

COMMUNITY FOR CREATIVE NON-VIOLENCE V. REID: A SPECIOUS SOLUTION TO THE "WORKS MADE FOR HIRE" PROBLEM

The "works made for hire"¹ doctrine of copyright law² provides that, in some circumstances, a hiring party rather than the creator³ owns the copyright in a work of authorship.⁴ The classification of

¹ This note will use the expression "work for hire" interchangeably with the statutory phrase "works made for hire."

² The Copyright Act of 1976 ("1976 Act") protects the right of an author to control the reproduction of his or her intellectual creation. 17 U.S.C. §§ 101-914 (1988); A. LATMAN, R. GORMAN & J. GINSBURG, COPYRIGHT FOR THE NINETIES 12 (3d ed. 1989) [hereinafter COPYRIGHT FOR THE NINETIES]. The 1976 Act derives substance from article I, section 8 of the United States Constitution, which vests Congress with the power to grant authors rights in their creations in order to encourage the production of literary, musical, graphic or other artistic works. The United States Constitution vests Congress with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ." U.S. CONST. art. I, § 8, cl. 8. Early decisions construed the term "writings" broadly. *E.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) ("By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.") The subject matter of copyright under the 1976 Act is extremely broad and not limited to contemporary methods of expression or reproduction. 17 U.S.C. § 102(a) (1988). Section 102(a) states that:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: .

- (1) literary works;
- (2) musical works, including any accompanying works;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

Id.

³ This note uses the term "creator" to mean the one who actually creates the work. The term "author" is avoided because under the 1976 Act "author" can mean either the actual creator or, in special circumstances, an employer. *See* 17 U.S.C. § 201(b) (1988).

⁴ Protection of a creator's work constitutes a basic foundation of copyright law. *See* W. PATRY, LATMAN'S THE COPYRIGHT LAW 114 (6th ed. 1986) (*citing* SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL PROVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, Ch. XI at 9 (draft ed. 1975)). The conviction that the production and dissemination of creative works is a public benefit that can best be achieved through an economic incentive for producing original works in the form of a limited monopoly, underlies

a work as "work for hire" governs the dealings among artists, writers, other creators and businesses that use copyrighted works, such as the publishing, music and motion picture industries.⁵ Such classification also determines several critical copyright ownership issues, including initial ownership of the copyright,⁶ copyright duration,⁷ renewal rights in the copyright,⁸ and termination of copyright

this grant of copyright. *E.g.*, *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . ."). Section 201 of the 1976 Act, which vests initial ownership in the author of the work, embodies this principal. *See* 17 U.S.C. §§ 201(a), 106 (1988). The 1976 Act, however, carves out an exception to this principal in situations where one party creates a work at the behest of another party. 17 U.S.C. § 201(b) (1988). Section 201(b) of the 1976 Act provides 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 them, owns all of the rights comprised in the copyright.

Id. By defining an employer as an "author" in "work made for hire" situations, Congress remained within its limits under the constitutional authorization to secure exclusive rights to "Authors." U.S. CONST. art. I, § 8, cl. 8.

The "works made for hire" provision of the 1976 Act grants copyright ownership and all accompanying rights to an employer when an employee creates a work in the scope of his or her employment and, in special circumstances, to the hiring party when a freelance creator produces commissioned works. *See* 17 U.S.C. § 201(b) (1988); *see also id.* § 101. Section 101 defines a "work made 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, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id. § 101.

⁵ *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2171 (1989). Application of the "work for hire" doctrine significantly affects freelance creators and industries that use their works. *See* STAFF OF SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., STUDY NO. 13, WORKS MADE FOR HIRE AND ON COMMISSION 139 n.49 (Comm. Print 1960) (reported by B. Varmer), *reprinted in* 1 STUDIES ON COPYRIGHT 731 n.49 (Fisher Memorial ed. 1963) [hereinafter *VARMER STUDY*]. The study indicates that as of 1955 approximately 40% of all copyright registrations were works for hire. *Id.* The Copyright Office does not maintain more recent statistics on the number of works made for hire registrations. *See Reid*, 109 S. Ct. at 2171 n.4. Industries that frequently utilize commissioned works include the publishing, motion picture, advertising and music industries. *Id.* at 2171. Freelance creators may include artists, writers, photographers, designers, composers and computer programmers. *Id.*

⁶ 17 U.S.C. § 201(a), (b) (1988).

⁷ *Id.* § 302(c).

⁸ *Id.* § 304(a).

rights.⁹ Thus, predictability in the "work for hire" doctrine is critical to the ability of parties to identify the potential and scope of economic rewards for creative production and to structure contracts concerning copyright interests accordingly.¹⁰

⁹ See *id.* § 203(a) (by negative implication). To gain protection under the 1976 Act, a work must be original and it must be fixed in any medium. *Id.* § 102(a). Section 102 provides that, "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed" *Id.* The statute, however, protects only the expression through which an author conveys ideas and not the ideas themselves. *Id.* § 102(b). Section 102(b) provides that, "[i]n 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 in such work." *Id.* Others may utilize the information or ideas that inspired the expression, provided they do not copy the expression itself. See *id.*

¹⁰ See *Reid*, 109 S. Ct. at 2177-78. Copyright protection under the "work for hire" doctrine differs from ordinary copyright protection in several important respects. For example, ordinarily the creator of a work owns the copyright. 17 U.S.C. §§ 201(a), 106 (1988). In contrast, the employer rather than the creator acquires the initial copyright in a "work for hire." 17 U.S.C. § 201(b) (1988). See *supra* note 4 for text of provision. Initial ownership is critical because the 1976 Act grants the copyright owner a bundle of five potentially lucrative rights: the right to reproduce the work; the right to prepare derivative works from the original creation; the right to distribute copies of the work to the public; the right to perform the work publicly; and the right to publicly display the work. 17 U.S.C. § 106 (1988). These rights are subject to certain limitations under the 1976 Act such as fair uses of a protected work and compulsory licensing authorization. *Id.* §§ 107, 115. Nonetheless, initial ownership of copyright grants a valuable and broad property interest that can be exploited in a variety of ways. The rights acquired under the 1976 Act are regulated by voluntary agreements. COPYRIGHT FOR THE NINETIES, *supra* note 2, at 32. Considerable flexibility exists for the author to exploit his or her rights by subdividing them, e.g., licensing only the right to reproduce while retaining the right to display the work in public, or by transferring or licensing limited rights, e.g. limiting the duration. *Id.* at 33. Furthermore, the copyright owner retains all copyright rights not expressly granted to another. *Id.*

The "work for hire" doctrine also affects the duration, renewal and termination of a copyright interest. Normally, the duration of copyright protection extends for the life of the author plus an additional 50 years. 17 U.S.C. § 302(a) (1988). This section applies to a work created on or after January 1, 1978, the date on which the 1976 Act took effect. *Id.* § 301. Copyright protection for a "work for hire," however, lasts for 75 years from publication or 100 years from creation, whichever expires first. *Id.* § 302(c). Generally, an "author" is entitled to renewal, which extends the copyright protection. *Id.* § 304(a), (b). An author must renew the copyright of a work created before January 1, 1978, in order to extend the protection to approximate the new duration dates set by the 1976 Act. *Id.* The 1976 Act, however, defines an employer as "author" of a "work for hire." *Id.* § 201(b). See *supra* note 4 for the text of the provision. Consequently, the employer, not the creator of a "work for hire," is entitled to copyright renewal. See *id.* § 304(a). Generally, when an author transfers any rights in a copyrighted work to another party, the statute permits the author to terminate these transfers after 35 years, thereby regaining copyright in the work and the accompanying right to use the work. *Id.* § 304(c). An author may terminate any grants or transfers of copyright in a work, other than a work made for hire, produced prior to January 1, 1978. *Id.* These voluntary reversionary rights protect authors who may have assigned these works before realizing their true value. See H.R. REP. NO. 94-1476, 94TH CONG., 2D SESS. 124 (1976),

Despite the essential need for predictability, definitional uncertainty has complicated application of the "work for hire" doctrine.¹¹ The 1976 Copyright Act ("1976 Act") does not define the terms "employee" or "employment," two critically important concepts in the determination of copyright ownership.¹² This omission of a statutory definition had resulted in inconsistent and sharply contrasting interpretations by federal courts, evidenced by four different views of the appropriate definition of "employee" under copyright law.¹³

One test designated a creator as an employee when the hiring party actually supervised and directed the creator's production of the work.¹⁴ A similar, but broader formulation, designated a creator as a copyright employee if the hiring party merely retained the right to control the manner in which the product was created.¹⁵ A third test indicated that agency law should be applied to determine if the creator is an employee under the "works made for hire" provision of the 1976 Act.¹⁶ The fourth formulation suggested that only a regular, salaried employee constituted a copyright employee under the 1976 Act.¹⁷

reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5740 [hereinafter H.R. REP. NO. 94-1476] ("The provisions of section 203 are based on the premise that the . . . proposed law should . . . [provide] a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."). If, however, the work constituted a "work for hire," the transferred copyright is not subject to termination. 17 U.S.C. § 304(c) (1988).

¹¹ See generally Fidler, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 HASTINGS COMM. AND ENT. L.J. 591 (1988).

¹² Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. COPYRIGHT SOC'Y OF THE U.S.A. 210, 211 (1988).

¹³ Compare *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 553 (5th Cir.), cert. denied, 469 U.S. 982 (1984) (court focused on the amount of supervision and control the hiring party exercised over the creator) with *Peregrine v. Lauren*, 601 F. Supp. 828, 829 (D. Colo. 1985) (court looked to hiring party's mere right to control and supervise creator's production of the work) with *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 334-35 (5th Cir. 1987) (court applied agency law principles to determine status as "work for hire") with *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989) (court concluded that only regular, salaried employees fall within the "works made for hire" provision).

¹⁴ *Aldon Accessories*, 738 F.2d at 553; see also *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 413 (4th Cir. 1987); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir.), cert. denied, 479 U.S. 949 (1986).

¹⁵ See *Peregrine*, 601 F. Supp. at 829; *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 142 (S.D.N.Y. 1983).

¹⁶ *Easter Seal*, 815 F.2d at 334-35.

¹⁷ *Dumas*, 865 F.2d at 1105.

In June 1989, the United States Supreme Court, in *Community for Creative Non-Violence v. Reid*, held that agency law shall be applied in the determination of a creator's status as an "employee" under the "work for hire" provision of the 1976 Act.¹⁸ In considering the creator's status for copyright purposes, the Court concluded that the language, structure and legislative history of the "work for hire" provision warranted the application of agency law.¹⁹ In applying agency law, the Court determined that Reid, the creator, was an independent contractor and therefore not an "employee" under the 1976 Act.²⁰

This note focuses on the interpretation of the term "employee" in light of the unique legislative history leading to the 1976 Act.²¹ Section I details the development of the "work for hire" doctrine until 1966, including its application under both the 1909 Act and under common law.²² Section II examines the legislative history of the "work for hire" provision in the 1976 Act.²³ Section III outlines the conflicting tests that courts developed under the 1976 Act.²⁴ Section IV analyzes the law surrounding the "work for hire" doctrine and concludes that, contrary to the Supreme Court's recent decision in *Reid*, Congress intended "employee" to refer to a formal, salaried employee and not to the equivalent of "servant" under agency law.²⁵ Furthermore, Congress's intentions provide a more predictable framework within which freelance creators and commissioning parties can structure their business relationships.²⁶ Finally, section IV concludes that Congress should amend the 1976 Act and add a definition of "employee" that limits that term under the "works made for hire" provision of the 1976 Act to one who receives a regular salary.

¹⁸ 109 S. Ct. 2166, 2168 (1989). In *Reid*, a freelance artist produced a sculpture for and under the direction of a non-profit organization, Community for Creative Non-Violence ("CCNV"). *Id.* at 2169. The parties did not sign a written employment contract and they did not discuss copyright ownership. *Id.* at 2169-70. Following completion of the sculpture, both Reid, the artist, and CCNV filed copyright registrations. *Id.* at 2170.

¹⁹ *See id.* at 2178.

²⁰ *Id.* at 2179-80.

²¹ *See generally* Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

²² *See infra* notes 27-48 and accompanying text.

²³ *See infra* notes 49-145 and accompanying text.

²⁴ *See infra* notes 146-231 and accompanying text.

²⁵ *See infra* notes 232-65.

²⁶ *See infra* notes 256-65 and accompanying text.

I. HISTORY OF "WORKS MADE FOR HIRE"

Congress enacted the first Copyright Act in 1790 pursuant to its Constitutional prerogative.²⁷ Since that time, Congress has revised the copyright law in general respects.²⁸ The Copyright Act of 1909 ("1909 Act"),²⁹ the most recent revision of copyright law prior to the 1976 Act, was the first copyright statute to incorporate a "work for hire" provision dealing specifically with works prepared by an employee.³⁰ Section 26, the "work for hire" provision of the 1909 Act, codified the common-law presumption that copyright ownership in a work produced by a salaried employee vests with an employer.³¹

In the 1903 case of *Bleistein v. Donaldson Lithographing Co.*, the United States Supreme Court expressly recognized that, under common law, an employer owned the copyright in a work prepared by his employee.³² The *Bleistein* Court held that a lithograph company owned the copyright in a circus advertisement created by the company's employee.³³ In *Bleistein*, an employee of the Courier Lithographing Co. ("Courier") who was employed on a regular, salaried basis to produce lithographs for Courier, created three lithographs intended as circus advertisements. Courier alleged that the defendant infringed its copyright in the lithographs by copying the circus posters in reduced form. Holding that Courier owned the copyright in the circus advertisements, the Court reasoned that an employer is entitled to copyright ownership in works produced by its regular employees.³⁴

²⁷ H.R. REP. NO. 94-1476, *supra* note 10, at 47.

²⁸ *Id.*

²⁹ Act of March 4, 1909, Pub. L. No. 349, ch. 320, 35 Stat. 1075 [hereinafter 1909 Act]. The 1909 Act was codified in Title 17 of the United States Code in 1947. Act of July 30, 1947, Pub. L. No. 281, ch. 391, 61 Stat. 652 (repealed 1976) [hereinafter 1947 Codification].

³⁰ See Fidlow, *supra* note 11, at 597-98. Section 62 of the 1909 Act provides that "the word 'author' shall include an employer in the case of works made for hire." 1909 Act, *supra* note 29, § 62. Section 62 of the 1909 Act became section 26 in the 1947 codification of the 1909 Act. 1947 Codification, *supra* note 29, § 26. This note uses section 26 when referring to either § 62 of the 1909 Act or § 26 of the 1947 codification of the 1909 Act.

³¹ See, e.g., Fidlow, *supra* note 11, at 597.

³² 188 U.S. 239, 248 (1903). Although ownership of the copyright by the employer was not the central issue, the Court stated that, "[t]here was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things." *Id.* Later cases indicate that *Bleistein* represents the origin of the "works made for hire" doctrine. See, e.g., *Murray v. Gelderman*, 566 F.2d 1307, 1309 (5th Cir. 1978).

³³ *Bleistein*, 188 U.S. at 248.

³⁴ *Id.*

The 1909 Act, which codified this common-law presumption, did not include a definition of "work for hire" or "employee." Section 26 of the 1909 Act merely stated that in the case of "works made for hire" an employer shall constitute the "author."³⁵ Thus, the distinction between an employee and an independent artist became subject to judicial interpretation.³⁶

Early decisions under the 1909 Act applied the statutory "work for hire" doctrine only to regular employment situations,³⁷ drawing a clear distinction between traditional, salaried employees and independent artists.³⁸ Over time, principles developed at common law concerning copyright ownership of commissioned works which retained the distinction between an independent creator and a salaried employee.³⁹ The courts refined this distinction in early cases involving portraits and photographs.⁴⁰ These cases developed a rebuttable presumption that the employer and commissioned party intended to have the copyright assigned to the hiring party unless a contract existed to the contrary.⁴¹

The 1939 case of *Yardley v. Houghton Mifflin Co.* applied this common-law principle of implied assignment to other commissioned art work.⁴² In *Yardley*, the United States Court of Appeals for the Second Circuit determined that an artist, commissioned to paint a mural, did not own the copyright in the art work.⁴³ The dispute in *Yardley* arose when the City of New York, through a

³⁵ 1947 Codification, *supra* note 29, § 26. A full definitional clause was requested to clarify this distinction, but none was ever added. See Misc. Amends. to S. 6330 and H.R. 19853 Proposed to the Copyright Office, reprinted in 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT at M55 (1976).

³⁶ *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 325 (1987).

³⁷ *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2177 (1989); see also VARMER STUDY, *supra* note 5, at 130 ("[A]ll the cases [decided under the 1909 Act] have involved salaried employees who received either a fixed salary or a minimum salary plus commission Hence, it may be concluded that section 26 [of the 1909 Act] refers only to works made by salaried employees in the regular course of their employment.").

³⁸ Compare, e.g., *In re Journal-News Corp.*, 104 F. Supp. 843, 845 (S.D.N.Y. 1951) (holding that newspaper owned the copyright in a column written by its regular, salaried employee) with *Altman v. New Haven Union Co.*, 254 F. 113, 118 (D.C. Conn. 1918) (stating general rule "[w]here 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").

³⁹ See *Easter Seal*, 815 F.2d at 325-27.

⁴⁰ See *id.*

⁴¹ *Id.* at 325. In *Easter Seal*, the court stated: "These early cases presumed that the copyrights were assigned to the patron under the commission contract; there was nothing in them about 'work for hire.'" (emphasis in original). *Id.*

⁴² 108 F.2d 28, 31 (2d Cir. 1939).

⁴³ *Id.*

general contractor, hired Charles Turner to paint a mural.⁴⁴ The employment contract was silent on the issue of copyright. Mr. Turner completed the mural and received payment. Upon Mr. Turner's death, his sister, Mrs. Yardley, obtained statutory rights in Mr. Turner's purported original copyright.⁴⁵ Mrs. Yardley sued Houghton Mifflin for copyright infringement based on its reproduction of her brother's paintings in history books.⁴⁶ The court affirmed the lower court judgment for Houghton Mifflin because Mrs. Yardley did not own the copyright.⁴⁷

The *Yardley* court reasoned that the copyright had impliedly passed from Mr. Turner to his employer, the City, because no agreement to the contrary existed between the parties. Thus, the court concluded that Houghton Mifflin's reproduction of the paintings was valid because the City, which was the legal copyright owner, had granted Houghton Mifflin permission to do so. Analogizing to the earlier portrait and photography cases, the *Yardley* court announced a general rule that copyright ownership of a commissioned work was presumed to be assigned to the hiring party unless an agreement to the contrary between the parties existed.⁴⁸

Thus, under early copyright law, employers generally were considered copyright owners of "works made for hire" and of commissioned works. Courts used two different and distinct analyses, however, to reach this conclusion. Courts applied the statutory "works made for hire" provision of the 1909 Act, which vested copyright ownership in the employer, to regular employment situations. Courts applied common law, which presumed that freelance creators intended to assign their works to the commissioning party, to commissioned works. Thus, early copyright law maintained a clear distinction between traditional, salaried employees and independent creators.

II. THE LEGISLATIVE HISTORY OF THE 1976 COPYRIGHT ACT

Between 1924 and 1940, Congress introduced several copyright law revision bills but failed to enact them.⁴⁹ In the 1950s, however,

⁴⁴ *Id.* at 29.

⁴⁵ *Id.* at 30.

⁴⁶ *Id.*

⁴⁷ *Id.* at 31.

⁴⁸ *Id.*

⁴⁹ See H.R. REP. NO. 94-1476, *supra* note 10, at 47; HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW at x (Comm. Print 1961), *reprinted*

Congress took steps to revise copyright law substantially in order to align copyright with advances in technology.⁵⁰ During the revision process, ownership of "works made for hire" became the subject of much heated debate, negotiation and finally, compromise.⁵¹ This revision involved a unique legislative process.⁵²

Dialogue among special interest groups played a central role in the legislative process. This dialogue, however, differed substantially from the bargaining incidental to lobbying that generally accompanies enactment of a statute.⁵³ For example, Congress officially funded these negotiations and, in conjunction with the Copyright Office, provided supervision.⁵⁴ Moreover, the bargaining sessions

in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman, ed. 1976) [hereinafter REGISTER'S REPORT]; STAFF OF SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STUDY NO. 1, THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 TO 1954 4 (Comm. Print 1960) (reported by Goldman), *reprinted in* 2 STUDIES ON COPYRIGHT 1103 (Fisher Memorial Ed. 1963) [hereinafter STUDY NO. 1]. Most of the suggested revisions were aimed at bringing United States copyright law into conformity with the Berne Convention, an international Copyright Union established in 1886 to recognize reciprocal copyright protection for members. STUDY NO. 1, *supra*, at 4.

⁵⁰ See H.R. REP. NO. 94-1476, *supra* note 10, at 47.

⁵¹ See *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2174 (1989) ("The Act, which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and . . . by Congress."); H.R. REP. NO. 94-1476, *supra* note 10, at 121 ("The work-made-for-hire provisions of this bill represent a carefully balanced compromise . . .").

⁵² See Litman, *supra* note 21, at 862. Litman explains the unique legislative process as follows:

Th[e] legislative history reflects an anomalous legislative process designed to force special interest groups to negotiate with one another . . . The legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus. During more than twenty years of negotiations, the substantive content of the statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright.

Id.

⁵³ Litman, *supra* note 21, at 871 n.83, (*citing* 122 CONG. REC. 31, 985 (1976) (remarks of Rep. Drinan) ("the compromises in this bill do not represent the kind frequently associated with the legislative process")). See generally STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL ix-xiii (Comm. Print 1965), *reprinted in* 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY [hereinafter SUPPLEMENTARY REPORT].

⁵⁴ H. R. REP. NO. 94-1476, *supra* note 10, at 47.

In that year [1955], the movement for general revision of the U.S. copyright law was revived and the legislative appropriations act for the next 3 years provided funds for a comprehensive program of research and studies by the

became part of the official government record.⁵⁵ One commentator notes that, although negotiation and bargaining often accompany the enactment of a statute, it is unusual for Congress to fund and supervise such negotiations.⁵⁶ It is even more uncommon for Congress to produce an official record of the bargaining sessions.⁵⁷ Nonetheless, Congress delegated the chore of framing the substance, structure and language of the "works made for hire" provision to industry representatives.⁵⁸ Congress resisted traditional lobbying and insisted that interested industries reach a consensus.⁵⁹ Thus, some commentators conclude that the legislative history of the "works made for hire" provision of the 1976 Act is unique because of the officially sponsored character of the pre-legislative negotiations that resulted in a compromise.⁶⁰

Furthermore, once the special interest groups reached a compromise, Congress enacted the compromise with little further debate or revision.⁶¹ In addition, although various special interest groups subsequently proposed variations in the "work for hire" provision,⁶² once the compromise was incorporated into a bill introduced in Congress in 1965, Congress deferred to the Register of Copyrights' advice and maintained the compromise almost precisely intact.⁶³ As a result, the 1976 Act's legislative history reveals little

Copyright Office as the groundwork for such revision. There followed a period of study which produced 35 published monographs on most of the major substantive issues in copyright revision, and culminated in 1961 in the "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law.

Id.; see also *Community for Creative Non-Violence v Reid*, 109 S. Ct 2166, 2174 (1989) ("The Act . . . was the product of . . . negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and . . . Congress.").

⁵⁵ Litman, *supra* note 21, at 871 n.83.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *id.* at 880. Litman notes that "[m]embers of Congress openly acknowledged their limited substantive expertise and their largely supervisory role in the drafting process. They emphasized that they had delegated to industry representatives the task of forging the statute's substantive provisions and they praised the negotiating process that evolved." *Id.*

⁵⁹ *Id.* at 871.

⁶⁰ See, e.g., *id.* at 871 n.83.

⁶¹ *Id.* at 868.

⁶² See, e.g., *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House of the Judiciary Comm.*, 89th Cong., 1st Sess. 264-71 (1965), reprinted in 6 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed.) [hereinafter 1965 *House Hearings*] (testimony of Leonard Zissu, Composers & Lyricists Guild, proposing to replace the "works made for hire" provision with a shop right provision.).

⁶³ E.g., U.S. COPYRIGHT OFFICE, SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF

evidence of Congress's *specific* intent on substantive copyright issues.⁶⁴

Throughout the negotiation process, representatives of authors, screenwriters and composers advocated freedom from the encroachment on independent creators' rights, whereas representatives of publishers and the motion picture industry generally opposed changes in the existing law.⁶⁵ The resulting structure and language of the "work for hire" provision of the 1976 Act reflects a carefully worked out compromise by the affected interest groups which Congress subsequently endorsed.⁶⁶ Commentators suggest that, because congressionally sanctioned special interest groups developed the structure and language of the 1976 "works made for hire" provision, and because of the paucity of congressional input, courts must consider the special interest groups' understanding of their agreement in order to give the compromise its congressionally intended effect.⁶⁷

The lengthy congressional record that culminated in the "work for hire" compromise provision can be divided into five subsections. The first subsection, *Works Made for Hire and on Commission*, the 1958 report known as the *Varmer Study*, is one of a series of studies

COPYRIGHTS ON THE GENERAL REVISION OF THE COPYRIGHT LAW: 1975 REVISION BILL 306-07 [hereinafter REGISTER'S SECOND SUPPLEMENTARY REPORT] (opposing alteration of "carefully negotiated definition" of works made for hire); see also Litman, *supra* note 21, at 868.

⁶⁴ See Litman, *supra* note 21, at 868.

⁶⁵ O'Meara, "Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations, 15 CREIGHTON L. REV. 523, 526 (1982). This encroachment had resulted under the common-law presumption of implied copyright assignment. See *supra* notes 37-48 and accompanying text for a discussion of the early common-law presumption of implied copyright assignment.

⁶⁶ H.R. REP. NO. 94-1476, *supra* note 10, at 121; SUPPLEMENTARY REPORT, *supra* note 53, at 66. The Copyright Office described the 1965 bill (H.R. 4347), which was enacted in the 1976 revision with only insignificant changes, as "a carefully worked out compromise aimed at balancing legitimate interests on both sides." SUPPLEMENTARY REPORT, *supra* note 53, at 66.

⁶⁷ See Litman, *supra* note 21, at 894. Litman states that:

Congress, for its part, chose to balance those interests by seeking and then enacting a network of negotiated compromises. If courts were to interpret the statute by determining whether they could give those compromises effect, they would necessarily need to consider what the parties to the compromises believed their agreements meant.

Id. Litman also notes that:

Congress's approach to enacting a modern copyright statute reflects an exceptional willingness to adopt particular language *because* industry representatives had agreed on it. If the reasons industry representatives agreed on that language and their interpretations of what the language meant can illuminate the statutory language, then considering their story will yield a useful interpretive tool.

Id. at 881; see also Hardy, *supra* note 12, at 241.

commissioned by Congress to examine substantive copyright issues.⁶⁸ The second subsection consists of the 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* ("Register's Report")⁶⁹ and subsequent meetings convened by the Copyright Office for interest groups.⁷⁰ The third subsection is the 1962 *Preliminary Draft for Revised U.S. Copyright Law* ("Preliminary Draft")⁷¹ and subsequent negotiations among special interest groups.⁷² The fourth subsection consists of three identical revised bills introduced in Congress in 1964 (collectively the "1964 Bill") and the record of the subsequent bargaining by interested parties.⁷³ The last subsection consists of four identical bills drafted in 1965 (collectively the "1965 Bill")⁷⁴ and eventually enacted, almost verbatim, as section 101 of the 1976 Act,⁷⁵ as well as the *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill* ("Supplementary Report"),⁷⁶ which accompanied and explained in detail the 1965 bill.

As a foundation for a general revision of the 1909 Act, Congress ordered a series of thirty-five studies in 1955 to examine major copyright issues.⁷⁷ One of these studies, the *Varmer Study*, examined

⁶⁸ VARMER STUDY, *supra* note 5.

⁶⁹ REGISTER'S REPORT, *supra* note 49.

⁷⁰ STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT REVISION, PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1963), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman, ed. 1976) [hereinafter REPORT DISCUSSION].

⁷¹ STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (Comm. Print 1964), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY [hereinafter PRELIMINARY DRAFT].

⁷² STAFF OF HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION, PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW (Comm. Print 1964), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY [hereinafter FURTHER DISCUSSIONS ON DRAFT].

⁷³ S. 3008, 88th Cong., 2d Sess., 110 CONG. REC. 16260 (1964); H.R. 11947, 88th Cong., 2d Sess., 110 CONG. REC. 16256 (1964); H.R. 12354, 88th Cong., 2d Sess., 110 CONG. REC. 19269 (1964). This note cites to the three bills collectively as reproduced in the STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS (Comm. Print 1965), *reprinted in* 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY [hereinafter 1964 REVISION BILL].

⁷⁴ *Hearing Before Subcomm. No. 3 of the Comm. on the Judiciary on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835*, 89th Cong., 1st Sess. (1965), *reprinted in* 5 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman, ed.) [hereinafter 1965 BILL].

⁷⁵ See *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2175-76 (1989).

⁷⁶ SUPPLEMENTARY REPORT, *supra* note 53.

⁷⁷ H.R. REP 94-1476, *supra* note 10, at 47; STUDY NO. 1, *supra* note 49, at ix.

These studies, covering practically all aspects of American copyright law, narrate the history and describe the provisions of the present United States Copyright

judicial treatment of employees and independent creators under the "work for hire" provision of the 1909 Act and constitutes the first section of the record.⁷⁸ The study concluded that courts had treated employees and independent creators separately under copyright law.⁷⁹ Courts had adjudicated works produced by employees under the statutory "work for hire" provision, whereas they had decided issues involving commissioned works under the common law.⁸⁰ Furthermore, although recognizing the inherent ambiguity in the concept of "employee," the *Varmer Study* noted that case law had consistently interpreted employment under the "work for hire" provision as referring only to regular, salaried employment.⁸¹

After circulating the *Varmer Study* among interest groups affected by copyright revision, the Register of Copyrights prepared a report of tentative recommendations intended to generate discussion.⁸² The Register's Report, which constitutes the second section of the record, proposed that "works made for hire" specifically exclude commissioned works.⁸³ Consistent with the conclusions of the *Varmer Study*, this change simply clarified the distinction between salaried employees and independent creators that existed under the 1909 Act.⁸⁴

Law, as enacted in 1909 and as amended to date, describe the comparable provisions of foreign laws and international conventions, analyze the numerous issues, and suggest various possible alternative solutions. These studies provided the groundwork for the Copyright Office revision report, which . . . contains the tentative recommendations of the Copyright Office for revision of the Law.

Id.

⁷⁸ VARMER STUDY, *supra* note 5, at 128-30.

⁷⁹ *Id.* at 142.

⁸⁰ *Id.* at 127-28.

⁸¹ *Id.* at 130. The *Varmer Study* stated that, "[a]ll the cases [that had dealt with employment] have involved salaried employees who received either a fixed salary or a minimum salary plus commission Hence, it may be concluded that section 26 [of the 1909 Act] refers only to works made by salaried employees in the regular course of their employment." *Id.*

⁸² REGISTERS REPORT, *supra* note 49, at iii.

⁸³ See *id.* at 86-87 (proposing that definition of "works made for hire" should include "works created by an employee within the regular scope of his employment," but not including a work made on special order or commission).

⁸⁴ See *id.* at 86 ("The courts, however, have not generally regarded commissioned works as 'made for hire.'"); REPORT DISCUSSION, *supra* note 70, at 144. Barbara Ringer, a representative from the Copyright Office, described the proposed definition in the following manner: "First, with respect to works made for hire, I think the report in essence recommends that the present law be retained The report recommends a somewhat more specific definition of what is a 'work made for hire,' but other than that would leave the present law undisturbed." REPORT DISCUSSION, *supra* note 70, at 144. Participants in the discussion did not object strongly to the explicit exclusion of commissioned works from the "work for hire" doctrine at this phase. Hardy, *supra* note 12, at 227. This may be attributable to the existence of the strong common-law presumption of employer ownership of copyright in commissioned

The Register's Report spawned heated debate among representatives of industries and groups affected by copyright law.⁸⁵ The Register of Copyrights convened four meetings of a Panel of Consultants, consisting of representatives of affected industry groups, for the purpose of discussing the Register's Report.⁸⁶

Objections from members present at the meetings, and written comments submitted by interested parties, reflected an understanding among the negotiating parties that the term "employee" in the Register's Report meant a regular, salaried employee.⁸⁷ Motion picture representatives, for example, objected to the recommendation that employers not be considered "authors" under "work for hire."⁸⁸ This group also objected to the use of the term "regular" in "regular scope of employment" because it believed that "regular" might limit the circumstances in which copyright vests with an employer.⁸⁹ When voicing their concerns, negotiating parties did not debate the definition of "employee" under the proposed act; they understood and accepted that "employee" meant a regular, salaried employee.⁹⁰

Universal Pictures' representative, Joseph A. Dubin, framed his objection to the proposal to deny employers status as "authors" in terms that distinguished between employers who maintain regular, salaried employees and employers who maintain less formal employment relationships.⁹¹ When confronted with the argument that classifying employers as "author" would completely deprive em-

works based on an implied assignment. *Id.* Under the proposal in the Register's Report, federal statutory copyright protection would attach whenever a work was "publicly disseminated by the publication of copies, registration in the Copyright Office, public performance, or the public distribution of sound recordings." REGISTER'S REPORT, *supra* note 49, at 43. Thus, before a work became available to the public, common-law protection would apply. Hardy, *supra* note 12, at 227-28.

⁸⁵ See SUPPLEMENTARY REPORT, *supra* note 53, at ix-x.

⁸⁶ *Id.* at x. Additionally, the Register of Copyrights received and reviewed written comments and recommendations from interested parties. *Id.*

⁸⁷ See, e.g., Hardy, *supra* note 12, at 241; Litman, *supra* note 21, at 901.

⁸⁸ See REGISTER'S REPORT, *supra* note 49, at 87. This Register's Report states that, "[i]t has been suggested that the statute, instead of indicating that the employer is the author, should merely provide that the right to secure copyright vests in the employer. We would adopt this suggestion." *Id.* Members raised concerns that copyright protection in foreign countries, which grant protection only to "authors," might be jeopardized or difficult to establish. See Hardy, *supra* note 12, at 225 n.66.

⁸⁹ See REPORT DISCUSSION, *supra* note 70, at 159. The group raised fears that "regular scope" might be too narrow such that works produced by employees that are not within their "regular" duties may fall outside the "work for hire" doctrine. *Id.*

⁹⁰ See Hardy, *supra* note 12, at 222-23.

⁹¹ See REPORT DISCUSSION, *supra* note 70, at 155. Dubin stated that, "[n]o one to this date has suggested, outside of the Copyright Office report, that an employer who meets a weekly payroll should not be entitled, in the absence of a contract, to be the author." *Id.*

ployees of authorship status, Dubin again distinguished between formal employees and independent contractors. Dubin responded that existing law, which treated employers as authors, did not deprive freelance creators of copyright protection because author status only vested in employers with regular, salaried employees.⁹²

Comments by John Schulman, chairman of the American Patent Law Association's Committee on Copyright,⁹³ also reflected the assumption that the term employment referred only to regular, salaried employment.⁹⁴ Schulman implicitly distinguished between an employee and an independent contractor when he argued that regular, salaried employees should also be allowed to obtain copyright in their creative efforts.⁹⁵

After considering the views expressed in the discussions and comments on the Register's Report, the Copyright Office prepared a Preliminary Draft for a new copyright statute as a basis for further debate.⁹⁶ This third section of the record, the Preliminary Draft, was issued in 1963 and granted "author" status to employers.⁹⁷ It also included a provision that vested copyright ownership in the employer, but which allowed the parties to agree contractually to transfer rights back to the employee.⁹⁸ The Preliminary Draft also added the Register's Report definition of "work for hire," which expressly excluded commissioned works.⁹⁹ The Copyright Office convened eight meetings with an enlarged Panel of Consultants, consisting of almost anyone with a significant interest in the sub-

⁹² See REPORT DISCUSSION, *supra* note 70, at 155. Dubin noted that classifying employers as authors "take[s] nothing away from the author, for the very simple reason that he can write on speculation, he can come in and give you his finished product, instead of sitting down week by week and drawing weekly compensation and not facing any risks at all." *Id.*

⁹³ The American Patent Law Association's Committee on Copyright is now known as the American Intellectual Property Law Association. Hardy, *supra* note 12, at 227 n.69.

⁹⁴ See *id.* at 227.

⁹⁵ See REPORT DISCUSSION, *supra* note 70, at 153-54. Schulman commented that, "[i]t should be possible for me to make a contract and say, 'even though I am employed, and you pay me X dollars a week, nevertheless I want to own title to the copyright and I give you only an exclusive right to use the motion picture.'" *Id.*

⁹⁶ PRELIMINARY DRAFT, *supra* note 71, at v.

⁹⁷ *Id.* at 15.

⁹⁸ See *id.* at 15-16.

⁹⁹ See *id.* Section 14 of the Preliminary Draft provided that, "[i]n the case of a work made for hire, the employer shall, for purposes of this title, be considered the author and shall have all of the rights comprised in the copyright unless the parties have expressly agreed otherwise." *Id.* A footnote to this statement stated that, "[a] 'work made for hire' would be defined elsewhere 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." *Id.* at 15 n.11.

ject.¹⁰⁰ Panel members and other interested parties raised vigorous objections concerning the Preliminary Draft, largely based on the preemptive effect the proposed act would have on state common law.¹⁰¹

The Preliminary Draft envisioned a uniform federal system of copyright that would preempt state common law.¹⁰² It also proposed that federal copyright protection should attach when a creator fixes a work in a tangible medium rather than at the time of publication.¹⁰³ The proposed act would therefore completely override the common-law presumption of implied assignment.¹⁰⁴ Moreover, it would explicitly deny statutory "work for hire" status to any commissioned work.¹⁰⁵ The Preliminary Draft, therefore, effectively denied employers initial ownership in any commissioned works. Additionally, the Preliminary Draft recommended the implementation of a right of reversion to enable a creator to reclaim any transfers, grants or assignments of copyright after a period of time.¹⁰⁶ Thus, the Preliminary Draft also limited the time period during which an assignee or licensee could exploit the work because a creator could regain his or her copyright.¹⁰⁷

The negotiating participants believed that the term "employee" in the Preliminary Draft applied only to salaried employees.¹⁰⁸ For example, John R. Peterson, representing the American Bar Association, clearly understood that the Preliminary Draft distinguished between employees and freelance creators because he objected to such a distinction as inappropriate.¹⁰⁹ Similarly, Saul N. Rittenberg of Metro-Goldwyn Mayer stated that he did not approve of the Preliminary Draft's distinction between formal employees and freelancers.¹¹⁰ Written comments submitted by Joseph A. Adelman also

¹⁰⁰ SUPPLEMENTARY REPORT, *supra* note 53, at xi.

¹⁰¹ Hardy, *supra* note 12, at 231-32.

¹⁰² See PRELIMINARY DRAFT, *supra* note 71, at 18.

¹⁰³ See *id.* at 18-19.

¹⁰⁴ See *id.* at 15 n.11, 18.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 15-16.

¹⁰⁷ See *id.*

¹⁰⁸ Hardy, *supra* note 12, at 232.

¹⁰⁹ See PRELIMINARY DRAFT, *supra* note 71, at 260. Peterson stated, "I don't think there is any valid philosophical or economic difference between the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job." *Id.*

¹¹⁰ See *id.* at 272. Rittenberg stated, "[i]t seems to me that the present draft has given more emphasis to formalism than necessary. If I commission a work from a man, . . . and I pay for it, what difference does it make whether I put him under an employment contract or establish an independent contractor relationship?" *Id.*

criticized the different treatment that the Preliminary Draft afforded to independent creators.¹¹¹

Comments made by Horace S. Manges, representing the Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute ("ATPI"), expressed his concern that the exclusion of commissioned works would require members of the publishing industry to add people to the payroll in order to retain copyright ownership.¹¹² Bella L. Linden, also representing the ATPI, was concerned about the exclusion of commissioned works from the "work for hire" provision because she thought that such a revision would require publishers of encyclopedias and compilations to put everyone on the payroll in order to maintain full copyright ownership of the work.¹¹³ The ATPI reiterated this concern in a written statement that recognized a difference between regular employees and independent contractors but, nonetheless, criticized the distinction.¹¹⁴ Other comments criticized the different protection afforded to independent creators under the Preliminary Draft.¹¹⁵

At one point during the discussions, a lawyer representing the American Bar Association, Samuel W. Tannenbaum, suggested that the "work for hire" provision be modified by replacing the term "employer" with the term "master," thus incorporating the agency

¹¹¹ See *id.* at 321. Adelman noted, "[i]t might be helpful not to restrict the description of a 'work made for hire' to the technical employer employee relationship. For various reasons today, a person may be engaged as an independent contractor, yet the hiring party has all of the incidents (and therefore should have the rights) of an employer." *Id.*

¹¹² See *id.* at 259. Manges remarked, "[p]ublishers would be discouraged completely from using any freelancer. There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll, and where the employees would prefer to work as independent contractors." *Id.*

¹¹³ See *id.* at 297. Linden commented, "no encyclopedia company or reference book publisher can possibly employ experts in every field of scientific and literary endeavor in order to produce the composite works which they market and sell." *Id.*

¹¹⁴ See *id.* at 341. The ATPI's written statement noted, "it is neither practical nor possible (if top specialists in a variety of areas are required) to hire these specialists as employees on a full-time basis." *Id.*

¹¹⁵ *E.g., id.* at 267. For example, F. Gabriel Perle, of Time, Inc., stated:

[T]he whole term of "employee for hire" has thrown our comptrollers and accountants throughout the whole publishing industry into a tizzy. Where you get an outside entity and you ask them to create a work for hire, and it's the express intention of all the parties that that work product be the exclusive product of the commissioner or the orderer, their comptrollers and accountants start going into a real tailspin the minute they start seeing the word "employee," because this means social security, withholding, and all the other attendant mechanical housekeeping tasks.

Id.

law concept of "master-servant."¹¹⁶ This change would have expanded the class of creators subject to the "work for hire" doctrine beyond formal, salaried employees because the degree of control and supervision a "master" exerts over his or her "servant" is a factor relevant to the determination of his or her "servant" status.¹¹⁷ The parties did not pursue this modification in debate and the Register of Copyrights rejected the idea.¹¹⁸

Following the debate on the Preliminary Draft, the Copyright Office reviewed the discussions and comments of the special interest groups and revised the Preliminary Draft.¹¹⁹ This fourth section of the record, the 1964 Revision Bill,¹²⁰ proposed a "work made for hire" definition dramatically different from the Preliminary Draft.¹²¹ Instead of excluding commissioned works from the definition of "works made for hire," the 1964 Revision Bill proposed that "works made for hire" include special commissioned works if both parties expressly agree in writing that the work shall constitute a "work for hire."¹²²

¹¹⁶ *Id.* at 273. Tannenbaum suggested:

It would seem to me that much of the difficulty to formulate a definition might be avoided if we used the words "master and servant," which have been recognized by a long line of cases. I would suggest rephrasing it as follows: "In the case of a work made by one whose relationship is deemed to be a servant during the existence of a 'master-servant relationship,'

Id.

¹¹⁷ *See id.* at 274. Mr. Tannenbaum explained the "master-servant" relationship as one in which the servant "receives compensation and is subject to control and regulation by the person for whom he performs the work." *Id.*

¹¹⁸ *See id.* The Register of Copyrights, Abraham Kaminstein, noted that "'master and servant' sounds medieval." *Id.* Mr. Kaminstein rejected the suggestion to employ an agency law definition:

Then you have a[n agency law] definition here which would open the door to persons who could not be deemed to be the author to come in and claim so-called "authorship" under a presumption which I think is unnatural: that the man who paid the money to the man who did the writing thereby became the author of the work.

Id.

¹¹⁹ *See* SUPPLEMENTARY REPORT, *supra* note 53, at xi-xii.

¹²⁰ *Id.* at xii.

¹²¹ *See* Hardy, *supra* note 12, at 236.

¹²² *See* 1964 REVISION BILL, *supra* note 73, at 31. Section 54 of the Bill states, "[a] 'work made for hire' is a work prepared by an employee within the scope of his employment, or 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." *Id.* In addition, the bill extended the time period after which an author could terminate a copyright from 25 to 35 years. *Id.* at 10. This change was made pursuant to objections from various industry representatives who complained that 25 years was insufficient to exploit particular works. *See, e.g.,* PRELIMINARY DRAFT, *supra* note 71, at 283 (music industry representatives protested because few songs become

The 1964 Bill was introduced in both Houses of Congress for the purpose of stimulating discussion as a basis for the preparation of a revision bill to be introduced in the 89th Congress.¹²³ The Copyright Office convened a two-day meeting of a Panel of Consultants to review the 1964 Bill.¹²⁴ Representatives of authors vigorously objected to the statutory authorization of "work for hire" agreements.¹²⁵ Authors' agents feared that commissioning parties would use their superior bargaining power to force independent creators to sign "work for hire" contracts.¹²⁶ Such "work for hire" contracts would effectively nullify the reversion provision that provided authors the right to terminate copyright transfers.¹²⁷

At this point, negotiations appeared to be at an impasse.¹²⁸ Writers and composers supported the retention of a reversion provision and the preservation of initial copyright ownership in freelance creators.¹²⁹ Representatives of the publishing and movie industries did not wish to restrict the commissioned works clause of the "work for hire" provision.¹³⁰

In 1965, the competing interests reached an historic compromise¹³¹ which was set out in a joint memorandum submitted to Congress and the Copyright Office, incorporated into the 1965 Bill, and ultimately enacted in the same form and nearly the same terms eleven years later as section 101 of the 1976 Act.¹³² In exchange for retaining the extended reversion provision and prohibiting the creation of "works made for hire" by contract, the authors'

great hits and exploitation of the few successful sellers was necessary to recoup losses on the majority).

¹²³ See 1964 REVISION BILL, *supra* note 73, at v.

¹²⁴ See *id.* The Copyright Office also accepted written comments concerning the 1964 Bill. See *id.*

¹²⁵ See SUPPLEMENTARY REPORT, *supra* note 53, at 67; Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, 17 J. ARTS MGMT. & L. 23, 33 (Fall 1987).

¹²⁶ See SUPPLEMENTARY REPORT, *supra* note 53, at 67; Ossola, *supra* note 125, at 33.

¹²⁷ See Hardy, *supra* note 12, at 237.

¹²⁸ *Id.*

¹²⁹ *Id.* at 237-38.

¹³⁰ *Id.* at 237.

¹³¹ *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, 89th Cong., 1st Sess. 134 (1965) (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 & Lyricists Guild of America, Inc., Music Publishers' Protective Association, Inc., Music Publishers Association of the United States), reprinted in 5 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman, ed.) [hereinafter JOINT MEMO].*

¹³² *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2175-76 (1989).

agents agreed to allow four specific categories of commissioned works to be deemed "works for hire," namely, a contribution to a collective work, part of a motion picture, a translation, or a supplementary work, but only if both parties agreed to such a designation in writing.¹³³

In light of these compromises, the Copyright Office drafted a new bill.¹³⁴ Congress introduced the revised bill in 1965 accompanied by the Register of Copyrights' Supplementary Report, which explained the provisions of the proposed copyright act in detail.¹³⁵ The 1965 bill and the Supplementary Report constitute the fifth section of the record. The 1965 Bill enumerated the four chosen categories of commissioned work that would be "works made for hire" if the parties so agreed in writing.¹³⁶ Other special order or commissioned works could not be classified as a "work for hire."¹³⁷

In 1966, the House Committee on the Judiciary endorsed the "work for hire" compromise in the first legislative report on the revision bill.¹³⁸ Retaining the distinction between works created by employees and commissioned works, the House Committee focused instead on how to draw a statutory division between those commissioned works that should be designated as "works made for hire" under the provision and those that should not.¹³⁹ The House Committee added four categories of commissioned works that would be classified as "works made for hire" if the parties so agreed in writing: compilations, instructional texts, tests, and atlases.¹⁴⁰ The 1976 Act

¹³³ 1965 BILL, *supra* note 74, at 3-4. The 1965 Bill specified four categories of commissioned works that could be "works made for hire:"

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

Id. Employers and employees could transfer statutory copyright rights that vested under the "work for hire" doctrine; parties, however, could not alter the status of a work made for hire by operation of a contract. W. PATRY, *supra* note 4, at 121. The 1964 Revision Bill had allowed parties to designate a work as work for hire by written agreement. Under the 1965 Bill, however, only those commissioned works enumerated could be classified as works for hire if the parties so agreed in writing. *Id.*

¹³⁴ See SUPPLEMENTARY REPORT, *supra* note 53, at xii - xiii.

¹³⁵ *Id.* at v.

¹³⁶ See 1965 BILL, *supra* note 74, at 3-4. See *supra* note 133 for the text of the provision.

¹³⁷ See SUPPLEMENTARY REPORT, *supra* note 53, at 67-68.

¹³⁸ *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2176 (1989).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

made only one modification to this list, otherwise mirroring the definition of "works made for hire" contained in the 1965 Bill.¹⁴¹

During the eleven years following the 1965 Bill and before the enactment of the 1976 Act, several witnesses appeared before Congress to propose variations on the "work for hire" provision.¹⁴² The Register of Copyrights consistently advised Congress to resist recommendations to modify terms of the negotiated compromise.¹⁴³ Congress deferred to the Register of Copyrights and enacted the "works made for hire" provision essentially verbatim.¹⁴⁴ Congress noted in the legislative history that the "work for hire" provision represented a compromise among industry representatives and delineated the specific categories of specially commissioned works that may be considered "works made for hire" under the 1976 Act.¹⁴⁵

In summary, Congress implemented a unique legislative process for copyright law revision in the 1950s. Members of Congress had little actual input in the debate of copyright issues. Instead, acting on a mandate from Congress, special interest groups, funded

¹⁴¹ See *id.* at 2175-76. Congress added one additional category to section 101(2) of the 1976 Act, namely, answer materials for a test. See *id.* The 1976 Act had the same structure, language and nearly the same terms as the 1965 bill.

¹⁴² See, e.g., 1965 *House Hearings*, *supra* note 62, at 264-71.

¹⁴³ REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 63, at 306-07.

¹⁴⁴ See Litman, *supra* note 21, at 868; *Reid*, 109 S. Ct. at 2175-76.

¹⁴⁵ H.R. REP. NO. 94-1476, *supra* note 10, at 121. Congress stated:

The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is 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. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.

Id. Section 101(1) of the 1976 Act provides that works produced by an employee in the scope of his or her employment are "works made for hire." 17 U.S.C. § 101(1). This section defines a "work for hire" as: "(1) a work prepared by an employee within the scope of his or her employment" *Id.* Section 101(2) lists nine categories of commissioned works that are considered "works for hire" if the parties so agree in writing. *Id.* § 101(2). Section 101(2) defines a "work made for hire" as:

(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.

Id.

by Congress and supervised by the Register of Copyrights, negotiated to reach consensus on a variety of copyright issues. Dialogue on the "work for hire" issue culminated in 1965 in a compromise "works made for hire" provision. Congress endorsed the substance, structure and language of this compromise in a 1965 congressional bill. Although subsequent lobbying efforts attempted to alter the compromise, Congress neither engaged in extensive debate following the 1965 compromise nor altered the provision significantly. Eleven years later, Congress codified this compromise almost verbatim in the "works made for hire" provision of the 1976 Copyright Act.

III. CASES UNDER THE 1976 COPYRIGHT ACT

The definition of "works made for hire" in the 1976 Copyright Act, enacted by Congress as section 101, mirrored the "work for hire" provision of the 1965 Bill.¹⁴⁶ Section 101(1) mandated that

¹⁴⁶ *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2175-76 (1989). Although the "works made for hire" provision of the 1976 Act was essentially drafted and endorsed by Congress as the 1965 Bill, *see id.* at 2175, the provision was not effective until 1978 when the 1976 Act took effect. 17 U.S.C. § 301 (1988). Thus, between 1965 and 1978, courts resolved "work for hire" controversies under the 1909 Act. Prior to 1966, the courts applied the "work for hire" doctrine of the 1909 Act only to traditional employees and applied the common law presumption of implied assignment to independent creators, thereby maintaining a clear distinction between the two. *See Reid*, 109 S. Ct. at 2177; *see also supra* notes 37-48 and accompanying text for a discussion of early courts' application of the "works made for hire" doctrine under the 1909 Act. In 1966, however, contrary to the prior legal scheme that had developed, courts began applying the "work for hire" doctrine to commissioned works. *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 326 (5th Cir. 1987).

In the 1966 case of *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, the United States Court of Appeals for the Second Circuit complicated the previously clear distinction between an employee and an independent artist. 369 F.2d 565 (2d Cir. 1966). The *Brattleboro* court explicitly merged the *Yardley* rule, that ownership of a commissioned work was presumed to be assigned to the hiring party, into the "work for hire" doctrine. *See id.* at 567-68; *see also Easter Seal*, 815 F.2d at 326. The court held that, in the absence of an agreement to the contrary, a merchant who had commissioned a local newspaper to create an advertisement owned the copyright in the advertisement. *Brattleboro*, 369 F.2d at 568.

For the first time, the court applied the "works made for hire" doctrine to an independent contractor. *Easter Seal*, 815 F.2d at 326. The *Brattleboro* court reasoned that the "work for hire" doctrine should apply whenever a work is created at the direction and expense of the hiring party, regardless of the nature of the employment relationship. *Brattleboro*, 369 F.2d at 567. The court commented that the "work for hire" doctrine applied "whenever an employee's work is produced at the instance and expense of his employer," and it could "see no sound reason why these same principles [regarding works created by salaried employees] are not applicable when the parties bear the relationship of employer and independent contractor." *Id.* at 567-68.

Six years later, in 1972, in *Picture Music, Inc. v. Bourne, Inc.*, the United States Court of

works created by an employee in the scope of his or her employment would be "works made for hire."¹⁴⁷ Section 101(2) directed that nine enumerated categories of commissioned works could be "works made for hire" if the parties so agreed in writing.¹⁴⁸ Despite the clear statutory dichotomy between employee and independent creators, as set forth in the language¹⁴⁹ and legislative history¹⁵⁰ of the provision, courts developed inconsistent and contradictory tests to

Appeals for the Second Circuit affirmed the broad language of its decision in *Brattleboro*, noting that the nature or form of employment does not determine application of the statutory "work for hire" doctrine. 457 F.2d 1213, 1216 (2d Cir.), cert. denied, 409 U.S. 997 (1972). The *Picture Music* court held that the plaintiff, who had been assigned an interest in a song by a freelance artist who had assisted in revising the song, had no copyright interest in the song because the employers, not the freelance creator, acquired initial copyright ownership in the song. *Id.* at 1217. The court recognized the freelance creator as an independent contractor, but noted that the existence of an employer-independent contractor relationship does not shield a creator from the application of the "work for hire" doctrine. See *id.* at 1216-17. The *Picture Music* court held that the freelance creator was an employee under the 1909 Act because the song was created at the direction and expense of her employers, who maintained supervisory control over production of the song. *Id.* at 1216.

The decision of the *Brattleboro* court, therefore, marked the beginning of a shift in the case law that led to the development of a new standard for the determination of a creator's "works for hire" status under the 1909 Act. See *Easter Seal*, 815 F.2d at 326-27. Under this new standard, represented by the *Picture Music* court's decision, a work was classified as a "work for hire" if it was created at the initiative and expense of the hiring party and if that party retained the right to supervise the production of the work. See *Murray v. Gelderman*, 566 F.2d 1307 (5th Cir. 1978). The *Murray* court provided a succinct summary of the relevant factors for determining an employer-employee relationship under the 1909 Act:

The crucial element in this [employment] determination appears to be whether the work was created at the employer's insistence and expense, or, in other words, whether the motivating factor in producing the work was the employer who induced its creation. (citation omitted). Another factor is whether the employer had the right to direct and supervise the manner in which the work was being performed. (citation omitted). Actual exercise of that right is not controlling, and copyright is vested in the employer who had no intention of overseeing the detailed activity of any employee hired for the very purpose of producing the material. (citation omitted).

Id. at 1310. Based on this standard, the buyer maintained a right to control the work simply by paying for it. See *Easter Seal*, 815 F.2d at 327. The *Brattleboro* court's expanded interpretation of "employee" thereby developed into an almost irrebutable presumption that any commissioning party became the statutory "author" under the "work for hire" doctrine by virtue of payment, and therefore owned the copyright. Thus, the courts incorporated independent creators into the "work for hire" doctrine by expanding the definition of an employer-employee relationship under the 1909 Act beyond the original, judicial definition of an employee that contemplated regular, salaried employment.

¹⁴⁷ 17 U.S.C. § 101(1) (1988). See *supra* note 145 for text of provision.

¹⁴⁸ *Id.* § 101(2). See *supra* note 145 for text of provision.

¹⁴⁹ *Reid*, 109 S. Ct. at 2173.

¹⁵⁰ *Id.* at 2176.

determine a creator's status under the "work for hire" provision of the 1976 Copyright Act.¹⁵¹

Prior to the Supreme Court's 1989 decision in *Community for Creative Non-Violence v. Reid*, which specifically endorsed an agency law test,¹⁵² federal courts had developed four tests for determining "works made for hire" under the 1976 Act: the actual control test,¹⁵³ the right to control test,¹⁵⁴ the agency law test,¹⁵⁵ and the traditional employee test.¹⁵⁶

The United States Court of Appeals for the Second Circuit formulated the actual control test in 1984 in the case of *Aldon Accessories Ltd. v. Spiegel, Inc.*¹⁵⁷ The *Aldon* court held that a wholesale designer and seller of statuettes owned the copyright in mini-statuettes created by independent contractors.¹⁵⁸ The court upheld a jury instruction that an artist who is not a regular salaried employee is nevertheless an "employee" under the "work for hire" provision of the 1976 Act when operating under the supervision and direction of the hiring party.¹⁵⁹

The court applied post-1966 case law developed under the 1909 Act that grouped traditional, salaried employees and indepen-

¹⁵¹ See *id.* at 2177. See *supra* notes 13-17 and accompanying text for a summary of the tests.

¹⁵² 109 S. Ct. at 2168 (holding courts should first apply agency law principles to determine if a creator is an employee and then apply the "work for hire" doctrine).

¹⁵³ See *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 413 (4th Cir. 1987); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 553 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

¹⁵⁴ See *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 142 (S.D.N.Y. 1983).

¹⁵⁵ *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 334-35 (5th Cir. 1987).

¹⁵⁶ *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989).

¹⁵⁷ 738 F.2d 548, 553 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

¹⁵⁸ *Id.* at 549.

¹⁵⁹ *Id.* at 552. In *Aldon*, the Aldon corporation commissioned statuettes by Japanese and Taiwanese artists who were not regular, salaried Aldon employees. Arthur Ginsberg, a principal of the Aldon corporation, conceived the idea of the statuettes and travelled to Japan and Taiwan to supervise development of the idea and production of the statuettes. Aldon advertised these mini-statuettes for sale in its 1980 and 1981 catalogues and at a 1981 gift trade show in Chicago. When Aldon became aware of the fact that the Spiegel Company was advertising and selling brass unicorns through its catalogue that were identical to Aldon's statuettes, Aldon sued Spiegel for copyright infringement. Spiegel argued that Aldon did not own the copyright in the commissioned statuettes because they did not fall within one of the nine categories of commissioned works enumerated in section 101(2) of the "work for hire" definition. *Id.* at 549-52. The *Aldon* court rejected defendant Spiegel's argument that independent creators were covered exclusively by section 101(2) of the "work for hire" provision. *Id.* at 552.

dent contractors together under "works made for hire."¹⁶⁰ These cases held that a hiring party's right to supervise and control the project was determinative of the creator's status as an employee under the 1909 Act.¹⁶¹ The *Aldon* court reasoned that congressional silence on this specific line of cases indicated Congress's intent to incorporate into the 1976 Act the judicial concepts of "employee" and "independent contractor" that had developed in the post-1966 cases.¹⁶² Narrowing the presumption somewhat, the court concluded that an independent creator would be considered an "employee" under the "work for hire" doctrine if the hiring party paid for and actually wielded control with respect to the creation of the work.¹⁶³

Just a year after *Aldon*, in the 1985 case of *Peregrine v. Lauren Corp.*, the United States District Court for Colorado adopted what became known as the right to control test for determining copyright ownership.¹⁶⁴ The *Peregrine* court held that an advertising agency owned the copyright in photographs taken by a commissioned freelance photographer because the agency retained the right to direct the photographer's work.¹⁶⁵ The court recognized that the manner of payment in this case suggested an independent contractor relationship.¹⁶⁶ Nevertheless, the *Peregrine* court, like the *Aldon* court, applied the post-1966 common-law rule that was based on the 1909 Act¹⁶⁷ and stated that a "work for hire" relationship existed if the employer initiated the project and if the employer maintained the right to direct and supervise the manner of production.¹⁶⁸

¹⁶⁰ See *supra* note 146 for a discussion of the "works made for hire" doctrine after 1966.

¹⁶¹ See *id.*

¹⁶² *Aldon*, 738 F.2d at 552.

¹⁶³ See *id.* at 552-53. The *Aldon* court concluded that because Arthur Ginsberg had actively supervised production of the statuettes, they constituted "works made for hire" and therefore *Aldon* was the statutory author. *Id.* at 553. The Court of Appeals affirmed the lower court's holding that Spiegel had infringed on *Aldon*'s copyright in the statuettes. *Id.* at 549.

¹⁶⁴ 601 F. Supp. 828, 829 (D. Colo. 1985).

¹⁶⁵ *Id.* In *Peregrine*, an advertising agency commissioned Mr. Peregrine, a professional photographer, to produce photographs for a brochure. After a dispute arose over payment, Mr. Peregrine filed for and received copyright in the photographs. Subsequently, Mr. Peregrine sued the advertising agency for copyright infringement when the agency included the photographs in the brochure. *Id.* at 828.

¹⁶⁶ *Id.* at 829.

¹⁶⁷ See *supra* note 146 for a discussion of the "works made for hire" doctrine after 1966.

¹⁶⁸ See *id.* at 829. The *Peregrine* court concluded that because the advertising agency could have vetoed the photographer's ideas or work product at any time, a "work for hire"

In the 1987 case of *Easter Seal Society v. Playboy Enterprises*, the United States Court of Appeals for the Fifth Circuit adopted an agency law test for the determination of employee under the "work for hire" provision.¹⁶⁹ In *Easter Seal*, the court held that a tape created by a local television station for the Easter Seal Society was not a "work for hire" under the 1976 Act.¹⁷⁰ Recognizing a dichotomy between "employee" and independent contractor, the Fifth Circuit Court of Appeals concluded that the Restatement of Agency Law should determine a creator's status as an "employee" under the 1976 Act.¹⁷¹

relationship existed and the advertising agency, not Mr. Peregrine, owned the copyright in the photographs. *Id.*

Although similar, the actual control and the right to control tests differed in the kind of control that created a "work for hire" employment relationship. *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2171 (1989). Under the right to control test, the hiring party merely needed to retain the ability to supervise the method of production, even if the employer never exerted that control. *See id.* Under the actual control test, however, simply retaining the ability to supervise production was insufficient to create a "work for hire" relationship; the employer must have actually exerted control over the project. *See Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 553 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

¹⁶⁹ 815 F.2d 323, 337 (5th Cir. 1987).

¹⁷⁰ *Id.* In *Easter Seal*, the Society contracted with a local television station, WYES, to tape a staged "mardi gras-style" parade and jazz jam session for airing on the National Easter Seal Telethon. WYES's director made the artistic and technical decisions with regard to taping, lighting, camera angles, color balance and sound recordings. The director produced a master tape from the raw footage and aired the tape on the Telethon. The station kept the raw footage on file and used portions of it occasionally in subsequent productions. The television producer then sent portions of the tape to a Canadian producer in response to a request for mardi gras footage. The tape became part of "Candy, the Stripper," an "adult film" produced by Playboy Enterprises, Inc. The Society sued Playboy for copyright infringement claiming that the Society owned the copyright because the tape constituted a "work for hire." *Id.* at 324-25.

¹⁷¹ *Id.* at 337. The *Restatement of Agency* defines a "servant" as follows: "(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958). Section 220(2) lists various factors considered relevant in the determination of a "servant:"

(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;

The *Easter Seal* court reasoned that the language of the "works made for hire" provision reflects a clear dichotomy that treats independent contractors and employees differently.¹⁷² The *Easter Seal* court adopted what it termed a bright line rule whereby only works of employees or commissioned works that fell within one of the categories of commissioned work enumerated in section 101(2) could be classified as "works made for hire."¹⁷³ The *Easter Seal* court reasoned that mere supervision or the right to direct would not bring a commissioned work under section 101(1) of the 1976 Act because that section applied only to employees.¹⁷⁴

In 1989, the United States Court of Appeals for the Ninth Circuit in the case of *Dumas v. Gommernan* set forth yet another formulation of the "work for hire" doctrine, the regular employee test.¹⁷⁵ The *Dumas* court held that the non-salaried artist who had prepared a series of lithographs was not an employee of the hiring party within the meaning of the "works made for hire" provision of the 1976 Act, regardless of the degree of control the hiring party exercised over the artist.¹⁷⁶ The court therefore concluded that the

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

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

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

Id. § 220(2). Comment d to 202(1) indicates that "[a]lthough control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relationship of master and servant may be very attenuated." *Id.* § 220(1), comment d.

¹⁷² *Easter Seal*, 815 F.2d at 335.

¹⁷³ *Id.* at 337.

¹⁷⁴ *See id.* at 335-36. Consequently, the *Easter Seal* court concluded that the tape was not a "work for hire" because it neither fell within the enumerated categories of section 101(2) nor was created by an employee. *See id.* at 337. The *Easter Seal* court noted that the term "scope of employment" constituted a term of art under agency law. *Id.* at 335. Thus, the court reasoned that "employees" under the 1976 Act are those persons who would be deemed "servants" under agency law. *Id.* at 337. The *Easter Seal* court bolstered this reasoning with the observation that connecting the "work for hire" provision to the well-developed agency law doctrine would provide predictability for the parties, an essential goal of the copyright revision. *Id.* at 335. The court also noted that the agency law approach creates "moral symmetry" because it would deem an employer a statutory author only in those circumstances where the employer would also be held liable for an employee's negligent acts. *Id.* The *Easter Seal* court held that because WYES was an independent contractor under agency law principles, the *Easter Seal* Society was not the statutory "author" of the mardi gras tape. *Id.* at 337. Thus, the court concluded that because the Society was not the author of the tape, Playboy's use of the film was not a copyright infringement.

¹⁷⁵ 865 F.2d 1093, 1105 (9th Cir. 1989).

¹⁷⁶ *Id.* In *Dumas*, ITT Canon ("ITT"), through its advertising agency, commissioned Patrick Nagel to create four works of art to be distributed as lithographs in an ITT promotional campaign. The advertising agency provided Nagel with sketches and determined some aspects of the paintings' design. The campaign was unsuccessful, leaving ITT with

widow of a deceased artist, not the commissioning party, owned the copyright in her late husband's lithographs.¹⁷⁷

The *Dumas* court examined the legislative history to determine the application of the "work for hire" doctrine.¹⁷⁸ The court noted that the language of the congressional reports reflected Congress's clear intent to embody the special interest groups' compromise in the 1976 Act.¹⁷⁹ Thus, the *Dumas* court reasoned that one could view the "work for hire" provision of the 1976 Act as a contract among possible marketers of copyrighted materials which should therefore be interpreted in light of what the negotiators intended when they negotiated and agreed to terms.¹⁸⁰

The *Dumas* court concluded that Congress intended the 1976 "works made for hire" provision to replace the old common-law tests based on the 1909 Act¹⁸¹ with a new, clear delineation between employees and independent contractors.¹⁸² The court first noted that section 101(2) provided statutory permission for certain kinds of independent contractors to give authorship status to the hiring party.¹⁸³ The court reasoned that, because discussions between the negotiators reflected an understanding that employee meant regular, salaried employees, not freelancers, courts should apply this understanding of the term.¹⁸⁴

The *Dumas* court reasoned that defining "employee" as a formal, salaried employee would provide predictability for the artist and the hiring party.¹⁸⁵ Thus, the court concluded that only formal salaried employees fall within section 101(1) of the "works made for hire" provision and, therefore, freelance creators cannot be

many extra lithographs. Stefan Gommerman, an art gallery owner, purchased the remaining sets from ITT along with any existing copyrights in the lithographs. When Gommerman created poster reproductions of one of the works, Jennifer Dumas, Nagel's widow, sued Gommerman for copyright infringement. *Id.* at 1094-95.

¹⁷⁷ *Id.* at 1105.

¹⁷⁸ *Id.* at 1098-1101.

¹⁷⁹ *See id.* at 1098-99.

¹⁸⁰ *Id.* at 1099.

¹⁸¹ *See supra* note 146 for a discussion of the "works made for hire" doctrine after 1966.

¹⁸² *See Dumas*, 865 F.2d at 1102.

¹⁸³ *See id.* at 1101.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at 1105. The court held that several factors must be considered in order to determine the creator's status in ambiguous cases. These factors include: where the artist works and whose tools are used; whether the buyer's regular business involves the creation of works of the type purchased; whether the artist works for several buyers at once; whether the buyer maintains the discretion to hire assistants; the treatment of the employment relationship for tax purposes; the method of payment; and whether the creator received all benefits customarily extended to the buyer's regular employees. *Id.*

"employees" under the 1976 Act.¹⁸⁶ The *Dumas* court determined that Nagel, the deceased artist, was not a freelance creator within one of the enumerated categories of section 101(2), nor was he an "employee" of the hiring party under section 101(1).¹⁸⁷ The *Dumas* court, therefore, affirmed the lower court ruling enjoining the defendant from reproducing the lithographs created by Nagel.¹⁸⁸

The United States Supreme Court granted certiorari in the case of *Community for Creative Non-Violence v. Reid* to resolve this confusion surrounding the interpretation of the "work for hire" provision of the 1976 Copyright Act.¹⁸⁹ In June 1989, the *Reid* Court unanimously held that agency law should determine whether a commissioned party qualifies as an "employee" under the "work for hire" doctrine.¹⁹⁰ In *Reid*, the Community for Creative Non-Violence ("CCNV") hired Reid, an artist, to create a sculpture depicting the plight of the homeless.¹⁹¹ Reid used his own studio and supplies to create the sculpture, but he received considerable input from CCNV regarding the desired overall effect.¹⁹² The parties did not discuss the issue of copyright prior to or during the creation of the

¹⁸⁶ *Id.* at 1105. The *Dumas* court rejected the control tests because these tests incorporated concepts of "employee" developed under the 1909 Act and failed to acknowledge the change implemented by the 1976 Act. *Id.* at 1102. The *Dumas* court reasoned that the control tests misinterpreted congressional silence with regard to the 1909 Act case law because they ignored the bargain achieved and endorsed by Congress prior to the development of this case law. The *Dumas* court noted further that the actual control test would distort the balance negotiators achieved by allowing independent contractors to be copyright "employees" in circumstances not sanctioned by Congress or the negotiators. *Id.* at 1103. Additionally, the *Dumas* court reasoned that the actual control test undercut certainty of ownership. This test allowed a hiring party to obtain copyright after completion of a work by virtue of the employer's actual involvement in the production of the work, even if the employer did not initially bargain for copyright ownership.

The *Dumas* court also rejected the agency law test because agency law emphasizes the extent of control that, by agreement, the employer may exercise over production of the work. *See id.* at 1103-04. The court reasoned that some independent contractors who fall outside of section 101(2)'s enumerated categories could be deemed "employees" under section 101(1) where the hiring party included provisions in the contract granting the hiring party substantial rights of control. *Id.* at 1104. The *Dumas* court noted that this potential consequence of the agency law test violates the bright line that the drafters intended to create between employees and independent contractors. Moreover, the court reasoned that because the drafters of the Act rejected a "work for hire" doctrine incorporating agency law, it did not intend this bright line to be determined by agency law. *See id.* at 1104 n.18.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ 109 S. Ct. 2166, 2170-71 (1989).

¹⁹⁰ *Id.* at 2168.

¹⁹¹ *Id.* at 2169.

¹⁹² *Id.* at 2171, 2179.

sculpture, and the parties did not sign a written employment contract.¹⁹³

After the sculpture's completion, both parties filed copyright claims.¹⁹⁴ Finding for CCNV, the United States District Court for the District of Columbia held that the sculpture was a "work for hire."¹⁹⁵ The district court reasoned that, because CCNV was the motivating force behind the statue's production, Reid was an employee of CCNV within the meaning of section 101(1) of the "work for hire" provision of the 1976 Act. The Court of Appeals for the District of Columbia reversed the district court's decision, holding that Reid was not an employee under agency law.¹⁹⁶ Adopting a literal interpretation of the 1976 Act, the Court of Appeals concluded that Reid was an independent contractor. Thus, the statue was not a "work for hire" under section 101(1) of the 1976 Act.¹⁹⁷

The Supreme Court affirmed the Court of Appeal's decision in *Reid*.¹⁹⁸ Because the 1976 Act does not define "employee," the Court assessed the language, structure, legislative history and purpose of the "work for hire" provision to determine its application.¹⁹⁹ The *Reid* Court noted that the language and structure of the provision clearly delineates between works prepared by an employee and commissioned works, thereby creating a dichotomy between employees and independent contractors.²⁰⁰ Thus, the Court reasoned that a "work for hire" can arise by two mutually exclusive routes, either from an employee or an independent contractor.²⁰¹

Reviewing the legislative history of the 1976 Act, the *Reid* Court found further support for interpreting the "work for hire" provision as a dichotomy.²⁰² The Court acknowledged that the 1976 Act represented a product of negotiation between industry representatives supervised by the Copyright Office and Congress.²⁰³ The Court also recognized that Congress, as well as the negotiating parties, consistently viewed employees and independent creators as

¹⁹³ *Id.* at 2169.

¹⁹⁴ *Id.* at 2170.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* A statue does not fall within one of the nine categories enumerated in § 101(2) of the 1976 Act. See *supra* note 145 for the text of section 101(2) of the Act.

¹⁹⁸ *Id.* at 2171.

¹⁹⁹ *Id.* at 2172-78.

²⁰⁰ *Id.* at 2174.

²⁰¹ *Id.*

²⁰² *Id.* at 2174-77.

²⁰³ *Id.* at 2174.

distinct entities. Additionally, the Court noted that the fact that Congress and the parties involved in the negotiations intended the term "employee" to refer to a "conventional employment relationship," underscored the intended dichotomy between employee and independent contractor.²⁰⁴ The *Reid* Court observed that the nine enumerated categories of commissioned works were chosen because, although they were not prepared by employees, they were usually prepared at the direction of the publisher or producer.²⁰⁵ Moreover, the Court noted that those publishers or producers bore the economic risk of production. Thus, the Court reasoned that the negotiating parties agreed that only the enumerated categories of commissioned works should be treated as "works made for hire."²⁰⁶

The *Reid* Court concluded that the legislative history highlights two important points with regard to this dichotomy.²⁰⁷ First, Congress's enactment of the 1965 compromise, with minor modifications, indicated that Congress intended two mutually exclusive means for achieving "work for hire" status.²⁰⁸ Second, the legislative history underscores the significance of the statutory language, namely, only a work that falls within the enumerated categories of commissioned works may be classified as a "work for hire."²⁰⁹

Examining the language of the "works made for hire" provision, the *Reid* Court stated that when Congress uses a term that has achieved a settled common-law meaning, this use raises the inference that Congress intended to incorporate that meaning into the statute, unless Congress explicitly indicated otherwise.²¹⁰ The Court noted that in statutes other than the 1976 Copyright Act where Congress has used the term "employee," the Court has inferred congressional intent to describe a conventional "master-servant" relationship under agency law.²¹¹ The *Reid* Court reasoned, therefore, that because the text of the statute does not indicate otherwise, Congress intended to incorporate the agency law definition of "employee" in the 1976 Act.²¹²

The Court noted that Congress's use of the term "scope of employment," a term of art in agency law, was further evidence that

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 2176.

²⁰⁶ *Id.* at 2176-77.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 2176.

²⁰⁹ *Id.* at 2176-77.

²¹⁰ *Id.* at 2172.

²¹¹ *Id.*

²¹² *Id.*

Congress intended an "employee" under the 1976 Act to be understood in light of the general common law of agency.²¹³ In a footnote, the *Reid* Court rejected the argument that "employee" refers to a formal salaried employee.²¹⁴ The Court recognized that the negotiating parties and Congress at all times meant "employee" to refer to a hired party in a traditional employment relationship.²¹⁵ Nevertheless, although the Court acknowledged "some support" for that definition of "employee," the Court noted that the 1976 Act does not use the term "formal" or "salaried."²¹⁶ The *Reid* Court reasoned, therefore, that the language of the 1976 Act does not support such a restrictive interpretation of "employee."²¹⁷

The Court noted that the right to control and actual control tests focus on a relationship between the hiring party and the work produced.²¹⁸ As such, these tests conflict with the language of the provision, which focuses on the relationship between the parties. The result, the *Reid* Court concluded, was that the control tests ignore the dichotomy of the "work for hire" provision by transforming commissioned works into "works made for hire."²¹⁹ The Court reasoned that the right to control test makes little sense in light of the nine enumerated categories because many works that could qualify under section 101(2) would already be deemed "works made for hire" under section 101(1), thereby making section 101(2) superfluous.²²⁰ The Court reasoned further that the actual control test creates an additional dichotomy between commissioned works created under the actual control and supervision of an employer, and commissioned works that are created independently.²²¹ This dichotomy, the Court reasoned, was contrary to the structure of the "work for hire" provision.²²²

The *Reid* Court rejected the argument that Congress intended to incorporate into the 1976 Act the line of cases decided under

²¹³ *Id.*

²¹⁴ *Id.* at 2174 n.8.

²¹⁵ *Id.* at 2174.

²¹⁶ *Id.* at 2174 n.8.

²¹⁷ *Id.*

²¹⁸ *See id.* at 2173-74.

²¹⁹ *Id.* at 2174. The Court reiterated that preparation at the direction and at the risk of the hiring party provides the common link among the nine commissioned works enumerated in section 101(2). *Id.* at 2173. See *supra* note 145 for the text of section 101(2) of the 1976 Act.

²²⁰ *Id.* See *supra* note 145 for the text of the "work made for hire" provision of the 1976 Act.

²²¹ *Reid*, 109 S. Ct. at 2174.

²²² *Id.* at 2174.

the 1909 Act that espoused the right to control test.²²³ The Court noted that reliance on legislative silence is inappropriate because the text and structure of the provision counsel otherwise. The Court noted further that Congress drafted and adopted the "work for hire" provision in 1965 before any federal court had ever applied the "work for hire" doctrine to a commissioned work. Thus, the Court reasoned that Congress could not have "jettisoned" a line of cases not yet before the bar.²²⁴

Lastly, the *Reid* Court concluded that the actual control test impedes Congress's paramount goal in revising copyright law, namely enhancing the predictability and certainty of copyright ownership.²²⁵ The Court reasoned that because the actual control test depends on whether a party has actually supervised the production of a work, the parties cannot determine the "work for hire" status of a work until late in the production process or even until after the work is completed.²²⁶ The Court further reasoned that such a condition impedes the ability of parties to plan and contract appropriately. The actual control test also allows a hiring party who has not obtained a copyright assignment for a commissioned work falling outside of the enumerated categories in section 101(2), to obtain author status unilaterally under the "work for hire" provision if the hiring party actually supervises and directs the work.²²⁷

Applying the general common law of agency, as set forth in section 220 of the *Restatement of Agency*,²²⁸ the *Reid* Court noted the relevance of a hiring party's right to control the manner and means of the creative process, but denied control as dispositive.²²⁹ Although CCNV directed Reid's work to ensure that the sculpture met certain specifications, the Court reasoned that other factors offset this supervision.²³⁰ The *Reid* Court concluded, based on an

²²³ *Id.* at 2177. These cases specifically held that an employment relationship existed under the "work for hire" doctrine whenever a party had the right to control or supervise the artist's work. See *supra* note 146 for a discussion of the "works made for hire" doctrine after 1966.

²²⁴ *Id.*

²²⁵ *Id.* at 2177.

²²⁶ *Id.* at 2178.

²²⁷ See *id.*

²²⁸ See *supra* note 171 for the text of section 220 of the *Restatement of Agency*.

²²⁹ *Reid*, 109 S. Ct. at 2179.

²³⁰ See *id.* at 2178-79. Reid worked in his own studio; he supplied his own tools; CCNV retained Reid for less than two months; Reid was compensated in a manner typical for an independent contractor; Reid maintained complete discretion in hiring and paying assistants; CCNV's regular business did not include creating sculptures; and CCNV did not pay payroll taxes, social security taxes or any employee benefits to Reid. *Id.*

application of the general common law of agency, that Reid was an independent contractor, not a CCNV employee, and therefore entitled to copyright ownership of the statue.²³¹

IV. CONGRESSIONAL INTENT AND THE APPLICATION OF AGENCY LAW TO "WORKS MADE FOR HIRE"

In the 1960s, congressional revision of copyright law involved a unique legislative process in which Congress resisted traditional lobbying and insisted that special interest groups negotiate to a consensus.²³² Over a four year period, these congressionally sanctioned special interest groups developed the structure and language of the "works made for hire" provision of the 1976 Copyright Act.²³³ Congress endorsed this compromise in 1966 and enacted it ten years later with little congressional input and no significant change.²³⁴ In light of the paucity of congressional input, little evidence of Congress's *specific* intent exists.²³⁵ Thus, congressional intent is best understood in light of the discussions and comments of the congressionally sanctioned negotiating parties who developed and essentially drafted the "work for hire" provision.²³⁶

Numerous discussions, written comments and reports indicate that, without exception, the participants understood "employee" under the "works made for hire" doctrine to mean a regular salaried employee.²³⁷ Despite this persuasive evidence of congressional intent, courts developed conflicting and contradictory tests to determine who is an "employee" for copyright purposes.²³⁸ The Supreme Court, in *Community for Creative Non-Violence v. Reid*, sought to reduce the confusion surrounding the interpretation of the "work for hire" provisions of the 1976 Copyright Act.²³⁹

²³¹ *Id.* at 2179-80.

²³² See *supra* notes 50-64 and accompanying text for a discussion of the unique legislative process preceding enactment of the 1976 Act.

²³³ See *supra* notes 77-145 and accompanying text for a discussion of the pre-legislative negotiations.

²³⁴ See *Reid*, 109 S. Ct. at 2175-76.

²³⁵ See Litman, *supra* note 21, at 868 n.122.

²³⁶ See *id.* at 864.

²³⁷ See *supra* notes 87-95, 108-18 and accompanying text for examples of participants' understanding of the term "employee."

²³⁸ See *supra* notes 157-231 and accompanying text for a discussion of the conflicting "work for hire" case law.

²³⁹ 109 S. Ct. 2166, 2170-71 (1989). See *supra* notes 190-231 and accompanying text for a discussion of the *Reid* decision.

The *Reid* Court, however, has only slightly remedied the problem. Its application of general common-law agency principles to determine who is an "employee" under the "work for hire" provision of the 1976 Act threatens the negotiated balance and objectives of the provision. The agency law test does not fully reflect the compromise enacted by Congress in section 101 of the 1976 Act.²⁴⁰ Moreover, the agency law test considers the issue of control in its analysis, thereby perpetuating the problems of uncertainty of ownership that Congress sought to alleviate.

In *Reid*, the Court accurately analyzed the legislative history of the 1976 Act, yet reached a result inconsistent with its own reasoning. The Court acknowledged that a unique process of negotiations among industry representatives culminated in a compromise that Congress endorsed and enacted as the "work for hire" provision of the 1976 Act,²⁴¹ noting that Congress enacted the compromise almost verbatim.²⁴² Accordingly, the *Reid* Court looked to the intentions of the negotiating parties who drafted the compromise to ascertain their understanding of the term "employee" in order to determine congressional intent.²⁴³

The Court recognized that the negotiators considered the term "employee" to mean a traditional employee, and that Congress therefore intended "employee" in the 1976 Act to refer to a conventional employment relationship.²⁴⁴ The *Reid* Court relied in part on this congressional intent when it concluded that the enacted provision represented a mutually exclusive dichotomy that treats conventional employees and independent creators differently.²⁴⁵ Although the *Reid* Court properly determined that Congress intended to create this statutory dichotomy, the *Reid* Court's definition of "conventional employment" is inconsistent with congressional intent. In its determination of the definition of "employee," the *Reid* Court virtually ignored the clear meaning that the negotiators had attributed to the term "employee."

Ample evidence indicates that Congress intended "employment" under the "work for hire" doctrine of the 1976 Act to mean

²⁴⁰ See *supra* notes 131-45 and accompanying text for a discussion of section 101 of the 1976 Act.

²⁴¹ *Reid*, 109 S. Ct. at 2174-75.

²⁴² *Id.* at 2175-76.

²⁴³ *Id.* at 2174.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

formal, salaried employment.²⁴⁶ Throughout the pre-legislative discussions, all of the rigorous objections raised were based on the notion that employment meant work performed by a regular, salaried employee.²⁴⁷ The negotiators' comments reflect a clear understanding that the Register's Report, the Preliminary Draft, the 1964 Revision Bill and the 1965 Bill were based on the distinction between regular, salaried employees and independent creators.²⁴⁸

For example, when participants in the extensive discussions on the Register's Report and the Preliminary Draft referred to "works made for hire," they assumed that employment meant regular, salaried employment.²⁴⁹ The negotiators disputed the different treatment afforded to employees and independent creators; they did not, however, debate the definition of "employee." The negotiators understood and accepted that "employee" meant regular, salaried employee. For example, negotiators framed their objections to the Register's Report's recommendation to deny employers "author" status under the proposed act, using terms such as "weekly payroll," which describe a conventional employment relationship.²⁵⁰ Similarly, negotiators objecting to the Preliminary Draft's differing treatment of employees and independent creators used terms such as "social security," "withholding," and "payroll," when referring to employees.²⁵¹

Moreover, negotiating parties disputed the Preliminary Draft's exclusion of commissioned works from the definition of "works made for hire" precisely because they viewed employees as traditional, salaried employees. Opponents of this omission were concerned about the treatment of composite works, which rely extensively on outside contractors. These representatives feared that it would be necessary, but impossible, to put all the independent creators on payroll in order to transform them into employees for copyright purposes. The subsequent compromise reached by the negotiating parties, which allowed nine categories of commissioned works to be classified as "works made for hire," was structured

²⁴⁶ See *supra* notes 87-96, 108-18 and accompanying text for a discussion of the negotiators' understanding of the term "employee."

²⁴⁷ See *supra* notes 82-130 and accompanying text for a discussion of the negotiations.

²⁴⁸ *Id.*

²⁴⁹ See *supra* notes 87-95, 108-18 and accompanying text.

²⁵⁰ See *supra* notes 90-95 and accompanying text for a discussion of participants' language.

²⁵¹ See *supra* notes 108-15 and accompanying text for examples of participants' language.

around this accepted distinction between a traditional employee and an independent creator.

Congress adopted the *negotiators'* definition of "employee," namely, a regular, salaried employee.²⁵² Congress did not intend the term "employee" to acquire an agency law meaning. Indeed, during the negotiations over the Preliminary Draft, the Register of Copyrights rejected the idea of using agency law to define "employee."²⁵³ The Register of Copyrights dismissed the agency law terms "servant" and "master" as "medieval" and the legal concept of a "master-servant" relationship as an inappropriate means of determining an "employee" under the "works made for hire" provision.²⁵⁴ Both the brief discussion of the recommendation to use a "master-servant" definition under the "works made for hire" provision, and the Register of Copyrights' subsequent rejection of the proposal, evidence the flaw in the *Reid* Court's adoption of agency law to "works made for hire."²⁵⁵ Such a definition clearly contradicts the understanding of the negotiators and thus misconstrues congressional intent.

The *Reid* Court concluded that well-established agency law provides a uniform structure and a predictable basis for copyright law.²⁵⁶ The *Reid* Court's agency law test, however, perpetuates the problem of uncertainty of copyright ownership that Congress sought to reduce in its copyright revision; the agency law test is a mere reformation of the control tests that the Supreme Court re-

²⁵² See *supra* notes 61–63 and accompanying text for a discussion of examples of proposals to alter the "work for hire" compromise. Throughout the legislative process, Congress consistently rejected recommendations to alter the terms of the "work for hire" compromise. See *id.*

²⁵³ See *supra* notes 116–18 and accompanying text for discussion of the proposal to apply agency law to "work for hire" doctrine. During discussions over the Preliminary Draft, a representative from the American Bar Association proposed implementing a "works for hire" provision that paralleled agency law. See *id.* This change would have expanded the class of creators subject to the "work for hire" doctrine beyond formal, salaried employees because the degree of control a "master" retains over his servant constitutes a relevant factor in determining servant status. See *supra* note 171 for the text of section 220 of the *Restatement of Agency*. Because a hiring party arguably retains control merely by paying an independent creator, injecting agency law would have greatly expanded the reach of the "work for hire" provisions to include almost all employer-independent creator relationships. Participants did not pursue this idea in debate. See *supra* notes 116–18 and accompanying text for a discussion of the sparse negotiations regarding the suggestion to incorporate agency law into the "works for hire" provision of the 1976 Act.

²⁵⁴ See *supra* notes 116–18 and accompanying text.

²⁵⁵ *Id.*

²⁵⁶ *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2173 (1989).

jected in *Reid*.²⁵⁷ By defining "servant" in terms of control or the right to control, section 220 of *Restatement of Agency* highlights the importance of the control factor.²⁵⁸ Section 220(2), which provides a number of factors relevant to the determination of the status of a worker, lists the degree of control retained by the employer as a factor.²⁵⁹ Moreover, comment d to section 220(1) explicitly states the critical importance of control or right to control.²⁶⁰ Thus, although the *Reid* Court rejected the actual control and right to control tests, the Court nevertheless reformulated these tests by adopting the agency law approach. Consequently, despite the statutory dichotomy between employees and independent creators, the *Reid* Court created a loophole through which independent contractors may be deemed "employees" for copyright purposes.

Moreover, agency law principles fail to provide courts with clear guidelines because control remains undefined in agency law. Courts may interpret control in various manners. For example, although one court may emphasize the kind of control, another may look to the actual control executed. Yet another court may look to the hiring party's right to reject the end product. The division in the federal courts over "actual" control and "right" to control highlights the interpretive nightmare that this idea inspires.²⁶¹

Thus, the *Reid* Court's agency law approach frustrates Congress's intent in revising copyright law, namely, to provide predictability. The agency law test is very malleable and allows courts too much discretion. Although courts should weigh all relevant agency law factors, courts now have the opportunity to treat the control issue as dispositive. Viewed in this light, a court could classify a commissioned work that does not fall within one of the nine enumerated categories as a "work for hire" under section 101(1) of the provision.²⁶² For example, courts could deem independent creators, who are not within the nine enumerated categories, as employees under section 101(1) where the hiring party contractually retains a substantial right of control. Congress intended, and the *Reid* Court acknowledged, that the nine enumerated categories constitute an

²⁵⁷ See *id.* at 2177.

²⁵⁸ See *supra* note 171 for the text of section 220 of the *Restatement of Agency*.

²⁵⁹ See *id.*

²⁶⁰ See *supra* note 171 for the text of comment d of the *Restatement of Agency*.

²⁶¹ See *supra* notes 157-68 and accompanying text for a discussion of the right to control and actual control tests.

²⁶² See *supra* note 145 for the text of section 101 of the 1976 Act.

exclusive list.²⁶³ Expanding the reach of the statutory provisions blurs the clear dichotomy between an employee and an independent creator.

Furthermore, by excluding independent contractors whose work does not fall within section 101(2) from "works made for hire" status, Congress intended to protect such contractors from possibly signing away their author status due to economic pressures. By adopting the agency law approach, the *Reid* Court may be eliminating this protection.²⁶⁴ The agency law test will allow jockeying by industries with significant bargaining power to the detriment of creators. In addition to possibly affecting the initial determination of ownership, application of the agency law test may produce subsequent inequities. Because control constitutes a significant factor under the agency law test, a party who obtains the initial copyright in a work could subsequently be stripped of ownership years later by a court considering, with hindsight, the control retained or executed by the hiring party.²⁶⁵ Thus, the agency law test, incorporating notions of control, would reduce the exploitative value of works made on commission. The possibility of a retroactive award of copyright reduces the value of a commissioned work. By contrast, absolute copyright ownership would allow creators to command compensation commensurate with the rights alienated.

Congress should revise the "works made for hire" provision by furnishing a definition of "employment" consistent with that envisioned by the participants in the negotiations. The congressional clarification of "employee" should mirror the negotiators' understanding of the term, namely, a regular, salaried employee. Furthermore, a congressional definition should foster uniformity and predictability in the "works made for hire" doctrine. A definition that undercuts either objective would undermine the "work for hire" doctrine. For example, a definition linked to state law, such as one defining "employee" as a worker who receives all the benefits mandated at state law, would complicate the application of the doctrine. In contrast, a definition of "employee" based on federal statutory mandates, such as federal income tax or social security tax

²⁶³ See *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2175-76 (1989).

²⁶⁴ See *supra* note 133 and accompanying text for a discussion of "works made for hire" contracts.

²⁶⁵ See *Reid*, 109 S. Ct. at 2177. The *Reid* Court noted that a test based on control will allow hiring parties who have not obtained full assignment of copyright to obtain unilaterally "work for hire" status rights years after the work has been completed simply by a showing of control. *Id.*

withholding provisions, would ensure uniform application of the "works made for hire" provision and enhance predictability.

V. CONCLUSION

The Supreme Court's application of agency law principles in *Community for Creative Non-Violence v. Reid* to define an "employee" for copyright purposes threatens the negotiated balance and objectives of the "works made for hire" provision of the 1976 Copyright Act. The *Reid* Court's agency law test does not fully reflect the "work for hire" compromise enacted by Congress in section 101 of the 1976 Act. Furthermore, the agency law test considers the issue of control in its analysis, thereby perpetuating the problems of uncertainty of ownership that Congress sought to alleviate.

In light of the Supreme Court's flawed decision in *Reid*, Congress should act to resolve the uncertainty and inequities surrounding the "works made for hire" doctrine. Congress should revise the "works made for hire" provision of the 1976 Act by furnishing a definition of employment. A congressional definition of "employee" should be consistent with that envisioned by the congressionally sanctioned special interest groups which debated, bargained and ultimately developed the "works made for hire" provision of the 1976 Act—namely, a regular salaried employee.

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