

September 1990

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Recommended Citation

Nancy Barbara Morris, *Community for Creative Non-Violence v. Reid: An Incomplete Resolution of the Work for Hire Controversy*, 11 Pace L. Rev. 167 (1990)

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Community for Creative Non-Violence v. Reid: An Incomplete Resolution of the Work for Hire Controversy

I. Introduction

The United States Supreme Court recently attempted to resolve the work for hire controversy in copyright law in *Community for Creative Non-Violence v. Reid*¹ (CCNV). The controversy arose because the language of the Copyright Act of 1976² (the Act) defining work for hire³ resulted in conflicting definitions by the United States Circuit Courts of Appeal,⁴ with no clear standard emerging to establish when a commissioned work would be considered a work for hire. The Supreme Court in CCNV⁵ adopted the literal standard first articulated in *Easter Seal Society for Crippled Children and Adults of La. v. Playboy*

1. 109 S. Ct. 2166 (1989).

2. 17 U.S.C. §§ 101-914 (1988).

3. Work 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.

17 U.S.C. § 101 (1988).

4. Compare *Easter Seal Soc'y for Crippled Children and Adults of La. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987) (works are for hire if and only if the party producing the work is an employee within the meaning of agency law, or if the work falls into one of the nine enumerated categories of section 101(2) and there is a signed work for hire agreement), *cert. denied*, 485 U.S. 981 (1988) with *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.) (works designed by independent contractors under supervision and direction of commissioning party are works for hire), *cert. denied*, 469 U.S. 982 (1984) and *with Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989) (only works of formal, salaried employees qualify as works for hire). For a discussion of works for hire prior to these decisions interpreting the Act, see O'Meara, "Works Made for Hire" *Under the Copyright Act of 1976—Two Interpretations*, 15 CREIGHTON L. REV. 523 (1982).

5. 109 S. Ct. at 2178.

Enterprises.⁶ The Court's literal interpretation of the Act provides that a copyrightable work of an independent contractor cannot be a work for hire under the Act unless the work falls within one of the enumerated categories of section 101(2) and the parties agree in writing that the work shall be considered a work for hire.⁷ According to the Court, employee status under section 101(1) is to be determined by reference to agency law principles.⁸

The CCNV Court's adoption of the literal standard resolves the conflict among the circuits in defining a work for hire and offers clear guidelines for future courts in determining whether a commissioned work is a work for hire under the Act.⁹ By so holding, the Court has simplified the judicial determination of work for hire status.

However, the Court's interpretation does not justly resolve the issue of whether a commissioning party who directs, controls, and creates a work using the representational skills of another can own the copyright to the product. The problem becomes apparent when we consider the situation of the creative commissioner — a hiring party who conceives of an idea in highly specific detail, and then supervises and controls the expression of his idea by one hired to use only his representational skills to fix that idea in tangible form.¹⁰ Under the CCNV deci-

6. *Easter Seal*, 815 F.2d at 334-35.

7. *Id.* at 2179-80.

8. The Court considers in its determination "the hiring party's right to control the manner and means by which the product is accomplished" and then goes on to list relevant factors, such as the ownership of the tools, the location of work, and skill required. *Id.* at 2178.

9. 109 S. Ct. at 2178-79.

10. The creative commissioner is often one who is unable to physically express his idea and hires another to do so; the creative commissioner will explain in precise detail what he wants while supervising, controlling, and correcting the work until the work takes the form he envisioned. See generally Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U. L. REV. 373 (1987) (a discussion of the effect of the work for hire doctrine on commissioned works under the various interpretations of the Act through 1984, and the resulting injustice to the creative commissioner). The court in *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983), observed that a drafter claiming ownership of the copyright "improperly places primary emphasis on the efforts of the scribe and not on the genesis of the ideas memorialized in the work." *Id.* at 141-42. See Note, *Copyright Law—The Work Made For Hire Doctrine: Incentive and Concern—Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir.), cert. granted, 109 S. Ct. 362 (1988), 62 TEMP. L. REV. 377 (1989) discussing

sion, the creative commissioner loses all rights to copyright ownership.

This Note suggests an amendment to the Act to clarify further the work for hire status of creative commissioners in an effort to avoid the injustice of the current definition of section 101 without infringing on the rights of independent contractors. The proposed amendment is an attempt to both fairly balance the interests of all parties to the creation — the commissioner and the individual who fixes the idea in tangible form — and to allow copyright to vest in the party truly responsible for the creation of the product.

Part II of this Note examines the history and the purposes of copyright law, and who and what are protected by it. The development of the work for hire doctrine under both the 1909 and 1976 Acts, the legislative history, and the conflicting case law interpreting the Acts are also discussed. Part II concludes with a discussion of the conflict among the circuits with respect to the proper interpretation of the 1976 Act's work for hire provision regarding commissioned works.

Part III examines *CCNV*, its facts, procedural history, and the reasoning behind the Supreme Court's unanimous opinion.

Part IV argues that the Court's holding is unfair to the creative commissioner, and that the joint works solution provides an inadequate remedy. Part IV offers examples from various fields using copyrightable works to demonstrate that this problem is of major consequence requiring further attention. Part IV also contains a proposed amendment to section 101 of the Act. This amendment demonstrates a potential resolution of the situation by protecting the creative commissioner's rights without dis-

CCNV prior to the Supreme Court's decision on the case. The Note asserts that the *Aldon* approach, see *infra* notes 79-87 and accompanying text, which offers copyright protection to the creative commissioner, is the one best suited to achieve the statutory goals of production and dissemination of creative works, and finds the literal approach (ultimately chosen by the Court in *CCNV*) too narrow to reach these goals.

For a discussion of the work for hire problem as seen by the creative employee whose employer will own the copyright to the employee's works, see Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987). For an analysis of the work for hire dilemma from the point of view of the freelance creator, who produces works for hire but does not have the benefit or protection of being an employee, see Note, *The Freelancer's Trap: Work for Hire Under the Copyright Act of 1976*, 86 W. VA. L. REV. 1305 (1984).

turbing the Court's ruling in *CCNV*.¹¹

Part V concludes that further legislative action is required to ensure that all authors' rights to their works are solidified under the Act, by offering new standards for courts to apply in future cases.

II. Background

A. History of United States Copyright Law

Copyright is "the right of an author to control the reproduction of his intellectual creation."¹² It is the "exclusive right or privilege of the author or proprietor to print or otherwise multiply, publish, and vend copies of his literary, artistic or intellectual productions . . ."¹³ The purposes of copyright are twofold: to encourage the creation and dissemination of intellectual property for the public good, and to reward authors for their contributions to society.¹⁴ The basis of copyright law lies in the Constitution, which grants Congress the power "to 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."¹⁵

The Copyright Act of 1790¹⁶ was the first United States copyright statute. This Act granted copyright protection to an author or his assigns for any book, map, or chart for fourteen

11. 109 S. Ct. at 2179-80.

12. A. LATMAN & R. GORMAN, *COPYRIGHT FOR THE EIGHTIES* 10 (1981).

13. 18 AM. JUR. 2d *Copyright and Literary Property* § 1 (1985); see 17 U.S.C. § 106 (1988); see also M. NIMMER & D. NIMMER, 1 *NIMMER ON COPYRIGHT* §§ 1.06-1.08 (1989).

14.

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 431-32 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)); see also 1 NIMMER, *supra* note 13, § 1.03[A] (primary purpose of copyright is to encourage creation and dissemination of intellectual property, which is facilitated by rewarding authors for their creative labors); LATMAN & GORMAN, *supra* note 12, at 12.

15. U.S. CONST. art. 1, § 8, cl. 8. For a discussion of some of the differences between French and American concepts of copyright, see Leiser & Spiessbach, *Artists' Rights: The Free Market and State Protection of Personal Interests*, 9 PACE L. REV. 1 (1989).

16. 1 Stat. 124 (as cited in LATMAN & GORMAN, *supra* note 12, at 4).

years, upon satisfaction of the statutory requirements of recording, publishing, and depositing a copy of the work with the Secretary of State.¹⁷ Gradually, new subjects were added to the list of copyrightable works,¹⁸ as the scope and term of copyright were expanded.¹⁹ The Copyright Act of 1870 continued this expansion of copyright protection and centralized copyright registration in the Library of Congress.²⁰

The Federal International Copyright Act of 1891²¹ further extended copyright protection to encompass works by nonresidents, provided that they complied with the requirements of recording, publishing, depositing, and having their work manufactured in the United States.²² This enactment was an attempt to participate in the general movement for an international copyright law without joining the International Copyright Union.²³ The Berne Convention, which established the International Copyright Union in 1886, granted automatic copyright protection to all authors and artists of Union-member countries throughout the world, with no formalities, on the condition of publication in any Union country not later than publication

17. LATMAN & GORMAN, *supra* note 12, at 5. Renewal privileges for an additional fourteen-year term were available if the author or his assigns again recorded and published, so long as the author survived the original term. *Id.*

18. New subjects added: prints (1802), musical compositions (1831), dramatic compositions (1856), and photographs (1865). *Id.*

19. In 1831, the original fourteen-year term of copyright was lengthened to twenty-eight years, with a renewal privilege of fourteen years only for the author or his widow and children. *Id.*

20. 16 Stat. 212, Rev. Stat. §§ 4948-71 (as cited in LATMAN & GORMAN, *supra* note 12, at 5-6). Paintings, drawings, sculptures, and models and designs for fine arts were made copyrightable in the 1870 Act. *Id.* In order to register a copyright the claimant must deposit: one (if the work is unpublished) or two (if the work is published) copies of the work, 17 U.S.C. § 408 (1988); an application including the name, address, and nationality of the claimant; in the case of a work for hire, a statement that it is such; if the claimant is not the author, a statement explaining the claimant's right to ownership; title of work; year of completion; date and nation of first publication, if any; and any other material required by the Register of Copyrights as relevant to preparation or identification of the work, *id.* § 409; and the required fee, *id.* § 410(d). The effective date of copyright registration is the date on which an acceptable application, deposit, and fee are received in the Copyright Office. *Id.* § 410(d). Registration is a prerequisite for filing an infringement action. *Id.* § 411.

21. Fed. Int'l Copyright Act of 1891, ch. 565, 26 Stat. 1106 (1891).

22. LATMAN & GORMAN, *supra* note 12, at 6.

23. *Id.*

elsewhere.²⁴

The Copyright Act of 1909²⁵ made several changes in prior law but still did not meet the requirements of the Berne Convention. The 1909 Act retained the formalities of notice, deposit, registration, and the requirement that English language foreign books be printed in the United States²⁶ — requirements that conflicted with those of the Berne Convention.

The Universal Copyright Convention is a multilateral treaty organized under the auspices of the United Nations and the United Nations Educational Scientific and Cultural Organization.²⁷ It does not affect obligations of members who are also members of the Berne Convention. It does offer, however, another route for international copyright protection by providing protection in all other member nations for works by a member-nation author and for works first published in a member nation. Formalities required domestically by a member nation are excused under certain conditions, and member nations can add other requirements to works of its own authors or works first published there.²⁸ The United States ratified this Convention in 1954, and it became effective in 1955.²⁹

The Copyright Act of 1976³⁰ was the result of twenty years of study and compromise.³¹ The Act's key changes from the 1909

24. Membership began with only ten countries. *Id.* It has now increased to eighty-one, including all major nations except the U.S.S.R. and China. 4 NIMMER, *supra* note 13, app. 22. The United States became a member on March 1, 1989, following 1988 legislation. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

25. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909).

26. The changes in the 1909 Act included increasing the subject matter of copyright to all writings of an author, extending the renewal term another fourteen years, exempting foreign books in foreign languages from American printing. See LATMAN & GORMAN, *supra* note 12, at 7.

27. Pub. L. No. 743, 83d Cong., 68 Stat. 1030 (1954); Universal Copyright Convention, Sept. 6, 1952, Geneva, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, revised July 24, 1971, Paris, 25 U.S.T. 1341, T.I.A.S. No. 7868.

28. LATMAN & GORMAN, *supra* note 12, at 8.

29. 4 NIMMER, *supra* note 13, app. 21. Presently eighty-one nations are members to this convention. *Id.* The Berne Convention and the Universal Copyright Convention are not rival treaties. The U.C.C. grants priority to the Berne Convention where parties are members of both conventions. Berne is the premier copyright treaty, offering the highest standards of protection. 3 NIMMER, *supra* note 13, § 17.01[B][2].

30. 17 U.S.C. §§ 101-914 (1988) (effective Jan. 1, 1978).

31. LATMAN & GORMAN, *supra* note 12, at 8-10; Community for Creative Non-Vio-

Act provided a single federal system of copyright protection for original works from the time of fixation in a tangible medium of expression, a term of protection lasting fifty years after the author's death, and protection of unpublished works regardless of the author's nationality.³²

The Act grants copyright protection to original works of authorship tangibly fixed in any form.³³ The requirement of originality is met by even a slight degree of originality; the work does not have to be strikingly novel or unique as long as it is more than a trivial variation of an existing work.³⁴ But the mere reproduction of a work in a different medium, or the use of physical, rather than artistic, skills, does not satisfy the "originality" requirement of the Act.³⁵ Literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual works, pantomimes, motion pictures, and sound recordings are copyrightable works of authorship under the Act.³⁶ Only works tangibly fixed,³⁷ however, may be copyrighted; ideas may not be.³⁸

lence v. Reid, 109 S. Ct. 2166, 2174-76 (1989).

32. See LATMAN & GORMAN, *supra* note 12, at 9-10.

33. 17 U.S.C. § 102(a) (1988). "[I]t has become firmly established in the case law that the requirement of 'originality' does not refer to a desired modicum of artistic merit [or] novelty . . . but rather to the origination of the work, viz., that the work has been 'independently' created, and not merely copied." W. PATRY, *LATMAN'S THE COPYRIGHT LAW* 18 (6th ed. 1986).

34. *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 825 n.3 (11th Cir. 1982) (soft-sculpture dolls had the requisite degree of originality to be copyrightable despite the artist's derivation of the idea from another artist's similar soft-sculpture dolls when the differences included facial expression, shape of nose, hands, buttocks, eyes, elbows, and ears); see also *Carolina Enters. v. Coleco Indus.*, 211 U.S.P.Q. (BNA) 479 (D.N.J. 1981) (confusing similarity between competing manufacturers' ride-on plastic tricycles constituted copyright infringement).

35. *L. Batlin & Son v. Snyder*, 536 F.2d 486 (2d Cir.) (substantial, not merely trivial, originality for plastic "Uncle Sam" banks copied from an antique cast iron bank was required for the bank to be copyrightable; since the replicas here involved only trivial variations, the copyright was held to be invalid), *cert. denied*, 429 U.S. 857 (1976); see also *Kenbrooke Fabrics v. Material Things*, 223 U.S.P.Q. (BNA) 1039, 1042 (S.D.N.Y. 1984) (transferring a work from one medium to another—a painting to a textile fabric—was insufficient as a matter of law to merit copyright protection).

36. 17 U.S.C. § 102(a) (1988).

37. Tangible fixation refers to "embodiment in a copy . . . by or under the authority of the author . . . sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* § 101.

38. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or dis-

Traditional forms of copyrighted materials include: biographies, novels, poems, anthologies, magazines, newspapers, music, plays, ballets, paintings, maps, fabric designs, cartoons, puzzles, games, greeting cards, jewelry, photographs, computer programs, and motion pictures.³⁹ A "useful article" may only be granted copyright protection to the extent that the design "incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."⁴⁰ That is, if a useful article incorporates separate artistic features which can exist independently as works of art, then those features are eligible for copyright protection.⁴¹

Ownership of copyright vests initially in the author of a work, and jointly in the co-authors of a joint work.⁴² In the case of a work for hire, "the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, [the employer] owns all of the rights comprised in the copyright."⁴³ Because ownership of the copyright is a separate consideration from ownership of the original copyrighted object, the transfer of one does not imply transfer of the other.⁴⁴

covery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.* § 102(b); *see also* *Mazer v. Stein*, 347 U.S. 201 (1954); *Baker v. Selden*, 101 U.S. 99 (1879).

39. D. JOHNSON, *COPYRIGHT HANDBOOK* 10-11 (2d ed. 1982). Other protectible materials include articles, condensations, histories, letters, translations, forewords, afterwords, indexes, editorial notes, annotations, pamphlets, catalogs, pantomimes, drawings, prints, art reproductions, posters, charts, atlases, comic strips, technical drawings, dolls, stuffed toy animals, toys, globes, models, radio and television shows, videotapes, and computer data bases. *Id.* Congress has amended the Act to expressly extend copyrights to computer programs, 17 U.S.C. §§ 101, 117 (1988) (Pub. L. No. 94-553, 90 Stat. 2565); until then, the right to copyright computer programs had been acknowledged in the legislative history but had not been given formal statutory recognition, JOHNSON at 18.

40. 17 U.S.C. § 101 (1988) (definition of "pictorial, graphic, and sculptural works"); *see also* *Mazer v. Stein*, 347 U.S. 201, 218 (1954) (china statuettes are protected by copyright despite the intention to use them as bases for electric lamps, provided that their artistic features are separable from their function).

41. N. BOORSTEIN, *COPYRIGHT LAW* 39-42 (1981). Consider, for example, the case of a picture frame with floral silverwork superimposed about the edges; while the frame itself would not be copyrightable, the floral silverwork would be.

42. 17 U.S.C. § 201(a) (1988).

43. *Id.* § 201(b).

44. *Id.* § 202. However, section 109 of the Act provides that the owner of a copy of a copyrighted work can sell the copy or display it publicly without the authority of the

Copyright duration varies with the type of authorship. Typically, copyright begins at the time of the work's creation and, with some exceptions, lasts until fifty years after the death of the author.⁴⁵ Copyright in a joint work lasts for fifty years after the death of the last surviving author.⁴⁶ For anonymous works, pseudonymous works, and works for hire, copyright is for seventy-five years from first publication, or one hundred years from creation, whichever occurs first.⁴⁷

B. *The Work for Hire Doctrine*

The 1909 Act stated that the author of a work "shall include an employer in the case of works for hire."⁴⁸ Because no specific provision was made with regard to commissioned works, the definition of "works made for hire" was left to the courts.⁴⁹ In the case of a work for hire, a judicial presumption developed that the parties intended the buyer to hold the copyright.⁵⁰ The Second Circuit held that when an artist was commissioned by a patron, a presumption arose that the artist acquiesced to control of the publication by the patron, absent an agreement to reserve the copyright to the artist.⁵¹ This became the general rule, that when a work was commissioned the copyright would vest in the commissioner as author of a work for hire, and not in the artist.⁵²

copyright owner. *Id.* § 109(a),(c).

45. *Id.* § 302(a).

46. *Id.* § 302(b).

47. *Id.* § 302(c).

48. 17 U.S.C. § 26 (repealed 1976).

49. The Supreme Court first acknowledged the work for hire doctrine in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903) (an employer owned the copyright to advertisements that had been created by an employee in the course of his employment), *noted in* *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2174 n.9 (1989).

50. *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *see infra* notes 54-57 and accompanying text.

51. *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939) (patron who commissioned an artist to paint a mural was determined to own all rights to its reproduction), *cert. denied*, 309 U.S. 686 (1940).

52. *See Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567 (2d Cir. 1966) (advertisements designed and printed by a newspaper at the "instance and expense" of the advertisers were determined to be works for hire, and copyright remained with the advertisers as employers and not with the newspaper whose staff created the advertisements).

The Second Circuit, "the *de facto* Copyright Court of the United States,"⁵³ continued to refine the work for hire doctrine throughout the duration of the 1909 Act. In *Scherr v. Universal Match Corp.*, two ex-servicemen who had created a statue at the request of their superiors while in the Army sought copyright protection for their work.⁵⁴ The United States government allowed commercial use of a reproduction of the statue on matchbook covers without payment to the ex-servicemen; the ex-servicemen then sued for copyright infringement and damages.⁵⁵ The court stated that when an employer-employee relationship was found, copyright ownership belonged to the employer, especially when the employer had the right to supervise the performance of the work, exercised that right, and expended considerable time and money on the project.⁵⁶ The employer's right to direct and supervise the manner in which the work was being performed was the key factor for the court in determining that the work had been created within the scope of employment, and was thus a work for hire whose copyright vested in the employer, with instance, expense, and ownership of facilities being among other lesser considerations.⁵⁷

Three years later, another Second Circuit case held that the work for hire doctrine was applicable when "the motivating factor in producing the work was the employer who induced the creation."⁵⁸ By 1974, the decisions of the federal judiciary had firmly established that the work for hire doctrine applied "only when the employee's work [was] produced at the instance and expense of the employer."⁵⁹

53. *Easter Seal Soc'y for Crippled Children and Adults of La. v. Playboy Enters.*, 815 F.2d 323, 325 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

54. *Scherr*, 417 F.2d at 498-99.

55. *Id.* at 498.

56. *Id.* at 501. In his dissent, Judge Friendly argued that Congress did not intend to extend copyright ownership to an employer where the creativity stemmed solely from the employee, particularly where, as here, the employees translated a model they had created on their own into a life-size statue at the employer's request. *Id.* at 502-03.

57. *Id.* at 500-01.

58. *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216-17 (2d Cir.) (independent contractor status did not preclude a finding that a song composed was a work for hire, with copyright vesting in the commissioners, when the commissioners controlled the original song, hired the contractor to adapt it, and had the power to accept, reject, or modify her work), *cert. denied*, 409 U.S. 997 (1972).

59. *Siegel v. National Periodical Publications*, 508 F.2d 909, 914 (2d Cir. 1974) (revi-

During this time the work for hire doctrine had developed from "the simple rule . . . for allocating the risk of uncertainty about whether the copyrights were assigned to the buyer . . . into an almost irrebuttable presumption that any person who paid another to create a copyrightable work was the statutory 'author'"⁶⁰ Whenever a buyer commissioned authorship services from another, the buyer was an employer for copyright purposes,⁶¹ with copyright therefore vesting in him. The work for hire doctrine under the 1909 Act had evolved to this point when the Copyright Act of 1976 was enacted.

The Act defines a work for hire as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work,⁶² as part of a motion picture⁶³ or other audiovisual work,⁶⁴ as a translation, as a supplementary work,⁶⁵ as a compilation,⁶⁶ as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly

sions directed by an employer to adapt a cartoon superhero to magazine format were insufficient to create the presumption that the comic strip was a work for hire where the superhero and his powers had been fully developed *prior to* the commencement of the employment relationship).

60. *Easter Seal Soc'y for Crippled Children and Adults of La. v. Playboy Enters.*, 815 F.2d 323, 327 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988); *see supra* notes 50-52 and accompanying text.

61. *Easter Seal*, 815 F.2d at 327.

62. "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101 (1988).

63. " 'Motion pictures' are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." *Id.*

64. " 'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." *Id.*

65. "[A] 'supplementary work' is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work." *Id.* (definition of "work made for hire").

66. "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." *Id.*

agree in a written instrument signed by them that the work shall be considered a work made for hire.⁶⁷

“[T]he employer or other person for whom the work [for hire] was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”⁶⁸

This definition was the result of a compromise agreement between publishers' organizations and authors' organizations.⁶⁹ The publishers' groups argued that many commissioned works were prepared at the instance, direction, and risk of the publisher, and that publishers of such works should therefore be given the benefits of the work for hire doctrine which vested copyright in the commissioning party.⁷⁰ The authors' groups countered that the proposed remedial bill, extending work for hire status to all commissioned works as long as there was a written agreement to that effect, would force authors, who are often in an inferior bargaining position, to sign away their rights in order to obtain work.⁷¹ The 1965 “historic compromise” bill⁷² was an attempt to balance the legitimate interests on both sides. It defined work for hire in essentially the same form as the bill enacted eleven years later as the Copyright Act of 1976.

The 1965 bill extended work for hire status only to those categories of commissioned works ordinarily prepared at the instance, direction, and risk of a publisher. Only four categories of commissioned works would be treated as subsection (2) works for hire, and then only if there was a written agreement. Works for hire were defined in the bill as:

(1) a work prepared by an employee within the scope of his employment; or

67. 17 U.S.C. § 101(1), (2) (1988) (footnotes added).

68. 17 U.S.C. § 201(b) (1988).

69. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976).

70. See Brief Amicus Curiae of Magazine Publishers of America, Inc. at 4, Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166 (1989) (No. 88-293); Brief Amici Curiae of the Computer and Business Equip. Mfrs. Ass'n at 13, Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166 (1989) (No. 88-293).

71. See Brief Amici Curiae of the American Soc'y of Magazine Photographers and the Copyright Justice Coalition at 20, Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166 (1989) (No. 88-293).

72. Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 2175-76 (1989) (referring to H.R. Rep. No. 4347, 89th Cong., 1st Sess. 134 (1965)).

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.⁷³

The following year, Congress drafted a revised bill which included four additional categories of subsection (2) commissioned works: "a compilation, an instructional text, a test, and an atlas."⁷⁴ The House of Representatives noted that a problem with the bill as drafted was "how to draw a statutory line between those works written on special order or commission that should be considered as works made for hire, and those that should not."⁷⁵

The definition of work for hire enacted in the Copyright Act of 1976 was the same as in the 1966 revision bill with the addition of one more category to subsection (2), "answer material for a test."⁷⁶ The House reiterated that the problem was finding an appropriate distinction between those commissioned works that should be works for hire and those that should not. It also noted that the bill represented a compromise spelling out the specific categories of commissioned works that could be works for hire under certain circumstances.⁷⁷

Nowhere in the Act did Congress define the essential terms "employee" or "scope of employment." Although the language of the Act seems to distinguish between employee works in subsection (1) and commissioned works in subsection (2), it is not explicit. For example, do all independent contractors fall solely within the ambit of subsection (2)? Should the term "employee" be given its plain meaning, its more expansive meaning under agency law, or its even more expansive right-to-control meaning? This ambiguity has resulted in conflict among the circuits concerning the proper application of the work for hire provisions

73. H.R. Rep. No. 4347, 89th Cong., 1st Sess. 134 (1965).

74. H.R. Rep. No. 2237, 89th Cong., 2d Sess. 116 (1966).

75. *Id.* at 115.

76. 17 U.S.C. § 101(2) (1988). The Act also now refers in subsection (1) to "the scope of his or her employment," 17 U.S.C. § 101(1) (1988) (emphasis added), instead of using "the scope of his employment," the language of the 1965 bill. See *supra* text accompanying note 73.

77. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976).

of the Act.⁷⁸

The Second Circuit was the first to interpret the Act's work for hire provision. Its interpretation in *Aldon Accessories Ltd. v. Spiegel, Inc.*⁷⁹ gave a broad definition to the Act, holding that statuettes designed by artists who were not regularly employed by the commissioner were nevertheless works for hire within the meaning of section 101(1) as works prepared by an employee within the scope of employment.⁸⁰ The court framed the issue as whether the contractor is "'independent' or is . . . so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship exists."⁸¹ Under this interpretation, the level of supervision and control determines whether there is an employer-employee relationship. Where an employer-employee relationship is found, copyright interests vest in the commissioner — the party providing the supervision and control.⁸² If, however, sufficient supervision and control are not demonstrated, copyright vests in the independent contractor, not in the commissioner.

The *Aldon* court found that the statuettes were works for hire based on the commissioner's supervision and direction of the creation of the statuettes: "While he did not physically wield the sketching pen and sculpting tools, he stood over the artists and artisans at critical stages of the process, telling them exactly what to do. He was, in a very real sense, the artistic creator."⁸³ The court held that Congress, in adopting the Act, did not intend to change prior law⁸⁴ in those situations where the creation

78. See *supra* note 4. The Georgia Volunteer Lawyers for the Arts, Inc. advises: "The uncertainties which arise in determining the ownership of copyright in a commissioned work can be solved if the parties agree in writing at the outset of their relationship as to who will own the copyright. This step is highly recommended." R. LOWER & J. YOUNG, AN ARTIST'S HANDBOOK ON COPYRIGHT 14 (1981).

79. 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

80. 738 F.2d at 552.

81. *Id.*

82. *Id.* at 553.

83. *Id.* The supervision and control here were demonstrated by the commissioner's intense involvement in every aspect of the creation. He sent rough sketches of the poses he envisioned, worked with the artists to achieve the proportions and sense of motion he wanted, and then stood over them as they sculpted, directing the shape and style of the product until it equalled his expectation. *Id.* at 549-50.

84. "Under the 1909 Act and decisions construing it, if an employer supervised and directed the work, an employer-employee relationship could be found even though the

was at the instance and expense of the commissioner.⁸⁵ The court viewed congressional intent as seeking to avoid injustice in cases where “the contractor did all of the creative work and the hiring party did little or nothing.”⁸⁶ Case law was to be left unchanged when commissioners took an active role in the creative process.⁸⁷

The actual control test of *Aldon* was adopted and expanded by the Seventh Circuit in *Evans Newton Inc. v. Chicago Systems Software*.⁸⁸ Although there was conflicting evidence with respect to whether the commissioner of a computer program and manual actually controlled its production, the Seventh Circuit found that the lower court’s determination that the commissioner supervised and directed was not clearly erroneous.⁸⁹ The court found that the writer of the computer program and manual was an employee of the commissioner due to the degree of supervision and direction, and that the writer merely used his programming skills to express the work of the commissioner.⁹⁰ The program and manual were, therefore, works for hire with copyright vesting in the commissioner as an employer under section 101(1).

Evans Newton reiterated the *Aldon* court’s holding that an employer-employee relationship can be found even where there is no such formal relationship, if sufficient supervision and direction exist. By finding the requisite supervision and control where there was no conclusive evidence of such control, the *Evans Newton* court softened the actual control standard to a right to

employee was not a regular or formal employee.” *Id.* at 552.

85. “Nothing in the 1976 Act or its legislative history indicates that Congress intended to dispense with this prior law applying the concepts of ‘employee’ and ‘scope of employment.’ . . . Rather, as indicated earlier, we believe and hold that Congress intended the prior law in such situations to remain unchanged.” *Id.*

86. *Id.*

87. See *supra* note 85.

88. 793 F.2d 889 (7th Cir.), cert. denied, 479 U.S. 949 (1986).

89. *Id.* at 894. This standard of review for factual determination is important because absent a clear lack of control and supervision, the court was unwilling to find independent contractor status. The commissioner did not have to show supervision and control in order to prevail—it was sufficient that the facts were ambiguous.

90. “The judge believed [the commissioner’s] testimony that [its president] supervised and directed the work, and that [the contractors] merely used their programming skills to produce the work according to [the commissioner’s] specifications.” *Id.*

control standard.⁹¹ The right to control test grants employment status whenever the commissioner reserves the right to control the product.⁹² This interpretation protects the rights of the creative commissioner, who merely hires another to express his conceptual creation using representational or other skills without intending to have himself displaced as the creative and motivating force behind the work.⁹³

The Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of La. v. Playboy Enters.*⁹⁴ articulated a radical new interpretation of the work for hire provision of the Act.⁹⁵ Unlike the Second Circuit, it found that Congress did intend in the 1976 Act to change the work for hire status of commissioned works under the 1909 Act.⁹⁶ The court adopted what it referred to as the "literal interpretation" of the Act,⁹⁷ and held that "a

91. *Easter Seal Soc'y for Crippled Children and Adults of La. v. Playboy Enters.*, 815 F.2d 323, 334 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

92. See *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) (photographs commissioned by an advertising agency were found to be works for hire, with copyright vesting in the advertising agency as the employer, when the work was undertaken at the instance of the agency, and the agency had the right to supervise the photographer's work); *Clarkstown v. Reeder*, 566 F. Supp. 137, 141-43 (S.D.N.Y. 1983) (a manual for a town Youth Court—a quasi-judicial forum where high school students learn about the legal system and adjudicate actual criminal complaints against their peers—drafted by a volunteer attorney was found to be a work for hire, with copyright vesting in the town as the employer, when the town had the right to direct and supervise the drafter's work).

93. A creative commissioner is one who does "much more than communicate a general concept or idea to the [contractors], leaving creation of the expression solely to them." *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 553 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

94. 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988). The court commented on

this most delightful of case names: *Easter Seal Society for Crippled Children v. Playboy Enters.*; seriously rivaled, in our judgment, only by *United States v. 11 ¼ Dozen Packages of Article Labeled in Part Mrs. Moffat's Shoo Fly Powders for Drunkenness*, 40 F. Supp. 208 (W.D.N.Y. 1941) (condemnation proceeding under Food, Drug and Cosmetic Act), and *United States ex rel. Mayo v. Satan and his Staff*, 54 F.R.D. 282 (W.D.Pa. 1971) (leave to proceed in forma pauperis denied in view of questions of personal jurisdiction over defendants).

Id. at 325 n.1.

95. 815 F.2d at 334-35.

96. "We are convinced that Congress meant to alter the status of commissioned works, which means that it meant to alter the 'work for hire' doctrine under the 1909 Act." *Id.* at 331.

97. *Id.* at 334-35.

work is 'made for hire' within the meaning of the Copyright Act of 1976 *if and only if the seller is an employee within the meaning of agency law*, or the buyer and seller comply with the requirements of section 101(2).⁹⁸

The application of the literal interpretation proceeds as follows: the court must first examine the facts of the case and then, using agency law principles, determine whether the seller is an employee or an independent contractor. Only then does the court apply section 101. The Restatement (Second) of Agency section 220 provides several parameters for determining employee status:

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

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

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

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

(d) the skill required in the particular occupation;

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

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

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

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

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

(j) whether the principal is or is not in business.⁹⁹

The court held that if the work was done in the scope of employment, as defined by agency law, section 101(1) applies and the employer is the author for copyright purposes.¹⁰⁰ Section 101(2) applies to independent contractors whose works are specially or-

98. *Id.* at 334 (emphasis added).

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

100. 815 F.2d at 334-35.

dered or commissioned. The independent contractor's work is not a work for hire unless the work fulfills the requirements of section 101(2). Under this interpretation, an independent contractor is always the author for copyright purposes unless the work is in an enumerated category and she has relinquished her authorship rights in writing.¹⁰¹ The Fifth Circuit's literal interpretation reflects its view that section 101 establishes a dichotomy between an employee and an independent contractor.¹⁰²

Before settling on the proper interpretation of the work for hire provision of the Act, the court examined the literal interpretation, the conservative interpretation, and the *Aldon* compromise.¹⁰³ It found the literal interpretation approach to have two problems. First was the inconsistency between the broad language defining the author as the employer or other person for whom the work was prepared, and the extremely narrow class of commissioners who can be authors under section 101(2).¹⁰⁴ Second, acceptance of the literal interpretation would assume that Congress intended to radically, not moderately, change the work for hire doctrine.¹⁰⁵ The court noted that other courts had rejected the literal interpretation precisely because they were unable to find legislative intent to so fundamentally alter the work for hire doctrine.¹⁰⁶

The conservative interpretation disregards the employee/independent contractor dichotomy, and utilizes a right to control standard. If the work was commissioned and the buyer had the right to control, then the seller was an employee under section 101(1). If the buyer would be the author under that analysis, the court would then look for compliance with the requirements of section 101(2), which offers special protection for sellers of section 101(2) works.¹⁰⁷ While this interpretation comports with the broad statutory language defining the author as the employer or other person for whom the work for hire was prepared,¹⁰⁸ it does

101. *Id.* at 331.

102. *Id.* at 335.

103. *Id.* at 329-34.

104. *Id.* at 330.

105. *Id.*

106. *Id.* at 331.

107. *Id.*

108. 17 U.S.C. § 201(b) (1988).

not leave any room for the apparent legislative intent to more closely define the work for hire doctrine. The Fifth Circuit determined that Congress meant to alter the doctrine and the status of commissioned works, even though it had not clearly expressed the parameters to be used.¹⁰⁹

The court argued that the *Aldon* compromise was “more an interpolation of the statute than an interpretation of it.”¹¹⁰ Under the *Aldon* holding, the theoretical right to control was not sufficient to constitute employee status; exercise of that right, or actual control, was needed in order to make the buyer the statutory author.¹¹¹ The court identified four problems with the actual control test:

- (1) the rule is unnecessary in cases where “work for hire” is raised by the defendant to question the validity of the plaintiff’s copyright since any plaintiff who actually controls an independent contractor will be a co-author of the work; (2) it makes the outcome of “work for hire” analysis too fact-specific for each work and therefore less predictable by buyers and sellers; (3) it does not eliminate the need for a determination of employee versus independent contractor since the “actual control” test applies only to independent contractors; (4) it slides too easily into the vague and expansive “right to control” test, as the decision in *Evans Newton* may portend.¹¹²

In addition, the court urged that this interpolation, rather than interpretation, of the statute was an “insurmountable” problem, because “[t]here is simply no way to milk the ‘actual control’ test of *Aldon Accessories* from the language of the statute.”¹¹³ On that basis the court rejected the *Aldon* rule.

The Fifth Circuit concluded that the literal interpretation of the work for hire provision was the best approach, and the court adopted a bright-line rule for determining whether a work was for hire under the Act.¹¹⁴ Accordingly, only works by em-

109. “The problem is figuring out the precise contours of the intended alteration.” 815 F.2d at 331.

110. *Id.*

111. “[T]he buyer must supervise and control the creation of the disputed work to be the statutory ‘author.’” *Id.* at 332.

112. *Id.* at 334.

113. *Id.*

114. *Id.* at 337.

ployees (defined by agency law) and independent contractors meeting the requirements of section 101(2) could be works for hire with copyright vesting in the employer.¹¹⁵ The court favored this approach because it found that it made the most sense out of the nine categories of section 101(2).¹¹⁶ Furthermore, the court found that agency law definitions of employee and independent contractor provided clear standard interpretive guidelines.¹¹⁷ The approach also gave both buyers and sellers maximum predictability, enabling them to contract accordingly. The court observed that the adoption of the agency law definition of employment for copyright purposes offered a moral fairness: a buyer could become the statutory author only if the seller was his agent. Under these circumstances, the buyer assumed responsibility for the seller's negligent acts under *respondeat superior* ("[f]or example, a buyer will only be the 'author' of a writing if he would be liable under *respondeat superior* in a defamation action based on that writing").¹¹⁸ The court stated that although actual control and the right to control were relevant considerations, they could not by themselves transform an independent contractor into an employee.¹¹⁹

Applying the literal interpretation to the facts of *Easter Seal*, the Fifth Circuit ruled that a videotape prepared by a public television station of a staged Mardi Gras parade and musical jam session for a third-party buyer was not mere mechanical fixation by the television station's employees, but was the work of an independent contractor, with copyright vesting in the television station.¹²⁰ The tape was not a work for hire, and the buyer was not the statutory author for copyright purposes. Therefore, he could not maintain a copyright infringement action against a company which used part of the tape in the adult film *Candy, the Stripper*.¹²¹

115. *Id.*

116. "[T]he nine narrow categories in § 101(2) . . . are statutory *permission* to allow certain kinds of independent contractors to sign away their authorship to their buyers." *Id.* at 335 (emphasis in original).

117. 815 F.2d at 335-36. This may not necessarily be so, however, because the determination requires balancing the various agency law factors.

118. *Id.* at 335.

119. *Id.* at 335-36.

120. *Id.* at 337.

121. *Id.* at 324-25. The videotape was sent on request to a Canadian television pro-

The Fourth Circuit also examined the meaning of the work for hire doctrine of the Act in *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*¹²² The court followed the *Aldon* line of reasoning, holding that copyright in newspaper advertisements vested in the newspaper publisher who developed them, not in the advertisers who purchased them. The court found nothing to indicate that the newspaper employees who prepared the work were employees of the advertisers because the advertisers provided no direction or supervision of the creation of the advertisements beyond expressing their wishes to the newspapers.¹²³ Absent actual control, copyright vested in the newspaper as an independent contractor. The court stated that the Act "requires the conclusion that the copyright is owned by the newspaper publisher whose employees prepared it, unless there is a written agreement signed by it and the advertiser that the work is to be considered a work for hire."¹²⁴

The Ninth Circuit articulated yet another view of the work for hire provisions of the Act in *Dumas v. Gommerman*.¹²⁵ The court held that only the works of formal, salaried employees are covered by section 101(1).¹²⁶ Further, only certain types of commissioned works can qualify as works for hire under section 101(2).¹²⁷ The court explicitly rejected the proposition that independent contractors could be covered by section 101(1), explaining that the drafters wanted a bright line between employees and independent contractors.¹²⁸

The advantage of the formal, salaried employee test is its clarity. Few disputes should arise over an artist's status as employee or independent contractor under this test, because when

ducer, who used it in the adult film without the knowledge of the public television station. It was shown nationally on cable television, and some viewers in the New Orleans area recognized themselves in the videotape footage incorporated into the movie—and were not pleased by the unexpected publicity. *Id.* at 324-25 & n.2.

122. 810 F.2d 410 (4th Cir. 1987).

123. *Id.* at 413.

124. *Id.* at 414. In a dissenting opinion, Judge Hall argued that the copyrights should not be owned by the newspaper whose staff prepared the ads because there was no evidence of congressional intent to change or so narrowly construe the work for hire doctrine. *Id.* at 414-15.

125. 865 F.2d 1093 (9th Cir. 1989).

126. *Id.* at 1105.

127. *Id.* at 1104.

128. *Id.*

the artist claims to be a freelancer, the commissioner should anticipate that the work will not be a work for hire under section 101(1).¹²⁹ When the relationship between the parties is ambiguous, the court suggested the following factors as relevant in determining employee or independent contractor status:

(1) whether the artist worked in his or her own studio or on the premises of the buyer; (2) whether the buyer is in the regular business of creating works of the type purchased; (3) whether the artist works for several buyers at a time, or exclusively for one; (4) whether the buyer retains authority to assign additional projects to the artist; (5) the tax treatment of the relationship by the parties; (6) whether the artist is hired through the channels the buyer customarily uses for hiring new employees; (7) whether the artist is paid a salary or wages, or is paid a flat fee; and (8) whether the artist obtains from the buyer all benefits customarily extended to its regular employees.¹³⁰

Many of these suggested factors are similar to the agency law factors used in the literal interpretation.¹³¹

The formal, salaried employee interpretation bears a strong similarity to the literal interpretation of the Act espoused by the Fifth Circuit in *Easter Seal* and by the District of Columbia Circuit in *CCNV*.¹³² However, the formal, salaried employee interpretation narrows the literal interpretation, offering clarity and consistency so that parties may order their behavior. Under this approach, the degree of control and input exercised by the buyer of the work will not be relevant in determining the employment status of the artist.¹³³

The literal interpretation of the work for hire provision of the Act first articulated by the Fifth Circuit was adopted by the District of Columbia Circuit in *CCNV*.¹³⁴ The District of Columbia Circuit held that a copyrightable work of an independent contractor cannot be a work for hire under the Act unless it falls into one of the enumerated categories of section 101(2) and the

129. *Id.* at 1105.

130. *Id.*

131. *See supra* text accompanying note 99.

132. *See supra* text accompanying notes 94-121; *see infra* text accompanying notes 188-209.

133. 865 F.2d at 1105.

134. 846 F.2d 1485 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989).

parties agree in writing that the work is to be a work for hire.¹³⁵

The circuits were thus sharply divided on the proper interpretation of the work for hire provision of section 101. The Fifth and District of Columbia Circuits favored a literal interpretation of the Act; the Second, Fourth and Seventh Circuits chose a supervision and control standard; and the Ninth Circuit followed a formal, salaried employee approach. The United States Supreme Court granted CCNV's petition for certiorari to resolve this conflict.¹³⁶

III. *Community for Creative Non-Violence v. Reid*

A. *Facts*

In the fall of 1985, the Community for Creative Non-Violence (CCNV), a nonprofit unincorporated association dedicated to eradicating homelessness in America, decided to sponsor a display in the annual Washington, D.C. Christmastime Pageant of Peace to dramatize the plight of the homeless.¹³⁷ Mitch Snyder, a CCNV member and trustee,¹³⁸ and other CCNV members conceived of the idea for the display: a sculpture of a modern Nativity scene, replacing the traditional Holy Family with a contemporary homeless family huddled on a streetside steam grate.¹³⁹ The family would be black, like most of the District of Columbia homeless, and the figures on the steam grate would be mounted on a pedestal base housing special effects equipment to emit simulated steam to swirl around the family.¹⁴⁰ CCNV decided on a title, "Third World America," and an inscription for the pedestal base, "and still there is no room at the inn."¹⁴¹

Snyder searched for an artist to produce the sculpture and was referred to a Baltimore sculptor, James Earl Reid.¹⁴² During

135. 846 F.2d at 1494.

136. 109 S. Ct. 362 (1988).

137. CCNV, 652 F. Supp. 1453, 1454 (D.D.C. 1987), *rev'd*, 846 F.2d 1485 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989).

138. Mitch Snyder was found hanged, an apparent suicide, on July 5, 1990. N.Y. Times, July 6, 1990, at A16, col. 1.

139. 652 F. Supp. at 1454.

140. *Id.*

141. *Id.*

142. *Id.* "According to Snyder, Reid was chosen by CCNV in part because of his geographic proximity to CCNV's shelter in Washington, D.C., which permitted CCNV to

two telephone calls, Reid and Snyder came to an oral agreement for Reid to sculpt the family and CCNV to provide the steam grate and pedestal base.¹⁴³ CCNV rejected Reid's proposal that the work be cast in bronze as too costly and time-consuming, but accepted his suggestion to use Design Cast 62. This is a synthetic material that is less expensive and faster to work with than bronze, can be tinted to resemble bronze, and can withstand exposure to the elements.¹⁴⁴ Reid and CCNV agreed to an expense of up to \$15,000, exclusive of Reid's services which he offered to donate. There was neither a written agreement nor any mention of copyright.¹⁴⁵

Reid began work immediately¹⁴⁶ and developed the "concept and mood" for the sculpture,¹⁴⁷ while CCNV "sought to ensure that Reid 'remained faithful' to CCNV's original 'vision' of the work."¹⁴⁸ Reid received a \$3,000 advance, and, at Snyder's request, he submitted a sketch of the proposed sculpture.¹⁴⁹ The family was depicted in a traditional creche-type setting with the mother seated, the infant on her lap, and the father standing behind her.¹⁵⁰ Reid testified that Snyder wanted the sketch to use in fund-raising; Snyder testified that it was also for his approval.¹⁵¹ Reid wanted a black family to serve as a model for the sculpture, and Snyder suggested a family from the CCNV shel-

'work with him on a continuous basis'" Brief for Petitioner at 6, *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293) [hereinafter Brief for Petitioner]. However, the Supreme Court noted that Reid's working in his Baltimore studio made constant supervision of his work by CCNV from Washington practically impossible. 109 S. Ct. 2166, 2179 (1989).

143. 652 F. Supp. at 1454.

144. *Id.*

145. *Id.*

146. *Id.* at 1455.

147. Brief for Respondent at 2, *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293)[hereinafter Brief for Respondent]. Reid called this "a research phase to develop the artistic concept," a fluid, evolutionary process in the creation of the sculpture. Reid's first step in this process was to begin sketching the models in various poses. *Id.*; see also *infra* text accompanying notes 149, 153.

148. Brief for Petitioner, *supra* note 142, at 7. CCNV made certain significant changes in details proposed by Reid. *Id.*; see also *infra* notes 154-55 and accompanying text.

149. 652 F. Supp. at 1455.

150. *Id.*

151. 109 S. Ct. 2166, 2169 (1989).

ter.¹⁵² Reid chose only the family's infant, and furnished the adult models himself.¹⁵³ Snyder showed Reid that the homeless tended to recline on steam grates to warm their bodies, and from then on, Reid's sketches were composed of only reclining figures.¹⁵⁴ CCNV rejected Reid's suggestion of suitcases or shopping bags to hold the family's possessions, insisting instead on a shopping cart as "an accessory more typical of the homeless."¹⁵⁵

Throughout November and the first two weeks of December, Reid worked intensively and exclusively on the figures,¹⁵⁶ aided at times by assistants¹⁵⁷ paid with funds provided by CCNV.¹⁵⁸ CCNV members came to his studio several times to check on his progress and to coordinate CCNV's construction of the pedestal base.¹⁵⁹ At no time during any of these meetings was copyright ownership mentioned.¹⁶⁰

On December 24, 1985, Reid delivered the completed sculpture to Washington, D.C. It was then mounted on CCNV's pedestal base and steam grate for display,¹⁶¹ and Snyder paid Reid the remaining balance due.¹⁶² CCNV returned the sculpture, af-

152. 652 F. Supp. at 1455.

153. *Id.*

154. *Id.* Reid claimed that he had already known that the homeless often lie on steam grates, and that he had planned to do the sculpture in that manner. The district court found that his preliminary sketch indicated otherwise. *Id.* at 1455 n.5.

155. *Id.*

156. *Id.* at 1455.

157. Reid hired approximately twelve workers to assist in the mechanical tasks of creating the sculpture. He also planned their schedules and supervised their work. Brief for Respondent, *supra* note 147, at 1-2.

158. 652 F. Supp. at 1455.

159. CCNV also engaged a cabinetmaker to build the pedestal base, and obtained the necessary chemicals to produce the simulated steam from the Mobil Oil Company. Beck, *Half a Loaf: Supreme Court Work for Hire Decision Leaves Many Questions Unanswered*, 6 *COMPUTER LAW*. 37 (July 1989). The special-effects equipment that CCNV ordered to generate simulated steam cost between \$7,000 and \$8,000. 652 F. Supp. at 1455.

160. 652 F. Supp. at 1455. However, just below the title on the sculpture, Reid inscribed an encircled "C" with his name, to indicate his claim to the copyright to the sculpture. The court found that Reid made that claim to the copyright for the first time on December 24, 1985. *Id.* at 1455 n.7.

161. *Id.* at 1455. The sculpture was displayed in Washington, D.C., but was not part of the Pageant of Peace as originally intended. Pageant officials rejected the sculpture for policy reasons; they did not want to accept any display with what might be construed as a political message. *Id.* at 1455 n.6.

162. "[T]hey paid in full for the work, making their final payment only when satisfied, upon delivery, that the statue did, indeed, convey the message they had intended

ter a month's display, to Reid's studio to repair some minor damage sustained in transit.¹⁶³ Snyder then organized a fund-raising tour of several cities for the sculpture.¹⁶⁴ Reid objected to this tour because the Design Cast 62 was not sturdy enough to withstand the proposed itinerary.¹⁶⁵ He urged CCNV to either cast the sculpture in bronze at a cost of about \$35,000 or to create a "master mold" at a cost of about \$5,000 which would enable a new casting to be made if the original sculpture were irreparably damaged.¹⁶⁶ Snyder declined to do either, but invited Reid to do one or the other at his own expense.¹⁶⁷ Reid did not accept Snyder's invitation.¹⁶⁸

Snyder asked Reid to return the sculpture several weeks later.¹⁶⁹ Reid refused Snyder's request,¹⁷⁰ filed an application for copyright registration for "Third World America" in his own name on March 20, 1986, and announced a small exhibition tour of his own for the sculpture.¹⁷¹ Snyder, as CCNV trustee, filed a competing application for copyright registration on May 21, 1986.¹⁷²

B. Procedural History

1. The District Court Opinion

Snyder and CCNV commenced this action against Reid on June 2, 1986, seeking return of the sculpture and a determina-

for it." *Id.* at 1457.

163. *Id.* at 1456.

164. CCNV claimed that "Third World America" was ultimately to be the centerpiece of a one or two year campaign of education, outreach, and fundraising to benefit the homeless, involving museum displays around the country and commercial use of the sculpture in posters and cards. Brief for Petitioner, *supra* note 142, at 4-5.

165. 652 F. Supp. at 1456.

166. *Id.*

167. *Id.*

168. Brief for Petitioner, *supra* note 142, at 9.

169. 652 F. Supp. at 1456.

170. Reid feared for the sculpture's survival if it were sent on the tour proposed by Snyder and refused to return it for its own protection. Brief for Respondent, *supra* note 147, at 4.

171. 652 F. Supp. at 1456.

172. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1488 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989). Snyder actually filed the competing copyright application in his own name, but the district court indicated that Snyder's ownership of the copyright was as CCNV's trustee. 652 F. Supp. at 1457; *see also* 846 F.2d at 1488 n.3.

tion of copyright ownership.¹⁷³ On July 25, 1986, the District Court for the District of Columbia granted a preliminary injunction which ordered Reid to return "Third World America" to CCNV.¹⁷⁴ After a two-day bench trial, Judge Thomas Penfield Jackson¹⁷⁵ declared that "Third World America" was a work for hire under section 101, that Snyder, as a CCNV trustee, was the exclusive owner of the copyright, that Reid's certificate of copyright registration for the sculpture was null and void, and that Reid was permanently enjoined from exercising any of the privileges of copyright with regard to "Third World America."¹⁷⁶

In examining section 101 of the Act, Judge Jackson concluded that the definition of employment that would vest copyright in the employer was more expansive than that determined by using agency law.¹⁷⁷ If the putative employer was the motivating force behind the work, or had the right to supervise and direct the manner in which it was done, the copyright would belong to him regardless of the amount of creativity contributed by the artist.¹⁷⁸ The court reasoned that Reid was an employee within the meaning of section 101(1) because CCNV was the motivating, supervising, and directing force behind the creation of the sculpture.¹⁷⁹ The court thus adopted the *Aldon* interpretation of the work for hire doctrine, and found CCNV had

not only conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season, they did so in starkly specific detail. They then engaged Reid to utilize his representational skills, rather than his artistic vision, to execute it. And while much was undoubtedly left to his discretion in doing so, CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding that his creative instincts may have been in har-

173. 846 F.2d at 1488. 17 U.S.C. § 202 (1988) provides that "[o]wnership of a copyright . . . is distinct from ownership of any material object in which the work is embodied." Here, ownership of the sculpture itself was not in dispute; CCNV paid the full price of \$15,000 and, therefore, owned the sculpture. Only ownership of the copyright was in question. 846 F.2d at 1488 n.4.

174. 846 F.2d at 1488.

175. 652 F. Supp. at 1454.

176. *Id.* at 1457.

177. *Id.* at 1456.

178. *Id.*

179. *Id.* at 1456-57.

mony with theirs.¹⁸⁰

Judge Jackson noted that Reid could have bargained with CCNV for ownership of the copyright to the sculpture but failed to do so, and therefore would have to satisfy himself with the public acclaim and recognition of his artistic talent achieved through CCNV's promotion of the sculpture.¹⁸¹ Absent a contrary writing, the court could only find that the sculpture was a work for hire with the copyright vesting in CCNV as the employer.¹⁸²

In reaching this decision, Judge Jackson focused on CCNV's control over the creation of the sculpture.¹⁸³ CCNV's conception of the idea, and control and direction of the work, were sufficient, he argued, to vest the copyright in CCNV as the employer under section 101(1).¹⁸⁴ Judge Jackson declared Reid to be an employee of CCNV on the grounds that CCNV conceived of the idea for "Third World America" in specific detail, that CCNV hired Reid for his representational skills rather than his artistic ones, and that CCNV made the final payment only when they felt the sculpture had been completed to convey the message they had envisioned.¹⁸⁵ Therefore, CCNV, as Reid's employer for copyright purposes, owned the copyright in the sculpture.¹⁸⁶ Reid filed a timely notice of appeal to the District of Columbia Circuit Court of Appeals on March 11, 1987.¹⁸⁷

2. *The Circuit Court of Appeals Opinion*

The District of Columbia Circuit Court of Appeals reversed and remanded.¹⁸⁸ Judge Ruth Bader Ginsburg determined that "Third World America" was not a work for hire.¹⁸⁹ She contended that Reid was an independent contractor and not an em-

180. *Id.* at 1456.

181. *Id.* at 1457.

182. *Id.*

183. *Id.* at 1456.

184. *Id.*

185. *Id.* at 1456-57.

186. *Id.* at 1457.

187. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1488 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989); Brief for Respondent, *supra* note 147, at 6.

188. 846 F.2d at 1499.

189. *Id.* at 1494.

ployee of CCNV under agency law, which meant that the sculpture did not fall within the scope of section 101(1).¹⁹⁰ The District of Columbia Circuit observed that sculpture is not a category of commissioned work enumerated in section 101(2), and that there was no written agreement between the parties that the work was to be a work for hire¹⁹¹ — either of which would disqualify the work as a work for hire under section 101(2). Thus, the sculpture was not a work for hire under either subsection of section 101, and copyright did not vest in CCNV as the author of a work for hire.¹⁹² The court held further that

a copyrightable work of an independent contractor cannot be a work made for hire under the current Act unless that work falls within one of the specific categories enumerated in § 101(2) and “the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”¹⁹³

The court adopted the literal interpretation of the work for hire provision of the Act as articulated by the Fifth Circuit in *Easter Seal*,¹⁹⁴ maintaining that when Congress distinguished between employment in section 101(1) and commissioned works in section 101(2), it intended to set up a dichotomy between the two: the work of an independent contractor can only be a work for hire under section 101(2), and never under section 101(1).¹⁹⁵ The court noted with approval the scholarly commentary on the legislative history and its “almost unanimous support” for the literal interpretation which views the two subsections of the work for hire provision as separate and distinct.¹⁹⁶ The court then expressly rejected the supervision and control standard of *Aldon*, finding the literal interpretation to be the correct definition of the Act’s work for hire provision.¹⁹⁷

190. *Id.*

191. *Id.*

192. *Id.* at 1494-95.

193. *Id.* at 1494 (quoting 17 U.S.C. § 101(2) (1988)).

194. *Id.*

195. *Id.* at 1489, 1494.

196. The court cited W. PATRY, *LATMAN’S THE COPYRIGHT LAW* (6th ed. 1986); A. LATMAN, R. GORMAN, & J. GINSBURG, *COPYRIGHT FOR THE EIGHTIES: CASES AND MATERIALS* (2d ed. 1985); and M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* (1985), among others. 846 F.2d at 1492-93.

197. *Id.* at 1487, 1494.

Judge Ginsburg applied the literal interpretation standard to the facts of the case. Because Reid was a skilled artist who donated his services, worked in his own studio, and chose his own assistants as needed, and because creation of sculptures was not the regular business of CCNV, the court found it "evident" that Reid was not an employee of CCNV under agency law.¹⁹⁸

Although the court ascertained that CCNV was not the author of a work for hire, it did not grant exclusive copyright to Reid because the facts before the court were insufficient to support such a claim.¹⁹⁹ The court suggested that "Third World America" might instead qualify as a joint work, and remanded the case to the district court with guidelines for determination on that issue.²⁰⁰

A joint work, as defined by the Act, is one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."²⁰¹ The court stated that on the record presented, "Third World America" seemed to meet that description.²⁰² Reid had sculpted the figures so that they would huddle on CCNV's steam grate and be attached thereto.²⁰³ Once the sculpture was affixed to the grate, the parts were not disassembled.²⁰⁴ Even when the piece was returned to Reid for repair, the entire construction remained together as a unit.²⁰⁵ In addition, CCNV's steam grate pedestal was sufficiently original to constitute a contribution to joint authorship.²⁰⁶ Judge Ginsburg indicated that "this case . . . might qualify as a textbook example of a jointly-authored work in which the joint authors co-own the copyright."²⁰⁷ The court noted Reid's original and creative contribution to the sculpting of the family; CCNV's initial conception of the idea, direction of

198. *Id.* at 1494 n.11.

199. *Id.* at 1495.

200. *Id.*

201. 17 U.S.C. § 101 (1988).

202. 846 F.2d at 1496. Based on the record, the court thought the sculpture might qualify as a joint work, but remanded for further consideration of that issue. *Id.* at 1495, 1499.

203. *Id.* at 1496.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 1497.

the work, and contribution to the steam grate; and the indication from the beginning of the parties' intent that their contributions would be merged into a unitary whole rather than independent and separate pieces.²⁰⁸ The case was remanded for "comprehensive consideration" of the status of "Third World America" as a joint work.²⁰⁹

CCNV filed a petition for certiorari in the United States Supreme Court on August 17, 1988.²¹⁰ The Court granted certiorari on November 7, 1988 to resolve the conflict among the circuits with respect to the proper construction to be given the work for hire provision of the Act.²¹¹

C. *The Supreme Court Opinion*

Justice Thurgood Marshall, writing for a unanimous Court, held that "[t]o determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101."²¹² Justice Marshall agreed with the court of appeals that Reid was not a CCNV employee but rather an independent contractor.²¹³ Although CCNV sufficiently directed Reid's work so that the sculpture met its requirements, the Court rejected the extent of this control as being the dispositive factor.²¹⁴ Further, the Court found that the circumstances of this case weighed strongly against finding an employer-employee relationship.²¹⁵

The Court applied agency law factors²¹⁶ to Reid's author-

208. *Id.*

209. *Id.* at 1499.

210. Petition for Writ of Certiorari, *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989) (No. 88-293).

211. *Community for Creative Non-Violence v. Reid*, 488 U.S. 940 (1988); see Brief for Respondent, *supra* note 147, at 7.

212. *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2178 (1989).

213. *Id.* at 2179.

214. *Id.*

215. *Id.*

216. Justice Marshall urged that relevant factors to be considered in determining employee status under agency law included skill required, source of tools, control of the workplace, duration of the parties' relationship, right of the hiring party to assign additional projects, extent of hiring party's control over when and how long to work, payment

ship of "Third World America," and determined that Reid was an independent contractor, not an employee.²¹⁷ Reid is a sculptor, a skilled artisan, and he provided his own tools.²¹⁸ Moreover, he worked in his own studio located in Baltimore, which necessarily precluded constant supervision by CCNV from its headquarters in Washington.²¹⁹ In addition, he worked for only a short time — less than two months — during and after which CCNV did not have the right to assign him additional projects.²²⁰ Further, he had complete freedom concerning when and how to work, provided only that he met the deadline for completion of the sculpture.²²¹ Also, payment depended on completion of the job, a method by which independent contractors, not employees, are often paid.²²² The hiring of assistants was left solely to Reid.²²³ Finally, CCNV was not in the regular business of creating sculptures, and, in fact, was not a business at all; it neither paid social security or payroll taxes, nor provided employee fringe benefits of any sort.²²⁴

Since Reid was found to be an independent contractor, section 101(1) did not apply, and "Third World America" could only be a work for hire if it fulfilled the terms of section 101(2).²²⁵ This the sculpture could not do,²²⁶ because sculpture is not one of the enumerated categories of section 101(2) and, further, there was no signed writing.²²⁷ The Court concluded that although CCNV is not the author under the work for hire provision of the Act, it may be a co-author of a joint work if the district court on remand finds that Reid and CCNV created the

method, right to hire and pay assistants, whether the work is part of the hiring party's regular business, whether the hiring party is in business, whether the hiring party furnishes employee benefits, and tax treatment of the hired party, with no one factor being determinative. *Id.* at 2178-79. These factors are from the Restatement (Second) of Agency § 220 (1958); see *supra* note 99 and accompanying text.

217. 109 S. Ct. at 2179.

218. *Id.*

219. *Id.*; see also *supra* note 142.

220. 109 S. Ct. at 2179.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 2179-80.

226. *Id.* at 2180.

227. 17 U.S.C. § 101 (1988).

sculpture with the intention of merging their contributions into an inseparable unitary whole.²²⁸ In that event, Reid and CCNV would be declared co-owners of the copyright in "Third World America."²²⁹

The Court adopted the literal interpretation of section 101, using agency law factors to determine the status of the artist as employee or independent contractor, after a careful review of the history of the 1909 and 1976 Copyright Acts and the case law construing them.²³⁰ The Court examined the *Easter Seal* literal interpretation agency law test,²³¹ the *Aldon* actual control test,²³² the *Dumas* formal, salaried employee test,²³³ and the *Peregrine v. Lauren Corp.* and *Clarkstown v. Reeder* right to control test.²³⁴

The Court rejected the right to control test, the actual control test, and the formal, salaried employee test.²³⁵ The focus of the right to control test, Justice Marshall stated, is on the relationship between the commissioner and the product (inquiring whether the commissioner had the right to control the production of the work), whereas the language of section 101(1) focuses on the relationship between the commissioner and the artist (inquiring whether there is an employment relationship between the parties).²³⁶ This test also ignores the dichotomy set up between employee works (section 101(1)) and commissioned works (section 101(2)), blurring the line between works for hire under the separate subsections of section 101.²³⁷ Justice Marshall ar-

228. 109 S. Ct. at 2180; see 17 U.S.C. § 101 (1988).

229. 109 S. Ct. at 2180; see 17 U.S.C. § 201(a) (1988). In December, 1990 an agreement was reached granting joint copyright interests to both CCNV and Reid. CCNV was given the right to make two-dimensional copies of the sculpture (e.g., cards and posters); Reid retained the right to make both two- and three-dimensional copies. N.Y. Times, Dec. 26, 1990 at A32, col. 1.

230. 109 S. Ct. at 2171-78.

231. *Easter Seal Soc'y for Crippled Children and Adults of La. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), cert. denied, 485 U.S. 981 (1988).

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

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

234. *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).

235. *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2173-78 (1989).

236. *Id.* at 2173.

237. *Id.*

gued that the right to control test distorts the meaning of section 101 by failing to maintain the distinction between the two work for hire definitions:

The right to control the product test ignores this dichotomy by transforming into a work for hire under § 101(1) any "specially ordered or commissioned" work that is subject to the supervision and control of the hiring party. Because a party who hires a "specially ordered or commissioned" work by definition has a right to specify the characteristics of the product desired, at the time the commission is accepted, and frequently until it is completed, the right to control the product test would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1).²³⁸

The Court found that the actual control test does not satisfy the language of the Act either, because "there is no statutory support for an additional dichotomy between commissioned works that are actually controlled and supervised by the hiring party and those that are not."²³⁹ The Court agreed that section 101 clearly distinguishes between works of an employee and commissioned works, and that "[t]here is simply no way to milk the 'actual control' test of *Aldon Accessories* from the language of the statute."²⁴⁰

According to Justice Marshall, the formal, salaried employee test fails because the Act does not specify "formal" or "salaried" employee, but merely states "employee."²⁴¹ In adopting this test, the Ninth Circuit had enumerated agency law factors for determining employee status in ambiguous cases, thereby edging closer to the literal interpretation and away from its own.²⁴²

Justice Marshall also found support for the literal interpre-

238. *Id.*

239. *Id.* at 2174.

240. *Id.* (quoting *Easter Seal Soc'y for Crippled Children and Adults of La. v. Play-boy Enters.*, 815 F.2d 323, 334 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988)).

241. 109 S. Ct. at 2174 n.8.

242. *Dumas v. Gommerman*, 865 F.2d 1093, 1103-04 (9th Cir. 1989); *CCNV*, 109 S. Ct. at 2174 n.8. The Court also noted that the various proponents of the formal, salaried employee test do not agree on the substance of that test—among the suggested versions are a hired party on the payroll, hired party who receives a salary or commissions regularly, and a hired party who receives a salary and is treated as an employee for tax purposes. 109 S. Ct. at 2174 n.8.

tation in the Act's legislative history.²⁴³ The Act was the result of twenty years of negotiation and compromise between representatives of creators and copyright-using industries,²⁴⁴ with two things remaining constant: "[F]irst, interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities. Second, in using the term 'employee,' the parties and Congress meant to refer to a hired party in a conventional employment relationship."²⁴⁵ These factors provided additional backing for the adoption of the literal interpretation of the work for hire provision of the Act.²⁴⁶

The Court concluded that the structure of section 101 shows that a work is for hire under one of two mutually exclusive paths: subsection (1) for works by employees, and subsection (2) for works by independent contractors.²⁴⁷ The Court then mandated that agency law should be used to determine employee or independent contractor status.²⁴⁸ This reading of the terms "employee" and "scope of employment," undefined by the Act, provides a logical framework for determination of copyright ownership.

IV. Analysis

The Court's adoption in *CCNV* of the literal interpretation of the work for hire definitions of section 101 of the Copyright Act of 1976, first articulated in *Easter Seal*, is well supported by the legislative history and interpretive case law. The literal interpretation of section 101 provides clear and flexible standards for determining whether a work is for hire under the Act. The difficulty is not that this interpretation is erroneous in any way; rather, the problem lies in the fact that it is unsatisfactory in

243. 109 S. Ct. at 2174 n.8.

244. Litman, *Copyright, Compromise, and Legislative History*, 72 *CORNELL L. REV.* 857, 862 (1987). "During more than twenty years of negotiation, the substantive content of the statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright." *Id.*

245. 109 S. Ct. at 2174.

246. *Id.*

247. *Id.*

248. *Id.* "[O]rdinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law." *Id.*

the case of a creative commissioner. It gives a fair result and fully settles the issue in the case of a commissioner who provides no creative input, but who instead commissions an artist to express the commissioner's idea using the artist's own creative vision. Such a work would not be a work for hire unless it fell into the enumerated categories of section 101(2) and there was a signed agreement between the parties stating that the work was to be for hire. However, the literal interpretation does not make a reasonable provision for the creative commissioner who has his own distinct creation in mind. The creative commissioner is one who is unable to physically express his idea and hires another to do so, explaining in precise detail what he wants, as he supervises, controls, and corrects the work until the result is in the form he envisioned.

The use of the literal interpretation of the Act results in identical treatment of both the "ordinary" and the "creative" commissioner, absent a finding of a joint work. Unless the work was one of the enumerated categories of section 101(2) and there was a signed agreement between the parties, the artist, rather than the commissioner, would own the copyright. This result is fair and reasonable in the case of the ordinary commissioner and artist, where the commissioner hires the artist for the artist's creative contribution. However, it effects an injustice on the creative commissioner who is the true creator, while the artist is merely a vehicle for accomplishing the fixation of the commissioner's creation in tangible form.

Under the Court's holding in *CCNV*, the creative commissioner is not the author for copyright purposes nor is the work a work for hire. Further, the artist holds the copyright at the expense of the true creator. The problem of the creative commissioner is not limited to the field of art and sculpture; it exists in any field where the products of creativity are copyrightable.

A. *What if . . .*

The following examples demonstrate situations in which the Supreme Court's ruling most likely would not favor the party who contributed most to the work:

- An art editor of a magazine commissions an illustrator to prepare a watercolor drawing to accompany an article written by an employee and describes in specific detail the nature of the

desired drawing. When not done to the art editor's design and specifications, he insists that the illustrator revise the work before he will accept it as the finished product. By the time the drawing is completed to the editor's satisfaction, he has been sufficiently involved in the drawing's scope, content, and style that it is his creation, despite his not having actually wielded the brushes.

- A wealthy socialite commissions a craftsman to prepare a stuffed elephant resembling one she saw in a dream, giving exact details concerning size, shape, facial expression, fabrics, colors, and the desired pose. The socialite knows precisely what she wants and she visits the craftsman constantly in order to guide the work so that the stuffed elephant will match her conception. The final product, with much revision at the socialite's insistence, is the elephant she, not the craftsman, had imagined.

- A computer company commissions a programmer to prepare screen displays for a new computer program, supplying the exact specifications for the type of displays needed. The company demands that the screen displays follow the style of those of its other programs, and that they be consistent with the company's reputation for "user-friendliness" and clarity. In order to guarantee that its requirements are met, the company continuously shapes the development of the screen displays by supervising the programmer until the result is what the company, not the programmer, intended.

- An educational publisher commissions a graphic artist to prepare graphic works for a series of promotional materials, explaining in great detail where the graphics should be in relation to the text, what style is needed, and what type of colors are to be used. The publisher knows precisely the feeling and message she wishes the materials to convey. She remains actively involved with production in order to guarantee that the graphics produced express her image, not that of the graphic artist.

In all of the above scenarios, the application of the *CCNV* literal interpretation test would result in the independent contractors, who merely served as the means to fix the commissioners' expressions in tangible form, owning the copyright to works which were not in fact their creations. The watercolor drawing, the stuffed elephant, the computer screen displays, and the promotional graphics were the creations of the commissioners, not

of the contractors. The commissioners conceived of the ideas, knew precisely what they wanted, and continued their involvement in the creative process until the result was in the form they had envisioned. Denying copyright privileges to creative commissioners perpetrates an injustice on an entire class of creators. Copyright was intended to encourage and enhance creativity, not to chill it.²⁴⁹

B. *Joint Works*

The Supreme Court noted with approval the remand of CCNV by the court of appeals to the district court for determination of whether "Third World America" was a joint work.²⁵⁰ If it is found to be a joint work, there would be co-ownership of the copyright by both Reid and CCNV. However, in general, extending authorship status to one who contributes only the idea of a work and not its expression directly contradicts the rule that copyright protects only expression and not ideas.²⁵¹ Absent a substantial creative contribution, a commissioner is not the joint author of a work.²⁵² The contribution of each of the joint authors must be greater than *de minimis*, although an equal contribution is not mandatory.²⁵³

The courts have generally rejected joint authorship claims by commissioners who have provided only the definition of the scope of a project or the specified aspects of a design. In *Whelan Assocs. v. Jaslow Dental Laboratory*,²⁵⁴ the court held that there was no joint authorship for a dental laboratory that had commissioned a computer programmer, defined the task, described the business for which the program was required, and provided some assistance in preparing the program.²⁵⁵ The court found

249. U.S. CONST. art. 1, § 8, cl. 8; *see also supra* text accompanying notes 14-15.

250. 109 S. Ct. at 2180.

251. "In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1988).

252. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1495 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989).

253. *Id.* at 1496.

254. 609 F. Supp. 1307 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

255. 609 F. Supp. at 1318.

that what the commissioner provided was only what was to be expected from any business seeking to have a computer system designed for it, and that the contribution was not sufficient to make the commissioner a joint author.²⁵⁶

In *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.*,²⁵⁷ no joint authorship was found for a building owner who supplied design features to be included in architectural plans.²⁵⁸ The court stated that a client providing general design features was not entitled to any copyright ownership in the plans, emphasizing that it was "normally expected" that a client provide those features desired in order for the architect to incorporate them into the design.²⁵⁹

The court in *Meltzer v. Zoller* also rejected joint authorship of architectural plans by a homeowner who provided initial sketches, contributed ideas, defined needs, made changes, and exercised approval power.²⁶⁰ It determined that those contributions of the homeowner were not sufficient to constitute authorship status, and that copyright thus vested in the architectural firm which had actually created the plan.²⁶¹ Contributions must be more than de minimis to justify a joint authorship claim.²⁶²

Courts have found co-authorship of a joint work by the commissioner and the independent contractor when the commissioner sufficiently participated in the creation of the work. In *Mister B Textiles Inc. v. Woodcrest Fabrics, Inc.*,²⁶³ the court

256. *Id.*; see also Beck, *supra* note 159, at 40-42. The decision in *Whelan* is primarily important, however, for a "structure, sequence, and organization" argument for infringement of programs. Note, *The New Look and Feel of Computer Software Protection*, 29 ARIZ. L. REV. 281 (1987); see also Comment, *Copyright Law—Copyright Protection for the User Interface of a Computer Program*: Digital Communications Associates v. Softklone Distributing, 13 J. CORP. L. 919 (1988); Note, *Differentiating Idea and Expression in Copyrighted Computer Software: The Tests for Infringement*, 6 J. L. COMM. 419 (1986); Davidson, *The Whelan Decision: Missing the Middle Ground*, 5 COMPUTER L. REP. 335 (1986); Kost, *Whelan v. Jaslow: Back to the Rough Ground*, 5 COMPUTER L. REP. 145 (1986).

257. 542 F. Supp. 252 (D. Neb. 1982).

258. *Id.* at 259-60.

259. *Id.* at 259.

260. 520 F. Supp. 847, 857 (D.N.J. 1981).

261. *Id.*

262. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1496 (D.C. Cir. 1988), *aff'd*, 109 S. Ct. 2166 (1989).

263. 523 F. Supp. 21, 24-25 (S.D.N.Y. 1981).

found that a fabric created by a designer with the participation of a textile company was a joint work co-authored by both parties when the textile company played a significant motivating role in the creation of the fabric.

Application of the joint works doctrine would result in co-ownership of the copyright by the joint authors — the commissioner and the independent contractor — as tenants in common.²⁶⁴ The co-authors would each have a nonexclusive independent right to use or license the use of the joint work subject only to an accounting to the other for profits.²⁶⁵ Another focus in a joint work determination is on the intention of the parties. The question is thus whether they intended their separate contributions to be merged into a unified whole.²⁶⁶

Because of the requirement that the respective contributions of the parties must be more than *de minimis*, the joint works doctrine cannot apply when the commissioner provides all of the creativity and the independent contractor provides only representational skills, absent an intent that it be so. Therefore, the joint works doctrine is not a solution to the creative commissioner quandary because even if granted co-authorship, the creative commissioner would still not have full copyright to his creation. Denying co-authorship to the contractor whose representational skills merely facilitated the preparation of the work is not unfair. The contractor has been paid for his work, and must be satisfied with that financial compensation, the broadened exposure of his talents, and his increased marketability resulting from his association with the commissioned work.

C. *A Proposed Solution*

The injustice to creative commissioners requires congressional action²⁶⁷ in order to preserve these creators' rights in their

264. 17 U.S.C. § 201(a) (1988); Notes of Committee on the Judiciary, H.R. Rep. No. 94-1476, *reprinted in* 17 U.S.C.A. § 201(a) (West 1977).

265. Notes of Committee on the Judiciary, H.R. Rep. No. 94-1476, *reprinted in* 17 U.S.C.A. § 201(a) (West 1977).

266. *Id.*

267. Charles D. Ossola, legislative counsel for the Copyright Justice Coalition, a group of 48 organizations whose membership includes over 100,000 freelance artists, writers, and photographers, stated that "[l]egislative action is the only solution to the work for hire quagmire created by the courts." Ossola, *Work for Hire: A Judicial Quag-*

works under the Act. An amendment to the Act would solve the problem by further subdividing the current work for hire provision.²⁶⁸ A revision to section 101 might read as follows:

A work made for hire is —

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned:

(a) 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; or

(b) in which the expression and the idea originate with the commissioner, and the contractor merely provides the fixation of the expression and the idea in tangible form.

This proposed new subsection (b) of section 101(2) of the Act would offer the creative commissioner an opportunity to retain the rights to his creation without disturbing the Court's holding in *CCNV* or the rights of an independent contractor who originated the concept for the expression of the idea. By expanding the possibilities within section 101(2), the rights of the true creator of the work in question are more fully protected, whether that creator is the commissioner or the contractor. "The

mire and a Legislative Solution, 17 J. ARTS MGMT. L. 23, 27 (Fall 1987). The accurate classification of a work as a work for hire is so important because it determines initial ownership, duration, renewal rights, termination rights, and certain import rights. Goldberg, *Copyright Law*, Vol. 8, No. 1 PAT. TRADEMARK & COPYRIGHT NEWSL. 5-7 (1989) (quoting *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2171 (1989)). Absent congressional action, the creative commissioner can still obtain the rights to his work via an assignment from the artist. As Justice Marshall observed in *CCNV*, "[i]n a 'copyright marketplace,' the parties negotiate with an expectation that one of them will own the copyright in the completed work With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work, and the ownership of reproduction rights." 109 S. Ct. at 2177-78. Legislation, however, would result in a clearer definition of the rights of all parties, regardless of any inequality of bargaining power.

268. See Note, *The Creative Commissioner*, *supra* note 10, at 394 ("The 1976 Act should be amended to allow a commissioner who has dictated the expression of a work to be deemed the author of the work, but a commissioner who has merely provided the idea for a work should remain outside the definition.").

creative contribution of the [commissioner] is not lessened because higher levels of skill are needed to represent his vision. . . . Compensation for use of this skill should not include the statutory grant of copyright."²⁶⁹

Judicial reaction to this proposal is likely to be favorable. An interpreting court would first determine, using agency law principles under the literal interpretation of work for hire as adopted by the Court in *CCNV*, whether the work was prepared by an employee or an independent contractor. If the work was prepared by an employee, section 101(1) would apply. If the work was prepared by an independent contractor, section 101(2) would apply. After further examination, the court would then determine which subsection of section 101(2) to apply. If the work belonged to one of the enumerated categories of section 101(2)(a) and was accompanied by a signed writing, then it would be a work for hire under that section. If the work did not meet the section 101(2)(a) requirements, the court would look to section 101(2)(b). If the commissioner supplied the creativity, motivation, and direction of expression, and the contractor merely supplied representational skills, the work would be a work for hire under section 101(2)(b). This approach maintains the integrity of the employee/independent contractor dichotomy without infringing upon the rights of any category of creator: employer, commissioner, or independent contractor.

D. *The Application of the Proposed Solution*

The examples described in Part IV-A of this Note can be used to illustrate the application of the proposed amendment to section 101.²⁷⁰ An art editor of a magazine commissions an illustrator to prepare a watercolor drawing to accompany an article. As originally set forth, the art editor was a creative commissioner who would be denied the copyright in his work under the Court's holding in *CCNV*. Under the new section 101(2)(b), the art editor as creative commissioner would be granted copyright in his drawing. If, however, the art editor did not direct the illustrator's work, but rather gave him just a general idea of the

269. *Id.* at 395.

270. *See supra* text preceding note 249.

type of drawing wanted without providing more, the drawing would not be a work for hire under any of the subsections, and copyright would properly vest in the illustrator.

A wealthy socialite commissions a craftsman to prepare a stuffed elephant resembling one she saw in a dream. As originally described, the socialite provided input into the creation of the elephant so that the socialite was the creative commissioner, unable to obtain the copyright to her work. She would, however, own the copyright under the new section 101(2)(b). If instead she had commissioned the craftsman to prepare the elephant in his own manner, offering only general details of what she wanted and allowing him to design it as he wished, the elephant would not be a work for hire and the copyright would properly vest in the craftsman.

A computer company commissions a programmer to prepare screen displays for a new computer program. As originally depicted, the company provided exact details regarding its requirements. Provision of those specifications and continued involvement in the development of those displays were not sufficient grounds for the company to receive the copyright. But section 101(2)(b) would grant work for hire status to the displays and copyright ownership to the company as creative commissioner. If, however, the company did not dictate the expressions of the work but rather permitted the programmer to independently develop the screen displays, the displays would not be works for hire, and copyright would properly vest in the programmer.

An educational publisher commissions a graphic artist to prepare graphics for a series of promotional materials. As originally outlined, the publisher explicitly stated what she wanted for the materials, and remained actively involved to guarantee that the expression she had in mind was the one the artist produced. Yet the work would not be a work for hire and the creative commissioner would not own the copyright in her work under the current law. The materials produced would, however, be works for hire under section 101(2)(b) and the copyright would belong to the publisher as the creative commissioner. If the publisher instead hired the graphic artist, gave him a brief description of what was desired, and then permitted him to design the graphics in his own way, the resulting graphics would not be works for hire, and copyright would properly vest in the

artist.

As these examples illustrate, the proposed addition to the work for hire provision of the Act would fairly grant copyright to the true author and creator of a work. Other proposed legislative remedies have been suggested to alleviate the injustice of the work for hire provision. On June 22, 1989, Senator Thad Cochran (D-Miss.) introduced his most recent work for hire bill, S. 1253, entitled the "Artists' Bill of Rights."²⁷¹ This bill was the first work for hire revision bill in five years to have the support of the Copyright Office,²⁷² in contrast to previous bills that attempted to revise the work for hire doctrine.²⁷³ The bill suggests several changes in the work for hire provision. It excludes specially ordered or commissioned works from section 101(1) and expressly provides that an employee within the meaning of that section be a formal, salaried one.²⁷⁴ It also mandates that the written work for hire agreement required by section 101(2) for specially ordered or commissioned works be signed before work begins.²⁷⁵ Moreover, the bill also proposes changes in the joint works definition of the Act. It provides that the contribution of each co-author must be original,²⁷⁶ and requires a writing signed by both parties prior to the commencement of any work on the project, to characterize the work as a joint work.²⁷⁷ Senator

271. S. 1253, 101st Cong., 1st Sess. (1989).

272. Telephone interview with Claire Ford Pickard, Legislative Aide to Senator Thad Cochran (Oct. 24, 1989).

273. Note, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 HASTINGS COMM./ENT. L.J. 591, 618-20 (1988). Senator Cochran proposed amendments to the Act's work for hire provision in 1982 (S. 2044, 97th Cong., 2d Sess.), 1983 (S. 2138, 98th Cong., 1st Sess.; also submitted in the House by D-Mass. Rep. Barney Frank as H.R. 5911, 98th Cong., 2d Sess. (1984)), 1986 (S. 2330, 99th Cong., 2d Sess.), and 1987 (S. 1223, 100th Cong., 1st Sess.). Note, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1307 and nn.132-34 (1987); Ossola, *supra* note 267, at 46, 62 n.124.

274. S. 1253, 101st Cong., 1st Sess. (1989).

275. *Id.*

276. *Id.* Although most courts have correctly recognized that the contributions must be more than de minimis to make a work a joint work, some decisions have allowed co-authorship status to commissioning parties who did not contribute, but merely remained involved with the project in a supervisory capacity. Senator Cochran feels that clarifying the joint works definition as stated above will resolve that inequity. 135 CONG. REC. S85-86 (daily ed. June 22, 1989) (statement of Sen. Cochran).

277. S. 1253, 101st Cong., 1st Sess. (1989).

Cochran urged enactment of his bill in order to restore a just balance between the rights of creators and the rights of users of copyrighted works.²⁷⁸ Although his bill would eliminate some of the injustices of the current work for hire provision of the Act, it would not ameliorate the situation of the creative commissioner.

V. Conclusion

The Supreme Court's decision in *CCNV*, approving the literal interpretation of the work for hire provision of the Copyright Act of 1976, resolves the conflict among the circuits regarding its proper construction. However, it leaves unsettled the method by which fairness to all parties can be accomplished where their relative contributions may vary tremendously.

The appropriate solution is legislative, not judicial. The amendment to the Act proposed in this Note further subdivides the "specially ordered or commissioned" works provision of section 101(2). It includes as a work for hire a specially ordered or commissioned work in which both the expression and the idea stem from the commissioner, and the contractor only fixes the idea in tangible form. This amendment offers equitable treatment to all parties concerned. It fairly grants the copyright to the employer in an employment setting, to the commissioner in the case of an enumerated work with a signed writing, to the creative commissioner who hires a contractor for his representational abilities alone, and to the contractor who creates a work from a commissioner's idea. Inclusion of this subsection with the existing provisions of section 101 would enable the Act to protect the copyright interests of the true creator of a work, whether that creator was the individual who conceived of the idea, or the one who fixed it in tangible form.

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278. *The Copyright Act's Definition of Work for Hire: Hearings on S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks* (Sept. 20, 1989) (statement of Senator Thad Cochran).

† The author is deeply appreciative of the constant encouragement and support of Craig, David, and Michael Morris. She would also like to thank Arlene Mund for her invaluable assistance.