the exclusive right to reproduce the work as well as the exclusive right to allow others to do so. This means that unless the copyright owner gives permission, it is illegal for someone to make a copy of the copyrighted work. So, it seems obvious that the best protection for a court reporter is to assert that the transcript is protected by a copyright. Unfortunately, the matter is not that simple.

The Act sets out eight categories of copyrightable works. These are:

1. literary works
2. musical works
3. dramatic works
4. pantomimes and choreographic works
5. pictorial, graphic and sculptural works
6. motion pictures and other audiovisual works
7. sound recordings
8. architectural works

If the work in question is listed in one of the categories, the author is all set. But, what if, as in the case of a reporter's verbatim record, the work does not fit neatly into a category? The an-

swer to whether it is a copyrightable work may be discovered in two ways. One is to apply to register a work with the Copyright Office. Although copyright exists without such registration, if the Copyright Office issues the registration, the matter is then settled. Sounds great, right? Unfortunately, the matter is also settled if registration is denied. (For more detailed information, see U.S. Copyright Office *Copyright Basics Circular 1*, www.loc.gov/copyright/circs/circ1.html.)

So, before applying for such a registration, it is important to consider what the chances are that the Copyright Office would find that a verbatim record is an "original work of authorship." How do you do that? It is helpful to find out if a court of law has ever issued an opinion on this matter.

The only case to directly address whether there is copyright protection for a transcript is *Lipman v. Commonwealth of Massachusetts* 475 F.2d 565. Unfortunately, the court clearly states that a court reporter's transcript is not a copyrightable work. *Lipman* discussed the rights of the court reporter to sell copies of the transcript from the infamous Chappaquiddick Inquest in 1969. In that case, the court stated that "without deprecating the mechanical skill necessary to become a stenotypist, we can recognize no ownership for that reason in a transcription of a judicial hearing. Since transcription is by definition a verbatim recording of other person's statements, there can be no originality in the reporter's product."

So, when looking at the factors set out by the U.S. Copyright Office which do not clearly include a reporter's transcript and taking into account a published court opinion clearly holding that a transcript is *not* copyrightable, relying on copyright law to prohibit an attorney from copying a transcript appears risky at best.

Then, if copyright assertion is not the best recourse for a reporter, what is?

Property Rights

Another avenue reporters may use to protect themselves from unauthorized copying is to assert that they have property rights, or ownership, in the transcript. The principles of property law generally define ownership of property as having the right to use, enjoy and dispose of the property at the will of the owner.

Once again, there is more than one way to consider this issue. The first, and potentially the most airtight, is to look to federal and state rules. The reason that this can be airtight is that if a rule clearly prohibits attorneys from sharing copies, then the reporter only needs to refer the attorneys to that rule and, presumably, the attorneys would purchase the copy rather than risk violating a state or federal rule.

Rule 30 of the Federal Rules of Civil Procedure governs deposition transcripts in the federal courts. Rule 30(f)(2) states:

> Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

Some reporters use this rule or a comparable state rule in their discussions with attorneys about copying. The Rule gives the court reporter the right to charge a reasonable fee and seems to identify the reporter as the source for transcript copies. However, the rule does not affirmatively prohibit sharing copies. In fact, taken together, the federal rules clearly do not grant to the reporter the attributes of ownership. Rule 30(f)(1), for example, requires the reporter to file the completed transcript with the noticing attorney. In addition, the noticing attorney, not the reporter, is charged with storing the transcript. ("Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked 'Deposition of [here insert name of witness]' and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering or deterioration.")

Most states that have rules addressing depositions are comparable to the Federal Rules of Civil Procedure in that they allow reporters to charge a fee for copies, yet retain control over other aspects of the distribution of the transcripts. There are some exceptions, notably California, where the state rules clearly prohibit a person who has purchased a transcript from sharing or giving copies to anyone else. At the other end of the spectrum is Texas, where the rules state that the custodial attorney must make the transcript available to other parties for inspection and copying. Consult your state's rules for more information on how this is addressed in your state so that you are prepared when the issue arises.

It is very important to understand that just because a rule recognizes the right of a reporter to be paid for preparing a transcript and/or a certified copy, that same rule might not be construed by the courts as prohibiting attorneys from sharing copies. Indeed, some state rules both allow a reporter to charge a fee and permit the public to obtain copies from the public files of the court. Very recently, in fact, the Administrative Office of the Federal Courts issued a memorandum requiring all federal court clerks to make copies of transcripts filed with them available to the public.

Ambiguities swim all around this topic, and there is not a great deal of case law on this subject, although some courts have addressed certain aspects of the issue of transcript ownership. In *State v. Watts* 670 S.W.2d 246 (Tn. Crim. App. 1984), the court stated that once a transcript is transmitted to the court clerk it becomes the property of the state. The court went on to state that payment to the reporter was a fee for the reporter's services and not purchase of the document itself. In the *Lipman* case, discussed earlier, the court clearly retained control of the transcript. The court both controlled who

had access to the transcript and regulated the rates at which the transcript was sold.

Even more troubling are recent cases in Missouri and Ohio addressing this issue. In Missouri, a court ordered the court clerk to provide a copy of an official transcript to an attorney rather than direct the attorney to obtain a copy from the official reporter. In Ohio, a prosecutor requested copies from the court clerk instead of the reporter. The judge denied the request, so the attorney filed a writ of mandamus with the court of appeals asking the court to order the judge and the clerk to give him the copies. This matter is still pending. (NCRA has filed an amicus brief in the Ohio case.)

Theft of Services

Some states have incorporated into their criminal statutes a crime commonly known as "theft of services." There exists no general definition for this, but an example is found in the Pennsylvania criminal code. Under the Pennsylvania code, a person commits theft of services if he "intentionally obtains services which he knows are available only for compensation, by deception or threat, or by false token or other trick ... to avoid payment for the service" or "... if, having control over the disposition of services of others to which he is not entitled, he knowingly diverts such services to his benefit or to the benefit of another not entitled thereto." Consult your state criminal codes to see how this is handled in your state.

This is an undetermined area of law, however, as there is no existing case law that has applied such a statute to unauthorized copying of a reporter's transcript. One can rationally make the argument that unauthorized copying does meet the standard set forth in the above statute. However, one can just as rationally argue that the theft occurs if a party obtains an original transcript without payment to the reporter, but not if making a copy of a purchased transcript. There is no answer to this without a court holding that unauthorized copying is a correct application of a theft of services statute.

As you can see, not only is the law governing the issue of unauthorized copying and ownership of transcripts unsettled, recent developments have not been favorable to reporters. Reporters should carefully consider the risks involved in any recourse they choose to take to remedy this growing problem.

Certainly, reporters may assert that they have a copyright in their transcripts. However, as discussed earlier, whether that is the case is unclear and to attempt to register a copyright and have that request denied might backfire and hurt the reporter's position even more. Another option is to lobby state and federal legislators to make the rules more restrictive and/or affirmatively prohibit sharing copies. As anyone who has ever participated in any lobbying attempts knows, this is a very costly path to take and one with no guarantees of success.

Finally, reporters should look to whether any of these options are worth not only the monetary costs, but also at the costs to the reporting community's relationship with the legal community. If there is no desire to change the relationship, then the next issue becomes, "Do reporters need to consider alternative ways to ensure that they are fairly compensated?" ■

Cases of Interest

In general, there is minimal case law that discusses the issues of copyright of a transcript or transcript ownership. However, the following cases do consider these matters at least peripherally and may be of interest to reporters:

***Lipman v. Commonwealth of Massachusetts,* 475 F.2d 565 (1st Cir. 1973)**

This case arose from the inquest on the death of Mary Jo Kopechne at Chappaquiddick Island. The clerk of the Superior Court was planning to offer copies of the transcript to the public at a lower rate than if they purchased them from the reporter. The court reporter sued to prevent the clerk from selling the transcript claiming that he had both a copyright and a property right in the transcript. Although the court did find that the reporter was entitled to payment from the proceeds of the sales, it held that the reporter had neither a copyright interest nor a property right in the transcript.

***State v. Watts,* 670 S.W.2d 246 (Tn. Crim. App. 1984)**

A prisoner sought return of his transcript from the court so he could use it in a later action arguing that since he paid the reporter for the transcription, he was entitled to withdraw it from the court. The court denied the request, holding that once transmitted to the court clerk, a transcript becomes a record of the court and property of the state. The court went on to state that payment to the reporter is for the reporter's services in preparing the transcript and not a purchase of the transcript.

***Warth v. Department of Justice,* 595 F.2d 521 (9th Cir. 1979)**

This case involved an attempt to obtain a trial transcript under the Freedom of Information Act. The court held that a trial transcript is a court document because the transcript reported the proceedings of the court and transcribed by a court reporter who is subject to the supervision of the court.

***Urban Pacific Equities Corporation et al v. The Superior Court of Los Angeles County,* (59 Cal. App. 4th 688, 69 Cal. Rptr. 2d 635)**

This case involved an attempt to serve a business records subpoena on a reporter in an effort to obtain a copy of a deposition transcript without purchasing the copy from the reporter. The court held that a deposition was a product of the reporter's business and not a business record and therefore could not be obtained through a business records subpoena.