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Work Made For Hire -- Analyzing the Multifactor Balancing Test

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WORK MADE FOR HIRE— ANALYZING THE MULTIFACTOR BALANCING TEST

RYAN VACCA*

ABSTRACT

Authorship of copyrighted works is oftentimes controlled by the 1976 Copyright Act's work made for hire doctrine. This doctrine states that works created by employees within the scope of their employment result in the employer, not the employee, being the author and initial copyright owner. One key determination in this analysis is whether the hired party is an employee or independent contractor. In 1989, the U.S. Supreme Court, in CCNV v. Reid, set forth a list of factors to distinguish employees from independent contractors. Unfortunately, the Supreme Court did not give further guidance on how to balance these factors. Three years later, in 1992, the Court of Appeals for the Second Circuit decided Aymes v. Bonelli and noted that not all factors are equally weighted and that five of the factors would "be significant in virtually every situation." This analysis was supported by looking at all the work made for hire cases decided in the three year period since Reid—six cases in total. This Article expands in both scope and time what the Second Circuit did in Aymes and systematically analyzes how courts have utilized the factors in the twenty-five years since Reid. In particular, this study has identified the universe of cases where the courts have decided whether a hired party was an employee or independent contractor and uses the data from these cases to describe what factors appear to be the most and least important in reaching these conclusions. Based on the results of this study, this Article proposes a continuum of importance, which graphically illustrates the relative importance of each factor.

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I. INTRODUCTION

Authorship plays a central role in copyright law.¹ Conferring this title on people or entities bestows on them initial ownership of the copyright² and the power to exploit the associated rights.³ Hence, it is no surprise that authorship is an oft-disputed issue between parties contesting the use of copyrighted works.⁴

In many circumstances, determining authorship is easy, because the general rule is that “the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression”⁵ The artist who paints a bowl of fruit in her home studio on the weekend to sell at a community art show is an easy example of the traditional notion of authorship. The glaring exception to this general rule is the “work made for hire” doctrine. In part, this doctrine provides that “a work prepared by an employee within the scope of his or her employment”⁶ is consequently owned by the employer.⁷ But the work made for hire doctrine does not simply

1. See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to *Authors* and Inventors the exclusive Right to their respective Writings and Discoveries.” (emphasis added)); see also Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 455 (1991) (“[A]uthorship’ . . . is arguably the most central, and certainly the most resonant, of the foundational concepts associated with Anglo-American copyright doctrine.”).

2. 17 U.S.C. § 201 (2012).

3. *Id.* § 106 (“[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following[. . . .]”); *id.* § 106A(a)(1) (“[T]he author of a work of visual art—shall have the right[. . . .]”).

4. See, e.g., *JustMed, Inc. v. Byce*, 600 F.3d 1118 (9th Cir. 2010); *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004); *Numbers Licensing, L.L.C. v. bVisual USA, Inc.*, 643 F. Supp. 2d 1245 (E.D. Wash. 2009); *Latimer v. Roaring Toyz, Inc.*, 574 F. Supp. 2d 1265 (M.D. Fla. 2008); *Int’l Code Council, Inc. v. Nat’l Fire Prot. Ass’n*, No. 02C5610, 2006 WL 850879 (N.D. Ill. Mar. 27, 2006); *Brower v. Martin*, 446 F. Supp. 2d 232 (S.D.N.Y. 2006).

5. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

6. 17 U.S.C. § 101 (defining work made for hire).

7. *Id.* § 201(b).

change initial ownership of the copyright.⁸ This doctrine has found its way into several other issues, such as modifying the duration of the copyright,⁹ eliminating the right to terminate transfers of copyright,¹⁰ and prohibiting the acquisition of moral rights.¹¹

But unlike *Hamlet*, where the question was “to be, or not to be,”¹² for the work made for hire doctrine, the question is “employee or independent contractor?” Distinguishing between employees and independent contractors under the 1976 Copyright Act’s work made for hire doctrine is an essential problem courts and parties need to resolve before proceeding to analyze how ownership, duration, terminations of transfers, and moral rights are affected.¹³

Twenty-five years ago, the U.S. Supreme Court attempted to give guidance to judges and parties involved in disputes over the employment status of hired individuals.¹⁴ In 1989, the Court issued its opinion in *Community for Creative Non-Violence v. Reid*¹⁵ and declared that distinguishing employees from independent contractors should be accomplished by using a multifactor balancing test.¹⁶ This test, which uses approximately a dozen factors, clarified what the proper test was but spawned questions about how those factors are balanced and which factors, if any, are the most important in the analysis.¹⁷

Three years after *Reid*, the Court of Appeals for the Second Circuit decided *Aymes v. Bonelli* and noted that not all factors are equally weighted.¹⁸ The court in *Aymes* went further still and opined that five of the factors would “be significant in virtually every situation.”¹⁹

8. Jon M. Garon & Elaine D. Ziff, *The Work Made for Hire Doctrine Revisited: Startup and Technology Employees and the Use of Contracts in a Hiring Relationship*, 12 MINN. J. L. SCI. & TECH. 489, 490 (2011).

9. Compare 17 U.S.C. § 302(a) (providing that copyright generally persists for the life of the author plus seventy years), with *id.* § 302(c) (providing that copyright in a work made for hire “endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first”).

10. *Id.* § 203(a) (“In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright[] . . . is subject to termination”); see also *id.* § 304(e), (d) (same exclusion but applied to a different set of transfers).

11. See *id.* § 106A(a) (granting moral rights to “the author of a work of visual art”); *id.* § 101(2)(B) (defining “work of visual art” as not including a work made for hire).

12. WILLIAM SHAKESPEARE, *HAMLET* act III, sc. 1.

13. See Garon & Ziff, *supra* note 8.

14. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

15. *Id.*

16. *Id.* at 751-52.

17. See *infra* Parts II.E–F.

18. *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

19. *Id.*

This analysis was supported by reviewing all the work made for hire cases decided in the three-year period since *Reid*—six cases in total.²⁰

This Article greatly expands upon the Second Circuit's work in *Aymes*. It is the first study to comprehensively and systematically analyze the work made for hire factors and show their relative importance in distinguishing employees from independent contractors. It contributes to the existing and highly-regarded literature of empirical studies analyzing multifactor tests.²¹ Using a data set consisting of the population of work made for hire cases decided since *Reid* where the courts determined the status of the hired party, this Article illustrates which factors are the most and least important in drawing this distinction. These results confirm, in part, what the Second Circuit in *Aymes* believed—that a small subset of factors is important.²² Likewise, these results show that some factors originally thought to be important are not terribly important and that other factors originally thought to be of only moderate importance are actually very important.²³

Part II provides historical background on the work made for hire doctrine and illustrates how the doctrine has evolved from when its foundation was laid in the mid-1800s through the Second Circuit's 1992 decision in *Aymes*.²⁴ Specifically, during the course of this discussion, I describe the legislative histories leading up to the codification of the work made for hire doctrine in the 1976 Copyright Act²⁵ and the circuit split occurring after its enactment, which eventually led to the Supreme Court's resolution in *Reid*.²⁶ Part II concludes by recounting the Supreme Court's rationale for adopting the multifactor test in *Reid*²⁷ and the Second Circuit's explanation of the important and unimportant factors in *Aymes*.²⁸

Part III describes the methodology and results of this study.²⁹ This Part explains the type of data collected, describes how this data is used to show four different measures of importance, and displays

20. See *id.* at 862 (citing six cases decided between 1990 and 1992).

21. See, e.g., Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Kevin Blum et al., *Consistency of Confusion? A Fifteen-Year Revisiting of Barton Beebe's Empirical Analysis of Multifactor Tests for Trademark Infringement*, 2010 STAN. TECH. L. REV. 3 (2010).

22. See *infra* Part II.F.

23. See *infra* notes 260-61 and accompanying text.

24. See *infra* Part II.

25. See *infra* Parts II.A–C.

26. See *infra* Part II.D.

27. See *infra* Part II.E.

28. See *infra* Part II.F.

29. See *infra* Part III.

how each factor ranks using each measure.³⁰ Most importantly, based on the results of these measures, I propose a continuum of importance for the *Reid* factors.³¹ This continuum groups together factors sharing similar features with respect to the measures of importance.³² Part III concludes by testing how useful the continuum is at predicting the ultimate outcome of the work made for hire cases.³³

Part IV first attempts to situate the results of this study within the historical development of the work made for hire doctrine and see whether these results cohere with the Supreme Court's rationales for adopting and rejecting the various interpretations existing before *Reid*.³⁴ Part IV then considers the implications of this study, paying attention to litigation and business-planning contexts.³⁵ Special attention is drawn toward terminations of transfers litigation involving sound recordings as a case study on how the results of this study may ultimately affect the outcome of this impending litigation.³⁶

II. AUTHORSHIP AND THE WORK MADE FOR HIRE DOCTRINE

To understand the modern work made for hire doctrine, it is necessary to appreciate how it came into being. Many of the changes taking place in 1976 and subsequent interpretations were heavily influenced by earlier copyright acts and how courts construed the work made for hire doctrine. The most significant of these early acts was the 1909 Copyright Act. This part of the Article briefly describes the work made for hire doctrine during the pre-1909 period and then discusses the codification of this doctrine in the 1909 Act and how the courts gradually, but greatly, modified this doctrine. Afterwards, this part describes the legislative history leading to the 1976 Act and the final codification in section 101, which left courts struggling with how to determine whether a hired party was an employee or independent contractor. Next, this part explains the four approaches lower courts used in making this determination before the Supreme Court resolved the issue in its historic 1989 case—*CCNV v. Reid*. Finally, it describes how the Second Circuit in *Aymes v. Bonelli* put an additional gloss on *Reid*, which serves as the jumping off point for this study and is fully explored in Parts III and IV.

30. See *infra* Part III.

31. See *infra* Fig. 1 in Part III.B.

32. See *infra* Fig. 1 in Part III.B.

33. See *infra* Fig. 2 and preceding discussion in Part III.B.

34. See *infra* Part IV.A.

35. See *infra* Part IV.B.

36. See *infra* Part IV.B.2.

A. Pre-1909 Case Law

The earliest appearance of the work made for hire doctrine (or at least the foundation for the doctrine) occurred in the 1860s.³⁷ Prior to this time, hiring parties were never entitled to the copyright of the parties they hired absent an agreement assigning the copyright to the hiring party.³⁸ As such, no distinction was drawn between employees and independent contractors, because hiring parties were not entitled to the copyright by virtue of employment.³⁹

During the 1860s, a shift occurred and courts began to recognize that hiring parties did have a copyright interest in the works prepared by those they hired to create.⁴⁰ One of the earliest cases laying the foundation for the work made for hire doctrine was *Keene v. Wheatley*.⁴¹ *Keene* involved the famous play, *Our American Cousin*.⁴² In relevant part, the British author, Tom Taylor, sold the American rights to Laura Keene, a New York City theater owner.⁴³ Joseph Jefferson, an actor in Keene's company, adapted the play for performance in Keene's New York theater.⁴⁴ The play became a huge success in New York, and Jefferson sold his additions in the play to Wheatley and John Clark, two Philadelphia theater producers, who had previously acquired a British copy of the play.⁴⁵ After a successful exhibition of the play in Philadelphia, Keene filed suit alleging copyright infringement.⁴⁶ The court held that Keene did not have a valid copyright to the original version of the play, because Taylor was not a U.S. resident.⁴⁷ Notwithstanding this ruling, the court also held that Keene could seek a remedy against Wheatley and John Clark for Jefferson's additions to the play.⁴⁸ As the court explained:

Mr. Jefferson, while in the general theatrical employment of the complainant, engaged in the particular office of assisting in the adaptation of this play; and made the additions in question in the course of his willing performance of this duty. She consequently

37. Catherine L. Fisk, *Authors at Work: The Origins of the Work-For-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 5 (2003) ("The concept began to appear after 1860.").

38. *Id.* at 32.

39. *Id.*

40. *Id.*

41. *Keene v. Wheatley*, 14 F. Cas. 180 (C.C.E.D. Pa. 1861) (No. 7644).

42. *Id.* at 181. *Our American Cousin* is famously known as the play occurring at Ford's Theater the night President Lincoln was assassinated by John Wilkes Booth. Fisk, *supra* note 37, at 38 n.125.

43. *Keene*, 14 F. Cas. at 182.

44. *Id.*

45. Fisk, *supra* note 37, at 37-38.

46. *Keene*, 14 F. Cas. at 184.

47. *Id.* at 185; Fisk, *supra* note 37, at 39-40.

48. Fisk, *supra* note 37, at 40.

became the proprietor of them as products of his intellectual exertion in a particular service in her employment.⁴⁹

In particular, the court declined to hold that Keene was entitled to the copyright as a matter of *statutory* copyright law but, instead, based its holding on equitable principles.⁵⁰

Eight years later, in *Lawrence v. Dana*,⁵¹ a federal court collapsed the distinction between statutory copyright law and equitable principles.⁵² *Lawrence* involved an international law treatise written by Henry Wheaton.⁵³ Upon Henry Wheaton's death, his wife, Catharine, sought the assistance of William Lawrence to prepare a new edition of the treatise.⁵⁴ As part of the agreement between Catharine and Lawrence, Catharine agreed to not make use of Lawrence's notes in a new edition of the treatise without his consent.⁵⁵ Subsequent litigation over the treatise ensued, and in dictum the court indicated that had the parties not entered into a contract for Lawrence to retain the copyright, Catharine would have owned the copyright because of the employment relationship between them.⁵⁶ This dictum was repeated throughout the rest of the nineteenth century as courts reallocated copyright ownership by including an implied contract between the parties that favored the hiring party owning the copyright.⁵⁷ Despite courts entertaining the idea of the hiring party owning the copyright in the absence of an express assignment to that effect, there was confusion about whether the default rule favored the hiring or hired party.⁵⁸ The cause for this shift from a default rule of hired party ownership to a default rule of hiring party ownership is muddled.⁵⁹ Nonetheless, one thing is clear—the courts deciding copyright cases during this period drew no distinction between employees and independent contractors like is done in the modern context.⁶⁰

49. *Keene*, 14 F. Cas. at 187.

50. *Id.*; Fisk, *supra* note 37, at 40.

51. 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136).

52. Fisk, *supra* note 37, at 43.

53. *Lawrence*, 15 F. Cas. at 26.

54. *Id.*

55. *Id.*

56. *Id.* at 51; Fisk, *supra* note 37, at 43.

57. Fisk, *supra* note 37, at 45.

58. *Id.* at 47 (“By the last two decades of the nineteenth century, the law of employee copyrights was highly uncertain and the results of cases were quite unpredictable.”).

59. *Id.* at 45 (suggesting the cause of this shift was based on (1) reflecting the intent of most parties, (2) employers having a stronger moral claim, or (3) changing assumptions about the nature of authorship).

60. *Id.* at 46.

It was not until nearly the turn of the century that the principle of hiring party-owned copyrights was more firmly established.⁶¹ In 1899, the court in *Colliery Engineer Co. v. United Correspondence Schools*⁶² noted that it was the employer of a salaried employee who was the copyright owner of instructional materials for a correspondence school.⁶³ The following year, the court in *Dielman v. White*⁶⁴ held that “when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist himself.”⁶⁵

B. *The 1909 Act*

After an uncertain history, Congress finally recognized the work made for hire doctrine in the Copyright Act of 1909.⁶⁶ The 1909 Act provided that “the word ‘author’ shall include an employer in the case of works made for hire.”⁶⁷ This provision of the 1909 Act resulted from a meeting in 1905 between industry leaders and the American Authors’ League.⁶⁸ The initial draft stated that only “authors” could obtain copyright, but industry leaders objected.⁶⁹ The Copyright Office proposed a revised bill that did not have a general work made for hire provision, but instead had a section indicating that the “publisher of a composite or collective work . . . which has been produced at his instance and expense” would be entitled to a copyright.⁷⁰ However, industry leaders were still unsatisfied. As one participant complained:

We have people who work for us who make engravings or etchings for us under salary. Under the new law—if it becomes a law as drafted—they would have the right to copyright, and I think it would be well to express in such a law that where no agreement exists to the contrary the payment of a salary to an employee shall entitle an employer to all rights to obtain a copyright in any work

61. *Id.* at 55.

62. *Colliery Eng’r Co. v. United Correspondence Sch. Co.*, 94 F. 152 (C.C.S.D.N.Y. 1899).

63. Fisk, *supra* note 37, at 59-60.

64. *Dielman v. White*, 102 F. 892 (C.C.D. Mass. 1900).

65. *Id.* at 894.

66. Michael B. Landau, “Works Made For Hire” After Community for Creative Non-Violence v. Reid: *The Need for Statutory Reform and the Importance of Contract*, 9 CARDOZO ARTS & ENT. L.J. 107, 110 (1990).

67. Copyright Act of 1909, ch. 320, §62, 35 Stat. 1075, 1088 (repealed 1976).

68. Fisk, *supra* note 37, at 63.

69. *Id.*

70. *Id.* at 64 (citing 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT xxiv (B. Fulton Brylawski & Abe Goldman eds., 1976)).

performed during the hours for which such salary is paid. It seems to me these things should not be left to the courts to decide.⁷¹

Interestingly, this comment indicates that some industry leaders believed that the copyright in works created by *salaried* employees during their employment would belong to the employer.⁷² The Copyright Office was persuaded by such comments and prepared another draft of the bill, which credited authorship to “[a]n employer, in the case of a work produced by an employee during the hours for which his salary is paid, subject to any agreement to the contrary.”⁷³ Later, in 1906, Congress held joint hearings and produced the language ultimately ending up in the 1909 Act—“the word ‘author’ shall include an employer in the case of works made for hire.”⁷⁴ Unfortunately, Congress failed to define “work made for hire” and “employer.”⁷⁵

One of the earliest cases interpreting the 1909 Act’s work made for hire provision was *National Cloak & Suit Co. v. Kaufman*.⁷⁶ In *Kaufman*, the plaintiff, a corporation, claimed a copyright in a fashion book.⁷⁷ The defendant reproduced portions of this book and, when sued for copyright infringement, moved to dismiss.⁷⁸ In the course of its opinion, the Second Circuit discussed the newly enacted 1909 Act and the work made for hire doctrine.⁷⁹ Importantly, the court noted that “[under the previous law], as well as now, the employer had the right to the copyright in the literary product of a *salaried employ[ee]*.”⁸⁰

The last major development in the work made for hire doctrine before enactment of the 1976 Act was *Brattleboro Publishing Co. v. Winmill Publishing Corp.*⁸¹ In *Brattleboro*, newspaper advertisers hired the *Brattleboro Daily Reformer*, a local newspaper, to create advertisements.⁸² These advertisements appeared in the *Brattleboro Daily Reformer* and subsequently appeared in the *Brattleboro Town Crier*, a direct-mail circular.⁸³ The *Brattleboro Daily Reformer* sued the *Brattleboro Town Crier* for copyright infringement for reproduc-

71. *Id.* (citing LEGISLATIVE HISTORY, *supra* note 70, at 65).

72. *See id.* (citing LEGISLATIVE HISTORY, *supra* note 70, at 65).

73. *Id.* at 66 (citing LEGISLATIVE HISTORY, *supra* note 70, at xxx).

74. *Id.* (citing LEGISLATIVE HISTORY, *supra* note 70, pt. J).

75. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1][a][i] (2014).

76. *Nat’l Cloak & Suit Co. v. Kaufman*, 189 F. 215 (C.C.M.D. Pa. 1911).

77. *Id.* at 216.

78. *Id.*

79. *Id.* at 217.

80. *Id.* (emphasis added).

81. *Brattleboro Publ’g Co. v. Winmill Publ’g Corp.*, 369 F.2d 565 (2d Cir. 1966).

82. *Id.* at 568.

83. *Id.* at 567.

ing the advertisements.⁸⁴ On appeal, the Second Circuit stated that in determining whether a work was a work made for hire under the 1909 Act, it applied the “instance and expense” test.⁸⁵ That is, the copyright is owned by “the person at whose instance and expense the work is done.”⁸⁶ In *Brattleboro*, the court held that the advertisers, who hired the newspaper, were the copyright owners of the advertisements.⁸⁷ Importantly, the Second Circuit opined that the “instance and expense” test applied regardless of whether the hired party was a traditional employee or an independent contractor.⁸⁸ Collapsing the distinction between employees and independent contractors laid the foundation for some of the confusion arising from the 1976 Act’s work made for hire provision.

C. *The 1976 Act—Legislative History and Statutory Text*

The deluge of technological advancements created in the wake of the 1909 Act caused the judges interpreting it to stretch the statutory language to its limits to accommodate these developments.⁸⁹ As a result, in 1955, Congress decided to overhaul the 1909 Act, which included funding thirty-five studies on copyright issues.⁹⁰ One of these studies, study number thirteen, published in 1958, focused on the work made for hire issue and reported the then-current state of the law under the 1909 Act.⁹¹

Based on these studies, the Copyright Office prepared a report on copyright law revisions, including recommendations on how to deal with the work made for hire issues.⁹² This 1961 report recommended that works made for hire be defined as “works created by an employee within the regular scope of his employment”⁹³ and suggested that commissioned works fell outside this definition.⁹⁴ Following publica-

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 568.

88. *Id.* at 567-68; see also *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 635 (2d Cir. 2004).

89. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 857-58 (1987).

90. I.T. Hardy, *Copyright Law’s Concept of Employment—What Congress Really Intended*, 35 J. COPYRIGHT SOC’Y U.S.A. 210, 222 (1988); Litman, *supra* note 89, at 872.

91. See Borge Varmer, *Works Made for Hire and on Commission* (1958), reprinted in STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, COPYRIGHT LAW REVISION, 86th Cong., 2d Sess., (Comm. Print 1960).

92. H. COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961) [hereinafter 1961 REG. REP.]; Hardy, *supra* note 90, at 224.

93. 1961 REG. REP., *supra* note 92, at app. 14–114; Hardy, *supra* note 90, at 224.

94. 1961 REG. REP., *supra* note 92, at app. 14–113, 14–114; Hardy, *supra* note 90, at 224.

tion of the 1961 report, stakeholders voiced their concerns about the recommendations.⁹⁵ One objection lodged by the motion picture industry concerned the use of the phrase “regular scope of employment” in the definition.⁹⁶ The movie studios thought this language narrowed what the studios had typically been able to claim as their own.⁹⁷ None of the objections concerned the understanding of what the term “employee” meant.⁹⁸ In fact, as Professor Trotter Hardy describes it, the comments to the 1961 report implicitly recognized “employee” to mean formal employees—those paid on a regular schedule.⁹⁹

After these discussions, the Copyright Office published a “Preliminary Draft Bill” in 1963.¹⁰⁰ This bill defined work made for hire as “a work prepared by an employee within the scope of the duties of his employment, *but not including a work made on special order or commission.*”¹⁰¹ Although the 1963 Preliminary Draft Bill included a few changes to the work made for hire doctrine, it did not define the term “employee.”¹⁰² Stakeholders’ understanding of the term “employee” became clear as a result of the objections to the provision in the 1963 Preliminary Draft Bill stating that specially ordered or commissioned works were not works made for hire.¹⁰³ As the stakeholders argued about the status of commissioned works, they frequently contrasted commissioned individuals with employees.¹⁰⁴ Again, as Professor Hardy articulately describes, these references to employees almost always describe employees as individuals who were formal employees—those who were on the payroll and paid a regular salary.¹⁰⁵

95. Hardy, *supra* note 90, at 225-28; Landau, *supra* note 66, at 115.

96. Hardy, *supra* note 90, at 225 n.66.

97. *See id.* Another objection to the proposal was that employers would not be considered authors, but merely owners of the copyright. *Id.* at 226.

98. H. COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., DISCUSSIONS AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 152-60 (Comm. Print 1963) [hereinafter 1963 REG. REP.].

99. Hardy, *supra* note 90, at 226-27.

100. *Id.* at 228; Landau, *supra* note 66, at 115.

101. Hardy, *supra* note 90, at 228 (emphasis added); *see also* Landau, *supra* note 66, at 115.

102. Hardy, *supra* note 90, at 229.

103. *Id.* at 232-35. The debate about commissioned works was that federal copyright law would preempt common law copyright, which had treated hiring parties that commissioned works as the copyright owner. In effect, commissioned works were treated similarly to employee-created works, but with preemption in effect that common law development would no longer exist and the hiring party would not own the copyright unless the hired party agreed to assign it. This, in conjunction with the introduction of the termination of transfer provisions, which did not apply to works made for hire, caused much consternation for film, textbook, and reference publishers. *Id.* at 229-32.

104. *Id.* at 232-35.

105. *Id.*

Following this set of discussions, Congress introduced the 1964 bill,¹⁰⁶ which included commissioned works within the definition of “work made for hire.”¹⁰⁷ In fact, the 1964 bill provided that any specially ordered or commissioned work would be a work made for hire “if the parties so agree[d] in writing.”¹⁰⁸ This one hundred eighty degree change on specially commissioned works raised objections from individual creators who had been routinely hired as independent contractors, especially members of the Authors League.¹⁰⁹ After much harranguing, the two sides of the work made for hire debate were able to find some common ground and agreed that some types of specially commissioned works should be works made for hire, while other types were not appropriate for that treatment.¹¹⁰ Because the focus of this round of discussions centered on specially commissioned parties, rather than employees, nothing was said on what constituted an employee.¹¹¹

At last, in 1965, Congress introduced two bills¹¹² which defined “work made for hire” as “a work prepared by an employee within the scope of his or her employment”¹¹³ and also specially ordered or commissioned works falling within four categories of works, including a contribution to a collective work, parts of a motion picture, translations, and supplementary works, if the parties expressly agreed in writing that the work shall be considered a work made for hire.¹¹⁴ After further discussions, this list of categories was expanded to include compilations, instructional texts, tests, atlases, and answer materials for a test.¹¹⁵ In the Congressional hearing, industry witnesses again

106. Technically, Congress introduced three identical bills—S. 3008, H.R. 11947, and H.R. 12354. For the sake of simplicity I refer to them collectively as the “1964 bill.” See Hardy, *supra* note 90, at 236.

107. Landau, *supra* note 66, at 115.

108. Hardy, *supra* note 90, at 236; Landau, *supra* note 66, at 115.

109. Hardy, *supra* note 90, at 237. These individuals were concerned that they could easily be forced to sign a contract declaring that the work was a work made for hire and, as a result, their termination rights would never exist. Landau, *supra* note 66, at 115-16.

110. Hardy, *supra* note 90, at 238.

111. See generally 1963 REG. REP., *supra* note 98 (some commentators noting their concerns about including specially commissioned works resulting in too little protection for authors; some commentators noting that a substantial percentage of audio-visual materials are specially commissioned and that the proposed law needs to be changed).

112. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 1 (Comm. Print 1965).

113. Landau, *supra* note 66, at 116 (internal quotations omitted).

114. Hardy, *supra* note 90, at 238-40; Landau, *supra* note 66, at 116. One of the driving forces behind these debates about the work made for hire definition was the new termination of transfers provisions. See Landau, *supra* note 66, at 116 (“[I]n exchange for concessions from publishers on provisions relating to termination rights, the authors consented to a second subsection . . .”).

115. Landau, *supra* note 66 at 117. The stakeholders involved in negotiating these categories—hence the seemingly random collection of included works—were representatives of the Authors League of America, the Ad Hoc Committee on Educational Institutions and Organizations, the American Guild of Authors and Composers, the American Textbook

focused on the specially commissioned works; but in reference to this issue, they explained their understanding of what an employee was.¹¹⁶ As they had in the past, the stakeholders considered employees as those who were paid a salary for either a fixed or indefinite term.¹¹⁷

After more than a decade of debates about the work made for hire doctrine, the statutory language had been worked out and was enacted, albeit a decade later, in the 1976 Copyright Act.¹¹⁸ In relevant part, the definition of “work made for hire” now reads:

A “work made for hire” is—

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.¹¹⁹

Although the 1976 Copyright Act uses the phrase “a work prepared by an employee within the scope of his or her employment,” it fails to define the term “employee.”¹²⁰ Nonetheless, given the extensive legislative history, one possibility was that everyone understood the term to mean those who were formal, salaried employees.¹²¹

D. Different Interpretations of “Employee” Under the 1976 Act

The 1976 Copyright Act went into effect on January 1, 1978, and courts were quickly confronted with the task of having to interpret the work made for hire language in the statute.¹²² During the course of the following eleven years, the lower courts adopted four different tests to determine whether a hired party was an employee under the first prong of the work made for hire definition.¹²³

Publishers’ Institute, the American Book Publishers Council, and the Motion Picture Association of America. Litman, *supra* note 89, at 890-91 nn.216-18.

116. Hardy, *supra* note 90, at 239.

117. *Id.* (discussing the testimony of Adolph Schimel *on behalf of the Motion Picture Association of America*).

118. Landau, *supra* note 66, at 117.

119. 17 U.S.C. § 101 (2012) (defining work made for hire).

120. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989) (internal quotations omitted).

121. Hardy, *supra* note 90, at 241; Litman, *supra* note 89, at 890.

122. Marita Covarrubias, Note, *The Supreme Court Sculpts a Definition . . . Is It a Work for Hire?*, 10 LOY. ENT. L.J. 353, 365 (1990).

123. Landau, *supra* note 66, at 120-21.

1. *Right to Control Test*

The first test was known as the “right to control” test.¹²⁴ Under this test, courts looked at “whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work.”¹²⁵ This test was borrowed from case law interpreting the 1909 Act.¹²⁶

One of the first cases adopting the right to control test was *Town of Clarkstown v. Reeder*.¹²⁷ In *Reeder*, the town decided to establish a civic project, known as a Youth Court.¹²⁸ As part of this project, the town’s Youth Court Executive Board formed various sub-committees, including a Constitution Committee and Steering Committee.¹²⁹ Michael Reeder voluntarily served on each of these committees.¹³⁰ As part of his role on the Steering Committee, Reeder was tasked with preparing a manual for the Youth Court.¹³¹ Reeder drafted the manual “after receiving conceptual and practical input from many people,” including guidance from members of the different committees and Executive Board.¹³² The chairman of the Executive Board relayed feedback from the committees to Reeder and served as a sounding board as Reeder prepared the manual.¹³³

Shortly after the manual was complete, Reeder contracted with another town to help them create a Youth Court and asserted a copyright in the Clarkstown manual.¹³⁴ Initially, Reeder granted Clarkstown a license, but after the Executive Committee requested Reeder to assign the copyright to the town, Reeder revoked the license and litigation ensued.¹³⁵ At issue was whether Reeder was an employee of the town and, as a result, whether the manual was a work made for hire with the copyright belonging to the town.¹³⁶

The court held that Reeder, despite the fact that he volunteered his time, was the town’s employee.¹³⁷ The court held that the crucial factor in determining whether Reeder was an employee “is whether

124. *Reid*, 490 U.S. at 738.

125. *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 141 (S.D.N.Y. 1983).

126. *See id.* (citing *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975); *Roy Exp. Co. v. Columbia Broad. Sys.*, 503 F. Supp. 1137, 1149 (S.D.N.Y. 1980)).

127. *Id.*

128. *Id.* at 137-38.

129. *Id.* at 138.

130. *Id.*

131. *Id.* at 139.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 139-40.

136. *Id.* at 140-41.

137. *Id.* at 141-42.

the alleged employer has the right to direct and supervise the manner in which the writer performs his work.”¹³⁸ The town had this right to direct and supervise the manner in which the manual was created because (1) the Chairman of the Executive Board had the power to remove and appoint members; (2) Reeder and the Chairman had ongoing discussions about drafting the manual, including what to include and change; (3) the Chairman assigned Reeder and another volunteer to prepare other documents and they did; and (4) Reeder submitted proposals to the committees and Executive Board for approval.¹³⁹ The fact that no one from the town ever ordered Reeder to write the manual in a specific format was not dispositive.¹⁴⁰ The court emphasized that the employment relationship depended on having the right to control, not exercising the right.¹⁴¹

The court’s justification for this interpretation of the term “employee” in the 1976 Act leaves much to be desired. Rather than looking at the legislative history of the 1976 Act, the court reached its conclusion about how to distinguish employees from independent contractors by relying on three cases interpreting the muddled 1909 Act.¹⁴²

2. *Actual Control Test*

The second test used by the courts following enactment of the 1976 Act was the “actual control” test.¹⁴³ This was a variation of the right to control test.¹⁴⁴ Under the actual control test, courts did not just look at whether the hiring party *could* control or direct the work, but looked at whether the hiring party *actually* asserted control over the creation of the work.¹⁴⁵

The leading case on the actual control test is the Second Circuit’s *Aldon Accessories Ltd. v. Spiegel, Inc.*¹⁴⁶ In that case, the plaintiff, Aldon, was in the business of designing and selling figurines.¹⁴⁷ One of Aldon’s principals, Arthur Ginsberg, handled the creative aspects of the company, including product-design.¹⁴⁸ In anticipation of a new

138. *Id.* at 141 (internal quotations omitted).

139. *Id.*

140. *Id.* at 142.

141. *Id.*

142. *Id.* at 140-41; *see supra* final sentence in Part II.B.

143. *Cmt. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

144. *Id.* at 738-39.

145. *Id.* at 742; Landau, *supra* note 66, at 123.

146. 738 F.2d 548 (2d Cir. 1984).

147. *Id.* at 549.

148. *Id.*

line of mythological porcelain statuettes, Ginsberg contacted a Japanese firm, Wado, about making models for the porcelain statuettes.¹⁴⁹

In addition to describing the pose of the porcelain statuettes and sending drawings to Wado, Ginsberg traveled to Japan and worked with the Wado artists to develop the porcelain statuette models.¹⁵⁰ Working with the artists included Ginsberg spending “hours and hours changing shapes, adjusting attitudes and proportions” in addition to giving specific directions to the artists on where to position the figures’ heads, legs, and hair.¹⁵¹ Afterwards, Aldon decided to develop brass versions of the statuettes and contacted a Taiwanese firm, Unibright, about creating brass models that differed from the porcelain models.¹⁵² Ginsberg traveled to Taiwan and worked with Unibright’s artists in the same way he worked with Wado’s artists.¹⁵³

After Aldon began selling the statuettes, a buyer for Spiegel inspected the statuettes at a trade show and requested a sample.¹⁵⁴ Aldon sent the samples and a few months later discovered Spiegel selling identical statuettes in its catalogue.¹⁵⁵ Aldon sued for copyright infringement and prevailed at trial, including on the issue of whether the models created by Wado and Unibright were works made for hire.¹⁵⁶

On appeal, Spiegel argued that Wado and Unibright, not Aldon, were the copyright owners (i.e. the models were not works made for hire).¹⁵⁷ The Second Circuit disagreed and held that the Wado and Unibright artists were employees working within the scope of their employment, because “Ginsberg did much more than communicate a general concept or idea to the [artists], leaving creation of the expression solely to them.”¹⁵⁸ The court was persuaded by the fact that “Ginsberg actively supervised and directed the creation” of the designs and that although he did not “physically wield the sketching pen and sculpting tools, he stood over the artists and artisans at critical stages of the process, telling them exactly what to do.”¹⁵⁹

In adopting the actual control test, the Second Circuit cited to several cases interpreting the 1909 Act and noted that there was “[n]othing in the 1976 Act or its legislative history indicat[ing] that

149. *Id.*

150. *Id.*

151. *Id.* at 550.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 550-51.

157. *Id.* at 551.

158. *Id.* at 553.

159. *Id.*

Congress intended to dispense with this prior law”¹⁶⁰ Rather than dissecting the legislative history as Professor Hardy has done, the court concluded that Congress did not intend to narrow what was meant by “employee,” because there would surely have been some discussion of this in the legislative history.¹⁶¹ In addition to the Second Circuit, the actual control test was adopted by the Fourth and Seventh Circuits.¹⁶²

3. Agency Test

The third test used by the courts following enactment of the 1976 Act was the “agency” test.¹⁶³ Under this test, courts determined whether a hired party was an employee or independent contractor by using the meaning of the word “employee” as understood under agency law.¹⁶⁴ Although there was no federal agency law, the courts suggested using the Restatement (Second) of Agency as a guide.¹⁶⁵ According to the Restatement, courts consider the following factors in distinguishing between employees and independent contractors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;

160. *Id.* at 552.

161. *Id.*

162. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *see* *Brunswick Beacon, Inc. v. Schock-Hopchas Publ’g Co.*, 810 F.2d 410, 413 (4th Cir. 1987) (“[T]here is no suggestion that they supervised *Beacon* employees as they developed the advertisements or directed the manner of the work’s completion.”); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir. 1986) (“We find the Second Circuit’s analysis and conclusion [in *Aldon*] compelling.”). *But see* Landau, *supra* note 66, at 127 (arguing that although the Seventh Circuit adopted the actual control test from *Aldon*, it applied it in a way that more closely conforms to the right to control test).

163. *Reid*, 490 U.S. at 739.

164. *Easter Seal Soc’y for Crippled Children & Adults of La., Inc. v. Playboy Enter.*, 815 F.2d 323, 334-35 (5th Cir. 1987).

165. *Id.* at 335.

- (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.¹⁶⁶

The leading case using the agency test was the Fifth Circuit's decision in *Easter Seal*.¹⁶⁷ *Easter Seal* involved a videotape of a staged Mardi Gras style parade.¹⁶⁸ A representative of the Easter Seal Society entered into a contract with a television station to film the parade and edit it to be a sixteen-minute segment for the Easter Seal Society's telethon.¹⁶⁹ The Easter Seal Society representative gave some suggestions to Mr. Beyer, the head of the film crew, including camera locations, scenes to look for during the parade, and camera angles.¹⁷⁰ However, it was not clear whether Mr. Beyer followed these suggestions.¹⁷¹ In addition, the Easter Seal Society did not control technical issues, such as lighting, sound, and color balance.¹⁷² Mr. Beyer made all decisions on aesthetics and technical issues concerning the cameras and sound equipment.¹⁷³

After being aired nationally, the television station permitted a Canadian television producer to use pieces of the film footage.¹⁷⁴ As it turned out, the Canadian producer used the film in an adult film, *Candy, the Stripper*.¹⁷⁵ *Candy, the Stripper* was distributed and shown nationally by Playboy and others.¹⁷⁶ After learning about this, Easter Seal Society filed suit alleging copyright infringement.¹⁷⁷ The district court held Mr. Beyer was not an employee of the Easter Seal Society, and therefore, the television station, which did employ Mr. Beyer, owned the copyright in the film.¹⁷⁸

On appeal, the Fifth Circuit considered three different interpretations of what constituted an employee for work made for hire purposes and analyzed the problems associated with each.¹⁷⁹ The Fifth Cir-

166. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

167. *Easter Seal*, 815 F.2d 323.

168. *Id.* at 324.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 324-25.

176. *Id.* at 325.

177. *Id.*

178. *Id.*

179. *Id.* at 328-34.

cuit discussed a variation of the right to control test and described it as ignoring the distinction between employees and independent contractors.¹⁸⁰ Under this test, the courts focus on whether the work was done at the instance and expense of the hiring party and ask whether the hiring party had the right to control the work.¹⁸¹ The Fifth Circuit criticized this test as making the nine categories of works under § 101(2) “completely mysterious”¹⁸² and also not deviating from the interpretation of work made for hire under the 1909 Act, despite a belief that Congress was trying to “tighten up the ‘work for hire’ doctrine under the 1976 Act.”¹⁸³

Likewise, the Fifth Circuit was critical of the Second Circuit’s actual control test in *Aldon*.¹⁸⁴ The Fifth Circuit was concerned that the actual control test could result in a lack of consistency between the same buyer and seller if more than one work were produced.¹⁸⁵ Moreover, the Fifth Circuit thought the test was overly complicated, because if a formal, salaried employee were hired, but the work was not actually supervised by the employer, then the employer’s copyright would be lost and this “would be almost unimaginable.”¹⁸⁶ Finally, the Fifth Circuit criticized the actual control test, because it easily slid into the right to control test.¹⁸⁷

The Fifth Circuit was also critical of the agency test.¹⁸⁸ The court thought that such an interpretation was radically different from the work made for hire doctrine under the 1909 Act, and the court was not sure Congress had this in mind.¹⁸⁹ Despite these concerns, the Fifth Circuit adopted the agency test because it: (1) made sense out of the specially commissioned works categories in § 101(2); (2) tied the meaning of “work made for hire” to a well-developed doctrine in agency law; (3) enhanced predictability; and (4) created a “moral symmetry” with others areas of the law, such as the employer being liable under the theory of respondeat superior.¹⁹⁰

180. *Id.* at 331.

181. *Id.* Note that the Fifth Circuit’s statement of the right to control test focuses on the right to control the work as opposed to the manner in which the work is performed, which was set forth in *Reeder*. See *supra* Part II.D.1.

182. *Easter Seal*, 815 F.2d at 331.

183. *Id.*

184. *Id.* at 333-34.

185. *Id.* at 333.

186. *Id.* at 334.

187. *Id.*

188. *Id.* at 330-31.

189. *Id.*

190. *Id.* at 335. Although the other justifications are probably self-evident, with respect to the fourth justification—moral symmetry—the Fifth Circuit explained “a buyer is a statutory ‘author’ if and only if he is responsible for the negligent acts of the seller. For

4. *Formal, Salaried Employee Test*

The final test used by the courts following enactment of the 1976 Act was the “formal, salaried employee” test.¹⁹¹ Under this test, courts initially looked to see if the hired party “[held] himself or herself out as a freelancer.”¹⁹² If so, then the hiring party should have anticipated the work not being a work made for hire.¹⁹³ If the relationship was ambiguous, then a variety of factors were examined, most of which were a subset of the factors identified under the agency test.¹⁹⁴ These factors included:

- (1) whether the [hired party] worked in his or her own studio or on the premises of the [hiring party];
- (2) whether the [hiring party] is in the regular business of creating works of the type purchased;
- (3) whether the [hired party] works for several [hiring parties] at a time, or exclusively for one;
- (4) whether the [hiring party] retains authority to assign additional projects to the [hired party];
- (5) the tax treatment of the relationship by the parties;
- (6) whether the [hired party] is hired through the channels the [hiring party] customarily uses for hiring new employees;
- (7) whether the [hired party] is paid a salary or wages, or is paid a flat fee; and
- (8) whether the [hired party] obtains from the [hiring party] all benefits customarily extended to its regular employees.¹⁹⁵

Importantly, the formal, salaried employee test does not inquire into the degree of control and input the hiring party exercises.¹⁹⁶

The leading case using the formal, salaried employee test was the Ninth Circuit’s decision in *Dumas v. Gommerman*.¹⁹⁷ In *Dumas*, ITT Cannon contracted with graphic artist Patrick Nagel to produce four paintings that ITT would give out as sets of lithographs to ITT Cannon’s distributors as part of a promotional campaign.¹⁹⁸ ITT Cannon’s advertising agency determined the content and some parts of the design, borders, and placement of figures and gave Nagel sketches for him to use in making the illustrations.¹⁹⁹ After paying for the paintings and distributing some lithograph sets, ITT Cannon had some lithographs leftover and eventually sold some to Stefan Gommerman,

example, a buyer will only be the ‘author’ of a writing if he would be liable under *respondet superior* in a defamation action based on that writing.” *Id.*

191. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

192. *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 1094.

199. *Id.*

an art gallery owner.²⁰⁰ In addition to purchasing the lithographs, Gommerman purchased ITT Cannon's copyrights in the works.²⁰¹

Nagel's widow, Jennifer Dumas, became the successor in interest in Nagel's copyrights.²⁰² After learning about ITT Cannon's purported transfer of the copyrights to Gommerman, Dumas objected to Gommerman's reproduction and sales of the paintings, claimed she was the copyright owner because Nagel was an independent contractor, and filed suit for copyright infringement.²⁰³ Gommerman defended by arguing that the paintings were works made for hire, because Nagel was ITT Cannon's employee.²⁰⁴ The district court granted a preliminary injunction in favor of Dumas and Gommerman appealed to the Ninth Circuit.²⁰⁵

On appeal, the Ninth Circuit perused the legislative history of the 1976 Copyright Act and acknowledged that the final work made for hire language in the statute was the result of a negotiated compromise.²⁰⁶ The court was reluctant to upset that compromise.²⁰⁷ In analyzing the legislative history, the Ninth Circuit determined that the negotiating parties used the term "employee" when referring to "a salaried worker in a long-term position."²⁰⁸ Because ITT Cannon conceded that Nagel was not a formal, salaried employee, the paintings were not works made for hire, and the court affirmed the district court.²⁰⁹

The Ninth Circuit recognized that other courts had utilized different tests but criticized those interpretations.²¹⁰ In particular, the Ninth Circuit opined that the Second Circuit's actual control test from *Aldon* failed to recognize that the 1976 Act was trying to substantively change copyright law under the 1909 Act and that it distorted the balance struck in the negotiations between stakeholders.²¹¹ Furthermore, the Ninth Circuit joined the Fifth Circuit's criticisms of the actual control and right to control tests.²¹² And although the Ninth Circuit largely agreed with the Fifth Circuit's agency interpretation in *Easter Seal*, it did object to the agency test as importing the actual control or right to control tests and making it difficult to de-

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1094-95.

204. *Id.* at 1094.

205. *Id.* at 1095.

206. *Id.* at 1098-1101.

207. *Id.* at 1099.

208. *Id.* at 1101 (emphasis omitted).

209. *Id.* at 1102.

210. *Id.*

211. *Id.* at 1103.

212. *Id.*

termine, *ex ante*, whether the hired party was an employee or independent contractor.²¹³ Instead, by conceiving of employees under the formal, salaried employee test, the Ninth Circuit believed there would be few disputes concerning the status of the hired party.²¹⁴

E. CCNV v. Reid and the Multifactor Balancing Test

Given the four different approaches to determining whether a hired party was an employee or independent contractor, it was no surprise the Supreme Court granted certiorari to resolve this circuit split. On June 5, 1989, the Supreme Court handed down its unanimous opinion in *Community for Creative Non-Violence v. Reid* and interpreted what Congress meant by the term “employee” in the work made for hire doctrine under the 1976 Act.²¹⁵

CCNV was a nonprofit organization committed to eliminating homelessness.²¹⁶ In 1985, CCNV hired James Earl Reid to produce a sculpture for use in a Washington D.C. Christmas pageant.²¹⁷ Members of CCNV conceived the idea of the sculpture as depicting a life-size nativity scene, but instead of using the Holy Family, the family would be homeless people huddled on a steam grate.²¹⁸ CCNV and Reid never signed a written agreement nor did they discuss copyright ownership.²¹⁹

During the course of creating the sculpture, CCNV and Reid communicated several times about the sculpture design, including the position of the family, the items used to hold the family’s personal belongings, and who would serve as models for the family members.²²⁰ Reid eventually completed the sculpture and it was displayed near the pageant site for a month.²²¹ The sculpture was returned to Reid for minor repairs while CCNV prepared to take the sculpture on tour.²²² Reid objected to taking the sculpture on tour and when CCNV requested return of the sculpture, Reid refused.²²³ Both parties claimed ownership of the copyright, and CCNV filed suit seeking a declaration of ownership.²²⁴

213. *Id.* at 1104.

214. *Id.* at 1105.

215. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 731 (1989).

216. *Id.* at 733.

217. *Id.*

218. *Id.*

219. *Id.* at 734.

220. *Id.*

221. *Id.* at 735.

222. *Id.*

223. *Id.*

224. *Id.*

The district court, after a two-day bench trial, declared that the sculpture was a work made for hire.²²⁵ In particular, the district court held that Reid was an employee, because CCNV was the motivating factor in the production of the work and because CCNV directed enough of Reid's efforts in creating the sculpture CCNV desired.²²⁶ On appeal, the D.C. Circuit reversed and held the sculpture was not a work made for hire.²²⁷ The D.C. Circuit adopted the Fifth Circuit's agency test from *Easter Seal* and determined that Reid was an independent contractor rather than a CCNV employee.²²⁸

The Supreme Court, in explaining the meaning of the work made for hire language, noted that the 1976 Act does not provide a definition of the term "employee" and that because of this ambiguity, the four interpretations discussed earlier had emerged.²²⁹ Ultimately, the Court adopted the agency test, because it was "well established that '[w]here 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.'"²³⁰ Because, the Court reasoned, Congress used the term "employee" in conjunction with the term "scope of employment"—a widely used term of art in agency law—and did not use any other language in the statute to indicate that it meant something other than the common law notion of the relationship between employers and employees, the common law agency test was appropriate.²³¹

The Court then fleshed out what it meant by the agency test.²³² First, it stated that in determining whether a hired party is an employee, "we consider the hiring party's right to control the manner and means by which the product is accomplished."²³³ Next, citing section 220(2) of the Restatement (Second) of Agency, the Court listed the following factors as relevant to this inquiry:

[1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the

225. *Id.*

226. *Id.* at 735-36.

227. *Id.* at 736.

228. *Id.* The D.C. Circuit also suggested the possibility that the sculpture could have been jointly authored by Reid and CCNV in which case both Reid and CCNV would own the copyright; the court remanded the case to the district court on this basis. *Id.*; see also 17 U.S.C. § 201(a) (2012) (describing authors of a joint work as co-owners of the copyright).

229. *Reid*, 490 U.S. at 738-39.

230. *Id.* at 739 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

231. *Id.* at 740.

232. *Id.* at 751-52.

233. *Id.* at 751.

right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.²³⁴

Although the Court cited the Restatement for the test, it is interesting to note that the factors listed in *Reid* do not match up exactly to those factors in the Restatement.²³⁵ Besides these oversights, the Court failed to provide any guidance as to how these factors should be balanced other than noting that “[n]o one of these factors is determinative.”²³⁶ The Court then applied these factors to the facts of the case and held that Reid was an independent contractor, not an employee, of CCNV, because although CCNV directed Reid's work to the extent it met their specifications, all of the other factors weighed in favor of Reid being an independent contractor.²³⁷

In the course of justifying the common law agency test, the Court explained that this interpretation furthered “Congress’ paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership.”²³⁸ In contrast, the actual control test undermined predictability and certainty, because the parties would not be able to know until late in the process whether the hiring party had actually wielded sufficient control over the hired party.²³⁹ Because CCNV had conceded that the closely-related right to control test was difficult to demonstrate without actual control, the right to control test suffered from a similar flaw.²⁴⁰

In addition to furthering the policy goals of predictability and certainty, the Court explained that the right to control test focused on

234. *Id.* at 751-52 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

235. Compare *id.*, with RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958); see also Assaf Jacob, *Tort Made For Hire – Reconsidering the CCNV Case*, 11 YALE J.L. & TECH. 96, 109 (2009). The Court failed to include some of the Restatement factors and added new factors not listed in the Restatement. *Id.* For example, the Court introduced the following factors: “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 hired party’s role in hiring and paying assistants; and the provision of employee benefits and tax treatment of the hired party.” *Id.* Likewise, “the Court omitted the following factors listed in the Restatement: whether or not the hired party is engaged in a distinct occupation or business; 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; and whether or not the parties believe they are creating the relations of master and servant.” *Id.* at 110.

236. *Reid*, 490 U.S. at 752.

237. *Id.* at 752-53.

238. *Id.* at 749.

239. *Id.* at 750.

240. *Id.* at 750 n.17.

the relationship between the hiring party and the product, rather than the relationship between the hiring and hired parties.²⁴¹ Accordingly, this focus was misguided, because the work made for hire language in section 101 is written in terms of the latter rather than former.²⁴² Moreover, the right to control test ignored the dichotomy between works created by employees and specially commissioned works, because under the right to control test, a specially commissioned work could also be a work by an employee as long as the hiring party had the right to control the product.²⁴³ In short, the right to control test would largely eliminate the statutory requirement for specially commissioned works of having a signed writing specifying the product is a work made for hire.²⁴⁴

Notwithstanding the Court's critiques of the right to control test, the test set forth in *Reid* seemed to adopt that test as the ultimate question in the analysis.²⁴⁵ The confusion in the Court rejecting the right to control test while at the same time partially adopting it is that the Court explained the right to control test differently than the way it was originally stated in *Reeder*. Under *Reeder*, the court defined the test as "whether the alleged employer has the right to direct and supervise the manner in which the [hired party] performs his work."²⁴⁶ This test is nearly identical to the test the Supreme Court partially adopts in *Reid*. The right to control test rejected in *Reid* was slightly different. The Supreme Court's criticisms were aimed at a test focused on whether "the hiring party retain[ed] the right to control the *product*."²⁴⁷ The difference between these two versions of the right to control test is that one focuses on the hiring party controlling the manner and means of production, whereas the other focuses on the hiring party controlling the product.²⁴⁸ The cases the Supreme Court cites to in its discussion of the right to control test framed the test in terms of the hiring party controlling the manner and means of production, rather than the product itself,²⁴⁹ but whether this is a meaningful distinction is doubtful.²⁵⁰

241. *Id.* at 741.

242. *Id.*

243. *Id.* at 741-42.

244. *Id.*

245. *Id.* at 751 ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.")

246. *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 141 (S.D.N.Y. 1983).

247. *Reid*, 490 U.S. at 738 (emphasis added).

248. 1 NIMMER & NIMMER *supra* note 75, at § 5.03[B][1][a][iii].

249. *Reid*, 490 U.S. at 738-39 (citing *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (Colo. 1985) and *Reeder*, 566 F. Supp. at 142).

250. 1 NIMMER & NIMMER, *supra* note 75, at § 5.03[B][1][a][iii] ("[T]he distinction may import no different result in many cases.").

The actual control test suffered from a similar problem of failing to dichotomize. The Court noted that although a work could be a work made for hire under section 101(2) and not under 101(1) if the work was specially commissioned, but no actual control was exercised, the Court found there was no support for this distinction in the statutory language.²⁵¹ Finally, the Court summarily rejected the formal, salaried employee test, because although there was some support for this approach in the legislative history, the work made for hire provision used the term “employee” rather than “formal employee” or “salaried employee.”²⁵² In addition, the amici arguing for this approach did not agree on the standard for what constituted a “formal, salaried employee.”²⁵³

In sum, the Court’s decision in *Reid* settled the question that had plagued the lower courts for several years. And, although the lower courts now had a multifactor test to help them determine whether the hired party was an employee or independent contractor, all they were told about the test was that no single factor was dispositive. This lack of further guidance led to additional confusion about how the factors ought to be applied.

F. *Weighting Factors—The Aymes v. Bonelli Three-Year Study*

Following the Supreme Court’s decision in *Reid*, the lower courts were confronted with how the *Reid* factors were to be applied. According to the Second Circuit, one district court erred in treating all the *Reid* factors as equally important and simply tallying the factors in making its determination.²⁵⁴ To provide the lower courts additional guidance in applying the *Reid* factors, the Second Circuit in *Aymes v. Bonelli* suggested that “there are some factors that will be significant in virtually every situation.”²⁵⁵ In particular, the *Aymes* court listed the following *Reid* factors as almost always being relevant and deserving of more weight in the multifactor analysis:

- (1) the hiring party’s right to control the manner and means of creation;²⁵⁶
- (2) the skill required;
- (3) the provision of employee

251. *Reid*, 490 U.S. at 742 (“[T]here is no statutory support for an additional dichotomy between commissioned works that are actually controlled and supervised by the hiring party and those that are not.”).

252. *Id.* at 742 n.8. It is worth noting that section 101 also does not use the term employee as understood by the common law of agency.

253. *Id.*

254. *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

255. *Id.*

256. Read literally, the hiring party’s right to control the manner and means of creation is not one of the *Reid* factors, but it is the ultimate question that the *Reid* factors help courts determine. As the Supreme Court stated in *Reid*, “[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among

benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.²⁵⁷

Of these important factors, the Second Circuit additionally noted that the employee benefits and tax treatment factors were especially probative, because “every case since *Reid* that . . . applied the test . . . found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”²⁵⁸ In determining which *Reid* factors were deserving of more weight, the *Aymes* court did not simply pull these five factors out of thin air. Instead it relied on all of the cases decided in the intervening three and a half years since *Reid*—six cases in total.²⁵⁹

With respect to the remaining *Reid* factors, the *Aymes* court indicated that some were generally of little use in the work made for hire analysis.²⁶⁰ In particular, the court noted that whether the work is part of the regular business of the hiring party and whether the hiring party is in business will generally have little weight in the analysis.²⁶¹

III. UPDATING *AYMES*—A COMPREHENSIVE MULTIFACTOR STUDY

The pronouncement of the important factors in *Aymes* took place a mere three years after *Reid*. Since *Aymes*, many more work made for hire cases have been decided. Accordingly, a fresh and more comprehensive look at courts’ analyses of the *Reid* factors will facilitate a greater understanding of which factors are the most important in determining whether a hired party is an employee or independent contractor. This study examines the universe of work made for hire cases since *Reid* where a determination of the hired party’s status has been made and evaluates which factors are and are not important in the analysis. This part sets forth the methodology for locating and coding the cases. Next, it describes the results of this study and clusters the factors based on their importance.

the other factors relevant to this inquiry are [the *Reid* factors].” *Reid*, 490 U.S. at 751. Nonetheless, many lower courts have treated this as one of the *Reid* factors. See, e.g., *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1097 (6th Cir. 1995); *Blair v. World Tropics Prods., Inc.*, 502 F. Supp. 2d 828, 834 (W.D. Ark. 2007); *Alcatel USA, Inc. v. Cisco Sys., Inc.*, 239 F. Supp. 2d 645, 652-54 (E.D. Tex. 2002); *Aerospace Servs. Int’l v. LPA Grp. Inc.*, No. Civ.A.1:90-CV-2605-J, 1992 WL 12000194, at *5 (N.D. Ga. Oct. 30, 1992).

257. *Aymes*, 980 F.2d at 861.

258. *Id.* at 863.

259. *Id.* at 860-63.

260. *Id.* at 863-64.

261. *Id.* at 863 (“[T]his factor will generally be of little help in this analysis.”).

A. Methodology

Using a broad search, I located what I believe to be all of the work made for hire cases decided under the 1976 Copyright Act from June 5, 1989 through June 5, 2014.²⁶² After eliminating false positives,²⁶³ this search yielded forty-six work made for hire cases.²⁶⁴ For each case, the following information was recorded: whether the court concluded the hired party was an employee or independent contractor, the identity of the court and which circuit it fell within, the year the case was decided, and whether the case cited *Aymes* in the context of the five factors the *Aymes* court found to almost always be important.²⁶⁵

In addition, for each case two variables were created for each *Reid* factor. The first variable was whether the factor favored employee status, favored independent contractor status, was indeterminate, or was not addressed by the court. These determinations were made based on statements by the courts about how these factors affected the outcome.

The second variable was whether the court weighted each *Reid* factor. The coding options for this variable were that the court gave

262. I ran the following search in the ALLCASES database in Westlaw, which contains all federal and state court cases: employee /p (“work for hire” “work made for hire”) /p factor!. I then limited the search results to the date range between June 5, 1989 and June 5, 2014. This yielded 109 cases. Of these 109 cases, 43 analyzed the *Reid* factors and determined whether the hired party was an employee or independent contractor. I then ran this search in Lexis: employee /para (“work for hire” or “work made for hire”) /para factor!. I then limited the search results to the date range between June 5, 1989 and June 5, 2014. The Lexis search produced an additional eighteen cases that were not already captured in the Westlaw search. Only two of these eighteen cases produced a copyright case that analyzed the *Reid* factors and determined whether the hired party was an employee or independent contractor. I then ran this search in Bloomberg Law: employee p/ (“work made for hire” OR “work for hire”) p/ factor!. I then limited the search results to the date range between June 5, 1989 and June 5, 2014. The Bloomberg search produced an additional five cases not already captured in the Westlaw and Lexis searches. Only one of these five cases produced copyright cases that analyzed the *Reid* factors and determined whether the hired parties were employees or independent contractors. I recognize that there might be other work made for hire cases that have been decided, but were not reported in Westlaw, Lexis, or Bloomberg. See generally Elizabeth Y. McCuskey, Submerged Precedent, *passim* (unpublished manuscript) (on file with author) (describing the concept of submerged precedent); Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 427-30 (2012) (same). Given the limited search capabilities of docket management systems, it is cost-prohibitive to do any more of an exhaustive search.

263. The false positives were mostly non-copyright cases (e.g. Title VII) or copyright cases where the court did not decide whether the hired party was an employee or independent contractor (e.g. denying a motion for summary judgment because there was a genuine issue of material fact regarding the analysis).

264. In one case, *Huebbe v. Oklahoma Casting Co.*, 663 F. Supp. 2d 1196 (W.D. Okla. 2009), the District Court engaged in two separate work made for hire analyses. Because these analyses were distinct, I treated them as two cases. This explains why although there were forty-five cases in the search, I analyzed forty-six cases as part of this study.

265. *Aymes* itself was also included in this last variable.

additional weight to the particular factor, discounted the factor, or did not expressly weight the factor.²⁶⁶ These too were based on statements (or the absence of statements) by the courts about how much weight they were giving each of the factors.

In addition to the twelve *Reid* factors, two factors that were addressed with some frequency were added: (1) the hiring party's right to control the manner and means by which the product is accomplished,²⁶⁷ and (2) how the hired party and hiring party referred to the hired party. Finally, because the *Reid* factors are not an exhaustive list, any additional factors the courts discussed in their analyses were recorded. All of the additional factors were coded the same as the two variables used for the *Reid* factors.²⁶⁸

B. Results

Using this data, the following calculations were made: how frequently each factor was addressed by the courts, how consistent each factor was with the ultimate result about the status of the hired party, and how frequently each factor was given additional weight or discounted in the courts' analyses. These calculations are shown below in Table 1 as Frequency,²⁶⁹ Consistency,²⁷⁰ Favored Weighting,²⁷¹ and Discounted Weighting,²⁷² respectively.

266. The weighting or discounting of the factors could be done either by the court stating that the factor generally was entitled to additional weight or should generally be discounted (i.e. the court stating that in its circuit, the following factors are important) or during the application of the factor to the facts of the particular case (i.e. the court not making a pronouncement about the factors' importance in the abstract, but stating that a particular factor was particularly important during the analysis of the facts before it).

267. See *supra* note 256.

268. My research assistant and I independently coded all of the variables and then met in person to resolve any conflicts in the coding by reviewing the case.

269. Frequency for each factor is calculated as forty-six total cases minus the number of cases the factor was not addressed by the courts.

270. Consistency for each factor is calculated by adding together the total number of cases where the factor's outcome is consistent with the court's ultimate conclusion about the hired party's status. For example, if the skill required factor favors a finding of employee status and the court ultimately concludes the hired party is an employee, then this is consistent. If, however, the court finds that the skill required factor favors a finding of employee status, but the court ultimately concludes the hired party is an independent contractor, then this is inconsistent. The percentage in parentheses is calculated by dividing this number by the number in the Frequency column. In other words, when the factor is addressed, how consistent is it with the ultimate conclusion?

271. Favored Weighting for each factor is calculated by adding together the total number of cases where the factor is given additional weight. The percentage in parentheses is calculated by dividing this number by the number in the Frequency column. In other words, when this factor is addressed, how often is it favored?

272. Discounted Weighting for each factor is calculated the same way Favored Weighting is, but counts cases where the factor is discounted rather than given additional weight.

These calculations all measure, in some form, the importance of the factors. The frequency with which a factor is analyzed suggests whether courts are considering the factor in the first place or simply ignoring it. A frequently ignored factor is less likely to be important than one frequently addressed. Likewise, consistency illustrates importance, because a factor that is less reliable in predicting the ultimate outcome suggests that courts treat that factor as having less impact on the ultimate result than other factors.²⁷³ Finally, whether a factor is discounted or given additional weight in the analysis reflects its importance as the courts are directly addressing which factors they take more seriously and find more probative in the analysis and which factors they routinely declare to be of less importance.

Table 1 – Summary Table

| Factor | Frequency | Consistency | Favored Weighting | Discounted Weighting |
|--|------------------|--------------------|--------------------------|-----------------------------|
| Skill required | 26 (57%) | 22 (85%) | 8 (31%) | 1 (4%) |
| Source of instrumentalities and tools | 33 (72%) | 29 (88%) | 2 (6%) | 1 (3%) |
| Work location | 32 (70%) | 24 (75%) | 0 (0%) | 4 (13%) |
| Relationship duration | 29 (63%) | 23 (79%) | 1 (3%) | 2 (7%) |
| Additional projects | 29 (63%) | 25 (86%) | 6 (20%) | 1 (3%) |
| When and how long to work | 32 (70%) | 26 (81%) | 0 (0%) | 2 (6%) |
| Payment method | 39 (85%) | 33 (85%) | 5 (13%) | 0 (0%) |
| Hiring and paying assistants | 18 (39%) | 13 (72%) | 0 (0%) | 2 (11%) |
| Part of regular business of hiring party | 29 (63%) | 24 (83%) | 0 (0%) | 4 (14%) |
| Hiring party in business | 9 (20%) | 4 (44%) | 0 (0%) | 3 (33%) |
| Employee benefits | 36 (78%) | 32 (89%) | 12 (33%) | 2 (6%) |
| Tax treatment | 37 (80%) | 32 (86%) | 12 (32%) | 2 (5%) |
| Right to control manner and means | 36 (78%) | 21 (58%) | 5 (14%) | 4 (11%) |
| Label | 9 (20%) | 5 (56%) | 1 (11%) | 3 (33%) |

Tables 2, 3, 4, and 5 show how each factor fares with respect to each of the four calculations. As illustrated in those tables, some factors tend to rise toward the top of the list regardless of which calcula-

²⁷³ Inconsistent factors are also less useful to the parties and attorneys in predicting outcomes.

tion is used.²⁷⁴ Other factors are stable in the middle²⁷⁵ or at the bottom²⁷⁶ of the list. But there is some fluctuation of the factors' rankings across calculations.²⁷⁷

Table 2 – Sorted by Frequency (%)

| Factor | Frequency |
|--|------------------|
| Payment method | 39 (85%) |
| Tax treatment | 37 (80%) |
| Employee benefits | 36 (78%) |
| Right to control manner and means | 36 (78%) |
| Source of instrumentalities and tools | 33 (72%) |
| Work location | 32 (70%) |
| When and how long to work | 32 (70%) |
| Relationship duration | 29 (63%) |
| Additional projects | 29 (63%) |
| Part of regular business of hiring party | 29 (63%) |
| Skill required | 26 (57%) |
| Hiring and paying assistants | 18 (39%) |
| Hiring party in business | 9 (20%) |
| Label | 9 (20%) |

Table 3 – Sorted by Consistency (%)

| Factor | Consistency |
|--|--------------------|
| Employee benefits | 32 (89%) |
| Source of instrumentalities and tools | 29 (88%) |
| Additional projects | 25 (86%) |
| Tax treatment | 32 (86%) |
| Skill required | 22 (85%) |
| Payment method | 33 (85%) |
| Part of regular business of hiring party | 24 (83%) |
| When and how long to work | 26 (81%) |
| Relationship duration | 23 (79%) |
| Work location | 24 (75%) |
| Hiring and paying assistants | 13 (72%) |
| Right to control manner and means | 21 (58%) |
| Label | 5 (56%) |
| Hiring party in business | 4 (44%) |

274. For example, payment method, employee benefits, and tax treatment are in the top half for each calculation.

275. For example, relationship duration is ranked eighth, ninth, ninth, and eighth in Tables 2, 3, 4, and 5, respectively.

276. For example, whether the hiring party is in business is ranked last in every calculation.

277. For example, payment method is ranked first when sorted by frequency and discounted weighting, but is only sixth for consistency and favored weighting.

With respect to weighting factors, it is worth noting that other than giving additional weight to employee benefits, tax treatment, skill required, and arguably the right to assign additional projects, courts do very little favorable weighting.²⁷⁸ Discounted weighting is even rarer. Although the hiring party being in business and the label used to describe the hired party are discounted thirty-three percent of the time, in terms of raw numbers, this discounting occurred in only three cases for each measure.²⁷⁹

Table 4 – Sorted by Favored Weighting (%)

| Factor | Favored Weighting |
|--|-------------------|
| Employee benefits | 12 (33%) |
| Tax treatment | 12 (32%) |
| Skill required | 8 (31%) |
| Additional projects | 6 (20%) |
| Right to control manner and means | 5 (14%) |
| Payment method | 5 (13%) |
| Label | 1 (11%) |
| Source of instrumentalities and tools | 2 (6%) |
| Relationship duration | 1 (3%) |
| Work location | 0 (0%) |
| When and how long to work | 0 (0%) |
| Hiring and paying assistants | 0 (0%) |
| Part of regular business of hiring party | 0 (0%) |
| Hiring party in business | 0 (0%) |

Table 5 – Sorted by Discounted Weighting (%)

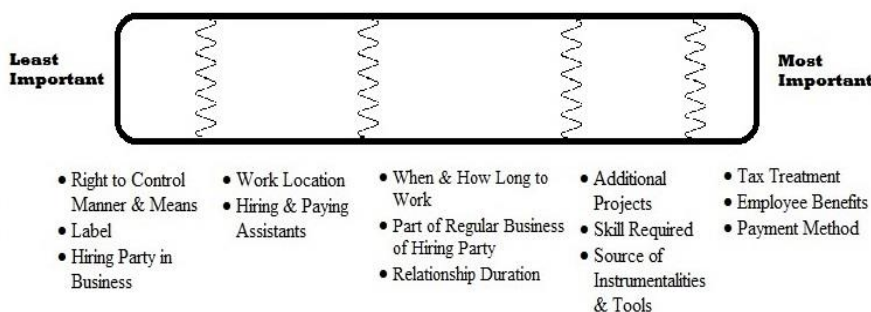
| Factor | Discounted Weighting |
|--|----------------------|
| Payment method | 0 (0%) |
| Source of instrumentalities and tools | 1 (3%) |
| Additional projects | 1 (3%) |
| Skill required | 1 (4%) |
| Tax treatment | 2 (5%) |
| When and how long to work | 2 (6%) |
| Employee benefits | 2 (6%) |
| Relationship duration | 2 (7%) |
| Hiring and paying assistants | 2 (11%) |
| Right to control manner and means | 4 (11%) |
| Work location | 4 (13%) |
| Part of regular business of hiring party | 4 (14%) |
| Hiring party in business | 3 (33%) |
| Label | 3 (33%) |

278. See Table 4.

279. See Table 5.

Although each calculation by itself is helpful in understanding the importance of a particular factor in the work made for hire analysis, no single calculation can tell the entire story. For example, if we only looked at the frequency with which the factors are addressed, then we might conclude that the skill required is one of the least important of the *Reid* factors.²⁸⁰ But although frequency tells us how often the courts address the factor, it could be that, when they do address it, they give it additional weight in the analysis, because the courts consider it to be important in the inquiry. The skill required factor falls into this category as it is weighted favorably 31% of the time. As described earlier, looking only at the weighting calculations is also of limited use because of the small number of cases where weight is discussed.²⁸¹ As a result, all of the calculations must be examined together to discover which factors are the most and least important. Based on all four calculations in Table 1, I propose that the continuum shown in Figure 1 describes the relative importance of the work made for hire factors.

Figure 1



This continuum groups together factors that share similar features with respect to each of the calculations. For example, the factors listed as the most important (tax treatment, employee benefits, and payment method) all have high consistency (85%–89%), are addressed very frequently (78%–85%), are often or sometimes favorably weighted (13%–33%), and are never or infrequently discounted (0%–6%). The next group of factors (additional projects, skill required, and source of the instrumentalities and tools) all have a high consistency (85%–88%) but have a lower frequency (57%–72%); they do, however, have significant weighting (6%–31% favorable; 3%–4% discounting). Because this group is similar in many respects to the “most im-

280. Skill required is ranked eleventh in Table 2.

281. See *supra* text accompanying notes 278-79.

portant" group, but is addressed with less frequency, these factors are grouped together and deemed slightly less important.

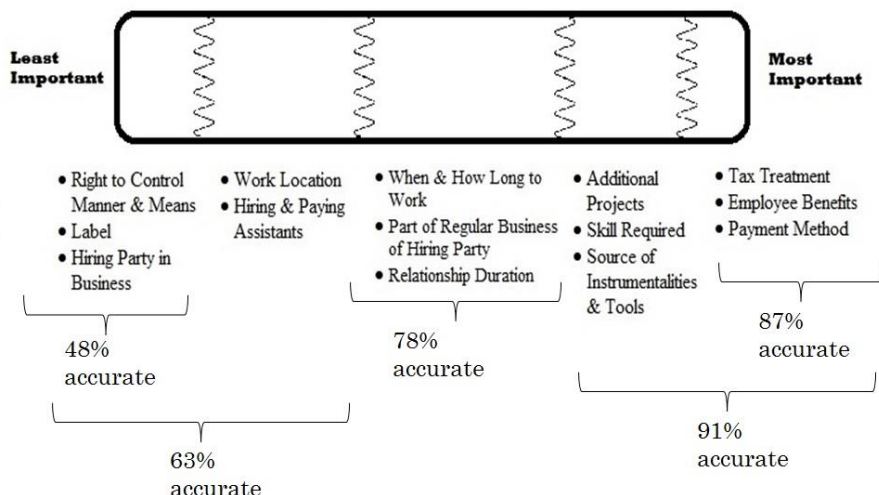
At the other end of the continuum are the least important factors. These factors (right to control the manner and means, the label used to describe the hired party, and whether the hiring party is in business) have very poor consistency (44%–58%). And although the right to control the manner and means factor is addressed with high frequency (78%), this means very little given how inconsistent it is (58%) and that courts also split on whether it receives favorable weighting (14%) or is discounted (11%). The other two factors in this group are rarely addressed (20%) and are the most likely to be discounted in the analyses (33%).

Whether a particular factor belongs in one group down or one group up is certainly debatable; reasonable minds can differ. Illustrating the importance of the factors using a continuum with fuzzy lines separating the groups rather than strict lines of demarcation between the groups was purposefully chosen to acknowledge this.

To test how useful these groups are at predicting the ultimate outcome in a case, the top three factors were analyzed. If a majority of the three factors that were addressed favored the ultimate outcome, this was considered a successful prediction. If only two of the three factors were addressed and they were split, this was considered an unsuccessful prediction. Using only the three most important factors (tax treatment, employee benefits, and payment method), eighty-seven percent of the cases would be decided consistent with courts' ultimate conclusion. When this study was done using the most important two groups, ninety-one percent of the cases would be decided consistent with the courts' ultimate conclusion. In contrast, doing the same analysis using the three least important factors yielded a forty-eight percent success rate. Expanding this to the five least important factors improved the success rate to sixty-three percent. Doing the same analysis for the middle three factors yielded a seventy-eight percent success rate. These results are displayed below in Figure 2. In sum, the structure of this continuum appears to correctly illustrate the relative importance of the *Reid* and other commonly-considered factors.²⁸²

282. There are, of course, limitations on this study. The primary limitation is the small number of cases (n=46) involved in the study. Because of this relatively small number of cases, it makes it nearly impossible to make the data any more granular. For example, it might be interesting to see if the factors' importance changes based on the type of industry or work at issue. Although there are some industries or works that occur with some frequency (e.g. architecture and software), there are not enough of these cases to be able to draw any meaningful conclusions. Another limitation of this study is the potential for selection bias. That is, the parties or their attorneys deciding which case to bring and not bring based on how the courts addressed the factors in previous decisions. This issue exists

Figure 2



IV. DISCUSSION

The results of this study lead to two broad questions. First, how do these results fit within the long and varied developments of the work made for hire doctrine? Second, going forward, what are the implications of these results? This part explores each of these questions.

With respect to reflecting on the results in light of the historical developments, this part discusses how these results square with the Second Circuit's statement in *Aymes* about the importance and lack of importance of specific factors.²⁸³ In addition, it examines whether and how these results cohere with the pre-*Reid* interpretations of "employee" and the Supreme Court's rationales for adopting and rejecting these interpretations.²⁸⁴

With respect to the implications of these results, this part first explores how these results may affect general copyright litigation where the parties contest the work made for hire status of a work.²⁸⁵ Afterwards, these results are situated within the context of the impending litigation concerning the work made for hire status of music recorded after 1977.²⁸⁶ Finally, this part suggests how these results

with any study based on reported cases, but the effect could be more pronounced in this situation given the small number of cases.

283. See *infra* Part IV.A.

284. See *infra* Part IV.A.

285. See *infra* Part IV.B.1.

286. See *infra* Part IV.B.2.

may be of use to business planning attorneys so they can effectively advise their clients to achieve their desired results.²⁸⁷

A. *Doctrinal Fit*

In *Aymes*, the Second Circuit concluded that the following factors were the most important in the multifactor analysis:

- (1) the hiring party's right to control the manner and means of creation;
- (2) the skill required;
- (3) the provision of employee benefits;
- (4) the tax treatment of the hired party; and
- (5) whether the hiring party has the right to assign additional projects to the hired party.²⁸⁸

Of the five *Aymes* factors, four are within the top two groups of the continuum.²⁸⁹ The only *Aymes* factor not in these top two groups is the hiring party's right to control the manner and means of creation. This factor is surprisingly within the least important group of the continuum. As noted earlier, the Supreme Court in *Reid* suggested this was not itself a factor but was the ultimate question to be answered using the listed factors.²⁹⁰ Despite this, many lower courts have deemed the right to control a factor, rather than the ultimate conclusion.²⁹¹ The lack of importance of this factor is surprising given that it is supposed to be determined by the other factors.²⁹² Given that two courts (the Supreme Court and Second Circuit) have bolstered the importance of this factor, it is worth emphasizing that other courts have, by and large, ignored this authority.

In addition to overemphasizing the importance of the right to control factor, the *Aymes* court underappreciated the importance of the method of payment factor. The court acknowledged that this could be a "fairly important factor,"²⁹³ but as illustrated above, this factor turns out to be one of the three most important factors. To a lesser extent, the source of the instrumentalities was underappreciated by *Aymes*, which is within the same group as the skill required factor.

287. See *infra* Part IV.B.3.

288. *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

289. Employee benefits and tax treatment are in the most important group. The skill required and right to assign additional projects are in the second most important group.

290. See *supra* note 256.

291. *Id.*

292. In theory, the lack of importance of the right to control factor could make sense given the way the Supreme Court and Restatement (Second) of Agency have phrased the test as the ultimate question. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989); RESTATEMENT (SECOND) OF AGENCY §§220, 228 cmt. c (1958). In other words, if the lower courts interpreted *Reid* this way, then it would not be an important factor, because it is not really a factor at all. However, this explanation is not warranted given that the lower courts have frequently treated the right to control as a factor (seventy-eight percent frequency). See *supra* Table 1. Ultimately, this factor is not consistent with the outcomes and is treated inconsistently by the courts with respect to the weighting.

293. *Aymes*, 980 F.2d at 863.

In addition to declaring which factors were the most important, the *Aymes* court also opined that whether the work is part of the regular business of the hiring party and whether the hiring party is in business were of little use in the analysis.²⁹⁴ Based on the results of this study, it turns out that *Aymes* was certainly correct with respect to whether the hiring party is in business, because this factor is in the least important group. However, being part of the regular business of the hiring party is not as inconsequential as *Aymes* made it out to be. Although not one of the most important factors, this factor is in the middle of the pack.

In sum, the statements in *Aymes* about the importance or lack of importance of specific factors are largely, but not completely, consistent with the results of this study. Of course, this could be attributed to path dependency. That is, the courts were bound to follow or were heavily influenced by *Aymes*. Of the forty-six cases, thirty-six postdated *Aymes*. Of those thirty-six cases, eight (twenty-two percent) cite to *Aymes*, or a case citing *Aymes*, for the proposition that the *Aymes* factors are the important ones.²⁹⁵ Although path dependency probably had some influence on the ultimate outcome of the importance of the factors, the variations between the results of this study and the conclusions in *Aymes* suggest that path dependency was not dispositive in determining importance.

With respect to the results of this study as they relate to the pre-*Reid* tests for distinguishing employees from independent contractors, two observations are in order. First, as described earlier, although the Supreme Court cast the rejected right to control test as focusing on controlling the product as opposed to controlling the manner and means of production,²⁹⁶ it is questionable whether there is a meaningful difference between them.²⁹⁷ Nonetheless, the right to control test, as adopted by the lower courts before *Reid*, focused on the right to control the manner and means in which the hired party worked.²⁹⁸ Even assuming the Supreme Court had correctly understood the right to control test, the results of this study suggest that the right to control is unimportant. This factor is in the least important group on the continuum. As a result, the Supreme Court's rejection of the right to control test is consistent with the results of this study. However, because the Supreme Court misunderstood the

294. *Id.*

295. Of course, courts that reached a similar conclusion with respect to how they balanced the factors could have read *Aymes* but failed to cite to the opinion.

296. See *supra* notes 246-49 and accompanying text.

297. See *supra* note 250 and accompanying text.

298. See, e.g., *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 141 (S.D.N.Y. 1983).

test, the reason for the consistency has little to do with the Court's rationale for rejecting the test.²⁹⁹

Second, when comparing the formal, salaried employee test with the results of this study, we see that the *Dumas* factors tend to line up fairly-well with the most important factors on the continuum. Of the eight *Dumas* factors, six are also found in *Reid*.³⁰⁰ Like *Aymes*, the *Dumas* factors account for four of the top six factors. But unlike *Aymes*, the *Dumas* factors account for all three of the most important factors. The other two *Dumas* factors that are found in *Reid*—whether the work is part of the regular business of the hiring party and location of the work—fall in the middle or lower end of the continuum, but not the lowest group as occurred with the *Aymes* factors. Moreover, one of the *Dumas* factors not listed in *Reid*—working for several hiring parties or exclusively for one—was addressed in four cases as an additional factor. This was the most common “other” factor and although not weighted favorably or discounted, it was 100% consistent with the ultimate outcomes in the cases. Given these results, it may be that courts are actually using a variation of the *Dumas* formal, salaried employee test. This comports with Professor Hardy's view that the formal, salaried employee test is the appropriate one.³⁰¹ Recall that Professor Hardy argued that the stakeholders assumed this was the test when they negotiated the terms of the 1976 Act in light of the 1909 Act, which seemed to recognize hiring party ownership of works created by salaried employees.³⁰² The factors at the important end of the continuum support the view that a variation of the formal, salaried employee test is what the courts are actually using in arriving at their conclusions. This is an interesting result in light of how harshly the Supreme Court treated the formal, salaried employee test in *Reid*.³⁰³ The importance of these factors also

299. Interestingly, the Restatement (Third) of Agency, published in 2006, defines employee as “an agent whose principal controls or has the right to control the manner and means of the agent's performance of work.” RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006). The factors from the Restatement (Second) of Agency have been relegated to the comments of section 7.07. *Id.* at § 7.07 cmt. f. No court has suggested reviving the right to control test in light of this change in the Restatement.

300. These factors include: (1) whether the hired party worked in his or her own studio or on the premises of the hiring party; (2) whether the hiring party is in the regular business of creating works of the type purchased; (3) whether the hiring party retains authority to assign additional projects to the hired party; (4) the tax treatment of the relationship by the parties; (5) whether the hired party is paid a salary or wages, or is paid a flat fee; and (6) whether the hired party obtains from the hiring party all benefits customarily extended to its regular employees. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

301. See *supra* notes 99, 105, and accompanying text.

302. See *supra* notes 99, 105, and accompanying text.

303. See *Reid*, 490 U.S. at 742 n.8 (noting that the statutory definition of work made for hire “cannot support” the formal, salaried employee test, and acknowledging disagreement about the exact contours of the test). This test was rejected in a footnote, unlike the

brings us back full circle to the legislative history of the 1909 Act, which focused on employees being salaried.³⁰⁴

One reason courts gravitate towards the three factors at the important end of the continuum could be that they are objectively measured and easy to apply. For example, whether the hiring party treated the hired party as an employee or independent contractor for tax purposes only involves looking at payroll documents and forms filed with the federal government. Likewise, providing benefits such as insurance is easily verified by looking at enrollment data. Similarly, the method of payment is easily determined by looking at paystubs to figure out the frequency and amounts paid. This is not to say that the other factors cannot be easily proven by looking at documents or other evidence, but factors such as skill required or the right to control the manner and means involve a certain level of subjectivity.

One final note about *Reid* and the results of this study is apposite. In justifying the agency test, the Supreme Court explained that “Congress’ paramount goal in revising the 1976 Act [was] enhancing predictability and certainty of copyright ownership.”³⁰⁵ Given the results of this study and the multitude of cases where summary judgment is denied because of an issue of material fact about whether the hiring party is an employee or independent contractor, it is doubtful that the agency test has achieved this result.³⁰⁶ Under *Reid*, courts balance about a dozen factors, some of which are consistent with the ultimate conclusion and some of which have very little to do with the ultimate result. It is odd to imagine a multifactor balancing test such as the one set forth in *Reid* as providing more predictability and certainty to the parties than a smaller set of factors would achieve.³⁰⁷ If enhancing certainty and predictability of copyright ownership really were Congress’ paramount goals in the 1976 Act, then perhaps the

right to control and actual control tests, which were rejected in the main text of the opinion. *Id.*

304. See *supra* notes 71-73 and accompanying text.

305. *Reid*, 490 U.S. at 749.

306. See, e.g., *Int’l Code Council, Inc. v. Nat’l Fire Prot. Ass’n*, No. 02C5610, 2006 WL 850879, at *23 (N.D. Ill. Mar. 27, 2006) (summary judgment is precluded because “a reasonable trier of facts could resolve the *Reid* multifactor analysis in either party’s favor”); *Brower v. Martin*, 446 F. Supp. 2d 232, 235 (S.D.N.Y. 2006) (“In light of these and other disputed questions of material fact, the court cannot conclude as a matter of law whether plaintiff’s songs constitute works-for-hire or to whom the copyright in these songs belongs.”); *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 416 (S.D.N.Y. 2004) (“Having examined the *Reid-Aymes* factors and drawn all inferences in favor of the Plaintiff, the Court cannot conclude as a matter of law that either the musical composition or the sound recording of the Vocal Phrase were created as works for hire.”).

307. In the consumer context, we see that having too much choice or too many options can lead to bad results. See generally BARRY SCHWARTZ, *THE PARADOX OF CHOICE – WHY MORE IS LESS passim* (2004). Perhaps courts suffer from a similar version of analysis paralysis in that they either fail to resolve the issue themselves, and instead let juries decide, or latch onto a subset of factors and fail to engage in a complete multifactor analysis.

Supreme Court should reconsider the *Reid* test and adopt a subset of factors for the courts to consider. One option would be to only use the factors in the most important and second most important groups of the continuum. Another option would be to use the factors from the top two groups, but if those factors are evenly split, then turn to the less important factors as tie-breakers. In the event Congress has the opportunity to revisit the work made for hire doctrine and believes predictability and certainty are still valuable goals vis à vis copyright ownership, then perhaps Congress could provide more guidance as to what constitutes an employer-employee relationship by recognizing these factors as existing in tiers. Neither is likely, but given the lack of guidance from the Supreme Court on how to balance the factors, lower courts have the flexibility to adopt a formal recognition of the important and unimportant factors as suggested by the continuum presented here.

B. Practical Implications

Although the fit between the results of this study and the underlying doctrine and historical developments is intriguing, these results may also be of great value to litigators and business planning attorneys in the field. Where the parties dispute the work made for hire status of a copyright, these results will help litigators to gather and present evidence concerning the doctrine and to better evaluate their cases.³⁰⁸ One such instance, explored in more depth below, is the upcoming litigation between artists, producers, and record companies in regard to songs recorded after 1977.³⁰⁹ In the context of business planning, these results will help attorneys structure their clients' relationships to help achieve the desired employment status.³¹⁰ Each is discussed in detail below.

1. General Work Made for Hire Litigation

Litigation involving employment status under the work made for hire doctrine can arise in a few situations. For example, a defendant may assert that the plaintiff has no right to assert a claim for copyright infringement, because the plaintiff is not the legal or beneficial owner of the copyright as a result of the work being a work made for hire.³¹¹ Another example is a copyright infringement dispute between the hiring and hired parties where the alleged infringer successfully defends by claiming ownership of the copyright via the work made for

308. See *infra* Part IV.B.1.

309. See *infra* Part IV.B.2.

310. See *infra* Part IV.B.3.

311. Only the legal or beneficial owner of an exclusive right is entitled to institute an action for copyright infringement. 17 U.S.C. § 501(b) (2012).

hire doctrine.³¹² Another instance could be determining whether artists are entitled to assert violations of their moral rights under the Visual Artists Rights Act of 1990, which does not provide moral rights to works made for hire.³¹³ Finally, the employment status in the work made for hire doctrine may arise in situations involving terminations of transfers, which also do not apply to works made for hire.³¹⁴ In these situations, determining whether a party is an employee or independent contractor may entirely or partially dispose of a case or significantly shift negotiating power when trying to settle a dispute.

Armed with the results of this study, litigators engaged in discovery can focus their energy and clients' money on the factors at the most important end of the continuum and pay less attention to those at the least important end. After completing discovery, the attorneys can use the continuum to decide how to present their arguments in favor of and against a work made for hire conclusion. For example, in a motion for summary judgment, rather than simply analyzing the factors in the order presented in *Reid*, it may be more persuasive to analyze the factors in the order of importance. If most of the factors at the important end of the continuum support the movant, then presenting them this way may cause the judge to grant the motion.³¹⁵ Likewise, if the factors at the more important end are split, the non-movant may want to present the factors like this to avoid summary judgment. In addition to gathering and presenting evidence of employment status, these results should assist attorneys in evaluating their clients' cases and giving more informed recommendations about whether to settle a dispute and for how much.³¹⁶ In short, focusing on

312. See, e.g., *Maness v. Heavrin*, 97 F.3d 1457, 1457 (8th Cir. 1996) (unpublished table decision). The reason this situation arises is because one cannot infringe a copyright they own. *Richmond v. Weiner*, 353 F.2d 41, 42 (9th Cir. 1965) (“[A] copyright owner cannot infringe against his own copyright.”).

313. 17 U.S.C. § 101(2)(B) (defining “work of visual art” as not including a work made for hire).

314. *Id.* § 203(a) (“In the case of any work other than a work made for hire, [certain granted rights are] subject to termination . . .”). For a more detailed analysis on termination rights, see *infra* Part IV.B.2.

315. This is not to say that simply reordering the factors will cause a change in outcome in most cases. In fact, considering how to present the factors may only be useful in borderline cases where a court is on the fence about granting or denying a motion for summary judgment.

316. It is unclear if the parties would settle even if they knew this information. Looking at the 46 cases involved in this study, in 22 (48%) of them, 100% of the factors that were addressed and not indeterminate were consistent with the ultimate outcome in the case (e.g. if 9 factors were addressed, the court held all nine weighed in favor of the outcome). In 10 of the cases (22% of the total), only one factor was inconsistent with the ultimate conclusion. Combined, 70% of the cases involved a situation where 0 or 1 factor was inconsistent with the ultimate outcome. Once the attorneys in these cases knew what the facts were, it is hard to understand why the attorneys for the eventually-losing parties would push ahead with this aspect of the litigation.

the most important factors can provide the increased predictability and certainty that the Court in *Reid* thought it was providing.

2. *Specific Work Made for Hire Litigation—Terminations of Transfers and Sound Recordings*

One of the most interesting areas of copyright law where the work made for hire status will arise is with respect to terminations of transfers in sound recordings. Section 203 of the Copyright Act permits termination right owners to end certain post-1977 transfers of a copyright and reclaim the copyright for themselves.³¹⁷ That is, if the work and type of transfer are eligible for termination and the termination right is exercised, all the rights covered by the transfer revert back to the owner of the termination interest.³¹⁸ As a result, the termination right holder gets “a second bite at the apple” and can attempt to negotiate a new license or assignment on more favorable terms.³¹⁹

For example, imagine an unknown artist records a song at her home studio and in 2014 successfully sells her copyright in the sound recording to a record company for a measly sum. The recording turns out to be a huge success, and the record company earns millions of dollars from exploiting its acquired rights in the recording. Under section 203, after thirty-five years, the recording artist could reclaim the copyright in the sound recording. If the record company wanted to continue exploiting the recording, it would be forced to sit down at the negotiating table with the recording artist and reach a new deal. Presumably, the recording artist will negotiate a better deal in 2049 than she did in 2014.

As illustrated by this example, the termination of transfer right is a powerful one. As it turns out, 2013 was the first year of terminations under section 203³²⁰ and a wave of termination disputes is expected over the next several years.³²¹ These disputes (and the inevi-

317. 17 U.S.C. § 203 (2012).

318. *Id.* § 203(b).

319. Corey Field, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate Over Sound Recordings as Works Made For Hire*, 48 J. COPYRIGHT SOC'Y U.S.A. 145, 155 (2000). Sections 304(c) and (d) of the Copyright Act are additional termination of transfers provisions, but apply to copyrights transferred before 1978. 17 U.S.C. § 304(c), (d). Like section 203, these sections also exclude works made for hire from termination. But because the works were created before 1978, the 1909 Copyright Act's work made for hire doctrine applies rather than the modern doctrine.

320. Section 203 applies to transfers made on or after January 1, 1978. § 203(a). The five-year termination window begins thirty-five years after execution of the transfer. Therefore, the earliest five-year window could have begun on January 1, 2013. *See* § 203(a)(3).

321. *See* Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 71 (2011); William Henslee & Elizabeth Henslee, *You Don't Own Me: Why Work for Hire Should Not Be Applied to Sound Recordings*, 10 J. MARSHALL REV. INTELL. PROP. L. 695, 704 (2011).

table litigation accompanying them) will turn, in part, on the outcome of the work made for hire analysis and what it means to be an employee versus an independent contractor, because termination of transfer rights do not exist for works made for hire.³²² Instead, an employer whose employee created a copyrightable work will be the author and can enjoy the copyright for the duration without the fear of losing the copyright thirty-five to forty years later. To be sure, terminations of transfers under section 203 apply to all types of copyrightable works. But the looming litigation involving terminations of transfers of sound recordings is a good case study for analyzing how the *Reid* factors should be analyzed and what the likely outcome is in light of the factors' relative importance.

To appreciate the work made for hire analysis of sound recordings, it is necessary to understand what sound recordings are and the potential authors laying claim to those copyrights. Sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects . . . in which they are embodied."³²³ Sound recordings are to be distinguished from musical works, which are the underlying composition and lyrics.³²⁴ An artist who sings and records a song written by someone else has created a copyrightable sound recording but has no copyright interest in the underlying composition.³²⁵

There are three major players in the sound recording industry who are likely to make a claim as being an author of a particular sound recording. First are the recording artists themselves. The artists are the individuals in the recording studio and creating the sounds by playing the instruments and singing the lyrics. Artists could be solo artists such as Billy Joel and Madonna or groups like Aerosmith and Bon Jovi. The House Report accompanying the Sound Recording Act of 1971³²⁶ suggests that recording artists can be authors of sound recordings.³²⁷ The Copyright Office does the same.³²⁸

322. See 17 U.S.C. § 203(a) ("In the case of any work *other than a work made for hire*, [a transfer of rights] is subject to termination" (emphasis added)).

323. *Id.* § 101 (defining "sound recordings").

324. See Jessica L. Bagdanov, Comment, *Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure*, 14 CHAP. L. REV. 135, 139 (2010).

325. See Brian Day, Note, *The Super Brawl: The History and Future of the Sound Recording Performance Right*, 16 MICH. TELECOMM. & TECH. L. REV. 179, 182-83 (2009).

326. The legislation in the Sound Recording Act of 1971 gave federal copyright protection to sound recordings. Before then, the only protection afforded was state common law copyright protection. Daniel Gould, *Time's Up: Copyright Termination, Work-For-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 97-98 (2007).

327. H.R. REP. NO. 92-487, at 5 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1569.

328. U.S. COPYRIGHT OFFICE, CIRCULAR 56, Copyright Registration for Sound Recordings 1 (2014), available at <http://www.copyright.gov/circs/circ56.pdf>.

Second are the producers. Producers come in all forms, but many of the most successful are those who are the driving force behind the recording; they are the ones with a vision of the recording and orchestrate everything from the lead vocals to instrumental solos to background vocals.³²⁹ Producers bring their experience with songwriting and arranging, musical performance, and recording to the table along with their musical philosophy, knowledge of the music business, and rapport with artists to create the sound eventually heard by the public.³³⁰ Just as with recording artists, the House Report and Copyright Office suggest that producers may have a claim to authorship of sound recordings.³³¹

Third are the record companies. The role of the record company has changed over time. Initially, the record companies exercised a great deal of control over the creative process.³³² But beginning in the 1970s, record companies narrowed their focus to manufacturing and promoting the sale of records.³³³ Nonetheless, record companies have not really abdicated all control over the creation of sound recordings³³⁴ and have a strong interest in claiming these recordings as works made for hire.³³⁵ In fact, nearly all recording contracts between record companies, artists, and producers contain clauses stating that the sound recordings are works made for hire and are owned by the record companies.³³⁶ Unfortunately for the record companies, merely

329. RICHARD JAMES BURGESS, *THE ART OF MUSIC PRODUCTION* 60-61 (Oxford University Press 4th ed. 2013) (describing how producers “can influence the intuitiveness of the arrangement so it flows naturally, is appealing on a first listen, creates a desire to be heard again, and holds the listener’s interest through repeated plays”); M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC* 37 (Billboard Books 8th ed. 2000).

330. Peter S. Menell & David Nimmer, *Defusing Copyright’s Termination of Transfers Time Bomb* 1 n.4 (2012) (unpublished manuscript) (on file with author); *see also* Gould, *supra* note 326, at 112-13 (describing the role of the producer); *see generally* RICHARD BUSKIN, *INSIDE TRACKS: A FIRST-HAND HISTORY OF POPULAR MUSIC FROM THE WORLD’S GREATEST RECORD PRODUCERS AND ENGINEERS passim* (1999) (providing interviews with several successful record producers).

331. H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1570; CIRCULAR 56, *supra* note 328, at 1.

332. *See* Menell & Nimmer, *supra* note 330, at 1 (noting that before the 1960s, the A&R departments at the record companies “nurtured the talent by locating, writing, and arranging music, recruiting studio musicians, and arranging recording sessions, often in label-owned or affiliated studios”).

333. REEBEE GAROFALO, *ROCKIN’ OUT: POPULAR MUSIC IN THE USA* 220 (Prentice Hall 4th ed. 2008); Day, *supra* note 321, at 74-75 (describing record companies subsidizing music video production, providing support for promotional tours, and incurring the promotional, manufacturing, and distribution costs).

334. *See infra* notes 401-14 and accompanying text.

335. Henslee & Henslee, *supra* note 321, at 697 (“Record companies prefer for sound recordings to be considered under the ‘work-made-for-hire’ doctrine because it prevents this right of termination and recapture.”).

336. BEVERLY HILLS BAR ASS’N, *THE MUSICIAN’S BUSINESS & LEGAL GUIDE* 390 (Mark Halloran ed., rev. 2d ed. 1996); KRASILOVSKY & SHEMEL, *supra* note 329, at 28, 72;

declaring a work to be a work made for hire does not necessarily make it so.³³⁷ This is because such statements are only relevant for specially commissioned works made for hire, not those falling under the employee within the scope of employment provision.³³⁸

As a result, an analysis of the *Reid* factors is necessary to determine whether artists and producers are employees of the record companies or independent contractors and hence whether the sound recordings are works made for hire.³³⁹ The remainder of this part analyzes the *Reid* factors in light of common practices in the music business. Then, using the continuum of importance, this part determines whether artists and producers are likely to be deemed employees and provides an in-depth roadmap for litigants and judges to analyze this issue in the upcoming cases. That being said, a word of caution is in order. Like with most general rules, there are exceptions. Contracts and practices in the record industry are no different. Every recording contract is not the same and what may be a general practice might not apply in a particular case.

(a) *Group #1*

Starting with the most important group of factors, the first factor to consider is the tax treatment. This factor likely weighs in favor of

RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW 150 (2005); Henslee & Henslee, *supra* note 321, at 697.

337. Mark H. Jaffe, *Defusing the Time Bomb Once Again – Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 151 (2006).

338. See 17 U.S.C. § 101 (2012) (defining work made for hire).

339. This article does not address whether the sound recordings could be a work made for hire under section 101(2) of the definition, which provides this status to specially ordered or commissioned works falling into one of nine categories. This analysis has been done by several others and is beyond the scope of this article, which is limited to work made for hire under section 101(1). See generally NIMMER & NIMMER, *supra* note 75, at § 5.03[B][2][a][ii] (concluding that “there is no armchair answer” to this question); Field, *supra* note 319, at 174-75 (noting that most scholars having indicated that sound recordings are not collective works or compilations); Gould, *supra* note 326, at 127-29 (concluding that sound recordings are “poor candidate[s]” for collective works, but could satisfy the requirement if an album included many guest artists or consisted of a compilation of an artist's hits); Jaffe, *supra* note 337, at 166-69 (2006) (concluding that Congress likely “did not intend for sound recordings to constitute a collective work[.]” but there is merit to the contrary argument); David Nimmer & Peter S. Menell, *Sound Recordings, Works For Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387 (2001) (noting that it is “rank speculation” that sound recordings routinely qualify as contributions to collective works and that the matter will remain in doubt until “painstaking analysis is performed”). It is worth mentioning however that in 1999, Congress ed § 101(2) to add sound recordings to the list of categories eligible for work made for hire status. This was done at the insistence of the Recording Industry Association of American and rushed through Congress as a “technical amendment” to the Omnibus Communications Reform Act of 1999 without analysis or debate. Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CALIF. L. REV. 375, 375 (2002). Outrage ensued and Congress, with its tail between its legs, repealed the amendment in Work Made for Hire and Copyright Corrections Act of 2000. *Id.* at 375-76.

artists and producers, because record companies “rarely withhold income taxes or contribute to social security”³⁴⁰

The second factor is whether employee benefits are provided. This factor is a tossup with respect to artists, but it definitely weighs in favor of producers. As a general rule, record companies do not provide health insurance, dental insurance, or retirement funds.³⁴¹ Nonetheless, the two major artist unions—AFTRA and AFM—provide health and retirement funds for their members.³⁴² Although not directly providing these traditional benefits, record companies are required to contribute to these unions’ health and retirement funds as part of their agreements with the unions.³⁴³ As a result, although not directly paying for employee benefits, the record companies are indirectly providing them to those who qualify. Similar agreements for the funding and provision of benefits do not exist for producers.³⁴⁴ In sum, record companies have a colorable argument that they provide benefits to artists, but not for producers. This factor could go either way with respect to artists, but it certainly weighs in favor of producers.

The last factor in this group is the method of payment. Although record companies have a little room to argue this factor weighs in their favor, it overwhelmingly favors artists and producers being treated as independent contractors. Artists and producers are compensated identically in two ways—advances and royalties. Artists are also compensated in a way producers are not—union scale.³⁴⁵ Artists and producers receive advances as part of a recording fund or are given separate cash advances that are not tied to the recording fund.³⁴⁶ Under a recording fund arrangement, the artist or producer

340. KRASILOVSKY & SHEMEL, *supra* note 329, at 203.

341. BRIAN MCPHERSON, *GET IT IN WRITING: THE MUSICIAN’S GUIDE TO THE MUSIC BUSINESS* 91 (1999).

342. KRASILOVSKY & SHEMEL, *supra* note 329, at 64 (“The AFTRA Health and Retirement Funds provide medical coverage and retirement benefits for eligible AFTRA members.”); MCPHERSON, *supra* note 341; *see* BEVERLY HILLS BAR ASS’N, *supra* note 336, at 229; Menell & Nimmer, *supra* note 330, at 5.

343. KRASILOVSKY & SHEMEL, *supra* note 329, at 60, 64.

344. E-mail from Jeff Slattery, Assistant Professor of Law and Arts & Entertainment Law Project Director at Thomas Jefferson School of Law, to author (Jan. 20, 2014, 10:25 PM EST) (on file with author) (confirming that no producers’ union exists that provides similar benefits to authors and that agreements between producers and record companies do not provide for such employee benefits). Professor Slattery also notes that many artists do not receive health and retirement benefits under their agreements with labels, union membership, or otherwise and thus are similarly situated as producers. E-mail from Jeff Slattery, Assistant Professor of Law and Arts & Entertainment Law Project Director at Thomas Jefferson School of Law, to author (Jan. 22, 2014, 7:24 PM EST) (on file with author).

345. Menell & Nimmer, *supra* note 330, at 5 (“Throughout the post 1978 period, artists have traditionally been paid through advances against future royalties, although studio recording time may be credited at union scale.”).

346. BURGESS, *supra* 329, at 171; KRASILOVSKY & SHEMEL, *supra* note 329, at 203; MCPHERSON, *supra* note 341, at 61.

pays for the recording costs and if any money remains at the close of production, the artist or producer keeps the rest.³⁴⁷ Any advances or recording funds are paid in installments with a percentage paid before commencement of the recording, and the remainder of the payments are paid at various benchmarks along the way and upon delivery and acceptance of the masters.³⁴⁸ Compensation via an advance suggests that artist and producers are independent contractors, as payment by the job, instead of by the hour, is indicative of an independent contractor relationship.³⁴⁹

Artists and producers are also paid a royalty based on sales of the album.³⁵⁰ These royalties are not paid to the artist and producer until the record company has recouped its recording costs, including any advances paid to the artist and producer.³⁵¹ Once recouped, record companies generally pay artists' and producers' royalties twice a year, although some do so quarterly and others annually.³⁵² Like with advances, the payment of royalties is not like an hourly wage or fixed salary paid to employees at frequent intervals. The payments cover a several-month period and the amount varies depending on the success of the album. As a result, this method of payment also favors artists and producers being classified as independent contractors.

Finally, artists may be compensated at union scale.³⁵³ For singers, as opposed to musicians, AFTRA provides minimum rates that artists must be compensated at, even if the artists are entitled to royalties.³⁵⁴ Union scale under AFTRA is calculated as the greater of a per-hour amount or per-side (per song) amount.³⁵⁵ However, it should be noted that these payments are capped at three times the minimum scale per side.³⁵⁶ With respect to payment of artists at union scale as calculated by the hour, this method of payment looks more akin to an hourly-wage arrangement for an employee.³⁵⁷ Nonetheless, the fact that record companies pay this amount at all has more to do with their agreement with the union rather than the relationship to the

347. MCPHERSON, *supra* note 341, at 61; SCHULENBERG, *supra* note 336, at 108.

348. See BURGESS, *supra* 329, at 171; SCHULENBERG, *supra* note 336, at 211-12.

349. RESTATEMENT (SECOND) OF AGENCY § 220 cmt. j (1958).

350. KRASILOVSKY & SHEMEL, *supra* note 329, at 39-40 (producers); *id.* at 203 (“[Recording artists] rely on royalty compensation, which is contingent on success.”).

351. *Id.* at 23 (“Artists generally do not receive any royalties until the record company has recovered all of its recording costs incurred for the artist’s records.”).

352. SCHULENBERG, *supra* note 336, at 121.

353. Menell & Nimmer, *supra* note 330, at 5.

354. BEVERLY HILLS BAR ASS’N, *supra* note 336, at 230.

355. *Id.*; KRASILOVSKY & SHEMEL, *supra* note 329, at 17 (“A *side* customarily consists of a single composition with a minimum duration of 2 ½ minutes.”).

356. BEVERLY HILLS BAR ASS’N, *supra* note 336, at 230.

357. See RESTATEMENT (SECOND) OF AGENCY § 220 cmt. j (1958).

artist, which undercuts the force of this argument.³⁵⁸ But if payments are calculated by the per-side method, they appear to be payments by the job and artists are likely to be deemed independent contractors.³⁵⁹ In sum, the method of payment factor overwhelmingly favors artists and producers being treated as independent contractors.

(b) *Group #2*

Moving on to the second most important group of factors, the first factor to consider is whether the hiring party has the right to assign additional projects to the hired party. This factor probably favors artists being treated as employees, but producers as independent contractors. Most recording contracts are structured so the artist is required to create one album, but the record company is also given a series of options to extend the agreement for several more albums.³⁶⁰ The number of options the record company has depends on the bargaining power of the artist but five or six options are common.³⁶¹ Unlike artists, agreements between producers and record companies do not give the record company options to require the producer to produce another album.³⁶²

The second factor in this group is the skill required. This factor likely weighs in favor of artists and producers being independent contractors. The record companies expend a tremendous amount of energy trying to find which artists to sign and which to pass on.³⁶³ Not every artist can fill the void in the market the record company is looking to capture and performing that sound can be quite a unique skill.³⁶⁴ The record companies seem to acknowledge this unique skill when they include provisions in the recording contracts that the artists are of a special and unique character that gives them peculiar

358. This same argument could undercut record companies' positions with respect to artists' benefits, which is already an uncertain proposition. *See supra* notes 341-44 and accompanying text.

359. *See* RESTATEMENT (SECOND) OF AGENCY § 220 cmt. j (1958).

360. KRASILOVSKY & SHEMEL, *supra* note 329, at 203 ("Many recording contracts call for additional recordings at the option of the record company.").

361. MCPHERSON, *supra* note 341, at 59.

362. *See* BURGESS, *supra* note 329, at 168 ("Producer contracts rarely extend beyond one album . . ."); SCHULENBERG, *supra* note 336, at 210-11 (describing how producers may be given a right to produce subsequent albums if a certain number of copies are sold).

363. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 322-23; *see also* PETER MULLER, THE MUSIC BUSINESS – A LEGAL PERSPECTIVE: MUSIC AND LIVE PERFORMANCES 79 (Quorum Books 1994) (describing what A&R departments do); SCHULENBERG, *supra* note 336, at 21 (describing the major function of A&R departments at record companies as discovering new talent); ALAN H. SIEGEL, BREAKIN' IN TO THE MUSIC BUSINESS 25, 91-92 (Cherry Lane Books 1986) (illustrating enormous amount of time and energy A&R departments spend trying to find good artists).

364. *See* KRASILOVSKY & SHEMEL, *supra* note 329, at 203.

value.³⁶⁵ Although drafted to allow record companies to obtain injunctive relief if artists try to record for other record companies during their contracts, these provisions may likely be used to hoist the record companies by their own petards. For producers, creating a sound recording is a highly-skilled job in that the producer not only needs to have a grand vision for what the album or record will sound like but also frequently makes musical suggestions to achieve that sound.³⁶⁶ As with artists, the contracts between record companies and producers contain clauses providing that the producers and their skills are special and unique.³⁶⁷

The final factor in this group looks at the source of the instrumentalities and tools. This factor likely favors artists and producers or is neutral. Although record companies sometimes own their own recording studios, it is rare that artists actually record there.³⁶⁸ If the recording is done at an independent studio, this factor would be neutral. However, sometimes the producer or even the artist owns the recording studio and equipment.³⁶⁹ In such a case, this factor could weigh in favor of the artists or producer being an independent contractor. As far as providing the instruments used during the recording sessions, these are normally owned by the artists and are sometimes purchased or paid off using the advance received from the record company.³⁷⁰

(c) *Group #3*

The third group of factors along the continuum of importance also has three factors. The first factor in this group is the extent of the hired party's discretion over when and how long to work. Who this factor benefits may very well depend on the stature of the artist or producer. Brand new artists and producers are given little control over

365. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 358.

366. See BURGESS, *supra* note 329, at 27, 182 ("Like all artistic endeavors, the successful pursuit of music production requires the development of practical skills." Creating hit singles and albums "requires skill and experience."); GAROFALO, *supra* note 333, at 223 ("Overdubbing, layering, mixing, and the addition of special effects such as reverb, equalization, and compression removed increasingly important aspects of the creative process from the studio performance and located them in the control room, elevating the producer to an artistic status equal to that of the musicians he produced.").

367. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 397-98.

368. KRASILOVSKY & SHEMEL, *supra* note 329, at 203.

369. Nimmer & Menell, *supra* note 339, at 399 (referring to testimony by Sheryl Crow that she owns her own recording equipment).

370. DICK WEISSMAN, *THE MUSIC BUSINESS* 56 (Crown Publishers, Inc. 1990).

issues such as the time for recording.³⁷¹ But over time, artists and producers can secure control over this aspect of their recordings.³⁷²

The second factor in this group is whether the work is part of the regular business of the hiring party. This factor certainly favors the record companies.³⁷³ Record companies are, and always have been, in the business of creating or acquiring rights to sound recordings and having those recordings distributed.³⁷⁴ Recording the albums that will eventually be distributed falls perfectly in line with these business practices.

The final factor in this group is the duration of the relationship between the parties. Artists and producers will probably be treated differently with respect to this factor. As mentioned earlier, recording contracts with artists are typically for a certain number of albums, and the record company has several options to extend the relationship.³⁷⁵ As a result, the exact duration of the relationship can be difficult to determine,³⁷⁶ but typically lasts for a period of several years,³⁷⁷ although usually not more than five to seven years.³⁷⁸ These long durations weigh in favor of artists being deemed employees.

371. See SIEGEL, *supra* note 363, at 111 (“In the basic beginner situation, the record company quite understandably seeks to maintain as much control as possible. Their experience has shown them that too often when they have relinquished control, disaster results); BEVERLY HILLS BAR ASS’N, *supra* note 336, at 331 (sample recording contract stating “The masters recorded hereunder by Artist shall be recorded in a recording studio selected or approved by Company *at such times as Company may designate or approve.*”); *id.* at 340 (another sample recording contract providing that the artist’s recording budget must include “the dates of recording and mixing . . .” and that the artist may begin recording after the record company has given its written approval).

372. KRASILOVSKY & SHEMEL, *supra* note 329, at 203 (“A record company’s control is likely limited to choosing producers and material to record.”); SIEGEL, *supra* note 363, at 121-23.

373. KRASILOVSKY & SHEMEL, *supra* note 329, at 203.

374. AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1369 (3d ed. Aspen Pub. 2002) (record companies typically own the rights to sound recordings); NEW YORK STATE BAR ASS’N, *ENTERTAINMENT LAW* 29 (Howard Siegel ed., 3d ed. 2004) (“Typically, the record company acquires all right, title and interest in and to the masters . . .”); SCHULENBERG, *supra* note 336, at 149 (“[W]ithout the rights [to the sound recordings], the record company has nothing . . .”); see DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 65-66, 68 (8th ed. 2012) (describing distribution by major and independent record companies).

375. See KRASILOVSKY & SHEMEL, *supra* note 329, at 14 (“The standard contract runs for a term based on the delivery of a minimum number of recordings (usually enough to constitute one album) plus a period of time thereafter (usually 9 months). The record company may have an option to extend the agreement for one or more successive albums.”); *supra* notes 360-61 and accompanying text.

376. SIEGEL, *supra* note 363, at 105.

377. KRASILOVSKY & SHEMEL, *supra* note 329, at 203.

378. BEVERLY HILLS BAR ASS’N, *supra* note 336, at 223 (describing that the AFM by-laws do not allow musicians to enter into personal service contracts for more than five years without approval); SCHULENBERG, *supra* note 336, at 28 (“In general, the total con-

Producers, on the other hand, are not typically signed to agreements giving the record companies options to have producers work on subsequent albums. Instead, a producer's working relationship with the record company is based upon the success of earlier recordings.³⁷⁹ Producers are almost always hired on a project basis rather than a number of years.³⁸⁰ In fact, sometimes producers are hired to work on a single song rather than an entire album.³⁸¹ As a result, the duration factor weighs in favor of producers being treated as independent contractors.

(d) *Group #4*

Moving on to the less important end of the continuum, there are two factors to consider. The first factor is the location of the work. This factor likely weighs in favor of artists and producers as independent contractors. Although record companies may have their own in-house studios³⁸² and prefer that they be used,³⁸³ it is rare for artists to record at those studios.³⁸⁴ Instead, the record companies try to include a provision in their contracts giving the record company the right of final approval of the recording studio.³⁸⁵ In practice, the record companies will approve any legitimate studio.³⁸⁶ Given that very few recordings occur at the record companies' studios, that the choice of the recording studio is made by artists and producers,³⁸⁷ and that the record companies rarely exercise their ability to veto a location, this factor probably favors artists and producers as independent contractors.

The second factor in this group is the hired party's role in hiring and paying assistants. This factor probably weighs in favor of artists and, to a lesser extent, producers being independent contractors, but may depend on the use of a recording fund and recoupment. In terms of selecting those who contribute to the recording, the artists and producers typically choose which engineers, non-featured musicians,

tract period will not run more than 7 years. This 7-year restriction can be directly traced to a provision of the California Labor Code, Section 2855").

379. SCHULENBERG, *supra* note 336, at 210.

380. *Id.*

381. BURGESS, *supra* note 329, at 168; SCHULENBERG, *supra* note 336, at 210.

382. Menell & Nimmer, *supra* note 330, at 1.

383. WEISSMAN, *supra* note 370, at 48.

384. KRASILOVSKY & SHEMEL, *supra* note 329, at 203.

385. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 331 ("The masters recorded hereunder by Artist shall be recorded in a recording studio selected or approved by Company at such times as Company may designate or approve."); MULLER, *supra* note 363, at 82.

386. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 332 ("Generally, the record company will approve any recording studio the artist or the artist's producer wishes to use, so long as it has satisfactory recording equipment and the studio's rates fit within the recording budget."); MCPHERSON, *supra* note 341, at 83.

387. Menell & Nimmer, *supra* note 330, at 4.

and non-featured vocalists to hire.³⁸⁸ The selection of the producer is a bit more involved. To the record company, selection of the producer is one of the more important provisions of the recording contract.³⁸⁹ These provisions usually state that the producer will be mutually selected by the artist and record company.³⁹⁰ In practice, however, the artist selects the producer, the record company consults and generally defers to the artist unless the record company has had a bad experience with the artist's choice.³⁹¹ Thus, it appears that artists and producers play a large role in hiring assistants.

Paying for those assistants is a bit more complicated. Today, artists pay for third parties out of a recording fund.³⁹² Under this approach, the recording costs and artist's advance are combined into a single fund, and the artist is responsible for paying all recording costs out of this fund.³⁹³ Any money leftover is the artist's to keep as an advance.³⁹⁴ As a result of this payment scheme, recording contracts include clauses specifying that the artist is solely responsible for paying all third party charges incurred in the production of the record.³⁹⁵ Because the artist's advance and recording costs are combined into one fund that is delivered to the artist to administer³⁹⁶ and the contract provisions describe the artist as being responsible for payment, it appears that this factor weighs in favor of the artist being an independent contractor.

Although the recording fund is more common today, it was common for the artist (especially a new artist) to be paid a separate advance and for the recording company to pay the recording costs.³⁹⁷ Although this arrangement suggests that the record companies paid for assistants, it is important to remember that all of the recording

388. *Id.*; Nimmer & Menell, *supra* note 339, at 399 (describing Sheryl Crow's testimony that she decides what musicians she wants to perform on each song, what engineers she wants to hire to implement her "sonic vision").

389. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 332.

390. *Id.*

391. *Id.*

392. KRASILOVSKY & SHEMEL, *supra* note 329, at 23-24; SIEGEL, *supra* note 363, at 112.

393. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 338.

394. *Id.* ("[The recording fund] gives the artist an incentive to minimize the recording costs, since the unspent portion of the recording fund is paid to the artist as a cash advance."); JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS 88 (1994) ("[I]f the artist's expenses do not exceed the recording fund . . . the amount left over is kept by the artist and treated as an additional advance recoupable from the artist's royalties.").

395. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 341.

396. The recording fund is customarily distributed at three points: (1) upon commencement of recording, (2) upon completion of the basic tracks, and (3) upon delivery of the finished master to the record company. KRASILOVSKY & SHEMEL, *supra* note 329, at 23-24.

397. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 338; BRABEC & BRABEC, *supra* note 394, at 88.

costs are treated as advances to the artist.³⁹⁸ As a result, these costs are recoupable from the artist's royalties.³⁹⁹ Because of this, if the artist earns a sufficient amount of royalties, it is the artist, not the record company, who pays for the recording costs.⁴⁰⁰ Of course, if the artist is never successful, then the record company will not recoup these costs and will end up paying for them. Who ultimately pays for the assistants under the older method of payment depends on whether the artist's album is a commercial success.

In sum, this factor probably weighs in favor of artists and, to a lesser extent, producers being independent contractors. Regardless of how these assistants are paid, the artist and producer choose who works on the recording. When a recording fund is used, the case for independent contractor is strengthened. However, if the record company did not use a recording fund and the costs are not recouped, then the record company will have a stronger argument that this factor weighs in favor of the artist and producer being employees.

(e) *Group #5*

Concluding with the least important group of factors, the first factor to consider is the right to control the manner and means by which the product is accomplished. Whether this factor weighs in favor of artists and producers being independent contractors or employees is difficult to determine. Prior to the 1970s, record companies exercised a large amount of creative control over the recording process, but since then, artists and producers have moved away from an in-house creative process and are exercising more creative control in recording.⁴⁰¹ Today, for newer artists and producers, the record companies may have language in the recording contracts requiring the artist and producer to submit written recording budgets specifying who the producer is and the financial agreement between the artist and producer, the songs to be recorded, the accompaniment and arrangement of the recordings, any recording fees that will exceed union scale, the dates and locations of the recordings and mixing, and the estimated costs of these sessions.⁴⁰² Despite this contract language, in practice,

398. BRABEC & BRABEC, *supra* note 394, at 88-89.

399. *Id.*; SIEGEL, *supra* note 363, at 112 ("Although the record company will pay the recording costs initially, it will charge them to [the artist] as advances against [the artist's] royalties as and when earned."); WEISSMAN, *supra* note 370, at 54.

400. SCHULENBERG, *supra* note 336, at 106.

401. Menell & Nimmer, *supra* note 330, at 3; Nimmer & Menell, *supra* note 339, at 393 (describing the Register of Copyrights as noting that "record companies level of involvement has diminished so that now, in many cases, record companies simply provide funds at the 'front-end,' and distribution at the 'back-end' of a sound recording's production" (quotation marks omitted)).

402. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 340.

written recording budgets are not always submitted or followed.⁴⁰³ More experienced artists and producers may, however, secure more control over the creative process, including the selection of music, recording location and time, final sound mix, and recording budgets.⁴⁰⁴ As a general matter, the record companies may have a better chance at artists and producers being employees under the right to control factor when the artists and producers are inexperienced. But the amount of control over the creative process wanes as artists and producers get more experience.

Specific components of recording that are important in the creative process are controlling music selection, monitoring what takes place during recording sessions, and selecting where the recording occurs. For music selection, the standard recording contract provides that the record company will select the music to be recorded.⁴⁰⁵ But in practice, the record company gives the artist a say in the decision.⁴⁰⁶ It is common today for the record company to only reserve a right of approval of the music selection.⁴⁰⁷ This is especially true for more seasoned artists.⁴⁰⁸ That said, there are actually very few disputes about song choice.⁴⁰⁹

With respect to where the recording occurs, as discussed in connection with the work location, record companies try to include clauses giving the record company approval rights of the recording studio.⁴¹⁰ In practice, the producer will normally choose the studio to work in,⁴¹¹ and the record companies will approve any legitimate studio.⁴¹² In addition to where the recording occurs, recording contracts typically contain a provision that the record company has the right to have a representative present to supervise the recording session.⁴¹³

403. *Id.*

404. *See* SIEGEL, *supra* note 363, at 122-23.

405. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 332; KRASILOVSKY & SHEMEL, *supra* note 329, at 13.

406. KRASILOVSKY & SHEMEL, *supra* note 329, at 13.

407. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 332.

408. KRASILOVSKY & SHEMEL, *supra* note 329, at 19.

409. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 332.

410. *Id.* at 331 ("The masters recorded hereunder by Artist shall be recorded in a recording studio selected or approved by Company at such times as Company may designate or approve."); MULLER, *supra* note 363, at 82.

411. WEISSMAN, *supra* note 370, at 48.

412. BEVERLY HILLS BAR ASS'N, *supra* note 336, at 332 ("Generally, the record company will approve any recording studio the artist or the artist's producer wishes to use, so long as it has satisfactory recording equipment and the studio's rates fit within the recording budget."); MCPHERSON, *supra* note 341, at 83.

413. SIEGEL, *supra* note 363, at 112-13.

Nonetheless, it is very rare for record companies to actually send a representative to the studio to supervise.⁴¹⁴

Although it appears that record companies actually exercise very little control over the creative process, they do reserve the right to do so in the recording contracts they enter into with artists and producers. As this factor really focuses on the *right* to control instead of *actual* control, which was rejected by the Supreme Court in *Reid*, it is likely that this factor will weigh in favor of artists and producers being considered employees.

The second factor in this group is the label the hired and hiring party use to describe the hired party. This factor certainly weighs in favor of artists and producers being deemed employees. Nearly every recording contract written since 1978 states that the works created by artists and producers are works made for hire.⁴¹⁵ Although many of the terms of a recording contract are negotiable, this one is not.⁴¹⁶

The final factor in the least important group of factors is whether the hiring party is in business. Record companies are obviously in business.⁴¹⁷ This factor clearly weighs in favor of the artists and producers being employees.

(f) *Conclusions for the Music Industry*

Table 6, below, summarizes the analysis of the *Reid* factors as applied to sound recordings in the music industry. This table sorts the factors by order of importance. A checkmark indicates this factor likely weighs in favor of that party's favored position (i.e. independent contractor for artist and producers, employees for record companies). A question mark indicates that it is unclear which way that factor applies.

414. *Id.*

415. NIMMER & NIMMER, *supra* note 75, at § 5.03[B][2][a][ii][II] (“[V]irtually all contracts that artists signed with record companies from 1972 onwards have contained acknowledgements of their contributions constituting works for hire.”); Nimmer & Menell, *supra* note 339, at 396; *see also* MCPHERSON, *supra* note 341, at 90; SCHULENBERG, *supra* note 336, at 148, 150.

416. *See* BEVERLY HILLS BAR ASS'N, *supra* note 336, at 390.

417. KRASILOVSKY & SHEMEL, *supra* note 329, at 203.

Table 6 – Summary of Sound Recording Analysis

| Factor | Artists | Producers | Record Companies |
|--|----------------------------|----------------------------|-----------------------------|
| Tax Treatment | ✓ | ✓ | |
| Employee Benefits | ? | ✓ | ? (artists) |
| Payment Method | ✓ | ✓ | |
| Additional Projects | | ✓ | ✓ (artists) |
| Skill Required | ✓ | ✓ | |
| Source of Instrumentalities & Tools | ✓ or neutral | ✓ or neutral | |
| When & How Long to Work | ? – new ✓ – established | ? – new ✓ – established | ? (new artists & producers) |
| Part of Regular Business of Hiring Party | | | ✓ |
| Relationship Duration | | ✓ | ✓ (artists) |
| Work Location | ✓ | ✓ | |
| Hiring & Paying Assistants | ✓ | ✓ | |
| Right to Control Manner & Means | | | ✓ |
| Label | | | ✓ |
| Hiring Party in Business | | | ✓ |

As illustrated in Table 6, it is nearly certain that producers will be treated as independent contractors. Five, and possibly six, of the most important factors weigh in favor of producers as independent contractors. In fact, the only factors suggesting producers would be employees are the part of the regular business of the hiring party and the three least important factors on the continuum.

The case for artists is more difficult. Nonetheless, it is more likely that artists will be deemed independent contractors. Of the three most important factors, two clearly weigh in favor of artists as independent contractors. The other factor (employee benefits) is unclear. As described earlier, when a party has two of these three factors in its favor, the courts find in favor of that party eighty-seven percent of the time.⁴¹⁸ Expanding this to the next group of factors, one favors the record companies, one favors the artists, and the remaining factor either favors the artists or is neutral. If a court were to rule that either the employee benefits or source of the instrumentalities factor favored the artists, then a majority of the top six factors would favor the artists. As described earlier, when a party has a majority of these six factors in its favor, the courts find in favor of that party ninety-one percent of the time.⁴¹⁹ The next group of factors favors the record

418. See *supra* Figure 2.

419. See *supra* Figure 2.

companies when the artist is new and is split two to one when the artist is established. This group is helpful to the record companies, but they face an uphill battle given that the more important factors favor artists. The fourth group of factors favors artists, which tips the scales slightly more towards artists being considered independent contractors. However, the least important factors all support the record companies. Of course, these are the least important factors, so their utility to the record company is of little value. Given the results of the most and second-most important groups of factors, this will likely carry the day and artists will be deemed independent contractors. That said, the record companies have a colorable argument that artists should be treated as employees, and this argument should not be considered futile.⁴²⁰ Hopefully, the results of this study and the analysis above provide a useful roadmap for litigants and judges navigating the upcoming termination of transfer cases.

3. *Business Planning*

In addition to assisting litigators to evaluate and present their cases, the results of this study will aid business planners in structuring relationships between hiring and hired parties. For example, if a hiring party seeks initial ownership of the copyright, it will be best advised to withhold income taxes and issue a W2 rather than a 1099, provide employee benefits such as life and health insurance, and pay the hired party at regularly intervals. To further ensure a work made for hire result, the hiring party could also include a provision in the agreement that reserves the right for the hiring party to assign additional projects to the hired party. And although difficult to control in some circumstances, the hiring party should provide as many of the tools as possible. Structuring the relationship this way forces the three most important factors and one or two of the factors in the second group to weigh in favor of employee status. This should all but assure a conclusion that the hired party will be an employee.

Likewise, for attorneys representing hired parties who would like to retain initial ownership—to take advantage of the termination of transfer provisions or to further exploit the copyright—they should insist on the hiring party not withholding taxes and issuing a 1099, refuse insurance coverage, and demand payment upon completion of projects or portions of projects. Submitting invoices to the hiring party upon completion would be a wise practice to adopt. Moreover, resisting a provision to accept additional projects and actually refusing additional projects until a new agreement is established for a new

420. See Mark H. Jaffe, *supra* note 337, at 165 (“[I]t would be futile for a record company to press this argument in litigation.”).

project will place the hired party in a strong position to argue that she is an independent contractor.

Of course, negotiating these terms may heavily depend on bargaining power. A weak hired party may not be able to demand that no additional projects be assigned. Likewise, a weak hiring party may not be able to insist that the hired party work on the hiring party's premises. But knowing where the various factors lie on the continuum may help the attorney for the weaker party focus on specific factors that the stronger party may be willing to budge on. If choosing between asking the stronger party to capitulate with respect to a provision about where the hired party will physically work and a provision concerning the hours of the day the hired party must work, the attorney for the weaker party should focus negotiation efforts on the working hours provision, because it is more important than the work location factor.

V. CONCLUSION

Drawing a distinction between employees and independent contractors in the work made for hire doctrine is a challenging endeavor, but one that strikes at the heart of many copyright disputes. After a quarter century of cases applying and interpreting the Supreme Court's multifactor test from *CCNV v. Reid*, this Article gives the first comprehensive study of this multifactor test and answers the question of which factors are the most and least important in these analyses. Some of the results are surprising while other results are expected. But regardless of how these results conform to our expectations, they will prove useful to the bench and bar involved in copyright litigation and for business planning attorneys advising their clients how to accomplish their copyright ownership goals.