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Community for Creative Non-Violence v. Reid: New Certainty for the Copyright Work For Hire Doctrine

INTRODUCTION

In 1985, the Community for Creative Non-Violence (CCNV), a non-profit organization devoted to the eradication of homelessness, approached a Baltimore artist, James Earl Reid, to create a sculpture that CCNV would enter into the Washington Christmas Pageant of Peace.¹ After two telephone conversations, an agreement was reached between Reid and CCNV. However, the parties did not discuss copyright ownership until after the statue was completed. CCNV claimed that Reid was its employee and, because of this relationship, the copyright to the statue belonged to the organization. Reid, on the other hand, argued that he was an independent contractor and, thus, the copyright belonged to him.² The ensuing suit quieted a century long dispute concerning the "work made for hire" doctrine and the ownership of artistic and intellectual endeavors.

The interpretation of the work made for hire theory of ownership³ under the Copyright Act of 1976 applies not only to artists like James Earl Reid, but also to writers, film makers, advertisers, computer programmers, and other persons in similar areas of intellectual endeavor. The dispute in *Community for Creative Non-Violence v. Reid*⁴ and other cases involved the methods for differentiation and application of the terms "employee"⁵ and "independent contractor."⁶

1. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). See *infra* notes 98-134 and accompanying text for a more detailed discussion of the facts.

2. *Id.* at 736. Leading cases in other circuit courts that have adjudicated the work made for hire issue are: *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989) (copyright infringement of lithographs resolved by deciding the work for hire issue), 738 F.2d 548 (2d Cir. 1984) (copyright infringement of statuettes resolved by deciding the work for hire issue), *cert. denied*, 469 U.S. 982 (1984); *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987) (copyright infringement of a film segment resolved by deciding the work for hire issue); *Alldon Accessories Ltd. v. Spiegel, Inc.* See *infra* notes 69-113 and accompanying text.

3. See *infra* note 58 and accompanying text.

4. 490 U.S. 730. See *infra* notes 150-179 and accompanying text for an explanation of the ruling.

5. An employee is generally considered to be in the permanent employ and supervision of his employer, the hiring party. See *infra* note 56.

Clarification of the differences between these terms is essential since their application is copyright determinative. When the commissioning party⁷ of a work is granted authorship of the copyright, that party receives a copyright monopoly, thus eliminating the threat of the creator's statutory power of termination.⁸ Consequently, the creator of the work is left with little or no rights reserved in the work he created.

At common law and under the Copyright Act of 1909 (1909 Act), the work made for hire debate focused on the legal definitions of the term "employee" in determining whether a work was made for hire.⁹ The principles of common law agency were used to outline the definition of "employee." The employer was generally afforded ownership of the work made, as well as the copyrights to the work, merely due to the existence of the employer-employee relationship: "The courts . . . viewed the employer-employee relationship as a manifestation of an employee's express consent to pass his copyrights to his employer."¹⁰

The Copyright Act of 1976 (1976 Act)¹¹ created a dichotomy between employees and independent contractors.¹² Subsequently, two

6. An independent contractor is usually hired for one project and works under somewhat unsupervised and independent terms. *See infra* note 56.

7. The commissioning party is the one who hires the independent contractor. He is not considered an "employer" because no employer-employee relationship exists. For a discussion of the employee-employer relationship as contrasted with the independent contractor-commissioning party arrangement, *see infra* note 58.

8. McNamara, *Preserving the Creator's Right of Authorship to Works Made for Hire*, 7 ENT. & SPORTS LAW. 3, 1 & 13 (Publication of the ABA Forum on the Entertainment and Sports Industries) [hereinafter McNamara]. The power of termination is defined in 17 U.S.C. § 203 (1982). *Id.* at 13. The author may terminate the grant after the statutory time period succeeding the grant has passed. *Id.* (referring to 17 U.S.C. § 203 (a)(3)). The power of termination is very important because it secures the author's rights when the work increases in value after the execution of the grant. *Id.* Thereafter, the author can terminate the grant and renegotiate the transfer. "The work made for hire controversy exists because commissioning parties wish to evade the impact of the power to terminate by being classified as authors instead of mere owners [of the work but not the copyright]." *Id.*

9. The agency definition of "employee" was generally utilized in these early cases. *See infra* note 76 for the agency definition of employee under RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

10. Comment, *The "Work for Hire" Definition In The Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works*, 74 CORNELL L. REV. 559-61 (1989).

11. 17 U.S.C. §§ 101-914 (1989) (successor to Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909)).

12. Work for hire is defined in two clauses:

A 'work made for hire' is —

- (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

significant and differing interpretations of the 1976 Act surfaced. One interpretation focused on the literal, strict interpretation of the 1976 Act,¹³ while the other construed the 1976 Act in broad terms and maintained much of the analytic theory from the 1909 Act.¹⁴ In *Community for Creative Non-Violence v. Reid*, the United States Supreme Court quieted the century long controversy and stated that "work made for hire" will be defined in accordance with the exclusive interpretation of work made for hire as found in the Copyright Act of 1976.¹⁵ The Court returned a strict reading of the statutory language, elucidating the proper test to determine the status of the author.

This Note assesses the treatment of the issue by the Supreme Court and its recent interpretation of the work made for hire dichotomy in *Community for Creative Non-Violence*. Part II traces the historical development of the copyright work made for hire controversy, beginning with the common law rule upon which the pertinent provisions of the 1909 Act were based. Part II also considers the 1976 Act and the relevant cases brought under it. Part III outlines the factual and procedural setting surrounding the decision in *Community for Creative Non-Violence*, and Part IV analyzes the Court's opinion and resolution of the employment relationship between the parties. Part IV then considers the impact which *Community for Creative Non-Violence* will have upon the art community and in areas of intellectual expression.

II. HISTORICAL BACKGROUND

A. *The Purpose and Philosophy of the Copyright Law*

"The philosophy and letter of the copyright law reward originality

parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire

17 U.S.C. § 101 (1989).

The dichotomy arises because the two clauses can be read as either an exclusive enumeration of what constitutes work made for hire, or as a general guideline for what types of situations are to be considered work made for hire.

13. This interpretation held that a work made for hire relationship exists only within the employment relationship or as defined in the nine enumerated categories in 17 U.S.C. § 101(2). See *infra* note 66 and accompanying text. For a discussion of the strict interpretation, see generally Comment, *supra* note 10, at 575-80.

14. This interpretation held that a work for hire relationship exists within the traditional employment relationship, as well as in other situations similar to, but not limited to those listed in 17 U.S.C. § 101(2). For a discussion of the more lenient interpretation, see generally Comment, *supra* note 10, at 573-75.

15. 490 U.S. 730, 747-48 (1989).

and creativity.”¹⁶ Copyright protects the author of an original expression against unauthorized copying by another.¹⁷ It grants the author the exclusive right to copy his own work for gain and the right to grant or deny this privilege to others. The original expression, however, must exist in a fixed tangible form before it can be afforded this protection.¹⁸ Ideas cannot be copyrighted; copyright can be obtained only on tangible expressions of those ideas. Infringement of copyright occurs when protected tangible expressions are copied or duplicated.¹⁹ Thus, intellectual endeavor is protected under the copyright laws, giving incentive to the propagation of expression and creativity in our society. Hence, authors are free to create without the fear that others will appropriate or exploit their expressions without their prior authorization.

Unauthorized copying infringes upon the copyright owner’s enumerated privileges²⁰ under the law. A cause of action for infringement can be brought against the unauthorized copier;²¹ however, suit may only be brought by the author or copyright holder.²² In work

16. FitzGibbon & Kendall, *The Unicorn in the Courtroom: The Concept of “Supervising and Directing” an Artistic Creation is a Mythical Beast in the Copyright Law*, 15 J. ARTS MGMT. & L. 23, 41 (1985). The United States Constitution empowers Congress to provide authors with a monopoly of exclusive rights to their intellectual work to “[p]romote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* at 41 n.1 (citing U.S. Const. art. I, § 8, cl. 8). See also *Goldstein v. California*, 412 U.S. 546, 555 (1973) (holding that the copyright clause describes Congress’ objective “to promote the progress of science and the arts” and to encourage people to pursue “intellectual and artistic creation” by granting to those individuals the exclusive right to their work); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating that copyright clause reflects an “economic philosophy” that “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

17. Renowned commentator Melville Nimmer has stated:

Just as copying is an essential element of infringement, so substantial similarity between the plaintiff’s and defendant’s works is an essential element of copying. Yet, the determination of the extent of similarity which will constitute a *substantial* and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations.

3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT, § 13.03[A] (1990) (footnote omitted) (emphasis in original) [hereinafter 3 M. NIMMER].

18. 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT, § 5.01[A] n.1 (1990) [hereinafter 1 M. NIMMER].

19. For a discussion of the protections afforded by the copyright law, see FitzGibbon & Kendall, *supra* note 16, at 30-32. “Copyright law protects the *original* works of an *author* [which is fixed in a tangible medium] from *copying* and nothing else.” *Id.* at 30 (emphasis in original). When copying occurs, the author’s copyright is infringed upon and suit can be brought by the copyright owner of the complaining work.

20. These privileges include the right to reproduce, the right to prepare a derivative work, the right to distribute copies, the right to perform the copyrighted work publicly, and the right to display the copyrighted work publicly. 17 U.S.C. § 106 (1982).

21. Authorized copying, unlike unauthorized copying, does not constitute copyright infringement, 3 M. NIMMER, *supra* note 17, at 13.05[A].

22. Suit for infringement can only be brought by the “legal or beneficial owner” of

made for hire situations, the determination of who holds the copyright dictates standing to sue for infringement and, consequently, who receives the privileges of authorship protected by copyright. Therefore, resolution of the work made for hire issue is important to the future protection of intellectual expression.

B. The Common Law and Copyright Act of 1909 Interpretation of Work for Hire

Prior to the passage of the 1909 Act, no explicit statutory provisions applied to the work for hire issue or the determination of copyright ownership. The common law theories of agency and traditional employment dominated the work made for hire analysis. The common law consent theory "deprived an author of copyrights without his express consent"²³ by reason of the employment relationship, in the absence of an express agreement or contract to the contrary.²⁴ The employer was presumed to own the copyrights *regardless* of whether the hired artist was an employee or an independent contractor.²⁵

In the 1896 case, *Gill v. United States*,²⁶ the Supreme Court held that the employer, Frankford Arsenal, was presumed to own the copyrights to the drawings of the machines that the employee

the copyright. 17 U.S.C. § 501(b) (1982). For a discussion of infringement and remedies therefore, see generally 17 U.S.C. 501-510 (1982).

23. Comment, *supra* note 10, at 561. The employer-employee relationship was viewed "as a manifestation of an employee's 'express consent' to pass his copyrights to his employer." *Id.*; see also McNamara, *supra* note 8, at 2.

24. McNamara, *supra* note 8, at 2.

25. *Id.* See also *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965) (patron owns copyright to a commercial illustration absent an express agreement otherwise when held that artist was hired to work on an advertising catalogue); *Lumiere v. Robertson-Cole Distrib. Corp.*, 280 F. 550 (2d Cir.), *cert. denied*, 259 U.S. 583 (1922) (when professional photographer hired to take pictures, patron owns copyright absent an express agreement otherwise).

26. 160 U.S. 426 (1896). Plaintiff was a machinist, foreman, and draftsman at the Frankford Arsenal in Pennsylvania. Between the years 1869 and 1882, six patents were granted to Gill for machines he created. In each case, the government reserved the use of the machines since they were created by someone in their employ. The court held that

while the claimant used neither the property of the [employer] government, nor the services of its employees in conceiving, developing, or perfecting the inventions themselves, the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines themselves that were made in putting the inventions into practical use was borne by the government, the work being also done under the immediate supervision of the claimant.

Id. at 433.

designed simply because of the employment relationship.²⁷ Ownership to anything invented or created during the existence of an employment relationship was considered to belong to the employer, because by hiring the employees, the employer was the originator of the work, and was, therefore, considered the source of creativity.²⁸ *Gill* was followed by *Dielman v. White*²⁹ in 1900 and *Bleistein v. Donaldson Lithographing Co.*³⁰ in 1903. Both cases similarly held that absent an express agreement otherwise, the patron of the commission, or employer, was the presumed owner of the copyright.³¹

This theory was incorporated into the 1909 Act.³² Congress defined the author as the employer in a work made for hire arrangement, but failed to define what constituted a work for hire arrangement. In determining when a work was made within the scope of traditional employment, the relevant factors the courts examined included:

the existence of an employment contract, at whose instance, expense, time, and facility the work was created, and the nature and amount of compensation, if any, received by the employee for his work . . . [and also whether] did the employer have a right to direct and supervise the performance of the work.³³

The courts looked to these and other similar elements of traditional employment and servitude. Therefore, the courts were forced to define what constituted a work made for hire, because the 1909 Act did not specifically address that issue.

The 1909 Act similarly neglected to consider the relationship between commissioning parties and independent contractors with regard to the work made for hire situation. Independent contractors are not usually subject to an employer's regular control and supervision and are commonly hired for relatively short periods of time to accomplish a specific task. Consequently, the courts addressed the

27. *Id.* at 436. When an individual invents something during the course and scope of employment, and the employer is permitted to use the invention, compensation may not be had by the employee when the invention was made at the expense of his employer. *Id.* at 436.

28. *Id.* at 435.

29. 102 F. 892 (1900). *Dielman* is said to have been the source upon which the 1909 Act was based. There, the court stated, "If a patron gives a commission to an artist, there appears to me a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron . . . [However,] by apt expressions in the contract, . . . the artist [can] retain the copyright for himself." *Id.* at 894-95.

30. 188 U.S. 239 (1903). Three chromolithographic posters were designed by Bleistein's employees and copied without authorization by Defendant. The Court remanded the case, finding that there was sufficient evidence to be presented to a jury. *Id.* at 252.

31. *Id.* at 244-45; 102 F. 522 at 894-95.

32. Copyright Act of March 4, 1909, ch. 320, 35 Stat. 1075 (1909), *repealed by* Pub. L. No. 94-553, 90 Stat. 2541 (1976).

33. Comment, *supra* note 10, at 563-64. Courts had to interpret the missing terms in the Copyright Act. Thus, in the absence of an agreement to the contrary, a rebuttable presumption was created whereby the employer was the statutory author, given the existence of an employment relationship. *Id.* at 564.

commissioner-independent contractor relationship separately from that of the traditional employer-employee relationship.³⁴ Hence, the courts had to delineate their own standards, paralleling agency law, to apply to commissioned works, because the 1909 Act provided none of its own.

In *Yardley v. Houghton Mifflin Co.*,³⁵ the Second Circuit Court of Appeals in 1939 held that the hiring party of an artistic work was the copyright owner unless the terms of the commissioning contract reserved the artist's rights to the copyright.³⁶ The court analyzed the issue under general contract law without reference to the work made for hire doctrine of the 1909 Act. Because the circuit court did not look to the 1909 Act in making its decision, the commissioning party was not held to be the statutory author.³⁷ Rather, the commissioning party was held to be the owner of the copyright under an assignment theory.³⁸

In the 1966 case, *Brattleboro Publishing Co. v. Winmill Publishing Corp.*,³⁹ the Second Circuit affirmed the *Yardley* decision. Using the work made for hire doctrine, the court found the newspaper, whose staff designed an advertisement for publication, to be the copyright

34. *Id.* at 564. The common law has differentiated between the traditional employer-employee relationship and the commissioning party-independent contractor relationship. *Id.* at 565 n.33. One report finds,

[T]he acts of an employee as such are imputed to the person for whom he performs a special commission. Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor.

Id. at 565 n.33 (quoting B. VARMER, WORKS MADE FOR HIRE AND ON COMMISSION, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2ND SESS., COPYRIGHT LAW REVISION, STUDY 13, at 142 (1958)).

35. 108 F.2d 28 (2d Cir. 1939) (involving a mural painted by an artist commissioned by the City of New York through a general contractor), *cert. denied*, 309 U.S. 686 (1940).

36. *Id.* at 31. The Second Circuit agreed with the federal district court's rationale that "[w]hen an artist accepts a commission to paint a picture for another for pay, he sells not only the picture but also the right to reproduce copies thereof unless the copyright is reserved to the artist by the terms, express or implicit, of the contract . . ." *Id.* at 30.

37. *Id.* The court interpreted the contract between the parties but did not interpret the statute. Therefore, under the contract assignment theory, the commissioning party's copyright was not as extensive as that of an employer or statutory author under the work for hire theory. For instance, the assignee does not possess copyright renewal rights, as does the statutory author. *Id.*

38. Comment, *supra* note 10, at 565.

39. 369 F.2d 565 (2d Cir. 1966) (plaintiff newspaper staff designed advertisements for a client which were later published in defendant's weekly circular).

holder.⁴⁰ The court concluded that it was immaterial whether the artist was an employee or an independent contractor; the principles of copyright ownership would apply similarly to both.⁴¹ Furthermore, when the intent of the parties was uncertain, there would always exist a presumption that the copyright belonged to the hiring party.⁴² “Thus, because of the courts’ refusal to plug the gap left by Congress’ failure to define ‘employer,’ the same standards applying to employees’ works made for hire were eventually applied to commissioned works made for hire.”⁴³

The 1909 Act failed to define a work made for hire and neglected to address the relationship between the commissioning party and the independent contractor to the work made for hire doctrine. As a result, after the promulgation of the 1909 Act, the courts made no distinction between the employer-employee relationship and the commissioning party-independent contractor relationship. Instead, the courts used common law principles to decide the cases before them.

C. *The Copyright Act of 1976 and Its Interpretation of Work for Hire*

1. Legislative History of the Revised Work for Hire Doctrine as Found in the Copyright Act of 1976

The revisions made in the 1976 Act⁴⁴ were the result of a series of studies initiated by the Copyright Office in 1955 to revamp the existing 1909 Act.⁴⁵ Congress intended to revise the 1909 Act to benefit the public welfare and to “give authors their reward due them for

40. *Id.* at 568.

41. *Id.* “We see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor.” *Id.* Therefore, absent any intent or express agreement otherwise, both the independent contractor and the employee would lose the copyright to his work.

42. *Id.* To substantiate this finding, the court cited to *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965); *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940); *Lumiere v. Robertson-Cole Distrib. Co.*, 280 F. 550 (2d Cir.), *cert. denied*, 259 U.S. 583 (1922).

43. Hamilton, *Works As Works Made For Hire Under The 1976 Copyright Act: Misinterpretation And Injustice*, 135 U. PA. L. REV. 1281, 1286 (1987). Later cases dwelled on the right to supervise as the definitive test in determining whether the work was done within the scope of employment. See *Murray v. Gelderman*, 566 F.2d 1307 (5th Cir. 1978) (whether or not supervision was exercised, the right to supervise had to exist to make the employment relationship one of work for hire); *Scherr v. Universal Match Corp.*, 417 F.2d 499 (2d Cir. 1969) (whether the employer enjoys the ability to direct and supervise work performance is key in discerning whether the work was made in the course and scope of employment), *cert. denied*, 397 U.S. 936 (1970).

44. 17 U.S.C. § 101 (1989).

45. Comment, *supra* note 10, at 567. Approximately 40% of copyrighted works in 1965 were works made for hire. *Id.* Consequently, the rights of artists, publishers, writers, and movie studios became a very volatile topic with respect to copyright. *Id.*

their contributions to society."⁴⁶ The Register of Copyrights at that time stated:

When it was originally drafted in the early 1960's, the bill that eventually became the Act of 1976 was not based on preexisting legislation, least of all the Act of 1909. Before embarking on its drafting efforts the Copyright Office had engaged in an extensive research project. . . . These studies included considerations of the history and wording of the copyright statutes of other countries, of international conventions on copyright, and of the long series of earlier revision bills [The 1976 Act's provisions] reflected deliberate choices between alternatives. . . .⁴⁷

A series of reports in the 1960's were submitted and considered before the revised Copyright Act appeared in final form in 1976.⁴⁸

The 1961 Report of the Register of Copyrights⁴⁹ defined work made for hire as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."⁵⁰ This definition raised many complaints from the movie and publishing industries because many of their employment agreements had previously been considered works made for hire.⁵¹ This new construction prohibited commissioned works from being classified as works made for hire. The publishing and motion picture industries subsequently claimed that since much

46. Hamilton, *supra* note 43, at 1290 (quoting REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESSION, COPYRIGHT LAW REVISION 5, 5 (Comm. Print 1961) [hereinafter REGISTER OF COPYRIGHTS]). Congress wanted to create a "new" copyright law while affording more rights to the artists as an incentive to create. *Id.* "While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward . . . [The creators'] rights should be broad enough to give them a fair share of revenue to be derived from the market for their works." *Id.* at 1290-91 (quoting REGISTER OF COPYRIGHTS at 6).

47. Hamilton, *supra* note 43, at 1290 (quoting Ringer, *First Thoughts on the Copyright Act of 1976*, 13 Copyright 187, 188 (1977)). Ms. Barbara Ringer was the Register of Copyrights at that time.

48. Studies for revisions began in the 1950's with draft bills and reports submitted in 1961, 1963, 1965, and 1967. *Id.* at 1290-92.

49. A 1961 report of the Register of Copyright suggested a shift in the focus to the creator of the work. Comment, *supra* note 10, at 567 (citing to HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW PROVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961)).

50. Comment, *supra* note 10, at 567 (quoting HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT AND DISCUSSIONS AND COMMENTS 15 n.11 (Comm. Print 1964)).

51. Comment, *supra* note 10, at 568. More specifically, the movie studios, Motion Picture Association of America, Inc., and Magazine Publishers' Association, Inc. started rivaling against the demands of the Composers and Lyricists Guild of America Inc., Writer's Guild of America and the Modern Language Association of America. FitzGibbon & Kendall, *supra* note 16, at 39-40.

of their work was specially commissioned, such a definition would create "insuperable obstacles" and "major economic dislocation" because they would lose copyright ownership.⁵²

To appease the motion picture and publishing industries, the Copyright Office responded with a new definition of work made for hire. This definition included "a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire."⁵³ This new definition satisfied the previous concerns of both the motion picture and publishing industries.⁵⁴ However, it brought strong opposition from various authors' and artists' organizations.⁵⁵ Authors and artists feared that they lacked the requisite bargaining power necessary to assure that their contracts did not contain boilerplate work made for hire clauses.⁵⁶

A series of compromises and negotiations ensued. Further bills were submitted in 1965 and in 1967 which enumerated specific categories of commissioned works to be considered works made for hire under the statute.⁵⁷ Thus, "[f]or the first time in copyright law, Congress distinguished works produced by traditional employees from

52. Comment, *supra* note 10, at 568. Publishers exhibited a particular disturbance with this definition because this would mean that a publisher would encounter tremendous problems when attempting to publish a collective work, encyclopedia, or compilation of works. *Id.* Furthermore, publishers would not be able to revise an original work. *Id.* "They argued that, because a publisher or movie producer exercises the true creativity in composite works, he should be considered the author for copyright purposes. If copyright did not vest in the commissioning party, the transaction costs of dealing with multitudes of authors would render the production of such works economically unfeasible. In the end, one basic purpose of the Copyright Clause — to disseminate information and thereby enhance learning — would be frustrated." *Id.* (footnotes omitted).

53. Comment, *supra* note 10, at 568-69 (quoting HOUSE COMM. ON THE JUDICIARY 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, Part 5: 1964 REVISION BILL WITY DISCUSSIONS AND COMMENT 149, 301 (Comm. Print 1964)).

54. For a discussion of the concerns of the motion picture and publishing industries, see *supra* note 51 and accompanying text.

55. Authors feared that clauses expressly stating that the work was work made for hire would become standard in their contracts. Consequently, they would not have the bargaining power to avoid or contract out of these clauses, this being especially true for lesser known authors. Artists similarly did not want to fall into the work made for hire category since many of their works were commissioned. FitzGibbon & Kendall, *supra* note 17, at 40.

56. Comment, *supra* note 10, at 569.

57. The 1965 Bill included four designated categories of works that would be considered works made for hire when the parties agreed to this status in writing. Hamilton, *supra* note 43, at 1292. Those categories were collective works, motion pictures, translations, and supplementary works. *Id.* at 1292 n.61 (referring to REGISTER OF COPYRIGHTS, 89TH CONG., 1ST SESS., SUPPLEMENTARY REPORT ON COPYRIGHT LAW REVISION pt. 6, at 67-68 (Comm. Print 1965)). The 1967 Bill made a further compromise by adding four more categories to the previous four introduced in the 1965 Bill. *Id.* at 1292. The additional four categories were compilations, instructional texts, tests, and atlases. *Id.* at 1292 n.63 (referring to H.R. REP. NO. 83, 90th Cong., 1st Sess. 86, 87 (1967)). All eight categories were incorporated into the final definition of the 1976 Act. *Id.* at 1292; 17 U.S.C. § 101 (1982). Additionally, § 101(2) of the 1976 Act added answer

those produced by independent contractors."⁵⁸ The Senate and House Reports both commented on the final bill promulgated in 1976: "The definition now provided by the bill represents a compromise which, in effect, spells out those *specific categories* of commissioned works that can be considered 'works made for hire' under *certain circumstances*.'"⁵⁹

2. The Copyright Act of 1976 Work for Hire Provision and the Judicial Interpretation Thereof

Section 101 of the 1976 Act defines work 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. . . .⁶⁰

Subsection one adopts the scope of employment theory of work made

material for tests to increase to nine the enumerated categories of work to be considered as works made for hire. 17 U.S.C. § 101 (1982).

58. Comment, *supra* note 10, at 571. A regular employee is distinguished from an independent contractor for purposes of federal and state payroll tax withholdings, social security, and union dues; social security matching by the employer, the employer's contribution towards unemployment insurance and workers' compensation funds; and payment by the employer of various benefits including, retirement funds, health insurance, and supplemental unemployment payments. FitzGibbon & Kendall, *supra* note 17, at 32. Contrastingly, independent contractors are deemed to be self-employed and do not receive any matching social security contributions from the commissioning party. *Id.* at 32.

59. Hamilton, *supra* note 43, at 1292 (quoting S. Rep. No. 473 94th Cong., 1st Sess. 105 (1976); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5737) (emphasis added). Many consider the negotiating process that occurred in arriving at the 1976 Act to be an indication that Congress made deliberate choices in determining the categories it wanted to include under the work made for hire definition, and that Congress specifically intended for there to be "a meaningful distinction between employee-created and commissioned works." *Id.* at 1293. On the other hand, others feel that the negotiation process was a system in which everyone bartered for inclusions and exclusions, making the final bill a product of compromise, rather than the intent of Congress. "Because the compromise . . . was negotiated by authors, publishers and other parties with economic interests . . . and [as] thereafter adopted by Congress, it is quite possible that legitimate categories could have been left out of subsection 2 of the work made for hire definition, and . . . the rigidity of the dichotomy approach would foreclose future adjustment." McNamara, *supra* note 8, at 16. It has in fact "been unflatteringly described 'as an immensely complex package of expedients and compromises altogether unilluminating by any conceptual thought or principle.'" Hamilton, *supra* note 43, at 1281 (quoting Whale, *Copyright and Authors Rights*, EUR. INTELL. PROP. REV., Feb. 1979, at 38, 38-39).

60. 17 U.S.C. § 101 (1989).

for hire under the 1909 Act.⁶¹ This is the only part of the 1909 Act which survived in the 1976 Act's work for hire definition.⁶² Subsection two marks a significant departure from the 1909 Act's approach to works made for hire.⁶³ Before a commissioned work may be deemed a work made for hire, three prerequisites must be met under subsection two.⁶⁴ First, the work must be specially ordered or commissioned.⁶⁵ Secondly, the work must fall within one of the nine categories specified in this Act: a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas.⁶⁶ Finally, both parties must sign a written instrument in which they expressly agree that the work is made for hire.⁶⁷

Section 201 of the 1976 Copyright Act delineates ownership of the copyright in a work made for hire relationship. It reads:

(b) WORKS MADE FOR HIRE- In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for the purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.⁶⁸

Therefore, section 101 defines what constitutes a work made for hire and section 201 defines who is the statutory copyright owner.

Courts have had difficulty applying the statutory definition of work made for hire under section 101.⁶⁹ Some courts viewed the 1976 Act as a distinct break from the prior law, whereas others see it as a continuation of the same work made for hire analysis under the 1909 Act.⁷⁰ Two interpretations of section 101 have developed to resolve which commissioned works are categorized as works made for hire:

61. Comment, *supra* note 10, at 571. However, "[l]ike the 1909 Act, this clause makes no provision for the treatment of independent contractors." *Id.*

62. Hamilton, *supra* note 43, at 1293.

63. Comment, *supra* note 10, at 571.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 17 U.S.C. § 201(b)(1989). House Report No. 94-1476 noted the historical importance of differentiating between commissioned works and works made in the course and scope of employment. *Id.* at Historical and Revision Notes, H.R. REP. NO. 94-1476. In defining works made for hire, the 1976 Act has undergone extensive legislative revision. "The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances." *Id.* at Historical Revision Note, H.R. REP. NO. 94-1476.

69. Comment, *supra* note 10, at 572. "[T]he work made for hire definition under § 101 has been variously interpreted because some courts have chosen to apply case law developed under the 1909 Act when faced with ambiguity." McNamara, *supra* note 8, at 13 (footnotes omitted).

70. See McNamara, *supra* note 8, at 13. See also *infra* notes 72-126 and accompanying text.

Congress either intended clause two [of section 101] to be the exclusive test for commissioned works or it intended clause two to act as a mere safeguard [not an exclusive list] for those nine specified types of works by requiring both parties to sign a writing designating the work as one made for hire.⁷¹

Therefore, courts have followed either an "exclusive interpretation" of section 101 or a "non-exclusive interpretation."

Proponents of the exclusive interpretation of section 101 reinforced the notion that the Copyright Act of 1976 was a break from the 1909 Act,⁷² and that the legislative purpose behind drafting subsection two was to delineate nine specific and exclusive categories that would be considered works made for hire.⁷³ Moreover, an express agreement had to exist in order for the work to be considered a work made for hire under clause two.⁷⁴ The supporters of the exclusive interpretation read the statute literally and restrictively. The two subsections of section 101 were to become the exclusive test for defining work for hire.⁷⁵

The leading case promoting the exclusive interpretation is *Easter Seal Society for Crippled Children & Adults of Louisiana v. Playboy Enterprises*,⁷⁶ which held that a work is made for hire when made in the scope of employment, as defined under agency principles, or when the requirements of section 101(a) are met.⁷⁷ The case involved film footage of a staged Mardi Gras-style parade and Dixie-land jazz session.⁷⁸ The film was commissioned by Easter Seals and was made by the WYES television station, which turned the film over to a Canadian producer who made an adult film with portions of

71. Comment, *supra* note 10, at 572.

72. See *supra* note 62, 63 and accompanying text. See also *Easter Seal Soc'y for Crippled Children & Adults of La. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

73. See *supra* note 59 and accompanying text. See also *Easter Seal Soc'y*, 815 F.2d 323.

74. See *supra* note 69 and accompanying text.

75. Comment, *supra* note 10, at 575. Section 101 defines which commissioned works will be considered works made for hire, and limits the scope of controversy so as to better enable the parties to ascertain copyright ownership. Angel & Tannenbaum, *Works Made For Hire Under S. 22*, 22 N.Y.L. SCH. L. REV. 209, 239 (1976).

76. 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

77. *Id.* at 334-35, 337. The court stated that a work is made for hire under the 1976 Act

if and only if the seller is an employee within the meaning of agency law, or the buyer and seller comply with the requirements of § 101(2). . . . [T]his interpretation is a radical break from 'work for hire' doctrine under the 1909 Act, but there are good reasons for this break [I]t is the best interpretation of the actual language of the 'work for hire' definition in the 1976 Act."

Id. at 334-35 (emphasis added).

78. *Id.* at 324.

the taped sequence.⁷⁹ The film was subsequently marketed to numerous distributors, including Playboy.⁸⁰ WYES claimed that it filmed the event using its own judgment and creative impulse.⁸¹ The court held in favor of WYES and Playboy, finding that the footage was not a work made for hire.⁸²

The court noted that there existed a dichotomy between an employee and an independent contractor which was reflected in the 1976 Act.⁸³ Consequently, commentators have suggested that the determination of whether a seller was an employee or independent contractor should first be ascertained by using the rules of agency law.⁸⁴

79. *Id.*

80. *Id.* at 325.

81. *Id.* at 337.

82. *Id.* The court adopted a bright line test to determine whether a work was made for hire: "Only works by actual employees and independent contractors who fulfill the requirements of § 101(2) can be 'for hire' under the new statute. Copyright 'employees' are those persons called 'employees' or 'servants' for purposes of agency law." *Id.*

83. *Id.* at 329. Clause one was said to apply to employees and clause two was applicable to independent contractors. *Id.* "This had the effect of switching from the 1909 Act presumption that the commissioning party owns the final product, to a new presumption that the independent contractor is the author of the work unless one of the statutory exceptions named in subsection 2 applies." McNamara, *supra* note 8, at 13.

84. McNamara, *supra* note 8, at 14 (referring to *Easter Seal Soc'y for Crippled Children & Adults of La. v. Playboy Enters.*, 815 F.2d 323, 329, 334-35 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988)). According to agency principles, the definition of a servant is as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

In *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989), the circuit court held that the definition of employee in § 101(1) of the 1976 Act is that of a formal, salaried employee. *Id.* at 1105. However, the United States Supreme Court rejected this limitation and held that the statutory definition of employee was that of the conventional employee. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 742 n.8 (1989). See *infra* note 170 and accompanying text.

Courts should then apply section 101 of the 1976 Act, subsection one for employees and subsection two for independent contractors.⁸⁵ In situations of employment, the employer is the author and statutory owner of the copyright.⁸⁶ If the artist is found to be an independent contractor, the artist would be the author and statutory owner of the copyright.⁸⁷ Subsection two is to be read literally. Thus, the artist will be considered an independent contractor under the Act and, hence, author and copyright owner when the work falls under one of the nine enumerated categories *and* where there exists a written agreement between the parties that the work was made for hire.⁸⁸

In *May v. Morganelli-Heumann & Associates*,⁸⁹ the Ninth Circuit Court of Appeals decided upon similar theories. In *May*, suit was brought for the alleged copyright infringement of architectural plans.⁹⁰ Since the cause of action arose before the 1976 Act was in effect, the court did not use the 1976 Act to arrive at its decision. Rather, the court hypothesized, in dicta, as to how it would interpret the 1976 Act had it applied.⁹¹ The court considered May an "independent contractor rather than an employee so under section 101, May's drawings would not be subject to the 'works for hire' doctrine, both because of the absence of a written agreement so providing, and because the drawings do not fall within one of the prescribed categories of work."⁹² The exclusive interpretation of the work made for hire doctrine in the 1976 Act is implicit in a number of cases: *Meltzer v. Zoller*,⁹³ *Everts v. Arkham House Publishers, Inc.*,⁹⁴ and *Childers v.*

85. *Easter Seal Soc'y*, 815 F.2d at 334-35.

86. *Id.* at 329.

87. *Id.*

88. *Id.*

89. 618 F.2d 1363 (9th Cir. 1980).

90. *Id.* at 1364-65. Fletcher Jones hired May to draw up plans for the Westerly Stud Project. The contract made no provisions for the copyright. May drafted the preliminary sketches, but was discharged soon thereafter. Subsequently, Fletcher hired defendant, Morganelli-Heumann & Associates, to finish the job. May claims that the defendant used and copied his preliminary sketches. Jones claimed no infringement because he owned the copyright under the doctrine of works made for hire which existed prior to the enactment of the 1976 Act. *Id.* at 1365.

91. *Id.* at 1368 n.4. The alleged infringement occurred in 1969. *Id.* at 1365. Therefore, the court applied the 1909 Act. *Id.* at 1368-69. See *supra* notes 23-43 and accompanying text for an analysis and application of the 1909 Act.

92. *Id.* at 1368 n.4. The court refused to give retroactive effect to 17 U.S.C. § 101 and § 201 of the 1976 Act. *Id.*

93. 520 F. Supp. 847 (D.N.J. 1981). This case involved an alleged infringement of architectural plans. *Id.* at 849. The court reasoned that "only 'works made for hire' are those which fall within one of the statutory categories set forth in 17 U.S.C. § 101, and concerning which the parties enter into an express written agreement designating the

In addition to the exclusive interpretation of section 101 of the 1976 Act, the Second Circuit developed a non-exclusive interpretation of the section. In 1984, the Second Circuit created a new standard by which to determine whether a work was made for hire in *Aldon Accessories, Ltd. v. Spiegel, Inc.*⁹⁶ This case revived the 1909 Act's presumption that the commissioning party is the author of the work of an independent contractor, absent evidence to the contrary.⁹⁷ With regard to works made in the course and scope of employment, the court used the test of control and supervision to determine whether an employer-employee relationship existed, such that a work could be considered made for hire.⁹⁸

In *Aldon*, the plaintiff designed a line of porcelain statuettes of mythological creatures to be produced in Japan.⁹⁹ Through one of its principals, the plaintiff supervised and worked with the artists in Japan.¹⁰⁰ The plaintiff filed a certificate of copyright in 1980.¹⁰¹ One

works as such." *Id.* at 854. The court found that the architectural plans were not works made for hire. *Id.* at 855.

94. 579 F. Supp. 145 (W.D.Wis. 1984). The case involved the alleged infringement of copyright of a book of poetry. The court stated that "[i]f the 1976 statute was applicable, the admitted lack of a written agreement between the parties and the type of work involved here (a book of poetry written by a single author) would summarily dispose of Everts' work-for-hire argument and his claim to the copyright." *Id.* at 148.

95. 557 F. Supp. 978 (S.D.N.Y. 1983). The court stressed the importance of the express written agreement between the parties which specified the work as work made for hire, noting that even if a work falls within a specified category, it will not be considered a work for hire unless the parties agree in writing that the work is such. *Id.* at 984.

96. 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

97. *Id.* at 551-53. The court found that the legislative history did not indicate a congressional intent to change the old law under the 1909 Act. *Id.* at 552. Thus, the presumption that works made on commission or by special order belonged to the employer, in the absence of evidence to the contrary, was revitalized. *Id.* "[T]he Second Circuit was the first to abandon the new legislation in favor of the pre-1976 Act case law . . ." McNamara, *supra* note 8, at 13. It has been said that the *Aldon* decision "threatens to undermine the legislative compromise represented by the 1976 Act's work-made-for-hire provisions." Hamilton, *supra* note 43, at 1295.

98. *Aldon*, 738 F.2d at 551-53. The control and supervision test delineated in *Aldon* depended on the hiring party's actual exercise of this right. *Id.* See *infra* notes 98 and accompanying text for a discussion of the facts of the case. Cf. *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) (delineating the test as one consisting of the right to control and supervise the work regardless of whether that right is actually exercised). *Id.* at 829. This interpretation is referred to as the conservative interpretation of § 101.

99. *Id.* at 549. *Aldon* had two principals, Arthur and Irwin Ginsberg. Arthur created the mythological statuettes and took part in their production. *Id.* Irwin contracted with Wado International Corporation to manufacture the porcelain statuettes. *Id.*

100. *Id.* at 549. Irwin testified that he had worked with an artist in developing the models, and that he and the artist ultimately agreed on the particular pose and proportions for the statuette. The artist's sketches were then delivered to a model maker who made clay models based on the sketches. *Id.* at 549-50. Irwin also asserted that

year prior, the plaintiff had contracted with a Taiwanese company to manufacture the same statuettes in brass.¹⁰² Once again, one of the plaintiff's principals traveled to the workshop in Taiwan to supervise the design and manufacture of the statuettes.¹⁰³ The plaintiff then filed another certificate of copyright for the brass statuettes.¹⁰⁴ In 1981, defendant Spiegel's catalogue advertised for sale brass unicorns identical to those made for the plaintiff.¹⁰⁵

The court held that the statuettes were a work made for hire under subdivision one of the 1976 Act.¹⁰⁶ Although the work was created after the implementation of the 1976 Act, the court analyzed the facts using the agency and control test developed under the 1909 Act.¹⁰⁷ The court did not agree that Congress intended to make a distinct change from the 1909 provisions of work made for hire when it enacted section 101 of the 1976 Act.¹⁰⁸ The jury instructions directed:

A work for hire is a work prepared by what the law calls an employee working within the scope of his employment It does not matter whether the for-hire creator is an employee . . . having a regular job with the hiring author. *What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation.*¹⁰⁹

The court reasoned that the plaintiff's involvement in the creative process essentially made him the artistic creator because he supervised and directed the artisans.¹¹⁰ Thus, in applying agency principles to the employment relationship, the statuettes were held to be

"[they] spent hours and hours changing shapes, adjusting attitudes and proportions" before he found a model to his liking. *Id.* at 550.

101. *Id.*

102. *Id.* at 550.

103. *Id.* Ginsberg "testified to working with the Unibright employees in essentially the same manner as he had worked with the Wado artists in developing the porcelain statuettes. . . . Several changes were made from the porcelain design at Ginsberg's direction." *Id.*

104. *Id.* The filing for the brass statuettes took place in July, 1980, the same time as the filing for the porcelain statuettes. *Id.*

105. *Id.* Spiegel claimed that the plaintiff's copyright was invalid and that it had ordered the statuettes before learning of plaintiff's claim to the copyright. *Id.* at 550-51.

106. *Id.* at 551-53.

107. *Id.* at 552. The court reverted to the 1909 analysis because it claimed that Congress did not intend to change the copyright law with respect to work made for hire, and, therefore, used the basic agency principles it used in deciding cases prior to the 1976 law. *Id.* at 552.

108. *Id.* See *supra* note 62 and accompanying text.

109. *Id.* at 551 (emphasis added). On appeal, these jury instructions were held to be proper. *Id.* at 553.

110. *Id.* "There was evidence . . . that Ginsberg did much more than communicate a general concept or idea to the Japanese and Taiwanese artists and artisans

works made for hire, and the plaintiff was construed as the essential creator and owner of the copyright.¹¹¹

Although *Aldon* has been widely criticized and unpopular, other circuits have followed its interpretation of work made for hire under the Copyright Act.¹¹² The Seventh Circuit, in *Evans Newton Inc. v. Chicago Systems Software*,¹¹³ used the control and supervision test revived in *Aldon*.¹¹⁴ The cause of action in *Evans Newton* was for copyright infringement of plaintiff's user's manual to a computer-managed instruction program.¹¹⁵ The court was not concerned with determining the status of the employment relationship as one of employee or independent contractor,¹¹⁶ but instead with whether the contractor was "independent or . . . so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship exist[ed]."¹¹⁷

Similarly, in *Brunswick Beacon, Inc. v. Shock*,¹¹⁸ the Fourth Circuit approached the work made for hire doctrine using pre-1976 rationale. Absent a written agreement so stating, a creation would not be considered a work made for hire under subsection two of the Act.¹¹⁹ Subsection two delineates nine categories of work to be considered made for hire and requires a written agreement between the parties. Here, the court found subsection two to be completely inapplicable because there was no written agreement.¹²⁰ Consequently,

[G]insberg actively supervised and directed the creation of both the porcelain and brass statuettes. He was, in a very real sense, the artistic creator." *Id.*

111. *Id.*

112. McNamara, *supra* note 8, at 14 (noting that in spite of its following, *Aldon* has been criticized as a "misinterpretation of the 1976 Act").

113. 793 F.2d 889 (7th Cir. 1986).

114. *Id.* at 894. See *supra* note 105 and accompanying text.

115. *Id.* at 890-91. Evans Newton Inc. (ENI) needed a computer programmer to work on a computer managed instruction program. *Id.* at 891. ENI was referred to Chicago Systems Software (CSS) to provide the necessary programming. *Id.* ENI marketed and published user's manuals for the computer-managed instruction program in April, 1980. *Id.* at 892. That same month, CSS was found to be marketing a program and manual similar to that of ENI. *Id.* at 892.

116. *Id.* at 894.

117. *Id.* (quoting *Aldon Accessories, Inc. v. Spiegel*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984)). The court found that sufficient control and supervision existed in the creation of the user's manual to consider it a work made for hire. *Id.*

118. 810 F.2d 410 (4th Cir. 1987). Both the plaintiff and defendant are publishers of a newspaper. The defendant paper copied and ran advertisements previously published by the plaintiffs. *Id.* at 411.

119. *Id.* at 413. Since no agreement existed, the court looked to subsection one of the Act, and found that the work relationship consisted of a typical employee-employer relationship, making any products prepared in the scope of employment works made for hire. *Id.*

120. *Id.* Even if the court construed the newspaper as a collective work or compilation under subsection two, there was still no written agreement expressly labeling the advertisements as works made for hire. *Id.* The court stated, "This part of the definition [referring to subsection two] is permissive only and is effective only if both parties execute a written agreement that the work is for hire." *Id.* at 413 (emphasis

the court looked to subsection one and held that the work was produced and prepared in the scope of employment, and thus was a work made for hire.¹²¹

The non-exclusive interpretation of section 101 of the 1976 Act has been much criticized, predominantly for its treatment of subsection two.¹²² The use of the control and supervision test allows hiring parties to obtain the copyright to a work merely by showing that they had some supervision or influence over the completed work.¹²³ This interpretation leads to abuse because a "commissioned work not designated a work for hire at the time of contracting may be converted thereafter by the commissioning party's exercise of 'actual control' in the production process."¹²⁴ The purpose behind drafting subsection two was to eliminate such abuse by delineating the nine categories of work made for hire.¹²⁵ This interpretation would make subsection two superfluous, and would remove the predictability by which the author of the work could determine his status as employee or independent contractor.¹²⁶ In essence, should the non-exclusive interpretation prevail, all of the compromises that went into the drafting

added). Therefore, the Fourth Circuit interpreted subsection two of section 101 as requiring the existence of a written agreement before a work will be deemed to be made for hire. *Id.* Because there was no written agreement, the court looked to subsection one and used general agency principles to determine whether the work was made in the course and scope of employment. *Id.* Under this subsection, the court found the advertisements to be works for hire. *Id.*

121. *Id.*

122. See generally McNamara, *supra* note 8, at 14 (the non-exclusive interpretation presented by Aldon is a misinterpretation of the 1976 Act); Hamilton, *supra* note 43, at 1305 (the non-exclusive interpretation threatens to undermine the 1976 Act's work made for hire definition in that "[s]ubdivision 121 becomes superfluous and many more works become works made for hire than Congress intended"); Note, *The Works Made For Hire Doctrine Under the Copyright Act of 1976 — A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc.*, 20 U.S.F. L. REV. 649, 661 (1986) (Aldon Accessories "improperly interpreted the Old Act [1909] case law and the New Act legislative history").

123. Hamilton, *supra* note 43, at 1304. The non-exclusive interpretation

leaves the door open for hiring parties, who have failed to get a full assignment of copyright rights from independent contractors falling outside the subdivision (2) guidelines, to unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party.

Id.

124. Comment, *supra* note 10, at 585.

125. *Id.* at 586. See *supra* notes 44-59 and accompanying text for a discussion of the negotiation and compromise process through which the 1976 Copyright Act was developed.

126. Hamilton, *supra* note 43, at 1305. Under this interpretation, an author could never be certain as to whether he could maintain his copyrights.

of the 1976 Act would be for nought.¹²⁷

In summary, the courts have been divided as to how to determine what constitutes work made for hire and how to best interpret section 101 of the 1976 Act. In 1989, the United States Supreme Court decided *Community for Creative Non-Violence v. Reid*,¹²⁸ ruling for the first time on the issue of work made for hire under the Copyright Act of 1976.

III. STATEMENT OF THE CASE

A. *Factual History*

Community for Creative Non-Violence (CCNV) is an organization based in Washington, D.C., which seeks to eradicate homelessness. In 1985, in furtherance of its cause, CCNV sponsored a statue depicting the plight of the homeless in Washington, D.C.'s Christmas Pageant of Peace.¹²⁹ Mitch Snyder, an agent of CCNV, along with the members of CCNV, envisioned the appearance of the statue: a modern day nativity scene of a homeless black family "huddled on a street side steam grate."¹³⁰ The figures would be life-size, with "simulated steam" spewing forth from the grate and eddying around their feet and persons.¹³¹ The scene was entitled "Third World America" and was presented on a pedestal bearing the words "and still there is no room at the inn."¹³²

Snyder was referred to James Earl Reid, a Baltimore artist.¹³³ Reid was enthusiastic about the project and suggested that the sculpture be made of bronze. He estimated that the cost would be \$100,000 and would take approximately six to eight months to finish.¹³⁴ Snyder replied that CCNV had neither the resources nor the time to afford such an endeavor.¹³⁵ Reid then proposed that the statue be made of "Design Cast 62," a synthetic substance that would cost con-

127. *Id.* (such an interpretation "erases twenty years of carefully crafted compromises").

128. 490 U.S. 730 (1989).

129. *Id.* at 733 (citing to the district court's description of the display, *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1454 (D.C. 1987)).

130. *Id.* (citing *Community for Creative Non-Violence*, 652 F. Supp. at 1454). The idea was for "a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black)" *Id.* (citing *Community for Creative Non-Violence*, 652 F. Supp. at 1454).

131. *Id.* (citing *Community for Creative Non-Violence*, 652 F. Supp. at 1454).

132. *Id.* (citing *Community for Creative Non-Violence*, 652 F. Supp. at 1454).

133. *Id.* Snyder was referred to Reid through a "mutual artist-acquaintance" from Massachusetts. *Community for Creative Non-Violence*, 652 F. Supp. at 1454.

134. *Community for Creative Non-Violence*, 490 U.S. at 733.

135. *Id.*

siderably less money and take less time to produce.¹³⁶ During two telephone calls made in October, 1985, the contract was finalized.¹³⁷ No mention was made of a copyright.¹³⁸

Reid drafted preliminary sketches modeled after a traditional nativity scene which were rejected by Snyder.¹³⁹ Snyder stated that the figures should be in a reclining pose,¹⁴⁰ have shopping carts¹⁴¹ and special effect steam rising up out of the grating.¹⁴² Reid adjusted his conception sketches appropriately.¹⁴³

Reid worked through November and the first half of December, 1985. He set his own hours, worked at his own pace, and was assisted by various people whom he selected.¹⁴⁴ A clay model was ready for casting on December 12, 1985.¹⁴⁵ The finished statue was delivered

136. *Id.* Design Cast 62 would cost approximately \$12,000 and no more than \$15,000 and could be completed by the December 12th deadline. *Community for Creative Non-Violence*, 652 F. Supp. at 1454. Reid informed Snyder that "Design Cast 62 was sufficiently durable to withstand the elements-'as strong as concrete,' . . . and could be tinted to resemble bronze." *Id.*

137. "Reid testified that he imposed two other conditions which Snyder expressly accepted: that he would 'reserve his full copyright rights' in the work, and retain 'total [artistic] control.'" This testimony was not corroborated, and the court did not accept it as true, stating, "[T]he conditions themselves are inconsistent with the tenor of the enterprise [S]nyder and CCNV had specific ideas about the sculpture's ultimate appearance which they would have been unwilling to surrender to someone else's 'control,' even the artist's." *Id.* at 1454 n.3.

138. *Community for Creative Non-Violence*, 490 U.S. at 734. *But see infra* note 130 and accompanying text.

139. *Id.* Reid testified that Snyder requested a proposed sketch for 'fundraising' purposes." *Community for Creative Non-Violence*, 652 F.Supp. at 1455 n.4. Additionally, although refuted by Reid, Snyder claims that the sketches were subject to his "approval." *Id.*

140. 490 U.S. at 734.

141. *Id.*

142. *Id.*

143. *Id.* Reid had originally modelled the family in a traditional creche-like pose, "the mother seated . . . cradling the infant in her lap, and the father standing behind her, bending over her right shoulder to touch the infant's foot with his right hand." *Community for Creative Non-Violence*, 652 F. Supp. at 1455. However, after Reid was taken on a tour of the homeless neighborhood and observed the people in the steam grates, he altered his design to include only "recumbent figures." Furthermore, testimony showed that "Reid at first favored 'suitcases' or 'shopping bags,' but was persuaded by Snyder and CCNV members to use a shopping cart as an accessory more typical of the homeless." *Id.* at 1455 n.5.

144. 490 U.S. at 734. Reid was aided by different people at different times. All of his assistants were paid by him from funds he received from CCNV. *Id.* These assistants may be considered joint authors. *See infra* notes 146-47 and accompanying text.

145. 652 F. Supp. at 1455. The statue had to be submitted by December 12, 1985 in order to be included in the pageant; however, "the statue was rejected by Pageant officials, who declined for policy reasons to accept any display with what might be regarded as a political message. . . ." *Id.* at 1455 n.6.

on December 24, 1985, and Reid received his last payment thereafter.¹⁴⁶ Beneath the title on the statue, Reid included the letter "C" encircled (the copyright sign), along with his name, and the date, indicating his claim to the copyright for the work.¹⁴⁷

The statue was displayed for a month, after which it was returned to Reid for the repair of some minor damage in late January, 1986.¹⁴⁸ Several months later, Snyder called to obtain the return of the statue, but Reid refused.¹⁴⁹ On March 20, 1986, Reid filed a Certificate of Copyright Registration on his behalf.¹⁵⁰ Subsequently, Snyder also filed a Certificate of Copyright Registration on May 21, 1986,¹⁵¹ and when Reid persisted in refusing to return the statue, a lawsuit was filed.¹⁵²

B. Procedural History

CCNV prayed for relief under the 1976 Act and sought a determination and enforcement of its copyright against the sculptor of the statue, James Earl Reid.¹⁵³ Furthermore, CCNV demanded that it be declared the copyright owner of the statue and that an injunction be issued prohibiting Reid from infringement.¹⁵⁴ On February 9, 1987, the injunction was issued, and the district court held that under the work made for order doctrine of the 1976 Act, CCNV was the owner of the copyright to the statue "Third World America."¹⁵⁵

The district court arrived at this determination by using the right to direct and supervise test delineated in *Aldon*.¹⁵⁶ Because Snyder

146. 490 U.S. at 735.

147. 652 F. Supp. at 1455 n.7. This copyright claim was determined by the district court to have been first made on December 24, 1985. *Id.*

148. 490 U.S. at 735. According to the appellate court, "damage to the foot of the male figure [had] occurred in the original transportation from Baltimore to D.C. Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1488 (D.C. Cir. 1988).

149. 490 U.S. at 735. Originally, Reid did not want to return the statue because CCNV wanted to take the statue on tour, and Reid believed that Design Cast 62 was not sturdy enough to withstand the wear of travel. *Id.* Reid preferred to cast the statue in bronze, or at least make a mold of it. *Id.* CCNV was not interested in expending any more funds but suggested that Reid could do so if he desired. *Community for Creative Non-Violence*, 652 F. Supp. at 1456. Later, a second demand for the statue's return was made and was refused by Reid. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1456 n.2.

153. *Id.* at 1454. Ronald Purtee, Reid's photographer, was also named as a defendant. *Id.* at 1454. However, Purtee did not appear at trial and has not made any claim to the statue. *Id.* at 1454 n.1.

154. *Id.* at 1454. The plaintiff withdrew her claim for statutory damages and attorneys' fees at the time of trial. *Id.* at 1454 n.2.

155. 490 U.S. at 735.

156. 652 F. Supp. at 1456. For a discussion of *Aldon's* non-exclusive interpretation of § 101 of the 1976 Act, see *supra* notes 94-109 and accompanying text. Here, the district court determined that a work made for hire is any product created by an employee in the course and scope of employment where "the putative 'employer' was

and CCNV had decided how they wanted the image produced,¹⁵⁷ the court found that "CCNV nevertheless directed enough of [Reid's] effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs."¹⁵⁸ Consequently, since CCNV and Snyder directed Reid's production, and because there was no express agreement otherwise, the work was held to be a work made for hire and CCNV was held the copyright owner.¹⁵⁹ Reid appealed to the D.C. Circuit of the United States Court of Appeals.¹⁶⁰

The court of appeals noted that the interpretation of "work made for hire" under the 1976 Act had split the courts.¹⁶¹ Following a long discussion of the history of work made for hire and an analysis of other circuit court interpretations,¹⁶² the court of appeals adopted the Fifth Circuit's exclusive interpretation as delineated in *Easter Seal*.¹⁶³ Reid was held to be an employee within agency rules of law, and was, therefore, held to be an independent contractor.¹⁶⁴ Additionally, the

either the 'motivating factor' in the production of the work, or possessed the right to 'direct and supervise' the manner in which the work was done. . . ." *Id.* The copyright belongs to the employer regardless of "[t]he degree of creative license actually exercised by the artist-employee." *Id.*

157. *Id.* "Snyder and his colleagues not only conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season, they did so in starkly specific detail. They then engaged Reid to utilize his representational skills, rather than his original artistic vision, to execute it." *Id.*

158. *Id.*

159. *Id.* at 1457. The district court reasoned that "Reid could have bargained with CCNV for the copyright but did not do so [I]n the absence of a writing to the contrary, the law leaves no doubt that 'Third World America' is a work made for hire, and CCNV the exclusive owner of the copyright therein." *Id.*

160. 846 F.2d at 1488.

161. *Id.* The appellate court stated that "[t]his issue is novel in this court and has divided sister courts." *Id.*

162. The court thoroughly discussed the non-exclusive interpretation of the work made for hire as set forth by the Second Circuit in *Aldon Accessories v. Spiegel*, 738 F.2d 548 (2d Cir. 1984) (the commissioning party will be considered the copyright owner where he retains the requisite supervision and control over the independent contractor in producing the work), *cert. denied*, 469 U.S. 982 (1984), and by the Seventh Circuit in *Evans Newton, Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.) (court looked to see whether the commissioning party had the right to direct and control the creation of the work such that an employment relationship was said to exist, thereby vesting the copyright in the employer), *cert. denied*, 479 U.S. 949 (1986).

163. *Id.* at 1494. The court adopted the approach set forth in *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988), believing it to be "the most consistent with the language, history, and policies of the 1976 Act." *Community for Creative Non-Violence*, 846 F.2d at 1494. For a discussion of *Easter Seal Soc'y*, see *supra* notes 76-86 and accompanying text.

164. *Id.*

sculpture did not fit into one of the nine enumerated categories listed in section 101(2) of the 1976 Act, and there was no written agreement between CCNV and Reid.¹⁶⁵ The court decided that because the statue was not a work made for hire, Reid was the copyright owner.¹⁶⁶

Although the Court of Appeals resolved the work made for hire issue, it remanded the case to determine whether CCNV, or any of Reid's assistants in the project, could be considered joint authors.¹⁶⁷ As a joint author, CCNV could have the opportunity of acquiring at least partial ownership of the copyright.¹⁶⁸

CCNV filed for a writ of certiorari to the United States Supreme Court, which was granted.¹⁶⁹ The case was limited to the sole issue of whether the sculpture, "Third World America," was a work made for hire under section 101 of the 1976 Act.¹⁷⁰

IV. ANALYSIS OF THE COURT OPINION

In *Community for Creative Non-Violence v. Reid*, the Supreme Court unanimously affirmed the court of appeals' decision on June 5, 1989,¹⁷¹ thereby ending a century long dispute over the work made for hire doctrine. In resolving the split of authority in the circuit courts, the Court validated the exclusive interpretation, by ruling that a strict interpretation of the existing language of section 101 of the 1976 Copyright Act was necessary.¹⁷²

165. *Id.*

166. *Id.* at 1497-98, 1499.

167. *Id.*

168. *Id.* at 1495. The appellate court noted that "[t]he 1976 Act defines a joint work as one 'prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.'" *Id.* at 1496 (citing 17 U.S.C. § 101 1989). Therefore, because Snyder and CCNV had originally conceived the statue, employed a cabinet maker to build the steam grate and base, and purchased and installed "special effects equipment" to simulate the steam rising from the grate, in addition to monitoring Reid's work, they may be eligible to be joint authors. *Id.* at 1495-96, 1497. The court also found that other participants in the creation of 'Third World America' should be scrutinized as potential joint authors, including: "(1) employees of Reid or CCNV within the applicable rules of agency law . . . subject to the work for hire doctrine, or (2) artisans carrying out specific orders, i.e., workers who did not meet the 'more than *de minimis*' standard of originality and creativity . . . needed to qualify for authorship." *Id.* at 1498 (citation omitted). However, the court was not prepared to rule on this issue and remanded the joint authorship determination to the district court. *Id.* at 1498.

169. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

170. *Id.* at 732. The rationale preferred by the Supreme Court for granting certiorari was "[t]o resolve a conflict among the Courts of Appeals over the proper construction of the 'work made for hire' provisions of the [1976] Act." *Id.* at 736 (footnote omitted). The Court did not consider the issue of joint authorship, since neither party sought a review of the appellate court's order. *Id.* at 753 n.32. Thus, the issue of joint ownership was remanded back to the district court.

171. *Id.* at 753. Justice Marshall wrote the opinion for the Court.

172. *Id.* at 750-51. See *infra* notes 189-96 and accompanying text.

The Court recognized the general rule, as enunciated in the 1976 Copyright Act, that whoever creates the work is the author and copyright owner.¹⁷³ However, the Court also recognized an exception to the general rule as embodied in the doctrine of work made for hire.¹⁷⁴ Accordingly, the Court emphasized the importance of classifying a work as the product of either an employee or an independent contractor.¹⁷⁵ This classification was considered to be of utmost importance because resolution of the creator's status "determines not only the initial ownership of its copyright, but also the copyright's duration, . . .¹⁷⁶ the owners' renewal rights, . . .¹⁷⁷ termination rights, . . .¹⁷⁸ and right to import certain goods bearing the copyright. . . ."¹⁷⁹

In its analysis of the issue, the Court looked to the existing language of section 101 of the 1976 Act. The sculpture in question did not fit into any of the nine categories listed under section 101(2) as works made for hire.¹⁸⁰ Additionally, there was no written agreement evidencing that the work was to be considered as a work made for hire.¹⁸¹ Justice Marshall consequently stated that the "dispositive inquiry" is whether, under section 101(1) of the Act, "Third World America" was "prepared by an employee within the scope of his or her employment."¹⁸² The opinion discussed various interpretations

173. By recognizing work for hire as an exception, the Court relied upon the mutual exclusiveness of § 101(1) and § 101(2).

174. *Id.*

175. *Id.*

176. Section 302 of the Copyright Act addresses the duration of a copyright. 17 U.S.C. § 302 (1982). In general, the copyright term is for the life of the author plus 50 years. *Id.* at § 302(a). Contrastingly, in work made for hire situations, "the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first." *Id.* at § 302(c).

177. Section 304(a) of the Copyright Act determines the duration of subsisting copyrights. Generally, the duration of a copyright already in existence as of January 1, 1978 is twenty-eight years from the date it was originally secured. *Id.* at § 304(a).

178. Section 203 addresses the termination of transfers and licenses granted by the author. It states that for all works, other than works made for hire, the grant of a copyright transfer or license is subject to termination in certain circumstances. 17 U.S.C. § 203(a) (1982).

179. *Community for Creative Non-Violence*, 490 U.S. at 737 (omitting reference to applicable sections of the Copyright Act of 1976). Section 601(b)(1) provides various requirements for the manufacture, importation and distribution of copies. In the case of works made for hire, this section applies when a substantial portion of the work was made for a person other than a domiciliary or citizen of the United States. 1 M. NIMMER, *supra* note 18, § 5.03[A], at 5-10, 5-11 (referring to 17 U.S.C. § 601(b)(1) (1982)).

180. *Id.* at 738.

181. *Id.*

182. *Id.*

of section 101¹⁸³ and decided that the exclusive interpretation approach derived the most support from the 1976 Act's legislative history, and most closely defined the intent of Congress.¹⁸⁴

Although section 101(1) discusses the terms "employee" and "scope of employment," the 1976 Act nowhere defined the precise meaning of these terms.¹⁸⁵ Following the rules of statutory interpretation, the Court resolved to look to common law agency doctrines to supply the meaning. The Court believed that when Congress uses terms that have established meanings under the common law, courts must infer that Congress intends to implement the common law meanings in drafting statutes.¹⁸⁶ The Court also concluded that Congress intended to apply agency law since the term "scope of employment" used in section 101(1) is "a widely used term of art in agency law."¹⁸⁷ As a final point, Justice Marshall stressed the importance of uniformity and predictability of decisions that would be afforded by the use of general common law theories of agency law.¹⁸⁸

The Court next analyzed the legislative history of the 1976 Act¹⁸⁹ and the language of the act itself. The Court noted that the negotiation and compromise which led to the 1976 Act as presently written

183. *Id.* at 738-39. The four interpretations discussed included: (1) the conservative interpretation as defined by *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (Colo. 1985) (a work is made for hire whenever the employer *has the right to* control and supervise the work); *see supra* note 96; (2) the nonexclusive interpretation as formulated by *Aldon Accessories, Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 551-53 (2d Cir.) (a work is made for hire whenever the employer *actually wields* control over the product), *cert. denied*, 469 U.S. 982 (1984), *see supra* notes 94-109 and accompanying text; (3) the exclusive interpretation announced in *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 334-35, 337 (5th Cir. 1987) (a work is made for hire if either made in the scope of employment as defined under agency principles or where the requirements of § 101(2) are met), *cert. denied*, 485 U.S. 981 (1988); *see supra* notes 76-83 and accompanying text; and (4) the formal employee interpretation set forth in *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989) (works produced by formal, salaried employees are works made for hire under § 101(1) of the 1976 Act); *see supra* note 76.

184. *Community for Creative Non-Violence*, 490 U.S. at 742-48.

185. *Id.* at 738. The Court decided that the most important place to start its interpretation of § 101 of the Copyright Act was with its language. *Id.* at 739.

186. *Id.* (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

187. *Id.* at 740. *See* RESTATEMENT (SECOND) AGENCY § 228 (1958) for a discussion of the "scope of employment." *See also supra* note 84 for a discussion of employment factors under agency law.

188. *Community for Creative Non-Violence*, 490 U.S. at 740. With regard to uniformity, Justice Marshall said, "Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the [1976] Act's express objective of creating national uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation." *Id.* *See* 17 U.S.C. § 301(a) (1989) (discussing pre-emption). Predictability was also important because in the "copyright marketplace," parties can negotiate and include relevant contractual terms with some expectation of which party will own the copyright to the work created. *Community for Creative Non-Violence*, 490 U.S. at 749-50.

189. *Id.* at 743-47. *See supra* notes 44-59 and accompanying text.

illustrates the intent of Congress to provide "two mutually exclusive ways" for works to be considered works made for hire.¹⁹⁰ One way is by determining an employment relationship, and the other is by meeting the requirements for independent contractors.¹⁹¹ The Court next observed that the language of the 1976 Act indicates that "only enumerated categories of commissioned works may be accorded work for hire status. The hiring party's right to control the product simply is not determinative."¹⁹² Through this declaration the Court rejected the supervision and control test advocated by the Second¹⁹³ and Seventh Circuits,¹⁹⁴ and the formal employment definition used by the Ninth Circuit,¹⁹⁵ favoring instead the exclusive interpretation of the Fifth Circuit.¹⁹⁶ The Court's decision to rely on the existing statutory language as evidence of Congressional intent gives force to the long negotiations which were required in arriving at a provision acceptable to and satisfactory for all interested parties.

Justice Marshall rejected the supervision and control test on several grounds. First, the language in section 101(1) focuses on the relationship between the hired and hiring parties; however, this interpretation would be distorted by the adoption of the supervision and control test, which instead emphasizes the relationship between the hiring party and the product.¹⁹⁷ Second, the supervision and control test misrepresents the meaning of section 101(2).¹⁹⁸ The common thread among the nine specified categories of section 101(2) is that the works are generally produced at the "instance, direction, and risk of the publisher or producer. By their very nature, therefore, these types of works would be works by an employee under petitioners' right to control the product test."¹⁹⁹ This interpretation com-

190. *Id.* at 747.

191. *Id.* at 747-48.

192. *Id.* at 748.

193. *See, e.g., Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). *See supra* notes 94-109 and accompanying text.

194. *See, e.g., Evans Newton Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1984). *See supra* notes 111-115 and accompanying text.

195. *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989). *See supra* note 76.

196. *See, e.g., Easter Seal Soc'y for Crippled Children & Adults of La. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988). *See supra* notes 76-83 and accompanying text.

197. *Community for Creative Non-Violence*, 490 U.S. at 741.

198. *Id.*

199. *Id.* at 741-42. "[A] party who hires a 'specially ordered or commissioned' work by definition has a right to specify the characteristics of the product desired. . . . [T]he right to control the product test would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1)." *Id.* at 741.

pletely disregards the employee and independent contractor dichotomy by turning any specially commissioned work into a work made for hire whenever the hiring party has the right to control and supervise the product.²⁰⁰

The Court also rejected the actual control test of *Aldon*.²⁰¹ Under this test, a specially ordered or commissioned work is only to be deemed a work made for hire when the hiring party exerts actual control over the work product.²⁰² The Court rejected this interpretation, finding it completely devoid of statutory support.²⁰³ The Court observed that nothing in the 1976 Act supports the dichotomy between “commissioned works that are actually controlled and supervised by the hiring party and those that are not.”²⁰⁴

Furthermore, the Court held that the meaning of employee in the 1976 Act is someone in a conventional employment relationship, rather than a formal, salaried employee.²⁰⁵ The 1976 Act does not support the definition of employee adopted by the Ninth Circuit in *Dumas*.²⁰⁶ Thus, the Supreme Court favored the conventional employment relationship used in agency law to define “employee.”²⁰⁷

In defining the work made for hire doctrine, the Court utilized a two-prong test. The Court first used general common law agency principles to determine whether the hired party should be classified as an employee or as an independent contractor.²⁰⁸ Following this determination, the Court applied the proper subsection of section 101: subsection (1) for employees, and subsection (2) for independent contractors.²⁰⁹ Use of this test by later courts will prevent transforming a specially commissioned work into a work made for hire through the right to control or supervise test, and lead to the proper resolution of work made for hire issues in the future.²¹⁰

Utilizing this two-prong test, the Court looked to agency factors which define an employee and found them inapplicable to Reid.²¹¹

200. *Id.*

201. *Id.* at 742.

202. *Id.*

203. *Id.*

204. *Id.* The court rejected both the *Peregrine* right to control and the *Aldon* actual control tests. *Id.*

205. *Id.* at 742 n.8.

206. *Id.* The Supreme Court, in refuting the formal, salaried employee test, stated that nowhere in the Act are the words “formal” or “salaried” mentioned; the Act just uses the word “employee.” *Id.* For a discussion of *Dumas v. Gommerman*, see *supra* note 84.

207. *Community for Creative Non-Violence*, 490 U.S. at 742 n.8.

208. *Id.* at 750-51. For a discussion of the Court’s decision to utilize common law agency principles, see *supra* notes 185-88 and accompanying text.

209. *Id.* at 751.

210. *Id.* at 750-51.

211. *Id.* The Court examined such factors as Reid’s skill as a sculptor, CCNV’s inability to assign additional projects to Reid, the duration of the relationship, Reid’s ab-

However, the Court found Reid to be an independent contractor under common law agency principles.²¹² Once Reid was declared an independent contractor, the Court turned to the actual language of the 1976 Act which dictated the application of section 101(2).²¹³ The sculpture Reid produced did not fall into one of the nine delineated categories designated "works made for hire" in that section.²¹⁴ Thus, "Third World America" was not held to be a work made for hire.²¹⁵ However, the Court did not declare Reid the sole owner of the copyright because the issue of joint ownership had yet to be resolved by the district court on remand.²¹⁶

V. IMPACT

"Despite its limited applicability, work made for hire has become a pervasive and destructive practice in many creative fields."²¹⁷ Before the Supreme Court ruling in *Community for Creative Non-Violence*, freelance artists were most affected by the uncertainty and unpredictability concerning the work made for hire issue.²¹⁸ Under any interpretation, work produced by permanent employees is deemed to be work made for hire. However, due to uneven bargaining power, the hiring party often forces the freelance artist to sign contracts which classify her work as work made for hire.²¹⁹ The hiring party,

solite flexibility in determining his work schedule as long as the project was completed by the stipulated time, Reid's discretion to hire assistants, and the fact that Reid supplied his own tools and studio. *Id.* Furthermore, CCNV was not a business and "did not pay payroll or social security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds." *Id.*

212. *Id.* at 752-53.

213. *Id.* at 753.

214. *Id.* at 738.

215. *Id.*

216. *Id.* See *supra* notes 167-68 and accompanying text.

217. The Artists' Bill of Rights: Hearings on S. 1253. Before the Senate Subcomm. on Patents, Copyrights and Trademarks, 101st Cong., 1st Sess. (1989) (statement of Senator Thad Cochran) [hereinafter Cochran Statement].

218. Comment, *The Freelancer's Trap: Work For Hire Under The Copyright Act of 1976*, 86 W. VA. L. REV. 1305, 1306 (1984). Freelance artists depend on commissions for work since they are not formally employed by any single employer. Cochran statement, *supra* note 217. "Freelance artists, writers, and photographers are often presented with overreaching work made for hire contracts in situations that are contrary to the intent of the Copyright Act. . . . Very often publishers demand that work for hire contracts be signed with no opportunity for the creator to engage in meaningful negotiation." *Id.*

219. *Id.* See also Note, *supra* note 122, at 672, stating:

The problem is most pervasive for less known artists, who make up the bulk of free-lancers. Because of market pressures, they are forced to sell their works at 'bargain' prices, without the benefit of copyrights. More popular art-

who is in a more powerful position, may demand this provision because the freelance artist generally needs work and money.²²⁰ This predicament makes it very difficult for freelance artists to survive.²²¹ Furthermore, this inferior position encourages neither creativity nor productivity.²²² If the work increases in value beyond the expected level, the hiring party can coerce the creator into signing an agreement to relinquish copyright ownership after the creation of the work. "The most significant difficulty is that the publisher can remunerate an artist for the least valuable aspects of her work, step into the artist's shoes as 'author' through the work-made-for-hire contract, and then put the work to more valuable uses."²²³ As a result, the public will suffer from the lack of incentive offered to freelance artists to create works of high quality.²²⁴ This affects not only traditional areas, but all areas of intellectual endeavor.

The Supreme Court in *Community for Creative Non-Violence* attempted to ameliorate the work made for hire dilemma. It adopted a two-prong test which dictates that the relationship between a commissioning party and an independent contractor does not constitute work made for hire unless it falls under one of the nine enumerated categories of section 101(2), and is accompanied by a written agreement between the parties stipulating that the work is made for hire; and that the relationship between employer and employee constitutes work for hire under section 101(1).²²⁵ The promulgation of this strict test provides freelance artists with the support and security of a judicial interpretation of work made for hire. Since the Court in *Community for Creative Non-Violence* returned to and strictly applied the statutory language of section 101 of the 1976 Act, the two-prong test is not subject to liberal judicial interpretation. As such,

ists, of course, have the freedom to demand higher prices and other rights, such as the copyright, as conditions of their [employment] contracts."

Id. at 672 n.115.

220. *Id.* at 672.

These contracts are oppressive to free-lance artists because they usually contain a clause giving the employer all future rights to the work. . . . This deprives free-lance artists of the copyright they often depend on as a part of their livelihood. Further, if the artist refuses to sign such a contract, the employer can simply hire someone else.

Id. "The most egregious abuse . . . is the increasingly common practice of stamping a work for hire provision on the back of a check forwarded to the freelancer in payment for producing a commissioned work." S. 1253, 101st Cong., 1st Sess., 135 CONG. REC. § 7341, § 7343 (1989).

221. Cochran Statement, *supra* note 217.

222. *Id.* The freelance artist does not have the copyright that he is entitled to as the independent contractor; moreover, he is often categorized as an employee so that his work may be considered made for hire but does not receive any of the benefits connected with that employment. *Id.*

223. Hamilton, *supra* note 43, at 1317.

224. *Id.* at 1311, 1317.

225. See *supra* notes 208-09 and accompanying text.

the decision provides predictability to work made for hire disputes,²²⁶ and in turn empowers creators to receive their deserved copyright protection.

Three cases alleging copyright infringement²²⁷ and involving the work made for hire provision of the 1976 Act have been decided since *Community for Creative Non-Violence: Nadel & Sons Toy Corp. v. Shaland Corp.*,²²⁸ *Schiller & Schmidt, Inc. v. Wallace Computer Services, Inc.*,²²⁹ and *SOS, Inc. v. Payday, Inc.*²³⁰

Influenced by *Community for Creative Non-Violence*,²³¹ Senator Thad Cochran of Mississippi submitted Senate Bill 1253²³² to revise the 1976 Act provisions concerning work made for hire²³³ and joint ownership.²³⁴ The Bill seeks to clarify the language of the 1976 Act

226. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749-50. See *supra* note 218 and accompanying text.

227. To prove copyright infringement, plaintiff must show ownership of a valid copyright and copying of the work. 3 M. NIMMER, *supra* note 17, at § 13.01. Ownership of a valid copyright is dependent on a determination of whether the work is work made for hire. 1 M. NIMMER *supra* note 18, at § 5.03[A].

228. No. 85 Civ. 5108 (S.D.N.Y. Nov. 8, 1989) (LEXIS Genfed Library, Dist. file). The case involved the copyright infringement of an inflatable unicorn. The facts of the case are extremely similar to those in *Aldon*; see *supra* notes 94-109 and accompanying text. However, in this case, the artist who drafted the model for the product was held to be an independent contractor, and hence, the work was not made for hire. *Nadel & Sons Toy Corp.*, No. 85 Civ. 5108, slip op. at 23. As such, the manufacturer owned the copyright, and no infringement occurred because the plaintiff was not the valid copyright owner. *Id.*

229. No. 85 Civ. 4415 (N.D.Ill. 1989) (LEXIS Genfed Library Dist. file). The case was brought for copyright infringement of a catalog for mail distribution. The designer made similar catalogs for two competing companies simultaneously. Both the designer and the catalog company brought cross motions for summary judgment with regard to the issue of copyright infringement. *Schiller & Schmidt, Inc. v. Wallace Computer Services, Inc.*, No. 85 Civ. 4415, slip op. at 3 (N.D. Ill. Nov. 20, 1989). The court denied the cross motions, holding that the issue of copyright infringement was a matter best left to the trier of fact. *Id.* at 13.

230. 886 F.2d 1081 (9th Cir. 1989). This case involved two employees of a computer soft and hardware company who sold a payroll software program to a payroll and financial services corporation without prior authorization. The computer company brought suit for copyright infringement, misappropriation of trade secrets and account stated. *Id.* at 1084. Since the parties failed to present evidence as to the nature of the employment relationship concerning the two employees, the court did not address the issue with regards to the work made for hire doctrine. *Id.* at 1087.

231. Telephone interview with Claire Ford Pickart, Legislative Aid to Senator Cochran, in Los Angeles (March 20, 1989).

232. Senator Cochran also proposed legislative amendments in 1982 (S. 2044, 97th Cong., 2d Sess., 128 Cong. Rec. 649 (1982)); in 1983 (S. 2138, 98th Cong., 1st Sess. (1983)); and in 1986 (S. 2330, 99th Cong., 2d Sess., 132 CONG. REC. § 4494 (1986)). Hamilton, *supra* note 43, at 1307.

233. For the present definition of work made for hire, see *supra* note 12.

234. For the definition of joint work under the 1976 Act, see *supra* note 168.

to more precisely reflect the intent of Congress.²³⁵ For the first time since 1982, when Senator Cochran submitted his first bill, Senate Bill 1253 has the support of the Copyright Office.²³⁶

Senate Bill 1253 proposes to amend both sections 101(1) and 101(2) of the 1976 Act. As amended, section 101(1) would apply only to formally salaried employees.²³⁷ Senator Cochran predicted that this specification will allow for more effective adjudication, since the agency standard evaluates some thirteen or more factors in defining "employee."²³⁸ The agency test would be reserved for situations of ambiguity.²³⁹ Subsequently, section 101(2) would also be amended to require that any written agreements stipulating that the work is "made for hire" be made before commencement of the work.²⁴⁰ This amendment would protect the freelance artist from being coerced into signing an agreement after the work is completed when it has increased in value or as a precondition to remuneration.²⁴¹

In addition, Senator Cochran proposes to amend section 101 as it defines joint author. The amended section would require co-authors to make "original contributions"²⁴² and sign a statement before the commencement of work, expressly agreeing that the work is to be considered a joint work.²⁴³

The introduction of the amendment to the section defining joint authorship was prompted in part by the joint authorship issue remanded by the appellate court in *Community for Creative Non-Violence*.²⁴⁴ Frequently, hiring parties plead in the alternative for a finding of joint authorship so as to circumvent an entirely adverse

235. S. 1253, 101st Cong., 1st Sess., 135 CONG. REC. § 7341 (1989). "My bill merely seeks to clarify the conditions which must be present for a work for hire arrangement to be valid. I believe these are the same conditions which Congress originally intended, when it enacted the Copyright Act of 1976." *Id.*

236. *Id.*

237. *Id.* at § 7342. This amendment would endorse the definition of employee set forth in *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989); see *supra* note 84.

238. S. 1253, 101st Cong., 1st Sess., 135 CONG. REC. at § 7342. "Adoption of the 'formal salaried' definition of 'employee' will avoid the inevitable uncertainties and costs associated with the agency law test[,] . . . which requires the evaluation of at least thirteen factors to the circumstances of each case, with no factor having dispositive impact alone." *Id.* "In sum, the 'formal, salaried' language would provide clear guidance to the courts and to parties involved in the creation and dissemination of copyrightable works." *Id.* See also *supra* notes 76 & 206 and accompanying text.

239. *Id.*

240. *Id.* at § 7341, § 7344.

241. *Id.* at § 7344. "[T]he bill will have the beneficial effect of reducing the incidence of disputes that arise when the value of the work brings the ownership question to the forefront and yet no written agreement exists." *Id.*

242. *Id.*

243. *Id.*

244. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988). For a discussion of the joint authorship issue, see *supra* notes 167-68 and accompanying text.

judgment.²⁴⁵ As joint author, the hiring party becomes co-owner of the copyright to a work.²⁴⁶ Contrastingly, under Cochran's amendment, commissioning parties are denied copyright ownership in the absence of compliance with section 101(2). The ability to plead joint authorship in the alternative to resolution of the issue of sole copyright owner "is an improper solution not only because of the potential for abuse, but because it is a false solution."²⁴⁷ The proposal by Senator Cochran would provide a proper method to determine who are the true joint authors.

VI. CONCLUSION

The Supreme Court holding in *Community for Creative Non-Violence v. Reid* has put to rest the dispute over work made for hire which has divided the circuits for over a century. After much deliberation and analysis of varying circuit court approaches, the Supreme Court adopted the exclusive interpretation of section 101's definition of work for hire. Justice Marshall delineated a two-prong test. First, the court should use general common law agency principles to determine if the hired party is an employee or an independent contractor. Second, the court should apply the proper subsection of section 101: (1) for employees, and (2) for independent contractors.

This two-prong test accurately represents the intent of Congress when it promulgated the 1976 Act. The two-prong test is firmly rooted in the strict reading of the statutory language of the 1976 Act; therefore, it will lend predictability in the area of work for hire. The two-prong test not only rewards creators for their intellectual and artistic endeavor, reinforcing the primary purpose enumerated by Congress of the Copyright Clause, but also promotes uniformity of decision and predictability for creators and hiring parties when entering into business contracts.

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245. McNamara, *supra* note 8, at 18.

246. "As joint authors are considered to be coowners in the work, 17 U.S.C. § 201(a) (1982), they are treated as tenants in common. They own an undivided interest in the whole of the work . . . and may independently use or license the work, subject only to a duty to account to the other coowner for any profits earned thereby." S. 1253, 101st Cong., 1st Sess., 135 CONG. REC. at § 7343 (citing *Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984)).

247. McNamara, *supra* note 8, at 18. "Joint authorship is a false solution to the work made for hire controversy because assistants to the primary parties may also qualify as joint authors." *Id.*

