

## Developing Original Campaign Materials: Issues to Consider

If you are getting ready to embark on a marketing campaign, you are no doubt developing a strategy, deciding on content and making plans for the campaign launch. In the midst of your planning, it is important not to overlook the legal considerations that may impact many aspects of the campaign implementation. Such issues may not be immediately obvious, but the questions below are designed to help you identify areas where these issues lurk and to guide you in proactively addressing them and to keep your campaign from becoming sidetracked.

### If I am developing my own materials, how can I ensure I have the full right to use them?

One way to make sure your organization will have the full right to use the materials developed is to have your own employees develop the materials. Under copyright law, the work-for-hire doctrine will typically apply to an organization's employees acting within the scope of their employment, so you can be sure that what your employees develop for your organization will be owned by your organization. Be sure that your organization's employees do not incorporate material into these original works that belongs to someone else as that would require permission from the third party who has rights to the materials. If such third party work is incorporated into the materials developed by your employee, any restrictions on use contained in the permission you were granted to use that third party work could limit your right to use your own materials. An attorney can help you interpret permissions granted in any given agreement.

If you need to have independent contractors or outside consultants, or anyone else who is not an employee of your organization develop the materials, be aware that they may own the copyright to works they produce for you, unless they sign a written agreement stating that your organization is granted sole ownership of the materials. Any development not handled by an employee of the organization should be subject to a written agreement between the organization and the developer, so that appropriate work for hire language and language assigning intellectual property rights to the organization can be included.

**Disclaimer:** The information contained in this document is intended as a general guide to issues that might arise and is not intended as legal advice. You should consult your attorney for review of any marketing campaign. In designing and implementing any specific marketing campaign, you should involve your attorney at the earliest stages, since the legal principles applicable to such campaigns may be applied very differently from one situation to the next depending on the exact facts of each individual situation. By describing your planned campaign in as much detail as possible, your attorney will be able to help you identify potential problem areas and craft appropriate agreements and responses to allow you to avoid problems later in the campaign process.

### **What if there is no written agreement with the non-employee developer?**

You will be at the mercy of the developer because ownership of the materials would belong to the developer, not your organization. In such a situation, the developer retains full control over the allowed uses of the materials. For this reason, the wisest course of action is to execute appropriate written agreements with all non-employee developers prior to allowing any actual development work to begin.

Because of these issues, if you are ever faced with a choice in negotiating a development agreement between owning the resulting materials versus licensing the resulting materials, ownership is the best choice since you will then have complete control over their use.

If you are working with a vendor who is paid to perform services for your organization's campaign, you should consider the following:

- Even if you paid the vendor for developing the materials for you, without a written agreement that specifies ownership, you will not own the materials.
- The only way to ensure that you will own the materials that you pay a vendor to develop is to have a written agreement with the vendor clearly stating that the materials developed by the vendor are a "work for hire", and further stating that in the event that the materials are found not to be a work for hire, the vendor assigns all rights in the materials to your organization (including all copyrights in such materials).

For situations where the development of the materials by your organization will be paid for by grant funding or other type of funding agreement (regardless of whether such funding pays for your employees' time or for a contract with a vendor or other third party/consultant), make sure that:

- The grant terms or the terms of the funding agreement allow your organization to own the materials.
- The clauses that deal with assignment of rights in intellectual property to determine whether an assignment of copyright or other intellectual property rights was made to your organization.
- If an assignment of rights was not made under the funding agreement or grant terms, find out if your organization was granted a license to use the materials. If so, you will need to identify the scope of the license that was granted and determine whether it is broad enough to allow your organization to implement its campaign as planned.

- Make sure there is explicit language transferring ownership to your organization of all intellectual property rights in the materials developed under the grant or funding agreement.

**Do I need to get permission if I use pictures or videos of people in my campaign? Are my permission needs different if the people in my campaign are talent that I contract with or real people (adults and/or children)?**

If pictures or videos of people will be used, the written permission of the individuals shown in the pictures or videos is required. These permissions are designed to avoid accusations that an individual's right of publicity (for celebrities/talent) or right of privacy (for non-celebrities – those not holding themselves out as talent for hire) have been violated. However, it is important to note that these permissions are separate and distinct from the permission to use the video itself. The video would be protected under copyright law, a determination is needed regarding whether a license to the video (if owned by a third party) is required or if your organization has sufficient rights in the video to use it without a license (if your organization developed it and it does not belong to a third party). Once you determine who holds the rights in the video itself, you will then need to explore how to secure permission of the individuals in the video to use their images.

**For talent you contract with:** For situations in which you want to use an individual's image in photographs, you will want to make sure you secure a written agreement with the individual that specifically allows you to: 1) use the image in your campaign; 2) change the use of the image in the campaign without approval of the individual; and 3) allow others to use the image in connection with the campaign.

With regard to television and radio commercials you should be aware that there are quite a few unions that cover their production, including, the Screen Actors' Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA). It is important to know whether your chosen talent is covered by one of these unions because under the SAG and AFTRA codes "principal performers" are distinguished from "extras". Extras can be paid a flat fee for their work, but you will be required to pay principal performers "minimums" for as long as the commercial is used.

**Useful Web Sites**

University of Texas System,  
"Crash Course in Copyright"  
and related materials managed  
by Georgia K. Harper:  
[copyright.lib.utexas.edu](http://copyright.lib.utexas.edu)

Copyright Management Center  
of Indiana University-Purdue  
University:  
[www.copyright.iupui.edu](http://www.copyright.iupui.edu)

University System of Georgia,  
"Regents Guide to  
Understanding Copyright and  
Educational Fair Use":  
[www.usg.edu/legal/copyright](http://www.usg.edu/legal/copyright)

Yale University, Copyright  
Resources Online:  
[www.library.yale.edu:80/~okerson/copyproj.html](http://www.library.yale.edu:80/~okerson/copyproj.html)

United States Copyright Office:  
[lcweb.loc.gov/copyright](http://lcweb.loc.gov/copyright)

United States Patent and  
Trademark Office:  
[www.uspto.gov](http://www.uspto.gov)

Any agreement with talent should be in put in writing in order to avoid confusion later in the process. Also, the agreement should clearly list the rights of your organization to use the voice and/or images of the talent in the commercials. To the extent possible, make the list of uses very broad so that you will not be restricted in future uses. For radio and television commercials that you plan to incorporate into your campaign, it is very helpful to use an advertising agency because the advertising agency often will have contracts in place with these unions allowing you to benefit from the agency's experience and counsel in dealing with talent covered by union agreements.

**If the video uses real people (adults and/or children) who are not professional talent:** The issues are basically the same except that union issues will not be encountered. If the person is even remotely recognizable in the photograph or video, then it is necessary to have an appropriate release signed by the individual that authorizes the use of their image or voice. Make sure that the use you are allowed to make under the release is broad (including use in "any medium, now or hereafter known") and that the individual does not retain a right to review and approve of any future uses that you make. Secure for your organization the unrestricted right to copyright and use, re-use, publish, edit, alter, exhibit, distribute, etc. any images whether intact or in part, distorted or transformed. It is advisable to add language stating that the individual waives any right to further compensation and to any royalties connected with use of the image. Finally, if you are using the image of a child, any release, waiver or agreement must be signed by a parent or guardian if the child is under 18 years of age.

### **How can I provide for or limit the right for other organizations to use my materials? Are there special considerations if I have used actors and/or real people in my campaign?**

In order to protect your rights in your materials, give thought to what type of intellectual property protection might apply to your materials. Typically, such materials would be governed under copyright or trademark law. Copyright law protects content (pictures, books, brochures, video, billboards, TV and radio spots) not ideas. Trademark law protects slogans, logos, and names that are used to identify a campaign. In order to preserve a right to control the use of these materials, understand which materials are protected by copyright and what actions are needed to preserve that copyright protection. Also, go through the same exercise with regard to campaign slogans and logos and decide whether it makes sense to seek trademark registration for them. Listed below are some critical copyright and trademark facts that will be useful in making these decisions.

- Copyright protection exists for all copyrightable materials from the moment the materials are first created. It is not necessary to register a copyright with the U.S. Copyright Office in order to claim copyright protection in the materials nor is it necessary to do so in order to mark the materials with a copyright notice. However, a copyright registration with the U.S. Copyright Office is necessary before the owner of the materials can bring a lawsuit alleging infringement of its copyright protected materials.

Unless you anticipate being involved in lawsuits in which you will need to protect your copyrighted materials, the main thing you need to do is to mark the materials with a copyright notice indicating the owner of the materials and the year the materials were first created. For example a notice might look like this: “Copyright 2007. The Education Resources Institute. All rights reserved.” or “© 2007 The Education Resources Institute. All rights reserved.” Notices such as this inform the public that copyright protection is claimed in the materials.

- In cases in which your organization is willing to grant certain types of rights or uses to other parties without permission (e.g., the right to use some or all of a copyright protected work for non-commercial purposes), it may also be helpful to include that information with the copyright notice on the materials to minimize the administrative burden of dealing with requests for permission to use. For example after the copyright notice you might have a statement like this: “Reproduction and distribution permitted for \_\_\_\_\_ purposes only” where you fill in the blank with the purposes you are willing to allow.
- A more critical registration for purposes of protecting a campaign is a trademark registration. To the extent that the campaign is branded with a particular name, logo or look and feel, trademark registration with the U.S. Patent and Trademark Office will do the most to protect your organizations’ rights. A trademark registration for those names, logos, slogans and any particular look and feel of the campaign will allow your organization to control third party associations with the campaign and allow uses of the campaign trademarks only for purposes furthering the campaign goals.
- Have trademark searches conducted on any potential domain names or trademarks proposed for use by your organization as an identifying name or logo for your campaign. A trademark search will uncover any names similar to the ones you are planning to use, allowing you to avoid choosing a name or logo that could create legal problems for your campaign later because it is confusingly similar to a name or logo already in use by another organization. Start by doing a search yourself on the Internet to see what turns up and, if nothing appears to be confusingly similar, follow up by having a professional search firm finalize your search. Any lawyer who specializes in trademark law can assist you with such a search and an evaluation of the risks of using a particular name or logo.
- While it is important for each organization to protect the materials and logos that it owns, you should never forget that the same laws and rules that protect your campaign materials and logos apply to your use of third party materials and logos.

## **What ownership issues should I consider if I am developing a campaign jointly with a partner organization?**

**1. Who has the right to control jointly developed materials?** In the absence of a written agreement between the parties stating otherwise, if the materials were truly jointly developed, each party has the right to use the materials in any way desired without the permission of the other party. However, in the case of copyrighted materials each party has a “duty of accounting” to the other – meaning that if one party makes profit from the use of the jointly owned materials, in the absence of an agreement, the profit has to be split equally among the parties who own the materials.

**2. What rights does one partner organization have to use materials owned by another partner organization?** The right of one partner organization to use materials owned by another partner organization would be controlled by whatever agreement the organizations have signed establishing the partnership. In the absence of such an agreement, or in the case of an agreement that did not cover the use of each partner’s materials by the other, neither partner has the right to use the other partner’s materials without permission. Such permission could be verbal or may even be implied from the circumstances, but the only way to know that a partner has appropriate permission to use such materials is to secure permission in writing.

**3. What responsibility/liability does one organization have to another with regard to use of each other’s materials? (If one organization uses materials of another – with or without permission – and the materials are found to infringe on third party rights, is the organization that used the infringing materials able to recover the costs it incurs in defending itself against these infringement claims?)** When organizations grant rights to each other allowing use of materials, they should decide (preferably in a written agreement) whether an organization allowing its materials to be used by the other will indemnify the organization using the materials if situations arise where the materials are found to infringe third party rights and the party using the materials is sued by the party whose rights were infringed. In other words, will the owner of the materials pay the legal fees and any judgments that the user has to pay to a third party as a result of such a lawsuit against the user? This needs to be decided and solidified in writing by the two collaborating organizations.

**4. What type of copyright issues face multimedia works?** Multimedia works frequently involve multiple creators, creating special challenges under copyright law. Collaborative projects might also involve employees and/or vendors connected with other partner organizations. In such projects, written agreements between partner organizations should be executed as early as possible in the process to clarify the rights and responsibilities of each party. Even if ownership of such works is held by a single entity (such as one partner organization), the rights to use such products can often be divided and shared to meet the needs of each party. For example, multiple parties may have non-exclusive rights to copy, display, or distribute a particular work. On the other hand, partner organizations hiring vendors to develop materials for their campaigns should exercise caution that in executing agreements with their vendors, they do

not agree to contractual clauses that would prevent them from allowing their partner organizations to also use the materials.

**5. What about crediting contributors?** In many situations involving multiple contributors, the issue of credit may be at least as important as questions of copyright ownership and control. This is an issue not just for organizations, but also increasingly for their employees with technical skills whose expertise is in short supply and is indispensable in developing multimedia projects or online materials. As in movie credits, individual contributors can be acknowledged without altering copyright ownership, so you can identify the developers of the materials even if they are not technically the legal owner of the copyright in the materials.

### **Are there any legal issues related to using blogging or social networking sites as part of my campaign?**

**Blogging** –Keep in mind that content entered in a blog must be assumed to be owned by the person who enters it, not by the organization hosting the website where the blog may be found. Anything copied from a blog will most likely require the permission of the poster. If you intend to use a blog as part of your campaign, you may want to set up the blog so that before an individual can post to the blog, they have to click through a very short license in which they agree that anything they post may be used by the owner of the website hosting the blog for any purposes associated with the campaign.

**Social networking and video sharing web sites** – The two main issues here are copyright and rights of privacy/publicity. Even though video or other materials are posted to a social networking or video sharing web site, they do not lose copyright protection. Prior to their use, the permission of the owner of the video and the materials is still required in some form. Also, before using materials or video containing images of individuals, make sure that you have secured the permission of the individuals to use the images for the purposes you desire. Simply securing copyright permissions is not sufficient; make sure the rights of privacy and/or publicity are not violated.

This brief was compiled by Gail Gunnells. For questions or comments, please contact Jessica Krywosa, Project Manager, Pathways to College Network at [krywosa@teri.org](mailto:krywosa@teri.org) or 617-535-6851.

[CollegeAccessMarketing.org](http://CollegeAccessMarketing.org) (CAM) was created to provide advice, support, and resources to college access marketing practitioners. The site is continuously updated, and maintained by partner organizations Pathways to College Network and the Southern Regional Education Board's *Go Alliance*.



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