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Complicating the Copyright Law's "Work Made for Hire Provisions:" Community for Creative Non-violence v. Reid

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SUPREME COURT RAMIFICATIONS

COMPLICATING THE COPYRIGHT LAW'S "WORK MADE FOR HIRE PROVISIONS": *COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID*

Congress' power to enact copyright legislation is derived from the copyright clause of the United States Constitution.¹ The copy-

¹ U.S. CONST. art. I, § 8, cl. 8. The copyright clause provides that "[t]he Congress shall have Power . . . [t]o promote 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.* See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (Constitution gives Congress task of defining scope of copyright laws); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("copyright is the creature of the Federal Statute passed in the exercise of the power vested in the Congress."); A. LATMAN, *THE COPYRIGHT LAW* 16 (6th ed. 1986) ("constitutional provision upon which all U.S. copyright acts were founded"); 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 1.02, at 1-30 (26th ed. 1989) (federal power to enact copyright and patent legislation comes from clause). See generally *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647-56 (1943) (brief history of copyright law prior to 1909 Act); Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503-29 (1945) (discussion of copyright law suggesting revision of 1909 Act); Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 109-17 (1928) (historical account of copyright clause).

The copyright clause's primary purpose is to secure the "general benefits derived by the public from the labors of authors." *Fox Film Corp.*, 286 U.S. at 127. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Justice Stewart, writing for the Court, enumerated the purpose of copyright as a balance of competing claims upon the public interest:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair

right clause establishes the general principle that only an author should be afforded copyright protection.² In 1903, the United

return for an 'author's' creative labor. But the *ultimate aim* is, by this incentive, to stimulate artistic creativity for the general public good. (citations omitted). *Id.* (emphasis added). See also *Sony Corp. of America*, 464 U.S. at 477 (Blackmun, J., dissenting) (monopoly created by copyright rewards author in order to benefit the public (citing *Twentieth Century Music Corp.*, 422 U.S. at 156 (1975)); *Fox Film Corp.* 286 U.S. at 127-28 (1932)); *Red Baron - Franklin Park, Inc. v. Taito Corp.*, No. 88-0156-A (E.D. Va. July 18, 1989) (LEXIS, Genfed library, Dist file) (limited grant of exclusive right to authors is means by which public purpose is achieved); H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909). In the Report accompanying the 1909 Copyright Act revision, the Judiciary Committee of the House of Representatives explained that Congress' enactment of copyright laws under the copyright clause of the Constitution is founded "upon the ground that the welfare of the public will be served . . ." *Id.* See also THE FEDERALIST NO. 43, at 309 (J. Madison) (B. Wright ed. 1961). Although the debates on the copyright clause at the Constitutional Convention were limited, the clause's main purpose was described by James Madison when he wrote: "The copyright of authors has been solemnly adjudged . . . to be a right of common law *Id.* The public good fully coincides . . . with the claims of individuals." *Id.*

The protection of federal copyright legislation extends only to works that qualify as "writings" pursuant to the copyright clause. See U.S. CONST. art. I, § 8, cl. 8 ("to their respective Writings"); 1 M. NIMMER, *supra* at § 1.08 [A], at 1-44 (only "writings" may claim protection of copyright laws). See generally Note, *Copyright - Study of the Term "Writings" in the Copyright Clause of the Constitution*, 31 N.Y.U. L. REV. 1263 *passim* (1956) (discussion of term "writings" within meaning of copyright clause). The word "writings" has been liberally construed by the courts. See *Goldstein v. California*, 412 U.S. 546, 561 (1973) ("writings" construed to reflect broad arena of constitutional principles); *The Trademark Cases*, 100 U.S. 82, 94 (1879) ("writings" construed as "the fruits of intellectual labor embodied in the form of books, prints, engravings and the like"); *Reiss v. National Quotation Bureau*, 276 F. 717, 719 (S.D.N.Y. 1921) (Judge Learned Hand noted Congress' power includes the "ingenuity [that] men should devise" in the future).

² See U.S. CONST. art. I, § 8, cl. 8 ("securing for limited Times to Authors . . ."); 1 M. NIMMER, *supra* note 1, § 1.06 [A], at 1-37 (under copyright clause, only "authors" entitled to copyright protection). Courts construing the term "author" have deemed originality to be the determinative factor in deciding whether the author's work is afforded copyright protection. See *Goldstein*, 412 U.S. at 561 ("author," within constitutional sense, construed to mean "originator"); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) ("he to whom anything owes its origin"); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (copyrighted work owes its origin to author); A. LATMAN, *supra* note 1, at 17 (author is "one who [independently] creates a work without copying"). Generally, only a trace of originality is needed. See *Weissman v. Freeman*, 868 F.2d 1313, 1321 (2d Cir. 1989) (only "unmistakable dash of originality" need be shown); *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (originality requirement is minimal); A. LATMAN, *supra* note 1, at 23 (minimal amount of creative effort is required). Derivative works, however, must have substantial originality. See *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 753 F.2d 1565, 1568 (11th Cir. 1985) ("derivative work must contain some substantial, and not merely trivial originality"); *Eden Toys v. Florelee Undergarment Co.*, 697 F.2d 27, 34 (2d Cir. 1982) ("standard for sufficient originality [in derivative works] is whether work contains 'some substantial, not merely trivial, originality.'" (quoting *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976))); *Donald v. Zack Meyer's T.V. Sales & Serv.*, 426 F.2d 1027, 1030 (5th Cir. 1970), (same), *cert. denied*, 400 U.S. 992 (1971).

States Supreme Court implicitly recognized an exception to the general rule that if a work is made for hire, the creator's employer is deemed the author and is thereby entitled to copyright protection.³

The Copyright Act of 1909 codified this exception as the "works made for hire" doctrine.⁴ The legislative history of the works made for hire provisions in the 1909 Act indicates an intent to distinguish between the doctrine's treatment of employees and independent contractors.⁵ Nevertheless, courts construing these provisions extended the earlier common law rule which presumed

³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903). Although ownership of copyrights was not a major issue in *Bleistein*, the case is deemed to be the origin of the "work for hire" doctrine. *Id.* Referring to the ownership of circus advertisement designs the Court stated: "[t]here was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs." *Id.* See *Murray v. Gelderman*, 566 F.2d 1307, 1309 (5th Cir. 1978) ("work for hire" doctrine was first recognized by Supreme Court in *Bleistein*); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567 (1966) ("so-called 'works for hire' doctrine recognized" in *Bleistein*); Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485, 487 (1982-83) (cases and commentators agree that *Bleistein* is origin of "work for hire" doctrine); Comment, *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, 649 (1986) (*Bleistein* is seminal case on "work for hire" doctrine).

Today, the "works made for hire" doctrine is codified in the Copyright Act of 1976. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1982)). The Act provides in part: "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 purposes of this title . . ." *Id.* at § 201(b). Categorizing a work as "made for hire" is important not only because it determines the initial ownership of the copyright but also the copyright duration, the owner's renewal rights, and the owner's termination rights. See *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2171 (1989); I M. NIMMER, *supra* note 1, at § 5.03[A].

⁴ Copyright Act of 1909, Pub. L. No. 349, Ch. 320, § 62, 35 Stat. 1088 (1909). The "work made for hire" doctrine in the 1909 Act stated "the word 'author' shall include an employer in the case of works made for hire." *Id.* The 1909 Act also codified the general rule regarding "authors" and "writings": "the works for which copyright may be secured under this title shall include all the writings of an author." *Id.* at § 4, 35 Stat. 1079.

⁵ See *Stenographic Report of the Proceedings of the Librarians' Conf. on Copyright*, 2d Sess. 188 (Nov. 1-4, 1905), reprinted in 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT at 188 (E. Brylawski & A. Goldman ed. 1976). During the hearings for the 1909 Act a distinction between independent contractors and employees was recognized. *Id.* Mr. Smith, Secretary of the Reproductive Arts Copyright League, noted that "the right belonging to [an employed artist] . . . should be very different from the right held by the independent artist . . ." *Id.* See Note, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1284-85 (1987) (legislative history of 1909 Act indicates legislators distinguished between employees and independent contractors).

employer ownership in the copyrights of commissioned works.⁶ These decisions applied the works made for hire doctrine equally to employers and independent contractors.⁷

The Copyright Act of 1976⁸ completely revised the 1909 Act.⁹

⁶ See *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939) (at common law, copyright of commissioned work presumptively passes to patron), *cert. denied*, 309 U.S. 686 (1940); *Dielman v. White*, 102 F. 892, 894-95 (C.C.D. Mass. 1900) (strong implication that copyright belongs to patron if she commissions artist to prepare work). Cf. *Lumiere v. Robertson-Cole Distrib. Corp.*, 280 F. 550, 552-53 (2d Cir.) (copyright of photograph rests with sitter, not commissioned photographer), *cert. denied*, 259 U.S. 583 (1922); *Lumiere v. Pathe Exchange, Inc.*, 275 F. 428, 428 (2d Cir. 1921) (photographer's employer entitled to copyright).

⁷ See *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966). *Brattleboro* is the seminal case revealing the equal treatment of independent contractors and employees. The court noted that the "works for hire" doctrine "is applicable whenever an employee's work is produced at the instance and expense of his employer." *Id.* at 567. The court continued: "We see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor." *Id.* at 568. See Comment, *supra* note 3, at 649-50 (under 1909 Act doctrine applied equally to employees and independent contractors). See, e.g., *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (when employer engages another, regardless of her status as independent contractor or employee, presumption is that copyright title rests in employer); *Grant v. Kellogg, Co.*, 58 F. Supp. 48, 54 (S.D.N.Y. 1944) (independent commercial artist who created Rice Krispies gnomes surrendered copyright by virtue of employment with Kellogg).

⁸ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1982)). The pertinent "work for hire" provisions of the 1976 Act are § 101(1) and (2), which defines a "work made for hire" and § 201(b) regarding ownership of copyright. Section 101 provides in part:

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 *specialy 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. at §101 (1) and (2) (emphasis added). Section 201(b) provides:

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 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.

Id. at § 201(b).

⁹ See *Dumas v. Gommerman*, 865 F.2d 1093, 1096-97 (9th Cir. 1989) (Congress did not want to continue the 1909 Act). The *Dumas* court further noted that "the 1976 Act was a 'radical departure' from prior law." *Id.* at 1102 (quoting Ms. Barbara Ringer, former Register of Copyrights); Ringer, *First Thoughts on the Copyright Act of 1976*, 13 COPYRIGHT 187, 188 (1977) ("bill that . . . became . . . Act of 1976 . . . not based on pre-existing legislation"). See also *Dumas*, 865 F.2d at 1097 n.6 (provides exhaustive list of commentators who unanimously agree that 1976 Act is clear break from prior doctrine). But see O'Meara, *'Works Made for Hire' under the Copyright Act of 1976 — Two Interpretations*, 15 CREIGHTON L. REV. 523 (1982) (legislative history is ambiguous).

The 1976 Act's new work for hire provisions¹⁰ are the manifestation of a heavily negotiated compromise between the creators of works and the parties that hire them regarding the treatment of commissioned works prepared by independent contractors.¹¹ The creators advocated the exclusion of commissioned works from the definition of work for hire¹² and alternatively, because of their weak bargaining position,¹³ opposed any broad definition that would transform a commissioned work into a work for hire upon

¹⁰ See *supra* note 8 (enumerates new work for hire provisions of 1976 Act).

¹¹ See *Dumas*, 865 F.2d at 1098 ("compromise" of new definitions are product of "hard-fought negotiations"). Both the Senate and House Reports on the final bill noted: "The definition now provided by the bill represents a compromise which . . . spells out those specific categories of commissioned works that can be considered 'works made for hire. . .'" 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. AND ADMIN. NEWS 5659, 5737. See also Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 859 (1987) (1976 Act is "detailed comprehensive code . . . full of specific, heavily negotiated compromise"); Note, *supra* note 5, at 1292 ("a compromise had been reached"). At first, the compromise consisted of four specific categories of commissioned works which could be works made for hire if the parties agreed in writing. See REGISTER OF COPYRIGHTS, 89th Cong., 1st Sess., *Supplementary Report on Copyright Law Revision* pt. 6, at 67-68 (Comm. Print 1965). From the Report it was clear that "other works made on . . . commission would not come within the definition . . . of a work made for hire." *Id.* In 1967, another compromise added an additional four categories to the list. See H.R. REP. NO. 83, 90th Cong., 1st Sess. 86, 87 (1967). The final list of enumerated categories of commissioned works which could be works for hire if the parties agreed in writing is codified at 17 U.S.C. § 101(2) (1982). See *supra* note 8 (quotes text of 17 U.S.C. § 101(2)).

¹² Cf. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, reprinted in 1976 U.S. CODE CONG. AND ADMIN. NEWS 5659, 5737 (creators proposed that hiring party could use the work to extent it was needed for his regular business, but all other rights vested in creator); Note, *supra* note 5, at 1291. The complete exclusion of commissioned works was met with "strong opposition on the part of book publishers . . ." *Id.*

¹³ See *Definition of Work Made for Hire in the Copyright Act of 1976: Hearing on S. 2044 Before the Committee on the Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter *Hearing on S. 2044*]. Due to unequal bargaining power of parties, authors had two choices: submit work as work made for hire or do not submit it. *Id.* at 132-33 (statement of illustrator, Mr. Robert G. Steele); Note, *supra* note 5, at 1308-09 (citing *Hearing on S. 2044*); Note, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*, 83 COLUM. L. REV. 1245, 1254 n.57 (1983) ("An artist's total dependence on the publisher to reach the public explains [leverage publisher has over artist]"). See also *Hearing on S. 2044, supra*, at 34 (fact that big stars can negotiate any contract they want is "irrelevant to problems faced by professionals at all levels") (statement of Ms. Robin Brickman, member of Graphic Artist's Guild); *Id.* at 73 (highest paid composer in his field stated if he chose not to enter into work made for hire arrangement, he would have to consider some other field of work) (statement of Mr. Elmer Bernstein, for Screen Composers of America). But see *id.* at 59 (Magazine Publishers Association argued that magazine writers "exercise bargaining power on an equal level . . . and demand and receive their quid pro quo") (statement of Mr. E. Gabriel Perle, for Magazine Publishers Association).

the creator's written consent.¹⁴ The publishers, on the other hand, opposed any exclusion of commissioned works from the work for hire definition in an effort to retain as many copyrights as possible.¹⁵ Unlike the 1909 Act's provision for works made for hire,¹⁶ section 101 makes a sharp distinction between works "prepared by an employee within the scope of his or her employment" and works prepared by an independent contractor.¹⁷ Under the 1976 Act, a commissioned work prepared by an independent contractor must meet two criteria to be deemed a work made for hire.¹⁸ It must fall within one of nine enumerated categories,¹⁹ and the parties must agree in writing that the work shall be considered a work made for hire.²⁰

Despite the apparent distinction between employees and independent contractors in section 101's definition of work made for hire,²¹ Congress' failure to define the term "employee" has caused many hiring parties to assert copyright ownership pursuant to subdivision one even when dealing with independent contractors.²² Consequently, the circuit courts have split in their interpre-

¹⁴ H.R. REP. NO. 83, 90th Cong., 1st Sess. 86 (1967). See Note, *supra* note 5, at 1292.

¹⁵ See H.R. REP. NO. 83, 90th Cong., 1st Sess. 86 (1967) (opponents of commissioned work exclusion argued that "distinction between employment and commission is . . . meaningless"); Angel & Tannenbaum, *Works Made for Hire Under S. 22*, 22 N.Y.L. SCH. L. REV. 209, 230-32 (1976) (strong opposition to exclusion of commissioned works expressed by publishers).

¹⁶ See *supra* note 4 (quotes "works made for hire" provisions of 1909 Act).

¹⁷ 17 U.S.C. § 101. Subdivision one applies specifically to works prepared by "employee[s]" and subdivision two applies specifically to "specially ordered or commissioned" works. *Id.*

¹⁸ See 17 U.S.C. § 101(1), (2) (1982); *supra* note 8 and *infra* note 20 and accompanying text (text of § 101 (1) and (2)).

¹⁹ See 17 U.S.C. § 101(2) (1982). The nine categories are: 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, and an atlas. *Id.* The first category of "a contribution to a collective work" includes contributions to such works as newspapers and magazines, therefore § 101(2) affects a substantial number of authors and artists. See generally I M. NIMMER, *supra* note 1, §3.02, at 3-5 to 3-8 (nature of collective works).

²⁰ See 17 U.S.C. § 101(2) (1982) ("if . . . parties . . . agree in a written instrument signed by them . . ."); *May v. Morganelli-Heumann and Assoc.*, 618 F.2d 1363, 1368 n.4 (9th Cir. 1980) (independent contractor not subject to works for hire doctrine because absence of written agreement and drawings did not fall within any enumerated category); *Meltzer v. Zoller*, 520 F. Supp. 847, 854-55 (D.N.J. 1981) (same).

²¹ See *supra* note 8.

²² See, e.g., *Dumas v. Gommerman*, 865 F.2d 1093, 1095-96 (9th Cir. 1989) (purchaser of lithographs from independent contractor's employer asserts copyright ownership be-

tation of "employee" in section 101 of the Copyright Act.²³ Recently, however, the United States Supreme Court purported to resolve this conflict in *Community for Creative Non-Violence v. Reid*.²⁴

I. COMMUNITY FOR CREATIVE NON-VIOLENCE V. REID

The plaintiff, Community for Creative Non-Violence (CCNV), is a charitable organization dedicated to eliminating homelessness in America.²⁵ During the fall of 1985, CCNV decided to sponsor a display for the December Pageant of Peace in Washington, D.C.²⁶ CCNV conceived the general idea of the display, a sculpture entitled "Third World America," which depicted a "modern" Nativity scene of a homeless black couple and their newborn, reclining on a steam grate.²⁷

Respondent, James Earl Reid, a sculptor, orally agreed to sculpt the three figures²⁸ while CCNV took on the task of creating the steam grate and pedestal.²⁹ On Christmas Eve, Reid completed

cause purchased from employer); *Easter Seal Soc'y for Crippled Children and Adults of La., v. Playboy Enters.*, 815 F.2d 323, 324-25 (5th Cir. 1987) (Easter Seals asserted copyright against purchaser of film made by independent contractor working for Easter Seals), *cert. denied*, 485 U.S. 981 (1988), [hereinafter *Easter Seal*]; *Evans Newton, Inc. v. Chicago Sys. Softw.*, 793 F.2d 889, 891-92 (7th Cir.) (employer of independent contracting computer program sought copyright damages when programmer marketed same program), *cert. denied*, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 549-51 (2d Cir.) (employer of independent contractor asserted copyright against party who purchased design from independent contractor), *cert. denied*, 469 U.S. 982 (1984).

²³ See *infra* notes 47-51 and accompanying text (discussing four interpretations of "employee" within meaning of § 101(1) of "works made for hire" provisions).

²⁴ 109 S. Ct. 2166 (1989).

²⁵ *Id.* at 2169. Mitchell D. Snyder "a member and trustee of CCNV," was also a plaintiff. *Id.*

²⁶ *Id.* Ultimately, the sculpture was rejected by the Pageant because of its political undertones. See *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1455 n.6 (D.D.C. 1987). The sculpture was, however, displayed nearby. *Id.*

²⁷ See *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2169 (1989) [hereinafter *CCNV v. Reid*, 109 S. Ct. 2166 (1989)] (quoting *CCNV v. Reid*, 652 F. Supp. 1453, 1454 (D.D.C. 1987)). On the pedestal of the sculpture was written "and still there is no room at the inn." *Id.*

²⁸ *Id.* Reid also agreed to sculpt a shopping cart containing the figures' belongings. *CCNV v. Reid*, 846 F.2d 1485, 1487 (D.C. Cir. 1988). "Reid decided to donate his services to this 'worthy cause.'" Brief for Respondent at 1, *CCNV v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293) [hereinafter Brief for Respondent] (quoting transcript of trial before the district court, February 2, 1987, at 146, Reid testifying).

²⁹ *CCNV*, 109 S. Ct. at 2169. CCNV assumed all expenses incurred in the production of the work, which totaled \$15,000. *Id.*; Brief for Respondent, *supra* note 28, at 1 ("Snyder agreed to reimburse Reid's expenses," ultimately paying him total of \$15,000).

the sculpture and delivered it to Washington, D.C.³⁰ After a one month display, the sculpture was returned to him for some minor repairs.³¹ It was during this time that Reid learned CCNV was planning to take the sculpture on a tour of several cities.³² When CCNV requested the return of "Third World America," Reid refused, contending that the sculpture was too fragile to withstand such a rigorous tour.³³ Subsequently, Reid filed a certificate of copyright registration for the sculpture in his name.³⁴ Immediately thereafter, CCNV filed their own competing certificate of copyright registration.³⁵

CCNV brought suit against Reid seeking the return of "Third World America" and a determination of copyright ownership.³⁶ The district court held that the sculpture was a work made for hire under section 101 of the Copyright Act and that CCNV was the exclusive owner of the copyright in the sculpture.³⁷ The Court of Appeals for the District of Columbia reversed and remanded the case.³⁸ Adopting the "literal interpretation" of the Fifth Circuit, the court held that the sculpture was not a "work made for hire" under section 101 of the Copyright Act because

³⁰ *CCNV*, 109 S. Ct. at 2170. It was previously agreed that the sculpture would be delivered on December 12. *Id.*

³¹ *Id.*

³² *Id.* The purpose of the tour was to raise money for the homeless. *Id.*

³³ *Id.* at 2170. The three figures were made of a synthetic material known as "Design Cast 62" which could be tinted to look like bronze. *Id.* at 2169-70. Reid objected to the tour because he felt that the Design Cast 62 was "not strong enough to withstand the ambitious itinerary." *Id.* at 2170. Instead, Reid wanted the sculpture to be cast in bronze at a cost of \$35,000 or, in the alternative, to have a master mold made at a cost of \$5,000. *Id.* But, CCNV refused to spend more money on the project. *Id.*

³⁴ *CCNV*, 109 S. Ct. at 2170. Reid also had placed beneath the title of the sculpture his own copyright notice: "© James Earl Reid, Sculptor '85." *CCNV v. Reid*, 846 F.2d. 1485, 1488 n.2 (D.C. Cir. 1988).

³⁵ *CCNV*, 109 S. Ct. at 2170.

³⁶ *Id.* Ronald Purtee, Reid's photographer, was also a party to the action. But he never appeared before the court, nor did he claim any interest in the sculpture. *Id.* at 2170 n.1.

³⁷ *Id.* at 2170. Prior to the district court's decision in favor of CCNV, the court granted CCNV's motion for preliminary injunction, ordering Reid to return the sculpture. *Id.* The district court reasoned that Reid was CCNV's employee because CCNV was the motivating force in the production of the sculpture, and since CCNV "directed enough of [Reid's] effort to assure that, in the end, he had produced what they, not he, wanted, . . ." *CCNV v. Reid*, 652 F. Supp. 1453, 1456 (D.D.C. 1987). It is important to note that petitioners did not assert that the sculpture satisfies the terms of § 101(2) and therefore the dispositive inquiry in this case concerns the meaning of § 101(1). *CCNV*, 109 S. Ct. at 2171-72.

³⁸ *Id.* at 2170. See *infra* note 49 (discussion of Fifth Circuit's "literal interpretation" in *Easter Seals* case).

Reid was an independent contractor under agency law.³⁹ Further, the sculpture did not fall within one of the nine categories of work enumerated in the statute, nor did the parties agree in writing that the sculpture would be a work made for hire.⁴⁰ Nevertheless, the court did suggest that the sculpture might be a joint work under the Copyright Act and remanded the case for determination of this issue.⁴¹ The United States Supreme Court granted certiorari⁴² to resolve the conflict among the circuits as to the proper construction of the work made for hire provisions of the Copyright Act.⁴³ In a unanimous decision, the Court affirmed the trial court's judgment.⁴⁴

Writing for the Court, Justice Marshall focused his inquiry on the proper construction of section 101(1);⁴⁵ specifically, "whether 'Third World America' is 'a work prepared by an employee within the scope of his or her employment.'" ⁴⁶ The Court began its inquiry with a discussion of the four interpretations that have emerged among the circuits:⁴⁷ 1) an "employee" prepares a work whenever the hiring party retains the *right* to control the product,⁴⁸ 2) an "employee" prepares a work whenever a hiring party

³⁹ *Id.*

⁴⁰ *CCNV*, 109 S. Ct. at 2170. The court of appeals construed Section 101 as creating "a simple dichotomy in fact between employees and independent contractors." *Id.* (quoting *CCNV v. Reid*, 846 F.2d 1485, 1492 (1988)).

⁴¹ *Id.* The issue of whether "Third World America" is a joint work will not be discussed in this Comment. "A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1982) (defining "joint work"). "The authors of a joint work are co-owners of copyright in the work." *Id.* at § 201(a).

⁴² 109 S. Ct. 362 (1988).

⁴³ *CCNV*, 109 S. Ct. at 2170-71. Compare *Dumas v. Gommerman*, 865 F.2d 1093, 1102 (9th Cir. 1989) (only "formal, salaried" workers are employees under § 101(1)) with *Easter Seal*, *supra* note 22, at 334-35 (common law agency principles determine who is employee under § 101(1)) and *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), (*actual* control of hired party determines whether she is "employee" under § 101(1)), *cert. denied*, 469 U.S. 982 (1984) and *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) (*right* to control hired party establishes an "employee" under § 101(1)).

⁴⁴ *CCNV*, 109 S. Ct. at 2180.

⁴⁵ *Id.* at 2171-72 (quoting 17 U.S.C. § 101(1)).

⁴⁶ *Id.*

⁴⁷ See *Id.* at 2172. The Court noted that the conflict in the circuits has arisen due to the legislature's failure to define a "work prepared by an employee within the scope of his or her employment." *Id.*

⁴⁸ *Id.* See *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 828 (D. Colo. 1985). In *Peregrine*, a photographer sought to compel an advertising agency to pay for his services by obtaining copyrights to the photographs he had taken for defendant. *Id.* at 828. Defend-

actually wields control with respect to the creation of a particular work,⁴⁹ 3) an "employee" within section 101(1) refers only to "formal, salaried" employees,⁵⁰ and 4) an "employee" within sec-

ant's motion for summary judgment was granted, however, because it was able to rebut the prima facie validity of the copyright. *Id.* at 829. The court reasoned that the "work for hire relationship exists when an employer has the *right* to control the party doing the work . . ." *Id.* (emphasis added). See also *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 415 (4th Cir. 1987) (Hall, J., dissenting) ("Regardless of whether [employer's] control is ever exercised . . . only rational conclusion is that Congress, under the 1976 Act intended for the [work] produced by employee to be a work made for hire."); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 142 (S.D.N.Y. 1983) ("employment relationship rests . . . on *right to control and not the exercise of that right*") (emphasis added); 1 M. NIMMER, *supra* note 1, § 5.03[B][1][a], at 5-13 (crucial question in determining employment relationship is whether employer has right to control employee).

⁴⁹ *CCNV*, 109 S. Ct. at 2172. See *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). Looking to the legislative history of the 1976 Act, the *Aldon* court noted that the common law presumption that a patron owned the copyright of the independent contractor's work product created an injustice in cases where the independent contractor did everything and the hiring party did nothing. *Id.* (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5737). Relying on legislative silence, however, the court wrote: "there is no indication . . . that Congress was focusing on contractors who *actually* supervised and directed . . ." *Aldon*, 738 F.2d at 552 (emphasis added). The court held that in actual control situations, the common law presumption was not changed. *Id.* The *Aldon* interpretation was subsequently adopted by two circuits. *CCNV*, 109 S. Ct. at 2172. See *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 413 (4th Cir. 1987) (citing *Aldon* as applying to circumstances when temporary situations exist where "an employee of one may be regarded as an employee of another."); *Evans Newton, Inc. v. Chicago Sys. Softw.*, 793 F.2d 889, 894 (7th Cir.) (court found Second Circuit's actual control analysis "compelling"), *cert. denied*, 479 U.S. 949 (1986).

The overwhelming position taken by commentators is that *Aldon* is an aberration which should not have been followed. See LITMAN, *supra* note 11, at 900 (*Aldon* "cleav[ed] to earlier doctrine, and mangl[ed] the statutory language, . . . the court's interpretation strains the statutory language," and renders writing requirement in § 101(2) meaningless); Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U. L. REV. 373, 389 (1987) (*Aldon* "misapplied literal terms of the 1976 Act"); Comment, *supra* note 3, at 661 (*Aldon* misinterpreted 1909 Act's case law and 1976 Act's legislative history). See generally Brief for Respondent *supra* note 28, at 17-19 (provides three page list of commentators who disagree with *Aldon*). *Peregrine*, which is an extension of *Aldon*, has been equally criticized. See Comment, *The "Work Made for Hire" Definition in the 1976 Copyright Act-A Simple Dichotomy*: Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, 26 HOUS. L. REV. 361, 376-77 (1989) (*Peregrine* underscores dangers of *Aldon* because it extended *Aldon* from "actual control" to mere "right to control").

⁵⁰ *CCNV*, 109 S. Ct. at 2172. See *Dumas v. Gommerman*, 865 F.2d 1093, 1102 (9th Cir. 1989). The *Dumas* court relied largely on the legislative history of the 1976 Act to come to its determination. See *id.* at 1098-1101 ("to fully understand the meaning of 'employee' as used in the Act, we must turn to its legislative history."). Cf. LITMAN, *supra* note 11, at 901 (those involved in legislative history understood "employee" to mean employee in salaried job). See also *infra* note 61 and accompanying text (discussing legislative history and commentators in support of *Dumas* interpretation). But see *Gallery House, Inc. v. Yi*, 582 F. Supp. 1294, 1297 (N.D. Ill. 1984) (one may be employee even when unpaid); 1 M. NIMMER,

tion 101(1) carries its agency meaning.⁵¹ The first two interpretations could not be reconciled with the statutory language and were therefore rejected.⁵² The Court relegated its dismissal of the third interpretation to a footnote, reasoning that a “formal, salaried” construction is not supported by the statutory language.⁵³ Ultimately, the Court adopted the agency view endorsed by the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*.⁵⁴ Using this approach, Justice Marshall concluded that Reid was an independent contractor and therefore, “Third World America” was not a “work made for

supra note 1, § 5.03[B][1][a], at 5-12 (“unimportant whether . . . employee is a regular or formal employee”).

⁵¹ *CCNV*, 109 S. Ct. at 2172. *See Easter Seal*, *supra* note 22, at 334-35. In *Easter Seal*, the court adopted a “literal interpretation” which “read[s] § 101 as a reflection of a simple dichotomy in fact between employees and independent contractors.” *Id.* at 329. The first step under the *Easter Seal* test is to determine whether the hired party was an employee or independent contractor using agency law principles. *Id.* If the hired party was an employee then § 101(1) applies and if she was an independent contractor then § 101(2) applies. *Id.* The court adopted the agency law approach because “‘scope of employment’ is virtually a term of art in agency law.” *Id.* at 335. The court used the Restatement of Agency as a guide. *Id.* at 335-36. *See also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). The nonexclusive list of factors in § 220(2) of the Restatement are helpful in a court’s determination of an employment relationship:

- (a) the extent of control which, by 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;
- (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 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.

Id.

⁵² *See CCNV*, 109 S. Ct. at 2173 (neither actual control nor right to control tests are “consistent with the text of the act”). Both tests ignore the dichotomy between § 101(1) and (2) by allowing an independent contractor who is either subject to the hiring party’s right to control or who is actually controlled to fall within § 101(1)’s employment relationship. *See id.*

⁵³ *CCNV*, 109 S. Ct. at 2174 n.8. The Court, nevertheless, did admit that there was support for this interpretation in the legislative history. *Id.* *See infra* note 61 and accompanying text (discussing legislative history in support of formal, salaried interpretation).

⁵⁴ 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 484 U.S. 981 (1988). *See supra* note 49 (discussing agency approach adopted by Fifth Circuit and Supreme Court).

hire" within the meaning of section 101(1).⁵⁵

In view of the legislative history⁵⁶ and statutory language⁵⁷ of the Copyright Act of 1976, the Supreme Court had two alternatives in *CCNV*.⁵⁸ The Court could have either adopted the *Easter Seal* agency approach, as it did,⁵⁹ or the "formal, salaried" employee approach advanced by the Ninth Circuit in *Dumas v. Gommerman*.⁶⁰ This Comment will assert that the *Dumas* interpretation warranted more than a cursory dismissal. It will then analyze the problems inherent in the *CCNV* Court's application of the *Easter Seal* interpretation, including its failure to address the issue of retroactivity. Finally, it will suggest a statutory modification to the Copyright Act, codifying a nonretroactive *Dumas* interpretation of "employee" as an alternative to the Supreme Court's *Easter Seal* approach.

II. REJECTION OF *Dumas* APPROACH

Although the *CCNV* Court conceded that the "formal, salaried" employee construction of section 101(1) can be supported by the

⁵⁵ *CCNV*, 109 S. Ct. at 2179-80. The Court applied a multifactor non-exclusive balancing test, utilizing the RESTATEMENT OF AGENCY. *See id.* at 2178-79. *See, e.g., id.* at 2178-79 nn.18-31 (examples of courts that apply agency factors).

⁵⁶ *See supra* notes 8-20 and accompanying text (discussing compromise in legislative history that lead to different treatments of employees and independent contractors).

⁵⁷ *See supra* note 49 and accompanying text (commentators criticizing *Aldon* and *Peregrine* decisions' distortion of statutory language); note 52 and accompanying text (actual control and right to control tests cannot be squared with language of statute).

⁵⁸ *See supra* notes 50 and 51 and accompanying text (discussing formal, salaried and agency law tests, respectively).

⁵⁹ *See supra* note 54 and accompanying text.

⁶⁰ 865 F.2d 1093 (9th Cir. 1989). *See supra* note 50 and accompanying text (discusses formal, salaried view). The "formal, salaried" approach was endorsed by the Respondent: the Ninth Circuit's "formal salaried" interpretation "most properly addresses the Copyright Act's work for hire provisions." Brief for Respondent, *supra* note 28, at 10. An amicus brief submitted by the United States Copyright Office and the Solicitor General supported the Respondent's view: "The language, history, and purpose of the work-made-for-hire provisions make clear that Subsection (1) applies only to works prepared by regular, salaried employees . . ." Brief for Register of Copyrights as Amicus Curiae Supporting Respondent at 7, *CCNV v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293) [hereinafter Brief for Register]. The Copyright Office is the agency which has the responsibility of administering and regulating the Copyright Laws. *See* 17 U.S.C. §§ 701-710 (1982). Reid's attorney noted that the most significant development in the case was the Solicitor General's brief on behalf of Reid and his formal, salaried interpretation because the Supreme Court often follows the Solicitor General's viewpoint in difficult cases involving federal law. *See* L.A. Times, Feb. 12, 1989, Calendar Section, at 7.

legislative history,⁶¹ the Court quickly rejected this interpretation on two grounds.⁶² First, the Court noted that the express language of section 101(1) does not support such an interpretation.⁶³ The Court reasoned that “[t]he Act does not say ‘formal’ or ‘salaried’ employee, but simply ‘employee.’”⁶⁴ Second, the Court noted that the respondent, amici and the Ninth Circuit who support the “formal, salaried” approach disagree on the test’s content.⁶⁵ Finally, the Court asserted that the *Dumas* court actually adopted an approach drawn from agency law principles which the Court endorses.⁶⁶ Perhaps more persuasive arguments militate

⁶¹ See *CCNV v. Reid*, 109 S. Ct. 2166, 2174 n.8 (1989) (“there is some support for such a [formal, salaried] definition in the legislative history”). Borge Varmer’s study of works made for hire and on commission was part of Congress’ program of research of the copyright law which would aid in the revision process of the 1909 Act. See STAFF OF SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHT LAW REVISION, 86TH CONG., 2d SESS., STUDY 13 WORKS MADE FOR HIRE AND ON COMMISSION (Comm. Print 1960) (report by B. Varmer). Varmer concluded that the 1909 Act’s work for hire provisions only addressed *salaried* employees and suggested that if the work for hire rule was not to include commissioned works, the definition might further specify “employment on a salary basis.” *Id.* at 141. In 1963, a preliminary draft of the work made for hire definition read: “a work prepared by an employee within the scope of his duties of his employment, *but not including a work made on special order or commission.*” REGISTER OF COPYRIGHTS, 89TH CONG., 1st SESS., SUPPLEMENTARY REPORT ON COPYRIGHT LAW REVISION PART 6, at 66 (Comm. Print 1965) (emphasis added). The publisher’s substantial resistance to this definition lead to subsection (2) of the existing act, enumerating specific instances where commissioned works are works made for hire. See *supra* notes 8-20 and accompanying text. Important for present purposes is that virtually all the parties resisting the preliminary draft referred to employees as formal, salaried employees. See, e.g., COPYRIGHT LAW REVISION, PART 4, FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW, 88TH CONG., 2d SESS. 250 (Comm. Print 1964) (American Book Publishers complained that suggested definition would “include only work done by a salaried employee in the scope of his regular duties”); *Id.* PART 3, at 259-61 (American Bar Association representative argued against preliminary definition because there was no difference between “payroll” worker and commissioned worker) (emphasis added); *Id.* at 267 (“‘employee’ . . . means social security, withholdings, and all other attendant mechanical housekeeping tasks”); *Id.* at 321 (“might be helpful not to restrict [definition] to . . . technical employer-employee relationship”); Hardy, *Copyright Law’s Concept of Employment-What Congress Really Intended*, 35 J. COPYRIGHT SOC’Y OF USA, 210, 225-27 (1988) (provides numerous examples similar to those mentioned above). See also Note, *supra* note 11, at 901 (“plenty of discussion indicates that everyone involved understood [employee] to mean someone working for an employer in a salaried job . . .”).

⁶² See *infra* notes 74-92 and accompanying text (analyzes Court’s two bases for rejecting formal, salaried interpretation).

⁶³ *CCNV*, 109 S. Ct. at 2174 n.8.

⁶⁴ *Id.*

⁶⁵ See *id.* The Court suggests that Respondent’s test required the hired party to be on the payroll while an amicus’ test required that the hired party “receives a salary *and* is treated as an employee for Social Security and tax purposes” *Id.*

⁶⁶ See *id.* “Even the one court of appeals to adopt what it termed a formal, salaried employee test in fact embraced an approach incorporating numerous factors drawn from the

against the rationale of the *CCNV* Court.

A. Rules of Statutory Interpretation Favor the Ordinary and Common Understanding of the Term "Employee"

While it is true that section 101(1) does not explicitly say "formal" or "salaried,"⁶⁷ it is suggested that the *CCNV* Court's reliance on this premise to reject the *Dumas* view defeats its own agency law construction of the term "employee." If express language is the Court's criterion,⁶⁸ then "employee" cannot carry its agency law meaning either because the statute does not say "employee according to agency law principles."⁶⁹ In the absence of a statutory definition, the general rule of statutory construction is that "words will be interpreted as taking their ordinary, contemporary, common meaning."⁷⁰ Although the established legal understanding of the term employee falls within the agency interpretation,⁷¹ the "ordinary" and "common" meaning favors a "formal, salaried" construction.⁷²

B. Consensus on the Application of Dumas

The *CCNV* Court also based its refusal to adopt a "formal, salaried" interpretation on the inability of the proponents of this view

agency law definition of employee which we endorse." *Id.* (citation omitted).

⁶⁷ See 17 U.S.C. § 101(1) (1982); *supra* note 8 (quotes text of § 101(1)).

⁶⁸ See *CCNV*, 109 S. Ct. at 2174 n.8 (language of act cannot support "formal, salaried" approach); Reply Brief for Petitioner at 12, *CCNV v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293) [hereinafter Reply Brief] ("would not have been difficult for Congress to place adjectives 'formal' and 'salaried' before the word 'employee' in Section 101(1)").

⁶⁹ See 17 U.S.C. § 101(1) (1982). *But see CCNV*, 109 S. Ct. at 2172-73 (Court argues that "scope of employment" is widely used term of art in agency law).

⁷⁰ *Perrin v. United States*, 444 U.S. 37, 42 (1979). See *Malat v. Riddell*, 383 U.S. 569, 571 (1966) (words of statutes should be construed in ordinary, everyday sense); *Deputy v. DuPont*, 308 U.S. 488, 493 (1940) ("general rule is that popular . . . import of words furnishes the interpretation of public laws").

⁷¹ See, e.g., *Kelley v. Southern Pac.*, 419 U.S. 318, 322-23 (1974) (standard of proof of employment for coverage under FELA is proof of master-servant relationship); *Baker v. Texas & Pac. Ry.*, 359 U.S. 227, 228 (1959) (same); *Robinson v. Baltimore & Ohio Ry.*, 237 U.S. 84, 94 (1915) (same).

⁷² See WEBSTER'S NEW WORLD DICTIONARY 459 (2d ed. 1972) ("person hired by another, or by a business firm, etc., to work for wages or salary"); Brief for Respondent, *supra* note 28, at 24 ("hired by another at a regularly paid salary to work over a long, indefinite time period". . . "what most people understand 'employee' to mean"). See also *Litman*, *supra* note 11, at 890 (pre-legislative dialogue indicated phrase to mean "a salaried worker in a long-term position").

to agree on its application.⁷³ An examination of the tests proposed, however, reveals that they all contain the same intrinsic element: a hired party who receives compensation on a regular basis.⁷⁴ The Court illustrated the tests to demonstrate the inconsistencies.⁷⁵ For example, it noted that Reid urged a test where the hired party must be a payroll employee,⁷⁶ while the amicus brief of Volunteer Lawyers for the Arts proposed that the hired party must be treated as an employee for tax and Social Security purposes.⁷⁷ It is submitted that the distinctions between the tests are trivial and in no way precluded the Court from adopting a “formal, salaried” approach.

Finally, the *CCNV* Court suggested that the *Dumas* court in fact adopted an agency law approach which the Supreme Court endorsed.⁷⁸ The *Dumas* approach, however, is distinguishable.⁷⁹ It incorporates specific agency law factors into its test only in the rare circumstances when the relationship between the parties is ambiguous.⁸⁰ In addition, when incorporated, these factors do not include the “control or right to control” factor adopted by the

⁷³ See *supra* note 65. See also Reply Brief, *supra* note 68, at 7-9 (distinguishes tests proposed by various proponents of formal, salaried approach).

⁷⁴ See, e.g., Brief for Respondent, *supra* note 28, at 37 (hired party on payroll); Brief for Register, *supra* note 60, at 13 (salaried worker in long term position); Brief for Volunteer Lawyers for the Arts Inc. *et al* as Amicus Curiae Supporting Respondent at 4, *CCNV v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293) [hereinafter Brief for VLA] (receives salary and treated like employee for tax and social security purposes). Analysis of the briefs mentioned by the Court, in fact, propose a general *Dumas* “formal, salaried” approach, rather than a particular test as the Court suggests. See Brief for Respondent, *supra* note 28, at 38 (“Respondent Reid believes that the best definition of a work for hire employee is the ‘formal, salaried’ employee as recently enunciated by the *Dumas* court”) (emphasis added); Brief for Register, *supra* note 60, at 7 (“We agree with the Ninth Circuit”); Brief for VLA, *supra*, at 2 (VLA submits that *Dumas* was correct).

⁷⁵ See *supra* note 65.

⁷⁶ See *CCNV*, 109 S. Ct. at 2174 n.8 (“hired party who is on payroll is an employee within § 101(1)”).

⁷⁷ See *id.* (“hired party who receives a salary and is treated as an employee for social security and tax purposes is an employee within §101(1)”) (emphasis in original).

⁷⁸ See *supra* note 66 and accompanying text.

⁷⁹ See *infra* notes 80 and 81 and accompanying text (discussing how *Dumas* is distinguishable from the agency law approach adopted by the Court).

⁸⁰ See *Dumas v. Gommerman*, 865 F.2d. 1093, 1105 (9th Cir. 1989) (when “relationship is ambiguous” apply relevant factors). It is important to note that when utilizing the formal, salaried test “few disputes should arise as to the status of the artist.” *Id.* See also Brief for Respondent, *supra* note 28, at 24 n.17 (“[f]or those very limited situations where this definition does not resolve all questions, an agency-type analysis would still be available”) (emphasis added).

Supreme Court.⁸¹ The *Dumas* court reasoned that by indirectly "includ[ing] the rejected 'supervision and control' test," the *Easter Seal* agency test could cause some independent contractors to be deemed employees.⁸² While *Dumas*' "bright-line" method does create some degree of uncertainty in situations where the agency factors are used, it is suggested that these ambiguities are minimal when compared with the *Easter Seal* test adopted by the Supreme Court.

III. THE *Easter Seal* TEST: AMBIGUITIES ADOPTED BY THE *CCNV* Court

A. *The Nonexclusive Multifactor Test*

The Supreme Court's interpretation of the work made for hire provisions affects thousands of business relationships because approximately forty percent of all copyright registrations are works for hire.⁸³ Therefore, the need for certainty in the interpretation is essential.⁸⁴ In *CCNV v. Reid*, the Supreme Court promulgated a

⁸¹ See *Dumas*, 865 F.2d at 1105 (degree of control not relevant in determining employment status of artist). See also *infra* note 82 and accompanying text (discusses rationale behind *Dumas*' exclusion of "control" factor).

⁸² See *id.* at 1104. The *Dumas* court noted that if the *Easter Seal* agency test was applied in situations where the hiring party includes provisions in the contract granting itself substantial rights of control, "independent contractors could be deemed 'employees.'" *Id.* Surprisingly, the *CCNV* Court based their rejection of the "right to control" and "actual control" tests on the same reasoning. See *CCNV v. Reid*, 109 S. Ct. 2166, 2173-74 (1989); *supra* note 52. Nevertheless, the Supreme Court chose to adopt the control factor of agency law as relevant to determining whether a hired party is an employee. See *id.* at 2178.

⁸³ See *CCNV*, 109 S.Ct. at 2171 n.4 ("[a]s of 1955, approximately 40 percent of all copyright registrations were for works for hire") (citing STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2d SESS. STUDY 13 at 139 n.49 Works Made for Hire and on Commission (report by B. Varmer) (Comm. Print, 1960)); L.A. Daily Journal, June 28, 1989, at 7, col. 1 ("may affect . . . 40 percent of all copyrighted work") (quoting R. Weisgrau, Director of American Society of Magazine Photographers). Cf. L.A. Times, February 12, 1989, at 7 (estimated potential dollars at stake run as high as \$43 billion). The Supreme Court recognized the significance of its interpretation: "The contours of the work for hire doctrine . . . carry profound significance for freelance creators . . . and for the publish[ers]." *CCNV*, 109 S. Ct. at 2171.

⁸⁴ See *id.* at 2177 (paramount goal of Congress in revising 1976 Act was to enhance predictability and certainty); *Dumas v. Gommerman*, 865 F.2d 1093, 1104 (9th Cir. 1989) ("drafters wanted a bright line between employees and independent contractors, so that the parties would not be mistaken in their appraisal of the contracted work's status"); Com-

nonexclusive multifactor agency balancing test where no one factor is determinative.⁸⁵ This test creates unnecessary ambiguity⁸⁶ which will increase the already overwhelming caseload of the courts.⁸⁷ “Practical considerations point to a definition of copyright ‘employees’ as regular, salaried employees.”⁸⁸ The use of a straightforward “formal, salaried” definition of employee rather than a multifactor balancing test would have established the certainty and stability necessary in the copyright marketplace.⁸⁹ In accord with this position, Senator Thad Cochran of Mississippi contends that “the *Reid* decision invite[s] legislative clarifica-

ment, *Copyright, Independent Contractors, and the Work-for-Hire Doctrine: Community for Creative Non-Violence v. Reid*, 67 N.C.L. REV. 994, 996 (1989) (because of tremendous effect doctrine has on business transactions, “need for clarification is acute”).

⁸⁵ See *CCNV*, 109 S. Ct. at 2178-79; *supra* note 51 and 55 and accompanying text (discussing RESTATEMENT OF AGENCY and multifactor agency test).

⁸⁶ See *NLRB v. Hearst Publications*, 322 U.S. 111, 120 (1943) (suggesting there is no “simple, uniform and easily applicable” common law test to distinguish between employees and independent contractors); *Dumas v. Gommerman*, 865 F.2d 1093, 1104 n.18 (9th Cir. 1989) (agency test does not provide “good fit” in copyright context); 135 CONG. REC. S1253 (daily ed. June 22, 1989) (statement of Sen. Thad Cochran) [hereinafter CONGRESSIONAL RECORD - Cochran] (*CCNV* decision did not “articulate a definitive interpretation of ‘employee’”); Comment, *supra* note 84, at 1007 (suggesting agency test does not create certainty and stability necessary in copyright marketplace). *But cf.* Brief for Petitioner at 10, *CCNV v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293) (formal, salaried view does not provide greater certainty).

⁸⁷ See generally Reynolds & Richman, *The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1167 (1978) (“federal courts . . . have been beset by a staggering increase in workload” in recent years); *Id.* at 1168 (“caseload of courts . . . is becoming unmanageable”). Immediately after the *CCNV* decision was handed down on June 5, 1989, it became apparent that the decision would increase the amount of disputes arising under the work for hire provisions. See CONGRESSIONAL RECORD - Cochran, *supra* note 84 (“inevitable uncertainties and costs associated with agency law test”) (emphasis added); Wash. Post, June 6, 1989, § B, at 8, col. 2 (decision does not resolve work for hire debate); Legal Times, June 12, 1989, at 19 (“absence of an objective standard may prevent the predictability essential to avoid frequent recourse to litigation”); N.Y. Times, June 12, 1989, at D 13, col. 3 (“potential for enormous disruption in what was thought to be a settled relationship”); L.A. Daily Journal, June 28, 1989, at 7, col. 4 (“ruling not expected to . . . reduce . . . litigation in . . . copyright” area).

⁸⁸ *Supra* Comment, note 84, at 1007. See CONGRESSIONAL RECORD - Cochran, *supra* note 86 (“‘formal, salaried’ language would provide clear guidance to the courts and to parties involved in the creation and dissemination of copyrightable works”).

⁸⁹ See *Dumas*, 865 F.2d at 1105 (using formal, salaried interpretation “few disputes should arise as to status of artist”); Hardy, *Copyright Law’s Concept of Employment - What Congress Really Intended*, 35 J. COPYRIGHT SOC’Y 210, 258 (1988) (“[a] far more satisfactory test of employment is that of regular, formal employment”); Brief for Respondent, *supra* note 28, at 24 (advantage of formal, salaried construction is that it provides “predictability and certainty as to copyright ownership”); *supra* note 88 and accompanying text.

tion."⁹⁰ Immediately after the decision was handed down, Senator Cochran proposed a legislative amendment to section 101(1) of the 1976 Act which would prefix the term "employee" with "formal salaried."⁹¹ It is submitted that the complex application of the multifactor balancing test could lead to another split in the circuits with regard to the relative importance of specific factors.

B. Problems Arising Out of the Court's Failure to Address the Issue of Retroactivity

In *Chevron Oil v. Huson*,⁹² the Supreme Court provided three separate factors to determine whether a judicial decision is non-retroactive:⁹³ 1) whether the decision establishes a new principle of law,⁹⁴ 2) whether the retrospective operation will further or retard the operation of the rule,⁹⁵ and 3) whether retrospective operation will lead to inequitable results.⁹⁶ Nevertheless, in *CCNV v. Reid*, the Supreme Court further distorted the application of its

⁹⁰ CONGRESSIONAL RECORD - Cochran, *supra* note 86. Cf. *supra* note 47 (legislature's failure to define "employee" is origin of present dispute).

⁹¹ S. 1253, 101st Cong., 1st Sess. (1989). Senator Cochran's Bill reads in pertinent part: That section 101 of title 17, United States Code, is amended — (1) by amending clause (1) . . . of the definition, "work made for hire" to read as follows:

(1) a work, other than a specially ordered or commissioned work, prepared by a formal salaried employee within the scope of his or her employment; . . .

Id. (emphasis added). In the past, Senator Cochran has prepared numerous bills to amend the work for hire provisions of the Copyright Law. See S. 1223, 100th Cong., 1st Sess. (1987); S. 2138, 98th Cong., 1st Sess. (1983); S. 2044, 97th Cong., 2d Sess. (1982).

⁹² 404 U.S. 97 (1971).

⁹³ See *id.* at 106-07; *infra* notes 94-96 and accompanying text (discussing three factors). *But cf.* *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) (" [I]t is manifest from numerous decisions that an all inclusive statement of a principle of absolute retroactive invalidity cannot be justified. ").

⁹⁴ See *Chevron Oil*, 404 U.S. at 106 (1971). The new principle can be established by overruling clear precedent. See *Hanover Shoe v. United States Mach. Corp.*, 392 U.S. 481, 496 (1968) (no reason to refrain from applying decision retroactively unless party relied on clearly established judicial doctrine which was overruled). The new principle can also be established by deciding an issue of first impression. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969) (decision given prospective effect because involved "complex issues of first impression").

⁹⁵ See *Chevron Oil*, 404 U.S. at 106-07 (1971). The Court stated that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)).

⁹⁶ See *Chevron Oil*, 404 U.S. at 107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)).

interpretation by failing to address the issue of retroactivity.⁹⁷ Since the effective date of the 1976 Copyright Act is January 1, 1978,⁹⁸ many freelance creators will now attempt to reclaim the copyrights to works produced over the last eleven years.⁹⁹ It is suggested that a determination of nonretroactivity would have precluded a potential explosion of litigation between artists asserting their rights and media companies protecting their chief assets. It is further suggested that such a determination would have insulated media companies from the inequitable economic hardships resulting from the possible redistribution of their copyrights.¹⁰⁰

CONCLUSION

In *CCNV v. Reid*, the Supreme Court unnecessarily complicated the work made for hire provisions of the Copyright Act of 1976. In an effort to resolve the conflict of interpretation among the circuits, the Court has created ambiguities which will foster additional disputes. This Comment has asserted that a better approach would have been a nonretroactive, formal, salaried interpretation of "employee." As an alternative to the Court's ruling, the simple

⁹⁷ See *CCNV v. Reid*, 109 S. Ct. 2166 (1989) (opinion does not address issue whether retroactive to effective date of Copyright Act of 1976).

⁹⁸ See 17 U.S.C.A. (West Supp. 1977) (historical note on first page of Title 17 identifies effective date as January 1, 1978).

⁹⁹ See *Legal Times*, June 12, 1989, 19 (freelance creators presumed to be employees in past will now seek to reclaim ownership and profits of their copyrightable works, as well as adaptations and derivative works) (citing *Chevron Oil*, 404 U.S. at 97 (1971)). Paul Goldstein, a professor of copyright law at Stanford University Law School noted that the ruling of the court will probably apply to material published since January 1, 1978. See *N.Y. Times*, June 12, 1989, at D13, col. 3.

¹⁰⁰ See *Taylor v. Ypsilanti*, 105 U.S. 60, 71-72 (1881) (overruling judicial construction of statute will not be given retroactive effect). Cf. *supra* note 96 (discussing equitable considerations involved in deciding whether decision has retroactive effect). Since copyrights to the material that they distribute are the chief assets of most media companies, a retroactive application of a decision which reassesses the ownership of those assets would have a disastrous effect on the economic well-being of the companies. See *N.Y. Times*, June 12, 1989, at D13, col. 3 ("chief asset of many media companies" is copyrights). Cf. *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) ("[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the 'injustice or hardship' by a holding of nonretroactivity") (quoting *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932)); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1939) ("Questions of rights claimed to have become vested . . . of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.").

solution is a statutory amendment codifying the formal, salaried definition of "employee." A prospective application of this approach would establish the certainty necessary to satisfy the expectations of both parties engaged in work for hire relationships.

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