

STOP WORK-FOR-HIRE

What it means, why it's hurting the creative industry, and why you should never accept a job that requires you to sign a document with a work-for-hire clause.

- 1 What is work-for-hire?**
- 2 Why work-for-hire is hurting the creative industry**
- 3 Work-for-hire from a legal perspective**
- 4 Stop work-for-hire. Take the pledge.**
- 5 Forum: Learn from your peers**
- 6 Support the efforts of PAL**

Fair to Share?

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StopWorkForHire.com is a project of the Professional Artists League.

Work-For-Hire Primer for Educators

For design and art schools today, the issue of **work-for-hire** should be front and center on the agenda. Sadly, the “business” of being a professional artist is routinely overlooked when it comes to “educating” young creatives about their chosen career path(s). Simply put, a student’s ultimate success as a professional depends equally as much on how well he understands contract negotiation as he understands how to layout a page, prepare a canvas, or select the correct aperture. As new technologies become increasingly common and integrated into all areas of school instruction and business, an up-to-date education on what is and is not a legal use of creative remains a crucial element of a workable 21st century creative literacy. Lightning-fast changes in technology also make understanding the business aspect of being a professional creative all the more prescient.

An understanding of work-for-hire can become a useful tool in the hands of administrators who deeply believe that school time is time for instruction and that every challenge, every break, and every pause in the day can play a part in the learning environment for young people. In truth, most work-for-hire abuses in the creative industry are a sign of weakness in the individual professional as well as weakness in the industry as a whole, not necessarily an indication of inadequate resources. That said, prior to launching StopWorkForHire.com there was no easy means of learning about work-for-hire. StopWorkForHire.com is an effort to present an argument geared toward revealing how destructive the abuse of work-for-hire is to the creative industry.

It is our belief that students, staff, business leaders, parents, and community members should all be well informed of copyright and work-for-hire legalities. In the final analysis, professional creatives of all mediums bear the responsibility of educating themselves and their colleagues about issues that affect their livelihoods.

An understanding of work-for-hire as described in *section 101, page 7 of the U.S. Copyright Act* gives teachers, administrators, professionals, and students a great deal of power. This resource guide and the resources available at StopWorkForHire.com and ProfessionalArtistsLeague.org are designed to help creative professionals make the best use of that power.

Together we can change the way the creative industry does business.

Thank you for your help,
The Professional Artists League (PAL) and StopWorkForHire.com

STOP WORK-FOR-HIRE

What it means, why it's hurting the creative industry, and why you should never accept a job that requires you to sign a document with a work-for-hire clause.

1 What is work-for-hire?

PLEASE NOTE: From here on, the word “contractor” will encompass freelancers, independents, artists, designers, animators, illustrators, writers, small businesses, etc. - in essence, any person or company hired by another individual or company to perform a creative service.

Work-for-hire as defined by the U.S. Copyright Act, Section 101, page 7

According to the U.S. Copyright Act, work-for-hire is a provision that allows a very narrow exception to the basic rule that the contractor who creates the work inherently owns the copyright to the work created. Work-for-hire grants authorship and ownership of the work produced to the individual or company (hiring party) who commissioned the work. You may have guessed that this nasty provision leaves the contractor with zero rights of any kind.

Actually, it's pretty simple to understand. Our purpose is to explain how companies abuse the work-for-hire clause, to describe why work-for-hire is harming our industry and our livelihoods, and to address what we can do about it.

Work-for-hire explained

When you work as a salaried employee for a company (ad, web, design, etc.), you have a relative sense of job security, a steady paycheck, health insurance and unemployment benefits, and access to the latest hardware and software.

You also get, depending on the company, a few snappy benefits like vacation, sick pay, 401ks, profit sharing, gym memberships, paid training and summer Fridays. Not to mention ... company outings, happy hours and annual bonuses, to name a few perks. With all this wonderful stuff comes the explicit contractual obligation that as long as you are employed by said company, all the work you produce in the employ of said company is the intellectual property of said company. With the added nicety that should the work you help produce win an industry award, such as a One Show Pencil, you will be given credit for your participation. You were “hired” to produce “work”.

Ok, so *what does work-for-hire mean* when a company outsources work? And why is work-for-hire the bane of the independent creative industry? Work-for-hire is a nasty bit of legalese that is typically buried in contracts for the sole benefit of the company outsourcing creative work.

- ▶ **Work-for-hire is a means for a company to treat a contractor as a full-time employee** *without* having to provide any of the benefits of employment to the contractor as “compensation” for loss of copyright and any future income the company may generate from reuse of the work produced.
- ▶ **Work-for-hire effectively strips any and all rights to any and all work the contractor creates** while working under such an agreement. “All” work includes: sketches, doodles, layer files, prep files, finished art, everything ... You didn’t doodle on your hand did you?

You get paid a set fee to become what is called, in industry parlance, a “silent partner”. These are false pretenses. You have no rights to anything you produce and no right to seek additional fees for the reuse of the art you produce. That negates the very concept of “partner”.

On the other hand, the company that hired the contractor can use and reuse the work produced under a work-for-hire agreement for perpetuity and NEVER has to give the contractor credit for the work or pay the contractor fees for subsequent reuses.

You, the contractor, *can’t even use work you have produced in your own portfolio*. Work-for-hire renders a contractor absolutely impotent and completely invisible. Nothing more than a pair of hands. With absolutely no benefits provided by a company / firm / industry as compensation other than the flat fee they agreed to pay you when you were hired.

Is this why you became a creative? To allow someone else to take credit for your talent?

2 Why work-for-hire is hurting the creative industry

Before signing any document, first ask yourself this most important **QUESTION: *Why would you, the contractor, sign a document that the individual or company offering you the contract would NEVER sign themselves?***

- ▶ Work-for-hire promotes dishonesty and deceptive business practices.
- ▶ Work-for-hire cheapens contractors, their talents, and the work they produce because it gives buyers carte blanche to change or manipulate the work without consulting the contractor.
- ▶ Work-for-hire subverts the process of creative collaboration.
- ▶ Work-for-hire will not inspire a contractor to produce the best work; therefore, creativity suffers.
- ▶ Work-for-hire guarantees the most talented people will be unavailable to agencies who mandate the clause.
- ▶ Work-for-hire hurts contractors

Work-for-hire hurts contractors

So, perhaps you have signed a document without reading the fine print. You decided you could “trust” the agency because they have a good reputation. You should have read the document. If work-for-hire language is anywhere in the document:

- ▶ You lose all right to the work you produce the moment your pen hits paper.
- ▶ You lose all possibility of additional income from the reuse and resale of the work you produce.
- ▶ You can not use the work you produce to market your own business
- ▶ You can not enter work into design contests
- ▶ You receive zero company benefits
- ▶ You probably even cut a deal with the agency and offered your services at a lower price because they gave you a song and dance about “establishing a long-term relationship with a creative vendor,” or they promised you, “there will be more work where this came from.”

How can such agreements motivate contractors to produce the best work when they know the work they produce doesn't, in the end, belong - even in part - to them? Bottom line is that work-for-hire is bad - very very bad - for contractors.

Work-for-hire hurts clients

Big clients want the best work, right? ... Every client wants the best work.

- ▶ Clients want to know that the time they are purchasing is for the best and brightest to work on “their” project.
- ▶ Work-for-hire practices allow agencies to farm work out and claim ownership of and all credit for work they didn't produce. So what happens the next time the client wants the same fantastic work and the artist isn't available?
- ▶ Clients pay exorbitant amounts of money for work agencies sell but do not produce.
- ▶ Clients WILL eventually learn that the work they paid XYZ agency to produce was actually produced by independent contractor ABC. XYZ agency has hurt itself in the end.
- ▶ Work-for-hire is an easy way for agencies to control the message by erasing the text.

Work-for-hire hurts employers

If a client is thrilled with the work, what difference does it make to an agency if they allow an artist to whom they have outsourced work claim authorship of the work produced? Agencies should be proud to align themselves with the most talented contractors they can find.

- ▶ Work-for-hire is a tarnish on an agency's reputation.
- ▶ Work-for-hire impedes creativity.
- ▶ Work-for-hire guarantees that a contractor will not put his best effort into any job after the reality of the contract sinks in. Why should a contractor produce his very best work when he will get no credit for it? The incentive has been removed.

Work-for-hire is unnecessary

While we fully understand the need for air-tight contracts and self-preservation in this business, we can not understand how any creative agency that mandates a contractor sign work-for-hire can rationalize what is essentially legalized theft. Not to mention, it's simply hypocritical.

Where is the disconnect? There isn't a snow ball's chance in Hades that *Verizon Wireless* will award their multimillion dollar interactive campaign to an independent contractor or even a small agency. The only concerns large corporations have are that the agency they hire produces amazing work, on-time, and on-budget ... even if that work is outsourced to an amazingly talented contractor. **Agencies should be proud to have the most talented people on their team, regardless of where an individual's desk is located.**

Why do agencies outsource work anyway? Is it because they sold a product or service they do not produce? Is it because they simply can not hire one of every type of creative out there? Is it because they need to find a certain level of experience and reliability to manage a project? Is it because they simply want to save money by outsourcing to less expensive contractors? Or, is it because they don't have the tools in-house to get a job done?

All of the above and more, actually.

Experienced contractors are an agency's best friend when the dookie starts flying ... So, Agencies of Design, why insult contractors, and potentially damage a relationship with a client, by using a work-for-hire agreement?

3 Work-for-hire from a legal perspective

When work-for-hire is abused, it is legalized theft and hurts the entire design industry. To prevent abuse, it's necessary to understand the true definition of work-for-hire.

For a project to be considered work-for-hire, two (2) conditions must be met:

- ▶ **The contractor and client must sign an agreement stating that the work is work-for-hire (work made for hire).**
- ▶ **and, the work described MUST fall under one of the following nine categories as specified by the U.S. Copyright Act.**
 1. A work specially ordered or commissioned for use as a contribution to a collective work (such as a newspaper, magazine, anthology, or encyclopedia)
 2. As a part of a motion picture or other audiovisual work
 3. As a translation
 4. As a supplementary work (defined as work prepared for publication as a secondary adjunct to a work by another author, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements.

5. As a compilation (defined as a new arrangement of preexisting works or data)
6. As an instructional text (defined as a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.)
7. As a test
8. As answer material for a test
9. As an atlas

Please note what is NOT included in the criteria above: **Print advertising** (such as brochures, logos, point-of-sale, package design, etc.); **Web media** (such as web sites, HTML emails, banner ads, etc.); **Interactive media** (such as Flash animations, demos, motion graphics, etc.); **Electronic media** (such as power point presentations, kiosks, etc.) This is, by no means, an exhaustive list and represents only a few examples of the type of work not included in the work-for-hire criteria.

A “standard” work-for-hire clause

(b) Company Ownership.

All right, title and interest in and to all Subject Ideas and Inventions, including but not limited to all registrable and patent rights which may subsist therein, shall be held and owned solely by the Company, and where applicable, all Subject Ideas and Inventions shall be considered works made for hire. I shall mark all Subject Ideas and Inventions with the Company’s copyright or other proprietary notice as directed by the Company and shall take all actions deemed necessary by the Company to protect the Company’s rights therein. In the event that the Subject Ideas and Inventions shall be deemed not to constitute works made for hire, or in the event that I should otherwise, by operation of law, be deemed to retain any rights (whether moral rights or otherwise) to any Subject Ideas and Inventions, I agree to assign to the Company, without further consideration, my entire right, title and interest in and to each and every such Subject Idea and Invention.

Expanding work-for-hire to include any media

Despite the limitations imposed by the work-for-hire clause in the U.S. Copyright Act, far too many companies and agencies, interactive and design firms subvert the Copyright Law by including revised contractual language that specifies any work they deem appropriate as work made for hire.

Can they do this legally? Short answer: **NO**. According to lawyers we have spoken with, the vast majority of work-for-hire can’t be held up to the scrutiny of the law if the criteria has been expanded to include media not listed in the Copyright Act.

So, why can agencies get away with including a web site, for example? Simple. **The loophole is your signature.** The moment you sign a document with work-for-hire language (or a restrictive covenant), you no longer have any rights to the work you create.

THE CATCH = COURT COSTS WILL RUIN YOU

You, the contractor, DO NOT have the financial resources to win a court case against a high-powered attorney who is defending an employer's work-for-hire agreement. Employers are well aware of this.

Are you Aware:**

- The average rate for an experienced attorney is \$300/hour
- The average PRE trial costs you will pay simply to prepare and bring a case to civil court is 60k to 90k
- The average total cost of pursuing a law suit will cost between 100k and 200k
- The average cost to defend yourself, if the case went to trial ... 100k to 200k

k = thousand

What this means is simple. The average contractor can't afford to go to court at any cost. Again, Employers are well aware of this.

You may also come to the conclusion that, based on potential legal fees, the majority of threats you receive from clients regarding rights infringements probably amount to nothing more than hot air ... And, you may be right. Don't assume, however, that your lives couldn't be made miserable.

** How did we arrive at these numbers? We spoke with a local Atlanta attorney who has extensive litigation experience.

The bottom line: Legal documents are deliberately written in obtuse (confusing) language in order to provide an attorney with multiple avenues for legal action should a case ever be brought to trial. This also provides a defense lawyer with the tools he needs to defend you against an overzealous employer.

However, you need to be aware that there are many many legal avenues an employer can use to prosecute you for an alleged contractual infringement, including (but not limited to) work-for-hire, copyright, trademark, trade name, trade dress, public display, and patent. ***Each of these are separate and distinct areas of the law that will be ruled on and judged separately by a judge or jury.*** Feeling confident yet?

Work-for-hire abuses

What should you as the contractor look for? Unfortunately, Copyright Law doesn't prohibit any of the following unethical practices. Which means, you need to be vigilant and **READ ALL DOCUMENTS CAREFULLY.**

We have identified three primary documents where work-for-hire language may appear: contracts, non-disclosure agreements, and purchase orders.

- ▶ Many businesses will pressure contractors by denying work to those who do not accept work-for-hire.

- ▶ Look out for clients who designate work as work-for-hire after the fact by requiring the contractor to sign a purchase order or payment check imprinted with work-for-hire terms.
- ▶ Some work-for-hire contracts understood by the contractor to apply only to the current project but may actually have language that covers all future work. Blanket work-for-hire agreements are not uncommon, and inexperienced contractors are especially vulnerable to their traps.

A slow economy and a saturated market has emboldened employers to add increasingly broad rights ownership to contracts. Look out for:

- ▶ Clauses buying “all electronic rights”
- ▶ **(Our favorite)** “All rights in all media now in existence or invented in the future in perpetuity throughout the universe”
- ▶ Fallback language in a work-for-hire contract that provides for an “all rights” transfer if work is not deemed to be work made for hire.

Not all contracts are created equal. If “work-for-hire” does not appear in a section header, read the text under the “rights”, “authorship”, and “ownership” sections carefully. You may just find the clause buried in a lengthy paragraph of legalese.

Other abuses

A few other nasty practices to watch out for:

- ▶ Contractual work-for-hire language found in random documents, such as on the back-side of paychecks.
- ▶ 1-5 year non-compete clauses buried in lengthy paragraphs.
- ▶ The words “silent partner”
- ▶ Unscrupulous clients who claim there was an “implicit” work-for-hire agreement, prior to the start of work, when in fact none existed.

Who is a “friend of PAL”?

- ▶ **A friend of PAL does not ask or require contractors to sign agreements that they would never sign themselves.**
- ▶ **A friend of PAL recognizes that contractors have the right to retain copyright ownership of the work they create.**
- ▶ **A friend of PAL understands that outsourcing work to a contractor is a “partnership”, not a “silent partnership”.**
- ▶ **A friend of PAL does not unfairly attempt to take advantage of contractors by denying work to those who refuse sign “restrictive rights” agreements.**
- ▶ **A friend of PAL recognizes that creativity demands fair contracts and ethical business practices.**

Protect yourself

Protect yourself from misunderstandings, unfair business practices, and potential legal action.

GET IT IN WRITING

Confirm all assignments in writing prior to starting any job, spelling out the exact terms of the agreement and the specific rights transferred (licensed).

Don't Sign agreements that strip your rights or limit your ability to make a living or run your business.

Request a new Purchase Order or cross out the incorrect work-for-hire clause if one appears on a document after the fact.

Request a new Paycheck or cross out the incorrect work-for-hire clause on the back of the check and write "deposited without reconditions" to mitigate the attempted rights grab.

Parting Advice

This material just scratches the surface of the legal side of work-for-hire. Your best defense is to learn and know your rights. Please take the time to educate yourself with regard to Copyright Law and best practices for your business.



Disclaimer

Important: Please DO NOT, under any circumstances, utilize the information within this document or on StopWorkForHire.com and ProfessionalArtistsLeague.org for purposes of legal defense. Hire an attorney who specializes in Copyright Law. This document and the information on StopWorkForHire.com and ProfessionalArtistsLeague.org is presented for the explicit purpose of educating experienced creatives and noobs about best practices for business and the perils of Work-For-Hire.

4 Take the Pledge

The “Pledge”

“I understand that work-for-hire, and all such similar “restrictive covenants,” is a growing threat to the creative industry and an affront to my talents and professionalism. I pledge, on behalf of myself and all my creative colleagues, that I will never sign a work-for-hire agreement. Scouts honor.”

Please Visit: <http://www.StopWorkForHire.com/index.php/site2/the-pledge/>

Why should I take The Pledge?

You may think this is asking a lot. You may ask rhetorically, “Well, if everyone is requiring that I sign a work-for-hire agreement, then what’s the harm?” You may argue, “Well, if I don’t sign, I won’t get the job”.

The Hard Reality

If you sign work-for-hire, you, the contractor, are helping perpetuate this egregious problem. When you sign, you are hurting the industry, your colleagues, and yourself. Every time you agree to absurd rights transfers, you make it harder for everyone to retain their creative integrity. If you sign, you are giving away your rights with no guarantee of future work ... *If you don’t understand this, slap yourself.*

Contractors who agree to work-for-hire ARE THE PROBLEM.

We realize that due to the sheer number of unemployed designers in a saturated market, the thousands of “newbie” independents, and the ridiculous notion that “anyone can be a designer”, there will always be a pool of desperate creatives who will sign anything in order to land a job.

The “But”

But we are confident that if the relatively small number of highly experienced, truly talented and reliable professionals who are available to agencies shrinks, we will eventually prompt change.

Our mission is simple: To educate, create a union of resolute professionals, and work to promote change. Join us. And let the ‘big boys’ know you won’t bend over for them and squeal like a pig.

5 Forum: Learn from your peers

Get Involved: Join PAL and participate in the PAL Community Forums and Stop Work-For-Hire Community Forums.

Please Visit: <http://www.StopWorkForHire.com/index.php/forums/>

6 Support the efforts of SWFH & PAL

Educating yourself is only half the battle. Please help everyone in the creative community by doing one or more very simple things ...

- ▶ **Take the Pledge** and add your name or business to a growing list of professionals who support our cause.
<http://www.StopWorkForHire.com/index.php/site2/the-pledge/>
- ▶ **Pass this booklet along to a fellow creative.**
- ▶ **Register to become a member of PAL** - We are a young organization and our grass-roots effort to change the business for the better is reliant upon the participation of creative professionals and students like you.
- ▶ **Download a “Badge”** from www.StopWorkForHire.com or www.ProfessionalArtistsLeague.org and display it on your site.
<http://www.StopWorkForHire.com/index.php/site2/support-pal-badges/>
<http://www.ProfessionalArtistsLeague.org/index.php/site/support-pal/>
- ▶ **Forward SWFH to a friend.**
<http://www.StopWorkForHire.com/index.php/site2/support-pal-tellafriend/>
- ▶ **Be Smart and practice business with integrity.**

The Professional Artists League

PAL is the premier web resource and online community serving ALL professional “artists” at-large. We are here for one purpose: ***To get professional creatives communicating with one another.*** Come and make us your home page for creative news and information.

Please Visit: <http://www.ProfessionalArtistsLeague.org/>