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COMMENTS

THE WORK FOR HIRE DOCTRINE UNDER *COMMUNITY FOR CREATIVE NON-VIOLENCE* V. *REID*: AN ARTIST'S FAIR WEATHER FRIEND

Copyright law protects creative people¹ by assuring them certain valuable rights in their work product.² Section 201 of the Copyright Act of

1. The terms "creative person" or "artist" are used throughout this Comment to refer to all artists, defined by the National Endowment for the Arts as "Actors, Architects, Authors, Dancers, Designers, Musicians/Composers, Painters/Sculptors, Photographers, Radio/TV Announcers, Teachers of Art, Drama or Music in Higher Education, and Other Artists not elsewhere classified." NATIONAL ENDOWMENT FOR THE ARTS, FIVE YEAR PLANNING DOCUMENT: 1986 - 1990 83 (1984). In addition, for the purposes of this Comment, the terms "artist" and "creator" are meant to include computer programmers.

2. An artist who owns his or her work has the same "bundle of rights" as any other owner of property: the right to use the work, to possess it, to conceal it from others, and to sell or give it away. LEONARD D. DUBOFF, ART LAW 185 (2d ed. 1993); *see also* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 509-10 (Cal. 1990) (Mosk, J., dissenting) (describing the rights associated with property ownership). These possessory rights are generally inadequate for artists, however, because most artists sell their works, and the possessory rights are transferred to the purchasers of the works. *See* DUBOFF, *supra*, at 185. Copyright law compensates for this shortfall by granting artists an intangible property right in their works, apart from possessory rights. *See* HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW 3 (Comm. Print 1961) [hereinafter REGISTER'S REPORT].

Copyright basically is the right of an author to control, and to prevent, the reproduction of his work. *See id.* When the author physically possesses his or her work, the author can control the use of the work by virtue of tangible property law. *See id.* However, if the author makes his or her work available to the public, he or she runs the risk that someone will reproduce the work without permission. *See id.* Copyright law allows the author to control the reproduction of his or her work even after it has been published. *See id.* Copyright law is based on the notion that a person who endeavors to create something, tangible or intangible, is entitled to exploit that creation commercially, regardless of ownership of the work itself. *See* D.F. Libling, Note, *The Concept of Property: Property in Intangibles*, 94 L.Q. REV. 103, 104 (1978).

Congress's authority to grant copyright derives from Article I, Section 8 of the Constitution, which states that Congress may "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." U.S. CONST. art. I, § 8, cl. 8. The Constitution therefore suspends copyright law between the poles of encouraging artistic creation and restricting the artist's monopoly in the work. *See* Marci A. Hamilton, *Commissioned Works as Works*

1976 (1976 Act)³ vests copyright ownership, with all of its benefits, in the author or authors of a work.⁴ Because “author” is a term of art under the 1976 Act, however, not all creators are considered copyright authors.⁵ In particular, under the “work made for hire” doctrine,⁶ “the employer or

Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice, 135 U. PA. L. REV. 1281, 1282 (1987); see also *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417, 429 (1984) (arguing that Congress constitutionally may grant a monopoly to artists as an economic incentive to artistic creation); cf. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 283-84 (1970) (arguing that the copyright monopoly is generally unnecessary in the publishing industry and that copyright protection should be recognized with caution).

As expressed in the 1976 Copyright Act, copyright law strikes the delicate balance between creation and monopoly by granting an artist exclusive rights in his or her work only for a limited time. See DUBOFF, *supra*, at 185. The law allows artists to continue to profit from their works after they no longer possess copies of them, by prohibiting others from copying, adapting, distributing, performing, or displaying their works. See *id.* This creation of a “limited monopoly” in an art work assures that others will not be able to profit unfairly from the labor of an artist, and further that artists as a whole will be encouraged to continue to enrich the public with their works. *Id.*; see also Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 38-45 (4th ed. 1992) (noting that a copyright operates as a monopoly to encourage productivity, but is limited in duration to foster competition); REGISTER’S REPORT, *supra*, at 6 (recognizing that while some restrictions on copyright ownership are necessary to protect the public, they should not be so oppressive that artists are not compensated fairly for their work).

3. See 17 U.S.C. §§ 101-1101 (1994).

4. See *id.* § 201(a). The Initial Ownership section states: “Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.” *Id.*

An author is “one who translates an original idea into a fixed, tangible means of expression.” *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994) (footnote omitted). In most cases, the author of a copyrightable work is also the creator of the work. See WILLIAM S. STRONG, *THE COPYRIGHT BOOK: A PRACTICAL GUIDE* 35-36 (4th ed. 1994). Generally, the initial copyright owner is the creator of the copyrighted work. See Matthew R. Harris, Note, *Copyright, Computer Software, and Work Made for Hire*, 89 MICH. L. REV. 661, 661 (1990).

5. See 17 U.S.C. § 201(b). This section provides:

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

Id.

6. The term “work made for hire” is defined as:

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

other person for whom the work was prepared," and not the artist, will be considered the work's author,⁷ and will be entitled to all of the rights appurtenant to authorship of a copyrighted work.⁸

In addition to determining initial authorship, work for hire law impacts several other aspects of copyright ownership.⁹ For example, once a work is determined to be a work for hire, the duration of its copyright,¹⁰ the

Id. § 101.

The work for hire doctrine was first recognized by the Supreme Court in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). The *Bleistein* Court was persuaded that the works in question were produced by paid employees and awarded copyright ownership to the employers. *See id.* at 248. Congress later accepted and codified the work for hire doctrine. *See* Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075 (1909).

7. *See* 17 U.S.C. § 201(b). There are two reasons for Congress's decision to classify employers in work for hire situations as authors rather than owners, or some other less artificial designation. First, the Constitution allows Congress to grant copyright ownership only to "[a]uthors." U.S. CONST. art. I, § 8, cl. 8; *see also* ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT FOR THE NINETIES* 246-47 (4th ed. 1993). Second, because of the many benefits associated with authorship and not with mere ownership, Congress designated employers as authors for purposes of work for hire. *See* Karen L. Gulick, *Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 62-63 (1994).

8. *See* 17 U.S.C. § 201(b).

Of course, copyright ownership also may change where there is no work for hire agreement. *See generally* STRONG, *supra* note 4, at 59-63. For example, an author may transfer his or her copyright to a third party by means of an assignment or licensing agreement. *See id.* at 60. Such rights-acquisition agreements may be used when a work, such as a film or play, is based upon an existing work, such as a novel. *See* KENNETH P. NORWICK & JERRY SIMON CHASEN, *THE RIGHTS OF AUTHORS, ARTISTS, AND OTHER CREATIVE PEOPLE* 114 (2d ed. 1992). In these cases, the purchaser may secure nearly all the rights in the work, although the author may retain the right to profit from the work in its original form (i.e. written as opposed to an on-screen performance). *See id.* at 114-15.

9. Besides its significance in American copyright law, the work for hire doctrine has important consequences in the international copyright area as well. The work for hire doctrine may conflict with the Berne Convention's emphasis on "rights . . . deemed to be personal to the human being who creates a copyrighted work." 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.03[B], at 5-20 n.56 (1996). *See infra* notes 10-18 and accompanying text (discussing the effects of the work for hire doctrine).

For an unusual use of the work for hire doctrine, see *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1375 (N.D. Cal. 1993) which asserted, as a defense to a libel suit, that the offending work was a work for hire and that the defendant writer, because he did not own the copyright in the work, should not be held liable.

10. *See* 17 U.S.C. § 302(c) (1994). For works created on or after January 1, 1978, the effective date of the 1976 Act, copyright protection endures for the life of the author plus fifty years. *See id.* § 302(a). The copyright term is different for works for hire, however, and lasts for seventy-five years from the year of a work's initial publication, or one hundred years from the year of its creation, whichever expires first. *See id.* § 302(c). This provision is necessary because in work for hire cases, the author is frequently not a person, but a business entity which has no measurable lifetime. *See* H.R. REP. NO. 94-1476, at 137 (1976) *reprinted in* 1976 U.S.C.C.A.N. 5659, 5753.

copyright owner's renewal rights,¹¹ and the owner's right to prevent importation of infringing goods into the United States¹² are changed. Additionally, the artist in a work for hire relationship has no transfer termination rights¹³ because the employer or hiring party¹⁴ is considered the copyright author.¹⁵ Finally, an artist's lawsuit for copyright infringement may be dismissed if the work was for hire because the artist-plaintiff does not have standing to sue.¹⁶ Because the operation of the work for

11. See 17 U.S.C. § 304(a). Prior to the effective date of the 1976 Act, many works were still protected under the 1909 Act. See generally GORMAN & GINSBURG, *supra* note 7, at 8-12 (discussing the history of the 1909 and 1976 Acts, and congressional efforts to protect previously copyrighted works under the 1976 Act). Works created before January 1, 1978 are subject to renewal after the first 28 year term. See 17 U.S.C. § 304(a)(1)(A). The person entitled to claim the copyright renewal varies depending on whether the work was for hire. See *id.* § 304 (a)(1)(B); see also 1 NIMMER & NIMMER, *supra* note 9, § 5.03[A], at 5-11.

12. See 17 U.S.C. § 601. An author who is not a citizen or domiciliary of the United States may not prevent the importation of infringing materials into the country. See *id.* § 601(b)(1). In the case of a work for hire, however, if the employer or commissioning party is a citizen or resident, the exclusion does not apply. See *id.* This is appropriate because, in work for hire cases, the hiring party is the author for purposes of the statute. See *id.* § 201(b).

13. A copyright is a form of intangible property; as such it may be sold, given as a gift, bequeathed by will, or otherwise transferred if the owner so desires. See 17 U.S.C. § 201(d); see also STRONG, *supra* note 4, at 59. When preparing a contract to transfer ownership of a copyright, many authors include a provision stating reasons for which the transfer may be terminated, in which case the copyright would revert to the author. See *id.* at 64. Furthermore, the Act gives authors a statutory right of termination. See 17 U.S.C. § 203(a) (providing that "the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright . . . is subject to termination" under several conditions). Congress found that a statutory right of termination was necessary because of "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until after it has been exploited." H.R. REP. NO. 94-1476, at 124 (1976) reprinted in 1976 U.S.C.C.A.N. 5659, 5740.

14. The terms "hiring party" or "employer" are used throughout this Comment to refer to "the party who claims copyright ownership under the work for hire doctrine." 1 NIMMER & NIMMER, *supra* note 9, § 5.03[B], at 5-15 n.27 (1995) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 736 n.6 (1989)).

15. See 17 U.S.C. § 203(a). Under § 203, an author who has made a grant of rights to a third party can terminate the transfer after thirty-five years. See *id.* § 203(a)(3). Artists often transfer copyright in their work before the true value of the work can be ascertained (i.e., when the artist is still unknown). See DUBOFF, *supra* note 2, at 193. Congress enacted § 203(a) to allow artists to renegotiate such transfer agreements after they achieve some renown. See *id.* This termination right does not apply to works made for hire, because there is no actual transfer of rights. See *supra* note 4 (discussing § 201). Instead, the employer is considered the author of the work from its inception. See 17 U.S.C. § 201(b).

16. In work for hire cases, the artist is not the copyright owner. See *supra* notes 5-6 and accompanying text (discussing the operation of the work for hire doctrine). Only copyright owners or their exclusive licensees may sue for copyright infringement. See 17 U.S.C. § 501(b) (1994) ("The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it."); see also Corey L. Wishner, Note, *Whose Work*

hire doctrine has many implications,¹⁷ it is vitally important that artists and employers alike be able to determine with certainty whether a work will be considered for hire.¹⁸

Under the 1976 Act, a work for hire relationship exists when an employee creates a work "within the scope of his or her employment."¹⁹

Is It Anyway?: Revisiting Community for Creative Non-Violence v. Reid in Defining the Employer-Employee Relationship Under the "Work Made for Hire" Doctrine, 12 HOFSTRA LAB. L.J. 393 (1995) (stating that the court must determine the true owner of a copyrighted work when adjudicating a copyright infringement case). Thus, the employer may sue for infringement, but the artist-employee may not. See *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1490 (11th Cir. 1990) (allowing the defendant in a copyright infringement suit to assert that because of the work for hire doctrine, the plaintiff-employee was not the copyright owner and thus lacked standing to sue); cf. 1 NIMMER & NIMMER, *supra* note 9, § 5.03[A], at 5-11 (noting that a defendant may use the work for hire doctrine to dispute a plaintiff's copyright ownership).

17. See generally Julie Goldscheid, *Copyright Law: Toward an Improved "Works for Hire" Doctrine*, 1990 ANN. SURV. AM. L. 557, 558 (1991) (arguing that the application of work for hire law is particularly important in the publishing, advertising, music, and computer programming industries, as the artists in those fields generally work as independent contractors).

18. Certainty is essential so that artists and employers or commissioning parties alike can negotiate with each other with full knowledge of the facts. See *Works-Made-For-Hire - Practical Perspectives: A Roundtable Discussion*, 14 COLUM.-VLA J.L. & ARTS 507, 539 (1990) (statement of William Patry) ("[T]he most desirable thing for everybody is that you know up front what the relationship is going to be and then you can bargain over it . . . you can get these many rights for this much money and that many rights for that much money.") [hereinafter *Works-Made-For-Hire*]; see also Christine Leahy Weinberg, Note, *Community for Creative Non-Violence v. Reid: A Specious Solution to the "Works Made for Hire" Problem*, 32 B.C. L. REV. 663, 665 (1991) (claiming that "predictability in the 'work for hire' doctrine is critical to the ability of parties to identify the potential and scope of economic rewards for creative production and to structure contracts concerning copyright interests accordingly"). On the other hand, an artist who is aware that his or her work may be considered for hire may be able to demand additional compensation, because he or she will not benefit from copyright protection. See *Works-Made-For-Hire, supra*, at 539. An employer or commissioning party will be able to save the expense of providing benefits to or withholding taxes for an artist, if the artist is considered an independent contractor. See *id.* So long as application of the work for hire doctrine remains uncertain, artists and employers alike cannot bargain effectively, as they cannot safely predict how a court will view their employment relationship. See *id.*

The Supreme Court accepted the importance of predictability when it rejected the actual control test in *Reid* because the test "thwart[ed] Congress' goal of ensuring predictability through advance planning." *Reid*, 490 U.S. at 749. The Court noted that in a "copyright marketplace," the artist and hiring party negotiate with the understanding that one of them will own the copyright in the finished work. See *id.* at 749-50. If copyright ownership may be predictably determined, the parties can confidently structure the provisions of their agreement. See *id.*

19. 17 U.S.C. § 101(1). The 1976 Act actually provides for two kinds of work for hire situations. The first involves an employee who creates a work within the scope of his or her employment. See *id.* § 101(1). The second kind of work for hire is one created by an independent contractor working in one of several statutorily defined categories, but only if the artist and hiring party agree in a writing that the work is for hire. See *id.* § 101(2). This

Unfortunately, the work for hire doctrine has not been applied uniformly, largely because the 1976 Act fails to define two key terms: "employee" and "scope of employment."²⁰ Courts interpreting the work for hire provision of the 1976 Act have developed their own tests for these terms, and as a result, artists in different jurisdictions have received varying amounts of copyright protection.²¹

In *Community for Creative Non-Violence v. Reid*,²² the Supreme Court addressed the copyright ownership problem by adopting common law agency principles for use in work for hire determinations.²³ Regrettably, because *Reid* adopts a flexible, multi-factor approach,²⁴ it has only partially resolved the controversy.²⁵ Lower courts applying *Reid* continue to

Comment focuses particularly on the employment type of work for hire described in § 101(1). For a thoughtful discussion of the commissioned artist type of work for hire relationship embodied in § 101(2), see generally Nancy Barbara Morris, Note, *Community for Creative Non-Violence v. Reid: An Incomplete Resolution of the Work for Hire Controversy*, 11 PACE L. REV. 167 (1990).

20. See 17 U.S.C. § 101; *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989) (observing that the Act does not define "employee" or "scope of employment"); 1 NIMMER & NIMMER, *supra* note 9, § 5.03[B], at 5-13 (noting that the text of the Act and the committee reports fail to define "employee" and "scope of employment"); Weinberg, *supra* note 18, at 668-85 (describing the history of the copyright work for hire doctrine and the legislative efforts to clarify the law with the 1976 Act).

21. Compare *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) (noting that a work is for hire if the hiring party has the right to direct and control the creation of the work), with *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir. 1984) (finding that a work is for hire if the hiring party actually exercises the right to direct and control the creation of the work), and *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989) (concluding that a work is for hire only if the artist is a formal, salaried employee, or if the work is created by an independent contractor and is one of nine kinds of works enumerated in the Act), and *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 334-35 (5th Cir. 1987) (holding that a work is for hire if the artist is an employee under common law agency principles, or if the artist is an independent contractor and the work is one of the kinds of works listed in § 101(2) of the 1976 Act); see also 1 NIMMER & NIMMER, *supra* note 9, § 5.03[B], at 5-26 to 5-27 (describing various tests courts developed in interpreting the 1976 Act).

22. 490 U.S. 730 (1989).

23. See *id.* at 740-41.

24. See *id.* at 751-52. After listing factors to be considered in determining whether an artist has been hired as an employee or as an independent contractor, the Supreme Court stated that no individual factor would be determinative. See *id.*

25. Several commentators have argued that a more precise test is necessary. See Hamilton, *supra* note 2, at 1313 (suggesting that Congress could borrow an employment definition from another statute); cf. 1 NIMMER & NIMMER, *supra* note 9, § 5.03[B], at 5-26 n.80 (arguing that only a "completely mechanical definition" would avoid case-by-case adjudication, and that such a definition, while providing certainty, would be harsh and inequitable in some cases).

reach inconsistent results,²⁶ and application of the work for hire doctrine remains unpredictable.²⁷

This Comment discusses the confusion in copyright law surrounding the work for hire doctrine that specifically results from *Reid*'s adoption of common law agency principles. Section I focuses on the conflicting tests the federal courts developed prior to *Reid*. Section II analyzes the *Reid* decision, focusing on the agency test adopted for work for hire cases. Examining several work for hire cases decided under *Reid*, Section III compares the factors the courts have relied upon and discusses the disparate conclusions they reach. Section IV considers the purposes underlying the work for hire doctrine and analyzes the state of work for hire law after *Reid*. This Comment concludes that, as currently applied, *Reid* has become merely a "fair-weather friend" to artists and proposes an alternative interpretation of *Reid* that considers the interests of both employers and artists, furthering the objectives of copyright law.

I. THE WORK FOR HIRE DOCTRINE PRIOR TO *COMMUNITY FOR CREATIVE NON-VIOLENCE V. REID*: STORMY WEATHER

Although federal copyright laws have existed in various forms since 1790,²⁸ a work for hire provision did not appear in statutory form until

26. Compare, e.g., *Avtec Sys., Inc. v. Peiffer*, No. 92-463-A, 1994 WL 791188, *8 (E.D. Va. 1994) (holding that a computer program created by an employee was not a work for hire), *aff'd*, 67 F.3d 293 (4th Cir. 1995) with *Miller v. CP Chems., Inc.*, 808 F. Supp. 1238, 1244 (D.S.C. 1992) (holding that a computer program created by an employee was a work for hire); see *infra* notes 173-204 and accompanying text (discussing the tests utilized in *Avtec* and *Miller*).

27. See Mary M. Luria & Laura Butzel, *Legal Rules Still Hazy On "Work for Hire,"* NAT'L L.J., Jan. 24, 1994, at S21 (asserting that regardless of the Supreme Court's decision in *Reid*, the classification of work for hire relationships remains unclear); see also Goldscheid, *supra* note 17, at 572 (concluding that the *Reid* agency approach may be no more precise than any of the tests previously applied by the courts); cf. Alan Hyde & Christopher W. Hager, *Promoting the Copyright Act's Creator-Favoring Presumption: "Works Made for Hire" Under Aymes v. Bonelli & Avtec Systems, Inc. v. Peiffer*, 71 DENV. U. L. REV. 693, 716 (1994) (arguing that the trend of cases decided under *Reid*, as evidenced by *Aymes* and *Avtec*, is to prefer the interests of the artist over those of the hiring party).

The problem of unpredictability is exacerbated because artists and hiring parties cannot contractually determine whether the working relationship will be considered one for hire. See Robert A. Kreiss, *Scope of Employment and Being an Employee Under the Work-Made-for-Hire Provision of the Copyright Law: Applying the Common-Law Agency Tests*, 40 KAN. L. REV. 119, 145-46 (1991). Courts look to the substance of the working relationship and find that an artist is an employee if the factors so indicate, regardless of any contractual agreement to the contrary. See *id.* at 146.

28. The American copyright system is derived from English statutory law. See GORMAN & GINSBURG, *supra* note 7, at 1. Following the Revolution, most of the Colonies enacted laws to protect authors, generally based on the proposition that such protection was necessary to promote "the improvement of knowledge, the progress of civilization, the

the 1909 Copyright Act.²⁹ In the 1950s, Congress undertook a substantial overhaul of copyright law to better adapt it to modern technology.³⁰ The revision process took two decades and resulted in the 1976 Act.³¹ As part of the revision process, Congress sponsored an official negotiation between artist and employer representatives that resulted in the work for hire provisions codified at § 101 and § 201 of the Act.³² Section 101(1)³³

public weal of the community, and the advancement of human happiness." *Id.* at 5 (quoting Massachusetts, Act of March 17, 1783). The first federal copyright law was the Copyright Act of May 31, 1790, 1 Stat. 124 (1790). *See id.* at 6. The 1790 Copyright Act underwent various revisions for the next one hundred years, until the enactment of the 1909 Copyright Act. *See id.* at 7-8. The 1909 Copyright Act remained in effect, with minor amendments, for the next 68 years. *See id.* at 8.

29. *See* Weinberg, *supra* note 18, at 668. The 1909 Act stated that "the word 'author' shall include an employer in the case of works made for hire." Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075 (1909). The work for hire provision of the Copyright Act of 1909 merely codified the presumption at common law that an employer was entitled to copyright ownership in works produced by a salaried employee. *See* Weinberg, *supra* note 18, at 668.

30. *See* Weinberg, *supra* note 18, at 670-71. The revision process also marked a shift in the mission of copyright law toward rewarding authors for their contributions to society. *See* REGISTER'S REPORT, *supra* note 2, at 6.

31. *See generally* Weinberg, *supra* note 18, at 670-73. For an in-depth discussion of the work for hire doctrine as it developed under the 1909 Act, and of the legislative history surrounding the adoption of § 101 of the 1976 Act, see Weinberg, *supra* note 18, at 668-84. Under the 1909 Act, the employer was presumed to be the author of works created by an employee. *See* Hyde & Hager, *supra* note 27, at 716. The 1976 Act essentially terminated that presumption by limiting commissioned works for hire to the nine exclusive works provided for in the Act, and by requiring an express written agreement between both parties agreeing to treat the relationship as for hire. *See id.*

32. *See* Weinberg, *supra* note 18, at 670-84 (discussing the legislative history of the 1976 Act and focusing particularly on the compromise nature of the work for hire provision eventually drafted).

The independent artist's interest in copyright ownership is self-evident. Copyright law seeks to secure for such artists fair compensation for their creative work. *See* *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

On the other hand, when the artist is hired to create a work, it may be more appropriate to award copyright ownership to the employer. *See* Harris, *supra* note 4, at 662. Many times the employer is responsible for undertaking the project. *See id.* The employer usually bears the risk of commercial loss if the project is unsuccessful, while the employed artist is paid no matter what. *See id.* Awarding copyright ownership to the employer in this situation helps ensure that the employer will be fairly compensated for its creative work. *See id.*; *see also* Alexandra Duran, Comment, *Community for Creative Non-Violence v. Reid: The Supreme Court Reduces Predictability by Attributing an Agency Standard to the Work for Hire Doctrine of the 1976 Copyright Act*, 56 BROOK. L. REV. 1081, 1082-83 (1990) (stating that the work for hire doctrine balances the rights of independent artists while rewarding hiring parties for their financial and editorial contributions).

Furthermore, the employer may be better able to disseminate the work, making it more available for public use. *See* I.T. Hardy, *An Economic Understanding of Copyright Law's Work-Made-For-Hire Doctrine*, 12 COLUM.-VLA J.L. & ARTS 181 (1988).

33. *See* 17 U.S.C. § 101(1) (1994). The use of subsections (1) and (2) to refer to the two parts of the work for hire definition in Section 101 of the Act perhaps is confusing.

provides that an employee-created work is for hire if it has been prepared within the scope of employment.³⁴ Section 101(2) provides that a commissioned work is for hire when it is one of nine specific types of work and the parties expressly agree in a signed writing that the work is for hire.³⁵ Congress's failure to define the critical terms "employee" and "scope of employment" in the Act has left the problem of interpreting those terms to the courts.³⁶

Without guidance from the 1976 Act, courts applying the work for hire doctrine developed various tests, often achieving different results.³⁷ Specifically, the courts adopted four different tests: the actual control test,³⁸

Section 101 is actually a collection of definitions which are not individually numbered, and some definitions found therein contain subsections. Thus, there are in fact several provisions which could be cited as § 101(1) or (2). However, a review of the applicable literature, including the Supreme Court's decision in *Reid*, reveals that this convention has been almost universally adopted, and it will be followed herein.

34. *See id.* § 101(1). The reasoning behind the employee work for hire rule is that, because the employer risks its capital, controls the creation process, and pays the artist, the employer should own the copyright in the artist's work. *See* Paul D. Supnik, *Contracts for Employment*, in *THE VISUAL ARTIST'S BUSINESS AND LEGAL GUIDE* 135, 139 (Gregory D. Victoroff ed., 1995).

35. *See* 17 U.S.C. § 101(2). The types of works the section classifies as potential works for hire are contributions to collective works, parts of motion pictures or other audiovisual works, translations, supplementary works, compilations, instructional texts, tests, answer materials for tests, or atlases. *See id.* The rationale supporting the specially commissioned works provision is that these works usually involve groups of artists, and it would be unreasonable to require that a hiring party negotiate separately with all of the artists to obtain copyrights. *See* Supnik, *supra* note 34, at 139.

36. *See supra* note 20 (discussing how the 1976 Act fails to define "employee" and "scope of employment").

37. *See* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 738-39 (1989) (discussing the various tests developed under the Act); Weinberg, *supra* note 18, at 666 (noting that the lack of a statutory definition resulted in inconsistent interpretations of the Act by federal courts).

38. *See* *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir. 1986) (finding that if an employer supervised and directed the creation of a work, the work is for hire even if the artist was an independent contractor); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 553 (2d Cir. 1984) (same).

the right to control test,³⁹ the agency law test,⁴⁰ and the traditional employee test.⁴¹

The United States Court of Appeals for the Second Circuit developed the actual control test in *Aldon Accessories Ltd. v. Spiegel, Inc.*⁴² Relying on case law developed under the 1909 Act, the court held that a work would be considered for hire if the hiring party paid for and controlled the creation of the work, regardless of whether an artist was an employee or independent contractor.⁴³ The actual control test interfered with the crucial predictability of copyright working arrangements by forcing artists and hiring parties to guess, before undertaking a project, whether enough control would be exercised to render the project a work for hire.⁴⁴

39. See *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) (concluding that work was for hire where the hiring party retained the right to supervise the work); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 142 (S.D.N.Y. 1983) (same); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 651 (S.D.N.Y. 1970) (noting that the right of an employer to direct and supervise work was demonstrative of a work for hire relationship), *aff'd*, 457 F.2d 1213 (2d Cir. 1972).

40. See *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1493-94 (5th Cir. 1987) (holding that a work may be for hire only if created by an employee within the scope of employment, according to the common law of agency, or by an independent contractor, if the requirements of § 101(2) are met), *aff'd*, 490 U.S. 730 (1989); *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 334-35 (5th Cir. 1987) (same), *cert. denied*, 485 U.S. 981 (1988).

41. See *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989) (finding that, to be an employee-created work for hire, a work must be prepared by a formal, salaried employee).

42. 738 F.2d 548 (2d Cir. 1984).

43. See *id.* at 552-53. The *Aldon* court held that:

A work for hire is a work prepared by what the law calls an employee working within the scope of his employment. What that means is, a person acting under the direction and supervision of the hiring author, at the hiring author's instance and expense. It does not matter whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation.

Id. at 551.

44. Harris, *supra* note 4, at 682. The actual control test was very fact specific, so that different works could be treated differently even though produced by the same artist for the same hiring party. See *id.*

The right to control test was a variation of the Second Circuit's actual control test.⁴⁵ In *Peregrine v. Lauren Corp.*,⁴⁶ the United States District Court for Colorado held that a work for hire relationship existed whenever an employer retained the right to supervise the creation of the work.⁴⁷ Under the test, nearly all commissioned works, even those created by independent contractors, could be considered works for hire.⁴⁸

Applying agency law principles, the United States Court of Appeals for the Fifth Circuit adopted a different work for hire test in *Easter Seal Society v. Playboy Enterprises*.⁴⁹ Recognizing that § 101 distinguishes between employees and independent contractors, the court held that agency principles should resolve whether an artist worked as an employee.⁵⁰

45. See Weinberg, *supra* note 18, at 687 n.168. Although the tests were similar, the actual control and right to control tests differed in the kind of control requisite to the work for hire relationship. See *id.*; see also *Reid*, 490 U.S. at 738-39. Under the right to control test, so long as the employer retained the right to supervise creation of the work, he or she did not need to actually exercise the right. See *id.* (citing *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) and *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 142 (S.D.N.Y. 1983)). Under the actual control test, however, the employer must have actually exercised the right. See *id.* at 739 (citing *Aldon Accessories*, 738 F.2d at 553).

46. 601 F. Supp. 828 (D. Colo. 1985).

47. See *id.* at 829.

48. See Harris, *supra* note 4, at 677-78 (maintaining that "few commissioning relationships are entered in which the commissioning party does not retain the right to direct and control a work"). The actual control test itself may be unsound: a hiring party may not delegate the right to control unless he or she originally possesses it. See Hardy, *supra* note 32, at 216-17. Because the hiring party thus retains a residual right to control, under the actual control test a commissioning party must always be the copyright author. See *id.*

49. 815 F.2d 323 (5th Cir. 1987).

50. See *id.* at 335. The *Restatement (Second) of Agency* defines an employee as a "person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958). The factors relevant to the employment issue are:

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

Id. § 220(2).

Under this test, a commissioned work prepared by an independent contractor could be for hire only if it was one of nine identified types of works and the parties agreed it was to be considered for hire.⁵¹

Finally, in *Dumas v. Gommerman*,⁵² the United States Court of Appeals for the Ninth Circuit fashioned the traditional employee test. The court held that an "employee" under the 1976 Act meant a formal, salaried employee and did not include free-lance creators.⁵³ This traditional employee test was the most narrow of the four tests and, because it limited the work for hire doctrine to the most formal of employment circumstances, it increased predictability in artist-hiring party relationships.⁵⁴

The various tests the courts used prior to *Reid* caused problems for artists and employers alike.⁵⁵ Despite the importance of predictability in copyright law,⁵⁶ the conflicting tests muddied the work for hire waters, and interfered with nationwide uniformity of copyright law.⁵⁷ These con-

The court reasoned that because the term "scope of employment" is a term of art under agency law, an employee under the 1976 Act would have to be an employee as determined by the law of agency. *Easter Seal*, 815 F.2d at 335-37. Furthermore, the court held that using agency law to apply the work for hire provisions of the 1976 Act would provide predictability and "moral symmetry." *Id.* at 335. By "moral symmetry," the court probably meant that applying agency principles would best balance the competing interests of artistic control and employment security.

51. See *Easter Seal*, 815 F.2d at 335-36. The *Restatement (Second) of Agency* defines an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958).

52. 865 F.2d 1093 (9th Cir. 1989).

53. *Id.* at 1105.

54. See Harris, *supra* note 4, at 684.

55. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) ("The contours of the work for hire doctrine therefore carry profound significance for freelance creators — including artists, writers, photographers, designers, composers, and computer programmers — and for the publishing, advertising, music, and other industries which commission their works."). The Supreme Court also cited a study which found that approximately forty percent of all copyright registrations as of 1955 were for works for hire. See *id.* at 737 n.4 (citing BERGE VARMER, WORKS MADE FOR HIRE AND ON COMMISSION, IN STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, Study No. 13, 86th Cong., 2d sess., 139 n.49 (Comm. Print 1960)).

56. See *Reid*, 490 U.S. at 740 (asserting that reliance on a federal rule of agency, rather than state law, would better serve the Act's goal of creating nationally uniform copyright law); Bennett E. Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 HASTINGS COMM. & ENT. L.J. 591, 616 (1988) (arguing for the importance of predictability in work for hire law).

57. See Goldscheid, *supra* note 17, at 561 (arguing that predictability and consistency are decreased if courts apply different tests, and copyright ownership is awarded depending upon the jurisdiction in which an artist happens to reside); Weinberg, *supra* note 18, at 685-86 (recognizing that, although the Act and its legislative history clearly distinguished be-

flicting tests may have discouraged artistic productivity, because some artists may have declined commissions for fear of losing copyright.⁵⁸ In 1988, the Supreme Court granted certiorari to resolve the conflict in the courts.⁵⁹

II. *COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID*: FORCASTING FAIR WEATHER

In 1985, the Community for Creative Non-Violence (CCNV), a non-profit charitable organization, engaged the artist James Earl Reid to create a sculpture for CCNV to display.⁶⁰ After Reid completed the sculpture and both CCNV and Reid claimed copyright ownership, CCNV brought suit.⁶¹ The United States District Court for the District of Columbia found that the sculpture was a work for hire based on § 101 of the 1976 Act, holding that Reid created it as an employee of CCNV.⁶²

The United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case.⁶³ Adopting the Fifth Circuit's

tween employees and independent contractors, courts developed conflicting tests to decide cases where an artist's employment status was disputed).

58. See *Works-Made-for-Hire*, *supra* note 18, at 525 (statement of Martin Mayer) ("My experience in dealing with magazines is that I will not sign work-for-hire things . . ."); see also Supnik, *supra* note 34, at 137 (counselling artists to avoid creating works for hire where possible). Furthermore, extraordinary works of art are susceptible to exploitation by hiring parties, who may desire to use the works for purposes that the parties did not originally contemplate. See Hamilton, *supra* note 2, at 1311. The confusion surrounding work for hire law thus may have created a "powerful incentive to artists to produce the absolute minimum work required by the commissioning party." *Id.* As the underlying purpose of copyright law is to foster artistic and intellectual development for the good of the public, uncertainty in work for hire law may undercut the very core of copyright. See *supra* note 2 (discussing the objectives of copyright law).

59. See *Community for Creative Non-Violence v. Reid*, 488 U.S. 940 (1988).

60. See *Reid*, 490 U.S. at 733. The sculpture, entitled *Third World America*, depicted a homeless black family huddled over a steam grating in a pose reminiscent of the Nativity scene. See *Copyright Ruling Favors Artists*, ART IN AMERICA, Sept. 1989, at 240. Reid donated his services to the project, and CCNV paid Reid's expenses. See *Reid*, 490 U.S. at 734. CCNV exercised some control over the creation of the sculpture, making suggestions about the placement of the figures and the media to be used. See *id.*

61. See *Reid*, 490 U.S. at 735. The dispute over ownership arose because CCNV intended to take the sculpture on a nationwide tour. See *id.* Reid attempted to block the proposed tour because he felt the sculpture, which had been cast in inexpensive material to save costs, could not withstand the trip. See *id.* The disagreement also may have stemmed from CCNV's plans to reproduce the sculpture on greeting cards and calendars. See *Copyright Ruling Favors Artists*, *supra* note 60, at 240.

62. See *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1457 (D.D.C. 1987), *rev'd*, 846 F.2d 1485 (D.C. Cir. 1988), *aff'd*, 490 U.S. 730 (1989). The court awarded ownership of the copyright to CCNV. See *Reid*, 652 F. Supp. at 1467.

63. See *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir. 1988). The court determined that, under agency law, Reid was an independent contractor, not an employee. See *id.* Since a sculpture is not one of the types of works listed in

agency test,⁶⁴ the court determined that Reid was an independent contractor and the sculpture was not a work for hire.⁶⁵

The Supreme Court affirmed the Circuit Court's opinion.⁶⁶ Because the sculpture would be a work for hire only if it were "a work prepared by an employee within the scope of his or her employment,"⁶⁷ the Court's opinion focused on the definition of "employee." The Court concluded that Congress intended "employee" to refer to the "conventional relation of employer and employee" found in common law agency principles.⁶⁸ Because federal statutes typically are intended to be applied uniformly nationwide,⁶⁹ the Court created a federal common law of agency, based on the *Restatement (Second) of Agency*.⁷⁰

Reid structured the work for hire inquiry as a two-step test. The first step is to determine whether, under general agency principles, an employee or independent contractor created the work in question.⁷¹ The distinction between employees and independent contractors reflects the law's sensitivity to employers, who are entitled to the copyright in the works they have subsidized through the payment of wages and provision of employment benefits.⁷² Further, the law recognizes that an employer usually supplies guidance and supervision over an employee's work, while

§ 101(2) and there was no writing, the relationship could not have been a work for hire arrangement under § 101(2). *See id.*

64. *See id.* (citing *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 334 (5th Cir. 1987)); *see also supra* note 50 (describing the elements of the agency law test).

65. *See Reid*, 846 F.2d at 1494. The court remanded the case for a determination as to whether the sculpture could be considered a joint work. *See id.*

66. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 736 (1989).

67. *See id.* at 738 (quoting 17 U.S.C. § 101(1) (1994)). CCNV conceded that sculpture is not one of the kinds of works listed in § 101(2) and that *Third World America* could not be considered a work for hire under that section. *See id.* In addition, the parties had not signed a written agreement as required. *See id.*

68. *Id.* at 739-41 (quoting *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 322-23 (1974)).

Common law agency principles have been applied in areas other than copyright law. *See Works-Made-For-Hire, supra* note 18, at 510 (statement of Irwin Karp). The National Labor Relations Act prevents independent contractors, as defined by agency principles, from organizing unions. *See id.* In addition, tax and antitrust laws make distinctions based upon agency law. *See id.*

69. Where Congress designates the federal courts as courts of original jurisdiction for a cause of action, the law the courts apply should be national in scope so that adjudication of cases will be uniform. *See Wishner, supra* note 16, at 400-01.

70. *See Reid*, 490 U.S. at 740-41 (citing *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)).

71. *See Reid*, 490 U.S. at 751.

72. *See Stenographic Report of the Proceedings of the Librarian's Conference on Copyright*, 2d Sess. (Nov. 1-4, 1905), *reprinted in* 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski & A. Goldman eds. 1976). The Report notes:

[T]he right belonging to that artist who is employed for the purpose of making a work of art so many hours a day, or that literary producer who is employed for so

a commissioning party may be relatively unconnected with the work of an independent contractor.⁷³

Therefore, the primary inquiry under *Reid* is whether a particular artist is an employee or an independent contractor.⁷⁴ *Reid* set forth several factors⁷⁵ relevant to the determination: the hiring party's right to control the manner and means by which the product is accomplished;⁷⁶ the skill

many hours, should be very different from the right that is held by the independent artist or man who makes a painting for art's sake.

Id. at 188 (statement of A. Beverly Smith, Lithographers' Ass'n (East)).

73. See VARMER, *supra* note 55, at 142.

74. See *id.*; see also MacLean Assocs. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 776 (3d Cir. 1991) (noting that the characterization of the employment relationship is the "key inquiry").

75. See *Reid*, 490 U.S. at 751. Although *Reid* cites the factors, it does not explain how they are to be applied. See *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) (stating that *Reid* failed to give direction concerning the balancing of the factors), *aff'd*, 47 F.3d 23 (2d Cir. 1995).

The comments to the *Restatement (Second) of Agency* do provide some guidance for relating the factors to the employment determination. According to the comments, the presence of the following factors signifies an employment relationship:

An agreement for close supervision or *de facto* close supervision of the servant's work; work which does not require the services of one highly educated or skilled; the supplying of tools by the employer; payment by hour or month; employment over a considerable period of time with regular hours; full time employment by one employer; employment in a specific area or over a fixed route; the fact that the work is part of the regular business of the employer; the fact that the community regards those doing such work as servants; the belief by the parties that there is [an employment] relation; an agreement that the work cannot be delegated.

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

In addition, comment (i) provides that "[t]he custom of the community as to the control ordinarily exercised in a particular occupation . . . together with the skill which is required in the occupation, is often of almost conclusive weight." *Id.* § 220 cmt. i. Therefore, a chef often would be considered an employee, even though he or she is highly skilled and not subject to the employer's control, because the community generally believes chefs to be employees. See *id.*

Also, if the employer controls the site of the work, then the workers are likely employees. See *id.* § 220 cmt. l. Finally, the parties' belief about their relationship is ordinarily not important. See *id.* § 220 cmt. m.

Because *Reid* does not cite to the comments, however, it is questionable whether they represent any more than persuasive authority for lower courts.

76. See *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 320-21 (2d Cir. 1982) (concluding that, because the employers had no right to control performances by hired musicians, the musicians were independent contractors); *NLRB v. Maine Caterers, Inc.*, 654 F.2d 131, 133, 135 (1st Cir. 1981) (holding that truck drivers were employees because they were subject to the control of their employers); RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958) (defining a servant as a person subject to an employer's control).

The right to control necessary to create an employment relationship may be "very attenuated." *Id.* § 220(1) cmt. d; see also *Wishner*, *supra* note 16, at 403. The agency test, however, focuses more on the hiring party's ability to control the worker than the ability to control the creation of the product. See *Kreiss*, *supra* note 27, at 160.

required;⁷⁷ the source of the instrumentalities and tools;⁷⁸ the location of the work;⁷⁹ the duration of the relationship between the parties;⁸⁰ the hiring party's right to assign additional projects to the hired party;⁸¹ the extent of the hired party's discretion over when and how long to work;⁸²

77. See *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947) (arguing that musicians were not employees because their musical abilities and performance determined their success); *Hilton Int'l Co.*, 690 F.2d at 320 (stating that skill may be considered in the agency inquiry); *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir. 1979) (arguing that the potential for additional profits through entrepreneurial skill is a factor in the agency analysis); RESTATEMENT (SECOND) OF AGENCY § 220(2)(d) (1958) (providing that the skill required in a particular occupation is a factor to be considered in determining whether a hired party is an employee).

If the skilled work is ordinarily considered secondary to the business of the hiring party, it may be inferred that the artist is an employee. See *id.* § 220(2) cmt. i. The fact that the artist is a skilled professional, however, weighs against the employer. See *Wishner, supra* note 16, at 405.

The level of skill required is not completely clear, but an artist is probably not required to be a master in his or her field to qualify. See *Marco v. Accent Pub. Co.*, 969 F.2d 1547, 1551 (3d Cir. 1992) (finding that a photographer did not have to rival Ansel Adams to be considered skilled).

78. See *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968) (holding that salespeople were employees in part because they used tools provided by their employer); *United States v. Silk*, 331 U.S. 704, 717-18 (1947) (finding that an employer's provision of tools was a factor to be considered); RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (stating that the identity of the party supplying the tools and work place is a factor in the agency test).

If an artist uses his or her own tools, he or she is probably not an employee. See *Wishner, supra* note 16, at 406-07. On the contrary, where an artist uses the hiring party's tools, it is expected that he or she will obey the hiring party's instructions regarding use of the tools. See *id.* This weighs in favor of an employment relation. See *id.*; RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. k.

79. See *United Ins. Co.*, 390 U.S. at 258-59 (asserting that salespeople were considered employees in part because they worked on employer's premises); *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989) (holding that the location of the work should be taken into account); *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 705 (4th Cir. 1986) (noting that the location of the work may be considered in determining whether a right to control exists), *rev'd*, 503 U.S. 318 (1992); RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (same).

80. The shorter the term of the job, the more likely it is that the artist is an independent contractor. See RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. j.

81. See *Dumas*, 865 F.2d at 1105 (holding that the employer's right to assign additional projects suggests that the hired party is an employee); *Short v. Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567, 573-74 (8th Cir. 1984) (noting the employer's control over substitution of workers and right to refuse work in finding the hired party was an employee).

82. See *Dumas*, 865 F.2d at 1105 (relying on the discretion of the hired party in determining whether he was an independent contractor); *Holt v. Winpisinger*, 811 F.2d 1532, 1539 (D.C. Cir. 1987) (same); *Darden*, 796 F.2d at 705 (same); RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (same).

the method of payment;⁸³ the hired party's role in hiring and paying assistants;⁸⁴ whether the work is part of the regular business of the hiring party,⁸⁵ whether the hiring party is in business,⁸⁶ and the tax treatment of the hired party.⁸⁷ No single factor is determinative.⁸⁸

83. See *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947) (holding that band leader was employer because, among other things, he paid musicians' wages and retained profits for himself); *Silk*, 331 U.S. at 719 (concluding that drivers were independent contractors because they worked for profit, not wages); *Darden*, 796 F.2d at 705 (citing the method of payment as a factor to be considered); *Short*, 729 F.2d at 574 (noting that the fact that workers were paid by commission weighed in favor of independent contractor status). An employment relationship is less likely if the artist is paid by the job. See RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. j; Wishner, *supra* note 16, at 407.

84. See *N.L.R.B. v. United Ins. Co. of America*, 390 U.S. 254, 259 (1968) (noting that the fact that the workers' assistance and management came from the company weighed in favor of employee status); *Silk*, 331 U.S. at 719 (concluding that workers who could hire their own assistants were independent contractors); *Hilton Int'l Co. v. N.L.R.B.*, 690 F.2d 318, 321 (2d Cir. 1982) (arguing that band leaders were independent contractors because they could hire and fire musicians in their band); RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. l.

The fact that the hired party may choose to hire and fire assistants, and pays the assistants himself, indicates that the artist is an independent contractor. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989) (noting that the artist had full discretion in hiring and paying assistants); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1492 (11th Cir. 1990) (finding that a party was an independent contractor, taking into consideration party's total discretion in hiring and firing assistants); Wishner, *supra* note 16, at 411.

85. See RESTATEMENT (SECOND) OF AGENCY § 220(2)(h). If the hiring party usually employs people to do the kind of work the artist performed, then the artist probably worked as an employee and not as an independent contractor. See *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 777 (3d Cir. 1991); Wishner, *supra* note 16, at 407.

86. See *United Ins. Co.*, 390 U.S. at 259 (relying on the fact that the employer was in business and workers did business in company name to find that workers were employees); *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989) (citing the "regular business" factor as part of the formal employee test); *Short*, 729 F.2d at 573-76 (finding that the factor weighed in favor of employee status).

Generally, the fact that the hiring party is in business weighs in his or her favor. See Wishner, *supra* note 16, at 409.

87. See *Dumas*, 865 F.2d at 1105 (citing the factor as part of the "formal employee" test).

88. See *Reid*, 490 U.S. at 752. After applying each factor to the facts in *Reid*, the Court determined that Reid had been an independent contractor and was entitled to the copyright in the sculpture. See *id.*

The Supreme Court has frequently stated that, in determining whether a hired party is an employee, no one factor is dispositive. See Kreiss, *supra* note 27, at 172. There is no "shorthand formula or magic phrase" to be applied; instead, all of the circumstances of the working relationship at issue must be weighed in context. *United Ins. Co.*, 390 U.S. at 258.

Other factors, besides those cited in *Reid*, may also be relevant in the work for hire context. See Kreiss, *supra* note 27, at 157-60. For example, the Internal Revenue Code lists twenty factors for consideration. See REV. RUL. 87-41, 1987-1 C.B. 296, 298-300. These factors include: whether training of the hired party is required; whether the hired

The second step under *Reid* is to apply the appropriate work for hire subsection of § 101.⁸⁹ Section 101(1), the scope of employment provision, defines employee-created works.⁹⁰ Works created by independent contractors, on the other hand, are defined by § 101(2).⁹¹ A work may be considered for hire only if it meets the requirements of both steps of the *Reid* test.⁹²

Although the test appears simple enough, as the lower courts have applied it, the *Reid* agency test has not resolved the stormy work for hire controversy.⁹³ Because the *Reid* Court explicitly noted that none of the factors relevant to the employment relationship determination are determinative, courts interpreting *Reid* remain free to apply the factors as they choose.⁹⁴ In addition, the *Reid* decision did not address the scope of employment issue, and courts have applied the concept inconsistently.⁹⁵ So long as application of the work for hire doctrine remains uncertain, copy-

party is required to personally render services; whether the hired party may set the order in which services are to be provided; whether the hired party has invested in an office or other facilities; whether the hired party pays business or travel expenses; and, whether the hired party undertakes financial risk. *See id.*

89. *See Reid*, 490 U.S. at 750-51.

90. *See* 17 U.S.C. § 101(1) (1994). If the artist in question was an employee and the work was produced within the scope of the artist's employment, the work was made for hire. *See id.*; *see also supra* note 6 (quoting the text of the statute).

91. *See* 17 U.S.C. § 101(2). A work created by an independent contractor will not be considered a work for hire unless it is one of the nine kinds enumerated in the statute *and* the parties agree in writing that the work will be considered for hire. *See id.*; *see also supra* note 6 (quoting the text of the statute).

92. *See* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989) (noting that a work may be for hire only if it meets the requirements of either § 101(1) or § 101(2)); *see also* Duran, *supra* note 32, at 1082 n.9 (discussing the two ways to create a work for hire).

93. *See* Goldscheid, *supra* note 17, at 557 (noting the uncertainty that remains even after *Reid*).

94. *See* 1 NIMMER & NIMMER, *supra* note 9, § 5.03[B], at 5-26 to 5-27 (asserting that by adopting a test based on numerous factors, the Supreme Court made it possible for future litigants to challenge their status under general agency principles); Hyde & Hager, *supra* note 27, at 708 n. 135 (arguing that *Reid* "provid[es] a seed bed for lower courts' discretionary preference over which factors control").

In addition, *Reid* fails to state how each factor would count in the analysis. *See* Harris, *supra* note 4, at 667 (asserting that *Reid* failed to address the issue of the amount of weight to be given each of the factors); Weinberg, *supra* note 18, at 700 (stating that the agency law test allows courts too much discretion). Thus, *Reid* may perpetuate the problems of inconsistency and unpredictability which plagued the prior work for hire tests. *See* Harris, *supra* note 4, at 667.

95. *See* Kreiss, *supra* note 27, at 122 (stating that, while *Reid* adopted common law agency principles to deal with the employee-independent contractor dichotomy, the term "scope of employment" has not been interpreted by a comparable decision). Kreiss argues that courts should also adopt common law agency principles for the scope of employment determination. *See id.* However, not all courts have agreed. *See* *Kelstall-Whitney v. Mahar*, No. CIV.A.89-4684, 1990 WL 69013, at *7-8 (E.D. Pa. May 23, 1990) (applying the

right law's "creator-favoring presumption"⁹⁶ will not be fully realized,⁹⁷ and *Reid* will remain merely a "fair-weather friend" to creators.

III. THE TURBULENCE CONTINUES IN CASES INTERPRETING *REID*

The lower courts interpreting *Reid* have used the *Reid* factors to reach different results, often upon similar facts.⁹⁸ Further, some of the approaches these courts developed fail to consider properly the competing interests at stake in work for hire determinations.⁹⁹ These inconsistencies undermine copyright law's creation incentives because they perpetuate unpredictability.¹⁰⁰

Reid factors to determine whether a computer program written by an employee was within the scope of his employment).

96. See generally Hyde & Hager, *supra* note 27, at 693. Copyright law historically presumed that employers owned the copyrights in their employees' work. See *id.* at 694. The work for hire doctrine as expressed in § 101, however, presumes that copyright belongs to the artist because one should be entitled to the fruits of one's labors. See *id.* at 693-95.

The work for hire doctrine favors free-lance artists by severely limiting the power of hiring parties to claim copyright ownership of their works. See Harris, *supra* note 4, at 686-87. Although many creators assign their copyright interest to the hiring party, they retain the right to cancel the assignment after 35 years. See *id.*; 17 U.S.C. § 203 (1994). If employers may successfully treat free-lance artists as employees for work for hire purposes, the ameliorative right to cancel is lost because the hiring party becomes the statutory author. See Harris, *supra* note 4, at 686-87. According to Paul Basista:

So here you have an independent contractor who becomes a de facto employee for copyright purposes. All the incentives for being in business for yourself, . . . for wanting to be a freelancer, are basically cut out from under you. If that can really determine who is an employee, . . . [then] work-for-hire takes [the right to capitalize on his own work] away from the creator.

Works-Made-For-Hire, *supra* note 18, at 507, 539-40 (statement of Paul Basista); see also *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1491 (11th Cir. 1990) (condemning the actual control test because, by allowing an independent contractor to be treated as an employee, it circumvented the writing requirement of § 101(2)).

97. Cf. Hyde & Hager, *supra* note 27, at 695 (arguing that *Aymes v. Bonelli* and *Avtec Systems, Inc. v. Peiffer* reflect a trend in judicial decisions favoring creators). See *infra* notes 108-26 and 189-204 and accompanying text (discussing *Aymes* and *Avtec*).

98. See Luria & Butzel, *supra* note 27, at S22-24 (discussing the different results reached on similar facts in three cases).

99. See generally Weinberg, *supra* note 18, at 702 (arguing that the *Reid* factors fail to properly reflect the balancing of employers' and artists' interests achieved by Congress in § 101).

100. See Luria & Butzel, *supra* note 27, at S21 (concluding that the diverse results have left employers with uncertainty regarding ownership). If employers, who often have access to counsel, are uncertain about the application of the work for hire doctrine, then artists are probably unsure as well.

The uncertainty in work for hire cases has important consequences for third parties as well. See Kreiss, *supra* note 27, at 124-25. The operation of the work for hire doctrine affects licenses and assignments of copyright. See *id.* at 125. If the employer and artist

The variables in the work for hire doctrine spring from two problems with *Reid*.¹⁰¹ First, *Reid* does not direct courts regarding the application of the agency factors.¹⁰² In cases where a hired party's status as employee or independent contractor is at issue, courts may apply the *Reid* factors differently, either excluding or adding factors or assigning greater or lesser weight to certain factors.¹⁰³ Second, *Reid* does not instruct courts on the definition of "scope of employment," a decisive part of the § 101(1) definition, except that it refers courts to the general common law of agency.¹⁰⁴ Thus, in cases where a hired party's status as an employee is undisputed, courts define "scope of employment" in various ways, either relying on the *Reid* factors themselves or referring to the common law as expressed in sections of the *Restatement (Second) of Agency*.¹⁰⁵ Because

misunderstand the nature of their working relationship, licenses or assignments granted by the party later determined not to be the author may be rendered invalid. *See id.*

101. In addition to the problems with *Reid* discussed in this Comment, the *Reid* test may be inadequate in other respects. Robert Kreiss argues that courts should review custom in work for hire determinations, but *Reid* does not require such evidence. *See Kreiss, supra* note 27, at 168-70. In addition, Kreiss argues that some *Reid* factors involve circular reasoning and are of questionable validity. *See id.* at 173 (arguing that the tax and employee benefit factors are based on circular reasoning). Kreiss also contends that some factors are useless, and should be discarded. *See id.* at 175-76 (asserting that whether the hiring party is in business and whether the hired party is engaged in a distinct occupation is irrelevant).

Furthermore, Kreiss argues that the common law of agency may not be appropriate in the copyright context. *See id.* at 137-39. Agency law developed under tort law and was designed to apportion respondeat superior liability between employers and their negligent employees. *See id.* at 138. The application of agency law in the copyright context means that copyrights will be awarded to hiring parties if they would be held responsible for negligence committed by the artist in the course of creating the work. *See id.* at 139. This test may seem "completely arbitrary and divorced from any policy rationale derived from the copyright laws." *Id.* Kreiss concludes, however, that the *Reid* test in fact is "sensible." *Id.*

102. *See supra* note 26 (demonstrating the elasticity of the *Reid* factor approach and how courts have applied the factors in various ways).

103. For example, one court applying *Reid* determined that the most important factors in the analysis were whether the hired party received employee benefits and was treated as an employee for tax purposes. *See Aymes v. Bonelli*, 980 F.2d 857, 863 (2d Cir. 1992). Another court held that these factors should be accorded only nominal significance. *See Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1118-19 (N.D. Ill. 1993).

104. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (providing that when the Court has determined that Congress intended terms such as "employee," "employer," and "scope of employment" to be interpreted according to agency law, the Court has relied on the general common law of agency); *see also infra* note 159 (discussing *Reid*'s failure to address the scope of employment issue).

105. For example, one court has relied on the *Reid* factors to define the scope of employment. *See Kelstall-Whitney v. Mahar*, No. CIV.A.89-4684, 1990 WL 69013, at *7-8 (E.D. Pa. May 23, 1990). Another court relied on section 228 of the *Restatement (Second) of Agency* (1958). *See Avtec Sys., Inc. v. Peiffer*, 805 F. Supp. 1312, 1318-19 (E.D. Va.

of these variables in the *Reid* analysis, the application of the work for hire doctrine remains unpredictable.¹⁰⁶

A. *Haziness on the Reid Factor Front*

Courts have developed at least four different approaches to *Reid's* agency factor analysis.¹⁰⁷ Generally, these approaches deal with the manner in which the factors are to be weighed, and whether and to what extent certain factors are to be emphasized in the evaluation. The interpretations may be characterized as stressing the tax and benefit factors, overlooking the tax and benefit factors, emphasizing the right to control, and minimizing the right to control.

1. *Stressing the Tax and Benefit Factors*

The United States Court of Appeals for the Second Circuit demonstrated the first approach to the *Reid* factor analysis in *Aymes v. Bonelli*.¹⁰⁸ *Aymes*, which involved computer software written by a freelance programmer, required the court to determine whether the programmer had worked as an employee or as an independent contractor when he wrote the software.¹⁰⁹ Despite *Reid's* admonition that none of the factors should be determinative,¹¹⁰ the Second Circuit found that two fac-

1992), *aff'd in part and vacated in part*, 21 F.3d 568 (4th Cir. 1994), *aff'd*, 67 F.3d 293 (4th Cir. 1995).

106. *Reid's* use of agency law principles is advantageous, however, in that it increases consistency among various federal statutes, all of which turn on agency law principles. See Kreiss, *supra* note 27, at 123. Attorneys and courts may look for guidance to relevant agency case law developed under these statutes, which include the Federal Rules of Evidence, the National Labor Relations Act, the Employee Retirement Income Security Act of 1974, the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Internal Revenue Code. See *id.*

107. See *infra* notes 108-56 and accompanying text (discussing the approaches courts have taken to the *Reid* analysis).

108. 980 F.2d 857 (2d Cir. 1992).

109. See *id.* at 858-59. The defendant, Bonelli, hired Aymes to write a computer program for use in Bonelli's retail stores. See *id.* When the work was completed, Aymes registered the program with the Copyright Office and sued Bonelli for continuing to use the program without his permission. See *id.* The United States District Court for the Southern District of New York, basing its decision on law developed prior to *Reid*, concluded that the program was a work for hire, and that Bonelli was its copyright owner. See *Aymes v. Bonelli*, 23 U.S.P.Q.2d 1317 (S.D.N.Y. 1991), *rev'd*, 980 F.2d 857 (2d Cir. 1992).

Because Aymes and Bonelli had not signed a written agreement, § 101(2) was inapplicable and the program could be a work for hire only if Aymes created it as an employee. See *id.* at 860.

110. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

tors, tax withholding and employment benefits, are particularly important, if not dispositive.¹¹¹

Reasoning that the *Reid* factors were merely "considerations" that could be "easily misapplied," the court determined that the agency factors should be weighted according to their factual significance.¹¹² Under the *Aymes* approach, some factors would be virtually irrelevant, while others would almost always be important and deserved more emphasis in the analysis.¹¹³

According to the Second Circuit, the particularly important factors included the right of the hiring party to direct the creation of the work, the skill required to create the work, the furnishing of employee benefits to the artist, the tax treatment of the artist, and whether the hiring party had the right to assign the artist additional work.¹¹⁴ These factors were particularly important because the court found that they were very probative of the real character of the employment relationship.¹¹⁵

Of all of the factors, the most important were whether the hiring party withheld taxes for the artist and whether the hiring party provided employment benefits to the artist.¹¹⁶ Hiring parties derive a substantial benefit from classifying artists as independent contractors, because they then do not have to withhold payroll taxes or pay benefits to the artist.¹¹⁷ The

111. See *Aymes*, 980 F.2d at 862. For a discussion of *Aymes*'s weighted factors, see Hyde & Hager, *supra* note 27, at 708-13. Hyde and Hager state that the Second Circuit's discussion suggests that the tax and benefit factors usually will distinguish an employee from an independent contractor. See *id.* at 711.

112. *Aymes*, 980 F.2d at 861. According to the court, *Reid* provided that no one factor was dispositive, but did not guide courts concerning the weighing of the factors. See *id.* The fact that none of the factors is dispositive does not necessarily mean that all the factors should be treated equally, or that all of the factors should be important in every case. See *id.*

This concept seems to give the court *carte blanche* to weigh the factors, because it is unclear when a factor would be considered important in a case. Is a factor to be considered important because its application yields an equitable result? If so, then the factors become merely a means to rationalizing a predetermined end. Or, is a factor important if it happens to be present in a particular fact situation, and other factors are not? If so, then the analysis ignores the balancing of interests which *Reid* announced.

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.* at 863. It is interesting to speculate about how California's work made for hire law might affect *Aymes*'s reasoning in this regard. California includes commissioned artists in its definition of "employee" for workers' compensation and insurance purposes, thereby entitling commissioned artists to worker's compensation and unemployment benefits. CAL. LAB. CODE § 3351.5(c) (West 1995); Gregory T. Victoroff, *California's Work Made For Hire Laws*, in THE VISUAL ARTIST'S BUSINESS AND LEGAL GUIDE 141 (Gregory T. Victoroff, ed., 1995). Thus, the employment benefit factors, at least, probably lose much of their relevance in California.

117. See *Aymes*, 980 F.2d at 862.

court reasoned that it would be inequitable for an employer to thereby profit, but then to be able to treat the artist as an employee for work for hire purposes.¹¹⁸ The court also found that most cases decided under *Reid* held in favor of the artist if employment benefits were not provided or taxes not withheld.¹¹⁹

Although the court stated that several factors were insignificant, it provided only two examples.¹²⁰ First, the right to hire assistants would be unimportant in cases where the nature of the work required the creator to work alone.¹²¹ The court, however, found the right to hire assistants would be important if the hired party actually employed assistants without the consent of the hiring party.¹²² The court reasoned that this factor then would be "highly indicative" that the artist was not an employee.¹²³ Second, the court found that whether the work was part of the hiring party's regular business would be irrelevant in most cases, as most businesses employ support staff.¹²⁴

The agency factors applied in *Aymes* were somewhat balanced: two factors indicated that Aymes worked as an employee, three indicated that he worked as an independent contractor, and the rest were inconclusive.¹²⁵ The court's emphasis on the employer's failure to withhold taxes and provide benefits, however, allowed it to find that Aymes worked as an independent contractor and that the program was not for hire.¹²⁶

118. *See id.* The court held that because Bonelli deliberately denied Aymes these basic characteristics of employment, he was effectively estopped from arguing that Aymes had been an employee. *See id.* at 862-63.

In addition, requiring that an employer treat hired parties consistently for copyright, tax, and other purposes promotes uniformity across a variety of federal statutes. *See Kreiss, supra* note 27, at 123. If an employer treats a hired party as an employee under the Internal Revenue Code, he or she also should classify the hired party as an employee under the Copyright Act of 1976. *See id.*

119. *See Aymes*, 980 F.2d at 863.

120. *See id.*

121. *See id.* at 864.

122. *See id.*

123. *See id.*

124. *See id.* at 863.

125. *See id.* at 862-64.

126. *See id.* at 864. The court found that Bonelli clearly had the right to direct Aymes' work, because he gave Aymes specific instructions regarding what the program was to be created to do. *See id.* at 862. This factor, then, counted "heavily" in favor of Aymes being an employee. *See id.* Bonelli also had the right to assign additional work to Aymes. *See id.* at 863. Although this factor weighed "strongly" in favor of an employee relationship, the court held that some independent contractors worked under the same conditions. *See id.* Therefore, the factor did not conclusively favor Bonelli. *See id.*

However, the court found that Aymes, as a computer programmer, possessed a high level of skill. *See id.* at 862. Aymes had not received any employee benefits, such as health, unemployment or life insurance benefits, and Bonelli did not pay any percentage of

2. *Overlooking the Tax and Benefit Factors*

In contrast, the United States District Court for the Northern District of Illinois virtually ignored the employee benefits and tax factors that were so critical in *Aymes*.¹²⁷ In *Respect, Inc. v. Committee on the Status of Women*,¹²⁸ the works at issue were teaching materials developed by the plaintiff, Mast.¹²⁹ The defendant, Committee, purchased the materials and began reproducing them without Mast's permission.¹³⁰ When Mast sued for infringement, Committee claimed that Mast had worked as an employee and that the materials were works for hire.¹³¹

The court agreed with the *Aymes* decision insofar as it concluded that the *Reid* factors should be weighted according to their factual significance.¹³² Thus, even if several factors counted in favor of employee status, a hired party could be an independent contractor if other factors weighed more heavily in the analysis.¹³³

Aymes's social security or income taxes. *See id.* These factors indicated that Aymes was an independent contractor. *See id.*

The remaining *Reid* factors were inconclusive. Aymes had been paid both hourly wages and lump sums at various times, so the method of payment was not particularly indicative of his employment status. *See id.* at 863. Further, whether the work was part of Bonelli's regular business was of "little use" in evaluating Aymes's claim. *Id.* Also, whether Bonelli was in business had little if anything to do with Aymes's employment status, so that factor deserved little weight. *See id.* Aymes and Bonelli both had some control over when and how long Aymes was to work, and, although Aymes worked for Bonelli for a fairly long period of time, during that period he also accepted projects from other employers. *See id.* at 863-64. Since Aymes did not use assistants, the authority to hire assistants factor was "virtually meaningless." *See id.* at 864. Finally, the location of the work and the source of the equipment were unimportant because Aymes had worked at Bonelli's offices, using Bonelli's computer, in order to install the program. *See id.*

127. *See Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1119 (N.D. Ill. 1993) (characterizing a hiring party's withholding of taxes as a "feather in the scales" of the *Reid* analysis).

128. 815 F. Supp. 1112 (N.D. Ill. 1993).

129. *See id.* at 1115.

130. *See id.* at 1115-16. The United States Department of Health and Human Services awarded the defendant, Committee, a grant to allow it to administer a program in public schools teaching sexual abstinence. *See id.* at 1115. After Committee purchased the plaintiff's manuscripts for use in the educational program, it reproduced and distributed the materials without the plaintiff's permission, pursuant to authority purportedly granted by the Department of Health and Human Services. *See id.* at 1115-16.

131. *See id.* at 1116.

132. *See id.* at 1117-18 (citing *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992)).

133. *See Respect*, 815 F. Supp. at 1118. The court cited *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992), and *Marco v. Accent Pub. Co.*, 969 F.2d 1547 (3d Cir. 1992), all cases in which hired parties were found to be independent contractors even though more *Reid* factors suggested employee status. *See Respect*, 815 F. Supp. at 1118.

Unlike *Aymes*, though, *Respect* held that the tax and benefit factors were practically inconsequential.¹³⁴ The court stated that *Reid* requires examination of all of the agency factors, unlike *Aymes*, in which some factors were considered irrelevant.¹³⁵ Based upon its weighted analysis, the court concluded that the teaching materials were not works for hire, and that Mast was the statutory author.¹³⁶

3. *Emphasizing the Right to Control*

In *MacLean Associates, Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*,¹³⁷ the Third Circuit took a different approach to the *Reid* factors. In that case, MacLean, a former employee of Mercer, provided some consulting services to one of Mercer's clients and developed a computer pro-

134. *See Respect*, 815 F. Supp. at 1118-19. Regarding the employment benefits factor, the court stated that Mast did not receive employee benefits in the customary use of the term. *See id.* at 1118. Based on the court's brief treatment of the subject, it is unclear whether she might have received employee benefits in another sense of the term. Still, *Respect* gave fairly cursory treatment to a factor considered highly significant in *Aymes*. *See id.*

Regarding the tax withholding factor, the court in *Respect* acknowledged that Commission in fact withheld payroll taxes for Mast. *See id.* According to the court, other parties who hired Mast often withheld taxes from her paychecks, and thus the fact that Commission also withheld taxes for Mast was irrelevant. *See id.*

135. *See id.* ("It should be remembered that [*Reid*] mandates consideration of all the factors."). In reaching this conclusion, the *Respect* court cited *Reid*. However, a careful review of the cited pages in *Reid* does not reveal such language, and furthermore, the Supreme Court stated in *Reid* that "[n]o one of [the] factors is determinative." *Reid*, 490 U.S. at 752. The Second Circuit in *Aymes* cited the same passage for its conclusion that not all of the factors would have to be considered in any given case. *See Aymes*, 980 F.2d at 861. The *Respect* court itself cited *Aymes* for the proposition that not all factors would be relevant in every case. *See Respect*, 815 F. Supp. at 1117-18. Therefore, the court's assertion that all of the *Reid* factors must be considered seems, at least, inconsistent.

136. Although Committee exercised some control over the content of the teaching materials, Mast really had created the "content and flavor" of the books. *Respect*, 815 F. Supp. at 1118. Furthermore, Mast worked mostly in her own office, using her own equipment, and was free to determine when and how long to work. *See id.* Although the parties disagreed about who owned the tools used to create the materials and who had hired assistants, the court determined that those issues were insignificant because Mast worked from her own research, used her own supplies, and was in charge of designing the materials. *See id.* Committee was not a regular textbook publisher, and during the period that Mast worked with Committee, she published works in conjunction with other companies. *See id.* The court noted that, even though Committee withheld payroll taxes from Mast's checks, such arrangements were not uncommon in independent contracting relationships. *See id.* Finally, the court held that Mast did not receive employee benefits as the term is generally understood. *See id.* The court concluded that Mast was an independent contractor and that the manuscript therefore was not a work for hire under § 101(1). *See id.* at 1119. Nor was it a work for hire under § 101(2) because Mast and Committee never signed a written agreement. *See id.*

137. 952 F.2d 769 (3d Cir. 1991).

gram for the client's use.¹³⁸ MacLean and Mercer disagreed as to which of them owned the copyright in the program.¹³⁹ The United States District Court for the Eastern District of Pennsylvania determined that the program was a work for hire and awarded copyright ownership to Mercer.¹⁴⁰ The Third Circuit vacated the district court's decision.¹⁴¹

Like *Aymes* and *Respect*, *MacLean* began with an analysis of the *Reid* factors.¹⁴² The court in *MacLean*, however, characterized the right to control factor as the "central" issue in establishing whether an artist is an employee or independent contractor.¹⁴³ The remaining factors, according to the court, were merely "pertinent" to the inquiry.¹⁴⁴ Strangely, the court addressed each of the *Reid* factors, without commenting specifically upon the issue of Mercer's right to control the creation of the program.¹⁴⁵

138. *See id.* at 773. The client was not informed that MacLean was no longer Mercer's employee. *See id.*

139. *See id.* at 773-74. MacLean brought suit for copyright infringement. *See id.* at 771. At the close of his case, the district court directed a verdict against MacLean, holding that because MacLean had been Mercer's employee when he wrote the program, Mercer was entitled to copyright ownership. *See id.* at 772.

Interestingly, in finding that MacLean had been Mercer's employee when he wrote the program, the district court relied on the fact that MacLean had been Mercer's apparent agent at the time. *See id.* at 777-78. Apparent agency is a doctrine of the common law of agency which holds that, if a person holds himself out as an agent of another, even if he is not, and a third party reasonably relies on that representation, the person will be considered an agent in fact. *See* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, AGENCY AND PARTNERSHIP 57-64 (1979). The district court was convinced that, because Mercer's client believed that MacLean was still Mercer's employee when he provided consulting services, he should be treated as an apparent agent. *See MacLean*, 952 F.2d at 777-78.

140. *See MacLean*, 952 F.2d at 772.

141. *See id.* at 781.

142. *See id.* at 776.

143. *Id.* (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)). Robert Kreiss has adopted this interpretation of *Reid* as well. *See Kreiss, supra* note 27, at 157. Kreiss argues that *Reid* should be interpreted as follows:

In order to determine whether a hired party is an employee under the common-law agency doctrine, the relationship between the parties must be examined to determine whether the hiring party has the right to control the manner and means by which the product is accomplished. This involves looking at many factors.

Id. (internal quotations omitted).

144. *MacLean*, 952 F.2d at 776. The court seemed to consider the remainder of the *Reid* factors subordinate to what it determined was the primary issue, the question of the hiring party's right to control the project. *See id.*

145. *See id.* at 776-78. The court considered that writing the software required skill and creativity, and MacLean had written it on his own computer, using his own software. *See id.* at 777.

In addition, MacLean's contract with Mercer had a relatively short duration, and Mercer did not have the right to assign other projects to MacLean. *See id.* MacLean had absolute freedom to choose when and how long to work, and he was paid on a project by project basis, not by salary. *See id.* Finally, Mercer was not in the regular business of providing software to its clients, and did not pay payroll or social security taxes, workers' compensa-

Based on its analysis of the factors, the court remanded the case for a trial on MacLean's claims of copyright infringement against Mercer.¹⁴⁶

4. *Minimizing the Right to Control*

In *Marco v. Accent Publishing Co.*,¹⁴⁷ the Third Circuit retreated from *MacLean's* emphasis on the control factor. The plaintiff, Marco, was hired to shoot photographs for Accent Publishing's magazine, and sued when Accent threatened to publish some of the photographs without his permission.¹⁴⁸ The United States District Court for the Eastern District of Pennsylvania found that Marco was an employee when he shot the photos, and denied his request for a preliminary injunction against the publication.¹⁴⁹

The Third Circuit vacated the district court's decision and remanded the case.¹⁵⁰ The lower court had relied on only some of the *Reid* factors, but all of the factors, according to the circuit court, should have been considered.¹⁵¹ The court performed its own analysis, and concluded that Marco, as an independent contractor, was entitled to the copyright in his photographs.¹⁵²

tion coverage, or unemployment insurance for MacLean. *See id.* On this basis, the court held that a rational jury could have found that MacLean was an independent contractor at the time he wrote the program, and that the district court had erred by directing a verdict against MacLean on his infringement claim. *See id.* at 778.

The court then held that the doctrine of apparent agency, although relevant to the common law agency doctrine, was not applicable in the work for hire context. *See id.* This is justified because the agency principles used in the work for hire doctrine apply to relationships between the hired and hiring parties, not with third parties. Thus, the fact that Mercer's client was not aware that MacLean was no longer employed by the company was irrelevant. *See id.*

146. *See id.* at 781. Based on its analysis of the *Reid* factors, the court held that a rational jury could have found that MacLean was an independent contractor at the time he created the program. *See id.* at 778. Therefore, the district court had erred by directing a verdict for Mercer on its infringement claim. *See id.*

147. 969 F.2d 1547 (3d Cir. 1992).

148. *See id.* at 1548-49. Accent and Marco never signed a written contract or discussed copyright or licensing. *See id.* at 1548.

149. *Marco v. Accent Publ'g Co., Inc.*, No. CIV.A.91-2057, 1991 WL 212187, at *7, *11 (E.D. Pa. Oct. 15, 1991).

150. *See Marco*, 969 F.2d at 1553.

151. *See id.* at 1550-52.

152. *See id.* at 1550. The court held that the factors weighed in favor of Marco being an independent contractor. *See id.* First, Marco used his own photographic equipment and paid his own taxes. *See id.* In addition, he worked out of his own studio, was not given any employment benefits, and worked in a skilled occupation. *See id.* Marco could choose when and how long to work; the fact that Accent had imposed a deadline for the completion of his work did not weigh against his status as an independent contractor. *See id.* Furthermore, Accent did not have the right to assign additional work to Marco, and the six

While the *Marco* court emphasized the hiring party's control over the details of the work, it did not do so in the same manner as the court in *Respect*.¹⁵³ After finding that Accent exercised direction and control over the creation of the photos, the court stated that the issue of control should be kept "in perspective."¹⁵⁴ According to the court, because the control factor is reminiscent of the actual control and right to control tests that *Reid* rejected, it should not be relied upon too heavily.¹⁵⁵ Therefore, even though Accent exercised a good deal of control over the photographs at issue, the court accorded that fact little weight.¹⁵⁶

The *Aymes*, *Respect*, *MacLean*, and *Marco* cases demonstrate the various ways that courts have manipulated the application of the *Reid* factors. In addition, courts can reach different results based upon the application of the second prong of § 101(1)'s work for hire test: the requirement that the work be created within the scope of the artist's employment.

B. Fog Blankets the "Scope of Employment" Analysis

Under *Reid*, once a court determines that a work was created by an employee under the common law rules of agency, it must next consider whether the work was produced within the scope of the artist's employment.¹⁵⁷ Therefore, how a court defines "scope of employment" greatly impacts determinations of copyright ownership.¹⁵⁸ Unfortunately, *Reid*

month duration of their relationship did not weigh in favor of Marco being an employee since he worked irregular hours. *See id.* at 1551.

Only three factors weighed in Accent's favor. First, Accent was in regular business, so it more likely would employ people. *See id.* Second, Accent was in the regular business of trade photography. *See id.* Finally, Accent exercised control over the details of the work. *See id.* The court found that the last three *Reid* factors—custom in the industry, the parties' intentions regarding Marco's status, and control and compensation of assistants—did not apply. *See id.* at 1552.

The court remanded the case to the district court for consideration of the preliminary injunction in light of factors unrelated to the work for hire determination. *See id.* at 1553.

153. *See id.* at 1550-51.

154. *Id.* at 1551 (noting that the control factor is not dispositive).

155. *See id.* (stating that courts should apply this factor with caution because it resembles the control test rejected in *Reid*).

156. *See id.* at 1552. Accent provided jewelry and props at the photo sessions, and sketched the intended layout of the photos. *See id.* at 1551. Accent also sometimes provided an Art Director who was responsible for the "subject matter, composition, and mood" of the photos. *Id.* at 1552 (internal quotations omitted).

157. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989) (citing 17 U.S.C. § 101(1) (1988)). Even employee-created works are not considered made for hire if they are prepared outside of the scope of employment. *See* 17 U.S.C. § 101(1).

158. *See infra* note 159 (discussing *Reid*'s treatment of the scope of employment determination).

does not guide courts toward a definition of scope of employment¹⁵⁹ and, as a result, at least three courts have addressed the issue differently.

1. *Misplaced Reliance on the Reid Factors*

In *Kelstall-Whitney v. Mahar*,¹⁶⁰ the District Court for the Eastern District of Pennsylvania took a novel approach to the scope of employment inquiry by relying on the *Reid* factors themselves.¹⁶¹ The work at issue was a computer program defendant Mahar created to improve software that his employer, Kelstall-Whitney, marketed.¹⁶² When Mahar proposed that Kelstall-Whitney promote the improved program and that they share the profits, Kelstall-Whitney terminated Mahar's employment and sued, claiming that the program was a work for hire.¹⁶³

There was in fact no question that Mahar was Kelstall-Whitney's employee when he wrote the program.¹⁶⁴ Therefore, the only real issue before the court was whether the program was written within the scope of Mahar's employment.¹⁶⁵ In making its decision, the court relied on the

159. *Reid* did not reach the issue of scope of employment because it found that the artist worked as an independent contractor, not as an employee. *See Reid*, 490 U.S. at 752-53. Presumably, *Reid* directs courts to the common law of agency, but the command is by no means clear. *See id.* at 750-51. The Court stated that to determine whether a work is for hire, a court should consult common law agency principles to discern whether an employee or independent contractor created the work. *See id.* at 751. Thereafter, the court can apply the relevant subsection of § 101. *See id.* Even if *Reid* adopted agency principles to guide the scope of employment definition, it did not choose a particular test as it did for the definition of employee. *See id.* at 751-52 (adopting the RESTATEMENT (SECOND) OF AGENCY § 220(2)).

160. No. CIV.A.89-4684, 1990 WL 69013 (E.D. Pa. May 23, 1990).

161. *See id.* at *7-9.

162. *See id.* at *2.

163. *See id.* at *6. Mahar and Kelstall-Whitney filed competing applications for copyright of various versions of Mahar's program. *See id.* Kelstall-Whitney brought suit to require that one of Mahar's copyright registrations be transferred to her name, claiming that she was entitled to the copyright by virtue of the work for hire doctrine. *See id.*

164. *See id.* at *1 (recognizing that Kelstall-Whitney hired Mahar as a full-time employee to be paid an hourly rate). The court also stated:

Robert C. Mahar . . . was employed as a formal employee of Carolyn Kelsall-Whitney [sic] During his formal employment for [Kelstall-Whitney], he received the standard income tax and social security withholding treatment of [Kelstall-Whitney's] employees and the standard benefits of [Kelstall-Whitney's] employees, including but not limited to unemployment compensation insurance, workman's compensation insurance and other benefits.

Id. at *6.

Despite this, the court claimed to apply the *Reid* factors in order to determine whether Mahar worked as an employee or as an independent contractor. *See id.* at *7-8. Given that Mahar was clearly Kelstall-Whitney's employee, however, and that the factors considered by the court make better sense in the scope of employment context, the court most likely was determining the scope of Mahar's employment.

165. *See supra* note 6 (describing the elements of § 101(1)).

Reid factors, and in so doing established the *Reid* agency factors as one scope of employment test.¹⁶⁶

The *Kelstall-Whitney* court's reliance on the *Reid* factors probably was misplaced. Although *Reid* did not expressly limit the use of the factors to the determination of employment status, the *Restatement (Second) of Agency* section 220, upon which the court relied, is so limited.¹⁶⁷ Section 220, entitled "Definition of Servant," and its factors cited in *Reid*, are designed to make the distinction between employees and independent contractors.¹⁶⁸ Other sections of the *Restatement (Second) of Agency* define the scope of employment and provide other factors for consideration.¹⁶⁹

166. See *Kelstall-Whitney*, 1990 WL 69013 at *1 ("Plaintiff hired defendant as an employee . . . [who] was to be paid an hourly wage and to work approximately 40 hours per week, with no overtime."); see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) ("In determining . . . whether a hired party is an employee under the general common law of agency, we consider [these factors] . . .").

Because the Supreme Court has not defined "scope of employment" specifically, lower courts are free to define it as they wish, within the confines of the general law of agency. However, because section 228 of the *Restatement (Second) of Agency* deals directly with the subject, it is a more appropriate definition. *Kelstall-Whitney's* reliance on the *Reid* factors is, therefore, probably misplaced.

Several of the factors cited in *Kelstall-Whitney* support the inference that the court was actually making a scope of employment determination. For example, the court's reliance on Mahar's low wage supports the inference that he was being paid only for the work he performed by the hour for *Kelstall-Whitney* and that his programming work therefore was outside the scope of his employment. See *Kelstall-Whitney*, 1990 WL 69013 at *8. In addition, the court's reliance on the fact that the program was created for use by one of *Kelstall-Whitney's* customers supports the argument that it may have been written within the scope of Mahar's employment. See *id.* at *8.

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

168. See *id.*

169. Several sections of the *Restatement (Second) of Agency* apply to scope of employment determinations. The scope of employment is generally delimited in section 228, which provides:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master, and
 - (d) (omitted).
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

The omitted portion of section 228 deals with intentional torts committed by employees and is not relevant in work for hire ownership determinations. See *Miller v. CP Chems., Inc.*, 808 F. Supp. 1238, 1243 n.5 (D.S.C. 1992).

Additional sections of the *Restatement* further refine the scope of employment concept. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 229 ("Kind of Conduct Within Scope of Employment"); *id.* § 230 ("Forbidden Acts"); *id.* § 231 ("Criminal or Tortious Acts"); *id.*

Assuming that *Kelstall-Whitney's* use of the *Reid* factors was proper, its application of the factors was selective. The court did not refer to all of the *Reid* factors¹⁷⁰ and applied some factors not discussed in *Reid*.¹⁷¹ Based upon this unusual analysis, the court in *Kelstall-Whitney* concluded that the program was not a work for hire and awarded the copyright to Mahar.¹⁷²

§ 232 ("Failure to Act"); *id.* § 233 ("Time of Service"); *id.* § 234 ("Area of Service"); *id.* § 235 ("Conduct Not for Purpose of Serving Master"); *id.* § 236 ("Conduct Actuated by Dual Purpose"); *id.* § 237 ("Re-entry into Employment") (1958).

170. See *Kelstall-Whitney*, 1990 WL 69013, at *7-9. The court did not discuss several of the *Reid* factors, including the hiring party's right to control; the skill required; the duration of the relationship between the parties; the right of the hiring party to assign other work to the hired party; the freedom of the hired party in deciding when or how long to work; the hired party's responsibility for hiring and compensating assistants; the extension of employment benefits; and the tax treatment of the hired party. See *id.*

The court did note, in discussing Mahar's salary, that his "final" wages were only \$ 7.50 per hour. *Id.* at *8. The fact that the court used the word "final" may suggest that payroll taxes were withheld from Mahar's checks, but the court does not discuss the issue further. *Id.*

171. See *id.* at *10 (discussing Mahar's maintenance of his time sheets). Of course, creating new factors is permissible under *Reid*, as the Court referred to its list of factors as "nonexhaustive." *Reid*, 490 U.S. at 752.

The court in *Kelstall-Whitney* considered very significant the fact that *Kelstall-Whitney* could not satisfactorily explain how she obtained certain copies of the program, and that it appeared she had in fact stolen them from Mahar. See *Kelstall-Whitney*, 1990 WL 69013, at *9-10.

Other non-*Reid* factors relied upon by the court seem pertinent to scope of employment analysis. Although Mahar worked on *Kelstall-Whitney's* computer equipment, the court considered it important that he did so after hours and with *Kelstall-Whitney's* express permission. See *id.* at *8. The court determined outright that the program had not been written within the scope of Mahar's employment. See *id.* In addition, the court apparently was impressed by the fact that Mahar received a relatively low wage. See *id.*

Finally, the court asserted that Mahar "authored" the program. *Id.* Actually, the authorship determination should have been a legal conclusion made based on the factor analysis, not a part of the analysis itself. See 17 U.S.C. § 201(b) (1994) (providing that "[i]n the case of a work made for hire, the employer . . . is considered the author"). Whether the court meant these factors to be evidence of the existence of the *Reid* factors which it did not address, or whether the court really was creating new factors, is unclear.

172. See *Kelstall-Whitney*, 1990 WL 69013, at *7-9. Several *Reid* factors weighed in favor of the program being a work for hire. Mahar was a full-time employee of *Kelstall-Whitney*, and *Kelstall-Whitney* was in the regular business of creating and marketing computer programs. See *id.* at *8. The program was written for use by one of *Kelstall-Whitney's* customers, although it is unclear whether the court considered this a separate factor or whether it simply evidenced that *Kelstall-Whitney* was in the regular business of computer programming. See *id.*

Other factors weighed against the program being for hire. Mahar wrote the program during his personal time, and did not receive any wages for the time he spent working on it. See *id.* The program was not written, according to the court, "in the course and scope of [Mahar's] employment." *Id.* Additionally, *Kelstall-Whitney* was opposed to Mahar's working on the program and refused to support it. See *id.*

2. *Reliance on Section 228 of the Restatement (Second) of Agency*

In *Miller v. CP Chemicals, Inc.*,¹⁷³ the United States District Court for South Carolina relied on the *Restatement (Second) of Agency* to make a work for hire scope of employment determination.¹⁷⁴ CP Chemicals (CP) employed the plaintiff, Miller, as a laboratory supervisor.¹⁷⁵ Miller developed a computer program to accelerate the mathematical calculations involved in chemical manufacturing in CP's labs.¹⁷⁶ Miller clearly was an employee of CP when he wrote the program.¹⁷⁷ The only question was whether the program was created within the scope of his employment.¹⁷⁸

The court held that although *Reid* did not specifically address the law governing scope of employment determinations, because it adopted common law agency principles to define "employee," common law agency principles should be equally relevant to define "scope of employment."¹⁷⁹ The court in *Miller* adopted as its test the elements set forth in section 228 of the *Restatement (Second) of Agency*.¹⁸⁰

The *Miller* court applied each element of the test in section 228.¹⁸¹ Although it found that the first two agency factors in section 228 did not establish conclusively that Miller created the program within the course of his employment,¹⁸² relying on section 229 of the *Restatement*, the court

173. 808 F. Supp. 1238 (D.S.C. 1992).

174. *See id.* at 1243-44.

175. *See id.* at 1240.

176. *See id.* Like Mahar in *Kelstall-Whitney*, Miller wrote the program on his own time, using his own computer equipment, and was not paid for the time he spent working on the program. *See id.* Also, Miller posted a notice on the computer terminal at work, stating that the copyright in the program belonged to him. *See id.* at 1241.

177. *See id.* at 1242.

178. *See id.* at 1242-43.

179. *See id.* at 1243 (citing Commission [sic] for Creative Non-Violence v. Reid, 490 U.S. 730, 741 (1989)).

The *Miller* court further noted, though, that the provisions of the *Restatement* might not be entirely appropriate to work for hire situations. It stated that: "The *Restatement* provisions relate directly to the question of respondeat superior liability of the employer for the tortious acts of the servant. Thus, the *Restatement's* discussion of the scope of employment is not directly on point with the issues in this case. However, the *Restatement's* discussion is generally applicable." *Id.* at 1243 n.4.

180. *See id.* at 1243.

181. *See id.* at 1243-44. Miller was not hired to write computer programs, but as a laboratory supervisor he was responsible for overseeing the efficiency of the lab's operations. *See id.* at 1243. Although Miller did most of his programming work at home for no pay, the programming was completed nevertheless while Miller was employed by CP. *See id.* The court concluded that Miller created the program at least partially because he wanted to please his employer. *See id.* at 1243-44.

182. *See id.* at 1243. Miller was not hired "primarily" to develop computer programs, although the court noted that writing the program was "incidental" to Miller's organiza-

found that the creation of the program was incidental to Miller's job.¹⁸³ Because Miller was responsible for organizing and modernizing the laboratory that he supervised, the creation of the computer program was con-

tional responsibilities. *Id.* Miller worked on the program in his home without pay; however, he was employed by CP during the general time period in which he worked on the program. *See id.* Because the first two factors did not clearly favor either Miller or CP, the court relied heavily on the third element of section 228 as well as section 229 of the *Restatement (Second) of Agency* (1958). *See id.*

183. *See Miller*, 808 F. Supp. at 1243. Section 229 of the *Restatement (Second) of Agency* provides:

- (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
- (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
 - (a) whether or not the act is one commonly done by such servants;
 - (b) the time, place and purpose of the act;
 - (c) the previous relations between the master and servant;
 - (d) the extent to which the business of the master is apportioned between different servants;
 - (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
 - (f) whether or not the master has reason to expect that such an act will be done;
 - (g) the similarity in quality of the act done to the act authorized;
 - (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
 - (i) the extent of departure from the normal method of accomplishing an authorized result; and
 - (j) whether or not the act is seriously criminal.

RESTATEMENT (SECOND) OF AGENCY § 229 (1958).

The court actually did not cite directly to section 229, but to comment b of section 229. *Miller*, 808 F. Supp. at 1243. The comment provides in pertinent part:

An act may be incidental to an authorized act, although considered separately it is an entirely different kind of act. To be incidental, however, it must be one which is subordinate to or pertinent to an act which the servant is employed to perform. It must be within the ultimate objective of the principal and an act which it is not unlikely that such a servant might do. The fact that a particular employer has no reason to expect the particular servant to perform the act is not conclusive.

RESTATEMENT (SECOND) OF AGENCY § 229 cmt. b (1958).

sidered incidental to his job duties.¹⁸⁴ The program apparently had been written to please Miller's employer.¹⁸⁵

Based on this analysis, the court concluded that the program had been prepared within the scope of Miller's employment and was a work for hire.¹⁸⁶ The *Miller* court recognized that, usually, work that an employee performs outside the work place, without pay, would not be considered for hire.¹⁸⁷ However, where the work was created with a specific product of the employer in mind and for the good of the employer, the court placed it squarely within the scope of the worker's employment.¹⁸⁸

184. See *Miller*, 808 F. Supp. at 1243. The computer program was considered within CP's "ultimate objectives" because it improved the organization of the lab and was not an activity that Miller was unlikely to undertake personally. *Id.* This conclusion of the court appears questionable, as it hardly seems reasonable to expect a laboratory employee, responsible for overseeing chemical manufacturing operations, to write computer software. Furthermore, in this context it should be remembered that the *Restatement's* formulation is intended to protect employers from their employee's unexpected torts, not govern complex copyright determinations. See Goldscheid, *supra* note 17, at 573 (asserting that, because agency principles are founded upon liability issues, they may not be appropriate for use in work for hire property ownership determinations). Therefore, the fact that it may not have been *unlikely* that Miller would write a computer program may not properly resolve the issue.

185. See *Miller*, 808 F. Supp. at 1243-44.

186. See *id.* at 1244.

187. See *id.* at 1244 n.7.

188. See *id.* A rule of this kind could have drastic consequences for employees who, inspired by the needs of their employers, work at home, without pay, to develop copyrightable works. See Luria & Butzel, *supra* note 27, at S21 (arguing that relying on case law without reducing an employment agreement to writing is risky for employers whose employees perform creative work outside of the workplace, as well as for companies who use freelance consultants). Many employees who work independently at home are motivated in some way by their employment, if only because they have witnessed certain problems at work and are interested in developing solutions to them. See *supra* notes 160-72 and accompanying text (discussing the *Kelstall-Whitney* case). Many such employees probably consider presenting their work to their employers hoping to be rewarded. Under this test, even if they decide not to do so, their works might be considered for hire. The test the court announced in *Miller* makes no reference to whether such works need to have been used at the work place at all, or whether the employer even need be aware of their existence. For an employee to lose ownership of a work, prepared at home, in his personal time, for which he was not paid, would be a highly inequitable result. Since the work for hire doctrine is based on the notion that employed artists forego copyright protection in exchange for security, wages, and other benefits, awarding copyright ownership to an employer in a case like *Miller* gives the employer a windfall and deprives the artist of the benefits of his or her work. See *supra* notes 19 and 32 (discussing the distinction between employed artists and independent creators for copyright ownership purposes); see also *Works-Made-For-Hire*, *supra* note 18, at 531 (statement of Paul Basista) (commenting on the inequity that results when free-lance artists are forced to forego copyright ownership in work for hire situations when they do not receive employment benefits in exchange).

3. Requiring Stricter Compliance with Section 228 of the Restatement

One court has required even stricter compliance with section 228 of the *Restatement* than the *Miller* court. In *Avtec Systems, Inc. v. Peiffer*,¹⁸⁹ the court held that the relevant test for defining “scope of employment” was section 228 of the *Restatement (Second) of Agency*.¹⁹⁰ Peiffer, the defendant, was a computer programmer employed by Avtec.¹⁹¹ Peiffer and Avtec disagreed about which of them owned the copyright in a program Peiffer developed, and Avtec brought suit.¹⁹²

Because it was undisputed that Peiffer was an employee of Avtec, the question for the court was whether the work was within the scope of Peiffer’s employment.¹⁹³ The United States District Court for the Eastern District of Virginia agreed with the court in *Miller* that section 228 of the *Restatement (Second) of Agency* was dispositive.¹⁹⁴ The court held that the evidence Avtec produced failed to show that the work was within the scope of Peiffer’s employment.¹⁹⁵

The Fourth Circuit affirmed the district court’s use of section 228, but disagreed with the district court’s interpretation.¹⁹⁶ The court found that the program was the kind of work that Peiffer had been hired to perform.¹⁹⁷ The court stated that generally, where the work in question is of the kind that the employee was hired to perform, the fact that the work was done in the employee’s home during his or her spare time will not defeat the presumption that the work was for hire.¹⁹⁸ More important, however, was whether the artist was “appreciably” motivated to conduct the work because of the employer’s objectives.¹⁹⁹ The Fourth Circuit remanded the case to the district court to determine whether the computer program had been created within the scope of Peiffer’s employment.²⁰⁰

On remand, the district court found that the employer must prove each element of section 228 to establish that a work was within the scope of

189. 805 F. Supp. 1312 (E.D. Va. 1992), *aff’d in part and vacated in part*, 21 F.3d 568 (4th Cir. 1994), *aff’d*, 67 F.3d 293 (4th Cir. 1995).

190. *See id.* at 1318 (citing the RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

191. *See id.* at 1314.

192. *See id.* at 1315.

193. *See id.* at 1318.

194. *See id.*; *see also supra* note 169 (quoting RESTATEMENT (SECOND) OF AGENCY § 228).

195. *See Peiffer*, 805 F. Supp. at 1318-19.

196. *See Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994), *aff’d*, 67 F.3d 293 (4th Cir. 1995).

197. *See id.*

198. *See id.*

199. *See id.* at 572 (citing the RESTATEMENT (SECOND) OF AGENCY § 236 cmt. b (1958)).

200. *See id.* at 573-74.

employment.²⁰¹ The court found that the program had not been created “substantially within the authorized time and space limits” because it had not been authored on Avtec’s premises and Avtec did not use or possess the program on its premises on a regular basis.²⁰² Finally, the court held that Avtec failed to prove that Peiffer was “appreciably” motivated by a desire to further Avtec’s business purposes.²⁰³ Because Avtec had failed to prove two of the elements of the test, the district court again found that the program was not a work for hire and that Peiffer was entitled to its copyright.²⁰⁴

The *Mahar*, *Miller*, and *Avtec* cases demonstrate the different approaches courts have taken in applying *Reid*. Because *Reid* does not provide clear guidance on how to implement its agency test, courts have great discretion in fashioning their decisions.²⁰⁵ The work for hire doctrine, as applied under *Reid*, thus remains uncertain.²⁰⁶

IV. ANALYSIS: *REID*’S VARIABLE SKIES

The work for hire doctrine strikes a careful balance between the interests of employers and employed artists.²⁰⁷ Work for hire law recognizes

201. *Avtec Sys., Inc. v. Peiffer*, No. CIV.A.92-463-A, 1994 WL 791188, at *2-5 (E.D. Va. Sept. 12, 1994).

202. *Id.* at *4. The court also stated that it reached its conclusion despite decisions by other courts which found works to have been for hire when they were created at home, on the employee’s own time. *See id.* at *5 (citing *Miller v. CP Chems., Inc.*, 808 F. Supp. 1238, 1242-44 (D.S.C. 1992) (concluding that a work created by an employee at home, in his spare time, using his own equipment, was a work for hire); *In re Simplified Info. Sys., Inc.*, 89 B.R. 538, 542 (Bankr. W.D. Pa. 1988) (same); *Marshall v. Miles Lab., Inc.*, 647 F. Supp. 1326, 1330 (N.D. Ind. 1986) (same)).

203. *See Avtec Sys.*, 1994 WL 791188 at *6-7. The fact that Avtec paid a substantial cash bonus to Peiffer upon completion of the first version of the program was regarded by the court as a neutral factor, as it was impossible to determine whether the bonus was meant to reward Peiffer for his good work or to reward him for his willingness to donate the use of the program to his employer. *See id.* at *6. Although the court did not address this issue, if the bonus had been meant to reward Peiffer for his good work, it would be reasonable to infer that Peiffer had been motivated by the desire to please his employer. This conclusion is less likely if Peiffer decided, after creation of the program, to turn it over to his employer and was then rewarded.

Peiffer’s use of the program to market Avtec’s satellite capabilities to potential Avtec customers tends to show that Peiffer was motivated, at least in part, by a desire to impress his employer. *See id.* at *7. Because Peiffer later refused to demonstrate the program to potential customers, however, the court held that the factor was ambiguous at best. *See id.*

204. *See id.*

205. *See Weinberg*, *supra* note 18, at 700 (asserting that because the agency law test is very flexible, courts are allowed too much discretion).

206. *See id.*

207. *See generally Works-Made-For-Hire*, *supra* note 18 (discussing, through representatives of industries and artists, the interests of creative people and employers, and the impact and practical operation of work for hire law).

that artist-employees who are paid for their work receive employment benefits; when they have exercised little control over the production of their work, they are adequately compensated and do not require the economic protection copyright ownership affords. The employers of such artists, however, require copyright ownership as compensation for the assumption of commercial risk.²⁰⁸ Section 101 was drafted, in part, as a compromise between artists and employers, to ensure that each would receive copyright protection only when truly entitled to it.²⁰⁹ When it is not applied uniformly, however, work for hire generally results in windfalls to employers and, occasionally, artists.²¹⁰ Furthermore, uncertainty in work for hire law undermines the twin purposes of copyright: stimulating creativity and fairly compensating artists.²¹¹ Thus, the *Reid* factors should be applied uniformly and in a way that maintains the careful balance between the rights of employers and artists.

Moreover, the operation of work for hire law has particularly drastic consequences for artists because of their inferior bargaining power with hiring parties.²¹² Despite copyright law's goal of ensuring fair compensation for creators,²¹³ artists often are forced to submit to work for hire agreements.²¹⁴ Therefore, the courts should administer the work for hire doctrine carefully, with particular concern for the rights of artists.²¹⁵

208. See *supra* note 32 (discussing the rationale for granting copyright to employers in work for hire cases).

209. See Weinberg, *supra* note 18, at 670-84 (discussing the compromise of interests underlying the work for hire doctrine).

210. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750 (1989) (rejecting the actual control test because it forced parties to guess in advance whether sufficient control would be exercised and provided unbargained for copyright interests); see also *supra* notes 108-204 and accompanying text (discussing cases which have resulted in windfalls to employers or artists).

211. See *supra* note 2 (discussing the purposes of copyright law).

212. See Hamilton, *supra* note 2, at 1308-09 (noting that because of unequal bargaining power, artists often are forced to choose between accepting a work for hire agreement or not submitting the work at all).

213. See *supra* note 2 (discussing the purposes of copyright law).

214. See *supra* note 2; see also *Works-Made-For-Hire*, *supra* note 18, at 515 (statement of Richard Weisgrau) ("It is usually after you invoice the work that you get back the rights agreement to sign that says sign this work-for-hire agreement so that we can process your check.") (internal quotations omitted).

It may be true that artists "assume the risk" of the work for hire doctrine by becoming professional artists or avoid the inequitable operation of the doctrine by simply choosing not to enter the industry. The goal of copyright law, however, is to encourage artists to create and disseminate their works. See *supra* note 2 (discussing the objectives of copyright law). If artists respond to work for hire unfairness by not creating, then the goals of copyright law are not achieved.

215. Copyright law by itself cannot remedy the fact that artists are disadvantaged in the open market. See *Works-Made-For-Hire*, *supra* note 18, at 549 (statement of William Patry) ("The real question is not whether the government or the statute can alter the eco-

A. *The Adequacy of the Reid Factors*

It is vitally important for a free-lance artist to own the copyright in a work produced in a work for hire relationship.²¹⁶ Although the artist has been paid a fee for producing the work, he or she has not necessarily received the employment benefits traditionally enjoyed by common law employees, such as insurance, vacation time, or pensions.²¹⁷ If the artist is awarded copyright ownership, he or she will be reimbursed for sacrificing the security associated with traditional employment.²¹⁸

On the other hand, if an artist is truly an employee, it is essential that the employer receive the benefits of copyright ownership: the employer has undertaken the risks related to free enterprise and has compensated the artist for his or her efforts with salary and benefits.²¹⁹ To preserve

nomics of the marketplace to work-made-for-hire assignments; it is obvious — you can't.”). As applied, however, the law should represent a public policy “default,” and should protect the interests of creative people. *See id.* Thus, courts should apply copyright law so that it benefits artists wherever possible. *See id.*; *see also* Gulick, *supra* note 7, at 86-87 (arguing that courts should be concerned with the weakness of artists as a group and with the inability of individual artists to bargain for rights in their working agreements).

216. *See* 134 CONG. REC. 28,309 (1988) (statement of Sen. Cochran). According to Senator Thad Cochran:

The livelihoods of freelance artists, photographers, and writers depend on their ability to claim “authorship” for the pieces they produce. They build their reputation, and therefore their ability to attract clients, on the basis of past performance. Their careers succeed or fail by their skill and style in translating through their own creative expression the ideas and messages society needs to disseminate.

Id.

217. *See Works-Made-For-Hire*, *supra* note 18, at 530 (statement of Irwin Karp). According to Irwin Karp:

[M]ost photographers, most illustrators, most indexers, most freelance editors, translators, etc. don't get to participate in whatever benefit program the publisher has for its employees; they don't get health insurance; and they don't have social security taxes paid by the publisher or the software company or whatever; and the publisher doesn't withhold their income taxes, or pay workmen's compensation or unemployment taxes for them. They probably have to pay unincorporated business taxes if they live in New York City. They have to pay commercial occupancy taxes here and elsewhere.

Id.

Employers claim that they are entitled to the copyright in works made for hire because of their considerable investment of time, skills and money in the works. *See* Supnik, *supra* note 34, at 139.

218. *See supra* notes 8-18 and accompanying text (discussing the consequences of copyright ownership).

In addition, there is substantial evidence that the drafters of the 1976 Act's work for hire provision intended to limit the application of § 101(1) to formal, salaried employees. *See* Weinberg, *supra* note 18, at 696-701; *see also* VARMER, *supra* note 55, at 130 (noting that cases decided under the 1909 Act generally were limited to works that salaried employees created in the course of employment).

219. *See* Gulick, *supra* note 7, at 63-64 (arguing that, where a commissioned work is created at the request, risk, and under the direction of the hiring party, awarding copyright

this balance, artists and employers alike must be able to predict accurately whether a working relationship will be considered an employment relationship and whether the work or works eventually created will be considered for hire.²²⁰ Furthermore, because many artists are relatively unsophisticated in matters of business, the work for hire doctrine should be applied in such a way as to protect their interests.²²¹ Unfortunately, the work for hire doctrine as currently applied is not uniform²²² and does not always favor the interests of creators.²²³

ownership to the artist would represent a "windfall"); *see also supra* note 32 (discussing the rationale for awarding copyright ownership to employers).

220. *See generally* Fidlow, *supra* note 56, at 593-94 (discussing the consequences of copyright ownership). While it may be true that uncertainty regarding employment status is tolerated in some areas of the law, including torts and contract, it should not be tolerated in copyright law. The employment/independent contractor distinction takes on heightened significance in the copyright area because copyright ownership was expressly provided for by the Framers of the Constitution. Article I of the Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Artistic creativity is to be encouraged because it is good for society. *See* Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 Nw. U. L. REV. 1011, 1022 (1988); *see also* 1 NIMMER & NIMMER, *supra* note 9, § 1.03[A], at 44.27 to 44.30. Artistic creativity will not be encouraged if the economic incentives to create are unpredictable.

221. The Supreme Court noted in *Reid* that "[a]rtists and photographers are among the most vulnerable and poorly protected of all of the beneficiaries of the copyright law." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 747 n.13 (1989) (quoting S. REP. NO. 473, at 4 (1975)).

Applying the work for hire doctrine to protect artists will not frustrate freedom of contract. *Cf.* Beyer, *supra* note 220, at 1047 n.103 (characterizing as invalid the argument that artists lack the bargaining power to insist on contractual protection). On the contrary, contract law traditionally has been applied to protect classes of disadvantaged persons, including minors, the mentally incompetent, and, occasionally, the intoxicated. *See* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 4.2-4.8, at 376-99 (2d ed. 1990). Because Congress has determined that artists generally are "vulnerable and poorly protected" and because the purpose of copyright law is to promote creativity, it seems logical that the courts should take into consideration the relatively weak bargaining position of artists in society. *See Reid*, 490 U.S. at 747 n.13.

222. *Compare, e.g., Aymes v. Bonelli*, 980 F.2d 857, 861-62 (2d Cir. 1992) (holding that the provision of employee benefits and the tax treatment of the employee are the two most important factors in the *Reid* analysis), *aff'd*, 47 F.3d 23 (2d Cir. 1995), *with* *Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1118-19 (N.D. Ill. 1993) (characterizing the employee benefits and tax treatment factors as "feather[s] in the scales" of the *Reid* analysis).

223. *Cf. Hyde & Hager, supra* note 27 (arguing that the trend in copyright decisions is to favor the interests of artists); *compare, e.g., Miller v. CP Chems., Inc.*, 808 F. Supp. 1238, 1243-44 (D.S.C. 1992) (holding that a computer program created by a laboratory supervisor was a work for hire) *with* *Kelstall-Whitney v. Mahar*, No. CIV.A.89-4684, 1990 WL 69013, at *7 (E.D. Pa. May 23, 1990) (holding on similar facts that a computer program created by a professional programmer was not a work for hire).

The problem lies not with the *Reid* factors themselves, but with the way that they are applied. Under *Reid*, courts classify employment relationships based upon the unique facts of each case.²²⁴ The multi-factor approach taken in *Reid* allows courts to apply the factors selectively.²²⁵ Depending on which factors a lower court chooses to apply, the Supreme Court's agency analysis may become highly variable.²²⁶ For example, the right to control is one factor of the *Reid* test.²²⁷ Although no one factor should be dispositive, the control factor certainly could be accorded a great deal of weight, making it, in effect, dispositive.²²⁸ Yet, allowing the control factor to become determinative is inconsistent with *Reid*'s rejection of the control tests, and further, will not favor the interests of creators as nearly all commissioning parties exercise some degree of control over the work.²²⁹ Other courts, however, might emphasize other factors, according the control factor little weight.²³⁰ Simply by weighing the factors differently, the *Reid* test is susceptible to highly contradictory results.²³¹

224. See Goldscheid, *supra* note 17, at 572.

225. See Weinberg, *supra* note 18, at 700 (arguing that the split in the federal courts over the actual control and right to control tests emphasizes the "interpretive nightmare" that results from a flexible test such as the agency test); see also *supra* notes 108-56 and accompanying text (discussing the various ways courts have weighed and applied the *Reid* factors).

226. See Weinberg, *supra* note 18, at 700.

227. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

228. See, e.g., *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 776 (3d Cir. 1991). Although the court in *MacLean* went on to consider each of the *Reid* factors, it determined that the hiring party's right to control would be "central to the resolution" of the employment inquiry. *Id.*

One case, decided before *Reid*, was based on an agency law analysis and seems to have relied solely on the right to control. See *Vane v. The Fair, Inc.*, 676 F. Supp. 133, 135 (E.D. Tex. 1987), *aff'd sub nom.* *Estate of Vane v. The Fair, Inc.*, 849 F.2d 186 (5th Cir. 1988).

In addition, other factors of the *Reid* analysis are relevant to the control issue. A court could manipulate those factors to make control the central issue, even though the Supreme Court expressly rejected such an approach.

229. See Weinberg, *supra* note 18, at 701 ("The agency law test will allow jockeying by industries with significant bargaining power to the detriment of creators."). Copyright protection exists to ensure the continued production and dissemination of valuable works, so that the public might be enriched and educated. See *supra* note 2 (discussing the dual purposes of copyright law). To deprive artists of these privileges when a hiring party exercises some control over the creation of a work may result in a disincentive to creation. See *Works-Made-For-Hire*, *supra* note 18, at 541 (statement of Richard Weisgrau) (arguing that work for hire "destroys . . . [free-lancers's] ability to really exploit and get the economic value of [their] works").

230. See *supra* notes 108-26 and 147-56 and accompanying text (discussing *Aymes* and *Marco*).

231. See *supra* note 26 (comparing the various results reached by courts under *Reid*).

The *Reid* analysis is also problematic because the Court did not define “scope of employment.”²³² The scope of employment prong of the *Reid* test is vital to determining whether a work will be considered for hire.²³³ Because *Reid* made use of the *Restatement (Second) of Agency* for employment status determinations, the logical choice for scope of employment determinations also seems to be the *Restatement*.²³⁴ The question is, however, which section of the *Restatement*? The most appropriate section seems to be 228, which defines “scope of employment.”²³⁵ At least one court has adopted section 228 for scope of employment issues.²³⁶ That court, however, also relied on section 229 of the *Restatement*.²³⁷ This reliance on section 229 broadened the scope of employment definition to include a computer program which an employee wrote during his personal time using his own equipment and for which he was not paid.²³⁸ Assuming that the *Restatement* is relevant to the work for hire framework,²³⁹ it should be implemented in a uniform manner, to ensure continued predictability.²⁴⁰

B. The Application of the Reid Factors

The “turbulent weather” currently surrounding work for hire law springs from the various interpretations lower courts developed in applying the *Reid* factors. Agency law should be applied consistently to work for hire cases to preserve predictability in copyright law, and should also be applied to maintain work for hire’s balancing of interests.²⁴¹ Central

232. See *supra* note 159 and accompanying text (discussing *Reid*’s failure to define “scope of employment”).

233. See 17 U.S.C. § 101(1) (1994) (providing that “a work prepared by an employee within the scope of his or her employment [is a work for hire]”).

234. See *Easter Seal Soc’y v. Playboy Enters.*, 815 F.2d 323, 335 (5th Cir. 1987) (suggesting that courts refer to the *Restatement (Second) of Agency*).

235. See *supra* note 169 (discussing RESTATEMENT (SECOND) OF AGENCY § 228).

236. See *Miller v. CP Chems.*, 808 F. Supp. 1238, 1243 (D.S.C. 1992); see *supra* notes 173-88 and accompanying text (discussing the result reached in *Miller*).

237. See *Miller*, 808 F. Supp. at 1243-44.

238. See *id.* at 1243-44.

239. But cf. *supra* note 101 (discussing the incompatibility of the *Restatement (Second)*’s focus on tort liability with copyright ownership issues).

240. See *supra* note 56 (discussing the need for predictability in copyright law).

241. See *Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1114 (N.D. Ill. 1993). The court in *Respect* recognized that:

At stake are competing policies — policies that on the one hand support those whose work (and often creativity) brings a vision to life, as against on the other hand supporting the organizations without whose funds and supervision (and perhaps creativity) the final product might never have come to fruition.

Id.

to the issue is an understanding of the benefits associated with copyright ownership.

1. *The Benefits of Copyright Ownership*

Consistent with its purposes of enriching public knowledge and compensating artists,²⁴² copyright law grants authors a limited economic monopoly in their works.²⁴³ Essentially, copyright ownership awards certain exclusive rights that extend beyond a single transaction. Possibly the most important of these rights are the rights to reproduce, adapt, distribute, perform, and display copyrighted works.²⁴⁴ These rights endure for the life of the copyright, which in most cases is the life of the author plus fifty years.²⁴⁵ The economic value of copyright lies in its monopolistic nature: the copyright owner's rights are exclusive, requiring others wishing to make use of the work to obtain the owner's permission first.²⁴⁶ The copyright owner may either forbid use of the work or allow the use of the work, usually in exchange for the payment of a fee.²⁴⁷

The economic benefits associated with copyright ownership stretch far beyond the payment tendered for creation of the work. The wages or commissions that employees or independent contractors receive represent one-time payments with concrete value.²⁴⁸ The economic benefits connected with copyright ownership, on the other hand, continue for as long as the term of the copyright and have virtually limitless value.²⁴⁹ These economic benefits are an incentive to artistic creation, and thus lie

242. See *supra* note 2 (discussing the purposes of copyright protection).

243. See *supra* note 2 (discussing the limited monopoly granted by copyright).

244. See 17 U.S.C. § 106 (1994); DuBOFF, *supra* note 2, at 185 (noting that these rights are “[p]erhaps the most important element of profit for creators”). Of course, not all works receive all of these rights. The right of performance is inapplicable to a visual work such as a painting or sculpture, for example. See STRONG, *supra* note 4, at 117-29 (examining the rights in copyrighted works and noting that performance means either live performance or “indirect performance by means of electronic broadcasting and similar processes”).

245. See 17 U.S.C. § 302. This provision applies only in cases of works created on or after January 1, 1978, the effective date of the 1976 Act, and does not apply to works for hire. See *id.*

246. See REGISTER'S REPORT, *supra* note 2, at 1 (noting that copyright allows an author to control a work's reproduction after it has been made available to the public).

247. See *id.*

248. See Hardy, *supra* note 32, at 190 (noting that an artist and employer may settle on a concrete price for use of a work, and that unforeseen uses of the work may have much greater value).

249. Although an unknown artist's copyright may have little value, as his or her reputation grows, his or her licensing fees, royalties, and performance fees will grow proportionately. The future value of copyright ownership is diminished somewhat because it involves some risk and because of economic concepts such as future value and inflation. Furthermore, few artists achieve the level of fame that would make copyright ownership truly profitable.

at the heart of copyright law itself.²⁵⁰ Work for hire law shifts these benefits to the employer to compensate the employer for undertaking entrepreneurial risk.²⁵¹ When the artist-employee has been compensated properly, he or she will continue to produce art works for the employer, at the employer's direction, and the purposes of copyright law are achieved.²⁵² If, however, the artist has not been compensated properly, as when the artist receives a flat fee for preparation of the work, and is forced to forego copyright ownership because of the operation of the

250. See GORMAN & GINSBURG, *supra* note 7, at 16 (stating that by guaranteeing fair compensation for authors, copyright encourages the creation and dissemination of intellectual works and allows publishers and distributors to circulate those works in the market).

In addition to economic benefits, copyright ownership also entails certain valuable non-economic rights. Although the European concept of *droit moral* has not been accepted in United States law, the courts have recognized some rights closely akin to moral rights in connection with copyright. See NORWICK & CHASEN, *supra* note 8, at 48-49 (discussing moral rights theory). These rights include the right of first publication, which is similar to the moral right of divulgation. See *id.*; Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 551 (1985) (stating that "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public"). The Visual Artists Rights Act of 1990 (VARA) extends additional moral rights to certain works of visual art, including rights of attribution and integrity. See 17 U.S.C. § 106A(a)(3) (1994). Because the limited moral rights implied from copyright law depend on copyright ownership, the artist in a work for hire relationship does not receive them. See NORWICK & CHASEN, *supra* note 8, at 49-51. VARA specifically exempts works for hire from its protection. See 17 U.S.C. § 101. These non-economic benefits further compensate either employers or artists for undertaking creative risks. See Gulick, *supra* note 7, at 56 (stating that "contract payments compensate for only some of the benefits of copyright ownership," and arguing that certain moral rights represent additional benefits which should belong to the creator in a work for hire relationship).

251. See REGISTER'S REPORT, *supra* note 2, at 2 (declaring that the work for hire doctrine is based on the fact that because the employee is paid for the work, while the employer bears the commercial risk, the employer should be entitled to any profits realized from the work); see also *supra* note 32 (discussing the interests of artists and employers in copyright ownership).

252. See David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT Soc'y 421 (1983). Ladd argues that:

By limiting potential rewards in the copyright market — whether by capping them with a compulsory license, or barring them with a complete exemption, or refusing to extend copyright to new uses, or curtailing them in any way under arguments of "harm" — the entrepreneurial calculus which precedes risk-taking in authorship and publishing is shifted in the direction of not taking a chance, *i.e.*, not writing or publishing a "risky" work, whether ideologically or economically risky.

Id. at 431.

Although Ladd did not directly address the work for hire issue, his argument is particularly relevant in that context. An artist who is unsure of being fairly compensated, whether through the benefits of copyright ownership or through employment earnings, is less likely to risk creating a work. See Randall K. Filer, *The "Starving Artist" — Myth or Reality? Earnings of Artists in the United States*, 94 J. POL. ECON. 56, 73-74 (1968) (asserting that artists are "normal, risk-averse, income-seeking individuals just like the rest of us").

work for hire doctrine, the incentive to create is diminished.²⁵³ Thus, when the work for hire doctrine is applied without concern for the balancing of employers' and artists' interests, the purpose of copyright is undermined and fewer creative works are produced. The challenge is to apply the agency factors enunciated in *Reid* with due regard for those interests.

2. *The Correct Application of the Reid Factors*

The *Reid* factors themselves contain the ideal balancing of employers' and artists' interests.²⁵⁴ Essentially, each of the factors relates either to the control exercised over the creation of the work or to the benefits provided in connection with the creation of the work. The best way to apply the *Reid* test, to protect the interests of both creators and employers, is to balance the control factors with the benefits factors. If, in a given case, numerous control factors favor the hiring party, and the hiring party has provided employment benefits to the artist, an employment relationship exists and the employer is entitled to copyright ownership. If, however, numerous control factors favor the artist, and the artist has not received employment benefits, the artist should receive copyright ownership. This interpretation of *Reid* will protect the interests of both employers and artists, and will further the purposes of copyright by promoting certainty in the work for hire formulation.

It should be recalled, however, that another goal of copyright protection is to reward artists fairly for their efforts.²⁵⁵ Thus, in applying the *Reid* test, courts should consider the generally inferior bargaining position of artists. Although it has been argued that artists may best protect their interest by contracting with hiring parties,²⁵⁶ this argument fails to

253. See *supra* note 252 (arguing that artists and employers will not produce works for public use if compensation for the works is uncertain).

254. Cf. Weinberg, *supra* note 18, at 699-700 (characterizing the agency test as no more than a revision of the control tests rejected in *Reid*).

255. See *supra* note 2 (discussing copyright's goal of compensating artists for their creative work).

256. See, e.g., Luria & Butzel, *supra* note 27, at S21 (arguing that it is vitally important that employers, employees, and independent contractors memorialize their rights in writing). One commentator has argued that artists are motivated by economic considerations. Filer, *supra* note 252, at 73-74; see also Jennifer T. Olsson, Note, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 TEX. L. REV. 1489, 1501 (1992) ("Most economic theory assumes the actors are rational, profit-maximizing creatures; this has been called the core of copyright doctrine.") (internal quotations omitted).

acknowledge the disadvantaged bargaining position that artists frequently occupy.²⁵⁷ Courts should apply *Reid* with due regard for this problem.²⁵⁸

V. CONCLUSION

The confusion in work for hire law is a serious problem. The courts have not applied *Reid* uniformly, and artists in different jurisdictions currently receive varying amounts of protection. If artists are motivated by economic considerations, it is conceivable that some artists will be reluctant to enter into agreements that could be considered work for hire relationships. As alternate sources of funding continue to shrink, it is especially important that copyright law serves the important purpose of encouraging the creation and dissemination of art.

Although *Reid* represented a step in the right direction, the Supreme Court allowed the lower courts to exercise too much freedom in applying the agency law analysis. The Court also erred by not instructing the courts on how to delineate the scope of employment for artists who have created works arguably related to their employment.

To resolve the confusion in the work for hire area, the courts should adopt the interpretation of the *Reid* balancing test suggested in this Comment. The scope of employment should be determined with reference to section 228 of the *Restatement (Second) of Agency*, but should also take into account copyright's goal of protecting artists. With this guidance, artists will be able to make better informed choices regarding work relationships, and employers will be able to make better hiring determinations. This new certainty in the work for hire area will lead to enhanced creativity in the arts and will prevent decreased productivity. Most im-

257. See 134 CONG. REC. 14,561 (1988) (statement of Sen. Cochran). Senator Cochran has argued that:

[M]any creative artists since the 1976 Copyright Act went into effect have been on the losing end of work for hire cases, even when they operate as independent contractors and decline to sign work for hire agreements. . . . It is important to recognize that most independent artists, photographers, or writers working in highly competitive fields simply cannot negotiate effectively with corporate art buyers. . . . By cutting creators off from potential reuse fees and control of their work, work for hire makes it unlikely that their bargaining positions will be strengthened as their careers progress.

Id.

258. It is especially important at this time that courts, by properly enforcing the work for hire doctrine, seek to ensure fair compensation for artists, as government-sponsored funding of the arts is being drastically cut back. See generally Jane Ludlam, *NEA Faces Abolition This Fall*, POETS & WRITERS MAG., July/Aug. 1995, at 7 (stating that the National Endowment for the Arts faces severe budget cuts, and that funding for the arts has never been more threatened).

portantly, certainty will promote the goals of copyright law by protecting the rights of artists and promoting continued artistic growth.

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