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LABOR LAW: ARE CREATIVE ARTISTS INDEPENDENT CONTRACTORS OR EMPLOYEES?

Few legal classifications have created greater controversy in application than attempts to distinguish an employee from an independent contractor.[1] The decision of the National Labor Relations Board ("NLRB") in *Aaron Spelling Productions, Inc. v. Society of Composers and Lyricists*[2] is no exception. The Board held that composers and lyricists are independent contractors and, consequently, are expressly exempted from the National Labor Relations Act and union representation.[3]

The case was tried before a hearing officer of the NLRB. The Society of Composers and Lyricists sought to represent all composers and lyricists employed by the motion picture and television studios.[4] The studios contended that under the National Labor Relations Act,[5] the petition should have been dismissed because the composers were independent contractors rather than statutory employees.

Congress amended section 2(3) of the National Labor Relations Act in 1947 to exclude independent contractors from the definition of "employee."[6] The purpose of this amendment was to encourage the NLRB and the courts to apply general agency principles when distinguishing between employees and independent contractors.[7] Thus, in defining the relationship between the studios and the composers in *Spelling*, a fact-based analysis was critical.[8] The NLRB applied a "right to control" test:

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to

1. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120-21 (1944). *See generally* 9 S. WILLISTON, WILLISTON ON CONTRACTS, § 1012A at 16-29 (3d ed. 1967); Comment, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015 (1941).

2. No. 31-RC-5755, slip. op. (Dec. 14, 1984).

3. *Id.* at 7.

4. The respondents named in the petition were Aaron Spelling Productions, Inc., Columbia Pictures Industries, Inc., Lorimar Productions, MGM/UA, MTM Enterprises, Inc., Orion TV Productions, Inc., Paramount Pictures Corp., Embassy Pictures/Embassy Television, Twentieth Century-Fox Film Corp., Universal City Studios, Inc., Walt Disney Pictures, and Warner Brothers, Inc.

5. 29 U.S.C. § 152(3) (1947).

6. *Id.* The act protects an "employee" only, and specifically excludes "any individual having the status of an independent contractor."

7. *See* 93 CONG. REC. 6441-442 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1537.

8. NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382 (3d Cir. 1979); Associated Gen. Contractors, Inc. v. NLRB, 564 F.2d 271, 282 (9th Cir. 1977).

> be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.[9]

Based on this test, the NLRB concluded that an employer-employee relationship did not exist. The studios exercised control over the final product and not over the means necessary to produce that product.[10] The NLRB explained that there were factors which tended to support both an employee and an independent contractor relationship. "There is no question that the studios exercise control over the musical compositions and lyrics that they contract with composers . . . to produce."[11] However, this general control over the final product was inadequate to justify a finding of an employee relationship.[12]

In making its determination, however, the NLRB appears to have relied on a strict construction of the "right to control" test to the exclusion of other relevant considerations. The focus on the lack of constraints placed on the musicians resulted in a cursory view of other evidence that might have weighed in favor of a different result. While the control test is an important factor in distinguishing employees from independent contractors, it is not the sole factor.[13] The United States Supreme Court has counseled that "there is no shorthand formula or magic phrase that can be applied to find the answer, but all incidents of the relationship must be assessed and weighed with no one factor being decisive."[14]

In *Spelling*, the NLRB implied that creative artists are beyond the scope of the normal agency analysis. Citing *American Broadcasting Company*,[15] it concluded that the autonomy inherent in the composing of music necessitated a finding of an independent contractor relationship. This reasoning seems contrary to the fact-based analysis that was at the heart of the 1947 amendment to the National Labor Relations Act.[16] With this in mind, the following analysis examines the *Spelling* decision

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9. *Spelling* at 6-7, citing Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. AFL-CIO v. NLRB, 603 F.2d 862, 873 (D.C. Cir. 1978). *See also* RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958).

10. *Spelling* at 7.

11. *Id.*

12. *Id.*

13. NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 919 (11th Cir. 1983); NLRB v. Deaton, Inc., 502 F.2d 1221, 1223 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975).

14. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).

15. 117 NLRB 13, 18 (1957).

16. *See supra* note 7.

in light of several factors that are important in determining whether musical composers are properly classified as independent contractors or employees.[17]

The most significant factor tending to show employment is the right of the employer to control the details of the employee's work. Conversely, freedom from such control tends to establish the relationship of independent contractor.[18] It is irrelevant whether the employer exercises the right to control, so long as the right exists.[19] In *Spelling*, the NLRB did not confine its analysis to whether the studios possessed the right to control the details of the composers' work, but focused instead on the minimal restrictions placed upon the composers by the studios. In doing so, the board appears to have misapplied the "right to control" test.

First, the record indicates that "in recognition of, and in deference to, the creative process . . . [the studios] avoid[ed] interfering with the freedom of composers to set their own hours, to work at their own pace, and to work wherever they please."[20] If an employment relationship exists, the fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved does not change the character of the relationship, particularly where the employer has general supervision and control.[21] Second, although the studios avoided involving themselves in the details of the composers' work, contracts between the two entitled them to do so.[22] The NLRB attempted to minimize the relevance of this language by labeling it as boilerplate. Nevertheless, it is not the actual exercise of the right to control that is important but, as here, the contractual right to do so.[23]

The providing of materials or equipment is also relevant to determining whether an employee or independent contractor relationship exists.[24] If the employer furnishes the materials necessary for the accomplishment of a task, an employer-employee relationship is more likely. While most composers own the basic tools of their trade, it is

17. Consolidated from current case law, RESTATEMENT (SECOND) OF AGENCY § 220 (1958), and legal scholarship.

18. 18A T. KHEEL, BUSINESS ORGANIZATIONS - LABOR LAW § 12 (1972).

19. *Id.*

20. *Spelling* at 6.

21. Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 974 (7th Cir. 1978); Grant v. Woods, 71 Cal. App. 3d 647, 654, 139 Cal. Rptr. 533, 536 (1977); RESTATEMENT (SECOND) OF AGENCY § 220(2)(c) (1957).

22. *Spelling* at 5-6.

23. *See supra* note 21.

24. RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (1957). *See also* Stewart, *Empirical Answer to the Problem of Determining "Employee" or "Independent Contractor" Status*, 58 TAXES 747, 752 (Nov. 1980).

common practice for the studios to supply the composers with scoring paper, pencils and erasers, or permit them to charge such items to the studio's account. The studios also make available an office with a piano in it, although the composer is under no obligation to use it. During the course of a project, the studio delivers videocassettes, timing sheets, and other necessary materials to the composer's home by messenger, and picks up scoring sheets the same way. Neither the cost of the items nor the cost of the messenger service are deducted from the composer's fee.

Another important consideration is whether the employer provides the employee with benefits or makes payroll deductions.[25] Generally, the studios do not furnish the composers with the amenities normally associated with an employer-employee relationship: life and health insurance, holiday and vacation pay, or other fringe benefits. However, in *Spelling*, the NLRB failed to fully explore the problems created by the composers' unique tax situation.

Many composers operate personal "loanout" corporations for tax purposes.[26] The artist is generally the sole stockholder.[27] Since exclusive rights to the composer's services are vested in the corporation, studios contract with the composer through this corporate entity. The studio pays the loanout corporation, which in turn pays the composer. The studio makes no payroll deductions.[28] The agreement between the loanout corporation and the studio generally contains a provision that explicitly states that the contract creates an independent contractor relationship.[29] Having thus elected to use the independent contractor form for tax purposes, it is argued that the artist should be viewed as such for all purposes.[30]

A contrary view argues that the fiction of the "loanout" corporation should be discarded for purposes of this analysis.[31] The loanout corporations pay the artist and provide him with employee benefits (albeit, through a corporate fiction).[32] If a composer is paid directly (rather than through a loanout company), the studios make the standard payroll deductions for taxes and social security themselves. Since it is not neces-

25. *A. Duie Pyle*, 606 F.2d at 385.

26. *Spelling* at 3.

27. Frackman, *Failure to Pay Wages and Termination of Entertainment Contracts in California*, 52 S. CAL. L. REV. 333, 364-65 (1979).

28. *Spelling* at 2.

29. "Lender shall furnish [composer's] services hereunder as an independent contractor." *Current Developments in the Television Industry: Legal, Business and Financial Aspects*, USC ENT. LAW INST., 332, 338 (E. Barton & E. Kleinberg eds. 1977).

30. Frackman, *supra* note 27, at 372.

31. *Id.* at 367.

32. *Id.* at 366.

sary that the studios directly pay the composer's wages, pension and other benefits, it follows that the proliferation of the loanout company may have little effect in determining the composer's status.[33] In short, the studio ensures that the composer receives such contributions either by paying him or her directly or through the avenue of the loanout company.

Another factor in determining the worker's status is the degree of skill required in a particular field.[34] It is the worker's unique skill that makes the independent contractor's services a marketable item. Thus, the greater the skill required, the greater the indication that the worker is an independent contractor.[35] Composers are highly skilled artists who receive no training whatsoever from the studios and whose talent and experience play an important role in their initial selection for work. Clearly, the composer's special skills militate in favor of an independent contractor designation.

An independent contractor relationship is also implied where the service contracted for is distinct from the principal's business.[36] The composing of music, although an integral component of a successful production, is nevertheless a different trade than that of producing movies. Composers are also under no obligation to accept offers for work, though some testified that they feared they would not be considered again if they exercised this option.[37]

In contrast, an employer-employee relationship is implied if the contract contemplates that substantially all of such services are to be performed personally by the individual.[38] This was particularly true in *Spelling* because composers were hired for their unique styles and their assignments could not be delegated to others without the studios' consent.

The relationship of an independent contractor is generally linked to a specific time period, whereas that of employment generally contemplates a continuous or indefinite rendering of services.[39] This principle is difficult to apply to *Spelling* because of the inherent differences between motion picture and television production. In motion picture production, studios hire composers on a picture-by-picture basis, typically for a pe-

33. *Id.* at 371.

34. RESTATEMENT (SECOND) OF AGENCY § 220(2)(d) (1957); Comment, *Agency: Independent Contractors in California*, 30 CALIF. L. REV. 57, 58-59 (1941).

35. *Id.*

36. *Id. See also* Hilton Int'l Co. v. NLRB, 690 F.2d 318, 320 (2d Cir. 1982).

37. *Spelling* at 3.

38. Stewart, *supra* note 24, at 750.

39. Stewart, *supra* note 24, at 752.

riod of six to ten weeks. In television production, the studio will usually contract with the composer for an entire season and, in some instances, for subsequent seasons as well. Still, contracts for remuneration for a specific period favor a finding of an independent contractor relationship.[40]

Another important factor in distinguishing an employee from an independent contractor is the risk of loss and opportunity for profit, and the degree of proprietary interest.[41] An employee is generally one who is precluded from earning a profit in excess of his stated compensation or is insulated against sustaining losses.[42] Composers are paid a flat fee for their services, even if the producer ultimately decides not to use the composer's work. Any risk of loss or opportunity for profit falls solely on the studio. Furthermore, the composers have no capital invested in the production. This absence of proprietary interest, although ignored by the NLRB in *Spelling*, points toward an employee relationship.

The worker's payment structure can also help in determining whether an independent contractor or an employee relationship exists.[43] Generally, the agent and the studio negotiate the composer's fee. Compensation varies with the composer's reputation, the project's budget, and various other administrative factors. The composer receives a lump sum payment for the work, as opposed to incremental payments, which increases the likelihood that he or she is an independent contractor.[44]

However, in reaching its decision in *Spelling*, the NLRB glossed over some other important factors concerning the studios' compensation structure. An employer-employee relationship is indicated when travel and equipment expenses are covered by the principal.[45] The studios either provide or reimburse the composer for all needed equipment. When travel is necessary, the expenses are covered. If delays require a commitment beyond the designated period, the composer is compensated for the extra time. Finally, even if the artist's composition is not used, the composer is still compensated in full.

While the actual belief of the parties as to their legal relationship is relevant to this analysis, it is of slight importance.[46] Contractual terminology is only of probative value if, as a matter of law, a different rela-

40. *Id.*

41. NLRB v. Maine Caterers, Inc., 654 F.2d 131, 132 (1st Cir. 1981); Brown v. NLRB, 462 F.2d 699, 705 (9th Cir. 1972), *cert. denied*, 409 U.S. 1008 (1972).

42. Stewart, *supra* note 24, at 752.

43. *Merchants*, 580 F.2d at 975; RESTATEMENT (SECOND) OF AGENCY § 220(2)(g) (1958).

44. *Id.*

45. Stewart, *supra* note 24, at 752.

46. KHEEL, *supra* note 18, at 653.

tionship exists.[47] Consequently, while contracts vary from studio to studio, general language that implies an independent contractor relationship carries little evidentiary value.

Despite the evidence favoring an employer-employee relationship under the foregoing agency analysis, the composers' chances of success on appeal are minimal. "A reviewing court may not displace the NLRB's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it de novo."[48] Only by showing that there was no "substantial evidence" for the board's decision would a different result be in order.[49]

Determining the composers' relationship with the studios is a complex problem. The NLRB's focus on the unique creative nature of the composer's work, however, is not the answer. Under such an approach, the impact of the board's decision could be greatest within the entertainment industry, where individual creativity is not only encouraged, but is a necessary commodity.

The analysis used in *Spelling* can lead to unpredictable results and controverts the reasoning behind section 2(3) of the National Labor Relations Act.[50] Clearly, predictable results can only be achieved through the consistent application of agency principles.

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47. *Grant*, 71 Cal. App. 3d at 654, 139 Cal. Rptr. at 537; Tieberg v. Unemployment Ins. Appeals Bd., 2 Cal. 3d 943, 471 P.2d 975, 88 Cal. Rptr. 175 (1970).

48. *United Insurance*, 390 U.S. at 260.

49. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

50. *See supra* note 7.