Works-for-Hire Under Copyright Law

Q: We pay people to do things like develop software, write articles, design our website and prepare certification exam questions for us. What do we need to do to make sure we own the rights to their work?

A: The answer: Follow the "work-for-hire" requirements of copyright law. Never assume that simply because the organization paid someone it automatically owns whatever that person created. Payment does not by itself guarantee ownership.

Copyright law provides that the owner of a work, in most cases, is the person who created the work. Without a clear transfer of copyright ownership from the creator of the work to the purchaser of the work, the purchaser/organization, at best, has only an implied license to use the work. Even if the organization paid a vendor under a written agreement, the copyright in the work belongs to the vendor unless the agreement clearly specifies the organization's rights.

Copyright ownership is important because the owner of the copyright has the exclusive right to make and distribute copies of the work, and has the exclusive right to create "derivative works" from the original copyrighted work. Derivative works are any works based on the original work that use substantial elements of the original work in the new work (e.g., translations and adaptations).

The work-for-hire doctrine is an important exception to the general rule that the creator is the owner of copyright. "Work-for-hire" is a fairly narrow concept under copyright law that gives the organization ownership of materials that have been created for it in certain limited circumstances.

The Work-for-Hire Doctrine

Copyright law protects the original expression of an idea in a tangible form, such as books, magazine articles, website designs, computer software, photographs and music. Copyright protection arises automatically when a work is created. In most cases, the owner of the copyright is the person who created the work. However, federal copyright law specifically defines when a work is considered "work-for-hire" and belongs to someone other than the creator of the work.

A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment or (2) a work specially ordered or commissioned for use as a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, supplementary work, compilation, instructional text, test, answer material for a test, or atlas, if the parties expressly agree in writing signed by them that the work shall be considered a work made for hire.

Under the work made for hire doctrine, the employer or organization for whom the work was prepared is considered the owner (or "author") of the work. So, if the organization's employee creates a brochure, for example, during the course of his or her employment, the copyright in the brochure automatically belongs to the organization.

Work by a third party can be considered "work made for hire" if two conditions are met: (1) the type of work is in the language of the statute—a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, supplementary work, compilation, instructional text, test, answer material for a test, or atlas; and (2) the parties have a written agreement specifically stating that the work is a work made for hire. If the work product is a contribution to a collective work (e.g., certification exam questions), that could be considered work made for hire but work such as software and website design likely would not be. For works that do not qualify as "works made for hire," the organization can obtain copyright ownership by using a copyright transfer agreement.

Best Practice

For anyone other than an employee, the organization must have a written agreement that addresses the work-for-hire and copyright issues. Because work-for-hire is a narrow concept, it's always a good idea for the written agreement to include language that calls the work a "work-for-hire" and that transfers ownership of the copyright from the creator (the third-party vendor) to the organization. Such a provision, as an example, could include the following language:

> *[Description of work product] shall be considered a work made for hire under federal copyright law. To the extent [work product] is not deemed a work made for hire, [Company] hereby transfers and assigns to [Association] all of its and its employees' right, title and interest, including but not limited to copyright and all rights subsumed thereunder, in and to the [work product].*

While this question and response focuses on works created by persons who are paid, it is just as important for organizations to obtain the explicit right to use any and all written work created by unpaid volunteers. For example, when committee members develop a technical standard or core curriculum for the organization, the individuals who contributed to the standard or curriculum own the copyright of the work. The organization must obtain from each committee member either a transfer of copyright or a license to use the work, and the copyright transfer or license must be in writing to be effective.

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.