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# Copyright, Independent Contractors, and the Work-for-Hire Doctrine: Community for Creative Non-Violence v. Reid

Mamie Deaton Lucas

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## Copyright, Independent Contractors, and the Work-for-Hire Doctrine: *Community for Creative Non-Violence v. Reid*

In 1976 Congress modernized American copyright law, overhauling a statute that had been in effect since the turn of the century.<sup>1</sup> The Copyright Act of 1976<sup>2</sup> made fundamental changes in the nation's copyright system.<sup>3</sup> Just before the new Act went into effect,<sup>4</sup> the Register of Copyrights remarked that "[I]ittle has remained the same."<sup>5</sup>

The extent of one of these changes remains unclear. The United States Circuit Courts of Appeals have split over how much the Copyright Act of 1976 changed copyright's work-for-hire doctrine, which provides that employers own the copyright in works created by their employees; although the employee created the copyrighted work, his employer is regarded as its statutory "author." The doctrine was first codified in the Copyright Act of 1909 which simply stated that an employer was the author of a "work made for hire,"<sup>6</sup> and left the development of the doctrine to the courts. The 1976 Act provides that an employer is the author of a work made for hire, but it also describes a "work made for hire" as "a work prepared by an employee within the scope of his or her employment."<sup>7</sup> Neither the 1976 Act nor its legislative history defines the key term "employee."<sup>8</sup> The controversy among the circuits centers on the meaning of the word "employee" and whether the new Act overruled a line of cases decided under the 1909 Act that treated independent contractors as "employees" under the copyright laws.

The United States Court of Appeals for the Second Circuit, generally regarded as the premier copyright court in the nation,<sup>9</sup> was the first circuit to

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1. Copyright Act of 1909, Pub. L. No. 349, ch. 320, 35 Stat. 1075 (1909) (repealed 1947); Pub. L. No. 281, ch. 391, 61 Stat. 652 (1947) (repealed 1976).

2. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1982 & Supp. IV 1986)).

3. See *infra* note 40. The most significant change was the creation of a single federal system of copyright protection, replacing a dual system of federal protection for published works and state protection for unpublished works. Other changes include replacement of two 28-year terms with a single term, see 17 U.S.C. § 302(a)-(c) (1982); Pub. L. No. 281, ch. 391, § 24, 61 Stat. 659, 659 (1947) (repealed 1976), recognition of divisibility of the exclusive rights comprising a copyright, see 17 U.S.C. § 201(d)(2) (1982), recognition of an author's inalienable right to terminate transfers and licenses of copyright after a specified period of time, see *id.* § 203, codification of the equitable doctrine of fair use, see *id.* § 107 (reasonable use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not infringement), and a definition of "work made for hire," see *id.* § 101, which is the subject of this Note.

4. The Copyright Act of 1976 became effective January 1, 1978. Pub. L. 94-553. § 102, 90 Stat. 2598 (1976).

5. Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

6. Copyright Act of 1909, Pub. L. No. 349, ch. 320, 62, 35 Stat. 1075, 1088 (1909) (repealed 1947); Pub. L. No. 281, ch. 391, § 26, 61 Stat. 652, 660 (1947) (repealed 1976).

7. 17 U.S.C. §§ 101 at 3, 201(b) (1982).

8. 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1], at 5-12 (1988).

9. *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 325 (5th Cir. 1987) (The United States Court of Appeals for the Second Circuit is "the de facto Copyright Court of the United States"), *cert. denied*, 108 S. Ct. 1280 (1988); *Gracen v. Bradford Exch.*,

interpret the new work-for-hire provisions. The Second Circuit held that the 1976 Act changed the work-for-hire doctrine only slightly: an independent contractor is still an "employee" if she is closely supervised by the hiring party.<sup>10</sup> In *Community for Creative Non-Violence v. Reid*<sup>11</sup> the United States Court of Appeals for the District of Columbia Circuit rejected the Second Circuit's view and held that the 1976 Act radically changed the work-for-hire doctrine: an independent contractor is never an "employee" under copyright law.<sup>12</sup> This view, known as the "literal" interpretation, has received almost unanimous support from commentators.<sup>13</sup>

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698 F.2d 300, 305 (7th Cir. 1983) (The United States Court of Appeals for the Second Circuit is "the nation's premier copyright court").

10. *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). The United States Court of Appeals for the Seventh Circuit adopted the Second Circuit's interpretation in *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986).

11. 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988).

12. *Id.* at 1487, 1494. The District of Columbia Circuit joined the United States Court of Appeals for the Fifth Circuit, which was the first circuit to reject the Second Circuit's interpretation and adopt the literal interpretation of the 1976 Act's new work-for-hire provisions. See *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 324, 333-36 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988). Recently, the Ninth Circuit rejected the Second Circuit's view and the literal view adopted by the Fifth and District of Columbia Circuits. See *infra* notes 84-85 and accompanying text.

13. For examples of scholarly commentary discussing the legislative history of the 1976 Act and supporting a literal interpretation, see CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION 101-05 (1973) (examining S. 1361, 93d Cong., 1st Sess. (1973), whose work-for-hire provisions were almost identical to those in the 1976 Act); 1 M. NIMMER & D. NIMMER, *supra* note 8, § 5.03[B][2][a]; W. PATRY, *LATMAN'S THE COPYRIGHT LAW* 118-25 (6th ed. 1986); Angel & Tanenbaum, *Works Made for Hire Under S. 22*, 22 N.Y.L. SCH. L. REV. 209, 230-32 (1976); Colby, *Copyright Revision Revisited: Commissioned Works as Works for Hire Under the United States Copyright Act*, 5 WHITTIER L. REV. 492, 505-12 (1983); Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 HASTINGS COMM/ENT L.J. 591, 601-08 (1988); Fitzgibbon & Kendall, *The Unicorn in the Courtroom: The Concept of "Supervising and Directing" an Artistic Creation Is a Mythical Beast in the Copyright Law*, 15 J. ARTS MGMT. & L., Fall 1985, at 23, 23-24, 38-40; Gallay, *Authorship and Copyright of Works Made for Hire: Bugs in the Statutory System*, 8 ART & L. 573, 579-82 (1984); Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1289-95 (1987); Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. COPYRIGHT SOC'Y U.S.A. 210, 221-43 (1988); Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 888-91 (1987); Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, 17 J. ARTS MGMT. & L., Fall 1987, at 23, 31-35; Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & UNIV. L. 485, 492-95 (1982-83); Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U. L. REV. 373, 381-86 (1987); Comment, *Free Lance Artists, Works for Hire, and the Copyright Act of 1976*, 15 U.C. DAVIS L. REV. 703, 707-09 & n.21 (1982); Note, *The Works Made for Hire Doctrine Under the Copyright Act of 1976—A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc.*, 20 U.S.F. L. REV. 649, 655-56, 665-67 (1986); Note, *The Freelancer's Trap: Work for Hire Under the Copyright Act of 1976*, 86 W. VA. L. REV. 1305, 1320-21 (1984). But see O'Meara, *"Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations*, 15 CREIGHTON L. REV. 523, 526, 533-34 (1982) (because the work-for-hire provisions were a compromise, "many different opinions [were] expressed over the years, [so] it is possible to recite legislative history in support of nearly any interpretation of work made for hire"; "[i]f Congress had intended to make sweeping changes with respect to works prepared by independent contractors, it would have been clearly mentioned in the [House] [R]eport"). For a discussion of the different interpretations of the work-for-hire provisions of the 1976 Act, see *infra* notes 72-101 and accompanying text. Cf. Comment, *The Works Made for Hire Doctrine of the 1976 Copyright Act After Aldon Accessories v. Spiegel, Inc.*, 5 CARDOZO ARTS & ENT. L.J. 265, 275 (text supports literal as well as conservative interpretations).

If a work is "made for hire," this status has important consequences. The employer, and not the creator, owns the copyright in that work.<sup>14</sup> The creator loses his right to terminate transfers and licenses of the copyright<sup>15</sup> and the copyright expires after a certain number of years, instead of fifty years after the death of the creator.<sup>16</sup> Because forty percent of all copyright registrations are works for hire, the courts' interpretation of what is a "work made for hire" affects thousands of business transactions.<sup>17</sup> The need for clarification of the doctrine is acute.<sup>18</sup> The United States Supreme Court has granted *certiorari* in *Reid* and will examine the work-for-hire doctrine this term.<sup>19</sup>

This Note traces the development of the work-for-hire doctrine under the Copyright Act of 1909<sup>20</sup> and examines the wording and legislative history of the work-for-hire provisions in the Copyright Act of 1976.<sup>21</sup> The Note explains three interpretations of the work-for-hire provisions of the 1976 Act<sup>22</sup> and concludes that the literal interpretation construing the term "employee" as a regular, salaried employee is the best approach.

In the fall of 1985, the Community for Creative Non-Violence (CCNV), a group organized to end homelessness in America, decided to enter a display in the District of Columbia's annual Christmas Pageant of Peace.<sup>23</sup> CCNV's idea for a sculpture that would dramatize the plight of the homeless were specific and detailed: a nativity scene called "Third World America" depicting the Holy Family as contemporary homeless people huddled over a streetside steam grate.<sup>24</sup> CCNV contacted James Earl Reid, a Baltimore sculptor, who was eager

14. 17 U.S.C. § 201(a)-(b) (1982) (copyright vests initially in the author, but an employer is considered the author of a work made for hire).

15. *Id.* § 203(a) (in the case of any work other than a work made for hire, transfers and licenses of copyright may be terminated after 35 years).

16. *Id.* § 302(a), (c) (copyright endures for the life of the author plus 50 years, but copyright in a work made for hire endures for 75 years from the year of its first publication, or 100 years from the year of its creation, whichever expires first).

17. Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. COPYRIGHT SOC'Y U.S.A. 210, 210 (1988). Work-for-hire also presents problems in the university setting. See, e.g., DuBoff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC'Y U.S.A. 17 (1984) (new copyright law may interfere with traditional arrangement that academicians own copyright in their works); Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & UNIV. L. 485 (1982-83) (custom that a professor retains copyright in scholarly writings is threatened by work-for-hire provisions of new Copyright Act).

18. See, e.g., Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 HASTINGS COMM/ENT L.J. 591, 597, 619-20 (1988); Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1306-20 (1987); Ossola, *Work for hire: A Judicial Quagmire and a Legislative Solution*, 17 J. ARTS MGMT. & L., Fall 1987, at 23, 26-27.

19. *Reid*, 109 S. Ct. 362. *Reid* provides the Court its first opportunity to analyze the doctrine. The Supreme Court implicitly recognized the work-for-hire doctrine in 1903, but has not examined the doctrine since then. The issue was before the Court in *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111 (1962) (per curiam), but the Court refused to review the doctrine under *Rickover*'s sketchy record. *Id.* at 113.

20. Pub. L. No. 60-349, ch. 320, § 62, 35 Stat. 1075, 1087-88 (1909); see *infra* notes 46-56 and accompanying text.

21. 17 U.S.C. § 201(b) (1982); see *infra* notes 60-69 and accompanying text.

22. See *infra* notes 72-101 and accompanying text.

23. *Reid*, 846 F.2d at 1487 (D.C. Cir.), cert. granted, 109 S. Ct. 362 (1988).

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

to donate his services to the project.<sup>25</sup> Reid agreed to sculpt the figures for "Third World America" if CCNV would pay for his materials and provide a base for the sculpture.<sup>26</sup> Neither party mentioned copyright.<sup>27</sup>

"Third World America" was completed<sup>28</sup> and exhibited in Washington,<sup>29</sup> but CCNV and Reid could not agree on a schedule of exhibitions in other cities.<sup>30</sup> Both claimed copyright in the work and CCNV sued Reid for a determination of copyright ownership.<sup>31</sup>

The United States District Court for the District of Columbia held that "Third World America" was a work made for hire whose copyright was owned exclusively by CCNV,<sup>32</sup> but the United States Court of Appeals for the District of Columbia Circuit reversed.<sup>33</sup> Interpreting the 1976 Copyright Act's work-for-hire provisions for the first time, the court of appeals followed the United States Court of Appeals for the Fifth Circuit<sup>34</sup> and adopted a "literal" interpre-

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*rev'd*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988). CCNV also determined that the figures should be life-sized, the family should be black because most of the homeless in Washington were black, the steam grate should emit simulated steam, and the platform should be inscribed "and still there is no room at the inn." *Id.*

25. *Id.*

26. *Reid*, 846 F.2d at 1487. The base included the steam grate and equipment to create simulated steam.

27. *Id.*

28. CCNV hired a cabinetmaker to construct the base, *Reid*, 846 F.2d at 1487, and ordered special-effects equipment from Hollywood to create simulated steam. *Reid*, 652 F. Supp. at 1455. This was not CCNV's only contact with Hollywood. CCNV received \$150,000 in royalties from "Samaritan," a CBS television movie depicting CCNV's struggles to help the homeless. Brief for Appellees Community for Creative Non-Violence and Mitchell D. Snyder at 5, *Reid*, 846 F.2d 1485 (D.C. Cir. 1988) (No. 87-7051), *cert. granted*, 109 S. Ct. 362 (1988). Reid worked on his portion of the sculpture for several months, changing the form and arrangement of the figures to accommodate CCNV's requests. *Reid*, 846 F.2d at 1487. On Christmas Eve, Reid delivered the work to Washington and the figures were attached to the base.

29. Pageant officials rejected "Third World America" because it contained a political message, but CCNV exhibited it nearby. *Reid*, 652 F. Supp. at 1455 n.6.

30. *Reid*, 846 F.2d at 1488. CCNV planned a tour of several cities to raise money for the homeless, but Reid contended that the material used to cast the figures—a synthetic substance painted to resemble bronze—was too delicate to withstand such an ambitious itinerary. *Id.* at 1487-88. The sculpture had already been damaged en route to Washington. *Id.* at 1488. Reid planned a more moderate exhibition tour of his own. *Id.*

31. *Id.* The dispute between CCNV and Reid concerns only ownership of the copyright in "Third World America," not ownership of the sculpture itself. *Id.* at 1488 n.4; see 17 U.S.C. § 202 (1982) (ownership of copyright is distinct from ownership of the material object in which it is embodied). CCNV paid for and owns the sculpture. The owner of a copy of a copyrighted work, such as a book, or the original "copy," such as a sculpture like "Third World America" (the term copy "includes the material object . . . in which the work is first fixed," 17 U.S.C. § 101 (1982)), is entitled to display that copy publicly without the permission of the copyright owner, 17 U.S.C. § 109(c); see *Reid*, 846 F.2d at 1488 n.4. Therefore, even if Reid were the exclusive owner of the copyright in "Third World America," he arguably had no right to prevent CCNV's planned tour of the work. As an author, Reid might have rights against CCNV if it displayed an excessively mutilated or altered version of the sculpture. *Id.* at 1498; see *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 23-25 (2d Cir. 1976) (integrity of original work by British comedy troupe "Monty Python" impaired by broadcast of edited version).

32. *Reid*, 652 F. Supp. at 1453.

33. *Reid*, 846 F.2d at 1499.

34. *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988).

tation of the statute,<sup>35</sup> using general principles of agency law to determine whether Reid was an "employee" whose creation was a work made for hire.<sup>36</sup> In an opinion by Judge Ginsburg, the court held that Reid was an independent contractor and therefore "Third World America" was not a work made for hire.<sup>37</sup> The court refused to name Reid the exclusive owner of the copyright, however, and remanded the case to determine whether "Third World America" was a joint work whose copyright was co-owned by CCNV and Reid.<sup>38</sup>

The basic rule of copyright ownership is that copyright vests initially in the author or creator of a copyrightable work,<sup>39</sup> who may subsequently transfer all or part of that copyright to others.<sup>40</sup> The work-for-hire doctrine is an exception to this rule: copyright in a work created by an employee vests initially in the

35. For a discussion of the literal interpretation of the work-for-hire provisions of the 1976 Act, see *infra* notes 79-87 and accompanying text.

36. *Reid*, 846 F.2d at 1494.

37. *Id.*

38. *Id.* at 1495-98, 1499; see 17 U.S.C. §§ 101, 201(a) (1982) (joint work is a work prepared by two or more authors with the intention that their contributions be merged into a unitary whole; authors of a joint work are co-owners of copyright). The court noted that both CCNV and Reid engaged others to assist them with "Third World America," who may qualify as coauthors and would need to be joined in the action below. *Reid*, 846 F.2d at 1497-98.

39. *Ossola*, *supra* note 18, at 24.

40. 17 U.S.C. § 201(d)(1) (1982). Any work that is "original" and "fixed in [a] tangible medium of expression" is copyrightable. *Id.* § 102(a). The originality requirement is not stringent. "'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.'" *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884)). The work does not need to be novel or "nonobvious," as an invention must be to obtain a patent nor must it reach a particular level of artistic merit. W. PATRY, *LATMAN'S THE COPYRIGHT LAW* 18 (6th ed. 1986). A work is fixed in a tangible medium of expression if it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1982). Ideas are not copyrightable, however: "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 discovery, regardless of the form in which it is described, explained, illustrated, or embodied . . ." *Id.* § 102(b).

Copyright owners have five exclusive rights in a copyrighted work: 1) to make copies of the work; 2) to make "derivative" works based on the copyrighted work; 3) to sell or rent copies of the work; 4) to perform the work publicly; and 5) to display the work publicly. *Id.* § 106. Any of these rights may be transferred, and the owner of a particular exclusive right is given the same protections and remedies as the copyright owner. *Id.* § 201(d)(2).

The 1976 Act fundamentally changed the way federal copyrights are obtained. Under the 1909 Act, an author obtained federal copyright protection by registering the work with the Copyright Office or publishing the work with notice of copyright. Pub. L. No. 80-281, ch. 391, §§ 10, 12, 61 Stat. 652, 656 (1947) (repealed 1976). Unpublished works were protected by state law, known as "common-law copyright." R. BROWN & R. DENICOLA, *CASES ON COPYRIGHT* 7 (4th ed. 1985) (The "common-law" designation was somewhat erroneous because much of state copyright law was statutory, but the name was used to distinguish it from federal copyright, known as "statutory copyright."). Registration or publication with notice divested the owner of common-law copyright, and simultaneously replaced it with federal copyright. Publication without notice or prior registration also divested common-law copyright, placing the work in the public domain. Once a work entered the public domain, it was ineligible for federal protection. The 1976 Act did away with this dual system of copyright protection, which had been a hallmark of United States copyright law since the first Copyright Act of 1790. Latman, *A Glimpse at the New Copyright Act*, 24 BULL. COPYRIGHT Soc'y U.S.A. 77, 78 (1977). Under the 1976 Act a work is protected by federal copyright the moment it becomes fixed in a tangible medium of expression; state law is expressly preempted. See 17 U.S.C. §§ 102(a), 301 (1982). This single federal system of protection for all original works of authorship, published or unpublished, registered or unregistered, from the moment they are fixed in a tangible medium is the 1976 Act's most significant innovation. Latman, *supra*.

employer, who is considered the "author" of the work under the copyright statute.<sup>41</sup> The doctrine was implicitly accepted in judicial decisions at the turn of the century,<sup>42</sup> but was not formally recognized until the Copyright Act of 1909.<sup>43</sup> The 1909 Act simply declared that "[i]n the interpretation and construction of this title, . . . the word 'author' shall include an employer in the case of works made for hire."<sup>44</sup> This skeletal framework for the doctrine was developed by the courts.<sup>45</sup>

At first, the courts applied the doctrine only to works created by regular, salaried employees during the course of their employment.<sup>46</sup> Commissioned works were governed by a separate rule: copyright vested initially in the independent contractor, but the contractor was presumed to transfer that copyright to the commissioning party.<sup>47</sup> The presumption was rebuttable.<sup>48</sup>

41. See 17 U.S.C. § 201(b) (1982). For a discussion of the work-for-hire doctrine under the 1976 Act, see *infra* notes 70-101 and accompanying text.

42. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 242 (1903) has been cited as the origin of the doctrine. See, e.g., *Real Estate Data, Inc. v. Sidwell Co.*, 809 F.2d 366, 371 (7th Cir. 1987); Simon, *supra* note 17, at 487; Annotation, *Application of "Work for Hire" Doctrine Under Federal Copyright Act*, 11 A.L.R.FED. 457, 461-62 (1976). The doctrine was recognized before *Bleistein*, however. See, e.g., *Colliery Eng'r Co. v. United Correspondence Schools Co.*, 94 F. 152, 153 (C.C.S.D.N.Y. 1899) (literary product of salaried employee became property of employer, who could copyright it). But see STAFF OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY NO. 13, WORKS MADE FOR HIRE AND ON COMMISSION 129 (Comm. Print 1960) [hereinafter REVISION STUDY NO. 13] (older cases support copyright ownership, but not authorship by employer), reprinted in 1 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

43. Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 62, 35 Stat. 1075, 1087-88 (1909) (repealed 1947); Pub. L. No. 80-281, ch. 391, § 26, 61 Stat. 652, 659-60 (1947) (repealed 1976).

44. Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 62, 35 Stat. 1075, 1087-88 (1909) (repealed 1947). The odd wording of the statute—calling an employer the "author" of a work made for hire—stems from Congress's constitutional power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. The constitutionality of the work-for-hire doctrine has been questioned. See 1 M. NIMMER & D. NIMMER, *supra* note 8, § 1.06(C). This treatise concludes that the doctrine passes constitutional muster because § 201(b) allows the parties to "agree otherwise" that the employee owns the copyright in a work made for hire. *Id.* § 1.06(C). No court has decided whether it is constitutional to treat an employer and not the true creator of a work as its author, Simon, *supra* note 17, at 487, 511, but dicta suggest that any principle depriving an author of copyright and vesting that right in another should be narrowly confined, see, e.g., *Sherr v. Universal Match Corp.*, 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting), *cert. denied*, 397 U.S. 936 (1970).

45. The 1909 Act contained a number of ambiguities requiring judicial interpretation. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 857 (1987); see also B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 40 (1967) ("the text of the [1909] statute has a maddeningly casual prolixity and imprecision throughout" and "leaves the development of fundamentals to the judges").

46. See, e.g., *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191, 193-94 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F.2d 516 (2d Cir. 1946) (per curiam) (work of salaried employee created in course of employment held to be work-for-hire); *United States Ozone Co. v. United States Ozone Co. of America*, 62 F.2d 881, 887 (7th Cir. 1932) (treatise prepared by employee as part of his employment duties; copyright in employee's name held in trust for employer); *National Cloak & Suit Co. v. Kaufman*, 189 F. 215, 217 (C.C.M.D. Pa. 1911).

47. See, e.g., *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939) ("copyright should be held to have passed with the painting, unless the plaintiff can prove that the parties intended it to be reserved to the artist"), *cert. denied*, 309 U.S. 686 (1940). The presumption existed before the formulation of the work-for-hire doctrine. See *Dielman v. White*, 102 F. 892, 894 (C.C.D. Mass. 1900) (burden of proving that artist retains copyright in work of art executed, sold, and delivered under commission is upon the artist); cf. *Uphear Co. v. National Broadcasting Co.*, 81 F.2d 373,

As late as 1958, a Copyright Office study surveying case law in this area observed that the work-for-hire doctrine applied only to works made by salaried employees in the regular course of their employment.<sup>49</sup> The distinction between works created by employees and those created by independent contractors began to break down,<sup>50</sup> however, and in 1966 the United States Court of Appeals for the Second Circuit applied the work-for-hire doctrine to an independent contractor for the first time.<sup>51</sup> The presumption that a free-lance creator assigned his copyright to the commissioning party was replaced by a presumption that the commissioning party owned the copyright as an employer-author under the work-for-hire doctrine.<sup>52</sup> The hiring party's right to control the production of the work became the crucial factor in finding a work-for-hire relationship.<sup>53</sup> A "right to control" existed any time the hiring party paid for the work and had the power to refuse to accept it.<sup>54</sup> Because this right did not have to be exercised, the presumption that the commissioning party was an employer was difficult to rebut.<sup>55</sup> By the time the Copyright Act of 1976 was enacted, the courts

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376 (1st Cir.) (presumption is that independent contractor retains copyright unless contract carries implied assignment to commissioning party), *cert. denied*, 298 U.S. 670 (1936).

Early cases involving photographic portraits held that copyright belonged to the commissioning party, but it is not clear whether courts relied on a work-for-hire theory or a presumption of transfer theory. *See, e.g.,* *Lumiere v. Robertson-Cole Distrib. Corp.*, 280 F. 550, 552 (2d Cir.) (right of copyright held to be "in" the sitter, or the person paying for the sitter to be photographed), *cert. denied*, 259 U.S. 583 (1922); *Lumiere v. Pathe Exchange, Inc.*, 275 F. 428, 428 (2d Cir. 1921) (patron paying photographer to take photograph is entitled to copyright); *Altman v. New Haven Union Co.*, 254 F. 113, 118 (D. Conn. 1918) ("Where the photographer takes the portrait for the sitter under employment by the latter, it is the implied agreement that the property in the portrait is in the sitter.").

48. *Hartfield v. Herzfeld*, 60 F.2d 599, 600 (S.D.N.Y. 1932) (undisputed facts and circumstances made it clear there was no mutual intention that compiler of commercial code give copyright to commissioning party); *W. H. Anderson Co. v. Baldwin Law Publishing Co.*, 27 F.2d 82, 88 (6th Cir. 1928) (because plaintiff was independent contractor and not employee, court may infer plaintiff did not intend to sell copyright for "a sum less than the bare cost of the work").

49. REVISION STUDY No. 13, *supra* note 42, at 130; *see, e.g.,* *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 570 (2d Cir. 1955).

50. *See, e.g.,* *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965):

[W]hen one party engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, . . . in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the party at whose instance and expense the work is done.

*Id.*

51. *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966). The court reasoned that the doctrine "is applicable whenever an employee's work is produced at the instance and expense of his employer," and saw "no sound reason" not to apply the doctrine to independent contractors. *Id.*; *see also* *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216-17 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972) ("[t]he purpose of the statute is not to be frustrated by conceptualistic formulations of the employment relationship"; plaintiff "acted in the capacity of an independent contractor does not preclude a finding that the song was done for hire").

52. *Hardy*, *supra* note 17, at 242.

53. *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *Sherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968).

54. *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 327 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988); *see, e.g.,* *Picture Music*, 457 F.2d at 1217.

55. *See, e.g.,* *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978).



considered anyone who paid another to create a copyrightable work to be the statutory author of the work under the work-for-hire doctrine.<sup>56</sup>

The shift in 1966 from a rule of presumed assignment to the work-for-hire doctrine is significant for two reasons. First, the Copyright Act of 1976 would have eliminated the pre-1966 presumption. Transfers of copyright cannot be presumed under the 1976 Act;<sup>57</sup> transfers must be in writing.<sup>58</sup> Absent the work-for-hire doctrine, free-lance creators would own copyrights in all of the works they create. Second, the shift did not take place until 1966, one year after the work-for-hire provisions of the 1976 Act were drafted.<sup>59</sup>

The final version of the Copyright Act of 1976 explains that:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by [both of] them, owns all of the rights comprised in the copyright.<sup>60</sup>

A "work made for hire" is—

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

(2) a work specially ordered or commissioned for use [1] as a contribution to a collective work, [2] as part of a motion picture or other audiovisual work, [3] as a translation, [4] as a supplementary work, [5] as a compilation, [6] as an instructional text, [7] as a test, [8] as answer material for a test, or [9] 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.<sup>61</sup>

These provisions were the result of a compromise between authors' and composers' groups and their publishers.<sup>62</sup> The 1963 Preliminary Draft Bill

56. *Easter Seal Soc'y*, 815 F.2d at 326-27; see, e.g., *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974) (work-for-hire doctrine applies when work is produced "at the instance and expense" of the employer). For a brief but thorough discussion of the development of the work-for-hire doctrine under the 1909 Act, see *Easter Seal Soc'y*, 815 F.2d at 325-27.

57. 17 U.S.C. § 202 (1982) (transfer of object in which copyright is fixed does not transfer copyright in the work).

58. *Id.* § 204(a).

59. See *infra* notes 64-70 and accompanying text.

60. 17 U.S.C. § 201(b) (1982).

61. *Id.* § 101 (bracketed numbers added).

62. *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the Comm. on the Judiciary, Part 1*, 89th Congress, 1st Sess. 136-37 (1966) [hereinafter *Copyright Law Revision Part 1*] (statement of Horace S. Manges, Counsel to American Book Publishers Council, Inc.), reprinted in 5 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976); *id.* at 148-49 (supplemental statement of American Book Publishers Council, Inc.); *Memorandum of American Book Publishers Council, Inc., American Guild of Authors & Composers, American Society of Composers, Authors and Publishers, American Textbook Publishers Institute, The Authors League of America, Inc., Composers and Lyricists Guild of America, Inc.; Music Publishers' Protective Association, Inc., Music Publishers of the United States, Re H.R. 4347, Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the Comm. on the Judiciary, Part 1*, 89th Cong., 1st Sess. 134 (1965) [hereinafter *Joint Memorandum*], reprinted in 5 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976); STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON

would have defined a work made for hire as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."<sup>63</sup> Publishers objected to this definition,<sup>64</sup> so the 1964 bill included "a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire."<sup>65</sup> Authors, naturally, disliked this change<sup>66</sup> and both sides agreed to a compromise: only specific categories of commissioned works could become works for hire.<sup>67</sup> The compromise was incorporated in the 1965 bill as "a work specially ordered or commissioned for use as . . . [the first four categories of the present definition], if the parties expressly agree in writing that the work shall be considered a work made for hire."<sup>68</sup> The 1976 Act added a few categories to the list of commissioned works that could be considered works made for hire, but the basic definition of work-for-hire enacted in the 1976 Act appeared in the 1965 bill.<sup>69</sup>

When this basic definition of work-for-hire was formulated in 1965, the work-for-hire doctrine applied only to regular, salaried employees.<sup>70</sup> By 1976, when the definition was enacted, courts had expanded the concept of "employees" for the purposes of copyright law to include independent contractors.<sup>71</sup> The 1976 Act does not define the term "employee." Did Congress adopt the broad 1976 concept of "employees," the narrow 1965 concept of "employees," or something in between?

One commentator has advocated a "conservative" interpretation of the

THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 66-68 (Comm. Print 1965) [hereinafter SUPPLEMENTARY REPORT], reprinted in 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

For brief but thorough discussions of the legislative history of the work-for-hire provisions in the 1976 Act, see W. PATRY, *supra* note 40, at 118-22; Ossola, *supra* note 18, at 31-35. For a more detailed discussion, see Hardy, *supra* note 17, at 221-41.

63. STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED UNITED STATES COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 15 n.11 (Comm. Print 1964), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

64. *Id.* at 274, reprinted in OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

65. STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT REVISION, PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS § 54 at 31 (Comm. Print 1965), reprinted in 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

66. See *id.* at 146-48 (comments of Irwin Karp, Counsel to The Authors League of America, Inc.), reprinted in OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

67. Joint Memorandum, *supra* note 62, at 134, reprinted in OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

68. H.R. 4347, 89th Cong., 1st Sess. § 101 (1965) reprinted in *Copyright Law Revision Part I*, *supra* note 62, at 3-4.

69. See *supra* text accompanying note 61; compare H.R. 4347, 89th Cong., 1st Sess. § 101 (1965) (1965 bill lists only four categories) with 17 U.S.C. § 101 (1982) (present bill contains nine categories).

70. See *supra* notes 46-49 and accompanying text. The application of the doctrine to independent contractors was foreshadowed by *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965), but *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966), was the first express application. See *supra* notes 50-52 and accompanying text.

71. See *supra* notes 50-56 and accompanying text.

1976 Act's work-for-hire provisions.<sup>72</sup> According to this view, the 1976 Act did not change the expansive concept of "employees" that had developed between 1966 and 1976; the hiring party's "right to control" the production of a specially commissioned work remained the crucial factor in establishing an employer-employee relationship.<sup>73</sup> Therefore, a work by an independent contractor falls under the first clause of the definition of a work made for hire, "a work prepared by an employee within the scope of his or her employment."<sup>74</sup> Clause number two<sup>75</sup> is said to carve out a narrow exemption for nine specific kinds of commissioned works, which can be works for hire only if the parties sign a written agreement.<sup>76</sup> This interpretation has been criticized as

mak[ing] the nine narrow categories in § 101(2) completely mysterious. . . . The activities in § 101(2) look like the kind of activities where the [commissioning party] normally wants and needs to be a statutory author in order to gain complete initial ownership of a collaborative project. It would be anomalous to give these activities special protections beyond those accorded other types of commissioned works.<sup>77</sup>

A few courts have adopted the conservative interpretation.<sup>78</sup>

The vast majority of commentators<sup>79</sup> advocate a "literal" interpretation of the new work-for-hire provisions, and this interpretation has been adopted by a number of courts.<sup>80</sup> Under the literal view, the two clauses defining works made for hire are mutually exclusive: the first clause refers to works created by employees and the second clause refers to works created by independent contractors.<sup>81</sup> A work prepared by an employee is a work made for hire only if it was prepared within the scope of employment.<sup>82</sup> A work ordered from an independent contractor is a work made for hire only if it falls into one of nine specific categories and the parties have agreed in writing that the copyright belongs to the party commissioning the work.<sup>83</sup> This interpretation is a radical departure

72. O'Meara, "Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations, 15 CREIGHTON L. REV. 523, 527-28, 532-39 (1982).

73. See *id.* at 528, 533.

74. 17 U.S.C. § 101 (1982); see *supra* text accompanying note 61.

75. 17 U.S.C. § 101; see *supra* text accompanying note 61.

76. O'Meara, *supra* note 72, at 528.

77. *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 331 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988). The interpretation has also been criticized as "demonstrably incorrect." Hardy, *supra* note 17, at 244 & nn.48 & 145 (citing SUPPLEMENTARY REPORT, *supra* note 62, 67-68 (commissioned works not falling within one of the enumerated categories would not come within the definition of works made for hire)).

78. *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 141-43 (S.D.N.Y. 1983).

79. See *supra* note 13.

80. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988); *Easter Seal Soc'y*, 815 F.2d at 334. Earlier district court decisions had implicitly recognized the literal interpretation. See, e.g., *Whelan Assocs. v. Jaslow Dental Laboratory*, 609 F. Supp. 1307, 1319 (D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986) (work-for-hire finding not challenged on appeal), *cert. denied*, 107 S. Ct. 877 (1987); *Childers v. High Soc'y Magazine, Inc.*, 557 F. Supp. 978, 984 (S.D.N.Y. 1983); *BPI Sys., Inc. v. Leith*, 532 F. Supp. 208, 210 (W.D. Tex. 1981).

81. *Easter Seal Soc'y*, 815 F.2d at 329.

82. *Id.*

83. *Id.*

from the work-for-hire doctrine that existed in 1976, but is only a slight expansion of the doctrine as it was applied in 1965.

The literal view actually encompasses two interpretations of the 1976 Act. Although proponents of the literal view agree that the term "employee" does not include an independent contractor, they disagree on a more precise definition. The United States Court of Appeals for the Ninth Circuit<sup>84</sup> and several scholars believe that the term refers only to formal, salaried employees.<sup>85</sup> This Note will refer to this view as the "formal employee" version of the literal interpretation. Others believe that the term "employee" should be construed under general agency principles, because "scope of employment" is a term of art in agency law.<sup>86</sup> This position was adopted by the District of Columbia Circuit in *Reid*<sup>87</sup> and will be called the "agency law" version of the literal interpretation.

A third interpretation is a compromise between the conservative view that almost all commissioned works are works made for hire and the literal view that only a few types of commissioned works are works made for hire. The "compromise" view was devised by the Second Circuit in *Aldon Accessories Ltd. v. Spiegel, Inc.*<sup>88</sup> Like the proponents of the conservative view,<sup>89</sup> the Second Circuit

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84. *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989). This decision was handed down after the Supreme Court granted certiorari in *Reid*, 109 S. Ct. 362 (1988).

85. See, e.g., W. PATRY, *supra* note 40, at 122; Hardy, *supra* note 17, at 221-22; Ossola, *supra* note 18, at 34. These scholars argue that the drafters of the 1976 Act's work-for-hire provisions intended for the word "employee" to mean a "regular" or salaried employee. They present two reasons why the drafters chose this meaning. Mr. Ossola and Professor Patry assert that the drafters adopted this meaning because the Copyright Office interpreted the term that way. See W. PATRY, *supra* note 40, at 119, 122; Ossola, *supra* note 18, at 32, 34. Professor Hardy believes that the drafters adopted this meaning because the courts interpreted the term that way in 1965, the year the provisions were written. See Hardy, *supra* note 17, at 221-46.

86. See, e.g., *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 334 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988); *Brunswick Beacon v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 413 (4th Cir. 1987); 1 M. NIMMER & D. NIMMER, *supra* note 8, § 5.03[B][1], at 5-12. The courts following this view use common-law principles listed in RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)-(j) (1958) to determine whether one acting for another is an employee or an independent contractor:

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, 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 part of the regular business of the employer;
- (i) whether or not the parties believe they are creating a relation of master and servant; and
- (j) whether the principal is or is not in business.

*Id.*

87. 846 F.2d at 1494.

88. 738 F.2d at 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

89. For a discussion of the conservative interpretation of the 1976 Act's work-for-hire provisions, see *infra* text accompanying notes 72-78.

believes that independent contractors may be considered "employees" under the first clause of the definition of work-for-hire.<sup>90</sup> Unlike the proponents of the conservative view, however, the Second Circuit believes that Congress did intend to narrow the expansive use of the term "employee."<sup>91</sup> According to the *Aldon Accessories* court, Congress felt that the presumption that works prepared by independent contractors were works made for hire "worked an injustice in those situations where the contractor did all of the creative work and the hiring party did little or nothing."<sup>92</sup> Therefore, the new work-for-hire provisions reverse this presumption when the hiring party does not actually control the production of the work.<sup>93</sup> The *Aldon Accessories* compromise treats a contractor as an employee for copyright purposes only if "the contractor [is] so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship exists."<sup>94</sup> If the contractor is strictly supervised, her work is a work-for-hire under the "work prepared by an employee" clause.<sup>95</sup> If the contractor were truly independent, her work would be covered by the "commissioned works" clause.<sup>96</sup>

Several courts have adopted the *Aldon Accessories* compromise as the definitive interpretation of work-for-hire under the 1976 Act.<sup>97</sup> However, the United States Courts of Appeals for the Fifth, Ninth, and District of Columbia Circuits have expressly rejected the reasoning of *Aldon Accessories*.<sup>98</sup> Critics maintain that the *Aldon Accessories* compromise was unnecessary because the same result could have been reached under a joint work theory: any plaintiff who actually controls an independent contractor should be the coauthor of a joint work.<sup>99</sup>

Both the *Aldon Accessories* compromise and the agency law version of the literal interpretation use agency law principles to establish work-for-hire status.<sup>100</sup> The only difference is that *Aldon Accessories* examines the control exercised by a hiring party over a specific work and the agency law version of the literal interpretation examines the hiring parties' relationship as a whole.<sup>101</sup>

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90. *Aldon Accessories*, 738 F.2d at 552.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 552-53.

96. *See id.* at 552.

97. *See, e.g., Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326, 1331 (N.D. Ill. 1986). *Evans Newton* has been criticized for failing to require the same degree of actual control by the hiring party as *Aldon Accessories*, Hardy, *supra* note 17, at 212, 217-18, 248, and for sliding toward the "right to control" standard developed under the 1909 Act, *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 334 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988).

98. *Dumas v. Gommerman*, 865 F.2d 1093, 1103-05 (9th Cir. 1989); *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988); *Easter Seal Soc'y*, 815 F.2d at 333-34.

99. *Reid*, 846 F.2d at 1491; *Easter Seal Soc'y*, 815 F.2d at 333; *Hamilton, supra* note 18, at 1302. For a description of joint works, see *supra* note 38.

100. *See Hardy, supra* note 17, at 256-57.

101. *Hardy, supra* note 17, at 256-57. Professor Hardy argues that the actual control test and the general agency law test will reach equally unpredictable results. *Id.* at 256.

The *Reid* opinion surveyed three of the interpretations described above: the conservative approach,<sup>102</sup> the *Aldon Accessories* approach,<sup>103</sup> and the agency law version of the literal approach adopted by the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults v. Playboy Enterprises*.<sup>104</sup> The court quoted at length the Fifth Circuit's reasoning in *Easter Seal Society*, wholeheartedly endorsing its choice of a literal interpretation and summarily dismissing two reservations the Fifth Circuit voiced when adopting a literal interpretation.<sup>105</sup> The Fifth Circuit in *Easter Seal Society* had justified its choice of agency law as the means to determine who is and is not an "employee" under the statute,<sup>106</sup> but the District of Columbia Circuit in *Reid* did not discuss the issue at all. The court simply stated that it had selected "the" literal interpretation of the statute and used agency law principles to apply that interpretation to the facts at hand.<sup>107</sup>

The *Reid* court's choice of one version of the literal view over another was not dispositive of the ownership of "Third World America's" copyright, however.<sup>108</sup> Even under the broader agency law view,<sup>109</sup> *Reid* was regarded as an independent contractor. Therefore, he could not have been an "employee" under either version of the literal interpretation. The court conceded that the result would have been different if it had followed the compromise interpretation

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102. *Reid*, 846 F.2d at 1489-94, see *supra* notes 72-78 and accompanying text.

103. *Id.*; see *supra* notes 88-96 and accompanying text.

104. *Id.* (citing *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.* 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988)); see *supra* notes 81-83 & 86-87 and accompanying text.

105. *Id.* at 1492-94. The *Easter Seal Society* court thought that § 201(b)'s language, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title," sounded like an affirmation of the 1909 Act work-for-hire doctrine. 815 F.2d at 330. The Fifth Circuit considered the language too broad to refer to the narrow class of persons who could be authors of specially commissioned works under the "commissioned works clause of § 101. *Id.* The *Reid* court disagreed. *Reid*, 846 F.2d at 1494. The Fifth Circuit was also concerned that Congress did not express a clear intent to fundamentally alter the works for hire doctrine. *Easter Seal Soc'y*, 815 F.2d at 330-31. The District of Columbia Circuit opinion in *Reid* also saw no difficulty. *Reid*, 846 F.2d at 1494.

106. *Easter Seal Soc'y*, 815 F.2d at 335-36. The court's reasons were: 1) the phrase "scope of employment" is a term of art in agency law; 2) the meaning of work-for-hire is tied to a well-developed doctrine in agency law; 3) it gives buyers and sellers of copyrightable works the greatest predictability; and 4) adopting an agency law definition creates a "certain moral symmetry"—a buyer is a statutory author only when he would be liable for the seller's negligence under *respondeat superior*. *Id.* at 335. But see *infra* notes 123-25 and accompanying text (policy behind tort law's *respondeat superior* doctrine does not apply in copyright context).

107. *Reid*, 846 F.2d at 1494.

108. For a discussion of the two literal interpretations of the Act, see *supra* notes 84-87 and accompanying text. Because *Reid* was an independent contractor, he was the author of "Third World America" and owned copyright in the work. *Reid*, 846 F.2d at 1495. The court was not willing to declare that *Reid* was the sole owner of the copyright, however. *Id.* The court remanded for a determination whether CCNV and others were joint authors of "Third World America" and co-owners of its copyright. *Id.* at 1497-98. If that is the case, *Reid* and the other owners hold copyright in "Third World America" as tenants in common. *Id.* at 1498; see H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5736, and in 7 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976).

109. This view examines a number of factors when determining whether an individual is an employee. See *supra* note 86. The formal employee view regards only regular, salaried employees as "employees" under the copyright statute.

of the Second Circuit.<sup>110</sup> Presumably, CCNV had exercised enough actual control over the production of "Third World America" to create an employer-employee relationship under the compromise view.

The *Reid* court's choice of a literal, rather than a conservative or compromise interpretation of the new work-for-hire provisions is logical from a textual viewpoint. The statute appears to create a simple dichotomy: "[a] 'work made for hire' is—(1) a work prepared by an employee . . . ; or (2) a work specially ordered or commissioned . . . ."<sup>111</sup> Legislative history<sup>112</sup> also supports a literal interpretation of the statute. The definition of work-for-hire that was incorporated into the Copyright Act of 1976 was a compromise between a definition that had excluded commissioned works altogether and a definition that included all commissioned works.<sup>113</sup>

The court's choice of agency law as the means to determine who is a copyright "employee" is not supported by legislative history, however. The legislative history of the 1976 Act is unusual in that many of its substantive provisions date from the early 1960s<sup>114</sup> and were written by industry representatives rather than legal scholars or members of Congress.<sup>115</sup> When authors', composers', and publishers' groups endorsed a definition of work made for hire in 1965, the courts defined the term "employee" as a traditional, salaried employee.<sup>116</sup> After 1965 Congress considered the ownership provisions of the new copyright act settled<sup>117</sup> and focused on other matters.<sup>118</sup> There is no evidence that anyone participating in the copyright revision process became aware of the line of cases expanding the work-for-hire doctrine.<sup>119</sup> Had Congress intended to change the meaning originally given the word "employee" to comport with later case law, it surely would have said so.<sup>120</sup>

Practical considerations point to a definition of copyright "employees" as regular, salaried employees. Determining that an individual is a formal employee is far simpler than determining that he is an employee under agency law. Payroll withholding records can be consulted to determine whether someone is a formal employee.<sup>121</sup> By contrast, the Restatement of Agency lists ten factors to

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110. *Reid*, 846 F.2d at 1497 n.18.

111. 17 U.S.C. § 101 (1982); *Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 335 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988).

112. *See supra* notes 62-69 and accompanying text.

113. *See supra* notes 62-69 and accompanying text.

114. Ossola, *supra* note 18, at 13.

115. Hamilton, *supra* note 18, at 1281; Litman, *supra* note 45, at 880-81.

116. *See supra* note 49 and accompanying text.

117. Litman, *supra* note 45, at 901.

118. For a decade, controversy over the scope of rights kept copyright revision efforts at standstill. Litman, *supra* note 40, at 80-81. The obligation of cable television operators to make contributions to copyright owners was the center of the controversy. *See R. BROWN & R. DENICOLA, supra* note 40, at 417; Litman, *supra* note 40, at 82. The problem was finally resolved by a compulsory licensing system. *See* 17 U.S.C. § 111 (1982).

119. Litman, *supra* note 45, at 901.

120. *See Hardy, supra* note 17, at 242-43.

121. *See Fitzgibbon & Kendall, The Unicorn in the Courtroom: The Concept of "Supervising and Directing" an Artistic Creation Is a Mythical Beast in the Copyright Law*, 15 J. ARTS MGMT. & L., Fall 1985, at 23, 32 (first earmark of a regular employee is that employer withholds federal and state

be weighed when determining whether someone acting for another is an employee or an independent contractor.<sup>122</sup> The use of a straightforward definition of an "employee" whose work is "for hire" will create certainty and stability in the marketplace.

Public policy also points to a narrow definition of the term "employee." In tort law, policy favors finding a closer relation between the parties than they may have intended in order to fix liability on the person best able to bear a financial loss.<sup>123</sup> Thus, an independent contractor may be regarded as an "employee" under the doctrine of *respondet superior*, allowing an injured plaintiff to reach the "deep pocket" of a wealthy "employer." Such a broad view of the employer-employee relationship does not similarly advance the goals of copyright law. The purpose of copyright protection is to encourage creative activity by rewarding authors.<sup>124</sup> Accordingly, the artificial treatment of employers as statutory "authors" should be limited to a true employment relationship.<sup>125</sup>

*Reid* correctly chose a literal interpretation of the work-for-hire provisions in the Copyright Act of 1976, but the court's use of agency law to determine who is and is not an employee under the Act appears misguided. The work-for-hire doctrine is in dire need of clarification by the Supreme Court or Congress. Either version of the literal interpretation—the formal employee view that treats only regular, salaried employees as "employees" under the copyright statute, or the agency law view that uses a broader test—would lend much-needed stability to the doctrine. But applying the work-for-hire doctrine only to formal employees is simpler, more predictable, and closer to congressional intent than applying the doctrine to agency law employees.

MAMIE DEATON LUCAS

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payroll taxes, social security (FICA), and union dues). Senator Thad Cochran (D-Miss.) has introduced legislation to clarify the work-for-hire doctrine by "confin[ing] the work-for-hire doctrine to the traditional employment relationship—the situation it was designed to address." 133 CONG. REC. S6,737 (daily ed. May 19, 1987) (statement of Senator Cochran); see S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986); S. 2138, 98th Cong., 1st Sess. (1983); 132 CONG. REC. S4494 (daily ed. Apr. 17, 1986). These bills would require that the employer withhold state and federal income taxes from an "employee" who creates a work made for hire. See, e.g., Artists Bill of Rights, S. 1223, 100th Cong., 1st Sess. (1987).

122. RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)-(j) (1958); see *supra* note 86.

123. Fitzgibbon & Kendall, *supra* note 121, at 33.

124. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (economic philosophy behind copyright is that encouraging individual effort through personal gain is the best way to advance public welfare; "[s]acrificial days devoted to such creative activities deserve rewards.").

125. But see Hardy, *An Economic Understanding of Copyright Law's Work-Made-for-Hire Doctrine*, 12 COLUM. J.L. & ARTS 181, 181, 227 (1988). Professor Hardy argues that courts feel an obligation to give rights to the "deep pocket" in copyright cases because the wealthier hiring party is in a better position to exploit the work and bring it to the public's attention. *Id.* at 181. Professor Hardy concludes, however, that Congress intended the 1976 Act's work-for-hire provisions to favor the creator over the exploiter of a work and any tension between the judicial goal of maximizing public access to a work by awarding copyright ownership to the better exploiter and a more limited congressional intent should be resolved by following congressional intent. *Id.* at 227.



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