Copyright for Creatives

SECOND EDITION

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Still for Durrell, who continues to put up with all my nonsense.

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Chapter 2

What's Not Protected?

As we saw in Chapter 1, a work has meet two basic requirements to be copyrightable. First, the creation must be in a fixed, tangible medium of expression that can be seen, reproduced, or recorded. And second, the creation must be published.

Now, "published" is not a word that's limited to books or magazine articles; in copyright law, the word means that the work was *made available to the public* ("*public*-ation") on an unrestricted basis. "Publication" includes public performances and posting on the Internet, not just something printed and distributed by a publisher. But if a limitation is placed on distribution, then the work is not published for purposes of copyright law.

What that means is this: If you write a poem or paint a picture, and then hide it away in a locked drawer and throw the key in a river, you haven't met the copyright requirements. Someday, when someone smashes that drawer open, your work isn't protected by copyright law. You created it, and it's in a fixed medium, but it was never published, so too bad.

Copyright law talks about "authors" and "authorship" a lot, but what that word means in copyright law is not limited to writers: it means anyone *who creates something copyrightable. So painters, photographers, sculptors, composers—they're all "authors" under copyright law.*

COPYRIGHT v. TRADEMARK v. PATENT

In a moment, we'll look at each of those unprotected things individually, plus some other types of creative work generally not protectable by copyright. But first, let's quickly address that while this book is primarily about protecting your creative work through copyright, there are in fact three different ways that creative people can protect their stuff. If copyright doesn't work for you, it's possible that trademark or patent law provides a safety net. You'll find an introduction to trademarks and patents in the Appendix, but for now here's a quick overview of the three types of protection:

Copyright

What's Protected? Artistic, literary, or intellectually created works, such as novels, music, movies, software code, photographs, and paintings that are original and exist in a tangible medium, such as paper, canvas, film, or digital format. For example, the song lyrics to "Let It Go" from the movie, *Frozen*.

What's the Benefit? Protects your exclusive right to reproduce, distribute, and perform or display the created work, and prevents other people from copying or exploiting the creation without your permission, for a period of your life plus 70 years.

Trademark[1]

What's Protected? A word, phrase, design, or combination that identifies your goods or services, distinguishes them from the

[1] See *Appendix*

goods or services of others, and indicates the source of your goods or services. For example, the Nike swoosh.

What's the Benefit? Protects the trademark from being registered by others without your permission and helps you prevent others from using a trademark that is similar to yours, with similar goods or services, for indefinitely renewable periods of 10 years.

Patent[2]

What's Protected? Technical inventions, such as chemical compositions like pharmaceutical drugs, mechanical processes like machinery, or machine designs that are new, unique, and usable in some type of industry, like a new type of hybrid car engine.

What's the Benefit? Protects your right to manufacture, sell, and distribute your invention, and prevents others from copying, or making, using or selling the invention without your consent, for a period of 20 years.

For example, Coca-Cola holds copyrights on the artwork and text in its ads (like the iconic Santa Claus or polar bears, or the lyrics to "I'd Like to Teach the World to Sing"). Coca-Cola holds trademarks on its logos, and patents on its formula and bottle shape.

WHAT'S NOT PROTECTED BY COPYRIGHT?

To understand copyright law, it's important to understand the requirements for something to be copyrighted. It's also important to understand that not every creative work can be copyrighted at all. Copyright is not without its limits.

[2] See *Appendix*

The following is the traditional list of creative efforts that are, under law, specifically *not* protectible by copyright:[3]

Ideas
Choreography
Recipes and formulas
Fashion
Names, titles, short phrases, or expressions
Facts and commonly known information

Those exclusions are actually a good thing: they helpfully allow us to wear clothes and observe that the sky is blue, and call each other by our names, and eat, and dance like no one's watching without having to pay someone royalties.

IDEAS

Copyright only protects things that are in a "fixed and tangible" form. That is, things that can be presented to others. Ideas can't be copyrighted, because an idea is nothing more than electrons flying around between synapses in your brain. However, the "expression" of an idea *can* be copyrighted. In other words, you can't copyright the idea for your novel, but your novel is absolutely copyrightable.

The Copyright Act is clear: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[4] Once an idea is fixed in a tangible form of expression, though, it's protectible.

Ideas aren't protectible by copyright, because they are intangible; they exist only in your mind. Even if you write your

[3] US Copyright Office, *Circular 33: Works Not Protected by Copyright* (rev'd 2021)
[4] 17 USC § 102(b)

idea down (so it's "tangible"), the only way it's copyrightable is if it's the complete manifestation of your concept. Writing the phrase "a novel about 19th century pirates who ride in steam-powered blimps" won't do the trick. You actually have to write the novel *Sky Pirates!* and then copyright that. (And if you do, I'll probably read it!)

The key here is that just having an idea doesn't make it a thing: you need to actually take steps to create something that's tangible—that's the "property" part of "intellectual property."

DANCING

Choreographic works are *only* protected if they're recorded somehow—in choreographic notation, for instance, or video. Just doing a dance doesn't make it intellectual property (particularly when *I* do a dance).

The Copyright Office lists the acceptable formats for the fixation of choreographic works:

> **Dance notation**, (such as Benesh Dance Notation)
>
> **Video recordings** of a performance
>
> **Textual descriptions** of the performance
>
> **Photographs or drawings** of the performance[5]

However, common movements or activities, like yoga positions, line dances and exercise routines, are not copyrightable, even when they are unique. Individual ballet or dance positions that are commonly used are also not copyrightable, because they're commonly-used and not unique.

RECIPES AND FORMULAS

A simple list of ingredients is not protected under copyright law. However, where a recipe or formula is accompanied by

[5] *Id.*

"substantial literary expression in the form of an explanation or directions, or when there is a collection of recipes as in a cookbook." [6]

That means that recipes (and other formulas) can't be copyrighted, because at their core they are simply lists of items and quantities, and copyright does not protect facts; facts belong to everyone.[7]

Now, that's not to say that a book of recipes *can't* be copyrighted (Betty Crocker and Fannie Farmer would be alarmed if that were true). But in that case what's protected is the *collection* of recipes, the layout, the design, and the narrative instructions and descriptions of the baking process—if those instructions are unique and not just a simple list of steps.

The list of ingredients and basic instructions for combining them cannot receive a copyright, but whatever the maker has added creatively to the process is.[8] In other words, a recipe that creatively explains how to perform a particular part of the process may be copyrightable, as are any photographs or illustrations created (or owned) by the author.[9] If a baker produced recipes and instructions in the form of a sonnet, however, she could probably copyright them.[10]

FASHION AND OTHER "USEFUL ARTICLES"

Clothing is considered a "useful article" under US copyright law. Unfortunately, copyright law does not protect "useful articles." Under the Copyright Act, a useful article is "an article having an intrinsic utilitarian function that is not merely to portray the

[6] US Copyright Office, *Circular 33: Works Not Protected by Copyright* (rev'd 2021)
[7] *Id.*
[8] See, e.g., *Tomaydo-Tomahhdo, L.L.C. v. Vozary*, 629 Fed.Appx. 658, 661 (6th Cir.2015).
[9] US Copyright Office, Circular 33: *Works Not Protected by Copyright* (rev'd 2021)
[10] See Chapter 12.

appearance of the article or to convey information."[11] Useful articles include things like machinery and tools; medical instruments; household appliances, fixtures, and furniture; and fabrics and clothing.[12] Other examples of potentially "useful articles" provided in statute are maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."[13]

Note that while copyright *won't protect "useful articles,"* usefulness *is one of the requirements for a patent.*

However, any *parts* of useful articles that are creative and can be separated from the useful object's function may be protected by copyright.[14]

So, for instance, a woodworker could build a beautiful coatrack, but it's still a functional coatrack so it can't be copyrighted. However, if the carpenter uses a wood burner to inscribe an original poem onto the coatrack, the poem is copyrightable, just not the thing it's carved into.

There's a carve-out in this general rule, though, for things that are works of "artistic craftsmanship." Artistic craftsmanship means "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned."[15] Basically, all that means is that the object has the functionality of a useful article, but its design and execution are purely artistic in nature.

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[11] 17 USC § 101

[12] US Copyright Office, *Compendium* of US Copyright Office Practices, Third Edition (Section 924.1)

[13] 17 USC § 101, "Pictorial, graphic, and sculptural works"

[14] US Copyright Office, *Compendium* of US Copyright Office Practices, Third Edition (§ 906.10)

[15] *Id.*, at § 925.1; see Chapter 10, Visual Arts

In other words, a thing is a "useful article" if it primarily serves a mechanical or utilitarian function, even if it has some elements of artistic craftsmanship.

To go back to our coatrack, imagine that the woodworker didn't simply build a panel with some hooks to hang coats on, but rather carved an elaborate, curving, interwoven object that looks like something from Dr Seuss. It's still something to hang a coat on, but its functional purpose is now secondary to its aesthetic value; it's a work of artistic craftsmanship, and may be protected by copyright.

Clothing

We've established that clothing is a useful article under copyright law, which is probably a good thing for the general modesty of society. But as with all things in the law, there are some exceptions and special circumstances of interest to people who make clothing.

For instance, a dress *pattern* could be considered artistic, since it is essentially a drawing of something and therefore an original creative work. But the thing it's a drawing of—a shirt or dress—serves the useful function of not having everyone wander around naked, and so it can't be copyrighted.

This can get confusing, so let's break it down a little bit more:

A dress *pattern* can be copyrighted, but the way fabric is cut cannot be. A *print* applied to a fabric can be copyrighted, but the fabric itself cannot be—unless the way it's woven, for instance, is particularly unique or creative.[16]

There are other ways to protect fashion items beyond copyright: trademark may offer protection for colors in some cases, for instance, or design patents can protect an otherwise useful article.

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[16] We'll discuss clothing, costumes, and patterns in detail in Chapter 4.

NAMES, TITLES, PHRASES, EXPRESSIONS, AND COMMON KNOWLEDGE

The purpose of copyright law is to protect **original works of authorship**—books, paintings, musical compositions, and other artistic or creative expressions. Copyright law doesn't concern itself with personal or business names, titles, short phrases, or common knowledge.[17] Some of those things—names, titles, and phrases—may be protected by trademark law, however.

Names

Fortunately for all of us, we can't copyright our names. The Copyright Office helpfully provides a list[18] of what they won't cover:

> The name of an individual (including pseudonyms, pen names, or stage names)
>
> The title or subtitle of a work, such as a book, a song, or a pictorial, graphic, or sculptural work
>
> The name of a business or organization
>
> The name of a band or performing group
>
> The name of a product or service
>
> A domain name or URL
>
> The name of a character

As is the case with fashion items, the trademark process may be a better alternative for those wishing to protect names. Kim Kardashian, for example, has trademarked the names of

[17] 37 CFR § 202.1, "Material not subject to copyright"
[18] US Copyright Office, Circular 33: Works Not Protected by Copyright

her children—North, Saint, Chicago, and Psalm. Trademark registration requires some specificity about what uses the mark will be put to, and Kardashian included "hair accessories, calendars, books, photo albums, jewelry, handbags, linens, baby bottles, toys, advertising services, skincare products, furniture, clothing, and … nutritional supplements."

Titles

Similarly, the titles of works are not copyrightable, either. So yes, that means that you can write a book called *Gone With the Wind*, and as long as it doesn't involve misty-eyed nostalgia for slavery and a romanticized retelling of American history and the Civil War, you're good to go. While the content of a book is copyrightable its title is not. What you need to avoid, though, is confusing people about what book they're buying.

Again, trademark may offer an alternative. While the general rule is that book titles cannot be trademarked—because the purpose of a trademark is to identify the source of goods or services, and to distinguish them from other, similar sources—in the case of a title for a book series, the Patent & Trademark Office may permit a book's title to be protected. For instance, the "For Dummies" series published by Wiley is trademarked as a series. If someone wrote a nine-book series chronicling the time-traveling adventures of a pair of cat detectives, an individual book title, like *Muffy & Fluffy and the Fall of the Roman Empire* could not be trademarked. But the series title, *Muffy & Fluffy's Adventures in Time*, referring to the entire series, could be.[19]

[19] See Chapter 15 for a brief introductory overview of trademark law.

Short Phrases or Expressions

The Copyright Office is pretty clear on this point:

> To be entitled to copyright protection, a work must contain something capable of being copyrighted — that is, an appreciable amount of original text or pictorial material .... Brand names, trade names, slogans, and other short phrases or expressions cannot be copyrighted, even if they are distinctively arranged or printed.[20]

Specifically, the Copyright Office says that "catchwords or catchphrases, and mottos, slogans, or other short expressions" are ineligible for copyright protection.[21]

So much for copyrighting Homer Simpson's "d'oh!" or "Make America Great Again"—both of which, however, *are* protected as registered trademarks.

Facts and Commonly Known Information

Finally, facts can't be copyrighted. The Copyright Office says "facts are not copyrightable and cannot be registered with the US Copyright Office."[22] A person who finds and records a particular fact has not created it; they simply discovered that it was there.[23] "No one may claim originality as to facts … because facts do not owe their origin to an act of authorship; this is true of all facts—scientific, historical, biographical, and news of the day.'"[24] For the same reason, theories, predictions, or

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[20] US Copyright Office, *Circular No. 46: Copyright in Commercial Prints and Labels*, cited in *Southco, Inc. v Kanebridge Corp.*, 390 F.3d 276 (3rd Cir., 2004)

[21] US Copyright Office, Circular 33: Works Not Protected by Copyright

[22] US Copyright Office, *Compendium* § 313.3(c)

[23] *Id.*

[24] *Id.*, citing *Feist Publications, Inc. v. Rural Telephone Service Co., Inc*., 499 US 340 (1991)

conclusions that are asserted to be facts are uncopyrightable, even if the assertion of fact is erroneous or incorrect.[25]

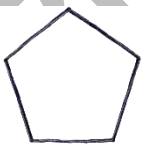
In other words, once you call something a fact, you can't copyright it, even if you're wrong.

For example, newspaper articles are copyrighted, but the copyright doesn't include the facts of the events that occurred, because the journalist didn't create them: they are independent facts that happened. For example, a news report about an automobile accident can be copyrighted because it contains original descriptions and analysis and interviews; but the fact that the automobile accident occurred doesn't belong to the newspaper.

COMMON GEOMETRIC SHAPES

The Copyright Act does not protect common geometric shapes—things like circles, ovals, spheres, triangles, cones, squares, pentagons, hexagons, and octagons.[26] Of course there's an exception: If "the author's use of those shapes results in a work that, as a whole, is sufficiently creative," then it may be copyrightable.

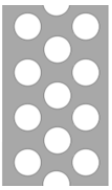
The Copyright Office itself provides some helpful examples of this distinction:[27]



A simple line-drawing of a standard pentagon on a bare white sheet of paper: the Copyright Office will not register the drawing because it consists only of a simple geometric shape.

[25] *Id.*
[26] US Copyright Office, *Compendium* of US Copyright Office Practices, Third Edition (Section 906.1).
[27] *Id.* Illustrations by the author

An artist sculpts a perfectly smooth granite sphere: the Copyright Office will not register this work because it is still a common geometric shape, and any pattern or coloring is just the natural stone, rather than the result of creative human expression.



An artist paints a picture with a gray background and evenly spaced white circles: the painting cannot be copyrighted because it features simple geometric symbols, and neither the placement of the circles or rectangle show sufficient original creativity.

A designer creates a giftwrap design that includes various shapes arranged in a random pattern, with each shape a different color: the Copyright Office *will* register the design because it combines various different shapes and colors in an original and creative way.[28]

FAMILIAR SYMBOLS AND DESIGNS

Familiar symbols and designs, or unique treatments of familiar symbols and designs, are not protected by the Copyright Act. Like geometric shapes, however, a work that includes familiar symbols or designs may be copyrightable if the familiar symbol or design is used "in a creative manner" and the whole work is eligible for copyright.

Once again, the Copyright Office provides us with some helpful examples:[29]

[28] *Id.*

[29] US Copyright Office, Circular 33: Works Not Protected by Copyright

An artist creates a sketch of the standard *fleur de lys* design used by the French monarchy. The Copyright Office will likely refuse to register a copyright, because the work merely depicts a familiar symbol.[30]

Another artist draws an original portrait of Marie Antoinette against a backdrop of multiple *fleur de lys* designs: the Copyright Office will probably approve copyright for this image, because the original, artistic portrait is the focus, and the standard *fleur de lys* designs are merely decorative background for the creative work.

The Copyright Office also provides a helpful list of examples of familiar symbols and designs that can't be copyrighted:

Letters, punctuation, or symbols on a keyboard

Abbreviations

Musical notation

Numbers and mathematical and currency symbols

Arrows and other directional or navigational symbols

Common symbols and shapes

Common patterns, such as standard chevron, polka dot, checkerboard, or houndstooth

Well-known and commonly used symbols that contain a minimal amount of expression or are in the public domain, things like the peace symbol, gender symbols, or simple emoticons

[30] Standard fleur de lys design. Source: Wikimedia Commons, public domain.

Industry designs, such as the caduceus, barber pole, food labeling symbols, or hazard warning symbols

Familiar religious symbols

Common architecture moldings[31]

COLORS

As a rule, colors cannot be copyrighted.[32] It doesn't matter what media is used (paint, computer, or whatever), or whether or not the color or combination of colors is aesthetically pleasing; colors aren't copyrightable. Simply adding color to a basic design is also insufficient for copyright.[33]

However, adding color to a black and white photograph, either through digital tools or with paint or overlays, has been approved by the Copyright Office. That's because adding the colors to an existing work demonstrates sufficient creativity.

You should note that, once again, while copyright is not the answer to your desire to protect a color, trademark may be. That's why T-Mobile magenta, Barbie pink, John Deere green, and Tiffany blue are all protected hues. [34]

SCÈNES À FAIRE

Scènes à faire roughly translates as "scenes that must be done." In copyright law, *scènes à faire* is a fancy French way of saying that there is no copyright protection for those features of a work that are indispensable or standard for similar works in the same genre.

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[31] US Copyright Office, Circular 33: Works Not Protected by Copyright
[32] 37 CFR § 202.1(a)
[33] Copyright Registration for Colorized Versions of Black and White Motion Pictures, 52 Fed. Reg. 23,443, 23,444 (June 22, 1987)
[34] See *Appendix*.

Because "[t]he entire dramatic literature of the world can be reduced to some three dozen situations,"[35] it's important that no one is able to monopolize the idea of a story about aliens invading earth, or star-crossed lovers from rival families, or cowboys in the Old West, or soldiers in wartime. If someone could copyright "stories about people flying around in spaceships meeting aliens" it would be hard for *Star Wars* or *Star Trek* to get made.

The exact way those stories are told—the words written, the specific situations, the characters—all those can be copyrighted of course, or in some cases trademarked, but E.L. James (author of the *Shades of Grey* novels) doesn't get to sue another author for writing a novel about romance in the BDSM community. A science fiction novel may involve interstellar travel, aliens from another planet, a heroic starship captain, and the Earth in peril. That author can't sue another science fiction writer for writing a novel involving interstellar travel, aliens from another planet, a heroic starship captain, and the Earth in peril—those are all *scènes à faire*: things and situations a reader will expect in a science fiction novel.

Remember that the Constitution says that copyright (and patent) are established for the *encouragement* of the useful arts, not to wall off a whole genre once someone has produced a work. Heroic starship captains, the Earth in peril, aliens from another planet—these are all elements of a good science fiction story, and no one gets to keep other people from using them.

In short, the *scènes à faire* doctrine prevents monopolies and encourages creative efforts. And that's the goal of copyright, as we already know: the balancing of freedom of expression and the protection of creativity. The doctrine balances the rights of artists to protect their work with an individual's right to create works that address the same theme that others have used in the past.

[35] *Echevarria v. Warner Bros. Pictures*, 12 F. Supp. 632 (S.D. Cal. 1935)

FONTS, CALLIGRAPHY, LAYOUT, AND BLANK FORMS

As a general rule, typeface, fonts, lettering, and calligraphy are not copyrightable.[36] It doesn't matter how unique or creative or fancy your lettering is; if it's just lettering it's not protectable by copyright. The *words* certainly may be, but the lettering isn't.[37]

Spatial Format and Layout Design

While the layout or design of a book, page, website, or poster is important, it's generally not something that can be protected by copyright. In the same way that a blank form isn't protectable because it's just a "shell" for content, the Copyright Office views page format, layout, and design as a container for the author's content.[38]

Blank Forms

Because blank forms are designed for recording information and don't convey information, they aren't copyrightable.[39]

"Blank forms" is pretty self-explanatory, but it means things like time cards, diaries, bank checks, scorecards, address books, and order forms. Blank forms are not copyrightable for two reasons: first (as mentioned) because they don't convey information, and second because they are really "containers" or "shells" into which copyrightable content *might* be poured. Because simple instructions aren't copyrightable, text labels on a blank form explaining would also not be protectable by copyright. However, if someone adds original, unique content to forms—such as decorative artwork or instructions on how to fill out the form—that content may be copyrightable. Likewise, the Office will

[36] 37 CFR § 202.1(a), (e).
[37] See Chapter 6
[38] US Copyright Office, *Compendium* of US Copyright Office Practices, Third Edition (Section 906.5)
[39] 37 CFR § 202.1(c)

refuse to register claims based solely on the arrangement, spacing, or juxtaposition of standard text on a blank form.[40]

This is as good a place as any to point out, though, that sometimes adding copyrightable content to non-copyrightable things results in something that's copyrightable. For instance, court decisions are generally not copyrighted, because they (like other government publications) are in the public domain. But there are many law book publishers who compile those decisions in volumes, adding summaries, notes, and analysis. The resulting books containing that public domain content are absolutely copyrightable by the publishers, because of the original "literary" content they've added. Because the analysis and notes theoretically make the decision more useful to lawyers, the publisher have added value and created a new work from the public domain content.

NATURALLY OCCURRING MATERIALS

Remember that human authorship is one of the basic requirements for copyright protection. As a result, naturally occurring objects, or things found in nature, cannot be copyrighted, because a human didn't create them. This distinction is important for some artists to be aware of, because it doesn't matter that you varnished and mounted the piece of driftwood you found, or that you polished a rock to a silky luster; if it is essentially a natural object, it won't be copyrighted.

MECHANICAL PROCESSES & RANDOM SELECTION

Because copyright law only protects works that human beings have created, works that are machine-generated or made with automated processes may not be copyrighted. That means, for instance, that posters created by an automated printing press run by an artificial intelligence using a randomized algorithm would not be protected by copyright. (The AI's underlying

[40] Registration of Claims to Copyright; Notice of Termination of Inquiry Regarding Blank Forms, 45 Fed. Reg. 63,298 (Sept. 24, 1980)

computer program could be copyrighted, however; just not the results of its labors, because a human being wasn't instrumental in the creation of those results.)[41]

WORKS FOR HIRE

"Works made for hire" are an important exception to the general rule for claiming copyright. To be clear, works made for hire *can* be copyrighted…just not by the person who created them!

When a work is made for hire, the author is not the individual who actually created the work; the party that *hired* the individual is considered the author and the copyright owner of the work. For instance, if you are employed by a magazine to write articles for the magazine, you are probably not the copyright holder of the articles.

There are two situations in which a work may be made for hire. First, when the work is created by an employee as part of their regular work responsibilities. And second, when a contractor and a hiring party enter into a specific written agreement that the work to be done by the contractor is to be considered a "work made for hire."

A work for hire happens when one party (the "employer") pays someone to create a work based on the employer's concept, and the employer has the right to direct and supervise the process of carrying out the work.[42]

On the other hand, if you are an independent contractor being paid to create something, then you most likely are the copyright holder, unless your contract states otherwise. The IRS defines an independent contract this way: "an individual is an independent contractor if the [person paying them] has the right to control or direct only the result of the work and not

[41] *Id.*, at 906.8

[42] *Martha Graham School of Dance Foundation v. Martha Graham Center of Contemporary Dance*, 380 F.3d at 635 (2004)

what will be done and how it will be done."[43] So as long as you control how you're doing the work, and the person paying only has the right to specify the result, you're an independent contractor and hold copyright to the work.

There's a twist, though. (Of course there's a twist; this is law and there's always a twist.) Under some circumstances, an independent contractor may not be the copyright holder. That happens if the work is "specially ordered or commissioned for use;" and the parties sign a written contract that specifically states that the job is a work-for-hire; and the work falls into one of the following categories:[44]

Contribution to a collective work,

Part of a motion picture or other audiovisual work,

Translation,

Supplementary work,

Compilation,

Instructional text,

Tests, and answer material for tests,

Atlases

The Copyright Office created a simple test to determine whether or not a work is made for hire:[45]

> *Did the creator of the work create it while acting within the scope of their employment?*
>
> **Yes**: The work is a work made for hire.
> **No**: The work is *not* a work made for hire.

[43] https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined
[44] US Copyright Office, *Circular 9* (rev'd 2012)
[45] US Copyright Office *Circular 30* (rev'd 2021)

Is there a written agreement between the employer and the creator of the work?

Yes: The work is a work made for hire.
No: The work is *not* a work made for hire.

Was the written agreement signed by both parties?

Yes: The work is a work made for hire.
No: The work is *not* a work made for hire.

Did the written agreement clearly state that the work was a work made for hire?

Yes: The work is a work made for hire.
No: The work is *not* a work made for hire.

Basically, if your job requires you to create things, then the copyright to the things you create belongs to your employer. If you're freelancing, the copyright belongs to the person who pays you. The bottom line is that you're being paid by someone who is purchasing not just your work, but your whole bundle of sticks.

©ASE STUDY Between 1958 and 1963, renowned comic artist Jack Kirby produced 262 works for Marvel Comics, as a freelancer contracted by Stan Lee. He worked in his own studio, using his own tools, and at his own expense. Kirby's work was close and continuous, and Lee considered him one of Marvel's best artists. Most of Kirby's published work during that period was for Marvel, although he also did some work for other comics publishers. Working for Marvel, Kirby created such characters as The Incredible Hulk, Thor, Black Panther, Iron Man, the X-Men, and Doctor Doom. His work was performed for specific titles and under creative direction from Marvel, and Marvel had the right to reject his work or demand do-overs. His work was expected

to conform with Marvel's house style specifications. As contractor, Jack Kirby assigned all copyrights in his work to Marvel. [46]

Jack Kirby died in 1994. In 2009, his surviving children attempted to "recapture" the assigned copyrights--recapture is possible in certain cases after 56 years (copyright assigned before 1978) or 35 years (copyright assigned after 1978). However, an estate's right to recapture copyright doesn't include assignments made under a work for hire agreement. Marvel (and its owner, Disney) sued the estate to block recapture.

The court ultimately found in favor of Marvel, concluding that the artwork was created under a work for hire relationship. "Kirby's completed pencil drawings, moreover, were generally not free-standing creative works, marketable to any publisher as a finished or nearly finished product. They built on preexisting titles and themes that Marvel had expended resources to establish—and in which Marvel held rights—and they required both creative contributions and production work that Marvel supplied. That the works are now valuable is therefore in substantial part a function of Marvel's expenditures over and above the flat rate it paid Kirby for his drawings."

The decision was in the process of being appealed to the US Supreme Court, when the parties reached an out of court agreement. While the terms of that agreement are not public, the parties did issue this statement: "Marvel and the family of Jack Kirby have amicably resolved their legal disputes, and are looking forward to advancing their shared goal of honoring Mr. Kirby's significant role in Marvel's history."[47]

[46] *Marvel v. Kirby*, 726 F.3d 119 (2013); see also Community for Creative Non-Violence v. Reid, 490 US 730 (1989).
[47] Rivera, J.," Why Kirby v. Marvel mattered." (Sept. 29, 2014) https://ew.com/article/2014/09/29why-kirby-v-marvel-mattered.

So what do you take away from all this? Here are four key points to remember:

If a human didn't make it, it can't be copyrighted.

Copyright only protects things that are actually things: tangible stuff that can be shown to other people.

Things that don't have some element of creativity, uniqueness, or artistry can't be copyrighted.

If copyright isn't available, there may be other options like trademarks or patents.