**17.11 Copyright Interests —Work Made for Hire By Employee**

**(17 U.S.C. § 201(B))**

 A copyright owner is entitled to exclude others from copying a work made for hire.

 A work made for hire is one that is prepared by an employee and is within the scope of employment.

 A work is made for hire within the scope of employment if:

 1. it is the kind of work the employee is employed to create;

 2. it occurs substantially within the authorized time and space limits; and

 3. it is made, at least in part, for the purpose of serving the employer.

 The employer is considered to be the author of the work and owns the copyright [unless the employer and employee have agreed otherwise in writing].

 A copyright owner of a work made for hire may enforce the right to exclude others in an action for copyright infringement.

**Comment**

 This instruction may not be appropriate in cases in which a copyright was obtained under the 1909 Copyright Act. For such cases, *see Dolman v. Agee*, 157 F.3d 708, 711-12 (9th Cir. 1998) (applying presumption of work for hire under 1909 Copyright Act).

 *See* 17 U.S.C. §§ 101 (defining work for hire), 201(b) (describing rights in work for hire). Congress used the words “employee” and “employment” in 17 U.S.C. § 101 to describe the conventional relationship of employer and employee. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989); *U.S. Auto Parts Network, Inc. v. Parts Geeks, LLC*, 692 F.3d 1009, 1015 (9th Cir. 2012). “An employment (or commissioning) relationship at the time the work is created is a condition” for creation of a work for hire.  *Urantia Found. v. Maaherra*, 114 F.3d 955, 961 (9th Cir. 1997). Absent a written agreement to the contrary, the employer is the author of a work made for hire within the scope of employment. *U.S. Auto Parts*, 692 F.3d at 1017 (explaining when work is made for hire within scope of employment); *Aquarian Found., Inc. v. Lowndes*, 127 F.4th 814, 820 (9th Cir. 2025) (holding works authored by the founder and head of a church and which were not part of the “traditional, hierarchical relationships in which the employee created the work” as part of the church’s “regular course of business” did not constitute “works for hire”).

 Under copyright law, a work for hire clause in a contract, or a work for hire relationship, vests all rights of authorship in the employer or “person for whom the work was prepared.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1144 (9th Cir. 2003) (quoting 17 U.S.C. § 201) (holding that grant of royalties to creator of work for hire, absent express contractual provision to contrary, does not create beneficial ownership interest in that creator).

 While all works created during the course of employment are works for hire, specially commissioned works prepared by independent contractors are considered works for hire only if they fall within certain categories of eligible works and the parties agree in writing that the works will become made for hire. *See* 17 U.S.C. § 101 (stating that “specifically ordered or commissioned” work made for hire exists only in nine specific categories); *Warren*, 328 F.3d at 1140 n.4.

 This instruction does not address specially commissioned works created outside of an employment relationship.

Supplemental Instruction

 [*If the issue of the employment status of the work’s creator will be decided by the jury,* *insert the following after the second paragraph of the instruction.*]

You should consider the following factors in determining whether the creator of the work in this case was an employee of the [*name of party identified*]:

1. The skills required to create the work. The higher the skills required, the more likely the creator was an independent contractor rather than an employee.
2. The source of the tools or instruments used to create the work. The more the creator had to use his or her own tools or instruments, the more likely the creator was an independent contractor rather than an employee.
3. The location of where the work was done. The less the creator worked at [*name of alleged employer’s work site*], the more likely the creator was an independent contractor rather than an employee.
4. Applicability of employee benefits, like a pension plan or insurance. The more the creator is covered by the benefit plans [*name of alleged employer*] offers to other employees, the less likely the creator was an independent contractor rather than an employee.
5. Tax treatment of the creator by [*name of alleged employer*]. If [*name of alleged employer*] reported to tax authorities payments to the creator with no withholding or by use of a Form 1099, the more likely the creator was an independent contractor rather than an employee.
6. Whether the creator had discretion over when and how long to work. The more the creator can control his or her work times, the more likely the creator was an independent contractor rather than an employee.
7. Whether [*name of alleged employer*] has the right to assign additional projects to the creator. The more the creator could refuse to accept additional projects unless additional fees were paid, the more likely the creator was an independent contractor rather than an employee.
8. Duration of the relationship between the parties. The more the creator worked on a project basis for [*name of alleged employer*], the more likely the creator was an independent contractor rather than an employee.
9. The method of payment. The more the creator usually works on a commission or onetime-fee basis, the more likely the creator was an independent contractor rather than an employee.
10. Whether the creator hired (or could have hired) and paid his or her own assistants. The more the creator hires and pays for his or her own assistants, the more likely the creator was an independent contractor rather than an employee.
11. Whether [*name of alleged employer*] is a business. If the party that did the hiring is not a business, it is more likely that the creator was an independent contractor rather than an employee.

**Comment**

This eleven-factor test employing common-law agency principles to determine whether the creator of a work was an employee or an independent contractor was identified by the Supreme Court. *See Cmty. for Creative Non-Violence,* 490 U.S. at 751-52. No single factor is determinative. *Id*. at 752. For a discussion of the weight of any of the eleven *Reid* factors, *see* *JustMed, Inc. v. Byce,* 600 F.3d 1118, 1125-28 (9th Cir. 2010), and *Aymes v. Bonelli*, 980 F.2d 857, 860-64 (2d Cir.1992).

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