1-1-1990

The Supreme Court Sculpts a Definition...Is it a Work for Hire

Marita Covarrubias

Recommended Citation

Marita Covarrubias, The Supreme Court Sculpts a Definition...Is it a Work for Hire, 10 Loy. L.A. Ent. L. Rev. 353 (1989). Available at: http://digitalcommons.lmu.edu/elr/vol10/iss1/11
THE SUPREME COURT SCULPTS A DEFINITION . . . IS IT A WORK FOR HIRE?

I. INTRODUCTION

For the photographer who is asked to take portraits of the British royal children, for the computer programmer asked to create an educational software system for a software firm, or for the architect who designs a building for a contractor, the issue of copyright ownership has been ambiguous. These parties are not formal salaried employees who know that copyright ownership will vest in their employer. Nor is the type of work they create specifically recognized by the law as being specially ordered or commissioned. If the issue of copyright comes up, and no agreements have been reached, the creators and their hiring parties have been uncertain as to who owns the copyright. To resolve the ambiguity in these situations, Congress attempted to establish boundaries for the definition of work for hire with the 1976 Revision of the Copyright Act (the "Revised Act"). But Congress never expressly defined who is considered an employee within the construction of the work for hire definition.

The questions concerning the definition of work for hire are of crucial importance because when a work falls within its boundaries, Section 201 of the Revised Act views the employer as the author of that work. Therefore, before reaching the application of Section 201, courts have been called on by hiring parties and the parties producing the works, to determine whether the party producing the work falls into the work for hire definition of the Revised Act. Section 101, which generally defines

4. The phrase "works for hire" will be used, instead of the more cumbersome statutory terminology "works made for hire".
5. "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 the rights comprised in the copyright." 17 U.S.C. § 201(b) (1982).
6. The definition for work for hire states a "work made for hire" is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use 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
the terms used in the Revised Act,⁷ appears explicit in its definition of work for hire. In Section 101(1) of the Revised Act, work for hire is defined as work prepared by an employee within the scope of his employment, and in Section 101(2) of the Revised Act work for hire is defined as specially commissioned works in nine expressly enumerated areas.⁸ It is the use of the term “employee” in Section 101(1) that has been the subject of much debate.

The circuits are split over the definition of “employee” as it is used in the Revised Act. The Second, Fourth and Seventh Circuits adopted variations of an “actual control” test to determine whether a party is an employee for purposes of the work for hire provision.⁹ The Fifth Circuit has defined “employee” within its common law agency meaning for purposes of determining copyright ownership.¹⁰ Finally, the Ninth Circuit recently ruled that only formal salaried employees are considered “employees” under the work for hire definition.¹¹ It is clear from the various definitions that a party who produces a single piece or multiple pieces for another party, may find herself in a dispute as to her status as an employee or an independent contractor.¹² The determination of her status, which in turn determines her ownership rights, will vary depending on the circuit in which she is raising the issue.

The Supreme Court decision in Community for Creative Non-Violence v. James Earl Reid¹³ was anxiously anticipated. Parties on both sides of the work for hire disputes hoped it would establish uniformity in the copyright rules of ownership as applied to work for hire. The amicus briefs submitted by parties representing both free-lancers and the hiring agree in a written instrument signed by them that the work shall be considered a work made for hire. 17 U.S.C. § 101 (1982).

7. See 17 U.S.C. § 101 (1982). Hereinafter references to Section 101 of the Revised Act will concern only the work for hire definition.


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

12. The term independent contractor is not found in the statute, and clause (2) of the work for hire definition appears to be the only clause that addresses works done by independent contractors. Debate has persisted as to whether the clause is all inclusive or if clause (1) can potentially apply to independent contractors. See infra notes 98-101, 182-84 and accompanying text.

parties show the importance of this decision.\textsuperscript{14} For many free-lancers, the final decision in \textit{Reid} has limited impact because the legislature carefully provided for the manner in which their works would be handled by the express enumerations in Section 101(2).\textsuperscript{15} But for artists like James Earl Reid ("Reid") the decision has a substantial impact.\textsuperscript{16} Sculptures are not one of the enumerated works included in Section 101(2) and, therefore, an artist like Reid loses copyright under the Revised Act only if he is considered an employee under Section 101(1). Some of Reid's counterparts have had their status defined as "employee" under Section 101(1) and the hiring party has obtained copyright to the product that he could not reach under Section 101(2). As of June 5, 1989, the term "employee" has been defined by the Supreme Court. Now only works by free-lancers who meet the common law agency definition of employee will have their works fall into the ambit of Section 101(1).\textsuperscript{17} After the determination of whether the piece is a work for hire, ownership under Section 201 can be considered.\textsuperscript{18}

\section{II. Community for Creative Non-Violence v. Reid}

This case centers around a statue depicting homelessness that was commissioned by Mitch Snyder of the Community for Creative Non-Violence ("CCNV").\textsuperscript{19} In 1985, CCNV determined they would participate in the Christmas Pageant of Peace held in Washington, D.C.\textsuperscript{20} To dramatize the plight of the homeless, the members of CCNV envisioned a sculpture representing the traditional nativity scene, however they would

\begin{enumerate}
\item Groner, \textit{Why Big Business Likes Mitch Snyder}, Legal Times, June 16, 1989, at 7 (lists names of some of the parties submitting amicus briefs, and organizations they represent).
\item See \textit{supra} note 6.
\item In addition to artists, the decision on work for hire will have an impact on writers, photographers, designers, composers, and computer programmers. The decision also effects the parties using their works, which includes the publishing, advertising and music industry. \textit{See} Community for Creative Non-Violence v. Reid, — U.S. —, 109 S.Ct. 2166, 2171 (1989) ("Reid III").
\item \textit{Id.} at 2178. Whether this interpretation will be retroactive to the time the Revised Act was enacted or whether it will be prospective has not yet been determined. \textit{See}, Ossola, \textit{High Court Decides Who 'Works for Hire,'} Legal Times, June 12, 1989, at 20 (discussion regarding the implications of a prospective or retroactive application of the Supreme Court's interpretation of work for hire).
\item Reid III, — U.S. —, 109 S.Ct. at 2178.
\item The Community for Creative Non-Violence is a Washington, D.C. based non-profit organization established to care for the welfare of the homeless. Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1487 (D.C. Cir. 1988)("Reid II").
\item Community for Creative Non-Violence v. Reid, 652 F. Supp. 1453, 1454 (D.D.C. 1987)("Reid I").
\end{enumerate}
replace the traditional Holy Family with a black, homeless family. To complete the work, the base for the statue would be constructed to appear as a steam grate with simulated smoke rising and swirling around the family. CCNV decided to title the work “Third World America” and the legend on the base would read “and still there is no room at the inn.”

In October, 1985, Snyder contacted James Earl Reid, a Baltimore sculptor, to ask him to produce the desired work. After two phone conversations, the parties agreed that Reid would sculpt the figures as envisioned by CCNV. Reid suggested that the sculpture be cast in bronze at a cost of $100,000 and taking six to eight months to complete. Due to time and budget constraints the parties agreed instead that the statue would be made with a synthetic material sufficiently durable to withstand the elements. Reid agreed that the project would cost from $12-15,000 for the materials and assistants, and he would provide his services at no cost to CCNV. Neither party discussed copyright ownership.

Reid commenced work on the project by drafting sketches of the figures in various poses. On November 1, 1985, CCNV paid an advance to Reid and asked for sketches of the figures. Reid sent Snyder sketches of the proposed sculpture, with the figures in the traditional pose used in nativity displays. A short time later, Reid asked Snyder if he knew of a family that would be appropriate models for the sculpture. Snyder took Reid to a Washington shelter for the homeless to view a black family with a newborn child. While Reid felt he could work with

---

21. Id. The family would be black since most of the homeless in Washington are black.

22. Id. CCNV contacted special effects people in Hollywood to provide the equipment to generate the steam. Id. at 1455.


24. Mitch Snyder acted as CCNV’s agent and trustee throughout negotiations and his name was on the copyright form as author of the work. Reid II, 846 F.2d at 1488.


26. Id. Reid was very enthusiastic about the proposal when the project began. Id.

27. Reid agreed to use “Design Cast 62,” a synthetic material, that would withstand the elements and could be tinted bronze. Id.

28. Reid I, 652 F. Supp. at 1454. A portion of the payment was to be used by Reid to pay the assistants he needed throughout the project. CCNV made these payments in installments. Reid III, — U.S. —, 109 S.Ct. at 2169.

29. Reid I, 652 F. Supp. at 1455. Reid claimed that he did state that he reserved his full copyright rights, and that he would retain artistic control. Id. at 1454-55 n.3.

30. Id. at 1455.

31. There is a dispute as to why the sketches were requested. Snyder asserted that it was for his approval and Reid asserted that sketches were requested to use for fundraising, and therefore the poses assumed were not necessarily intended for the sculpture. Id. at 1455 n.4.
the child, he rejected using the parents.\textsuperscript{32} At this time Reid and Snyder toured the Washington area inhabited by many homeless people. During the tour Snyder pointed out the people lying on the grates.\textsuperscript{33} Reid's initial sketches showed upright figures, but following this visit to Washington, all new sketches depicted figures reclining.\textsuperscript{34}

Through November and the first two weeks of December, Reid and his assistants worked exclusively on the sculpture.\textsuperscript{35} The deadline for completion was December 12, 1985, but the sculpture was not completed at that time. Snyder initially demanded the sculpture be delivered immediately, but Reid explained the piece could be harmed and Snyder gave Reid more time to complete a "first class work."\textsuperscript{36} On December 24, 1985, Reid delivered the completed sculpture to the Ellipse in Washington D.C.\textsuperscript{37} At that time, CCNV had the pedestal attached.\textsuperscript{38}

Organizers of the Christmas pageant, for which the sculpture had been constructed, did not think the political implications of the sculpture were appropriate for their event and would not accept the sculpture into their pageant.\textsuperscript{39} Instead, CCNV decided to place "Third World America" on display near the pageant site.\textsuperscript{40} After one month on display, the sculpture was returned to Reid for minor repairs.\textsuperscript{41}

Following the return of the sculpture to Reid, Snyder expressed a desire to take the piece on a multi-city tour to raise funds for the homeless.\textsuperscript{42} Reid rejected that idea because he felt the material used for the work could not withstand the rigors of the scheduled tour.\textsuperscript{43} Snyder would not allot any more money to upgrade the sculpture or pay for a

\textsuperscript{32} Reid I, 652 F. Supp. at 1455. Reid later chose to use his photographer and a female acquaintance as models for the parent figures. \textit{Id.}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.} Whether Snyder pointed out the position of the people on the grates and thus the sculpture took on that pose or Reid was aware of that all along is not clear, however the district court felt it was an idea initiated by Snyder and the Supreme Court appears to accept that view. \textit{Reid III}, — U.S. —, 109 S.Ct. at 2169.

\textsuperscript{35} \textit{Reid III}, — U.S. —, 109 S.Ct. at 2169. Reid had complete discretion as to his choice in hiring and paying assistants. \textit{Id.} at 2179.

\textsuperscript{36} Reid I, 652 F. Supp. at 1455.

\textsuperscript{37} \textit{Id.} Before Reid delivered the statue, he had inscribed the copyright symbol and his name underneath the title of the work. \textit{Id.} at 1455 n.7.

\textsuperscript{38} \textit{Id.} CCNV had complete responsibility for the preparation of the pedestal. \textit{Reid II}, 846 F.2d at 1487. In the respondent's brief Reid asserts that he provided the sketch and details for the pedestal, however that was not the focal point of the case. Respondents Brief, No. 88-293, at 3.

\textsuperscript{39} Reid I, 652 F. Supp. at 1455 n.6.

\textsuperscript{40} Reid III, — U.S. —, 109 S.Ct. at 2170.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} Reid I, 652 F. Supp. at 1456.

\textsuperscript{43} \textit{Id.}
master mold, and when he asked that the sculpture be returned to CCNV, Reid refused. After refusing to return the sculpture, on March 20, 1986, Reid filed a certificate of copyright for “Third World America” and announced a tour for the statue that would be less arduous than that proposed by Snyder. In response, on May 21, 1986, Snyder filed a copyright certificate on the same work.

On June 2, 1986, CCNV filed a complaint against Reid seeking return of the sculpture and determination of the copyright ownership. Determination of copyright ownership depended on whether the sculpture was a work for hire as defined by the Revised Act.

III. HISTORY OF THE WORK FOR HIRE PROVISION OF THE REVISED ACT

In 1909 Congress established the first Copyright Act (the “Original Act”). It had broad provisions that fostered a large body of judicial interpretation and business practices. However, as time progressed, general changes in the nature of works produced and increasingly divergent common law interpretations of the Original Act required that statutory changes be made. Many revision bills were introduced and rejected before Congress began work on the Revised Act.

In 1961, the Copyright Office of the Library of Congress, completed its studies in anticipation of a general revision to the Copyright Law. At that time, the Copyright Office issued its first Copyright Law Revision

44. Id.
45. Id. When Reid presented the sculpture to CCNV he had inscribed a copyright symbol on the base to assert his claim of copyright. However the court found that Reid’s first claim was asserted on December 24, 1985. Id. at 1455 n.7.
46. Reid II, 846 F.2d at 1488.
47. Id. Since actual ownership of the sculpture itself was not a contested issue, upon preliminary injunction, the district court required that Reid deliver the work to CCNV. Reid I, 652 F. Supp. at 1456.
50. Id. at ix-x (1961); See Litman, Copyright, Compromise and Legislative History, 78 CORNELL L. REV. 857, 858 (1987); Fitzgibbon & Kendall, The Unicorn in the Courtroom: The Concept of “Supervising and Directing” an Artistic Creation Is a Mythical Beast in the Copyright Law, 15 J ART MGMT & LAW 23 (Fall 1985).
51. 1961 GENERAL REVISION, supra note 48, at x. Between 1924 and 1940 continuous effort was made to revise the Original Act. While two bills were passed by the House in the 1930s, they were ultimately rejected primarily because of differences between the Berne Convention and U.S. Law. Id.
Report.\textsuperscript{52} This report, as the reports following it would do, highlighted recommendations of the Copyright Office and addressed the views and responses various parties had to the intended revisions.\textsuperscript{53} Testifying at these hearings were authors, book, newspaper and music publishers, photographers, and representatives of the movie and television industries. The numerous reports, hearings and bills to Congress led to the 1976 revision of the Copyright Act. In its final form, the Revised Act was a comprehensive law reached after much compromise, which adopted certain common law doctrines and abrogated others.\textsuperscript{54}

In the process of revising the Original Act, the work for hire provision was addressed in two areas. There was revision on both the area of ownership of works for hire and on the actual definition of works for hire. The question of ownership was debated by various parties, but in the end the Revised Act remained consistent with the Original Act and ownership vested in the employing party unless otherwise agreed to by the parties.\textsuperscript{55} However, the definition of work for hire changed dramatically through the course of the hearings and reports before Congress.\textsuperscript{56} In the final revision, the work for hire definition was far more explicit than the work for hire provision in the Original Act.\textsuperscript{57}

\textsuperscript{52} Id. at iv.

\textsuperscript{53} Id. at iv-v.

\textsuperscript{54} Litman, Copyright, Compromise and Legislative History, 78 Cornell L. Rev. 857, 859 (1987).

\textsuperscript{55} 17 U.S.C. § 201(b) (1982). According to the Copyright Office, this was the most practical rule to follow. 1961 General Revision, supra note 48, at 85. See also, Comm. on the Judiciary, Copyright Law Revision Part 3: Preliminary Draft For Revised U.S. Copyright Law and Discussions and Comments on the Draft, 15 (1964)[hereinafter Copyright Law Revision Part 3] The preliminary drafts for the revised Copyright law, stated ownership would vest in the employer unless the parties agreed otherwise. Id. This was disputed by many parties. See House Comm. on the Judiciary, Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., 152, 393 (1963)[hereinafter Copyright Law Revision Part 2](testimony of John Schulman, American Patent Law Association, Committee on Copyright), 384 (testimony of Harriet F. Filpel, Society of Magazine Writers Society of Magazine Photographers, and Morton David Goldberg); Copyright Law Revision: Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 89th Cong., 1st Sess., 264 (1965)(statement of Leonard Zissu, on Behalf of the Composers & Lyricists Guild of America). Other parties felt that ownership vesting in the employer or hiring party was essential, and further that employers should be deemed authors. See Copyright Law Revision Part 2, supra at 358 (response by Motion Picture Association of America, Inc. to Register's Recommendation to Congress supported intent of Register); Id. at 374 (statement by Melville B. Nimmer).

\textsuperscript{56} See infra notes 58-93 and accompanying text.

\textsuperscript{57} See infra note 91.
A. The Definition of Work for Hire

The work for hire provision is a unique section of the Copyright Laws that does not vest copyright ownership in the creator of the work.\(^58\) Section 26 of the Original Act\(^59\) stated that the employer would be considered the "author" of works by his employee for the purposes of copyright when there were works done for hire.\(^60\) But since the terms "employer," "employee" and "work for hire" were not defined in the statute, courts were required to judicially define the terms.\(^61\)

In 1961, in its first report, the Copyright Office, through the Register of Copyrights, recommended that the revision bill define the phrase "works made for hire" as "works created for an employer by an employee within the regular scope of his employment."\(^62\) This definition recognized that courts had generally excluded commissioned works from the work for hire provision, but because work for hire was an inexact phrase it might be construed to include commissioned works.\(^63\) In response to this new definition, the hiring parties argued that inclusion of the phrase "regular scope of his employment" would serve to create more problems than it solved.\(^64\) The interpretation of the term "regular" as used in this context would be subject to confusion and therefore was too ambiguous.\(^65\) It was further argued that the term "regular" would create problems when people hired in one capacity performed functions

\(^{58}\) The Copyright Act provides generally "copyright in a work protected under this title ... vests initially in the author or authors of the work." 17 U.S.C. § 201(a) (1982).


\(^{63}\) Id. at 86-87.

\(^{64}\) COPYRIGHT LAW REVISION PART 2, supra note 55, at 157 (testimony of Sidney Diamond, London Records). The Motion Picture Association of America, Inc., argued that to change the definition would disrupt the body of law that had developed around the existing phrase "work made for hire" and that was already an area in which there was a great deal of difficulty in determining whether works met the definition. Id. at 359 (testimony of Edward Sargoy of the Copyright Committee of the Motion Picture Association of America, Inc.).

\(^{65}\) Id. at 157.
in capacities outside the "regular scope" of their employment.  

Following the discussion on the 1961 General Revision Report, the Copyright Office prepared a preliminary draft of provisions for a revised copyright law ("Preliminary Draft"). In a footnote, this draft provided a new definition, "A 'work made for hire' [is] 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." Additional debate followed the presentation of the Preliminary Draft.

Strong objections were lodged against this last phrase of the Preliminary Draft definition. Concern was expressed that if this provision remained, parties who used free-lancers would be discouraged from using them or would be forced to put people on payroll in order to ensure that the hiring party had ownership rights. The publishers argued that this would force free-lancers, in industries that predominantly worked on a special commission basis, to give up their preference and become employees.

In response to these and other objections, the Copyright Revision Bill of 1964 once again changed the definition of work for hire to "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."

The Register of Copyright noted,

There are commissioned works, such as operas and serious music, and various works of that sort, that most people would find hard to accept as 'works made for hire.' But it is true, and I think we have to accept the fact, that some works made on special order or commission have been construed by the courts as coming within the ambit of the 'works made for hire' con-

66. Id. at 159-60 (testimony of Joseph Dubin of Universal Pictures Co., Inc.). Limiting work for hire to the "regular scope of employment" would thereby force hiring parties to demand assignment of rights in the instances where an actor wrote lines in the course of filming because that was beyond the regular scope of his employment. Id.

67. COPYRIGHT LAW REVISION PART 3, supra note 55, at iii. The preliminary draft was prepared after discussion in eight meetings by an advisory group of specialists convened by the Register. Id.

68. Id. at 15.

69. COPYRIGHT LAW REVISION PART 3, supra note 55, at iii.

70. COPYRIGHT LAW REVISION, PART 5, 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS. 89th Cong., 1st Sess., 144-45 (1965)[hereinafter COPYRIGHT LAW REVISION PART 5] (statement by Barbara Ringer).


72. Id. See also Id. at 260-61 (testimony by John R. Peterson, American Bar Association).

73. COPYRIGHT LAW REVISION PART 5, supra note 70, at 31 (1964 Revision Bill § 54).
cept under the present law [and therefore should be construed as works made for hire].

In a prepared statement, the Motion Picture Association of America, Inc. ("MPAA") approved the change, stating that the Register's alteration of the definition showed "an appreciation of the practical working problems of the motion picture and other industries" where work for hire was crucial to the growth of the industry. This change allowed specially commissioned works to be considered works for hire, while leaving room for the parties to negotiate. It was thus intended to provide free-lancers, not considered employees, with the rights to retain ownership, and at the same time give the parties commissioning the works the ability to bargain for those rights.

The revision, however, did not satisfy everyone. Authors were concerned about the impact incorporating the phrase "works made on special order or commission" into the definition would have on their copyrights to their work. While not suggesting that authors were improvident, Mr. Karp, of the Authors League of America (the "ALA"), rejected the Register's proposition. Mr. Karp believed that simply because specially commissioned works only met the definition if agreed to by the parties, there was no presumptive advantage to the authors. He stated "authors don't read contracts," and that it was too easy to bury a clause stating that a work was in fact a work for hire in the boilerplate of contracts and the author would unwittingly transfer away his rights. The ALA also argued that many authors would not have the economic power to resist the terms of the contract. The ALA suggested that the

74. Id. at 144-45 (statement by Barbara Ringer). Ms. Ringer noted that because works for hire were excluded from the general guidelines regarding termination of the transfer of copyright ownership, the consequences of the definition became extremely important. Id. See also, Id. at 10 (§ 16, 1964 Revision Bill, Termination of transfers of copyright ownership).
75. Id. at 301.
76. COPYRIGHT LAW REVISION PART 5, supra note 70, at 145.
77. Id. at 147 (testimony by Irwin Karp of Authors League of America).
78. Id.
79. Id.
80. Id. at 147. This concern persisted. In 1982, during hearings on a bill proposing to amend the Revised Act's work for hire provision, Mr. Karp reiterated the problems he saw arising from the current definition. Mr. Karp voiced an even stronger objection to the presumption that § 101(2) gives free-lancers producing commissioned works the ability to negotiate copyright ownership. Instead, he stated, the effect of this provision has been that publishers say "as a condition for your selling us and our accepting the first serial right... you must also tie in all your other rights." Definition of Work Made for Hire in The Copyright Act of 1976: Hearing before the Committee on the Judiciary, United States Senate, on S. 2044, 97th Cong., 2nd Sess. 10 (1982). Numerous contracts were also presented as evidence of the alleged misuse of the work for hire provision. Id. at 24-33. S. 2044 was not ratified.
81. COPYRIGHT LAW REVISION PART 5, supra note 70, at 239.
work for hire provision should expressly state that work made on special order or commission is excluded from the definition. This would still allow parties to negotiate, but there would be no statutory presumption that ownership would transfer to the hiring party.

Witnesses representing screenwriters and composers urged that instead of the work for hire definition granting authorship to employers, ownership should be determined in a method similar to the "shop right" doctrine used in patent law. Application of the "shop right" doctrine would allow the employee to retain all copyright ownership in the work. The employer, however, would have "the right to use the employee's work to the extent needed for purposes of his regular business," and the employee's use could not compete with that of the employer. This would protect the employees or commissioned artists from losing all rights to their work.

The Senate Committee on the Judiciary, to whom all the revision bills were submitted, weighed the various arguments, and while recognizing that the bargaining power of screenwriters was at stake, determined that "the practical benefits that individual authors would receive [by using the "shop right" doctrine] are highly conjectural." To exchange the longstanding policy that initial ownership rights vested in the employer for the shop right doctrine, would create uncertainties and raise other issues of dispute. In an effort to reconcile the conflicts between the needs of the hiring parties and recognizing that certain specially commissioned works could be considered works for hire, the 1965 bill changed the definition of a "work made for hire" to:

(1) a work prepared by an employee within the scope of his 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, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

82. Id.
84. Id.
85. The employer is considered the author of the employee's work, and therefore the employee has no rights to the work she has produced. 17 U.S.C. § 201(b) (1982).
86. Id.
87. COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, 94th Cong., 2d Sess., 121 (report by Mr. Kastenmeier, from the Committee on the Judiciary).
The committee responded to the objections and concerns about the broad inclusion of “specially ordered or commissioned” works, and determined that the four special cases specifically mentioned were more apt to be treated as work for hire due to the process of creating the works. In the cases of translations, maps, illustrations and encyclopedias, and certain portions of motion pictures, the free-lancers work at the direction of the hiring party, and because the hiring party bears all the risk, to exclude these areas from the work for hire provision would have been unfair. The committee did clearly state “other works made on special order or commission would not come within the definition.” Whether this was in reference to clause one or two of the definition is the question that has plagued courts working to determine the scope of the work for hire definition.

Before the enactment of the Revised Act, the second clause of the work made for hire definition was expanded to include five more types of work and the current definition reads:

(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.

The final framing of the work for hire provision was intended to draw a statutory line between works written on special order or commission, that should not be considered works for hire, and those works that should. The specific categories enumerated in Section 101(2), were the categories of commissioned works that could be considered works for hire in certain instances.

89. Id. at 67.
90. Id.
91. Id. at 68.
93. COPYRIGHT LAW REVISION, H.R. REP. No. 94-1476, 94th Cong., 2d Sess., 121 (report by Mr. Kastenmeier, from the Committee on Judiciary).
94. Id.
IV. JUDICIAL INTERPRETATION OF THE WORK FOR HIRE
DEFINITION OF THE REVISED ACT

After the Revised Act took effect in 1978, courts began to interpret the various provisions of copyright ownership. With the new definition of works for hire, many questions of copyright were no longer disputed. However, while the Revised Act provided that certain commissioned works were deemed works for hire only if there was written agreement by the parties, it still remained unclear how other commissioned works were to be considered. Three cases decided after the enactment of the Revised Act illustrate the split between the circuits as to how commissioned works, not enumerated in the Act, have been designated when determining copyright ownership.

A. Aldon Accessories Ltd. v. Spiegel Inc. - The Second Circuit

In Aldon Accessories Ltd. v. Spiegel Inc., the Second Circuit stated that when the commissioner of a work “actively supervised and directed the creation of [the work]” an employer/employee relationship would be supported even when the party producing the work did not fall into the regular employee category. The court stated that it could find no indication in the legislative history that Section 101(2) was meant to refer to contractors who were actually sufficiently supervised and directed by the hiring party to be considered “employee” acting within “the scope of their employment.” The court stated that Section 101(2) only framed the issue and therefore independent contractors were governed accordingly: a free-lance party could be “so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship exists.” By adopting this view, the Second Circuit stated that Section 101(1) of the Revised Act was not intended to apply only to “traditional” employees. Based on this interpretation, the court concluded that the jury properly found an employer/employee

96. 738 F.2d 548 (2d Cir.) cert. denied, 105 S.Ct 387 (1984). In this case the Second Circuit was called on to settle a dispute between a third party, Spiegel, and Aldon Accessories, the commissioning party. Id. Aldon Accessories had commissioned miniature unicorns to be produced by a Japanese company in Japan. Id. at 549. Aldon Accessories then argued that similar unicorns being sold through Speigel catalogs infringed on Aldon’s copyright. Id. Speigel responded that Aldon was not the copyright owner under the work for hire provision because the unicorns did not fit under Section 101, clause 2. Id. at 551.
98. Id. at 552.
99. Id.
100. Id.
relationship based on the actual amount of supervision and direction asserted by the employer and thus ownership vested in the commissioning party.101

The Second Circuit had ruled similarly before and after the legislative compromise regarding works for hire.102 Based on the Original Act, the Second Circuit developed a presumption that the buyer was intended to hold the copyright.103 While Congress' definition delineated specific categories of commissioned works to be considered works for hire, the Second Circuit expanded the presumption that the buyer has ownership to work for hire situations regardless of the employee/independent contractor status.104 Because of this interpretation, and the fact that no mention was made in the legislation striking down the Second Circuit's treatment of commissioned works, the confusion in construing the work for hire provision has been perpetuated.105

The Second Circuit's approach to commissioned works that fall outside of the categories enumerated in Section 101(2), has been assessed in different ways. It has been stated that the Aldon Accessories holding—that actual control is the basis for determining the parties' status—fills a "vacuum left by congressional silence on the treatment of most commissioned works."106 However, the decision also serves to break down the distinction between employees and independent contractors. Through the course of producing the work, if the employer asserts enough actual control the employer will then be considered the author for purposes of copyright.107

The Aldon Accessories test, while potentially justifiable based on the

101. Aldon Accessories, 738 F.2d at 553. "There was evidence that [the commissioning party] actively supervised and directed the creation of . . . [the] statuettes. While he did not physically wield the sketching pen and sculpting tools, he stood over the artists and artisans at critical stages of the process, telling them exactly what to do. He was, in a very real sense the artistic creator." Id.


facts of the case,\textsuperscript{108} has been followed in situations where the actual control test has become more of a right to control test.\textsuperscript{109} The Fourth and Seventh Circuits have altered the test by applying it in cases with less compelling evidence that the hiring party has asserted actual control.\textsuperscript{110}

\textbf{B. Easter Seal Society v. Playboy - The Fifth Circuit}

In 1987, the Fifth Circuit ruled in \textit{Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises}\textsuperscript{111} that the Revised Act greatly restricted the scope of the work for hire doctrine.\textsuperscript{112} To define the scope of work for hire, the \textit{Easter Seal} court held that "a work is 'made for hire' within the meaning of the Copyright Act of 1976 if and only if the seller is an employee within the meaning of agency law, or the buyer and seller comply with the requirements of Section 101(2)."\textsuperscript{113} To reach this decision, the court examined the case law prior to and following the Revised Act.\textsuperscript{114} The court recognized that there was a presumption that whenever authorship services were purchased, the seller was considered the employee and the buyer was considered the author according to the statute.\textsuperscript{115} After examining the Revised Act, the Fifth Circuit rejected that presumption and said for the purposes of copyright ownership, "A 'buyer' is the putative legal employer claiming ownership under the 'work for hire' doctrine. Similarly, a 'seller' is the person against whom a buyer claims, whether an employee or an independent contractor."\textsuperscript{116} By rejecting the presumption, the court then offered what it considered the literal interpretation of the work for hire definition.\textsuperscript{117} Following the literal terms of the Revised Act, ownership

\begin{itemize}
\item \textsuperscript{108} See supra note 95.
\item \textsuperscript{109} See Evans Newton Inc. v. Chicago Sys. Software, 793 F.2d 889 (7th Cir.), cert. denied, 479 U.S. 949 (1986).
\item \textsuperscript{111} 815 F.2d 323 (5th Cir. 1987). The court in this case was called on to settle a dispute between the hiring party, Easter Seal, and Playboy Enterprises, who had obtained and used videotape that was initially used in the National Easter Seal Telethon. \textit{Id.} at 324. Because entertainer Ronnie Kole, representing Easter Seal, had participated in the production process, they argued that they were owners of the videotape under the work for hire doctrine, not the television station that had produced the tape and then submitted it to Playboy. \textit{Id.} at 324-25.
\item \textsuperscript{112} \textit{Easter Seal}, 815 F.2d at 324.
\item \textsuperscript{113} \textit{Id.} at 334-35.
\item \textsuperscript{114} \textit{Id.} at 326-27.
\item \textsuperscript{115} \textit{Id.} at 327.
\item \textsuperscript{116} \textit{Id.} at 329.
\item \textsuperscript{117} \textit{Easter Seal}, 815 F.2d at 334.
\end{itemize}
would only vest in the buyer if the seller is an employee under the terms of agency law, \(^{118}\) therefore the presumption that all sellers were employees was no longer viable. The court found its interpretation consistent with the intent of the statute since the “scope of employment” provision of section 101 is “virtually a term of art in agency law.” \(^{119}\)

_Easter Seal_ is viewed as the seminal case establishing the “literal interpretation” of the work for hire provision. \(^{120}\) Authority on copyright has recognized, as the Fifth Circuit did, that the presence of the phrase “scope of employment” showed the drafters’ intent to follow the general law of agency when defining the term “employee.” \(^{121}\) However, as the Fifth Circuit noted, the literal interpretation does have flaws. The court felt that by using this definition, they may have veered too far from the Original Act’s use of the phrase. \(^{122}\) However, authority has stated that the legislative history prior to the Revised Act supports the view that commissioned works were not to be treated in the same manner as works created by employees. \(^{123}\) Therefore a clear distinction was intended.

The critics have also argued that the literal interpretation adopted in _Easter Seal_ is an extremist view that will keep employers from hiring outside contractors. \(^{124}\) The concern is that employers will use their employees, over whose works they are virtually guaranteed copyright ownership rights, rather than using non-employees with whom there are no guarantees. \(^{125}\) Despite these concerns the “literal interpretation” approach has been supported by the courts. \(^{126}\)

---

\(^{118}\) _Id._ at 335.

\(^{119}\) _Id._. The court noted that “[a]lthough there is no general federal agency law and adopting state agency law would not give copyright law the requisite national uniformity, federal courts can turn to early copyright cases before the Yardley rule, [which presumed to make copyright “employees” out of independent contractors,] and to the general principles embodied in the Restatement of Agency Law.” _Id._


\(^{122}\) _Easter Seal_, 815 F.2d at 335 (“We recognize that this interpretation is a radical break from the ‘work for hire’ doctrine under the 1909 Act, but there are good reasons for this break . . . .”).


\(^{124}\) See _supra_ note 120, at 394.

\(^{125}\) Only if the parties expressly agree otherwise will ownership vest in the employee and not the employer according to § 201(b). 17 U.S.C. § 201(b) (1982).

\(^{126}\) See, _e.g._, _Reid II_, 846 F.2d at 1494.
C. Dumas v. Gommerman - The Ninth Circuit

In January 1989, the Ninth Circuit construed the work for hire provision of Section 101 for the first time.\(^\text{127}\) In *Dumas v. Gommerman*,\(^\text{128}\) the Ninth Circuit concluded that "only works produced by formal, salaried employees are covered by 17 U.S.C. Section 101(1). Works by independent contractors are to be considered works for hire only when the requirements of 17 U.S.C. Section 101(2) are satisfied."\(^\text{129}\) In the course of reaching this conclusion, the court noted its approval of the Fifth Circuit's interpretation of work for hire in *Easter Seal*, which followed the common law agency theory.\(^\text{130}\) However, the court concluded that the application of an agency law reading of employee "indirectly includes the rejected 'supervision and control' test [used by the Second Circuit], because agency law considers relevant the extent of control which . . . the master may exercise over the details of the work."\(^\text{131}\) The Ninth Circuit reached its own conclusion after reviewing the legislative process and determining that the drafters did not intend to follow the agency law definition.\(^\text{132}\) The *Dumas* court concluded that because the work for hire provision implicitly destroyed the artist's right to terminate the transfer of his work, the drafters felt it was necessary to have a bright line between employees and independent contractors to prevent mistakes over the status of the contracted work.\(^\text{133}\) It followed that only formal salaried employees should be considered employees according to the work for hire provision.\(^\text{134}\)

The court believed this interpretation gave effect to the intent behind the Revised Act and would prevent disputes between the authors of the works and the parties who commissioned the works.\(^\text{135}\) Following the agency law theory, disputes initially would arise regarding an author's status as an employee or as an independent contractor, and then proceed from that point.

At the time the Ninth Circuit ruled in *Dumas*, there was support for

\(^{127}\) Dumas v. Gommerman, 865 F.2d 1093, 1094 (9th Cir. 1989)(*"Dumas"*).

\(^{128}\) 865 F.2d 1093 (9th Cir. 1989). In this case, Jennifer Dumas, the widow and successor in interest to copyrights held by Patrick Nagel, brought an action against Stefan Gommerman, the owner of a Los Angeles art gallery. *Id.* at 1094. Ms. Dumas contended that Patrick Nagel was an independent contractor when he produced the works for a client, who then sold the copyrights to Gommerman. *Id.*

\(^{129}\) *Id.* at 1105

\(^{130}\) *Id.* at 1103.

\(^{131}\) *Dumas*, 865 F.2d at 1104 (citing Restatement (Second) of Agency § 220(2) (1958)).

\(^{132}\) *Id.* at 1104.

\(^{133}\) *Id.*

\(^{134}\) *Id.* at 1104.

\(^{135}\) *Id.* at 1104-05.
the interpretation that only salaried employees were to be considered under Section 101(1). One commentator had stated that only salaried, or likely situated, employees should be considered under Section 101(1), regardless of how closely an independent contractor's work was supervised and controlled.\footnote{136} It was also noted that this interpretation is most consistent with the formal definition of employee, despite the presence of the term "scope of employment."\footnote{137} However, in 1985, in response to a Senate bill suggesting changes to the work for hire provision of the Revised Act, the Copyright Office succinctly stated that "employee" was not intended to mean regular or salaried employees.\footnote{138} The Copyright Office has since changed its position and adopted a "purist position" which supports a clear distinction between the employee and the independent contractor.\footnote{139}

The 	extit{Dumas} interpretation currently stands as the most favorable interpretation of "employee" for free-lancers, and thus is the position supported by numerous organizations supporting creators' rights.\footnote{140}

\section*{V. Community for Creative Non-Violence v. Reid}

\subsection*{A. The District Court}

In February 1987, CCNV and Reid argued their opposing positions on work for hire in the United States District Court in the District of Columbia.\footnote{141} The district court recognized that ownership of the copyright turned on the statutory identification of "author," which in turn depended on whether the piece was considered a work for hire.\footnote{142} While Section 101(1) states that works meet the definition only when they are produced by employees within the scope of their employment, the district court declined to follow the master-servant relationship found in the common law of agency, and instead interpreted employee more broadly.\footnote{143} Thus, if the putative employer was either the "motivating force" or "possessed the right to direct and supervise the work," the

\begin{footnotes}
\item[136] Easter Seal, 846 F.2d at 1492 (citing W. PATRY, LATMAN'S THE COPYRIGHT LAW 122 (6th ed. 1986)).
\item[139] Id. at 6.
\item[141] Reid I, 652 F. Supp. 1453.
\item[142] Id. at 1456.
\item[143] Id.
\end{footnotes}
commissioning party would be considered the owner of the copyright.\textsuperscript{144} The district court found support for this position in \textit{Aldon Accessories} and a Fifth Circuit decision that followed a variation of the "actual control" test.\textsuperscript{145}

Using this expansive definition of work for hire, the court then determined that plaintiff CCNV was the motivating force behind the work and additionally that CCNV "directed enough of [Reid's] effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs."\textsuperscript{146} Therefore, Reid was considered an employee "regardless of whether he [was] paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if [he works] as an accommodation with no compensation at all."\textsuperscript{147} Thus, CCNV was considered the exclusive owner of the copyright in "Third World America" under the definition of work for hire.\textsuperscript{148} Reid appealed.\textsuperscript{149}

\textbf{B. The Appellate Court}

The appellate court rejected the district court's broad reading of the work for hire provision, and ruled consistently with the Fifth Circuit in \textit{Easter Seal} on the issue of Reid's status as either an employee or an independent contractor.\textsuperscript{150} The court examined rulings from the Second and Seventh Circuits which followed the actual control test, and variations thereof, for determining the status of employee.\textsuperscript{151} The appellate court noted that \textit{Aldon Accessories} examined Section 101(1) and determined that it was intended to follow case law prior to the enactment of the Revised Act.\textsuperscript{152} On that premise the Second Circuit ruled that independent contractors should be viewed as employees for the purposes of work for hire if they were "sufficiently supervised and directed by the hiring party."\textsuperscript{153} The appellate court in \textit{Reid} determined that while the facts of \textit{Aldon Accessories} compelled the use of the "actual control" test, it had the potential to become a "right to control" test.\textsuperscript{154} The appellate

\begin{itemize}
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} Reid \textit{I}, 652 F. Supp. at 1456.
  \item \textsuperscript{146} \textit{Id.}
  \item \textsuperscript{147} \textit{Id.} (citing 1 Nimmer on Copyright, § 5:03[B][1][a] (1985)).
  \item \textsuperscript{148} \textit{Id.} at 1457.
  \item \textsuperscript{149} Reid \textit{II}, 846 F.2d 1485.
  \item \textsuperscript{150} \textit{Id.} at 1487.
  \item \textsuperscript{151} See, supra notes 95-109.
  \item \textsuperscript{152} Reid \textit{II}, 846 F.2d at 1490.
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} Reid \textit{II}, 846 F.2d at 1491. See \textit{Easter Seal}, 815 F.2d at 334.
\end{itemize}
court cited Evans v. Newton,155 where the Seventh Circuit attempted to follow the actual control test.156 In Evans, the court did not have the substantial factual showing of supervision and control that the Aldon Accessories court had when it applied the actual control test.157 The appellate court in Reid further noted that the district court below also had combined the actual control and the right to control tests when it determined that Reid was considered an employee.158

Not satisfied with this multi-test interpretation, the appellate court turned to the "literal interpretation."159 The court concluded that the ruling by the Fifth Circuit in Easter Seal was the most consistent with the intent of the Revised Act.160 Therefore, under Section 101(1), a party was considered an employee only if he or she met the agency law standard.161 Consequently, the work of an independent contractor was a work for hire only if it fell into one of the enumerated categories in Section 101(2), and the parties expressly agreed to sign a written instrument consistent with that intent.162

Following the literal interpretation approach to the work for hire definition, the court determined that the sculpture "Third World America" did not qualify as a work made for hire.163 The appellate court pointed out that Reid was a fine artist who donated his services for this one occasion and all the work was done at his studios by assistants that he personally hired.164 Additionally, the court stated that CCNV was not in the regular business of creating sculptures.165 Based on these facts, Reid could not be considered an employee under common law agency theory and, therefore, he was considered an independent contractor. Thus copyright ownership to his work did not transfer to CCNV under the work for hire provision.166 CCNV appealed to the Supreme

155. 793 F.2d 889 (7th Cir.), cert. denied, 479 U.S. 949 (1986).
156. Reid II, 846 F.2d at 1491.
157. Easter Seal, 815 F.2d at 334; See Evans v. Newton, 793 F.2d at 892-93 (facts of the case).
158. Reid II, 846 F.2d at 1493.
159. Id. at 1492.
160. Id. at 1494.
161. Id.
162. Id.
163. Reid II, 846 F.2d at 1494.
164. Id. at 1494 n.11.
165. Id.
166. Id. at 1494. While the appellate court ruled that CCNV was not the author, they did not conclude that Reid was sole owner of the copyright in "Third World America." The issue of joint ownership was remanded to the district court for a ruling consistent with the appellate court's holding. Id. at 1499.
C. The Supreme Court

In June 1989, an unanimous Supreme Court handed down the ruling which was intended to "resolve a conflict among the Courts of Appeals over the proper construction of the 'work made for hire' provision of the [Revised] Act." The Court recognized that the interpretation of the work for hire definition has a great impact on free-lance creators and for the industries commissioning their works. Not only does the classification of a work determine its initial ownership, but special provisions to work for hire have also been established with regard to the copyright's duration, the owners' renewal rights, termination rights and the right to import goods bearing the copyright. Based on its vast effect, the Supreme Court welcomed and received numerous amicus briefs supporting the opposing positions.

Dispositive to the above considerations concerning ownership is the initial determination that a work is, in fact, a work for hire. To determine the meaning of "employee" and "scope of employment," the Court looked at the existing interpretations.

The first interpretation examined "holds that a work is prepared by an employee whenever the hiring party retains the right to control the product." The Supreme Court determined that this first interpretation distorted the intended meaning of Section 101(2). This interpretation would allow any work that is specially ordered or commissioned to become a work for hire if it is subject to the supervision and control of the hiring party. The Supreme Court ruled that this ignored the dichotomy that Congress expressly established between Section 101(1) and Section 101(2), by allowing works that should reach work for hire status through the enumerations in prong two, plus a signed agreement, to be determined works for hire under prong one.

The second interpretation was the "actual control" test discussed in

Aldon Accessories. This test allowed for works by independent contractors that could fall into Section 101(2) if there was a signed agreement, additionally to be considered works for hire if the commissioning party exerted a great deal of control through the process of creating the work.\textsuperscript{175} The Court could not find "statutory support for an additional dichotomy between commissioned works that are actually controlled and supervised by the hiring party and those that are not."\textsuperscript{176} It was clear, according to the Court, that through the entire process of negotiating and compromising to reach the current definition of work for hire, it was always the intent of the parties that "works by employees and commissioned works by independent contractors [were] separate entities."\textsuperscript{177} On that basis, the "actual control" test, which blurred the line between employees and independent contractors, could not be supported by the language or structure of Section 101.\textsuperscript{178} The appellate court in Reid had noted that the first and second interpretations were problematic because they were easily interchangeable.\textsuperscript{179}

The Court then determined that the statutory language of Section 101 supported the proposition that "classification of a particular hired party should be made with reference to agency law."\textsuperscript{180} This was the "literal interpretation" adopted in Easter Seal.\textsuperscript{181} Recognizing that statutory terms alone cannot show their intended meaning, the court looked to the negotiations that had occurred in reaching the present wording to determine how the clause should be read.\textsuperscript{182} Based on the 1965 compromise, the Court determined that, in response to concerns of parties on both sides of the issue, Congress still intended to "provide two mutually exclusive ways for works to acquire work for hire status: one for employ-

\textsuperscript{175} The respondent's brief also noted that a "pervasive result" could occur with the application of the "actual control" test:

Under the [Aldon Accessories actual control] test a perverse result would be reached in the common situation in which a traditional, salaried employee works on a copyrightable project without any specific direction and supervision by his or her employer. Using the Aldon [Accessories] test, such a work created without the employer's direction and supervision, even if created within the scope of employment, would not be deemed a work for hire in the absence of actual direction and supervision. Works thus created would not be owned by the employer but by the employee.

Brief for Respondent, No. 88-293, at 21.

\textsuperscript{176} Reid III, — U.S. —, 109 S.Ct at 2174.

\textsuperscript{177} Id.

\textsuperscript{178} Id.

\textsuperscript{179} See supra notes 153-58 and accompanying text.

\textsuperscript{180} Reid III, — U.S. —, 109 S.Ct. at 2174.

\textsuperscript{181} See supra notes 110-25 and accompanying text.

\textsuperscript{182} See supra notes 48-94 and accompanying text.
ees and the other for independent contractors."\textsuperscript{183} Furthermore, that since specific areas of works were enumerated in clause two of the definition, only those enumerated works were to be "accorded work for hire status," when created by independent contractors.\textsuperscript{184}

Based on that conclusion, the Court determined:

Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions. To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor.\textsuperscript{185}

Using the common law of agency test, the Court examined a number of factors. The factors included: the hiring parties right to control the project; the skills required of the free-lancer; the source of the tools used to create the work; the location where the work was done; the duration of the working relationship between the parties; the hiring parties right to assign additional projects and the method of payment.\textsuperscript{186} Using these factors, the Supreme Court then turned to Reid's status in this instance. The Court weighed the following facts: CCNV asserted control over the project; Reid was practicing a skilled occupation and supplying his own tools; Reid did the work in his own studio; Reid was hired especially for this project and only for this project; Reid was only retained for two months and payment was dependent on completion of the statue.\textsuperscript{187} While the court recognized that CCNV had directed enough of Reid's work to ensure that the end product met their requirements, that factor is not dispositive under the agency test.\textsuperscript{188} Weighing all these factors, the Court concluded that all circumstances, other than the assertion of control, "weigh[ed] heavily against finding an employment relationship."\textsuperscript{189}

Therefore, Reid could not be considered an employee of CCNV.\textsuperscript{190}

\textsuperscript{183} Reid III, — U.S. —, 109 S.Ct. at 2176.
\textsuperscript{184} Id. at 2176-77.
\textsuperscript{185} Id. at 2178.
\textsuperscript{186} Reid III, — U.S. —, 109 S.Ct. 2178-79.
\textsuperscript{187} Id. at 2179.
\textsuperscript{188} Id. (no one of these factors is determinative).
\textsuperscript{189} Id.
\textsuperscript{190} Id. Though the Court determined the CCNV was not the author of the sculpture according to the work for hire provision, there still remained the issue of joint ownership. This still remained for the district court to rule on consistent with the appellate court's order. Id. at 2180.
While the Supreme Court cited *Dumas* in the course of its opinion, it did not address the proposition that only formal, salaried employees ought to be considered employees under Section 101(1). In its *amicus curiae* brief to the court, the Copyright Office, through the Solicitor General, recommended that the Court adopt the interpretation limiting "employee" to formal salaried employees.\(^{191}\) Reid also urged the Court to recognize the *Dumas* test and enumerated the numerous opinions that supported this position.\(^{192}\) The Court did acknowledge that the drafters intended clear distinctions between employees and independent contractors and that Congress’ paramount goal when enacting the Revised Act was to enhance predictability and certainty of copyright ownership.\(^{193}\) However, the Court was not willing to go beyond the common law agency theory.

VI. IS THE DISPUTE RESOLVED?

While the Supreme Court recognized that no federal law exists governing agency theory, the Court decided the agency law interpretation was the most consistent with the statute and would effect the purpose of the Revised Act. How this interpretation will actually impact parties who are not formal salaried employees and whether this interpretation will be accepted remains to be seen.

The decision is considered a victory for free-lance artists.\(^{194}\) Now if a photographer does not meet the requisites of common law agency theory, he will retain copyright ownership of his products. If the software

---


194. Ossola, *High Court Decides Who “Works for Hire.”* Legal Times, June 12, 1989, at 19 (Charles Ossola filed an amicus brief in the *Reid* case on behalf of the American Society of Magazine Photographers and the Copyright Justice Coalition, a group of 50 organizations which represent free-lance creators).
creator brings his experience, tools and only agrees to a single project, he can argue that he is not an employee under common law agency theory. Further, if an architect drafts a building for a contractor and simply turns over the prints, he will not lose copyright to his design under the work for hire provision. However, there is still no concrete rule for freelancers. The free-lancers' victory stems from the fact that under agency law their conduct, skill and method of working will weigh into the test to determine whether they are employees. Under the "actual control" test or the "right to control" test the primary determination of the free-lancer's status was based on the action of the hiring party. The agency law theory allows additional considerations to be balanced when the creator's status is being determined. However, there is still room for uncertainty.

Because of the continued uncertainty that follows the agency law theory for defining employee, the Supreme Court clearly failed to go far enough in its decision. The Court could have ended litigation in these areas by following the position adopted in Dumas. The Dumas position is supported by many commentators and by new legislation before the Senate. Since the enactment of the 1976 Copyright Law, a number of bills have been proposed to alter the definition of works for hire. The decision in Reid did not end the efforts to amend the work for hire provision. On June 22, 1989, just two weeks after the Supreme Court held that agency law determined whether a party was an employee under Section 101(1), a bill proposing to amend the copyright law regarding work made for hire was submitted to the Senate. The intent of Senate Bill 1253, in pertinent part, is to limit the definition of "employee" in Section 101(1) to apply only to formal salaried employees. Senator Cochran intro-

195. See supra note 186.
196. See supra note 192.
197. See Note, The Works Made for Hire Doctrine Under the Copyright Act of 1976 — A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc., 20 U.S.F. L. REV. 649, 673 n.121 (discussion of the various bills that have been proposed to redefine the work for hire provision); e.g., DEFINITION OF WORK MADE FOR HIRE IN THE COPYRIGHT ACT OF 1976, S. 2044, 1986 Copyright L. Rep. (CCH) ¶ 20,366.
198. "That section 101 of title 17, United States Code, is amended - by amending clause (1) and the first sentence of clause (2) of the definition, "work made for hire" to read as follows:

(1) a work, other than a specially ordered or commissioned work, prepared by a formal salaried 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 . . . if, with respect to each such work, the parties expressly agree in a written instrument signed by them before the commencement of the work, that the work shall be considered a work made for hire.

duced this bill because he believed that the work for hire provision should be modified to “assure that work made for hire is confined to the limits that Congress intended when it enacted the 1976 amendments.”

As with the hearings prior to the enactment of the Revised Act, various interested parties continue to present their positions on the work for hire provisions. Unlike the prior bills seeking changes in the work for hire provision, testimony regarding the most recent bill has occurred subsequent to the Supreme Court interpretation of the pertinent phrases. Recognizing that “employee” is now defined under common law agency theory, some parties are not convinced that this is a satisfactory interpretation.

The Copyright Office has reasserted its position that only formal salaried employees should be considered under Section 101(1). They consider this a more suitable interpretation than the common law agency theory which does not provide certainty in business relationships. Instead of allowing ownership determinations to be made after the fact, based on balancing the factors under the common law agency status for the creator, the formal salaried definition ensures that a determination as to copyright ownership is made upon commencement of the working relationship. The formal salaried definition is also supported by other organizations on the grounds that a clear, objective definition is a necessary step towards achieving a fair balance between the rights of creators and the hiring parties.

Publishers and other hiring parties oppose any changes in the wording of Section 101(1). Two reasons are asserted for rejecting the inclusion of “formal salaried” into the work for hire definition. First, it is argued that because the Supreme Court unanimously voted to support the common law agency definition, the Court rejected the proposition

---

200. See infra notes 201-09.
202. Id.
203. Id. at 15.
206. Id. at 27-28.
that Section 101(1) be interpreted only to include formal, salaried employees. Second, it is argued that the impact of the Supreme Court's interpretation has not yet been assessed. Until the businesses using free-lancers have determined the effect of the Supreme Court ruling, it is premature to change legislation.

At present there has been no further decision on this proposed legislation. However, Congress has rejected earlier bill submissions proposing changes to the work for hire provision. Additionally, examining the extensive process that preceeded the Revised Act, it is unlikely that Congress will hastily change the wording of the work for hire provision, especially since the Supreme Court has so recently provided its interpretation.

VII. CONCLUSION

No legislation will guarantee a balance in bargaining power that in turn ensures an artist's, writer's or software creator's right to the copyright in the product he or she creates. However, while the agency law theory provides more certainty for a creator than the actual control or right to control tests, there is still room for disputes to arise. If the goal of the Supreme Court was to follow the intent of Congress there is sufficient support to show that the Court should have followed the ruling in Dumas. Instead, the Court felt that it was strictly abiding by the terms of the Revised Act by following common law agency theory.

With the agency law definition of work for hire, the Court has resolved the dispute between the circuits. But as organizations continue to present their views, it is clear that the current definition is not unanimously accepted. Now we must wait to see if a new area of litigation develops as parties argue whether the creators are common law employees or independent contractors.

Marita Covarrubias

207. Id.
208. Id. at 28.
209. Testimony of R. Jack Fishman, Publisher, Before the Subcommittee on Patents, Copyrights & Trademarks of the Judiciary Committee of the United States Senate, 101st Cong., 1st Sess., Introduction.
210. See supra note 197.