MULTIMEDIA AND THE WORK-FOR-HIRE RULES

The creation of multimedia products and web sites usually involves a chain of developers and subcontractors. Publishers and end-users often hire developers to create the products. The developers often subcontract all or part of a project to one or more other developers. Developers at each tier may engage other contractors to assist them. In this common scenario, everyone in the chain, from the publisher and end-user to the coder and artist, should be aware that the Copyright Act has rules that will profoundly affect their rights in the final product. These rules, which are known as the work-for-hire rules, are the subject of this article.

Under the Copyright Act, as applied to multimedia products and web sites, the "lowly" coder and the artist, not the publisher, end-user, or developer are generally considered the authors of the work. The Copyright Act gives the author significant rights, such as the right to reproduce, distribute, and display the work. The work-for-hire rules change this result. Whoever wants to own the copyright should pay careful attention to the work-for-hire rules so that the wrong person does not inadvertently become the author.

The Copyright Act establishes two kinds of works made for hire. These are "employee works" and "specially commissioned works." "Employee works" are products that employees prepare within the scope of their employment. Because independent contractors are not employees, products created by independent contractors will not be "employee works" under the work-for-hire rules. For example, suppose a publisher hires an outside developer (Developer A) to create a multimedia product or design a web site. Developer A is not the publisher's employee, so between the publisher and Developer A the work will not be an "employee work." If Developer A's employees create the product within the scope of their employment, Developer A will be the author. However, if Developer A subcontracts the project to Developer B or if Developer A hires independent contractors to write the code or create the art, Developer A will not be the author. This result will repeat itself with Developer B and so on down the production chain. Ultimately, whoever is designated as the author under the Copyright Act will own the copyright. Moreover, as discussed in the October 1998 issue of *DoubleClick*, whether workers are employees or independent contractors is not always easy to determine.

As mentioned above, the second type of work for hire is a "specially commissioned work." The Copyright Act specifies that only the following nine kinds of work can be a "specially commissioned work": (1) a work specially ordered or commissioned for use as a contribution to a collective work, (2) part of a motion picture or other audiovisual work, (3) a translation, (4) a

supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, or (9) an atlas. Even if the work fits one of these definitions, it still will not be a work for hire unless the parties expressly agree in writing that it is.

Failing to pay close attention to the work-for-hire rules under the Copyright Act can have devastating consequences. For a publisher or end-user, it could mean the inability to reproduce, distribute, and display the work. For a developer, it could mean the inability to deliver the copyright to a client. To avoid these unhappy situations, before any work commences, publishers and end-users should clarify in writing the copyright ownership with their developers. Developers should do the same with their subcontractors, independent contractors, and employees.

For more information about the work for hire rules and copyrights, visit the United States Copyright Office website,http://lcweb.loc.gov/copyright/