



## Work Made For Hire

Jeffrey Pittard<sup>1</sup>

Seton Hall School of Law

Copyright 2005

Reprinted and distributed by New Jersey Volunteer Lawyers for the Arts with the permission of the author

Copyright in a protectible creation vests initially in the author or, in the case of a joint work, authors, of a creation.<sup>2</sup> The Copyright Act's "work made for hire" doctrine is the fundamental exception to the general rule that copyright ownership vests initially in the individual who creates the work.<sup>3</sup> The significance of this concept is not inconsequential. With ownership comes control over the exclusive rights in a work and, hence, the ability to commercialize a work to its fullest extent.

Section 101 of the Copyright Act of 1976 provides that a work is made for hire if it falls within one of two overall categories. First, a work will be considered "for hire" if it is prepared by an employee within the scope of his or her employment. Thus, when a software programmer authors new code as part of

performing her job, the software company itself is considered the author of the work despite the obvious fact that the individual programmer created the work. The second way in which a work would be considered for hire is if a freelancer or independent contractor creates a work by commission or special order. Two further conditions must be met for such commissioned works: (1) the work falls within one of nine categories enumerated in the statutory definition of work made for hire, and (2) there is a written agreement between the parties specifying that the work is made for hire. While deciding whether a work is made for hire might seem like a simple question at first blush, the answer is a complex one that takes into account common law principals as well as statutory law.

If an “employee” authors a work, part one of the statutory definition is triggered and courts look to the common law of agency to determine whether the creator of a work is an employee for purposes of copyright law. Under the law of agency, courts place emphasis on the “hiring party’s right to control the manner and means by which the work is accomplished.”<sup>4</sup> In the seminal case *Community for Creative Non Violence v. Reid*, 490 U.S. 730 (1989), the United States Supreme Court listed certain factors that are relevant when deciding whether an employee-employer relationship is present:

- The skill required in making the work

- Whether the hiring party supplied the tools and instrumentalities used in the creation of the work
- The place where the work is created
- The length of time the two parties will be working with each other
- Whether the hiring party can assign additional work
- The hired party's ability to choose when and how long to work for
- The method in which the hiring party pays the hired party
- Whether the hired party can hire and pay assistants
- Whether the hiring party engages in this type of work on a regular basis
- "Whether the hiring party is in business"
- Whether the hired party receives employee benefits, and
- The method of tax treatment given to the hired party.<sup>5</sup>

Essentially, the more it appears that the hiring party treats the hired party as a "regular, salaried" employee, the more likely it is that the court will find that an employee-employer relationship exists.<sup>6</sup> On the other hand, the more the hired person appears to be working under his own control, with his own workspace and using his own tools, the more likely it

is that the court will consider the hired party not an employee, but rather an independent contractor.<sup>7</sup>

If the hired party is found to be an employee of the hiring party, then the hired party must have acted in the scope of employment when creating the work if the creation is to be considered made for hire.<sup>8</sup> The scope of employment encompasses the tasks that the employee would reasonably be expected to carry out while serving the employer's interest.<sup>9</sup> An employee taking on a task as a personal endeavor, however, would not be considered acting within the scope of employment.

Examples that the United States Copyright Office provides of work made for hire in an employee-employer relationship include:

- “A newspaper article written by a staff journalist for publication in a newspaper that employs him.”<sup>10</sup>
- “A musical arrangement written for XYZ Music Company by a salaried arranger on its staff.”<sup>11</sup>

If the court finds that the hired party is not an employee, but a freelancer or independent contractor, then the court will both (1) look for a signed written document in which the two parties agree that the work is made for hire and (2) ensure that the work created fits into one of the categories listed in § 101.<sup>12</sup> These categories limit work made for hire to creations that include only the following:<sup>13</sup>

- A contribution to a collective work

- Part of a motion picture or other audiovisual work
- A translation
- A supplementary work that comments upon, explains, revises, or assists in the use of another work
- A compilation
- An instructional text
- A test
- Answer material for a test, or
- An atlas.<sup>14</sup>

The work must be created for one of the statutorily expressed purposes, otherwise the creation will not be considered a work for hire and the independent contractor will retain authorship and ownership of the work and the privilege to exploit all exclusive rights in the work.<sup>15</sup> A stand-alone work created by an independent contractor will most likely not fit into one of the nine statutory categories and will not be considered a work made for hire.

For example, in the Reid case, noted earlier, CCNV verbally hired Reid, a sculptor, to make a statue of a “Nativity” scene depicting homeless people. Subsequent to its display, the statue was returned to Reid for minor repairs.<sup>16</sup> The parties then disputed whether the figure should go on tour and each filed competing copyright registrations for the work.<sup>17</sup> CCNV then brought Reid to court claiming that the sculpture was a work made for hire.<sup>18</sup>

The Supreme Court found that while CCNV had control over the details of the project, Reid was not an

employee for the purposes of § 101 because Reid held a skilled occupation, supplied his own tools, had the authority to hire his own assistants, and worked in Baltimore while CCNV was located in Washington.<sup>19</sup> Furthermore, CCNV was not in the business of creating statues and the organization did not offer any employee benefits to Reid nor did CCNV contribute to unemployment or workman's compensation funds.<sup>20</sup>

Since Reid was not an employee, the court then looked to see if the requirements of a work made for hire by an independent contractor were present.<sup>21</sup> Here, there was no written contract and a sculptural work was not one of the categories listed in § 101 of the Copyright Act that allowed an independent contractor to make a work for hire.<sup>22</sup> Thus, the Supreme Court found that the statue was not a work made for hire and remanded the case to the district court to determine whether the work was a result of joint authorship.<sup>23</sup>

When an independent contractor is found not to have made a work for hire, it is important to inquire whether the work was a result of joint authorship. Joint authorship occurs when two or more parties merge inseparable or interdependent parts of a work into a unitary whole.<sup>24</sup> Intent of each author to combine the parties' work is a statutory requirement in all United States federal jurisdictions.<sup>25</sup> In most jurisdictions, each party must contribute a type of work that can be independently copyrighted, but a few jurisdictions require only intent and that the final work be copyrightable.

As shown, simply being the creator of a work does not make one the owner of the copyright in the work. When computer programmers who work for a software company or in-house graphic artists create a work, the employer is the “author” for copyright purposes. Also, freelance journalists and composers of movie scores, who agreed in writing that their work would be considered “made for hire,” do not own the copyright in the works they create either. Instead, the rights of ownership vest with the creator’s employer or, in the case of an independent contractor, with the person who contracted with the creator. Because the copyright owner controls the works and gets exclusive rights that come with ownership, understanding when a work is made for hire is critical.

###

By reviewing this article, the reader acknowledges that (1) the article contains law that is subject to change after the publication of the article; and (2) the article is intended for informational use only and is not to be construed as a legal opinion or legal advice, in general or with respect to any particular legal matter. This article contains a general overview of the topic and is not intended as legal advice or as a substitute for a consultation with an attorney. If you have further questions about this or any arts-related legal issue, please contact New Jersey Volunteer Lawyers for the Arts at 856-627-0428 or [info@njvla.org](mailto:info@njvla.org).

---

<sup>1</sup> With very special thanks to Vanessa A. Ignacio, Esq., of Lowenstein Sandler, PC, in Roseland, NJ.

<sup>2</sup> 17 U.S.C.A. § 201(a) (2005).

<sup>3</sup> 17 U.S.C.A. § 201(b) (2005).

<sup>4</sup> U.S. Copyright Office, *Works Made For Hire Under the 1976 Copyright Act*, Nov. 2004, at 2 available at <http://www.copyright.gov/circs/circ09.pdf>.

<sup>5</sup> *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

<sup>6</sup> U.S. Copyright Office, *supra* note 4.

<sup>7</sup> *See* *Community for Creative Non-Violence*, *supra* note 5, at 752-753.

<sup>8</sup> U.S. Copyright Office, *supra* note 4.

<sup>9</sup> BLACK'S LAW DICTIONARY (7th ed. 2000).

<sup>10</sup> U.S. Copyright Office, *supra* note 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 17 U.S.C.A. § 101 (2005).

<sup>14</sup> *Id.*

<sup>15</sup> *Community for Creative Non-Violence*, *supra* note 5, at 753.

<sup>16</sup> *Id.* at 735.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Community for Creative Non-Violence*, *supra* note 5, at 753.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Community for Creative Non-Violence*, *supra* note 5, at 753.

<sup>24</sup> 17 U.S.C.A. § 101.

<sup>25</sup> *Id.*