Works Made For Hire

by Maggie Armstrong, JD

What is a Work Made for Hire?

The US Copyright Act defines a work made for hire as "a work prepared by an employee within the scope of his or her employment, or 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 audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional test, (7) as a test, (8) as answer material for a test, or (9) as an atlas." This definition is found in Section 101 of the US Copyright Act.

What does that mean? Normally, a work that is eligible for copyright protection belongs to that work's author: the person or entity who has fixed the work in a tangible medium. However, there is an exception called Work Made for Hire which allows for an employer or commissioner of a work to be the author, with all the rights that being an author entails, even when an employee or an independent contractor is actually the person who created the work.

Can they do that? It seems counterintuitive for someone who creates a work not to have ownership of that work under copyright law, and for someone else who did not create the work to be deemed the author. However, it is extremely common in employment situations, where employees create work for the benefit of the employer, and in commissioned works, where the work is created specifically for another person or entity.

How do you know if what you're doing is a Work Made for Hire? Sometimes it's quite clear that any work you create will belong to someone else. Work Made for Hire clauses are common in employment contracts. However, even without an employment contract stating that the employer will own what the employee creates, work that is created by an employee in the scope of employment will generally be considered a work made for hire.

When the work is created by a non-employee, absent an agreement between the parties, it's not always clear who the author is. Independent contractors may be able to claim authorship in certain situations, but are also subject to the Work Made for Hire exception in other situations. It is useful to apply the rules of Agency and Employment law to determine whether one is operating as an employee or an independent contractor, and how that affects the work created.

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Who is an employee? In a landmark Work Made for Hire case, *Community for Creative Non-Violence v. Reed*, the Supreme Court issued out the relevant factors in determining who is an employee and how that determines what is considered a Work Made for Hire. If the employer has control over the work, such as providing direction and equipment for its creation, if the employer has control over the employee, and if the employer is in the business of producing such works, it is likely that there exists an employer/employee relationship and that the work created by the employee belongs to the employer.

Who is an independent contractor? Independent contractors work outside the supervision and control of an employer. It is much clearer when a work created by an independent contractor will be determined a Work Made for Hire. In *Community for Creative Non-Violence*, the Supreme Court concluded that work by an independent contractor will be a Work Made for Hire *only* if it falls under one of the nine categories listed in the Copyright Act's definition (see above), *and* there is a written agreement between the parties specifying that the work is a Work Made for Hire.

Will I ever get ownership of the Works Made for Hire I create?

Unfortunately, no. A Work Made for Hire unequivocally and irrevocably belongs to the author, who again, is not the person who created the work. Even when an employee leaves employment, she does not get to take her work with her. Anything that is created in the scope of employment, whether a concrete Work Made for Hire contract exists, belongs solely to the employer.

What if it's unclear whether a work will be a Work Made for Hire? Outside an employer/employee relationship, it is advised that parties discuss who will obtain ownership rights over the work before it is created. It is both possible and common for the parties to agree that they will be co-authors of the work, with each obtaining the ownership rights that the Copyright Act grants to authors. If such a decision is made, it must be in writing; co-authorship is nearly impossible to prove without a written agreement to that effect. Contact an attorney to help you create a contract outlining authorship of a work before it is created. That way, later confusion about who has the exclusive rights granted to copyright owners will be avoided.

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