



## WORK MADE FOR HIRE DOCTRINE: MORE COMPLEX THAN YOU THINK

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It's a question that Attorney Tori L. Kluess hears all the time:

If I specifically commission and pay for work, I own the work product, including the copyrights, don't I?

The answer comes as a surprise to many.

"Just because you request the work and pay for the work does not mean you own the copyright to the work," Attorney Kluess says. "If you are dealing with an independent contractor, who is not an employee of your company, and if the work does not fall within nine narrow, specifically enumerated areas set forth in the Copyright Act, then the only way you can be sure you own the copyright is if the person doing the work for you assigns those copyrights to you in writing as part of your contract."

According to the Copyright law "Work Made for Hire Doctrine," Kluess says, the person for whom work is prepared is considered the author, and therefore owner of the copyright, in only two situations: (1) when an employee prepares it while working in the scope of his or her employment; or, (2) when a person or company is hired to prepare one of nine specifically described types of work that are listed under the Copyright Act, and a written agreement between the parties indicates that it is a "Work Made for Hire."

"In all other circumstances, the person preparing the work owns the copyrights," Kluess says.

The nine types of works that constitute a Work for Hire, if there is a written document expressly confirming that, are: (1) a contribution to a collective work; (2) part of a motion picture or other audio-visual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for a test; or (9) an atlas.

If these circumstances do not apply, Kluess says, people need to take affirmative steps to protect their rights by contractual assignment; they should not just assume that copyright law will protect them.

"When you are hiring a computer programmer to create source code and applications for your computer systems and if you wish to own the copyrights to such programs and work products, the independent contractor must assign those copyrights to you," Kluess says. "The same thing applies to photographs, marketing materials, art work and anything else used for advertising, marketing and promoting your business."

"If you are not the copyright owner, all you receive for what you pay is a license or right to use the work product and sometimes in a very limited fashion," Kluess adds. "If you actually want to own the copyrights, so that you are free to use the work product in other mediums and fashions without the potential for future remuneration to the copyright owner, you must obtain the copyrights through an assignment agreement."