If You Pay For A Work To Be Developed, Do You Own The Copyright?

There are many confusing aspects of copyright law, but one of the most commonly misunderstood is the Work-For-Hire Doctrine. The Doctrine is found in the Copyright Act and has existed in its current form with minor amendments for decades.[1] Despite its age, the Doctrine is frequently misapplied in determining copyright ownership.

Under the Copyright Act, a "work made for hire" is first defined as "a work prepared by an employee within the scope of his or her employment."[2] This is relatively straightforward; when an employee prepares a work in the scope of employment, the employer generally owns any copyrights in that work.

Copyright ownership becomes complicated in situations where one creates a work for another outside the employer/employee relationship. The Copyright Act further defines a "work made for hire" as "a work specially ordered or commissioned for use":

> as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas . . .[3]

Even if the work falls into one of these specific categories, it will not be considered a work made for hire unless "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[4] Therefore, outside of the employer/employee relationship, a work will not be a work made for hire unless it falls into one of the types of work mentioned above, and the parties have a written agreement stating that the work will be a work made for hire.

Some common examples demonstrating misunderstandings of the Doctrine relate to clients hiring contractors for jobs such as software or website development. Clients often believe that, since they paid the contractor to develop the software or website, the client automatically owns any copyright in the software or website. As shown above, unless the software or website falls into one of the specific categories, and there is a written agreement designating the software or website as a work made for hire, the contractor would own the copyright.

If the work is one that will not fall into one of the specific categories of works listed in the Copyright Act, the proper method for the client to ensure that it owns any copyrights coming out of a work developed by a contractor is to create a written agreement under which the contractor assigns any and all copyrights to the client.

The best way to ensure that clients own the copyrights in works created by hired contractors is to create written agreements under which any works created are designated to be works made for

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[1] 17 U.S.C. § 101; *see also* § 201(b).
[2] *Id.* at § 101.
[3] *Id.* The terms "collective work," "supplementary work," and "compilation" are specifically defined in Section 101.
[4] *Id.*

hire with fall back language that, even if the works cannot be considered works made for hire under the Copyright Act, the contractor assigns any and all copyrights in the works to the client.[5]

[5] Note that generally, the term of a copyright is the life of the author plus 70 years, but the term for a work made for hire is 95 years from the year of its first publication or 120 years from the year of its creation, whichever expires first. *Id.* at § 302.