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It's not Who you Are, but Who you Work For:
Limitation on the Works Made For Hire Doctrine:
Community for Creative Non-Violence v. Reid, 109 S.
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It's not Who you Are, but Who you Work For: Limitation on the Works Made For Hire Doctrine

Community for Creative Non-Violence v. Reid,
109 S. Ct. 2166 (1989).

I. INTRODUCTION

The Copyright Act of 1976¹ vests copyright ownership “in the author or authors of [a] work.”² Normally, the person who fixes a work of authorship in a “tangible medium of expression” is considered the author of that work.³ However, an exception to this general rule exists for those works which are “work[s] made for hire.”⁴ If a work is made for hire, “the employer or other person for whom the work was prepared is considered the author” for copyright purposes and, unless there is a written agreement providing otherwise, “owns all of the rights comprised in the copyright.”⁵ Section 101 of the Copyright Act⁶ provides that a work can be one “for hire” in either of two scenarios. First, pursuant to section 101(1) of the Act, a work is one made for hire if it was “prepared by an employee within the scope of his or her employment.”⁷ Alternatively, section 101(2) provides that a work is made for hire if it falls within one of the nine specific categories of “specially ordered or commissioned” works enumerated in the subsection, and the parties expressly

1. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-914 (1988)) [hereinafter Copyright Act or Act].

2. 17 U.S.C. § 201(a) (1988).

3. *Id.* § 102.

4. *Id.* § 101.

5. *Id.* § 201(b).

6. *Id.* § 101. The work made for hire provisions of section 101 provide, in pertinent part, that a work is made for hire when it 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 parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id. § 101.

7. *Id.* § 101(1).

agree in writing that the work would be considered one for hire.⁸

At issue in *Community For Creative Non-Violence v. Reid*⁹ was the proper construction of section 101(1).¹⁰ Primarily, the question was whether an artist who was specially commissioned by a non-profit organization to create a sculpture was an "employee acting within the scope of his . . . employment."¹¹ This interpretive problem arose because of the failure of the drafters of the Copyright Act to include within the Act a definition of the term "employee." In the absence of a definition, the lower federal courts had adopted four different interpretations of the term.¹² On June 5, 1989, the Supreme Court of the United States resolved the conflict when it unanimously announced in *Reid* that the language, structure, and legislative history of the work made for hire provisions require a court to use the general principles of the common law of agency to determine who is an "employee" for purposes of section 101(1) of the Copyright Act.¹³

II. HISTORY OF THE CASE

A. Facts

In the fall of 1985, the Community for Creative Non-Violence (CCNV) decided to participate in Washington, D.C.'s annual Christmastime Pageant of Peace.¹⁴ Mitch Snyder, a member and trustee of CCNV, commissioned James Earl Reid, a Maryland art-

8. *Id.* § 101(2).

9. 109 S. Ct. 2166 (1989).

10. 17 U.S.C. § 101 (1988).

11. *Reid*, 109 S. Ct. at 2168-69.

12. Some federal courts have interpreted section 101(1) to mean that a work is prepared by an employee whenever the hiring party retains the *right to control* the product. See *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983). The Second, Fourth, and Seventh Circuits have adopted a somewhat related view which would find that a work is created by an employee whenever the hiring party exercises *actual control* over the creation of the work. See *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Evans Newton Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986). The Fifth Circuit and the D.C. Circuit have adopted the position that the term "employee" as found in section 101(1) should be defined as it would be under the common law of agency. See *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Play-boy Enterprises*, 815 F.2d 323 (5th Cir. 1987); *Community For Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989). Finally, the Ninth Circuit recently interpreted the word "employee" in section 101(1) to refer only to formal, salaried employees. *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989).

13. *Reid*, 109 S. Ct. at 2178.

14. *Id.* at 2169.

ist, to construct for CCNV a display dramatizing the plight of the homeless.¹⁵ Snyder and other members of CCNV conceived the idea for the work, which ultimately would depict a modern day Nativity scene in which life-sized black adults, representing the traditional Holy Family, huddled on a streetside.¹⁶ The work was to be entitled "Third World America" and the epigraph beneath the work would read, "and still there is no room at the inn."¹⁷ Reid suggested the sculpture be cast in bronze at a cost of \$100,000 and projected that he could complete the statue within six to eight months.¹⁸ However, because of CCNV's limited funds and the December 12, 1985, deadline, Reid and Snyder agreed that Reid would construct the sculpture with a less costly material, enabling the project to be completed in time.¹⁹ Reid and Snyder agreed that the cost of the project would not exceed \$15,000 and that Reid would contribute his services for free.²⁰ They did not sign a contract, nor was there any mention of copyright.²¹

Soon after receiving an advance of \$3,000, Reid began to make sketches of figures in a number of possible poses, one of which Reid sent to Snyder at Snyder's request.²² Later, at Snyder's suggestion and in an effort to accurately portray the plight of the homeless, Reid and Snyder visited homeless shelters and observed homeless people living on the streets of Washington, D.C.²³

During November and early December, Reid worked exclusively on the statue, aided by different people who were paid with CCNV funds.²⁴ On various occasions during this period, CCNV members visited Reid in his Maryland studio to check on the statue's progress.²⁵ However, on none of those occasions did Reid

15. *Id.*

16. *Community For Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1454 (D.D.C. 1987).

17. *Id.*

18. *Reid*, 109 S. Ct. at 2169.

19. *Id.* They decided to construct the statue with "'Design Cast 62,' a synthetic substance that could meet CCNV's monetary and time constraints, could be tinted to resemble bronze, and could withstand the elements." *Id.*

20. *Id.*

21. *Id.*

22. *Id.* There was a discrepancy in the testimony of Reid and Snyder as to why Reid sent the sketches to Snyder. Snyder testified that he had requested the sketch so that he could give his approval to Reid's ideas. *Id.* Reid, meanwhile, claimed he sent the sketch to Snyder only so that Snyder could use it for fundraising purposes. *Id.*

23. *Id.* After Snyder indicated to Reid that homeless persons recline on steam grates instead of sitting on them, Reid's sketches only included reclining figures. *Id.*

24. *Id.*

25. *Id.*

and the CCNV members discuss copyright.²⁶

Reid delivered the statue to Washington, D.C. on December 24, 1985, where it was joined to a steam grate pedestal²⁷ and placed on display.²⁸ At that time, Snyder paid Reid the final installment of the agreed price of \$15,000.²⁹ CCNV displayed the statue for a month and, in late January of 1986, returned the statue to Reid for minor repairs. Later, while the statue was still in Reid's possession, Reid voiced his objection to Snyder's plan to display the statue around the country for fundraising purposes, claiming that the statue's material would not withstand excessive travel.³⁰ Snyder declined Reid's suggestion to recast the statue in bronze and, in March of 1986, asked Reid to return the sculpture.³¹ Reid refused and instead filed a certificate of copyright registration.³² Snyder, acting for CCNV, immediately filed a competing certificate of registration and then filed suit against Reid.³³

B. Procedure Below

Snyder and CCNV brought suit in the United States District Court for the District of Columbia seeking an injunction to force Reid to return the sculpture to CCNV and a declaratory judgment determining ownership of the copyright in the sculpture.³⁴ Following a two-day bench trial, the district court held that, pursuant to section 101(1) of the Act, "Third World America" was a work made for hire and Snyder, as acting trustee for CCNV, was the exclusive owner of the copyright.³⁵ The district court reasoned that Reid had been an employee within the meaning of section 101(1) because Snyder and other CCNV members had contributed sufficiently to the inception and creation of the work and had directed Reid's work in such a way that the work represented the result

26. *Id.* at 2169-70.

27. CCNV prepared the steam grate pedestal, independent of any assistance from Reid. *Id.* at 2170.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* Reid also announced his intention to take the statue on a tour which would be shorter than the one CCNV had proposed. *Id.*

33. *Id.* CCNV named Reid's photographer Ronal Purtee as a defendant in the suit as well; however, Purtee never appeared. *Id.*

34. *Id.*

35. *Community For Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1457 (D.D.C. 1987).

which CCNV, not Reid, had wanted.³⁶ Reid appealed.

The United States Court of Appeals for the District of Columbia Circuit reversed, holding that, because under the rules of agency law Reid was not CCNV's employee but instead was an independent contractor, the statue, since sculpture does not fall within one of the nine categories of specially commissioned works enumerated in section 101(2), is not a work made for hire.³⁷ In an opinion authored by Judge Ruth Bader Ginsberg, the court of appeals, after recognizing that the case presented an issue of first impression in the D.C. Circuit, adopted the interpretation of section 101(1) which would apply the common law of agency to determine who was an employee for purposes of the statute, an approach which the Fifth Circuit had advocated in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*.³⁸ Using that approach, the court of appeals found that section 101 created "a simple dichotomy in fact between employees and independent contractors."³⁹ With the common law of agency as its primary guide, the court of appeals concluded that Reid was an independent contractor and that therefore the work was not prepared by an employee under section 101(1).⁴⁰ Further, the court of appeals concluded that, because sculpture was not among the nine categories enumerated in section 101(2), section 101(2) likewise did not render the sculpture a "work made for hire."⁴¹

Although concluding that the sculpture was not a work made for hire, the court of appeals suggested that the work may have been jointly authored by the parties, giving CCNV some rights to the copyright in the work.⁴² Consequently, the court of appeals remanded the case to the district court to allow that court to make a finding as to whether the sculpture was a joint work.⁴³ However, in the interim, the Supreme Court granted certiorari to resolve the conflict that existed among the federal circuits as to the proper construction of the word "employee" in section 101(1) of the Act.⁴⁴

36. *Id.* at 1456-57.

37. *Community For Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir. 1988).

38. *Id.* at 1487 (citing *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988)).

39. *Reid*, 846 F.2d at 1492.

40. *Id.* at 1494.

41. *Id.* See *supra* note 6 for the text of section 101(2).

42. *Reid*, 846 F.2d at 1497.

43. *Id.* at 1499.

44. *Community For Creative Non-Violence v. Reid*, 109 S. Ct. 362 (1988).

III. THE SUPREME COURT OPINION

The Supreme Court unanimously affirmed the court of appeals.⁴⁵ Writing for the Court, Justice Marshall initially delineated the statutory framework underlying the work made for hire doctrine.⁴⁶ Quoting section 101 of the Copyright Act,⁴⁷ he recognized that a work is one for hire under two sets of circumstances: (1) where the work is created by an employee acting within the scope of his or her employment or (2) where the work is one of the specially ordered or commissioned works enumerated in section 101(2), and the parties agree in writing that the work is to be considered a work made for hire.⁴⁸ After illuminating the dichotomy created by the two subsections of section 101, Justice Marshall quickly narrowed the issue by concluding that the statue, as sculpture is not one of the nine categories enumerated in section 101(2), clearly is not a work made for hire under that subsection.⁴⁹ With section 101(2) inapplicable, he reasoned, "the dispositive inquiry in the case . . . is whether 'Third World America' is a 'work prepared by an employee within the scope of his . . . employment under § 101(1).'"⁵⁰

Although apparently necessitating nothing more than a determination of whether Reid created the statue as an employee laboring within the scope of his employment, the inquiry was complicated because, as Justice Marshall points out, the Copyright Act does not define the term "employee."⁵¹ He noticed that because the statute lacked an express definition, four different constructions of the word had emerged from the lower federal courts.⁵² In order to create a uniform federal standard, the Court's task essentially was to choose among these interpretations.

A. *The Language of Section 101(1)*

Justice Marshall began his interpretation of section 101(1) by inspecting its language.⁵³ After reiterating that the statute fails to

45. *Community For Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989).

46. *Id.* at 2171.

47. 17 U.S.C. § 101 (1988).

48. *Reid*, 109 S. Ct. at 2171. See *supra* note 6 for the text of the work made for hire provisions in section 101.

49. *Reid*, 109 S. Ct. at 2171.

50. *Id.* at 2171-72.

51. *Id.* at 2172.

52. *Id.* See *supra* note 12 (discussing the various interpretations of section 101(1) adopted by the lower federal courts).

53. *Reid*, 109 S. Ct. at 2172.

define the term "employee" or the phrase "scope of employment," Justice Marshall argued that this definitional void was of no consequence because when "'Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"⁵⁴ On previous occasions, Justice Marshall argued, the Court has concluded that where Congress used the word "employee" in a statute, but failed to define the word, Congress intended to "describe the conventional master-servant relationship as understood by common law agency doctrine."⁵⁵ In fact, he continued, "Congress' intent to incorporate the agency law definition is suggested by § 101(1)'s use of the term, 'scope of employment,' a widely used term of art in agency law."⁵⁶ As a result of this established tradition of construing the term "employee," and because nothing in the text of the work made for hire provisions indicates that Congress intended a different construction, Justice Marshall concluded that the D.C. Circuit was correct in its conclusion "that the term 'employee' should be understood in light of the general common law of agency."⁵⁷

B. *The Alternative Tests Do Not Apply*

In adopting the interpretation of section 101(1) which the Fifth Circuit⁵⁸ and the court of appeals below had advocated,⁵⁹ Justice Marshall rejected the alternative interpretations of the section.⁶⁰ First, he rejected the right to control the product test because it incorrectly focuses on the relationship between the hiring

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

55. *Reid*, 109 S. Ct. at 2172 (citing *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-23 (1979); *Baker v. Texas & Pacific Ry. Co.*, 359 U.S. 227, 228 (1959) (per curiam); *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, 94 (1915)).

56. *Reid*, 109 S. Ct. at 2172.

57. *Id.* at 2173. Justice Marshall remarked that the terms were to gain their meaning from the general common law of agency and not from the law of any particular state. *Id.* Doing so, he claimed, would further the goal of achieving a uniform application of the federal copyright statute. *Id.*

58. *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987).

59. *Community For Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989).

60. *Reid*, 109 S. Ct. at 2173. CCNV had urged the Court to adopt either the right to control the product test or the actual control test. *Id.* *Reid* and various amici also had suggested to the Court that the Ninth Circuit's interpretation—limiting employee status to formal, salaried employees—was a proper construction of the statute. *Id.* at 2174 n.8.

party⁶¹ and the product rather than the relationship between the hiring party and the hired party.⁶² Justice Marshall also found the test unworkable in light of the structure of section 101.⁶³ Congress, he claims, created a dichotomy in section 101 by which a work can become a work made for hire in two circumstances—if it is prepared by an employee or if it is one of the specially commissioned or ordered works enumerated in section 101(2) and is the subject of a written agreement.⁶⁴ The right to control the product test, Justice Marshall argued, renders this dichotomy irrelevant as it would make any specially ordered or commissioned work which is created under the control of the hiring party a work made for hire under section 101(1).⁶⁵ Were that the proper interpretation, he claimed, section 101(2) would be superfluous as “many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1).”⁶⁶

Justice Marshall was equally unimpressed with the actual control test which the Second Circuit originally had articulated in *Aldon Accessories Ltd. v. Spiegel, Inc.*⁶⁷ It too, Justice Marshall claimed, was unworkable in light of the language of the statute.⁶⁸ In his eyes, section 101 already included a clear dichotomy between works prepared by an employee and those works which are commissioned.⁶⁹ The adoption of the actual control test, he concluded, only would create an unnecessary second dichotomy by drawing a distinction between commissioned works which are created under the actual control of the hiring parties and those which are not.⁷⁰

Finally, Justice Marshall considered and rejected the interpretation of section 101(1) which the Ninth Circuit had adopted in *Dumas v. Grommerman*.⁷¹ In *Dumas*,⁷² the Ninth Circuit construed the term “employee” in section 101(1) to refer only to a

61. The *hiring party* is the party who invokes the services of another—the *hired party*—to create the work in question. Alternatively, the hiring party may be referred to as the commissioning party.

62. *Id.* at 2173.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (citing *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984)).

68. *Reid*, 109 S. Ct. at 2174.

69. *Id.*

70. *Id.*

71. *Id.* at 2174 n.8.

72. 856 F.2d 1093 (9th Cir. 1989).

formal, salaried employee. Although conceding that there is some support for this interpretation in the legislative history, Justice Marshall again concluded that the language of the statute does not support such a construction.⁷³

C. *Legislative History Supports the Court's Interpretation*

Justice Marshall also argued that his construction of section 101(1), and its undefined terms, is supported by the legislative history of the Copyright Act of 1976.⁷⁴ He noticed that the 1976 overhaul of the copyright statute was the end result of "two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright office and, to a lesser extent, by Congress."⁷⁵ After tracing this lengthy period of negotiation and compromise in detailed fashion, Justice Marshall was convinced that two things remained unchanged throughout, each of which support his construction of the statute:

First, interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities. Second, in using the term "employee," the parties and Congress meant to refer to a hired party in a conventional employment relationship.⁷⁶

The legislative history was significant, Justice Marshall believed, because it clearly indicated that Congress intended to create two separate methods by which a work could become a work made for hire—one for employees and one for independent contractors.⁷⁷ Additionally, he continued, the legislative history supported the clear message of the statutory language, namely that Congress intended for a commissioned work to become a work made for hire only if it qualified under one of the nine enumerated categories in section 101(2), irrespective of the commissioning party's control.⁷⁸

CCNV advanced a contrary interpretation of the history leading to the enactment of the Copyright Act of 1976.⁷⁹ CCNV argued that in enacting the 1976 revision of the Copyright Act Congress intended to "incorporate a line of cases decided under the 1909 Act

73. *Reid*, 109 S. Ct. at 2174 n.8. Justice Marshall argued that "[t]he Act does not say 'formal' or 'salaried' employee, but simply 'employee.'" *Id.*

74. *Id.* at 2174-78.

75. *Id.* at 2174.

76. *Id.*

77. *Id.* at 2176.

78. *Id.* at 2176-77.

79. *Id.* at 2177.

holding that an employment relationship exists sufficient to give the hiring party copyright ownership whenever that party has the right to control or supervise the artist's work."⁸⁰ Essentially CCNV claimed that there was no evidence in the 1976 Act or in the Act's legislative history indicating that Congress intended to abandon the control standard set out in those cases.⁸¹

Justice Marshall rejected CCNV's interpretation as unpersuasive, primarily for two reasons.⁸² First, he believed CCNV's reliance on Congress' silence to argue that section 101(1) incorporated one of the control tests was misplaced because of the clarity of the language and the structure of section 101.⁸³ Second, Justice Marshall was unconvinced that Congress intended to incorporate the line of cases upon which CCNV relied because, he reasoned, the text of the work for hire provisions was agreed upon, in what was essentially its final form, prior to the decision in any of those cases.⁸⁴ In succinct fashion, Justice Marshall concluded that "Congress certainly could not have 'jettisoned' a line of cases that had not yet been decided."⁸⁵

Furthermore, Justice Marshall claimed that construing the statute as CCNV advocated would undermine Congress' "paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership."⁸⁶ He argued that the ability of negotiating parties to know with certainty at the outset the extent and nature of their relationship is crucial to avoiding subsequent disagreements over a copyright.⁸⁷ However, because the actual control test advocated by CCNV turns on how much control the hiring party exercises throughout the creation process, Justice Marshall claimed that were the Court to adopt it parties would not know until late in the process whether the hiring party's control was sufficient to render the work one made for hire.⁸⁸ As a result,

80. *Id.* (citing *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966)).

81. *Reid*, 109 S. Ct. at 2177.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. 129, *reprinted in* 1976 U.S. CODE CONG. & ADMIN NEWS 5659).

87. *Reid*, 109 S. Ct. at 2177-78.

88. *Id.* at 2178.

he reasoned, each party would have to guess whether a work will fall within 101(1).⁸⁹ Clearly, he claimed, such a situation was not intended by the drafters of the statute who sought to ensure predictability through advance planning.⁹⁰

In the end, Justice Marshall concluded that the language, structure, and legislative history of the work made for hire provisions do not support the conclusion that a hiring party's right to control, or actual control of, a commissioned work renders the work one by an "employee."⁹¹ Instead, he remarked, a court assessing whether a work is one made for hire must first determine, using the principles of the general common law of agency, whether the work was created by an employee or an independent contractor.⁹² Only after that determination, he pointed out, could a court apply the applicable subsection of section 101—subsection (1) if the court concludes that the creator is an employee and subsection (2) if the creator is an independent contractor.⁹³

D. The Court Holds That Reid Was An Independent Contractor

After Justice Marshall announced the proper method of interpreting section 101(1), he was left to determine, applying the general common law of agency, whether Reid was an employee working within the scope of his employment when he created "Third World America." Justice Marshall claimed that primarily the inquiry required a consideration of Reid's control over the manner and means by which the statue had been created.⁹⁴ Additionally, he enumerated several other factors, none of which is determinative, which he found relevant to assessing whether a hired party is an employee.⁹⁵

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* Justice Marshall suggested consideration of the following factors:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 2178-79. See also RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (providing a non-

Applying the factors to the facts, Justice Marshall concluded that Reid was an independent contractor and not CCNV's employee.⁹⁶ Although conceding that CCNV did exercise enough control over Reid's work to guarantee that the finished product was consonant with their specifications, Justice Marshall claimed that the amount of control is not dispositive.⁹⁷ In this case, he argued, all the other factors militate strongly against a finding that Reid was an employee.⁹⁸ For example, he noted that Reid was a sculptor by trade and that CCNV was not even in the sculpting business.⁹⁹ Additionally, Justice Marshall commented, Reid supplied his own tools and worked in his own studio in Baltimore—separated from CCNV which was housed in Washington, D.C.¹⁰⁰ Further, he claimed that Reid was retained for a very short period of time and that at no time did CCNV ever have the right to assign additional tasks to him.¹⁰¹ Also, Justice Marshall noted that Reid was free to choose when to work and was permitted to select his own assistants.¹⁰² Finally, he pointed out that Reid was compensated upon completion of the job, an arrangement frequently used to pay an independent contractor.¹⁰³

In sum, Justice Marshall concluded that the factors overwhelmingly indicated that Reid was not an employee but rather an independent contractor.¹⁰⁴ Reid being an independent contractor, he reasoned, "Third World America" only could be a work made for hire if CCNV could fit it within the parameters of section 101(2), a task CCNV conceded it could not achieve.¹⁰⁵

The Supreme Court merely affirmed the D.C. Circuit's interpretation of the word employee in the work made for hire provision of section 101. The court of appeals order remanding the case for a determination of whether CCNV was a joint author was not before the Court.¹⁰⁶ Therefore, in accord with the D.C. Circuit's order,¹⁰⁷ the Supreme Court remanded to the district court for a

exclusive list of factors relevant to determining whether a hired party is an employee).

96. *Reid*, 109 S. Ct. at 2179.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 2179-80.

106. *Reid*, 109 S. Ct. at 2180 n.32.

107. *See supra* text accompanying notes 42-43.

trial on the joint author issue.¹⁰⁸

IV. CONCLUSION

In *CCNV v. Reid* the Supreme Court settled the conflict which arose among the lower federal courts over the proper interpretation of the word employee within the work made for hire provision in section 101 of the Copyright Act of 1976. Specifically, the Court held that the word employee should be construed as it would be under the common law of agency. Although the Supreme Court's interpretation has settled the issue for the lower federal courts, Congress currently is considering legislation which would provide an express definition of the word employee within the statute.¹⁰⁹

*Celeste A. Siblesz**

108. The parties are going forward with discovery in an effort to prepare for trial. Telephone interview with Robert Allen Garrett, Arnold & Porter, Washington, D.C., attorney for CCNV (March 13, 1990). Although the parties are attempting to resolve the case through arbitration, the case has been set for trial in April 1990 before U.S. District Judge Thomas Jackson. *Id.*

109. S. 1253, 101st Cong., 1st Sess. (introduced June 22, 1989).

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