

# Circular 9

## Works Made for Hire Under the 1976 Copyright Act

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### INTRODUCTION

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Under the 1976 Copyright Act as amended (title 17 of the United States Code), a work is protected by copyright from the time it is created in a fixed form. In other words, when a work is written down or otherwise set into tangible form, the copyright immediately becomes the property of the author who created it. Only the author or those deriving their rights from the author can rightfully claim copyright.

Although the general rule is that the person who creates a work is the author of that work, there is an exception to that principle: the copyright law defines a category of works called “works made for hire.” If a work is “made for hire,” the employer, and not the employee, is considered the author. The employer may be a firm, an organization, or an individual.

To understand the complex concept of a work made for hire, it is necessary to refer not only to the statutory definition but also to its interpretation in cases decided by courts.

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### STATUTORY DEFINITION

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Section 101 of the copyright law defines a “work made for hire” 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, as a sound recording, 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, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for a publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes; and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

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### DETERMINING WHETHER A WORK IS MADE FOR HIRE

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Whether or not a particular work is made for hire is determined by the relationship between the parties. This determination may be difficult, because the statutory definition of a work made for hire is complex and not always easily applied. That definition was the focus of a 1989 Supreme Court decision (*Community for Creative Non-Violence v. Reid*, 490 U.S. 730 [1989]). The court held that to determine whether a work is made for hire, one must first ascertain whether the work was prepared by (1) an employee or (2) an independent contractor.

If a work is created by an employee, part 1 of the statutory definition applies, and generally the work would be considered a work made for hire. **IMPORTANT:** The term “employee” here is not really the same as the common understanding of the term; for copyright purposes, it means an employee under the general common law of agency. This is explained in further detail below. Please read about this at “Employer-Employee Relationship Under Agency Law.”

If a work is created by an independent contractor (that is, someone who is not an employee under the general common law of agency), the work is a specially ordered or commissioned work, and part 2 of the statutory definition applies. Such a work can be a work made for hire only if **both** of the following conditions are met: (1) it comes within one of the ten categories of works listed in part 2 of the definition and (2) there is a written agreement between the parties specifying that the work is a work made for hire.

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### Employer-Employee Relationship Under Agency Law

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If a work is created by an employee, part 1 of the copyright code’s definition of a work made for hire applies. To help determine who is an employee, the Supreme Court in *CCNV v. Reid* identified certain factors that characterize an “employer-employee” relationship as defined by agency law:

- 1) **Control by the employer over the work** (e.g., the employer may determine how the work is done, has the work done at the employer’s location, and provides equipment or other means to create work)
- 2) **Control by employer over the employee** (e.g., the employer controls the employee’s schedule in creating work, has the right to have the employee perform other assignments, determines the method of payment, and/or has the right to hire the employee’s assistants)

- 3) **Status and conduct of employer** (e.g., the employer is in business to produce such works, provides the employee with benefits, and/or withholds tax from the employee's payment)

These factors are not exhaustive. The court left unclear which of these factors must be present to establish the employment relationship under the work for hire definition, but held that supervision or control over creation of the work alone is not controlling.

All or most of these factors characterize a regular, salaried employment relationship, and it is clear that a work created within the scope of such employment is a work made for hire (unless the parties involved agree otherwise).

Examples of works for hire created in an employment relationship are:

- A software program created within the scope of his or her duties by a staff programmer for Creative Computer Corporation.
- A newspaper article written by a staff journalist for publication in the newspaper that employs him.
- A musical arrangement written for XYZ Music Company by a salaried arranger on its staff.
- A sound recording created by the salaried staff engineers of ABC Record Company.

The closer an employment relationship comes to regular, salaried employment, the more likely it is that a work created within the scope of that employment would be a work made for hire. However, since there is no precise standard for determining whether or not a work is made for hire under the first part of the definition, consultation with an attorney for legal advice may be advisable.

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### WHO IS THE AUTHOR OF A WORK MADE FOR HIRE?

If a work is a work made for hire, the employer or other person for whom the work was prepared is the author and should be named as the author in Space 2 of the application for copyright registration. The box marked "work-made-for-hire" should be checked "yes."

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### WHO IS THE OWNER OF THE COPYRIGHT IN A WORK MADE FOR HIRE?

If a work is a work made for hire, the employer or other person for whom the work was prepared is the initial owner of the copyright unless there has been a written agreement to the contrary signed by both parties.

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### EFFECT ON TERM OF COPYRIGHT PROTECTION

The term of copyright protection of a work made for hire is 95 years from the date of publication or 120 years from the date of creation, whichever expires first. (A work **not** made for hire is ordinarily protected by copyright for the life of the author plus 70 years.) For additional information concerning the terms of copyright protection, request Circular 15a, "Duration of Copyright."

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### EFFECT ON TERMINATION RIGHTS

The copyright code provides that certain grants of the rights in a work that were made by the author may be terminated 35 to 40 years after the grant was made or after publication, depending on the circumstances. The termination provisions of the law do **not** apply to works made for hire.

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### FOR FURTHER INFORMATION

**Information via the Internet:** Circulars, announcements, regulations, other related materials, and all copyright application forms are available via the Internet. You may access these on the Copyright Office homepage at [www.loc.gov/copyright](http://www.loc.gov/copyright).

**Information by fax:** Circulars and other information (but not application forms) are available from Fax-on-Demand at (202) 707-2600.

**Information by telephone:** For information about copyright, call the Public Information Office at (202) 707-3000. The TTY number is (202) 707-6737. Information specialists are on duty in the Public Information Office from 8:30 a.m. to 5:00 p.m., eastern time, Monday through Friday, except federal holidays. Recorded information is available 24 hours a day. Or, if you know which application forms and circulars you want, request them 24 hours a day from the Forms and Publications Hotline at (202) 707-9100. Leave a recorded message.

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