

Using Materials from Other Organizations: Issues to Consider

When creating a marketing campaign, some agencies may benefit from the efforts already forged by similar organizations. In many cases, licensing materials can be an option allowing use of materials already created for a separate organization's campaign. When deciding whether or not to adapt another campaign's message to your own, you should consider the many legal implications such an adoption can incur.

What do I need to consider when deciding to use someone else's materials (text, pictures, video, music) for my campaign?

First and foremost you must obtain permission to use another person or organization's materials. Materials that belong to someone else cannot be used without the permission of the owner. In most cases a written agreement that provides a license to use the materials is required. This agreement must be executed with the owner of the materials. Once this written agreement is in place granting license to the materials, your organization is free to use the materials in accordance with the terms of the agreement. Without such an agreement, a lawsuit could be threatened for infringement of the owner's rights.

While in many cases a third party may be happy to have its materials appear in connection with your campaign, and often permission to use the materials can be implied from the context of the interaction between the parties, the safest course for all sides is to enter into a written agreement prior to such use that details each party's obligations and rights with regard to the use of the materials. This is particularly true in situations where use of the third party materials will involve placing the materials on the Internet. Since the Internet provides instant worldwide distribution of anything that is uploaded without password protection, most third parties prefer to have specific knowledge of, and prior approval of, such uses.

Decide exactly what materials you want to use in your campaign, and then identify the owners of those materials. If the materials turn out to be in the public domain and not subject to copyright, then you are free to use them without securing any permissions. Very few materials that you might want to use for these purposes are actually in the public domain, so you will need to determine who owns the materials and develop an agreement for their use by your program.

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.

Keep in mind that even though existing materials or logos are found on the Internet or can be easily downloaded from the Internet, such availability does not mean that the materials or logos are free to be used in your campaign without permission from the owner of the materials.

Such materials are still subject to copyright and trademark protection and in most cases permission will need to be secured from the owner of the materials in order to use them in your campaign. Likewise, lack of a copyright notice or trademark notice does not mean that materials are freely available for use without the permission of the owner.

When it is necessary to obtain permission to use such materials, permission should be sought in writing. A letter should be sent to the copyright or trademark owner specifying the nature of the use, along with a signature block for the copyright or trademark owner to sign and date.

Secure the broadest license available for the money you have to spend. A broader license will have the benefit of allowing the campaign to later expand its scope in ways that may have been unanticipated during the initial planning. Too often a narrow license is taken to fit only the initial campaign plans, only to discover later in the implementation phase that it would be desirable to broaden the scope of the campaign, but the license restricts such use. At that point it is up to the owners of the materials you licensed, and since those owners now find that the materials are of more value to you than originally thought, the price of the necessary license may increase substantially.

What kind of permission do I need to use video or pictures that are part of another campaign?

If you want to use pictures or videos of people in your campaign, you will generally need the written permission of the individuals shown in the pictures or videos. These permissions are designed to avoid accusations that your organization has violated 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). *However, it is important to note that these permissions are separate and distinct from the permission to use the video itself.*

The video is protected under copyright law, so first determine whether a license to the video (if owned by a third party) is needed or if you have 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 it is determined who holds the rights to the video itself, you will need to explore how to secure permission of the individuals in the video to use their images.

For talent used in someone else's campaign that you now want to use parts of: If the photograph/video/commercial is owned by a third party, you will need to question the third party about what rights it secured from the individuals shown in the photo/video or performing in the commercial. In many cases there may have been an appropriate release signed by each individual in which the individual authorized his/her image or voice to be used without any further permissions or compensation in connection with any use of the photo, video or commercial and the third party may be within their rights to approve your proposed use.

If such a release was not signed, you will need to decide whether you will be able to secure appropriate permissions from each of the individuals or whether you can edit out the individual. In some cases you may have to give up on any use of the video or commercial if appropriate permissions are not available or are too difficult to acquire. Also, be aware that certain changes to commercials may constitute a “new” commercial. In such situations where the original agreement placed a limit on the number of commercials that could be produced, the Screen Actors Guild and American Federation of Television and Recording Artists union codes may be applicable and might function to prevent the third party from authorizing your desired use.

Once you have identified the materials your organization would like to use and have made the decision to seek permission, the following issues will need to be addressed:

Determine who owns the rights by looking for:

- Copyright notices
- Trademark symbols
- Patent numbers

In approaching the organization that owns the materials or logos that you want to use, a few key questions will help you understand who actually developed the materials or logos for that organization. The answers are important because they ensure that you are getting permission from the correct organization. You will want to first ask who actually developed the materials. Was it someone inside the organization or outside the organization? Several possibilities are discussed below:

The organization’s employees – If the organization’s employees developed the materials in the scope of their employment duties, then the organization is considered the owner of the materials under the work for hire doctrine. A written agreement is not necessary to transfer ownership of materials, which were developed by an organization’s employees in the course of performing their duties for the organization, and the organization has the right to grant you permission to use the materials.

Consultant – If a consultant developed the materials for the organization, then a written agreement should be in place between the organization and the consultant to transfer ownership of the materials to the organization. In the absence of such an agreement specifically stating that the organization owns the materials, ownership remains with the consultant, regardless of whether the organization paid for the materials or not. In the absence of such an agreement between the organization and the consultant, you will need permission from the consultant to use the materials.

Outside agency – If an outside agency developed the materials, the issue is the same as for a consultant. Regardless of whether the organization paid for the materials, they will be owned by the outside agency unless there is a written agreement in place between the agency and the organization specifically assigning ownership of the materials to the organization.

Government employee – If the materials were developed by a government employee one cannot automatically assume that they are freely available for use. While copyrighted materials developed by federal government employees are typically freely available for use, there are a few more questions that need to be asked before you can be sure that an agency can grant you the right to use such materials in your campaign. (See below re: who paid for development of the materials)

In addition to determining the correct owner of the materials, you should also ask, who paid for the materials?

Federal Government – If the federal government paid for the development of the materials, then generally the federal government allows the developer of the materials to retain ownership.

However, the federal government keeps a non-exclusive license to use the materials and to allow others to use the materials, so factor that license into your planning. Typically, any license to materials developed with federal funding will be subject to the license that the federal government retained, so securing (or granting) an exclusive license to use the materials would not be possible as a practical matter.

State or Local Government – If a state or local government paid for the development of the materials, check the terms under which payment was made to determine whether the government retained any rights or allowed the organization to keep all rights. Also, be sure to find out the source of the state or local funding. Many times the state or local government may be using federal funds for such funding, so the materials may be subject to the same restrictions identified above for situations involving the use of federal funds.

Private Funding – If private funding was the source of the development money, then look for a funding agreement under which ownership of the materials was transferred to the organization. You will also want to ask whether the private funding was a pass-through of any government funding for the reasons identified above.

Useful Web Sites

University of Texas System,
“Crash Course in Copyright”
and related materials managed
by Georgia K. Harper:
copyright.lib.utexas.edu

Copyright Management Center
of Indiana University–Purdue
University:
www.copyright.iupui.edu

University System of Georgia,
“Regents Guide to
Understanding Copyright and
Educational Fair Use”:
www.usg.edu/legal/copyright

Yale University, Copyright
Resources Online:
www.library.yale.edu:80/~oker-son/copyproj.html

United States Copyright Office:
lcweb.loc.gov/copyright

United States Patent and
Trademark Office:
www.uspto.gov

Once you have satisfied yourself that you are talking with the rightful owner of the materials, you are ready to seek permission.

Broader permission is better – include rights to use the materials in “media now or hereafter known” if possible, so that future uses that you desire to make of the materials are not precluded simply because the media to be used was not known or developed at the time you secured initial permission (for example, securing permission initially to reproduce and distribute on VHS tapes, but now wanting to reproduce and distribute over the Internet).

- You may need the right to modify (make derivative works) of the materials to tailor them to your specific campaign. If so, you will need to have this right specifically listed in the permission letter or license from the owner of the materials.
- You may need the right to sublicense your right to use the materials and allow others to also use the materials (your partner organizations, for example).

Cost or time may be a factor – sometimes the cost of securing a license granting you permission to use the materials or simply the time that it will take for your permission request to be reviewed and responded to by the owner of the materials will effectively prevent you from being able to make use of the materials. Some entities that grant rights for the use of commercialized copyrighted works (usually with a fee) include the following:

For publications:

Copyright Clearance Center Online: A clearinghouse where you can obtain permission to reproduce copyrighted content such as articles and book chapters in journals, course packs, web sites, etc. (www.copyright.com)

For music:

ASCAP: A membership organization that licenses and distributes royalties for non-dramatic public performances of copyrighted works. Many colleges and universities have licenses with them. (www.ascap.com)

BMI: An American organization that represents songwriters, composers, and music publishers in all genres of music. BMI collects license fees for public performance of its compositions. Many institutions also have licenses with them. (www.bmi.com)

Harry Fox Agency, Inc.: This agency licenses the use of music for mechanical and digital uses, such as for use in records, tapes, CDs, and digital services. (www.harryfox.com)

SESAC: This performing rights organization represents songwriters and publishers, and provides licenses to allow music users (e.g., television and radio stations, auditoriums, restaurants, etc.) to play songs in the SESAC repertory. (www.sesac.com/)

What permissions do I need in regard to placing materials on the Internet?

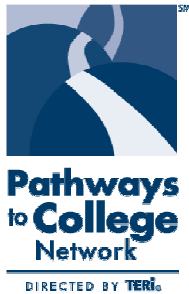
Once you have your permissions in place and you are setting up websites and making materials available online, be careful when linking. Several trademark infringement issues have arisen as

a result of “linking”, where users of one website connect to another by clicking on a hyperlink displayed on the first site. “Deep linking”, which is the practice of providing access to a Web page on a second site without going through the home page of the second site, is of particular interest because it can confuse consumers into believing that the “deep linked” site is associated with the original site.

This was the issue in Ticketmaster Corp. v. Microsoft Corp., in 1997, where Microsoft connected users to the ticket sales section of the Ticketmaster site. Ticketmaster claimed infringement of the “TICKETMASTER” trademark, dilution of the mark’s value, and violations of state and federal unfair competition law. The suit was settled with Microsoft agreeing to remove its deep link and link only to Ticketmaster’s home page. Given these issues, you will want to make sure that you seek appropriate permissions if you want to engage in any such “deep linking”.

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 or 617-535-6851.

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*.



Pathways to College Network is an alliance of prominent national organizations committed to advancing college access and success for underserved students, including those who are the first generation in their families to go to college, low-income students, underrepresented minorities, and students with disabilities.

Pathways is directed by TERi and its pathwaystocollege.net web site provides evidence-based resources to support the work of researchers, policymakers, and practitioners. For more information about Pathways, please contact 617-535-6829. Media inquires: 617-556-0565

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