“I paid for it so I own it!” “No you don’t. I created it so I own it!”

Sound familiar? Ownership, and just about anything related to intellectual property, is the current hot lunch and dinner party topic. With the advent of the Internet, John Q. Public has become sensitized to issues of ownership and branding like never before, and everyone wants to protect what they own or think they own. Unfortunately, even if you paid for someone to create something for you, there are many factors that determine whether you own it unconditionally.

A work created for or prepared by someone else usually falls under the copyright category of a “work for hire.” The Copyright Act of 1976, 17 U.S.C. sections 101 and 201(b), and in particular, the provision in section 101, essentially defines a “work made for hire” as either (i) a work created by an employee, someone who works at your place of business, uses your stuff, and takes home a paycheck from you after you’ve taken out taxes, or is (ii) a work created by an independent contractor, hired by you but who does not use your stuff or place of business to create the work, is not directly supervised by you, and pays his or her own taxes. That may sound simple but there is much more gray in that picture than black and white.

To illustrate, here’s a scenario:

> A client hires an architect to create and draw plans for a new house. During construction, the client discovers the architect to be slow, obnoxious, and unresponsive in working with the general and subcontractors, as well as with the client himself, regarding changes in the plans. Eventually fed up, the client fires the architect. Angered at his dismissal, the architect refuses to hand over the mechanicals and other drawings, stating that he is the owner of the copyright. The client, believing the drawings to be his purchased property, threatens to take the architect to court unless the plans are returned. Who is the actual owner of the plans?
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> The answer is that it depends on what was written in their contract, assuming they had a contract. If the architect considers himself an independent contractor but the client considers him an employee, and their relationship is not spelled out in writing, the matter may become litigious. In *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989—hereinafter, CCNV and Reid), considered the seminal case for deciding work-for-hire copyright ownership, a disagreement between two do-gooders over how and how often to display a large sculpture depicting a homeless family a la urban Nativity degenerated into a copyright brawl and a Supreme Court decision. Because there was no written agreement, and no discussion ever took place regarding copyright ownership, CCNV, a nonprofit organization dedicated to assisting the homeless, and Reid, a well-intentioned sculptor, ended up in court. Reid was commissioned by, and donated his services to, CCNV, who picked up the tab for materials and staff wages. They collaborated on the design, and it was that collaboration and the outlay of monies that fueled CCNV’s belief that CCNV owned the work. When Reid disagreed with

their plan to aggressively tour the work and then refused to return it to CCNV, CCNV filed suit. The District Court found for CCNV, ruling that Reid was an employee, but that decision was reversed by the Court of Appeals for the District of Columbia Circuit, holding that Reid was actually an independent contractor, and due to the lack of a written agreement and any discussion regarding copyright ownership, the reversal was ultimately upheld by the Supreme Court.

Returning to our original scenario, ownership of the plans and the copyright are really separate issues. Work for hire relates only to the copyright and not the underlying work. The client may be entitled to receive the original plans, and an implied license may have been granted to make copies to achieve the purpose expressed in the contract, but the client still could be prevented from building the house if the architect chooses to terminate the license, again depending upon the contract terms. If there is an express writing signed by both the client and the architect agreeing that the plans are a work made for hire, then the one commissioning the work—the client—is the author and copyright owner; that is, the architect *never* possessed the copyright, as it vested in the client when it was created. If the client is the one building the house, then the architect will have to release the plans. If there is no executed contract, or if one exists but does not expressly state that the plans are a work for hire, then the architect, if he or she is the author, holds the copyright.

We all know that not everyone plays well with others; hence, the need for written agreements. So in our scenario, who really owns the plans? It depends.