

1. What is a Work for Hire?

Generally, when a work is created, whether that be a drawing, a piece of music, a digital asset, a piece of writing, etc... that work is considered under the ownership of the creator.

The work began as their idea, through their efforts the work was manifested into existence, and how that work can legally be used and by whom is entirely their decision. However, there are specific situations when the creator of a work does not own the work, but ownership belongs to another party. These situations fall under two definitions:

- 1) A work that is created by an employee for an employer during the agreed time periods then the employee is acting as an employee, and the work falls under the requirements and responsibilities of the position which the employee holds, and...
- 2) A work which is commissioned by a 3rd party for use under a set of qualifiers, which is agreed upon by both parties in a written and signed legal agreement

A work for hire, or a “work made for hire”, is defined as the following:

“A work for hire, or work made for hire, refers to works whose ownership belongs to a third party rather than the creator.” (Cornell Law School Wex Definitions Team,

https://www.law.cornell.edu/wex/work_for_hire)

They go on to list the two conditions mentioned above, and then specify the qualifiers under point 2 as:

- Contribution to a collective work
- Part of a motion picture of other audiovisual work
- A translation
- A supplementary work
- A compilation
- An instruction text
- A test or an answer for a test
- An atlas

2. How is Ownership Affected by This?

Ownership is not just affected by work for hire, but is entirely determined by it. A creator of a work may feel an entitlement to their work, however this can lead to legal problems for the creator, the result of which could be owing monetary compensation. An artist which was commissioned to create a character for a production company they are not employed with cannot later decide to create an IP around that character for personal monetary gain, and in many cases could not even use that work in their portfolio without it being agreed to by both parties in the contract between them.

This dynamic applies especially to employees working in creative roles for an employer. Regardless of industry, it is generally understood as the default that any work created while working for an employer is the property of the employer and not the employee

who created it. This is considered the default because of the “*instance and expense*” test, which was articulated by the Second Circuit court in *Marvel Characters, Inc. v Kirby*, No. 11-3333 (2d Cir. 2013). As Cornell Law School explains, “Under this test, a work is made for hire if it was incurred at a hiring party’s *instance and expense*. The Second Circuit further explained that a work is made at a hiring party’s *instance and expense* when the employer ‘induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out.’” (Cornell Law School Wex Definitions Team, https://www.copylaw.com/new_articles/wfh.html)

While a contract is not required under the above test when it comes to the employee/employer relationship, a clause reaffirming such a relationship can be included in hiring contracts. An employer generally does not need a contract to protect his rights under the *instance and expense* test, as any employee-generated work would qualify under the test’s conditions. However, there can be instances where the employee who created the work maintains copyright ownership of the work, but this must be agreed to in a contract ahead of the creation of the work, and would be included in the hiring contract. So essentially, unless otherwise agreed to, an employer will always be the copyright owner of an employee’s work.

There are some exceptions, like when an employee generates a work outside of the scope of their employment, but even in those instances, there will be cases where the work “... may still be owned by the employer if there’s an assignment provision in the

employment agreement...” (Mark Tyson, <https://www.tkntysonlaw.com/blog/work-made-for-hire-who-owns-the-copyright>)

3. Why is it Important for Employees to Understand Work for Hire Rules?

I believe I’ve touched on this question already, but without understanding what work for hire means and how it applies to their employment, an employee can get themselves into legal trouble through copyright infringement.

As a simple example, for employees who are freshly entering a creative industry, especially when fresh out of higher education where saving work for a portfolio was likely drilled into their heads, they may not understand that the works they generate for an employer cannot be taken and used without first receiving the express and written agreement of their employer.

If we look at the video games industry, it is more common than not that there will be more assets created for a game during its development than will be used in the release product. An individual employed as a character designer may have generated dozens of character concepts, while only a handful ended up being used in the final game. While the employee may feel an emotional attachment to those characters as their personal creation, by default, they have no right to use them in any work moving forward, nor do they have the right to maintain personal instances of those character assets in their personal portfolio or on their personal storage devices.

To do so may be considered theft of the employer's property, and they would not only be legally entitled to define it as such, but they have a genuine reason to be concerned about the asset(s) potential to leak to the public, which may reveal confidential information or trade secrets the employer would otherwise prefer kept from the public.

4. Why is it Important for Employers to Understand Work for Hire Rules?

Employers need to understand work for hire rules to protect themselves as well, and for multiple reasons. To use the example from the previous section, if an employer were to have lax rules regarding employee's use of its intellectual property (or IP, which is how it will be referred to from this point onward), the employer runs the risk of confidential information regarding its IP getting out to the public. While some may not understand the monetary risk involved in such a lax application of policy, the risk could result in the loss of millions of dollars of lost revenue.

To continue using the video game industry to demonstrate the position, let's consider the gacha games industry. Studios which produce gacha titles as their bread-and-butter rely on the power of drip marketing to produce anticipation for character releases. Many of these companies have psychologists under their employ who work specifically on understanding purchasing motivations and the impact of marketing techniques on profit. It has become an industry standard to intentionally release "leaks" of future characters in a controlled manner to spur discussion and speculation.

Information is drip-fed to the community which makes up the game's consumer base, and the discussions surrounding those characters builds "hype" and induces FOMO in

those potential buyers, or the “**Fear Of Missing Out**” which may trigger a consumer to spend their money on pull tickets to guarantee they get the character rather than relying on the typically minimal free pulls obtainable through free-to-play gameplay.

If a character designer were to keep digital assets of the game’s character concepts on their personal devices or in their portfolio, whether released, unreleased, or cut, and especially without having had the express permission to do so agreed upon in their employment contract, those assets can become unintentionally leaked to the public. When those assets include characters yet to be released, this can cause the hype the company was building around a soon-to-be-released character to die out, hurting the potential profits which would otherwise have been generated by that character as players became more excited for the wrongfully leaked character over the impending release.

5. Why is it Important for Freelance Consultants to Understand Work for Hire Rules?

It is especially important for freelancers to understand work for hire rules. Freelancers are responsible for writing up their own contracts, and with attorney services being expensive, many will take on the responsibility personally.

As with the above examples, a freelancer cannot simply assume the works they generate can be used as portfolio pieces or in future works. Freelancers especially rely on portfolios to attract potential contracts, so they are more likely to want to use whatever they generate for a commissioned work in their portfolio to improve their ability to attract clients. However, many companies would not want their IP to be used

in ways they have not approved of or shown to parties they are unaware of, including their competition.

Commissioned works are not necessarily always considered works for hire, and “... to qualify, a commissioned work must be specified as a work made for hire, either in a contract or other writing, and the work must fit within one of the following categories...”

(Mark Tyson, <https://www.tkntysonlaw.com/blog/work-made-for-hire-who-owns-the-copyright>) (see section 1 for the full list of applicable categories) For a freelancer to use the works they generate in their portfolios without fear of potential legal recourse, they would need to agree with their clients ahead of time and ensure the specifics of what usage rights/licensing they are entitled to are written in the commission contracts that get signed by both parties. Without doing so, they may become liable for copyright infringement and open themselves up to legal recourse by including the generated work in their portfolio, even when legally allowed to do so but the client believes otherwise.

This may not sound fair to the freelancer, but from the client’s perspective, that freelancer may perform work for a competing company down the road, and by that freelancer including the IP in their portfolio, they may unknowingly provide that competitor with information that gives that company a market advantage, costing the original client potential profits or market share. To prevent this from happening and to protect themselves from ending up in a court room, freelancers must ensure they fully understand work for hire laws and keep themselves up to date on any changes to those laws, including impactful court cases which have the potential to create new legal

precedents, as well as ensuring their clients fully understand and agree to the copyright ownership of the resulting works of their contract, however that ownership has been agreed upon.

Works Cited:

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