Works Made for Hire in the United States

By Paul D. Supnik

The United States Supreme Court recently [in 1989] decided "Community for Creative Non-Violence [CCNV] v. Reid" which illuminates copyright ownership issues of interest to creators and producers. The particular facts defining a creator-producer relationship will determine whether a producer has exclusive ownership of an audiovisual work.

To understand the CCNV case, a brief review of United States copyright law is helpful. Copyright comes into being by fixation. Thus, on the writing of a script or capturing a work on film or tape, copyright springs into existence. The original owner of the work is generally the individual who created or provided "authorship". However if a "work made for hire," the employer is the author and owner.

A "work made for hire" is defined by the 1976 Copyright Act as:

"(1) a work prepared by an employee within the scope of his or her employment; or

(2) 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, ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. ... "

The Copyright Law also provides that "Copyright ... vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work. ... In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author ... and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all the rights comprised in the copyright." A "joint work" is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or independent parts of a unitary whole".

The facts underlying this court decision involved a sculptor, Reid, who created a statue "Third World America" dramatizing the plight of the homeless. An oral agreement to create the statue was made with a representative of a nonprofit association, Community for Creative Non-Violence (CCNV). Reid was to donate his services to CCNV and CCNV was to pay US$15,000 for the cost of art materials. Neither party discussed copyright. Members and representatives of CCNV visited Reid's studio to make suggestions as to appearance and look of the sculpture, which suggestions were accepted by Reid.

The completed work was displayed in Washington for one month, and then given back to Reid for repairs. After a dispute regarding return of the sculpture, Reid refused and CCNV filed a lawsuit seeking return of the sculpture and a determination of copyright ownership.

The United States Supreme Court affirmed the decision of the Court of Appeals holding that copyright was retained by the artist. The sculpture was not a "work made for hire" as defined by the Copyright Act since it was not a work prepared by an employee within the scope of his employment. Supervision or the right of supervision was not sufficient to create an employment relationship, being formally on a payroll would not have been required to establish that relationship.

The court pointed to a series of factors set forth in the general common law of agency to determine whether or not an employment relationship exists, no one of which is considered to be determinative:

1. The right to control the manner and means by which the product is accomplished.

2. The skill required.

3. The source of the instrumentalities and tools.

4. The location of the work.

5. The duration and relationship between the parties.

6. Whether the hiring party has the right to assign additional projects to the hired party.

7. The extent of the hired party's direction over when and how long to work.

8. The method of payment.

9. The hired party's role in hiring and paying assistants.

10. Whether the work is part of the regular business of the hiring party.

11. Whether the hiring party is in business

12. The provision of employee benefits.

13. The tax treatment of the hired party.

The Supreme Court sent the case back to the trial court to determine whether or not both Reid and CCNV were joint owners of the works since the effect of supervision by CCNV may have supported that legal result. Consequences of joint ownership are that either party can grant a license, subject only to the obligation to account to the other joint owner.

The decision of the Supreme Court was not particularly surprising but it did clarify and bring to the attention of the public recent cases, some which tended to broadly and others to narrowly construe the meaning of the term "employee". One court, protective of artists, had suggested that being on a payroll might be necessary to establish an employment relationship. Other courts had found that either right to supervise or supervision was all that was needed for there to be employment.

The primary significance of CCNV as applied to audiovisual works is that for rights in the United States, there either must be a real employment relationship or a document specifically referring to a work made for hire signed by both parties, for a work for hire to exist. The specific language of the copyright statute is likely to be followed by the courts. Failure for there to either be a true

employment relationship or to obtain an appropriate agreement may result in rights held by creators which may later hinder a party in warranting the license of exclusive rights.

Often, the issue of whether a work is made for hire arises because the parties did not consider the copyright consequences at the outset. Some work made for hire problems can be resolved by a simple copyright assignment, which must be in writing and signed by the assignor. The assignee will not be the author of a work made for hire, but as a practical matter, the result is substantially the same. However, a work assigned to a producer, rather than a work for hire of the producer will have other consequences. The United States Copyright Act of 1976 provides for termination of transfers by authors. 35 years after assignment, the assignment may be terminated by its creator or heirs. However, in the case of works made for hire, there is no right to terminate the transfer. Termination of a transfer, of course, only becomes significant for a work which are likely to have a significant value many years after initial exhibition, and the present value of a right to terminate may be only of nominal value. The copyright term may differ for a work made for hire. The U.S. copyright term is the life of the author plus 50 years, but for a work made for hire, the term is the earlier of 75 years from publication or 100 years from creation.

Though not applicable to CCNV, one potentially undesirable consequence of transforming a work into a work made for hire is that certain liabilities associated with employment relationships may result. For example, California law provides that a work made for hire imposes the obligation of obtaining workers compensation insurance by the commissioning party for the commissioned party. Failure to obtain such insurance could result in significant liability exposure in the event of an injury to the creator in ways arising out of the efforts associated with the commissioned work, even if only remotely related to the commissioned activity.

Thus, the lesson of the CCNV case for the entertainment industry is that one should not assume a party paying a writer or other person who imparts copyrightable authorship to a motion picture in the United States is the owner of the copyright. While a true employment situation may sometimes occur in the context of a studio deal, the independent or often studio financed independent features may not take on the character of a true employer-employee relationship. Payment and the right to supervision or supervision does not establish an employment relationship such that the work is a work made for hire. Cinematographers, directors and others may contribute authorship to a motion picture, and their relationship with the producer should be considered. The arguable possibility of the creation of a joint work suggests that greater attention be given to those who add creative authorship, beyond screen writers and composers.

The producer, then, should be conscious prior to production whether it is desirable to have an employer for hire situation or an assignment of rights and structure the relationships accordingly. These factors should also be considered in acquisitions of an underlying work not independently created by a single author. Remember that payments of funds to individuals who could be considered "authors", not accompanied by either written assignment or work made for hire agreement may not result in ownership in the producer. Not only the screenwriter may supply copyrightable authorship to the film, but also, directors, composers, set designers and others conceivably add copyrightable authorship. It might be an unusual situation where a contributor to a film other than a screenwriter could grant rights in derogation of a license granted by the producer. However, it is possible that if a joint work results, that could impair the ability of the producer to grant exclusive rights in a work. In some situations, exposure to liability may result in structuring the arrangement in the form of a work made for hire.

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