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The doctrine of 'Work for Hire': A Critical Survey of US, UK & Indian Cases

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In recent times, copyright law has seen more development and progress than most of the other niche areas of law, thanks to the fast-paced and ever-changing global economic landscape. This, coupled with the use and development of technologies has impacted the authorship and ownership of a particular task, work, or piece of art, whatever one might call it. Now, it is not necessary that only one person creates, makes, or does a particular thing upon which he/she has complete ownership. However, it is assumed, under copyright law, that the person who creates a work is the owner of that work. But what if an employer hires a team to build a product and many persons work on that particular project for that employer, or for instance, a production company hires an art director to improve or work on an already existing piece of a movie that is made and directed by another different individual? In this case, with whom will the owner of the copyright lie? Here, the doctrine of work for hire comes as an exception to the general copyright law principles.

Keywords: *copyright law, work for hire, authorship*

WHAT IS THE DOCTRINE OF "WORK FOR HIRE"?

In the US, work made for hire is defined as 'In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title,

and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.' In simple terms, under the doctrine of work for hire, the authorship of a work and ownership of all the rights derived from that work, are deemed to be with the employer or any other person for whom the work is done, unless expressly agreed otherwise.[1]

Generally, it is not difficult to determine when a work is prepared, created, or done by an employee within the scope of his/her employment, as the author of that work would usually be someone who is a full-time employee of the company and is specifically employed and remunerated to do, create or prepare that work. On the other hand, as far as independent contractors or part-time employees are concerned, the distinction can be foggy, and in such cases, several factors are required to be considered to determine whether the work was created by an employee within the scope of his or her employment. The concept of work for hire is governed by each country in its way. This article limits itself to only three such counties, viz. the United States of America, the United Kingdom, and India, and explains how the doctrine of work for hire exists in their varied jurisdictions[2].

THE UNITED STATES OF AMERICA

The United States of America is the birthplace of the doctrine of work for hire. This concept evolved somewhere in the 19th Century and yet garners more importance and emphasis at present than ever before. Under the U.S. Copyright law, work made for hire could be divided into two parts, viz. i) a work made by an employee while at work, or ii) a work specially ordered or commissioned for use[3]. However, the such clear-cut demarcation was not always culled out.

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[1] 'Doctrine of"Work for Hire" under the Copyright Law' (*AM Legals,* 08 August 2022) <https://amlegals.com/doctrine-of-work-for-hire-under-the-copyright-law/#> accessed 12 October 2022

[2] Aditi Goel & Nirjhar Gupta, 'Comparative Study- Doctrine of Work for Hire' (2020) 2(1) Lex Research Hub Journal

[3] David O'Klein, 'United States: Work-For-Hire Clauses and Agreements: One Key to Intellectual Property Ownership' (*Mondaq,* 04 March 2016) <https://www.mondaq.com/unitedstates/employee-rights-labourrelations/471596/workforhire-clauses-and-agreements-one-key-to-intellectual-propertyownership#:~:text=According%20to%20the%20Copyright%20Act,contribution%20to%2%200a%20collective%20work.%22 > accessed 12 October 2022

Initially, the U.S. courts were left to define essential elements of the doctrine of work for hire on a case-to-case basis as and only when necessary. This was the general view of the courts before the landmark decision of the U. S. Supreme Court in *Community for Creative Non-Violence v Reid*[4]. In this case, the issue of ownership of copyright sprouted between the Community for Creative Non-Violence (CCNV) and a sculptor named Reid who had created a statute for CCNV. The CCNV had approached the District Court for the District of Columbia by filing a suit against Reid for the statute's copyright. The District Court decreed the suit in favour of CCNV holding that the creation of the statute fit the definition of "work made for hire" as defined under the Copyright Act of 1976. When Reid went before the Court of Appeals and challenged the decision of the District Court, he succeeded and the Court of Appeals reversed the decision of the District Court by holding, inter alia, that such a work of an independent contractor cannot be considered as work made for hire. The CCNV ultimately lost when the Supreme Court affirmed the appellate court's decision. The Supreme Court laid down an analysis that was to be followed in such cases. It held that the first point of determination should be whether a particular work was created by an employee or an independent contractor. In case it is created, done, or prepared by an employee then the first part of the above-mentioned definition will be attracted and that particular work would be generally considered as work for hire. On the other hand, if the work is done, created, or prepared by an independent contractor, then, in that case, the doctrine will not apply.

Many other factors to determine whether a particular work is a work made for hire were laid down in cases following the landmark case of *Community for Creative Non-Violence v Reid.* One of the most relevant to the current times is the case of Marco v Accent Publishing Company[5]. This case deals with the copyright of photographs taken by a freelance photographer, viz. Marco. The Third Circuit held that a freelance photographer was to be considered as an independent contractor and not an employee who created a work made for hire, after referring to the decision in *Community for Creative Non-Violence v Reid.* Another noteworthy case law is

[4] *Violence v Reid* [1989] 846 F.2d 1485
[5] *Marco v Accent Publishing Co.* [1992] 969 F.2d 1547

that in *Aymes v Bonelli*[6] wherein the Second Circuit held that Aymes who was a computer programmer, is to be considered an independent contractor as per the principles laid down by the Supreme Court in the *Reid* Case. However, the Court of Appeals reversed this decision and held that the factors laid down in the Reid Case cannot be applied and used as a straight jacket formula for every such case. This points out the fact that the interpretation of work made for hire or the concept of the doctrine of work for hire is still highly debatable, even in the country of its origin.

UNITED KINGDOM

In the UK, the doctrine of work for hire finds its place in the Copyright, Designs, and Patents Act of 1988. Section 11 lays down the provisions about the ownership of copyright. It states that the first owner of the copyright lies with the author of the work subject to certain provisions. One of such provisions is that where a literary, dramatic, musical, or artistic work **[**or a film,**]** is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary[7]. This definition is similar to that of the United States.

The doctrine of work for hire in the UK is somewhat similar to that of the U.S.A. However, the courts in the UK have emphasized the necessity of there being a written instrument or written agreement to call out that the first owner of any copyright in the work created by an employee will not be the employer. Moreover, as far as the commissioning of work is concerned, the copyright law of the UK is similar to the legal position of an independent contractor or freelancer in the U.S.A. In cases of commissioning of work, the person who creates the work will be the first legal owner of the copyright and not the person who commissioned the work or for whom the work was created. This is subject to a written agreement, otherwise[8]. This also comes as an exception to the doctrine of work for hire. Again, when there is an absence of a clear written

[6] *Aymes v Bonelli* [1992] 980 F.2d 857
[7] Copyright, Designs and Patents Act 1988, s 11
[8] 'Guidance Ownership of Copyright Works' (*GOV.UK*, 19 August 2014) <https://www.gov.uk/guidance/ownership-of-copyright-works#commissioned-works> accessed 12 October 2022

instrument between the parties about the copyright of the work, the courts may interpret such situations in favour of the commissioner inferring an implied license to use the commissioned work. However, this would not amount to a total transfer of ownership of the copyright. Instead, it would only give the commissioner a limited non-exclusive right to use the commissioned work, as per the terms laid down by the courts. The existence of such a grey area has an alarming effect on the minds of the parties who would rather want to lay down, in clear written terms, all the terms and conditions about the copyright of a particular work commissioned.

Two important case laws in this niche area are the cases of *Noah v Shuba*[9] and *Stevenson Jordan Harrison Ltd. V Macdonald & Evans*[10]. In *Noah's* case, work done by the employee in his spare time and his personal capacity was claimed to be the work of the employer since the same was created when the employee was under his employment. The Court held that the work which was created, could not be said to be made for the employer or at the behest of his employers since the said work was done, created, or prepared in the employee's capacity at his home and after the official working hours and during weekends. In the *Stevenson* case, the Court laid down the principles of the relationship of the employee vis-à-vis 'contract service'. The Court laid down a clear distinction between when an employee is considered an employee under a service contract and when an employee is considered an independent contractor for services. Similar to the position of the U.S.A, the legal position of the doctrine of work for hire in the UK relies heavily upon the interpretation of the courts on a case-to-case basis.

INDIA

The Indian Copyrights Act, of 1957 provides for the definition of work for hire in Section 17 under the title of First Owner of the Copyright[11], much akin to the definition under the UK copyright law. The provisions laid down in the said section are detailed and chalk out the different situations in which the doctrine of hire will come into play. Even in the Indian scenario, the legal position remains almost identical to that of the U.S.A and the UK. For instance, in the

[9] *Noah v Shuba* [1991] FSR 14
[10] *Stevenson Jordan Harrison Ltd. v Macdonald & Evans* [1952] 1 TLR 10
[11] Indian Copyrights Act 1957, s 17

event of a work created by an author at the request of another person, then the person who so requested (one may call him/her the commissioner) shall be the first owner of the copyright, however, as stated in the foregoing paragraphs, this will be so only in the absence of a written agreement between parties. The legal position of a work created in the course of employment under a contract of service is also similar to that of the UK.

When it comes to the rights of a lyricist or a music composer, the Supreme Court had observed that once the producer, or whomever the filmmaker might be, hires or engages a music composer or a lyricist to work under a service contract, the rights of that lyricist or composer over the work so created would be defeated and the filmmaker or producer would have the first ownership over copyright. This was laid down by the Supreme Court in the case of *Indian Performing Right Society Ltd. v Eastern Indian Motion Pictures Association and Ors*[12]. On a perusal of this decision, one can safely say that the doctrine of work for hire was beautifully applied by the Supreme Court. Yet another example to showcase the application of the doctrine of hire by the Indian Courts would be the case of *Khemraj Shrikrishnadas vs Garg & Co*[13]. In this case, the Delhi High Court held that in the absence of a contract to the contrary, the copyright of a literary work would typically lie with the publisher or owner of the publication instead of the staff who prepared it. Furthermore, the Court also explained how, therefore, freelancers are the first owners of copyright in the absence of any contractual obligations.

CONCLUSION

On a simple analysis of the case law and the legal position discussed hereinabove, it can be said that the doctrine of work for hire under copyright law and basic contract law are two sides of the coin. The doctrine of work for hire is an exception to the general copyright principle and having a written contract between the parties calling out all the rights and liabilities regarding copyright, may also amount to an exception to the doctrine of work for hire itself. This is the very reason why and where the courts of law come into the picture and interpret the provisions and various corresponding situations to either protect or defeat the rights of, in simple terms,

[12] *Indian Performing Right Society Ltd. v Eastern Indian Motion Pictures Association and Ors* [1977] AIR 1443 (SC)
[13] *Khemraj Shrikrishnadas v Garg & Co.* [1975] AIR 130 (Del)

either the employer or the employee. Who can claim the authorship would determine what right that author would have with respect to that work. In today's day and age, this comes as an essential point of inquiry because to protect the interest of the creators, who spend their time and efforts into creating a particular work, and who might not be aware of this doctrine and the copyright law in general, the present interpretation of the doctrine may require certain tweaks.