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Who Owns It? Copyright Ownership for the Collaborative Age

"Collaborate or die!" While a touch over the top, this familiar and often used Millennial-generation refrain is becoming a reality for industries that rely on creativity and innovation. Creators, innovators and "makers" (hereafter, innovators) are realizing that isolation can equal death – that intricate projects require the expertise and participation of widely varying talents. It is not uncommon for complex engineering or product development teams to include designers, marketers, business professionals, accountants, engineers, programmers, artists and other "big thinker types" to bring a concept to fruition or market. During the initial stages of any project, the participants are typically on the same page and smitten with the common goal of bringing a novel concept to life. Over time, relationships and organizations change; sometimes they sour and lawyers are called in to clean up the toxic stew. If issues pertaining to ownership of a project, including individual contributions made to the project, are not addressed up front, the parties will likely end up in some rather sticky and complex situations. *Collaborate or die* should therefore really be read as "collaborate and you may die" if the upfront good feelings are not matched with proper planning for the ownership and control of the project or creation.

As the innovator, it is critical to ask yourself "Who is working with me to bring my concept to life?" Unfortunately, the tendency of many innovators or project sponsors is to believe, "If I pay for it, I own it." While this may be a logical assumption, it is not always a correct conclusion. With an understanding of the role and scope of involvement that is to be made by such third parties, you can effectively avoid the pitfalls that lurk.

An Example

Let's suppose you have an idea for creating a novel piece of construction machinery and you ask your lawyer for assistance. During product development, you realize that the services of a third-party software developer are required in order to engineer the computer code for the machinery. Your lawyer advises you that you will want to own all rights to the copyright in that software code. If you do not, there is a risk that the third-party developer will retain ownership of the underlying copyright in and to the developed software. If the developer retains such control, he or she could, in the future, require that you pay a licensing fee or royalties in order to continue to use the software code; or he or she could turn around and sell that code to a competitor. It is in your best interest, when possible, to own all intellectual property associated with the machine being developed. The best time to negotiate for these rights is up front when everyone is in the haze of collaborative bliss.

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Is an Independent Contractor Involved?

In many cases, when an independent contractor is hired to complete a work, that contractor may automatically retain ownership therein and to the copyright in the work. Take the example above. Although you hired a third-party software developer specifically to create software for your machinery, you may not be the legal owner of that software absent a specific agreement to that effect. When determining whether a contributing party is an independent contractor, the following factors, although not dispositive of the issue, are important considerations:

- Extent of control;
- Type of occupation;
- Whether skill is required;
- Payment method;
- Length of time employed;
- Whether the work is part of the regular business of the employed; and/or
- Who supplies the instrumentalities, tools and place of work?

The answer is usually clear as mud. True to most issues involving copyright law, courts are not consistent in their application of the factors, though the inconsistencies provide endless fodder for law review articles. Consequently, any application of these factors to a particular set of facts is problematic and unpredictable. Much of this uncertainty can be avoided by addressing the ownership of the copyright on the front end of a development project. Implementation of a simple and straightforward agreement (or the addition of well-planned copyright clauses in the underlying contract) can avoid such eventual headaches, heartaches and litigation expenses required to determine copyright ownership in the courts.

As a precautionary measure, you should always execute a written and signed work-for-hire agreement with all third-party contributors. Such an agreement generally states that all copyrights in and to the commissioned work, and prepared on your behalf, will be exclusively owned by you. As a "catch-all" approach, it is also a good idea to include an overarching copyright assignment clause in the agreement itself rather than relying on the creator executing an assignment after the project is completed. If the relationship between you and the creator of the work you commissioned is such that it does not meet the requirements for a work-for-hire relationship, such a copyright assignment will transfer title to you up front and, most importantly, without additional payment or negotiations.

Does Someone Else Own Rights in a Preexisting Work?

In the software programming world, code is often a "derivative work" that is based upon one or more preexisting works. Derivative works are extremely common in these industries and the existence of preexisting works should always be considered when you hire a software developer to create computer or software programming. For example, because the rights in and to a derivative work extend only to the "new material" created and not to the preexisting work, the scope of the copyright in the derivative work may be limited. Additionally, the rights to the preexisting work are retained by the original author thereby potentially subjecting you to liability for using or misappropriating the preexisting works. This alleged exploitation of the derivative work may, therefore, subject you to liability for copyright infringement, an award of monetary damages, and the prohibition of future use.

What Other Deals are Involved? Has Anyone Offered to Publish the Work?

If you are a creative type (such as an artist, writer or musician) it is critical that you truly understand the nature of the "deal." Entire industries are devoted to the purchase of copyright interests in and to literary and musical works in exchange for marketing and "deal shopping." These "publishers" (i.e., promoters) kick back a portion of any deal they procure to the artist, writer or musician in the form of royalties. While promoter-based deals are good for some creative types, particularly those who are not interested in "the business of it all," they may not be a good fit for everyone. It is important for you to be counseled and advised of the limitations of your remaining rights and the possibility of never receiving a royalty payment even if the promoter inks a deal.

A great and shining example of an artist who maintained control of the copyright in and to her work is J.K. Rowling, author of the acclaimed *Harry Potter* series. A little known fact is that you cannot find *Harry Potter* on iTunes for download. You must go to an e-commerce site set up by Rowling herself (http://www.pottermore.com/), one in which she retains a large proportion of the purchase price, in order to download and listen to audio versions of her books. While an author may want to enter into a deal with a promoter for the written book, the copyright in and to the audible version or the movie rights may be retained by the author. These examples are just a taste of the many ways in which a copyright can be divided and subdivided for licensing or marketing purposes. This is a strategy brilliantly used by Rowling which has allowed her to maintain for herself many of the rights and opportunities routinely given away by authors.

Conclusion — Think Before You Leap

Early in the relationship and before "the deal is done," it is critical to ask yourself, "With whom am I working?" In law, just as in medicine, the same principle applies – "prevention is the best medicine" and, with collaborative endeavors as with medicine, the precautions you take at the outset may make all the difference in the outcome or recuperation (legal battle) that ensues. P