# Work Made for Hire. An overview of the copyright concept

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The Legal Impact column regularly considers the legal rights of one party as compared with another in connection with a certain situation or issue. Continuing with that theme, this installment explores "work made for hire" in copyright law and how this concept affects the rights of the individual that produces the work and the rights of other parties that may be involved under the circumstances. For purposes of examining work made for hire, let us consider a physical therapy practice that is seeking to launch a hand therapy program. In connection with the program, the practice asks one of its employees, a physical therapist, to illustrate an educational handout that describes certain anatomical structures in the hand. The physical therapist performs some of the work during her regularly scheduled work day and some on evenings and weekends. The practice also hires a website development firm to design a unique webpage for the hand therapy program. The design services are performed under a "work order" that terminates automatically once the work is completed. A number of months after the successful launch of the hand therapy program, the employee terminates her employment and takes a position at a competitive practice a few miles away. Under this scenario, how is ownership of the handout and the website determined? The answer to this question depends in part upon whether each of these works was a work made for hire.

The Federal Copyright Act defines a "work made for hire" to generally include two categories: (i) a work prepared by an employee within the scope of his or her employment; or (ii) a work specially ordered or commissioned for use under certain specific circumstances, if the parties expressly agree in a signed writing that the work shall be considered a work made for hire.[1] By way of example, the list of enumerated circumstances under the second prong of the work made for hire definition includes "instructional text" which is defined to include pictorial or graphic work prepared for publication and intended to be used in systematic instructional activities.[2] Determining whether a work is work made for hire is essential because the general principle under copyright law is that only the author or those deriving rights from the author can make a lawful copyright claim. However, if the work is deemed to be a work made for hire, a third party such as an employer may claim ownership rights in the work created by the author.[3]

With that very basic background on work made for hire, let us now examine the employed physical therapist and the web designer in the above scenario. The U.S. Supreme Court has held that it is important in a work made for hire analysis to first ascertain whether the work was prepared by an employee or an independent contractor.[4] In its analysis, the Court noted that if an employee created the work, the work will generally be considered a work made for hire by definition. However, when considering work performed by an employee, it is important to note that the work must be created within the employee's "scope of employment" to constitute work made for hire. In the above scenario, the practice's claim for ownership of the handout may be hindered because the work was performed after hours at the employee's home[5] and the work was not of the type the employee was hired to perform[6] (i.e., a physical therapist performing artistic work). To improve its ownership claims in the employee's work the practice should consider whether a written employment agreement describing the treatment of such work is necessary. For example, the agreement could include an acknowledgement that any work that does not qualify as work made for hire is automatically assigned to the employer. Additionally, in the case of an employee the practice may be better served by assuring that the employee performs the work during typical working hours and that, if work is performed in the employee's home, the work is nonetheless clearly delineated as that which is done for the benefit of the employer.

In the case of work created by an independent contractor, such as the website designer in the above scenario, for the work to be work made for hire it must fall within one of the specific categories listed in the definition (e.g., “instructional text”) and there must be a written agreement between the parties specifying that the work is a work made for hire.[7] The scenario above raises concerns over the practice’s claim to ownership of the website for a few reasons. Initially, work on a website, logo or custom software does not fall within the listed categories that qualify as work made for hire when performed by an independent contractor. Additionally, a typical “work order” such as that provided by the website designer would likely not satisfy the written agreement requirement in the non-employee context. The practice could strengthen its ownership claim to the website by having a written agreement in place with the website designer describing the legal rights in the work performed. For example, the parties could execute an agreement which provides that any copyrightable material developed by the designer within the scope of the engagement is automatically assigned to the practice. Adding this assignment provision, in addition to assessing whether the work is work made for hire, will generally increase the likelihood that the practice rather than the independent contractor is the owner of the work.[8]

A physical therapy practice spends significant amounts of financial resources to develop numerous works such as logos, websites, and educational materials to improve day to day operations and the value of the practice. It is important to take appropriate measures to assure that the practice secures ownership of such works and can benefit from the associated competitive advantages, such as preventing the use of such works by others or licensing such works to others in exchange for a fee.

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For additional information, please contact Paul Welk.

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[1] 17 U.S.C.S. §101 (2015).

[2] Id.

[3] *See* Circular 09: Works Made for Hire, U.S. Copyright Office, available at http://copyright.gov (accessed April 19, 2015).

[4] Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[5] *See* Avtec Systems, Inc. v. Peiffer, 67 F.3d 293 (1999).

[6] Restatement (Second) of Agency §228.

[7] *See* Circular 09: Works Made for Hire, U.S. Copyright Office, available at http://copyright.gov/circs/circ09.pdf (accessed April 19, 2015).

[8] *See* Copyrights and Works Made for Hire, American Bar Association, (accessed April 19, 2015).