Complicating the Copyright Law's "Work Made for Hire Provisions:" Community for Creative Non-violence v. Reid

Douglas W. Hammond
SUPREME COURT RAMIFICATIONS

COMPLICATING THE COPYRIGHT LAW'S "WORK MADE FOR HIRE PROVISIONS": COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID

Congress' power to enact copyright legislation is derived from the copyright clause of the United States Constitution.¹ The copy-


The copyright clause's primary purpose is to secure the "general benefits derived by the public from the labors of authors." Fox Film Corp., 286 U.S. at 127. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Justice Stewart, writing for the Court, enumerated the purpose of copyright as a balance of competing claims upon the public interest:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair
right clause establishes the general principle that only an author should be afforded copyright protection. In 1903, the United

return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. (citations omitted).

Id. (emphasis added). See also Sony Corp. of America, 464 U.S. at 477 (Blackmun, J., dissenting) (monopoly created by copyright rewards author in order to benefit the public (citing Twentieth Century Music Corp., 422 U.S. at 156 (1975)); Fox Film Corp. 286 U.S. at 127-28 (1932)); Red Baron - Franklin Park, Inc. v. Taito Corp., No. 88-0156-A (E.D. Va. July 18, 1989) (LEXIS, Genfed library, Dist file) (limited grant of exclusive right to authors is means by which public purpose is achieved); H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909). In the Report accompanying the 1909 Copyright Act revision, the Judiciary Committee of the House of Representatives explained that Congress' enactment of copyright laws under the copyright clause of the Constitution is founded "upon the ground that the welfare of the public will be served . . . ." Id. See also The Federalist No. 43, at 309 (J. Madison) (B. Wright ed. 1961). Although the debates on the copyright clause at the Constitutional Convention were limited, the clause's main purpose was described by James Madison when he wrote: "The copyright of authors has been solemnly adjudged . . . to be a right of common law . . . . Id. The public good fully coincides . . . . with the claims of individuals." Id.

The protection of federal copyright legislation extends only to works that qualify as "writings" pursuant to the copyright clause. See U.S. Const. art. I, § 8, cl. 8 ("to their respective Writings"); 1 M. Nimmer, supra at § 1.08 [A], at 1-44 (only "writings" may claim protection of copyright laws). See generally Note, Copyright - Study of the Term "Writings" in the Copyright Clause of the Constitution, 31 N.Y.U. L. REV. 1263 passim (1956) (discussion of term "writings" within meaning of copyright clause). The word "writings" has been liberally construed by the courts. See Goldstein v. California, 412 U.S. 546, 561 (1973) ("writings" construed to reflect broad arena of constitutional principles); The Trademark Cases, 100 U.S. 82, 94 (1879) ("writings" construed as "the fruits of intellectual labor embodied in the form of books, prints, engravings and the like"); Reiss v. National Quotation Bureau, 276 F. 717, 719 (S.D.N.Y. 1921) (Judge Learned Hand noted Congress' power includes the "ingenuity [that] men should devise" in the future).

* See U.S. Const. art. I, § 8, cl. 8 ("securing for limited "Times to Authors . . . ."); 1 M. Nimmer, supra note 1, § 1.06 [A], at 1-57 (under copyright clause, only "authors" entitled to copyright protection). Courts construing the term "author" have deemed originality to be the determinative factor in deciding whether the author's work is afforded copyright protection. See Goldstein, 412 U.S. at 561 ("author," within constitutional sense, construed to mean "originator"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) ("he to whom anything owes its origin"); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951) (copyrighted work owes its origin to author); A. Latman, supra note 1, at 17 (author is "one who [independently] creates a work without copying"). Generally, only a trace of originality is needed. See Weissman v. Freeman, 868 F.2d 1313, 1321 (2d Cir. 1989) (only "unmistakable dash of originality" need be shown); Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988) (originality requirement is minimal); A. Latman, supra note 1, at 23 (minimal amount of creative effort is required). Derivative works, however, must have substantial originality. See Sherry Mfg. Co. v. Towel King of Fla., Inc., 753 F.2d 1565, 1568 (11th Cir. 1985) ("derivative work must contain some substantial, and not merely trivial originality"); Eden Toys v. Floreelee Undergarment Co., 697 F.2d 27, 34 (2d Cir. 1982) ("standard for sufficient originality [in derivative works] is whether work contains 'some substantial, not merely trivial, originality.' " (quoting L. Batlin & Sons, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir.), cert. denied, 429 U.S. 857 (1976))); Donald v. Zack Meyer's T.V. Sales & Serv., 426 F.2d 1027, 1030 (5th Cir. 1970), (same), cert. denied, 400 U.S. 992 (1971).
States Supreme Court implicitly recognized an exception to the general rule that if a work is made for hire, the creator's employer is deemed the author and is thereby entitled to copyright protection.

The Copyright Act of 1909 codified this exception as the "works made for hire" doctrine. The legislative history of the works made for hire provisions in the 1909 Act indicates an intent to distinguish between the doctrine's treatment of employees and independent contractors. Nevertheless, courts construing these provisions extended the earlier common law rule which presumed

---

8 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248 (1903). Although ownership of copyrights was not a major issue in Bleistein, the case is deemed to be the origin of the "work for hire" doctrine. Id. Referring to the ownership of circus advertisement designs the Court stated: "[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." Id. See Murray v. Gelderman, 566 F.2d 1307, 1309 (5th Cir. 1978) ("work for hire" doctrine was first recognized by Supreme Court in Bleistein); Brattleboro Publishing Co. v. Winnill Publishing Corp., 369 F.2d 565, 567 (1966) ("so-called 'works for hire' doctrine recognized" in Bleistein); Simon, Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?, 9 J.C. & U.L. 485, 487 (1982-83) (cases and commentators agree that Bleistein is origin of "work for hire" doctrine); Comment, 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, 649 (1986) (Bleistein is seminal case on "work for hire" doctrine).

9 Copyright Act of 1909, Pub. L. No. 349, Ch. 320, § 62, 35 Stat. 1088 (1909). The "work made for hire" doctrine in the 1909 Act stated "the word 'author' shall include an employer in the case of works made for hire." Id. at § 201(b). Categorizing a work as "made for hire" is important not only because it determines the initial ownership of the copyright but also the copyright duration, the owner's renewal rights, and the owner's termination rights. See Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 2171 (1989); 1 M. Nimmer, supra note 1, at § 5.03[A].
employer ownership in the copyrights of commissioned works. These decisions applied the works made for hire doctrine equally to employers and independent contractors.

The Copyright Act of 1976 completely revised the 1909 Act.

* * * See Yardley v. Houghton Mifflin Co., 108 F.2d 28, 31 (2d Cir. 1939) (at common law, copyright of commissioned work presumptively passes to patron), cert. denied, 309 U.S. 686 (1940); Dielman v. White, 102 F. 892, 894-95 (C.C.D. Mass. 1900) (strong implication that copyright belongs to employer if she commissions artist to prepare work). Cf. Lumiere v. Robertson-Cole Distrib. Corp., 280 F. 550, 552-53 (2d Cir.) (copyright of photograph rests with sitter, not commissioned photographer), cert. denied, 259 U.S. 583 (1922); Lumiere v. Pathe Exchange, Inc., 275 F. 428, 428 (2d Cir. 1921) (photographer's employer entitled to copyright).

* See Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565 (2d Cir. 1966). Brattleboro is the seminal case revealing the equal treatment of independent contractors and employees. The court noted that the "works for hire" doctrine "is applicable whenever an employee's work is produced at the instance and expense of his employer." Id. at 567. The court continued: "We see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor." Id. at 568. See Comment, supra note 3, at 564-50 (under 1909 Act doctrine applied equally to employees and independent contractors). See, e.g., Lin-Brook Builders Hardware v. Gertier, 352 F.2d 298, 300 (9th Cir. 1965) (when employer engages another, regardless of her status as independent contractor or employee, presumption is that copyright title rests in employer); Grant v. Kellogg, Co., 58 F. Supp. 48, 54 (S.D.N.Y. 1944) (independent commercial artist who created Rice Krispies gnomes surrendered copyright by virtue of employment with Kellogg).

* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1982). The pertinent "work for hire" provisions of the 1976 Act are § 101(1) and (2), which defines a "work made for hire" and § 201(b) regarding ownership of copyright. Section 101 provides in part:

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, 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. at § 101 (1) and (2) (emphasis added). Section 201(b) provides:

WORKS MADE FOR HIRE. — 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. at § 201(b).

* See Dumas v. Gommerman, 865 F.2d 1093, 1096-97 (9th Cir. 1989) (Congress did not want to continue the 1909 Act). The Dumas court further noted that "the 1976 Act was a 'radical departure' from prior law." Id. at 1102 (quoting Ms. Barbara Ringer, former Register of Copyrights); Ringer, First Thoughts on the Copyright Act of 1976, 13 COPYRIGHT 187, 188 (1977) ("bill that . . . became . . . Act of 1976 . . . not based on pre-existing legislation"). See also Dumas, 865 F.2d at 1097 n.6 (provides exhaustive list of commentators who unanimously agree that 1976 Act is clear break from prior doctrine). But see O'Meara, 'Works Made for Hire under the Copyright Act of 1976 — Two Interpretations, 15 CREIGHTON L. REV. 523 (1982) (legislative history is ambiguous).
The 1976 Act's new work for hire provisions\textsuperscript{10} are the manifestation of a heavily negotiated compromise between the creators of works and the parties that hire them regarding the treatment of commissioned works prepared by independent contractors.\textsuperscript{11} The creators advocated the exclusion of commissioned works from the definition of work for hire\textsuperscript{12} and alternatively, because of their weak bargaining position,\textsuperscript{13} opposed any broad definition that would transform a commissioned work into a work for hire upon

\textsuperscript{10} See \textit{supra} note 8 (enumerates new work for hire provisions of 1976 Act).

\textsuperscript{11} See \textit{Dumas}, 865 F.2d at 1098 ("compromise" of new definitions are product of "hard-fought negotiations"). Both the Senate and House Reports on the final bill noted: "The definition now provided by the bill represents a compromise which . . . spells out those specific categories of commissioned works that can be considered 'works made for hire. . . .' " \textit{S. REP. No. 473, 94th Cong., 1st Sess. 105 (1976); H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, reprinted in 1976 U.S. CODE CONG. AND ADMIN. NEWS 5659, 5737. See also \textit{Litman, Copyright, Compromise and Legislative History}, 72 CORNELL L. REV. 857, 859 (1987) (1976 Act is "detailed comprehensive code . . . full of specific, heavily negotiated compromise"); \textit{Note, supra} note 5, at 1292 ("a compromise had been reached"). At first, the compromise consisted of four specific categories of commissioned works which could be works made for hire if the parties agreed in writing. \textit{See Register of Copyrights, 89th Cong., 1st Sess., Supplementary Report on Copyright Law Revision} pt. 6, at 67-68 (Comm. Print 1965). From the Report it was clear that "other works made on . . . commission would not come within the definition . . . of a work made for hire." \textit{Id.} In 1967, another compromise added an additional four categories to the list. \textit{See H.R. REP. No. 83, 90th Cong., 1st Sess. 86, 87 (1967).} The final list of enumerated categories of commissioned works which could be works for hire if the parties agreed in writing is codified at 17 U.S.C. § 101(2) (1982). \textit{See supra} note 8 (quotes text of 17 U.S.C § 101(2)).

\textsuperscript{12} Cf. \textit{H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, reprinted in 1976 U.S. CODE CONG. AND ADMIN. NEWS 5659, 5737} (creators proposed that hiring party could use the work to extent it was needed for his regular business, but all other rights vested in creator); \textit{Note, supra} note 5, at 1291. The complete exclusion of commissioned works was met with "strong opposition on the part of book publishers . . . ." \textit{Id.}

\textsuperscript{13} \textit{See Definition of Work Made for Hire in the Copyright Act of 1976: Hearing on S. 2044 Before the Committee on the Judiciary, 97th Cong., 2d Sess. (1982) [hereinafter \textit{Hearing on S. 2044}].} Due to unequal bargaining power of parties, authors had two choices: submit work as work made for hire or do not submit it. \textit{Id.} at 132-33 (statement of illustrator, Mr. Robert G. Steele); \textit{Note, supra} note 5, at 1308-09 (citing \textit{Hearing on S. 2044}); \textit{Note, Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor, 83 COLUM. L. REV. 1245, 1254 n.57 (1983)} ("An artist's total dependence on the publisher to reach the public explains [leverage publisher has over artist]."). \textit{See also Hearing on S. 2044, supra, at 34} (fact that big stars can negotiate any contract they want is "irrelevant to problems faced by professionals at all levels") (statement of Ms. Robin Brickman, member of Graphic Artist's Guild); \textit{Id.} at 73 (highest paid composer in his field stated if he chose not to enter into work made for hire arrangement, he would have to consider some other field of work) (statement of Mr. Elmer Bernstein, for Screen Composers of America). \textit{But see id. at 59} (Magazine Publishers Association argued that magazine writers "exercise bargaining power on an equal level . . . and demand and receive their quid pro quo") (statement of Mr. E. Gabriel Perle, for Magazine Publishers Association).
the creator's written consent.\textsuperscript{14} The publishers, on the other hand, opposed any exclusion of commissioned works from the work for hire definition in an effort to retain as many copyrights as possible.\textsuperscript{15} Unlike the 1909 Act's provision for works made for hire,\textsuperscript{16} section 101 makes a sharp distinction between works "prepared by an employee within the scope of his or her employment" and works prepared by an independent contractor.\textsuperscript{17} Under the 1976 Act, a commissioned work prepared by an independent contractor must meet two criteria to be deemed a work made for hire.\textsuperscript{18} It must fall within one of nine enumerated categories,\textsuperscript{19} and the parties must agree in writing that the work shall be considered a work made for hire.\textsuperscript{20}

Despite the apparent distinction between employees and independent contractors in section 101's definition of work made for hire,\textsuperscript{21} Congress' failure to define the term "employee" has caused many hiring parties to assert copyright ownership pursuant to subdivision one even when dealing with independent contractors.\textsuperscript{22} Consequently, the circuit courts have split in their interpre-
CCNV v. Reid

tation of "employee" in section 101 of the Copyright Act. Recently, however, the United States Supreme Court purported to resolve this conflict in *Community for Creative Non-Violence v. Reid.*

I. COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID

The plaintiff, Community for Creative Non-Violence (CCNV), is a charitable organization dedicated to eliminating homelessness in America. During the fall of 1985, CCNV decided to sponsor a display for the December Pageant of Peace in Washington, D.C. CCNV conceived the general idea of the display, a sculpture entitled "Third World America," which depicted a "modern" Nativity scene of a homeless black couple and their newborn, reclining on a steam grate.

Respondent, James Earl Reid, a sculptor, orally agreed to sculpt the three figures while CCNV took on the task of creating the steam grate and pedestal. On Christmas Eve, Reid completed
the sculpture and delivered it to Washington, D.C.30 After a one month display, the sculpture was returned to him for some minor repairs.31 It was during this time that Reid learned CCNV was planning to take the sculpture on a tour of several cities.32 When CCNV requested the return of "Third World America," Reid refused, contending that the sculpture was too fragile to withstand such a rigorous tour.33 Subsequently, Reid filed a certificate of copyright registration for the sculpture in his name.34 Immediately thereafter, CCNV filed their own competing certificate of copyright registration.35

CCNV brought suit against Reid seeking the return of "Third World America" and a determination of copyright ownership.36 The district court held that the sculpture was a work made for hire under section 101 of the Copyright Act and that CCNV was the exclusive owner of the copyright in the sculpture.37 The Court of Appeals for the District of Columbia reversed and remanded the case.38 Adopting the "literal interpretation" of the Fifth Circuit, the court held that the sculpture was not a "work made for hire" under section 101 of the Copyright Act because

30 CCNV, 109 S. Ct. at 2170. It was previously agreed that the sculpture would be delivered on December 12. Id.
31 Id.
32 Id. The purpose of the tour was to raise money for the homeless. Id.
33 Id. at 2170. The three figures were made of a synthetic material known as "Design Cast 62" which could be tinted to look like bronze. Id. at 2169-70. Reid objected to the tour because he felt that the Design Cast 62 was "not strong enough to withstand the ambitious itinerary." Id. at 2170. Instead, Reid wanted the sculpture to be cast in bronze at a cost of $35,000 or, in the alternative, to have a master mold made at a cost of $5,000. Id. But, CCNV refused to spend more money on the project. Id.
34 CCNV, 109 S. Ct. at 2170. Reid also had placed beneath the title of the sculpture his own copyright notice: "© James Earl Reid, Sculptor '85." CCNV v. Reid, 846 F.2d. 1485, 1488 n.2 (D.C. Cir. 1988).
35 CCNV, 109 S. Ct. at 2170.
36 Id. Ronald Purtee, Reid's photographer, was also a party to the action. But he never appeared before the court, nor did he claim any interest in the sculpture. Id. at 2170 n.1.
37 Id. at 2170. Prior to the district court's decision in favor of CCNV, the court granted CCNV's motion for preliminary injunction, ordering Reid to return the sculpture. Id. The district court reasoned that Reid was CCNV's employee because CCNV was the motivating force in the production of the sculpture, and since CCNV "directed enough of [Reid's] effort to assure that, in the end, he had produced what they, not he, wanted, . . ." CCNV v. Reid, 652 F. Supp. 1453, 1456 (D.D.C. 1987). It is important to note that petitioners did not assert that the sculpture satisfies the terms of § 101(2) and therefore the dispositive inquiry in this case concerns the meaning of § 101(1). CCNV, 109 S. Ct. at 2171-72.
38 Id. at 2170. See infra note 49 (discussion of Fifth Circuit's "literal interpretation" in Easter Seals case).
Reid was an independent contractor under agency law. Further, the sculpture did not fall within one of the nine categories of work enumerated in the statute, nor did the parties agree in writing that the sculpture would be a work made for hire. Nevertheless, the court did suggest that the sculpture might be a joint work under the Copyright Act and remanded the case for determination of this issue. The United States Supreme Court granted certiorari to resolve the conflict among the circuits as to the proper construction of the work made for hire provisions of the Copyright Act. In a unanimous decision, the Court affirmed the trial court’s judgment.

Writing for the Court, Justice Marshall focused his inquiry on the proper construction of section 101(1), specifically, “whether ‘Third World America’ is ‘a work prepared by an employee within the scope of his or her employment.’” The Court began its inquiry with a discussion of the four interpretations that have emerged among the circuits: 1) an “employee” prepares a work whenever the hiring party retains the right to control the product, 2) an “employee” prepares a work whenever a hiring party

---

39 Id.
40 CCNV, 109 S. Ct. at 2170. The court of appeals construed Section 101 as creating “a simple dichotomy in fact between employees and independent contractors.” Id. (quoting CCNV v. Reid, 846 F.2d 1485, 1492 (1988)).
41 Id. The issue of whether “Third World America” is a joint work will not be discussed in this Comment. “A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101 (1982) (defining “joint work”). “The authors of a joint work are co-owners of copyright in the work.” Id. at § 201(a).
43 Id. at 2170-71. Compare Dumas v. Gommerman, 865 F.2d 1093, 1102 (9th Cir. 1989) (only “formal, salaried” workers are employees under § 101(1)) with Easter Seal, supra note 22, at 334-35 (common law agency principles determine who is employee under § 101(1)) and Aldon Accessories Ltd. v. Spiegel, Inc., 758 F.2d 548, 552 (2d Cir.), (actual control of hired party determines whether she is “employee” under § 101(1)), cert. denied, 469 U.S. 982 (1984) and Peregrine v. Lauren Corp., 601 F. Supp. 828, 829 (D. Colo. 1985) (right to control hired party establishes an “employee” under § 101(1)).
44 CCNV, 109 S. Ct. at 2180.
45 Id. at 2171-72 (quoting 17 U.S.C. § 101(1)).
46 Id.
47 See Id. at 2172. The Court noted that the conflict in the circuits has arisen due to the legislature’s failure to define a “work prepared by an employee within the scope of his or her employment.” Id.
48 Id. See Peregrine v. Lauren Corp., 601 F. Supp. 828, 828 (D. Colo. 1985). In Peregrine, a photographer sought to compel an advertising agency to pay for his services by obtaining copyrights to the photographs he had taken for defendant. Id. at 828. Defend-
actually wields control with respect to the creation of a particular work,\textsuperscript{46} 3) an “employee” within section 101(1) refers only to “formal, salaried” employees,\textsuperscript{60} and 4) an “employee” within sec-

ant’s motion for summary judgment was granted, however, because it was able to rebut the prima facie validity of the copyright. \textit{Id.} at 829. The court reasoned that the “right for hire relationship exists when an employer has the right to control the party doing the work . . . .” \textit{Id.} (emphasis added). \textit{See also} Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co., 810 F.2d 410, 415 (4th Cir. 1987) (Hall, J., dissenting) (“Regardless of whether [employer’s] control is ever exercised . . . only rational conclusion is that Congress, under the 1976 Act intended for the [work] produced by employee to be a work made for hire.”); \textit{Town of Clarkstown v. Reeder}, 566 F. Supp. 137, 142 (S.D.N.Y. 1983) (“employment relationship rests . . . on right to control and not the exercise of that right”) (emphasis added); 1 M. Nimmer, \textit{supra} note 1, § 5.03[B][1][a], at 5-13 (crucial question in determining employment relationship is whether employer has right to control employee).

\textsuperscript{46} CCNV, 109 S. Ct. at 2172. \textit{See Aldon Accessories Ltd. v. Spiegel, Inc.}, 738 F.2d 548, 552 (2d Cir.), cert. denied, 469 U.S. 982 (1984). Looking to the legislative history of the 1976 Act, the \textit{Aldon} court noted that the common law presumption that a patron owned the copyright of the independent contractor’s work product created an injustice in cases where the independent contractor did everything and the hiring party did nothing. \textit{Id.} (citing H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, \textit{reprinted in} 1976 U.S. CODE CONG. & ADMIN. NEWS at 5737). Relying on legislative silence, however, the court wrote: “there is no indication . . . that Congress was focusing on contractors who actually supervised and directed . . . .” \textit{Aldon}, 738 F.2d at 552 (emphasis added). The court held that in actual control situations, the common law presumption was not changed. \textit{Id.} The \textit{Aldon} interpretation was subsequently adopted by two circuits. CCNV, 109 S. Ct. at 2172. \textit{See Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.}, 810 F.2d 410, 413 (4th Cir. 1987) (citing \textit{Aldon} as applying to circumstances when temporary situations exist where “an employee of one may be regarded as an employee of another.”); \textit{Evans Newton, Inc. v. Chicago Sys. Sofw.}, 793 F.2d 889, 894 (7th Cir.) (court found Second Circuit’s actual control analysis “compelling”), cert. denied, 479 U.S. 949 (1986).

The overwhelming position taken by commentators is that \textit{Aldon} is an aberration which should not have been followed. \textit{See Litman, \textit{supra} note 11, at 900 (\textit{Aldon} “cleaved to earlier doctrine, and mang[ed] the statutory language, . . . the court’s interpretation strains the statutory language,” and renders writing requirement in § 101(2) meaningless); Note, The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976, 62 N.Y.U. L. REV. 373, 389 (1987) (\textit{Aldon} “misapplied literal terms of the 1976 Act”); Comment, \textit{supra} note 3, at 661 (\textit{Aldon} misinterpreted 1909 Act’s case law and 1976 Act’s legislative history). \textit{See generally} Brief for Respondent \textit{supra} note 28, at 17-19 (provides three page list of commentators who disagree with \textit{Aldon}). Peregrine, which is an extension of \textit{Aldon}, has been equally criticized. \textit{See Comment, The “Work Made for Hire” Definition in the 1976 Copyright Act-A Simple Dichotomy: Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, 26 HOUS. L. REV. 361, 376-77 (1989) (Peregrine underscores dangers of \textit{Aldon} because it extended \textit{Aldon} from “actual control” to mere “right to control”).}

\textsuperscript{60} CCNV, 109 S. Ct. at 2172. \textit{See Dumas v. Gommerman}, 865 F.2d 1093, 1102 (9th Cir. 1989). The \textit{Dumas} court relied largely on the legislative history of the 1976 Act to come to its determination. \textit{See id.} at 1098-1101 (“to fully understand the meaning of ‘employee’ as used in the Act, we must turn to its legislative history.”). \textit{Cf. Litman, \textit{supra} note 11, at 901 (those involved in legislative history understood ‘employee’ to mean employee in salaried job). See also infra note 61 and accompanying text (discussing legislative history and commentators in support of \textit{Dumas} interpretation). But see Gallery House, Inc. v. Yi, 582 F. Supp. 1294, 1297 (N.D. Ill. 1984) (one may be employee even when unpaid); 1 M. Nimmer,
The first two interpretations could not be reconciled with the statutory language and were therefore rejected. The Court relegated its dismissal of the third interpretation to a footnote, reasoning that a "formal, salaried" construction is not supported by the statutory language. Ultimately, the Court adopted the agency view endorsed by the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises.* Using this approach, Justice Marshall concluded that Reid was an independent contractor and therefore, "Third World America" was not a "work made for

*supra* note 1, § 5.03[B][1][a], at 5-12 ("unimportant whether . . . employee is a regular or formal employee").

*CCNV*, 109 S. Ct. at 2172. *See Easter Seal*, *supra* note 22, at 334-35. In *Easter Seal*, the court adopted a "literal interpretation" which "read[s] § 101 as a reflection of a simple dichotomy in fact between employees and independent contractors." *Id.* at 329. The first step under the *Easter Seal* test is to determine whether the hired party was an employee or independent contractor using agency law principles. *Id.* If the hired party was an employee then § 101(1) applies and if she was an independent contractor then § 101(2) applies. *Id.* The court adopted the agency law approach because "'scope of employment' is virtually a term of art in agency law." *Id.* at 335. The court used the Restatement of Agency as a guide. *Id.* at 335-36. *See also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). The nonexclusive list of factors in § 220(2) of the Restatement are helpful in a court's determination of an employment relationship:

(a) the extent of control which, by 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;

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

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

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

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

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

*Id.*

*See CCNV*, 109 S. Ct. at 2173 (neither actual control nor right to control tests are "consistent with the text of the act"). Both tests ignore the dichotomy between § 101(1) and (2) by allowing an independent contractor who is either subject to the hiring party's right to control or who is actually controlled to fall within § 101(1)'s employment relationship. *See id.*

*CCNV*, 109 S. Ct. at 2174 n.8. The Court, nevertheless, did admit that there was support for this interpretation in the legislative history. *Id.* *See infra* note 61 and accompanying text (discussing legislative history in support of formal, salaried interpretation).

*815 F.2d 323 (5th Cir. 1987), cert. denied, 484 U.S. 981 (1988). See supra* note 49 (discussing agency approach adopted by Fifth Circuit and Supreme Court).
hire” within the meaning of section 101(1).\textsuperscript{58} In view of the legislative history \textsuperscript{66} and statutory language\textsuperscript{57} of the Copyright Act of 1976, the Supreme Court had two alternatives in CCNV.\textsuperscript{58} The Court could have either adopted the Easter Seal agency approach, as it did,\textsuperscript{69} or the “formal, salaried” employee approach advanced by the Ninth Circuit in Dumas v. Gomerman.\textsuperscript{60} This Comment will assert that the Dumas interpretation warranted more than a cursory dismissal. It will then analyze the problems inherent in the CCNV Court’s application of the Easter Seal interpretation, including its failure to address the issue of retroactivity. Finally, it will suggest a statutory modification to the Copyright Act, codifying a nonretroactive Dumas interpretation of “employee” as an alternative to the Supreme Court’s Easter Seal approach.

II. Rejection of Dumas Approach

Although the CCNV Court conceded that the “formal, salaried” employee construction of section 101(1) can be supported by the

\textsuperscript{58} CCNV, 109 S. Ct. at 2179-80. The Court applied a multifactor non-exclusive balancing test, utilizing the RESTATEMENT OF AGENCY. See id. at 2178-79. See, e.g., id. at 2178-79 nn.18-31 (examples of courts that apply agency factors).

\textsuperscript{59} See supra notes 8-20 and accompanying text (discussing compromise in legislative history that lead to different treatments of employees and independent contractors).

\textsuperscript{60} See supra note 49 and accompanying text (commentators criticizing Aldon and Peregrine decisions’ distortion of statutory language); note 52 and accompanying text (actual control and right to control tests cannot be squared with language of statute).

\textsuperscript{61} See supra notes 50 and 51 and accompanying text (discussing formal, salaried and agency law tests, respectively).

\textsuperscript{62} See supra note 54 and accompanying text.

\textsuperscript{63} 865 F.2d 1093 (9th Cir. 1989). See supra note 50 and accompanying text (discusses formal, salaried view). The “formal, salaried” approach was endorsed by the Respondent: the Ninth Circuit’s “formal salaried” interpretation “most properly addresses the Copyright Act’s work for hire provisions.” Brief for Respondent, supra note 28, at 10. An amicus brief submitted by the United States Copyright Office and the Solicitor General supported the Respondent’s view: “The language, history, and purpose of the work-made-for-hire provisions make clear that Subsection (1) applies only to works prepared by regular, salaried employees ... .” Brief for Register of Copyrights as Amicus Curiae Supporting Respondent at 7, CCNV v. Reid, 109 S. Ct. 2166 (1989) (No. 88-293) [hereinafter Brief for Register]. The Copyright Office is the agency which has the responsibility of administering and regulating the Copyright Laws. See 17 U.S.C. §§ 701-710 (1982). Reid’s attorney noted that the most significant development in the case was the Solicitor General’s brief on behalf of Reid and his formal, salaried interpretation because the Supreme Court often follows the Solicitor General’s viewpoint in difficult cases involving federal law. See L.A. Times, Feb. 12, 1989, Calendar Section, at 7.
CCNV v. Reid

legislative history, the Court quickly rejected this interpretation on two grounds. First, the Court noted that the express language of section 101(1) does not support such an interpretation. The Court reasoned that “[t]he Act does not say ‘formal’ or ‘salaried’ employee, but simply ‘employee.’” Second, the Court noted that the respondent, amici and the Ninth Circuit who support the “formal, salaried” approach disagree on the test’s content. Finally, the Court asserted that the Dumas court actually adopted an approach drawn from agency law principles which the Court endorses. Perhaps more persuasive arguments militate  

61 See CCNV v. Reid, 109 S. Ct. 2166, 2174 n.8 (1989) (“there is some support for such a [formal, salaried] definition in the legislative history”). Borge Varmer’s study of works made for hire and on commission was part of Congress’ program of research of the copyright law which would aid in the revision process of the 1909 Act. See STAFF OF SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHT LAW REVISION, 86TH CONG. 2d SESS., STUDY 13 WORKS MADE FOR HIRE AND ON COMMISSION (Comm. Print 1960) (report by B. Varmer). Varmer concluded that the 1909 Act’s work for hire provisions only addressed salaried employees and suggested that if the work for hire rule was not to include commissioned works, the definition might further specify “employment on a salary basis.” Id. at 141. In 1963, a preliminary draft of the work made for hire definition read: “a work prepared by an employee within the scope of his duties of his employment, but not including a work made on special order or commission.” REGISTER OF COPYRIGHTS, 89TH CONG., 1st SESS., SUPPLEMENTARY REPORT ON COPYRIGHT LAW REVISION PART 6, at 66 (Comm. Print 1965) (emphasis added). The publisher’s substantial resistance to this definition lead to subsection (2) of the existing act, enumerating specific instances where commissioned works are works made for hire. See supra notes 8-20 and accompanying text. Important for present purposes is that virtually all the parties resisting the preliminary draft referred to employees as formal, salaried employees. See, e.g., COPYRIGHT LAW REVISION, PART 4, FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW, 88TH CONG., 2d Sess. 250 (Comm. Print 1964) (American Book Publishers complained that suggested definition would “include only work done by a salaried employee in the scope of his regular duties”); Id. PART 3, at 259-61 (American Bar Association representative argued against preliminary definition because there was no difference between “payroll” worker and commissioned worker) (emphasis added); Id. at 267 (“‘employee’ . . . means social security, withholdings, and all other attendant mechanical housekeeping tasks”); Id. at 321 (“might be helpful not to restrict [definition] to . . . technical employer-employee relationship”); Hardy, Copyright Law’s Concept of Employment-What Congress Really Intended, 35 J. COPYRIGHT Soc’y of USA, 210, 225-27 (1988) (provides numerous examples similar to those mentioned above). See also Note, supra note 11, at 901 (“plenty of discussion indicates that everyone involved understood [employee] to mean someone working for an employer in a salaried job . . .”).  

62 See infra notes 74-92 and accompanying text (analyzes Court’s two bases for rejecting formal, salaried interpretation).  

63 CCNV, 109 S. Ct. at 2174 n.8.  

64 Id.  

65 See id. The Court suggests that Respondent’s test required the hired party to be on the payroll while an amicus’ test required that the hired party “receives a salary and is treated as an employee for Social Security and tax purposes . . . .” Id.  

66 See id. “Even the one court of appeals to adopt what it termed a formal, salaried employee test in fact embraced an approach incorporating numerous factors drawn from the
against the rationale of the CCNV Court.

A. Rules of Statutory Interpretation Favor the Ordinary and Common Understanding of the Term "Employee"

While it is true that section 101(1) does not explicitly say "formal" or "salaried," it is suggested that the CCNV Court's reliance on this premise to reject the Dumas view defeats its own agency law construction of the term "employee." If express language is the Court's criterion, then "employee" cannot carry its agency law meaning either because the statute does not say "employee according to agency law principles." In the absence of a statutory definition, the general rule of statutory construction is that "words will be interpreted as taking their ordinary, contemporary, common meaning." Although the established legal understanding of the term employee falls within the agency interpretation, the "ordinary" and "common" meaning favors a "formal, salaried" construction.

B. Consensus on the Application of Dumas

The CCNV Court also based its refusal to adopt a "formal, salaried" interpretation on the inability of the proponents of this view

agency law definition of employee which we endorse." Id. (citation omitted).

67 See 17 U.S.C. § 101(1) (1982); supra note 8 (quotes text of § 101(1)).
68 See CCNV, 109 S. Ct. at 2174 n.8 (language of act cannot support "formal, salaried" approach); Reply Brief for Petitioner at 12, CCNV v. Reid, 109 S. Ct. 2166 (1989) (No. 88-293) [hereinafter Reply Brief] ("would not have been difficult for Congress to place adjectives 'formal' and 'salaried' before the word 'employee' in Section 101(1)").
72 See WEBSTER'S NEW WORLD DICTIONARY 459 (2d ed. 1972) ("person hired by another, or by a business firm, etc., to work for wages or salary"); Brief for Respondent, supra note 28, at 24 ("hired by another at a regularly paid salary to work over a long, indefinite time period"). . . what most people understand 'employee' to mean"). See also Litman, supra note 11, at 890 (pre-legislative dialogue indicated phrase to mean "a salaried worker in a long-term position").

70
to agree on its application. The examination of the tests proposed, however, reveals that they all contain the same intrinsic element: a hired party who receives compensation on a regular basis. The Court illustrated the tests to demonstrate the inconsistencies. For example, it noted that Reid urged a test where the hired party must be a payroll employee, while the amicus brief of Volunteer Lawyers for the Arts proposed that the hired party must be treated as an employee for tax and Social Security purposes. It is submitted that the distinctions between the tests are trivial and in no way precluded the Court from adopting a "formal, salaried" approach.

Finally, the CCNV Court suggested that the Dumas court in fact adopted an agency law approach which the Supreme Court endorsed. The Dumas approach, however, is distinguishable. It incorporates specific agency law factors into its test only in the rare circumstances when the relationship between the parties is ambiguous. In addition, when incorporated, these factors do not include the "control or right to control" factor adopted by the

---

73 See supra note 65. See also Reply Brief, supra note 68, at 7-9 (distinguishes tests proposed by various proponents of formal, salaried approach).

74 See, e.g., Brief for Respondent, supra note 28, at 37 (hired party on payroll); Brief for Register, supra note 60, at 13 (salaried worker in long term position); Brief for Volunteer Lawyers for the Arts Inc. et al as Amicus Curiae Supporting Respondent at 4, CCNV v. Reid, 109 S. Ct. 2166 (1989) (No. 88-293) (hereinafter Brief for VLA) (receives salary and treated like employee for tax and social security purposes). Analysis of the briefs mentioned by the Court, in fact, propose a general Dumas "formal, salaried" approach, rather than a particular test as the Court suggests. See Brief for Respondent, supra note 28, at 38 ("Respondent Reid believes that the best definition of a work for hire employee is the 'formal, salaried' employee as recently enunciated by the Dumas court...") (emphasis added); Brief for Register, supra note 60, at 7 ("We agree with the Ninth Circuit"); Brief for VLA, supra, at 2 (VLA submits that Dumas was correct).

75 See supra note 65.

76 See CCNV, 109 S. Ct. at 2174 n.8 ("hired party who is on payroll is an employee within § 101(1)")

77 See id. ("hired party who receives a salary and is treated as an employee for social security and tax purposes is an employee within §101(1)") (emphasis in original)

78 See supra note 66 and accompanying text.

79 See infra notes 80 and 81 and accompanying text (discussing how Dumas is distinguishable from the agency law approach adopted by the Court).

80 See Dumas v. Gommerman, 865 F.2d. 1093, 1105 (9th Cir. 1989) (when "relationship is ambiguous" apply relevant factors). It is important to note that when utilizing the formal, salaried test "few disputes should arise as to the status of the artist." Id. See also Brief for Respondent, supra note 28, at 24 n.17 ("[f]or those very limited situations where this definition does not resolve all questions, an agency-type analysis would still be available") (emphasis added).
Supreme Court. The *Dumas* court reasoned that by indirectly “includ[ing] the rejected ‘supervision and control’ test,” the *Easter Seal* agency test could cause some independent contractors to be deemed employees. While *Dumas*’ “bright-line” method does create some degree of uncertainty in situations where the agency factors are used, it is suggested that these ambiguities are minimal when compared with the *Easter Seal* test adopted by the Supreme Court.

III. THE *Easter Seal* TEST: AMBIGUITIES ADOPTED BY THE CCNV COURT

A. The Nonexclusive Multifactor Test

The Supreme Court’s interpretation of the work made for hire provisions affects thousands of business relationships because approximately forty percent of all copyright registrations are works for hire. Therefore, the need for certainty in the interpretation is essential. In *CCNV v. Reid*, the Supreme Court promulgated a...
CCNV v. Reid

nonexclusive multifactor agency balancing test where no one factor is determinative. This test creates unnecessary ambiguity which will increase the already overwhelming caseload of the courts. "Practical considerations point to a definition of copyright 'employees' as regular, salaried employees." The use of a straightforward "formal, salaried" definition of employee rather than a multifactor balancing test would have established the certainty and stability necessary in the copyright marketplace. In accord with this position, Senator Thad Cochran of Mississippi contends that "the Reid decision invite[s] legislative clarification.

See generally Reynolds & Richman, The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167, 1167 (1978) ("federal courts . . . have been beset by a staggering increase in workload" in recent years); Id. at 1168 ("caseload of courts . . . is becoming unmanageable"). Immediately after the CCNV decision was handed down on June 5, 1989, it became apparent that the decision would increase the amount of disputes arising under the work for hire provisions. See CONGRESSIONAL RECORD - Cochran, supra note 84 ("inevitable uncertainties and costs associated with agency law test") (emphasis added); Wash. Post, June 6, 1989, § B, at 8, col. 2 (decision does not resolve work for hire debate); Legal Times, June 12, 1989, at 19 ("absence of an objective standard may prevent the predictability essential to avoid frequent recourse to litigation"); N.Y. Times, June 12, 1989, at D 13, col. 3 ("potential for enormous disruption in what was thought to be a settled relationship"); L.A. Daily Journal, June 28, 1989, at 7, col. 4 ("ruling not expected to . . . reduce . . . litigation in . . . copyright" area).

See Dumas, 865 F.2d at 1105 (using formal, salaried interpretation "few disputes should arise as to status of artist"); Hardy, Copyright Law's Concept of Employment - What Congress Really Intended, 35 J. COPYRIGHT SOC'Y 210, 258 (1988) ("[a] far more satisfactory test of employment is that of regular, formal employment"); Brief for Respondent, supra note 28, at 24 (advantage of formal, salaried construction is that it provides "predictability and certainty as to copyright ownership"); supra note 88 and accompanying text.
Immediately after the decision was handed down, Senator Cochran proposed a legislative amendment to section 101(1) of the 1976 Act which would prefix the term "employee" with "formal salaried." It is submitted that the complex application of the multifactor balancing test could lead to another split in the circuits with regard to the relative importance of specific factors.

B. Problems Arising Out of the Court's Failure to Address the Issue of Retroactivity

In *Chevron Oil v. Huson*, the Supreme Court provided three separate factors to determine whether a judicial decision is non-retroactive: 1) whether the decision establishes a new principle of law, 2) whether the retrospective operation will further or retard the operation of the rule, and 3) whether retrospective operation will lead to inequitable results. Nevertheless, in *CCNV v. Reid*, the Supreme Court further distorted the application of its
interpolation by failing to address the issue of retroactivity.\textsuperscript{97} Since the effective date of the 1976 Copyright Act is January 1, 1978,\textsuperscript{98} many freelance creators will now attempt to reclaim the copyrights to works produced over the last eleven years.\textsuperscript{99} It is suggested that a determination of nonretroactivity would have precluded a potential explosion of litigation between artists asserting their rights and media companies protecting their chief assets. It is further suggested that such a determination would have insulated media companies from the inequitable economic hardships resulting from the possible redistribution of their copyrights.\textsuperscript{100}

\textbf{Conclusion}

In \textit{CCNV v. Reid}, the Supreme Court unnecessarily complicated the work made for hire provisions of the Copyright Act of 1976. In an effort to resolve the conflict of interpretation among the circuits, the Court has created ambiguities which will foster additional disputes. This Comment has asserted that a better approach would have been a nonretroactive, formal, salaried interpretation of "employee." As an alternative to the Court's ruling, the simple

\textsuperscript{97} See \textit{CCNV v. Reid}, 109 S. Ct. 2166 (1989) (opinion does not address issue whether retroactive to effective date of Copyright Act of 1976).


\textsuperscript{99} See Legal Times, June 12, 1989, 19 (freelance creators presumed to be employees in past will now seek to reclaim ownership and profits of their copyrightable works, as well as adaptations and derivative works) (citing \textit{Chevron Oil}, 404 U.S. at 97 (1971). Paul Goldstein, a professor of copyright law at Stanford University Law School noted that the ruling of the court will probably apply to material published since January 1, 1978. See \textit{N.Y. Times}, June 12, 1989, at D13, col. 3.

\textsuperscript{100} See Taylor v. Ypsilanti, 105 U.S. 60, 71-72 (1881) (overruling judicial construction of statute will not be given retroactive effect). \textit{Cf. supra} note 96 (discussing equitable considerations involved in deciding whether decision has retroactive effect). Since copyrights to the material that they distribute are the chief assets of most media companies, a retroactive application of a decision which reassesses the ownership of those assets would have a disastrous effect on the economic well-being of the companies. See \textit{N.Y. Times}, June 12, 1989, at D13, col. 3 ("chief asset of many media companies" is copyrights). \textit{Cf. Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) ("[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the 'injustice or hardship' by a holding of nonretroactivity") (quoting \textit{Great N. Ry. v. Sunburst Oil & Ref. Co.}, 287 U.S. 358, 364 (1932)); \textit{Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1939) ("Questions of rights claimed to have become vested . . . of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.")}
solution is a statutory amendment codifying the formal, salaried definition of "employee." A prospective application of this approach would establish the certainty necessary to satisfy the expectations of both parties engaged in work for hire relationships.

Douglas W. Hammond