Copyright
United States Copyright Office

Works Made for Hire

Copyright law protects a work from the time it is created in a fixed form. From the moment it is set in a print or electronic manuscript, a sound recording, a computer software program, or other such concrete medium, the copyright becomes the property of the author who created it. Only the author or those deriving rights from the author can rightfully claim copyright.

There is, however, an exception to this principle: "works made for hire." If a work is made for hire, an employer is considered the author even if an employee actually created the work. The employer can be a firm, an organization, or an individual.

The concept of "work made for hire" can be complicated. This circular refers to its definition in copyright law and draws on the Supreme Court's interpretation of it in *Community for Creative Non-Violence v. Reid*, decided in 1989.

Definition in Law

Section 101 of the Copyright Act (title 17 of the *U.S. Code*) defines a "work made for hire" in two parts:

a a work prepared by an employee within the scope of his or her employment

or

b a work specially ordered or commissioned for use

1 as a contribution to a collective work,

2 as a part of a motion picture or other audiovisual work,

3 as a translation,

4 as a supplementary work,

5 as a compilation,

6 as an instructional text,

7 as a test,

8 as answer material for a test, or

9 as an atlas,

if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The law defines a "supplementary work" as a work prepared for a publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes.

The law defines an "instructional text" as a literary, pictorial, or graphic work prepared for publication and intended to be used in systematic instructional activities.

Supreme Court Interpretation

Determining whether a work is made for hire can be difficult because it is not always easy to apply the legal definition of "work made for hire."

The Supreme Court's decision in *Community for Creative Non-Violence v. Reed* addressed that definition. The Court held that one must first ascertain whether a work was prepared by (a) an employee or (b) an independent contractor.

If an employee created the work, part 1 of the definition above applies, and the work will generally be considered a work made for hire.

But note that the term "employee" in the definition differs from the common understanding of the term. For copyright purposes, "employee" means an employee under the general common law of agency. See the subheading "Agency Law" below.

If an independent contractor created the work, and the work was "specially ordered or commissioned," part 2 of the definition above applies. An "independent contractor" is someone who is not an employee under the general common law of agency.

A work created by an independent contractor can be a work made for hire only if (a) it falls within one of the nine categories of works listed in part 2 above *and* (b) there is a written agreement between parties specifying that the work is a work made for hire.

Agency Law

To help determine who is an employee, the Supreme Court in *Community for Creative Non-Violence* identified factors that make up an "employer-employee" relationship as defined by agency law. The factors fall into three broad categories.

1 *Control by the employer over the work*. For example, the employer determines how the work is done, has the work done at the employer's location, and provides equipment or other means to create the work.

2 *Control by employer over the employee*. For example, the employer controls the employee's schedule in creating the work, has the right to have the employee perform other assignments, determines the method of payment, or has the right to hire the employee's assistants.

3 *Status and conduct of employer*. For example, the employer is in business to produce such works, provides the employee with benefits, or withholds tax from the employee's payment.

These factors are not exhaustive. The Court left unclear which of these factors must be present to establish the employment relationship under the work-for-hire definition. Moreover, it held that supervision or control over creation of the work alone is not controlling.

However, all or most of these factors characterize a regular, salaried employment relationship, and it is clear that a work created within the scope of such employment is a work made for hire (unless the parties involved agree otherwise).

Examples of works made for hire created in an employment relationship include:

- A software program created by a staff programmer within the scope of his or her duties at a software firm
- A newspaper article written by a staff journalist for publication in the newspaper that employs the journalist (who is not a freelance writer)
- A musical arrangement written for a music company by a salaried arranger on the company's staff
- A sound recording created by salaried staff engineers of a record company

The closer an employment relationship comes to regular, salaried employment, the more likely it is that a work created within the scope of that employment will be a work made for hire. But because no precise standard exists for determining whether a work is made for hire under part 1 of the definition in section 101 of the copyright law, consultation with a lawyer may be advisable.

If a work is made for hire, the employer or other person for whom the work was prepared is the author and should be named as the author on the application for copyright registration. Respond "yes" to the question on the application about whether the work is made for hire.

Owner of the Copyright in a Work Made for Hire

If a work is made for hire, the employer or other person for whom the work was prepared is the initial owner of the copyright unless both parties involved have signed a written agreement to the contrary.

Term of Copyright Protection

The term of copyright protection of a work made for hire is 95 years from the date of publication or 120 years from the date of creation, whichever expires first. (A work not made for hire is ordinarily protected by copyright for the life of the author plus 70 years.) For information about terms of copyright protection, see Circular 15a, *Duration of Copyright*.

Termination Rights

The copyright law provides that certain grants of the rights in a work that were made by the author can be terminated 35 to 40 years after the grant was made or after publication, depending on the circumstances. However, the termination provisions of the law do not apply to works made for hire.

For Further Information

The Internet

Circulars, announcements, regulations, copyright application forms, and related materials are available on the Copyright Office website at *www.copyright.gov*.

By Telephone

For general information about copyright, call the Copyright Public Information Office at (202) 707-3000 or 1-877-476-0778 (toll free). Staff members are on duty from 8:30 AM to 5:00 PM, eastern time, Monday through Friday, except federal holidays. Recorded information is available 24 hours a day. Request application forms and informational circulars 24 hours a day at (202) 707-9100 or 1-877-476-0778 by leaving a recorded message.

By Regular Mail

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