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Does Authorship Really Equate to Ownership?

By Michael M. Ratoza

If I create something, then I own it, correct? Usually this is the case, however there are assorted circumstances where the rules of ownership produce unanticipated results.

Employment

Generally speaking, absent a written agreement to the contrary, when a work is created by an employee during the course and scope of the employee's duties, the employer is the owner. Typically, no written agreement is required for this result. Alternatively, when an employee creates work outside of the workplace and outside of the employee's duties, absent written agreement to the contrary, the work is owned by the employee and not the employer. If the employer has a written agreement or employment manual in place that defines the ownership of work created by the employee, then those written documents will control ownership.

There is an exception to this general rule regarding educators. Work created by an instructor as part of the instructor's research, writing or class instruction duties belongs to the instructor, and not the educational institution, absent agreement in writing to the contrary.

Web Sites and Marketing Materials

Generally speaking, when a business hires a third party website developer, the developer owns the copyright in the website. The same is true for marketing materials developed by a third party marketing firm. Similarly, a third party who produces radio, television or multi-media ads is the owner of the copyright in the ads. And the third party composer of an advertising jingle is the owner of the copyright to the jingle. This is so even though the customer who commissions or requests the work from the third party pays for the work in full.

Absent a written agreement, the third party developer owns the copyright and has the right to license or control the use of the material. The customer who commissions and pays for the material has at least an inferred right to use the material, but not to sell, sub-license or create derivative work from the material. This harsh result can be modified with a written agreement between the customer and the third party. Such a contract can specify that the customer is the owner of the copyright and can assign the third party's copyright to the customer. A hand shake is not good enough to transfer the copyright. Courts have made very clear that a copyright transfer must be in writing to have any validity.

Authorship and Co-Authorship

A person may write something — say, a book or computer code — or, may create something — say, a website or a product design. The creator may show the work, the book draft, the website or the computer code, to a friend, an acquaintance or an English major for critique, comment, or moral support. The person who reviews the draft may give comment and suggestions for improvement, and may provide specific revisions. When all is said and done, who is the author — the original writer or the friend who offers suggested revisions?

This is not an easy answer. Copyright law recognizes jointly developed contributions to a work, and may grant co-authorship rights to several people based on the co-development understandings. The person who writes the original draft may be deemed an author, but so can the person who provides the written revisions. This is the case whether or not the suggested revisions find their way into the final work product.

Whether co-authorship results from a particular development arrangement depends on the intent and expectations of the parties. Notice, however, the difficulty that exists for the original author who maintains that he or she is the sole, true author. Without a written agreement between the original writer and the person offering the suggested revisions, conflict may develop and the original author may receive a serious challenge to his or her claim of sole authorship and ownership. This is a result that should — and can — be avoided fairly easily with a properly written agreement up front.

For more information about the practical effects of copyright law on your business, contact the lawyers of Bullivant Houser Bailey's IP Group.