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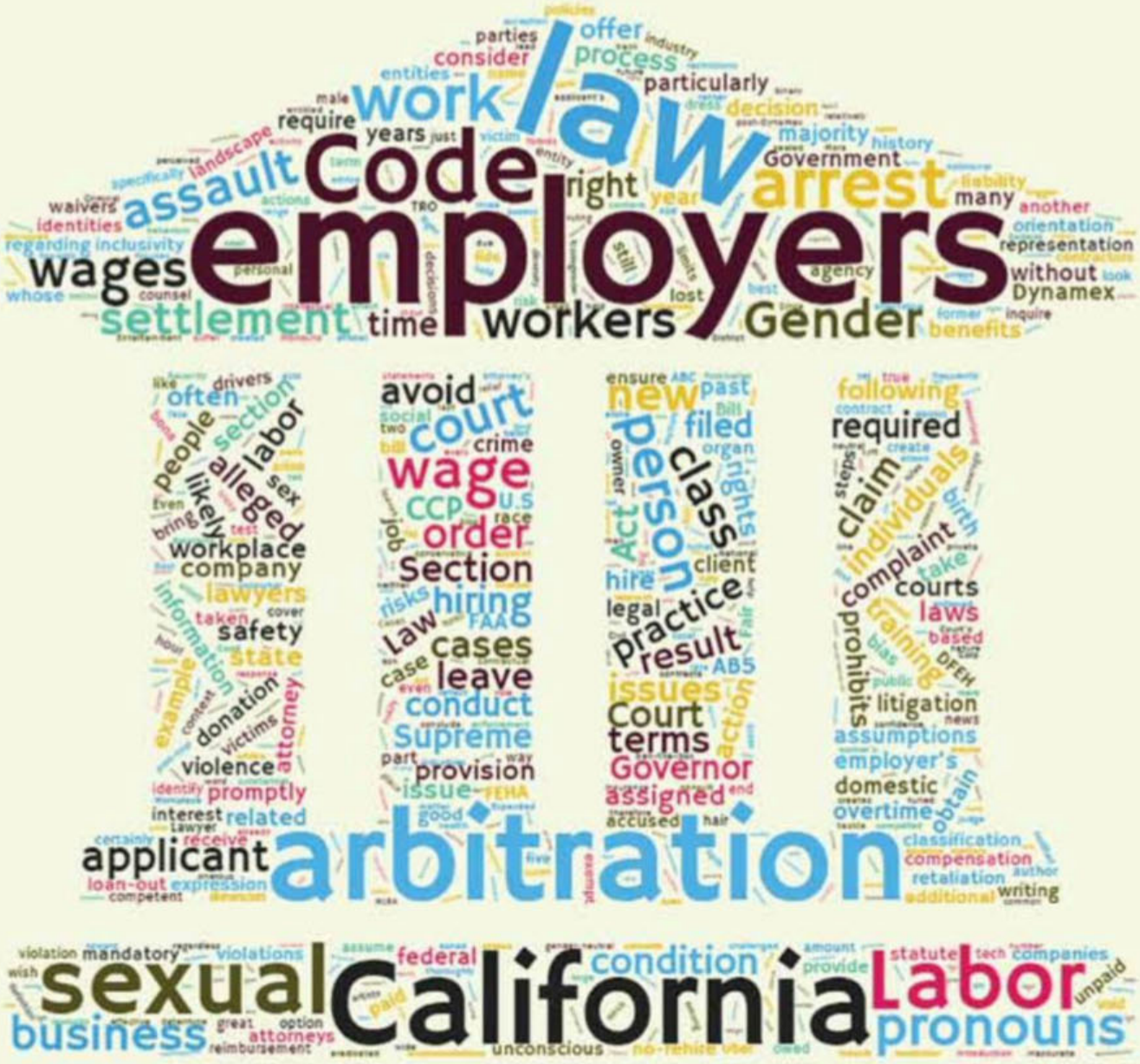
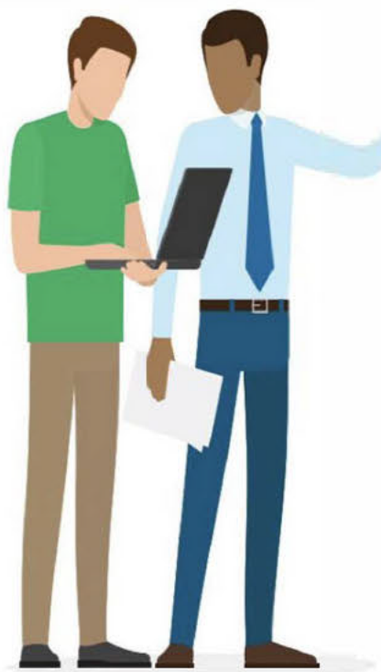


Work Made For Hire:

Effect on Copyright and Employment Laws in the Tech and Entertainment Industries After *Dynamex* and AB5

By Natasha S. Chee and Marta R. Vanegas



The "work made for hire" concept is deeply rooted in copyright law. However, it may create unintended and unforeseen consequences regarding the creative worker's classification under California's *Dynamex* decision and AB5[1], especially for the tech and entertainment industries.

Federal copyright grants authorship and ownership of a work to the creating party or parties[2]. However, for any work made for hire created on or after January 1, 1978, the author and owner of the copyright is the employer or commissioning party[3], if the work was (1) prepared by an employee in the scope of his or her employment, or (2) specially ordered or commissioned under one of nine listed categories[4], which encompass works in music, film, literature, gaming, and other tech and entertainment fields.

The California Labor and Unemployment Insurance Codes classify workers as employees if they expressly agree in writing to create works made for hire as specified under federal copyright law[5]. A hiring entity may unwittingly misclassify an individual worker as an independent contractor and incur liability by failing to comply with certain requirements for employees, such as providing workers' compensation insurance[6]; contributing to the Employment Development Department[7]; complying with administrative, reporting, and notice requirements[8]; reimbursement[9] or providing overtime, wage and hour benefits, wage statements, and sick leave[10]. Noncompliance may incur severe penalties, interest charges, fines, and possible misdemeanor charges[11].

The legal landscape post-*Dynamex* and AB5 leans more sharply toward a finding of employee-status, making it more difficult to qualify as an independent contractor. As of January 1, 2020, AB5[12] codifies *Dynamex*[13], deeming workers employees unless the worker meets the stringent "ABC test"[14] or is statutorily exempt.[15] While the statute exempts certain professions such as lawyers, accountants, graphic artists, fine artists, and grant writers,[16] the vast majority of workers in the tech and entertainment industries are not so exempted. Cinematographers, screenwriters, animators, programmers, and content creators regardless of the distribution platform are not exempt under the statute.[17] Moreover, still photographers and photojournalists are specifically precluded from exemption if their work is for a motion picture[18]. Individuals reclassified post-*Dynamex* as employees cannot be converted to independent contractors even if the statute provides them with an express exemption from employee status.[19]

One option is to eliminate the work made for hire provision from agreements and transfer ownership of copyright via conveyance or operation of law, such as through assignment or license[20], however, this option may insufficiently protect the hiring entity's copyright needs. Congress created the right to terminate copyright transfers, superseding any contractual waivers or perpetuity terms[21], and allowing for copyright ownership to revert to the original owner[22]. This termination right creates great risk, uncertainty, and a potentially unfavorable bargaining position if the work later becomes exceedingly valuable or is vitally integrated within an intellectual property framework. Transfer of rights with the risk of termination and without a work made for hire provision may be an unsuitable option, as entertainment entities increasingly use their "back catalog" to generate revenue and film distribution agreements often contain lengthy terms of duration.

Another option for preserving work made for hire provisions in agreements while avoiding employee classification is to contract with a loan-out company specifically created for and managed by the creative worker. The loan-out company, usually formed for tax and liability purposes, essentially loans out the creative individual to the hiring entity. Under the Labor and Unemployment Insurance Codes only individuals, not entities, are considered employees, thus contracting with a worker's loan-out company bypasses employee classification[23]. Under this scenario, the loan-out company is considered the employer of the worker, fulfilling the above-mentioned requirements for its employee[24]. Although effective in preserving the work made of hire provision thereby protecting the hiring entity's copyright, requiring workers to form and manage loan-out companies to avoid employee classification may place too great a burden on workers, especially those of modest means.

Entertainment unions SAG-AFTRA, WGAW, IATSE, Hollywood Teamsters Local 399 and Laborers Local 724 expressed confidence in a joint letter that AB5 "is not directed at [the entertainment] industry, and [they] do not believe it will trigger a change to industry practices" or affect loan-out companies[25]. Gig-economy companies Uber, Lyft and Postmates, as well as commercial truck drivers have challenged the constitutionality of *Dynamex* and AB5, creating an uncertain landscape for these laws[26]. It would be prudent for hiring entities and individuals to consult with an experienced employment or entertainment attorney to ensure they understand their rights and obligations regarding work-for-hire provisions.

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1. *Dynamex Operations W. v. Superior Court (2018) 4 Cal.5th 903; AB5: Worker status: employees and independent contractors, Chapter 296, 2019-2020 Session, September 19, 2019 (hereinafter "AB5").*
2. *17 U.S.C. § 201.*
3. *Id.*
4. *17 U.S.C. § 101.*
5. *Labor Code § 3351.5; Unemployment Insurance Code §§ 621, 686.*
6. *Labor Code § 3700 (requiring employers to secure workers' compensation coverage).*
7. *See, e.g., California 2020 unemployment, disability and employment training tax rates and limits (November 8, 2019) 2019 Tax News Update 2001, https://taxnews.ey.com/news/2019-2001-california-2020-unemployment-disability-and-employment-training-tax-rates-and-limits (last accessed January 13, 2020).*
8. *Notice to Employees; Unemployment Insurance/Disability Insurance Benefits (DE 1857A) (poster advising employees of their rights to benefits); Disability Insurance Provisions (DE 2515) (brochure regarding nonwork related illness, injury, pregnancy, or childbirth) http://www.edd.ca.gov/pdf_pub_ctr/de2515.pdf; Paid Family Leave Benefits (DE 2511) (brochure) https://www.edd.ca.gov/pdf_pub_ctr/de2511.pdf.*
9. *Labor Code § 2802 (requiring the employer to indemnify employee for work-related expenses and includes attorney's fees required to obtain indemnification as a reimbursable business expense. Plaintiff may receive attorney's fees in wage claims with the California Labor Commissioner under Labor Code § 98 et seq. ("Berman hearing")).*
10. *Labor Code §§ 245 et seq., 515.*
11. *Labor Code §§ 3700 (requiring employers to secure workers' compensation coverage), 3700.5; People v. Barker, 3 Cal. Comp. Cases 60, 62, 29 Cal. App. 2d Supp. 766, 769, ("[T]he duty of an employer to secure the payment of compensation arises as soon as he becomes such[.]")*
12. *AB5; Worker status: employees and independent contractors, Chapter 296, 2019-2020 Session, September 19, 2019 (hereinafter "AB5").*
13. *Dynamex Operations W. v. Superior Court (2018) 4 Cal.5th 903.*
14. *Id.*
15. *Labor Code § 2750.3*
16. *Id.*
17. *Id.*
18. *Labor Code § 2750.3(c)(2)(B)(ix-x).*
19. *See fn. 11, Sec. 6.*
20. *17 U.S.C. §201.*
21. *Id.*
22. *17 U.S.C. §203.*
23. *Unemp. Ins. Code §623 (the term "employee" does not include any member of a limited liability company that is treated as a partnership for federal income tax purposes); Unemp. Ins. Code §621(f) ("employee" includes any member of a limited liability company that is treated as a corporation for federal income tax purposes); Unemp. Ins. Code §622 ("employee" does not include a director of a corporation or association performing services in his or her capacity as a director); See also Lab. Code §§3354, 3351(d), 3715(b).*
24. *See supra notes 6-10 and accompanying text.*
25. *https://www.sagaftra.org/important-message-california-ab-5-and-loan-out-companies.*
26. *Commercial truck drivers recently were deemed an exception to AB5 in Los Angeles Superior Court (https://www.sfchronicle.com/business/article/California-judge-rules-gig-law-does-not-apply-to-14960988.php), and rideshare companies are pursuing legal action in California to avoid having their drivers deemed employees. (https://techcrunch.com/2019/12/30/uber-and-postmates-claim-gig-worker-bill-ab-5-is-unconstitutional-in-new-lawsuit/).*