

Beth N. Ochoa, Esq.

FACSIMILE COVER PAGE

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Pages: 9

To: Jason Markham
Company: Perpetual Motion Films
Fax #: 13104777135

From: Beth N. Ochoa
Title: Attorney at Law
Company: The Law Offices of Beth N. Ochoa
Address: 13520 Rye St., Suite 105
Fax #: (818) 995-4402
Voice #: (818) 905-8785

Message:

Dear Jason,

As you requested, John Willheim has produced the original contract between him and Air America, Inc. proving that John is indeed the true copyright owner of the film "Air America." Please call me to discuss this. John will be glad to loan you his master again.

Beth Ochoa

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THE LAW OFFICES OF BETH N. OCHOA

13520 Rye Ct. Suite #105
Sherman Oaks, CA 91423



December 7, 1999

Jason Markham
Perpetual Motion Films
11801 Mississippi Ave., Suite 300
Los Angeles, CA 90025

Dear Jason:

When we last spoke, we agreed that if Mr. Willheim could produce the original contract between himself and Air America, Inc. and prove that Mr. Willheim was indeed the copyright owner of the film, Perpetual Motion would pay Mr. Willheim seven thousand dollars (\$7,000.00) for the use of his master and related materials.

Mr. Willheim has gone through his storage boxes and has produced the contract you requested. A copy is enclosed. The Copyright Act of 1976 specifically refers to works made for hire. I have enclosed a copy of "Circular 9" which clarifies Section 101 of the Copyright Act of 1996 which defines a "work made for hire." To determine whether a work is a work for hire, the relationship of the parties of either employee or independent contractor must be determined. In the present case, Mr. Willheim was not an employee of Air America, Inc. and is by the language in the contract an independent contractor for the following reasons.

"Circular 9" states that the contract must have the words "the work is a work made for hire." Nowhere in the contract between Mr. Willheim and Air America, Inc. does it say the required words "the work is a work made for hire."

Because the Air America contract was signed in 1969, it would be subject to the Copyright Act of 1909 rather than the newer Copyright Act of 1976. The Copyright Act of 1909 does not address works made for hire in detail, but in the Register of Copyrights "Copyright Law Revision Study No. 18" written to Congress in 1975, the Register wrote, on the subject of works made for hire and the Copyright Act of 1976, "The rule has long been established, both under the common law and under the statute (1909), that the rights in a work produced by an employee in the course of his employment are vested in the employer. This rule has been based on several grounds: (1) the work is produced on behalf of the employer and under his direction; (2) the employee is paid for the work; and (3) the employer, since he pays all the costs and bears all the risks of loss, should reap any gain."

It should be noted that the reason the Copyright Act of 1976 specifically requires the words "work for hire" in a contract is that, at the time the 1976 statute was written, there was already extensive case law in which the federal courts had interpreted the 1909 Copyright Act to require such words. This case law was governing law when the Air America contract was signed in 1969.

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Under this 1909 Act standard, we have the distinction between employee and independent contractor. Paragraph two (2) of the Air America contract under "RECITALS" says "Sponsor...desires to retain the services of Producer..." Retaining the services of someone is not the wording of an employment contract but a contract between two different entities (independent contractor contract). Mr. Willheim did not produce his work as an employee and was not paid as an employee, therefore failing the work for hire test of the Copyright Act of 1909.

In addition to the absence of the words "work made for hire," other language in the Air America contract also confirms that Mr. Willheim was always the copyright owner. Working with the History Channel, you are familiar with a "buyout." In a buyout, one company hires a production company to produce a film for them. The company hiring the production retains the negative and the intellectual property (copyright). Paragraph seven (7) under "AGREEMENT" says that Mr. Willheim must deliver one positive print. Not only does this paragraph not require delivery of the negative, the paragraph gives possession of the negative to Mr. Willheim with the promise that Air America, Inc. has the right of purchasing further positive prints. Air America, Inc. does not have the right to have positive prints of the film, they have to purchase copies from Mr. Willheim, and Mr. Willheim has to agree to a special price.

The fact that the Air America contract lacks the words "work for hire" and that Mr. Willheim retained the negative instead of Air America, Inc. are compelling proof that Mr. Willheim owns the copyright.

You claim that the film is public domain because government publications are public domain. Section 105 of the Copyright Act of 1976 says "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."

The rule of government publications does not apply in the present case. Section 105 applies to government publications by government agencies where the government acknowledges publication. In the present case, Air America, Inc. was a proprietary corporation secretly funded by the Central Intelligence Agency. Air America, Inc. provided airlift capabilities for sensitive operations worldwide. Mr. Willheim did not have a contract with a government agency. He had a contract with an independent Delaware registered corporation not publically affiliated with the U.S. government. Therefore, Section 105 does not apply to the present situation.

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When I did an extensive Library of Congress search for copyrights, the Library of Congress had no record of the film ever being copyrighted nor any record of Air America, Inc. or George A. Doole, Jr. as copyright claimants. In other words, the CIA is not going to claim copyright of this film because they would have to publicly admit they were spying on China during the Viet Nam years as well as providing secret paramilitary assistance to anti-Chinese forces in Tibet. Since the CIA will not claim the copyright, this is final compelling proof that this film does not fall under the Section 105 exception and that Mr. Willheim is truly the rightful copyright owner.

Mr. Willheim currently has a copyright application for the film pending in the U.S. Copyright Office in Washington D.C.. Since he is rightfully claiming the copyright, the film is copyright protected. Please call me to finalize payment details.

Very truly yours,

A handwritten signature in cursive script that reads "Beth N. Ochoa".

Beth N. Ochoa
Attorney at Law

BNO/jp

Encl.

TO: BETH

NOV 14 1999

A G R E E M E N T

THIS AGREEMENT, made this 30TH day of December, 1969, by and between JOHN WILLHEIM PRODUCTIONS of Hollywood, California (herein called "Producer") and AIR AMERICA, INC., a Delaware corporation (herein called "Sponsor").

R E C I T A L S

At the request of Sponsor, Producer has heretofore conducted, completed, and submitted to Sponsor, a field study report dated March 3, 1969, setting forth Producer's proposal for the production of a full length documentary motion picture on the domestic and overseas operations and activities of Sponsor, which proposal was supplemented by "(1) Proposal Modification" dated March 21, 1969. The portions of said proposal and Proposal Modification which are pertinent to this Agreement are reproduced and attached hereto and hereafter referred to as the "Proposal".

Sponsor desires to have a motion picture produced documenting its activities and desires to retain the services of Producer for the production of such motion picture on the terms and conditions hereinafter set forth.

Producer and Sponsor therefore agree as follows:

A G R E E M E N T

Producer shall produce and deliver to Sponsor, one fully complete 16mm sixty minute color motion picture release print, with recorded narration and sound effects as determined by Producer, made to the highest professional standard, documenting the activities and operations of Sponsor, within the Proposal description.

Producer shall proceed forthwith with the production of the motion picture, and shall carry on the same with all due diligence, in accordance with the customs and standards of the industry, and within six months from the date of this Agreement shall deliver said print to Sponsor. Said six month period shall be extended in the event of delays beyond the control of Producer including, but not limited to, weather restrictions, acts of God, wars, civil disturbances and the unavailability of aircraft required in the production of the motion picture.

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Producer and Sponsor shall work in close cooperation in producing the motion picture. To insure that Sponsor is advised of the content of the motion picture to the fullest possible extent at all stages of preparation and production, Sponsor shall provide a representative to accompany Producer during the production period. In addition, Producer shall use his best efforts to keep Sponsor fully advised.

It is understood that Producer's obligation hereunder is to produce a motion picture within the limits of the Proposal. However, Sponsor shall have the opportunity to examine the motion picture with respect to arriving at a final product agreeable to Sponsor at two stages of production as the same are defined in the Proposal, namely, rough cut stage and interlock stage. At these stages, Sponsor shall make suggestions for those reasonable changes it desires and Producer shall cooperate in making such reasonable changes as are feasible.

Sponsor shall pay to Producer, the sum of \$85,000.00 as follows:

One-third of said sum (\$28,333.00) concurrently with the execution of this Agreement;

One third (\$28,333.00) at the beginning of the laboratory phase of film production;

The balance of \$28,334.00 upon delivery of the finished print. Included in said \$85,000.00 is the delivery of one print. All additional prints of the motion picture will be provided at a cost of \$450.00 each, provided, however, that Producer shall have the option of delivering the negative to the Sponsor in lieu of providing additional prints.

Sponsor shall use its best efforts to cooperate and aid Producer in all aspects of the production of the motion picture. To that end, Sponsor shall provide Producer with ground transportation whenever practical at Sponsor's facilities and will make available a reasonable number of non-revenue flying hours in various aircraft for the purpose of photographing air operations and transporting Producer and his equipment to the specific sites required for complete film coverage.

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Sponsor shall indemnify and hold Producer harmless from any and all claims, damages and costs, including reasonable attorneys fees which may result or arise from the production of the motion picture or any showing or exhibition thereof, except for such claims, damages, costs and fees which may result or arise from the negligence including acts of commission and omission on the part of any principal, officer, or employee of the Producer.

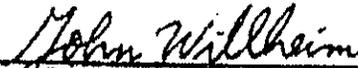
This Agreement shall enure to the benefit of and shall be binding upon the parties hereto, their successors and assigns.

This Agreement may be executed in several counterparts, each of which may be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their representatives thereunto duly authorized as of the day and year first above written.

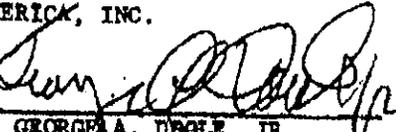
JOHN WILLHEIM PRODUCTIONS

BY


JOHN WILLHEIM

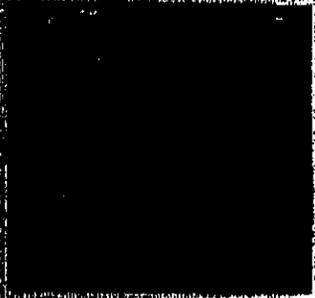
AIR AMERICA, INC.

BY


GEORGE A. DOBLE, JR.
Managing Director



9



WORKS MADE FOR HIRE

Under the
1976
Copyright
Act

INTRODUCTION

Under the 1976 Copyright Act, as amended (title 17 of the United States Code), a work is protected by copyright from the time it is created in a fixed form. In other words, when a work is written down or otherwise set into tangible form, the copyright immediately becomes the property of the author who created it. Only the author or those deriving their rights from the author can rightfully claim copyright.

Although the general rule is that the person who creates a work is the author of that work, there is an exception to that principle: the copyright law defines a category of works called "works made for hire." If a work is "made for hire," the employer, and not the employee, is considered the author. The employer may be a firm, an organization, or an individual.

To understand the complex concept of a work made for hire, it is necessary to refer not only to the statutory definition, but also to its interpretation in cases decided by courts.

STATUTORY DEFINITION

Section 101 of the copyright law defines a "work made for hire" as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for a publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes and indexes; and an "instructional text" is a literary, pictorial or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

DETERMINING WHETHER A WORK IS MADE FOR HIRE

Whether or not a particular work is made for hire is determined by the relationship between the parties. This determination may be difficult, because the statutory definition of a work made for hire is complex and not always easily applied. That definition was the focus of a 1989 Supreme Court decision (*Community for Creative Non-Violence v. Reid*, 490 U.S. 730 [1989]). The court held that to determine whether a work is made for hire, one must first ascertain whether the work was prepared by (1) an employee or (2) an independent contractor.

If a work is created by an employee, part 1 of the statutory definition applies and generally the work would be considered a work made for hire. **IMPORTANT:** The term "employee" here is not really the same as the common understanding of the term; for copyright purposes, it means an employee under the general common law of agency. This is explained in further detail below. Please read about this at "Employer-Employee Relationship Under Agency Law."

If a work is created by an independent contractor (that is, someone who is not an employee under the general

common law of agency), the work is a specially ordered or commissioned work and part 2 of the statutory definition applies. Such a work can be a work made for hire only if both of the following conditions are met: (1) it comes within one of the nine categories of works listed in part 2 of the definition and (2) there is a written agreement between the parties specifying that the work is a work made for hire.

Employer-Employee Relationship Under Agency Law

As mentioned above, if a work is created by an employee, part 1 of the copyright code's definition of a work made for hire applies. To help determine who is an employee, the Supreme Court in *CCNV v. Reid* identified certain factors that characterize an "employer-employee" relationship as defined by agency law:

1) **Control by the employer over the work** (e.g., the employer may determine how the work is done, has the work done at the employer's location, and provides equipment or other means to create work).

2) **Control by employer over the employee** (e.g., the employer controls the employee's schedule in creating work, has the right to have the employee perform other assignments, determines the method of payment, and/or has the right to hire the employee's assistants).

3) **Status and conduct of employer** (e.g., the employer is in business to produce such works, provides the employee with benefits, and/or withholds tax from the employee's payment).

These factors are not exhaustive. The court left unclear which of these factors must be present to establish the employment relationship under the work for hire definition, but held that supervision or control over creation of the work alone is not controlling.

All or most of these factors characterize a regular, salaried employment relationship, and it is clear that a work created within the scope of such employment is a work made for hire (unless the parties involved agree otherwise).

Examples of works for hire created in an employment relationship are:

- A software program created within the scope of his or her duties by a staff programmer for Creative Computer Corporation.
- A newspaper article written by a staff journalist for publication in the newspaper that employs him.