

# **The Concept of “Work for Hire” and Its Usability in the Nigerian Copyright Law Context**

By

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## **INTRODUCTION**

The concept of “work for hire” has gained widespread recognition across many jurisdictions and has increasingly been adopted in structuring deals within Nigerian industries, particularly in the entertainment sector.

Despite our localization of this concept and in fact its fame – it is yet only a foreign terminology imported into our industries which has not yet enjoyed recognition by our local laws.

We consider the place of this foreigner named ‘Work for Hire’ in our jurisprudence, and how it has attained its prominence with regards to ownership and transfer of copyright under Nigerian law. It is posited that while the Nigerian copyright Act 2022 has a design that may implicitly accommodate the ‘work for hire’, the provision is however, not called ‘work for hire’ under our law and cannot be construed to have the same effect, implication and meaning as the ‘work for hire’ principle known, for instance under the United States Copyright Laws. Essentially, the contention is as to the place of ‘work for hire’ in light of the fundamentality of moral rights under the Nigerian Copyright Act.

## **THE CONCEPT OF WORK FOR HIRE**

The long-heard name of this concept is ‘work mode for hire’. It is simply a legal concept that allows a person to hire the creative service of another person such that the hirer will be deemed as the author of the work created.

It transfers and confers the right to be named the creator of a work from the “real creator” to the Hirer, such that the hirer is considered as the original creator and not the “real creator”.<sup>1</sup>

To simplify this explanation, an example is where for instance, a film studio like Walt Disney hires a music writer to write a theme song for its feature length film or hires a screen writer/creative to create a story on a “work for hire” basis. In this structure Walt Disney will be deemed as the original creator of the work, that is, the author of the work and the person hired disappears or say ‘ghosted’.

“Work for hire” operates in a way that in the eyes of the law the real creator never existed in the eye of the law and the person or company commissioning the work owns it as if they had created it themselves.

Generally, the effect of “work for hire” is that the employer/ commissioner actually becomes the author of the work insofar as copyright law is concerned.<sup>2</sup> The extensive

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<sup>1</sup>Paul Hellyer, ‘Who Owns This Article? Applying Copyright’s Work-Made-for-Hire Doctrine to Librarians’ Scholarship’ (2016) 108 Law Library Journal 33

<sup>2</sup>Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, OUP 2006) 435.

consequence of this is that the employer/commissioner could leverage on this to deny the real creator of any moral right or economic right except expressly otherwise agreed with the real creator.

### **BRIEF HISTORY OF THE DOCTRINE OF THE WORK FOR HIRE**

Because the Nigerian practice and usage of the concept of “work for hire” somewhat links to the exchange of industry practice with the American jurisdiction, the history of the doctrine of work for hire will thus be traced from its historical perspective and evolution in the United States of America.

The doctrine of work for hire as known today is a product of early struggles dating back to the early 19<sup>th</sup> century.<sup>3</sup>

The work for hire doctrine emerged in the 19<sup>th</sup> century as the United States industrialized and creates industries like publishing and journalism expanded upon the need to determine the question of who owns or should own the copyright to work created by employees. The evolution of the doctrine witnessed a shift starting from the common law position in the 19<sup>th</sup> century granting copyright to the employees and not the employers, on to the 20<sup>th</sup> century when the court and congress eventually allowed copyright to be allocated to the employer and not the employee based on the doctrine of the “work for hire”.<sup>4</sup>

In the period before 1860 the court asserted that persons hired to create works owned the copyrights to their works and not the person who hired the creator. However, there was a shift between the period of 1860 and 1900 when the courts began to transition and recognize the interests of employers in the copyright ownership. During this transition period the courts would only hold that the employer owned the copyright if there was an express contract giving the copyright to the employer. Hence, the fact of employment does not Ipso fact confer copyright on the employer except that there is a written contract to that extent.<sup>5</sup>

However, by 20<sup>th</sup> century the principle of employer ownership of copyrights in employee works regardless of whether there is an express contract or not was finally settled by statute – that is, the Copyright Act 1909.<sup>6</sup>

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<sup>3</sup>Catherine L Fisk, ‘Authors at Work: The Origins of the Work-for-Hire Doctrine’ (2003) 15(1) *Yale JL & Humanities* 1, p. 11

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup>The foremost landmark cases that recognized this work for hire doctrine were: *Collier Engineer Co. United Vs Correspondence Schools* (94. F.152 (CC.S.DN.Y.1899); *Dielman Vs Dhite* (102F.8928) C.C.D MASS 1900) and *Edward Thompson Co Vs American Law Book* (119 F. 217, 119 CC.C.S.D.M.Y.1900)

The copyright Act 1909 (amendment) finally codified the work for hire doctrine by adding a provision stating that employers were the authors of works made by employees. The doctrine of “work for hire” has ever since remained in the US Copyright Act.

### **WORK FOR HIRE IN THE UNITED STATES**

Section 201 of the United States copyright Act 1976 (Title 17 U.S code) provides that in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author of the work and owns all the copyright unless parties have expressly agreed in a written instrument signed by them.

Whereas, section 101 of the Act defines a “work for hire” to mean

1. A work prepared by an employee within the scope of his or her employment. OR
2. A work specifically ordered or commissioned for use as a contribution or to be made part of a collective work, a motion picture or audiovisual work, a translation, a completion or a supplementary work, provided that parties must have first expressly agreed and signed in writing that the work will be made a work made for hire.

The implication of the above in simple term is that, when a work is made for work for hire, the employee who made the work under an employment is not the author/creator/owner of the work but rather the employer is. Also, when a work is made for hire, the person who is commissioned to create the work is not the author/creator/owner of the work, rather the commissioner is, provided that there is a written agreement between the person and the commissioner to that effect.

Further, with works-made for hire, there are no termination rights because there was no transfer in the first place. Thus, the original creator never existed in the eyes of the copyright law- the person or company commissioning the work owns it as if they had created it themselves.<sup>7</sup>

### **THE NIGERIAN DESIGN**

The Nigerian Copyright Act 2022 does not specifically recognize the doctrine or term “work for hire”. Under the Nigerian Copyright Act, the general principle is that copyright shall initially vest in the author of a work except otherwise provided in an agreement.

Thus section 28(1) provides that:

*Except as otherwise provided in an agreement, copyright conferred by this Act, shall initially vest in the author.*

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<sup>7</sup>Donald S. Passman, ‘All you Need to Know About Music Business’ Simon & Schuster 11<sup>th</sup> ed. P.324

This means that if there is no contrary agreement, copyright will vest in the original creator of the work. Section 28(1) is the most authoritative and relevant provision of the law regarding this discourse.

Although, the Nigerian Copyright Act 2022 makes provision for copyright ownership under employment and under commissioning, however, the law as obtainable under the Nigerian law fairly differs from the "work for hire" doctrine under the U.S copyright law.

In fact "work for hire" in U.S originated as an exception to the general rule that copyright initially vests in the original creator, but no exception of this sort is provided in Nigeria. Although, it could be argued that the qualification in Section 28(1) to wit: "Except provided in an agreement..." allows parties to sign or enter into a work for hire Agreement, the challenge however would be whether the said Agreement can carry the full effect of work for hire doctrine in the light of the provision of Section 14 regarding moral rights of authors. This is subsequently addressed.

Firstly, the Nigerian copyright Act 2022 only addresses copyright ownership under the employment of a government agency, ministry, or international organization- but is indifferent towards copyright ownership under general or private employment. Thus, section 28(2) of the Nigerian copyright Act 2022 provides that where a person who is under a contract for service or in course of employment by a government, ministry, agency or international organization, creates a work in the course of such employment the copyright in the work will 'automatically' vest in that government or international body- except there is an agreement to the contrary.

The provision of section 28(2) of the Nigerian copyright Act 2022 may appear to have a semblance with the "work for hire" doctrine but it is in reality not. Section 28(2) only operates to vest 'copyright' in the work and not 'authorship' in the government employer. Therefore, the original creator which is the employee under government employment is not completely eliminated. The employee will not own the copyright in the first instance but will still retain authorship which means the employee can still claim moral rights (e.g right to be attributed/credited)pursuant to Section 14 of the Act, against the government employer unlike the doctrine of "work for hire".

It is to be recalled that the 'work for hire' doctrine operates to totally ghost or eliminate the original creator such that the employer is deemed as the original author. Section 201(b) of the US copyright law provides that in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author except otherwise agreed in writing.

Therefore, although section 28(2) of the Nigerian copyright Act 2022 vest copyright initially in the government employer. It does not vest authorship in the government employer hence, the government employee remains the author of the work but not the copyright owner of the work in the absence of a written agreement.

Section 28 of the Nigerian copyright Act 2022 omits to expressly mention about other employments which are not government employments. This appears as an intentional omission by the legal draftsman-because the old Nigerian copyright Act 1988 had more elaborate provisions in section 10(2) by expressly stating that a commissioned work or work made under employment shall belong in the first instance to the author unless otherwise stipulated in writing. Section 10(3) further provided that copyright in literary, artistic or musical works made by an author who is in the employment of a newspaper shall in the absence of any contrary agreement vest in the employer of such an author as first owner.

It appears therefore that the intention of the legal draftsman under the new Act in section 28(1) is to authoritatively ensure that copyright will vest in the first instance in the original creator of the work, whether the work is made under employment or by a commissioned work except there is a written agreement to the contrary.

Secondly, the Nigerian Copyright Act 2022, does not in any way suggest that the original author can be stripped of his authorship under any guise. Like the work for hire doctrine portends to operate.

Under the Nigerian law, even if the original creator (under employment or not) is by agreement not vested with copyright in the first instance, according to section 28(1), he cannot however be stripped of his authorship status even if he doesn't hold the copyright.

This position is further strengthened by the provision of section 14 of the Nigerian copyright Act 2022, which provides that an author's moral right which include;

- a) The right to claim authorship (not ownership) of his work
- b) To object to any distortion, or derogatory use of his work
- c) To object to being falsely attributed as the author

are rights that cannot be transmitted during the life of the author. By implication, so long an original creator, that is, the author of a work is still alive, he cannot transmit his moral right, that is, he cannot by will or wit transfer his right to be credited or attributed as the author of the work to another person whether under employment or not.

The question therefore remains "can authorship of a work be validly alienated or transferred to another person through a written agreement under the Nigerian law?" like work for hire doctrine would.

One is obliged at this juncture to restate the provision of section 28(1) of the Nigerian copyright Act 2022 thus:

*"Except as otherwise provided in an agreement, copyright conferred by this act shall initially vest in the author".*

The above provision means that an author can transfer 'copyright' which he would have originally owned as the author to another for or for no consideration.

Section 30(1) of the copyright Act 2022 further clarifies the mode by which copyrights can be transferred or alienated. it provides thus:

*For the purpose of chapter 4 of the constitution of the federal republic of Nigeria 1999, copyright shall be deemed to be movable property and shall be transferable by way of assignment, testamentary disposition or operation of law.*

Essentially, during the life of an author or creator of a work, the means of transferring copyright include:<sup>8</sup>

- i. Assignment of the rights in part or wholly, which is required to be in writing.
- ii. Exclusive license of the rights also required to be in writing.
- iii. Non-exclusive license which may or may not be in writing

Section 30(10) further adds a layer of protection for authors with regards to future works. It provides thus:

*“An assignment, licence or testamentary disposition, may be granted or made in respect of a future work or an existing work in which copyright does not subsist, provided that it shall not be permitted to transfer the rights in all future works of an author”*

This implies that an author can assign the copyright in his future works (i.e works which had not been created yet at the time of the contract) but the mode of such alienation would be by an assignment, license or testamentary disposition not accommodating the work for hire doctrine which alienates authorship. The provisions of the Act are drafted in a manner of which there can be no insinuation that it intends moral rights or authorship to be alienated.

It therefore means that an author can truly transfer copyright but does the copyright transfer include authorship right? This is best answered in the negative as the provision of section 14 is crystal clear that authorship or 'moral rights' cannot be transmissible during the life of the author.

The Act simply defined the term "copyright" as "copyright under the Act"<sup>9</sup>. The Act further states the nature of copyright in section 9, 10, 11, 12, and 13 of the Act which are collectively commonly called the economic rights.

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<sup>8</sup> See *Musical Copyright Society of Nigeria Ltd/Gte v Compact Disc Technology Ltd & Ors* (2018) LPELR-46353(SC); *Adenuga v. Ilesanmi* (1991) 5 N.W.L.R 82

<sup>9</sup>Section 108 Nigerian Copyright Act, 2022

Therefore, it follows from the above that the copyright allowed to be transferred by agreement either by assignment or license by section 30 and section 28(1) are only the economic rights but do not extend to the authorship-which is an innate and inalienable right of the original creator of the work whether in employment or not.

### **DRAFTING A TRANSFER CLAUSE/CONCLUSION**

While it is posited that the Nigerian copyright Act does not recognize the doctrine of “work for hire” as it is expressly enshrined in the US copyright law- and in fact, it is shown that “work for hire” in the United States operates as an exception to the rule of moral rights and authorship.<sup>10</sup>

However, one must note that this discourse is yet to enjoy any judicial pronouncement or precedent from the Nigerian courts. Therefore, it cannot be foretold if the judiciary will interpret the Nigerian Act plainly or accommodate the doctrine of “work for hire” in the Nigerian territory either by waiver or assignment.

Nevertheless, it is essential that solicitors take note and creatives also take into cognizance the workability of this doctrine under the Nigerian law.

Hence, where rights are to be transferred by a written clause, it is essential to ensure that such transferring clauses are drafted in a way that occasions an assignment of rights not merely stating that it is transferred on a “work for hire” basis especially where such arrangement is to be governed by Nigerian law.

Alternatively, it could also be a safe practice to include in the clause that where the draft transfer will not operate as a ‘work for hire’ whether by judicial pronouncement or operation of law then, it is deemed that the author has assigned such rights in accordance with the applicable Nigerian law.

Also, more materials are required in this jurisprudence for instance to determine if an author will validly waive his authorship/moral right when the law had clearly stated that moral right are not transmissible.

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<sup>10</sup>Catherine L Fisk, ‘Authors at Work: The Origins of the Work-for-Hire Doctrine’ (2003) 15(1) *Yale JL & Humanities* 1, p. 11