

# WHAT'S LEGAL

producer's rights

by Mark Levy and Roman Zelichenko



## Their Video, Whose Copyright?

As a videographer, freelance projects can be a great source of experience, exposure, and at the very least, some spare change. Let's say a newly engaged couple approaches you and asks you to shoot their wedding. Some questions immediately come to mind. Who exactly wants to be on video? When and where will the recording be done? How much will you be paid? These questions are realistic and will likely determine whether you accept the project. You're probably not thinking about long term legal ownership and copyrights, but should you be?

### Copyright Law

According to the Copyright Act of 1976, the creator of a work is the owner of the copyright to that work, unless other explicit, written legal arrangements have been made. This no longer means, as the 1909 version of the law originally stipulated, that protection is granted only to works of art that are "published." Now, a work that is "fixed in any tangible medium of expression," like a DVD, can be protected by law even if it is not actually "published." There is, however, an exception to this: a "work made for hire," which deals with a work created by one individual that was commissioned by another. The nature of freelance projects is exactly this, so let us explore this exception.

### Exception

The "work made for hire" doctrine essentially states that although a work is created by one individual, the copyright to that work (i.e., the right to display and copy it), may be owned by another (i.e., your client). Thus, the couple that hires you to record their wedding becomes the commissioning party while you, the videographer, are the creator. You will spend hours pre-

paring the equipment, planning angles and lighting, transporting equipment, editing and burning DVDs, and ultimately creating a memorable video. What if, after all your effort, you want to use the video to display your skills to potential clients? Conversely, what if the couple gets famous and the video is broadcast thousands of times? Can the couple upload portions of the video online? It is important to know who, in the end, will have copyright rights to your work.

### Case Law and You

According to the Copyright Act, a work is "made for hire" when: (1) that work is "prepared by an employee within the scope of his or her employment"; or (2) when the work is commissioned to be used in one of nine specified categories and there is a written, signed agreement between the parties expressing that the work "shall be considered a work made for hire."

Lawyers (bless them!) get paid to battle over works such as "employee" and "employer" and whether their client fits into either category. Luckily, however, since the 1989 U.S. Supreme Court case, *Community for Creative Non-Violence v. Reid*, these words have been given clear definitions.

In *CCNV v. Reid*, the U.S. Supreme Court declared that an "employee" relationship is mainly determined by the hiring party's influence on the project. Some factors that weigh into this are the skills required, the source of the tools (did the hiring party or the artist provide them?), the duration of the relationship between the parties, the presence of employee benefits, and the hiring party's tax treatment of the artist, among others. These factors, however, can be hard to predict when beginning a project. Accordingly, the Supreme Court made it difficult for

a hiring party to prove that the work was made for hire. It could certainly be unfair if, at the end of the project, the couple who hired you decided they had sufficient influence, determined an employee relationship, and claimed copyright ownership.

For a small, one time project, such as the wedding video, you might not enter into a contract expressly stating that the work is "made for hire." If this is the case, even if your project falls within one of the nine categories specified in the statute, you – not your client – will own the copyright rights. In other words, your clients will own the DVDs you provide (after all, that is what they paid for), but they will not be permitted to display them publicly or make copies of them without your permission. This is the same as owning a CD or a commercial DVD but not being allowed to copy it.

Thus the law is on your side. It's important to keep the "work made for hire" exception in mind when taking on a project, but it should not stop you from doing so and should, in fact, empower you. As the creator of a video, you will have the power of the court behind your copyright ownership and behind the subsequent use of the video as well. Still, it's a good idea to have a written agreement with your clients, spelling out each party's rights and obligations. This simple, professional step can help prevent litigation and having to share your profit with your friendly lawyer. ■

Contributing editor Attorney Mark Levy specializes in intellectual property law. He has won many amateur moviemaking awards. Roman Zelichenko is attending Brooklyn Law School.

For comments, email: [editor@videomaker.com](mailto:editor@videomaker.com), use article #15067 in the subject line. You can comment and rate this article by going online: [www.videomaker.com/article/15067](http://www.videomaker.com/article/15067)