

Work Made for Hire

Who owns the footage you shoot for your clients?

by Mark Levy



One of the issues that I am frequently asked by clients who make videos for a living relates to ownership of their video work. As an intellectual property lawyer, I am surprised how often this legal principle arises and how it is often misinterpreted. The basic law of copyright, which extends to all countries that are members of the Berne Convention (i.e., all major, civilized countries - some 160 in all), is that whoever creates a work owns it. As I said, that is the basic law. Real-life situations can be more complex.

“The basic law of copyright... is that whoever creates a work owns it.”

WHEN YOU DON'T OWN YOUR WORK

Unless you work for the government (see the Sidebar), there are two situations where you might not own the footage you shoot: (1) when you are an employee or (2) when you have a written contract that says otherwise. Many customers, corporate and otherwise, request a written agreement giving them the right to copy and display the work either for an additional fee or as part of the agreed-upon compensation. Therefore, it is in the best interest of the customer to enter into a written agreement, under which you or your production company grants copyright rights to your client.

WHEN YOU DO...

Without a written agreement, you, the moviemaker or production company, own the copyright rights, regardless of whether you are commissioned to create the work (e.g., a wedding video, a corporate PR piece or a commercial) or even whether

you are paid for it or not. Suppose that you are paid an exorbitant amount of money for a 30-second commercial spot. Even after delivering the finished video to your client, without an agreement to the contrary, you own the work. Depending on what you agreed to before you started production, this might mean that your obligation to your client or customer is merely to deliver one good copy of your video. The customer, on the other hand, has no right to copy the video or even to display or broadcast it without your permission, since you own the copyright to your work.

RETAINING YOUR RIGHTS

As you may recall from pre-digital days, portrait photographers routinely held onto negatives and charged their customers for copying photos, even though the customers had already paid the photographer for taking the photos in the first place. That was standard practice. Copyright confers the exclusive rights to

the maker of the work to reproduce it, prepare derivative works, distribute copies to the public by sale or rental, and to perform or display the work publicly. By the way, these exclusive copyright ownership rights also apply to whatever unused footage or sound you leave on the cutting room floor. You own it all.

LAYING DOWN THE LAW

In 1989, the U.S. Supreme Court heard an interesting case involving ownership of intellectual property. In this case, James Reid, a sculptor, was commissioned by The Community for Creative Non-Violence (CCNV) to create a modern Nativity scene, complete with a homeless couple and their baby huddled on a street-side steam grate. He was paid \$15,000 for creating the sculpture by the CCNV. Unfortunately for the client, the agreement or understanding between the parties was not in writing. If a written agreement had been executed, however, and the magic words "work made

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WHEN THE GOVERNMENT OWNS YOUR WORK



If you are an employee of the federal government, and you create a work in the course of your employment, not only do you not own the work, neither does the government. Works created by the federal government are not subject to copyright. Therefore, any work published by the government (e.g., the Federal Register, U.S. patents, federal statutes and regulations) can be copied without permission and without liability.

LOOK IT UP

For more information, see:

- 17 U.S.C. 101, 105 (2005)
- Matthew Bender & Co. v. West Publishing Co., 158 F.3d 674, 679 (2d Cir. 1998)
- The Community for Creative Non-Violence (CCNV) v. Reid, 492 U.S. 730.



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for hire" had been used, then the client would have owned the copyright rights. But, since the understanding was not in writing, the client did not own copyright rights, but merely owned the one and only sculpture created and delivered by Mr. Reid. In other words, Mr. Reid retained his copyrights and could make, and sell, copies of the work to anyone he wanted to. Furthermore, the client did not have any right to make any copies of the sculpture that they owned.

The Supreme Court outlined factors that should be considered when deciding whether an artist (e.g., a painter or videographer) is working as an employee (see the Sidebar). If a court decides that you are an employee, the person or organization that employs you owns the video. In other words, if (1) you are considered an employee or (2) you enter into a written contract that: (2a) specifically states that the video is a "work made for hire" or (2b) that you are assigning the copyright to your client

(employer), your employer owns the copyright. Otherwise, since you created the video, you are an independent contractor and you own the copyright to your work, even if you were paid for it.

PRECEDENT

A contract can be legally binding even though it may be relatively short. The magic words in these cases ("work made for hire") establish the ownership of intellectual property. What does James Reid's sculpture have to do with video? In our system of jurisprudence, precedent can be set in an identical or related field. Laws that have arisen based on one sort of intellectual property, such as sculpture or still photographs, can be applied to other areas of intellectual property, such as your video projects. When in doubt (repeat after me): see a lawyer!

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ARE YOU AN EMPLOYEE?

Here are the factors that the Supreme Court used in *CCNV v. Reid* to determine whether a person is an employee:

The hiring party's right to control the manner and means by which the product is accomplished.

- The skill required
- The source of the instrumentalities and tools
- The location of the work.

The duration of the relationship between the parties

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

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

- The method of payment.
- The hired party's role in hiring and paying assistants
- Whether the work is part of the regular business of the hiring party.
- Whether the hiring party is in business.
- The provision of employee benefits.
- The tax treatment of the hired party.