

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 1 *Volume I*
Number 2 *Volume I Book 2*

Article 7

1991

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Nicholas C. Katsoris

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Recommended Citation

Nicholas C. Katsoris, *Who's Afraid Of The Big Bad Works Made For Hire Doctrine?-Not The Supreme Court*, 1 Fordham Intell. Prop. Media & Ent. L.J. 251 (1991).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol1/iss2/7>

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WHO'S AFRAID OF THE BIG BAD WORKS MADE FOR HIRE DOCTRINE?—NOT THE SUPREME COURT

INTRODUCTION

Since the enactment of the 1976 Copyright Act ("1976 Act"),¹ United States courts have been compelled to walk a tightrope dividing employees and independent contractors in works made for hire cases.² A growing debate has ensued regarding the definition of "employee" within the confines of the 1976 Act. Courts have been looking for guidance on this issue and the Supreme Court has been silent — until recently.

In June, 1989, the Supreme Court broke its silence in *Community for Creative Non-Violence v. Reid*³ ("CCNV") by holding that a commissioned free-lance author retains copyright ownership over his creation if he is not an employee in the conventional sense.⁴ Thus, in the absence of a specific agreement assigning the copyright to the hiring party, the artist or other independent producer will retain the ownership of their work product. This, however, may be contrary to the expectations of the contracting party.

This casenote discusses the evolution of the works made for hire doctrine. Part I examines sections 101(1) and 101(2) of the 1976 Act and discusses the various tests used by courts to define "employee" within the 1976 Act. Part II discusses *Community for Creative Non-Violence v. Reid*.⁵ Part III discusses the effects of CCNV on works made for hire and the entertainment industry by analyzing several cases that might have been decided differently had they been tried under the recent Supreme Court analysis. Part IV examines the future of the works made for hire doctrine. Furthermore, part IV discusses post-CCNV problems with the works made for hire doctrine and evaluates a new Senate bill proposing amendments to the 1976 Act. This casenote concludes that only by amending the 1976 Act will its ambiguity be laid to rest once and for all.

1. 17 U.S.C. § 101 (1976). See *infra* note 23 (defining author of work made for hire).

2. See *infra* notes 28-50 and accompanying text (discussing various tests used by the courts to define copyright ownership).

3. 490 U.S. 732 (1989).

4. *Id.* at 738. "In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine." *Id.*

5. 490 U.S. 732 (1989).

I. COPYRIGHT OWNERSHIP AND THE WORK MADE FOR HIRE PROVISION

A. *Historical Background of the 1909 Copyright Act*

The importance of copyright law was initially recognized in the United States by the framers of the Constitution as they gave Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁶ The first Copyright law was enacted shortly thereafter in 1790.⁷ Congress subsequently enacted comprehensive revisions in 1831, 1870 and 1909.⁸ The Copyright Act of 1909 (hereinafter "1909 Act")⁹ remained in effect until Congress enacted the 1976 Act.¹⁰

The 1909 Act, however, did not explicitly deal with works made for hire.¹¹ The 1909 Act did not define a work made for hire, nor did it discuss the employment relationship. It merely stated that "the word 'author' shall include an employer in the case of a work made for hire."¹²

Thus, due to the 1909 Act's failure to clearly define a work made for hire, the federal courts developed several tests to interpret its meaning. One such test was the "instance and expense" analysis which was introduced in *Lin-Brook Builders Hardware v. Gertler*,¹³ where the Ninth Circuit held that the copyright owner is the person at whose instance and expense the work is done.¹⁴ Similarly, in *Pic-*

6. U.S. CONST. art. I, § 8, cl. 8.

7. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5660 (hereinafter "1976 House Report").

8. *Id.*

9. 17 U.S.C. (1909) (amended 1977).

10. *Id.* The 1909 Act was codified and enacted into positive law, Title 17 of the United States Code entitled "Copyrights," in 1947. Since Title 17 "made no substantial changes in the provisions of the 1909 Act and its amendments except to omit those provisions that had become obsolete," 17 U.S.C.A. at VIII (West 1977). "[t]he law as it stood prior to the 1976 enactment is generally referred to as the 'Copyright Act of 1909.'" 18 AM. JUR. 2d *Copyright and Literary Property*, § 1, n. 13 (1985).

11. 1976 House Report, *supra* note 7, at 5660. Works for hire were not a foreseeable concern at the time the 1909 Act was enacted. *Id.* "Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development." *Id.* "The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns." *Id.*

12. 17 U.S.C. § 26 (1909).

13. 352 F.2d 298 (9th Cir. 1965).

14. *Id.* at 300. The court stated that:

[w]hen one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, that in the absence of an express contractual reservation of the copyright in the artist,

ture Music, Inc. v. Bourne, Inc.,¹⁵ the Second Circuit stated "that the motivating factor in producing the work was the employer who induced the creation."¹⁶

Other factors used by the courts to interpret the 1909 Copyright Act were the manner in which the work was done,¹⁷ and the nature or existence of the compensation paid to the creator of the work.¹⁸

B. 1976 Copyright Act and the Interpretations of the Works Made for Hire Doctrine

In 1976, advances in technology compelled Congress to repeal the 1909 Act by Title 17 of the United States Code.¹⁹ Section 201(a) of the 1976 Act provides that an author automatically owns the copyright to his creation.²⁰ The 1976 Act, however, provides an exception for works made for hire under Section 201(b) to protect the interests of organizations that commission freelance creators.²¹

the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done.

Id.

15. 457 F.2d 1213 (2d Cir. 1972), *cert. denied*, 409 U.S. 997 (1972). Appellant was denied copyright interest in her adaptation of the song "Who's Afraid of the Big Bad Wolf?" for the Walt Disney Productions, Inc. animated cartoon "The Three Little Pigs."

16. *Id.* at 1216 (quoting Note, *Renewal of Copyright — Section 23 of the Copyright Act of 1909* [now section 24], 44 COLUM. L. REV. 712, 716 (1944)).

17. See *Scherr v. Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

18. See *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (holding that no employment relationship existed between the parties because the so-called "employee" received no compensation for his work).

19. Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1977).

"During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future." 1976 House Report, *supra* note 7, at 5660.

20. 17 U.S.C. § 201(a) (1976). Section 201(a) reads as follows:

"Section 201: Ownership of Copyright

(a) Initial Ownership - Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work."

Id.

21. 17 U.S.C. Section 201(b) (1976). Section 201(b) reads as follows:

(b) 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.

Section 201(b) states that the organization that commissions the work becomes the author and receives the author's copyright when the creation is a work made for hire.²² Sections 101(1) and 101(2) describe the two ways that a freelance creation may be classified as a work made for hire.²³

Under section 101(2) a work is made for hire if it falls within one of nine enumerated categories and also if the parties expressly agree in a written agreement that the work is to be for hire.²⁴ Section 101(1) offers a mutually exclusive way that a work can be made for hire. This occurs when the work is prepared by an employee within the scope of his or her "employment."²⁵ Unfortunately, this has not assisted independent contractors because Congress failed to explicitly define "employer", "employee" or "scope of employment."²⁶

On one side of the debate, writers, composers and other artists argue that if a creative work is made for hire then they will not receive sufficient compensation for their creativity. Publishers, motion picture producers and other employers, alternatively argue that there are substantial risks involved that are assumed by the employer, and that the employees are compensated for exactly what they are asked to provide.²⁷ As a result of this controversy, courts have established three tests to interpret the meaning of "employee."²⁸ The three tests are the literal approach, the conservative approach, and the "Aldon" actual control approach.

22. *Id.* See *supra* note 21 (setting forth text of Section 201(b)).

23. 17 U.S.C. § 101 (1976). Section 101 defines a work for hire as follows:

SECTION 101: 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 (1) a contribution to a collective work, as part of (2) a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) a test, (8) answer material for a test (9) 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.

24. 17 U.S.C. § 101(2). See *supra* note 23 (setting forth text of section 101(2)).

25. 17 U.S.C. § 101(1). See *supra* note 23 (setting forth text of section 101(1)).

26. Congress recognized the ambiguity yet did nothing about it. See 1976 House Report, *supra* note 7, at 5737. "The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire' and those that should not." *Id.*

27. See Kling, *The Work Made for Hire Doctrine Under the Copyright Act of 1976: Employees, Independent Contractors and the Actual Control Test*, 22 *IND. L. REV.* 619, 622 (1988).

28. *Id.* at 629-636; See Doyle, *The Work Made for Hire Doctrine: Incentive and Concern - Community for Creative Non-Violence v. Reid*, 62 *TEMP. L. REV.* 377, 386-393 (1989).

1. The Literal Approach

This approach focuses on the plain meaning of the language in the work made for hire doctrine of the 1976 Act.²⁹ The literal approach defines a work made for hire as a work prepared by an employee within the scope of his or her employment,³⁰ or a work by an independent contractor falling within the nine categories of section 101(2) of the 1976 Copyright Act³¹ as long as it is accompanied by a written agreement between the parties stating this is a work made for hire.³² Courts which utilize this interpretation treat subsections 101(1) and 101(2) of the 1976 Act as mutually exclusive.³³

The Fifth Circuit used the literal approach in *Easter Seal Society v. Playboy Enterprises*.³⁴ In *Easter Seal Society*, a musician on behalf of the Easter Seal Society entered a contract with a local television station to film a mock Mardi Gras Parade and jam session. While the entertainer made several suggestions to the television crew, studio personnel were primarily responsible for all technical decisions. Nevertheless, the Fifth Circuit held that the videotape was not a work made for hire and the musician was considered an employee rather than an independent contractor.³⁵

The Fifth Circuit defined employee using traditional agency law factors.³⁶ If it is decided, however, that the person is an independent contractor it is not a work made for hire unless it fits within one of the nine specified categories of the 1976 Act and is expressly

29. See *supra* note 23 (setting forth language of works made for hire doctrine).

30. 17 U.S.C. 101(1). See *supra* note 23 (setting forth text of § 101(1)).

31. See Kling, *supra* note 27, at 629.

32. 17 U.S.C. § 101(2). See Doyle, *supra* note 28, at 629; see also *supra* note 23 (setting forth text of § 101(2)).

33. Kling, *supra* note 27, at 629; Mr. Kling states that the two subsections of the act are mutually exclusive. *Id.* "In other words, under the literal interpretation, the first subsection includes only regular salaried employees. Subsection (2) of the definition enumerates the only categories of independent contractors (assumed to be anyone who is not a regular salaried employee) which may be subject to the work for hire doctrine." *Id.* See, e.g., *Childers v. High Society Magazine, Inc.*, 557 F. Supp. 978, *aff'd on rehearing*, 561 F. Supp. 1374 (S.D.N.Y. 1983).

34. *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1280 (1988).

35. *Id.* "WYES did not simply set up one camera on a tripod, turn it on and sit down to watch. Instead, it worked cooperatively and dynamically with the performers to create the field tapes. This work was a work of authorship." *Id.* at 337.

36. *Id.* at 334-37. In the Opinion, Judge Gee wrote that:

[A]dopting an agency-law definition of copyright "employment" creates a certain symmetry: a buyer is a statutory "author" if and only if he is responsible for the negligent acts of the seller. For example, a buyer will only be the "author" of a writing if he would be liable under *respondent superior* in a defamation action based on that writing. *Id.* at 335. See *infra* note 71 (setting forth eleven factors determining an employee relationship).

commissioned as such.³⁷

2. The Conservative Approach

The conservative approach is similar to the "instance and expense test" which courts use regularly in their interpretation of the 1909 Act.³⁸ The conservative approach examines whether the work was created at the instance and expense of the buyer. If so, and the buyer has exercised supervision over the creator, then the creator becomes an "employee" under section 101(1) of the 1976 Act.³⁹ The enumerated categories in 101(2) are therefore, only referring to commissioned works which are not works for hire unless the parties expressly agree to this in a signed instrument.

One notable flaw with this approach is that it treats the 1976 Act just like its predecessor in that it infers that Congress had no change in mind when it enacted the 1976 Act.⁴⁰ As a result, few courts have employed this approach.⁴¹

3. The Aldon "Actual Control" Compromise

The Aldon "Actual Control Test" ("Aldon Test"), also supported by the Second Circuit view draws a compromise between the literal and the conservative views.⁴² In order to find an employer/employee relationship the Aldon Test requires the employer to have control over the creative process, but more importantly actual participation in the project.⁴³

This test was set forth by the Second Circuit in *Aldon Accessories Ltd. v. Spiegel, Inc.*⁴⁴ In *Aldon*, plaintiff (Aldon) and defendant (Spiegel) each manufactured a line of brass and porcelain statuettes in the form of mythical creatures and at issue in the case was the

37. The Supreme Court followed similar reasoning in deciding *Community for Creative Non-Violence v. Reid*, 490 U.S. 732 (1989). See *infra* notes 51-88 and accompanying text (discussing the CCNV decision).

38. See *supra* notes 13-16, and accompanying text (discussing the instance and expense test).

39. 17 U.S.C. 101(1) (1977).

40. *Easter Seal Society*, 815 F.2d at 331. "The problem with the 'conservative' interpretation is that we cannot avoid the impression that Congress meant somehow to tighten up the 'work for hire' doctrine under the 1976 Act, although it failed to make clear where and how this tightening is to take place." *Id.*

41. *Id.*; See, e.g., *Peregrine v. Lauren Corporation*, 601 F.Supp. 828, 829 (D. Colo. 1985); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 141-42 (S.D.N.Y. 1983).

42. See Goldberg and Bernstein, *Copyright Law: The Work for Hire Conflict*, N.Y.L.J., Sept. 16, 1988, at 3, col. 5.

43. *Id.* "The theoretical right to control, present in most circumstances where one party is paying another, is no longer enough. We now require actual . . . control of the creative process by the buyer." *Easter Seal Society*, 815 F.2d at 332.

44. 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

lawful ownership of the statuettes.⁴⁵ Spiegel claimed that Aldon did not own the statuettes because Aldon did not exercise actual control over their manufacture since he had two overseas trading firms manufacture the statuettes.⁴⁶ Aldon, however, worked very closely with the artists who made the models.⁴⁷ Subsequent to their completion, Aldon also received copyright registration certificates for the work declaring him as the author and the work as performed for hire.⁴⁸ The Second Circuit subsequently deemed Aldon the owner of the statuettes since he exercised actual control over the manufacture of the statuettes.⁴⁹

The Second Circuit reaffirmed that the 1976 Act does not define employee, and therefore, stated that even under the first part of the 1976 Act, an independent contractor can be considered an employee if the contractor is so controlled and supervised in the creation of the particular work by the employing party that an employer/employee relationship exists.⁵⁰

Thus, the actual control requirement differs from the literal interpretation because it is broader as it encompasses more situations. Here the test can extend to independent contractors, while the literal approach is restricted to employees in the traditional sense.⁵¹ The Aldon test likewise differs from the conservative approach because the conservative approach bases ownership solely on instance and expense whereas the Aldon test emphasizes participation as well as control.

II. THE SUPREME COURT'S ANSWER TO THE WORKS MADE FOR HIRE DILEMMA: COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID

The differences among the tests used by federal courts all center on Congress' failure to define "employment" or "scope of employment," or "employee." For years, the Supreme Court was silent on this issue, until it decided *Community for Creative Non-Violence v.*

45. *See id.* at 549.

46. *See id.* at 550-51.

47. *Id.* at 553. "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.*

48. *Id.* at 550.

49. *See id.* at 553.

50. *Id.* at 553.

51. *See* Kling, *supra* note 27, at 633. In contrast to the conservative interpretation, under which "right to control is sufficient to find an employer/employee relationship, this view requires at least actual supervision by the employing party." *Id.* *See also* O'Meara, *Works Made for Hire Under The Copyright Act of 1976 - Two Interpretations*, 15 CREIGHTON L. REV. 523 (1981-82) (discussing the two views).

Reid.⁵²

In the fall of 1985, Community for Creative Non-Violence, a non-profit organization based in Washington D.C. and dedicated to eliminating homelessness, entered into an oral agreement with James Earl Reid, a sculptor, to create a statue characteristic of homelessness in America.⁵³ At this point of the agreement, no mention was made of copyright ownership.

The statue was to be displayed in the upcoming Christmas Pageant in Washington.⁵⁴ The statue took the form of a modern nativity scene, however, in lieu of the traditional Holy Family, the scene pictured a homeless couple huddled on the street with their child.⁵⁵

Throughout the project, Community for Creative Non-Violence and Reid worked very closely together and conferred regularly on materials used, and time schedules for the completion of the project.⁵⁶ Reid worked exclusively on the statue, assisted at various times by several other people who were paid with funds provided in installments by CCNV.⁵⁷ CCNV also agreed to create the pedestal and base for the statue and visited Reid to check on the progress of the creation.⁵⁸

On December 24, 1985, the completed statue was delivered, and Reid received the final installment of his compensation.⁵⁹ After Christmas, the statue was returned to Reid's workshop for minor repairs. CCNV then informed Reid that they planned to take the statue on a tour across the nation in an effort to raise money for the homeless. Reid stated that the statue could not withstand such a trip and refused to return it to CCNV.⁶⁰ Reid then filed for copyright registration in his own name and promised to take the sculpture on a more modest tour than that proposed by CCNV, and CCNV subse-

52. 490 U.S. 730 (1989).

53. *See id.* at 733.

54. *See id.*

55. *See id.*

56. *See id.* at 733-34. CCNV and Reid together visited homeless families on the streets of Washington, D.C., and studied their habits and actions so as to acquire a personal feel for the statue. They also closely conferred on whether to have the statue made of bronze, but this was not within CCNV's budget and a substitute was used. On another occasion, Reid wanted to sculpt a shopping bag for the family's belongings, but instead CCNV insisted on a shopping cart. *See id.*

57. *See id.* at 733.

58. *Id.* Reid also wanted to cast the statue in bronze at a cost of \$100,000. It also would have taken six to eight additional weeks to complete but CCNV rejected this idea because of limited funds and time. *Id.* The parties agreed on an inexpensive substitute material called "Design Cast 62." The total cost of the statue was agreed not to exceed \$15,000 plus the cost of Reid's services. *Id.* at 733-34.

59. *See id.* at 735. The statue was delivered twelve days after the agreed upon date. *Id.*

60. *Id.* Reid stated that the statue would not survive an extended trip because the cheaper material with which it was made might crack. *Id.*

quently filed a competing copyright registration.⁶¹

After the district court granted a preliminary injunction ordering the return of the sculpture, the district court declared that the statue was a "work made for hire" under section 101 of the 1976 Act⁶² and that CCNV was exclusive owner of the copyright in the sculpture because "CCNV was the motivating force in the statue's production, . . . and directed enough of Reid's efforts to assure that, in the end, he had produced what they, not he wanted."⁶³ In essence, the district court applied the "conservative interpretation"⁶⁴ to define the employment relationship.

The Fifth Circuit, however, reversed and remanded the district court's decision and based its analysis on the "literal interpretation"⁶⁵ of the employment relationship. The Fifth Circuit read section 101 of the 1976 Act as creating "a simple dichotomy in fact between employees and independent contractors."⁶⁶ They stated that under agency law, Reid was an independent contractor, therefore, the work was not prepared by an "employee," under section 101(1), nor did it fit under one of the categories enumerated in 101(2) of the 1976 Act.⁶⁷

On June 5, 1989, the Supreme Court unanimously affirmed the D.C. Circuit's decision.⁶⁸

A. Supreme Court Decided Under Common Law Agency Principles

The Supreme Court recognized the fact that the 1976 Act failed to define the terms "employee" and "scope of employment." Justice Marshall stated while delivering the court's opinion, however, that "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."⁶⁹ Therefore, the Supreme Court decided this case under the common law of agency, a practice utilized

61. *Id.*

62. 17 U.S.C. § 101.

63. 652 F. Supp. 1453, 1456 (D.D.C. 1987), *rev'd* 846 F.2d 1485, *cert. granted* 488 U.S. 940 (1988).

64. *See supra* notes 38-41 and accompanying text (discussing the conservative interpretation).

65. *See supra* notes 29-37 and accompanying text (discussing "literal interpretation.") *See also* *Easter Seal Society v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988) (video presentation where the court also applied the literal interpretation). Thus, the Fifth Circuit followed its own precedent in *Easter Seal Society*. *Id.*

66. 815 F.2d at 329; *CCNV*, 846 F.2d at 1492.

67. 846 F.2d at 1494.

68. *See CCNV*, 490 U.S. 730.

69. *Id.* at 736, quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1979).

to show that federal statutes have uniform nationwide application.⁷⁰

According to the Supreme Court decision, several factors must be examined to determine whether the commissioned person is an employee or an independent contractor including:

the duration of the relationship between the parties;⁷¹ whether the hiring party has the right to assign additional projects to the hired party;⁷² the extent of the hired party's discretion over when and

70. *Id.* at 737. Justice Marshall wrote:

[t]his practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national uniform copyright law by broadly pre-empting state statutory and common law copyright regulation.

Id. (cite omitted) (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. —, —, 109 S.Ct. 1597, 1605 (1989)).

71. See, e.g., *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947); See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957). The Second Restatement of Agency lists eleven factors to be considered when determining the nature of an employee relationship:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business:

RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

72. See *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989). The Ninth Circuit in *Dumas* balanced eight factors to determine whether a work is for hire. They include (1) where the artist conducted his work; (2) whether the buyer was in the regular business of creating similar works; (3) whether the artist works for several buyers at a time or exclusively; (4) whether buyer has the authority to assign additional projects to the artist; (5) the tax consequences stemming from the parties' relationship; (6) the channels through which the buyer hired the artist; (7) the method of compensation; (8) the benefits conveyed to the artist. *Id.*

how long to work;⁷³ the method of payment;⁷⁴ the hired party's role in hiring and paying assistants;⁷⁵ whether the work is part of the regular business of the hiring party;⁷⁶ whether the hiring party is in business;⁷⁷ the provision of employee benefits;⁷⁸ and the tax treatment of the hired party.⁷⁹

Incorporating these factors, the Court reasoned that Reid was clearly an independent contractor. Granted, CCNV was actively involved in the shaping of the project, however, Reid was a sculptor and the work was part of his regular business. He supplied his own tools, and worked in his own studio in Baltimore. Thus, daily supervision by CCNV in Washington was virtually impossible.⁸⁰ Furthermore, Reid was retained exclusively for two months for this project, and CCNV had no right to assign other projects to Reid, or dictate to him his working hours. Finally, Reid was not on CCNV's payroll, nor was he eligible for any benefits from them. Therefore, absent any agreement to the contrary, the Court held that the statue was not a work made for hire within the confines of the statute.⁸¹

B. *Right to Control is Not Dispositive of an Employer/Employee Relationship*

The Court recognized that section 101 of the 1976 Act creates two distinct ways in which a work can be deemed for hire.⁸² The first approach deals with works prepared by employees, while the second focuses on specially commissioned works falling within one of the nine enumerated categories⁸³ and are subject to a written agreement.⁸⁴

The Court rejected the traditional "right to control test" because it "ignores this dichotomy by transforming into a work for hire, under section 101(1) any 'specially ordered or commissioned' work that is

73. See, e.g., *Short v. Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567, 572 (8th Cir. 1984). The Eighth Circuit in *Short* listed several factors that must be balanced in order to decide whether a worker is an employee or an independent contractor. The court recognized, however, that the most important factor is the right of control over the artist. *Id.*

74. See, e.g., *Dumas* at 1105.

75. See, e.g., *Short* at 574.

76. See, e.g., *Dumas* at 1105; see also, RESTATEMENT (SECOND) OF AGENCY, § 220(2)(h) (1957).

77. See RESTATEMENT (SECOND) OF AGENCY § 220(2)(j).

78. See, e.g., *Short* at 574.

79. See, e.g., *Dumas* at 1105. See also CCNV, 109 S.Ct. at 2178-79; RESTATEMENT (SECOND) OF AGENCY § 220(2), *supra* note 70, which sets forth a non-exhaustive list of factors relevant to determining whether a hired party is an employee.

80. CCNV, 490 U.S. at 745.

81. *Id.* at 745-46.

82. *Id.* at 739.

83. 17 U.S.C. § 101(2). See *supra* note 23 (setting forth text of § 101(2)).

84. *Id.*

subject to the supervision and control of the hiring party." ⁸⁵

The Court likewise rejected the Aldon Actual Control Test. ⁸⁶ According to the Court, under the actual control test, a work for hire could only arise under section 101(2) where a party commissions, but does not actually control, a product that falls into one of the nine categories set forth in section 101(2) of the 1976 Act. ⁸⁷

Thus, *Community for Creative Non-Violence v. Reid*, basically accepted the literal interpretation and "came down squarely on the side of the Fifth Circuit, putting itself directly at odds with the Second and Seventh Circuits." ⁸⁸ Contrary to the Fifth Circuit, however, the Supreme Court's decision did not address section 101(2) of the 1976 Act. ⁸⁹

85. CCNV, 109 S.Ct. at 2173.

86. See *supra* notes 42-51 and accompanying text (discussing the Aldon Test).

87. See CCNV, 109 S.Ct. at 2174; see also, *Easter Seal Society*, 815 F.2d at 334. "[T]here is no way to milk the 'actual control' test of Aldon Accessories from the language of the statute." CCNV, 109 S.Ct. at 2174, quoting *Easter Seal Society*, 815 F.2d at 334. "We therefore conclude that the language and structure of section 101 of the Act do not support either the right to control the product or the actual control approaches." *Id.*

88. Goldberg and Bernstein, *Copyright Law: The Work For Hire Conflict*, N.Y.L.J., Sept. 16, 1988, at 3, col. 7. The Fifth Circuit in *Easter Seal Society*, likewise utilized common law agency principles to determine a definition of "employee" as did the Supreme Court in CCNV. *Easter Seal Society*, 815 F.2d at 334. In *Easter Seal*, however, the court also stated that the second part of the definition must be specifically examined, while the Supreme Court was silent on this issue. *Id.*

The Supreme Court concluded that alternative tests used by lower courts are invalid and we must stick to the general principles of agency law. See CCNV, 109 S.Ct. at 2173. The court further stated that the undefined statutory terms find considerable support in the legislative history of the 1976 Copyright Act which almost completely revised existing copyright law, and was the product of two decades of negotiation by the Copyright Office and Congress. *Id.* at 2174. Two things, however, remained constant. First of all, works by employees and commissioned works by independent contractors were always viewed as separate entities. Secondly, "in using the term 'employee,' the parties and Congress meant to refer to a hired party in a conventional employment relationship. These factors militate in favor of the reading we have found appropriate." *Id.*

89. 17 U.S.C. § 101(2). Once again, under that section, a work is "made for hire" when the parties sign a written agreement explicitly recognizing that the work is, in fact, "made for hire" and when the commissioned work fits into one of the nine enumerated categories. *Id.* If a commissioned project does not fit into any one of the nine categories of section 101(2), the commissioning party can still obtain ownership of the copyright by means of an assignment. See Patton, *AN AUTHOR'S GUIDE TO COPYRIGHT LAW*, 70-71 (1980). See also Samuels, *PATENT, TRADEMARK AND COPYRIGHT LAWS*, 182-88 (1985) for a discussion on duration of copyright. The freelance creator must sign a written agreement explicitly assigning to the commissioning party the ownership of his copyright in the work. If the commissioning party wants the power to renew its assigned copyright, an agreement must explicitly provide for an assignment of the right to renew as well. *Id.*

III: RETROSPECTIVE AND PROSPECTIVE - THE EFFECT OF COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID ON THE ENTERTAINMENT INDUSTRY

As a result of *CCNV*, businesses that commission creative works, including advertising agencies, film and record companies, computer software developers, and the like will often be deprived of the benefits of copyright ownership unless the issue is explicitly addressed by contract. Their payments to freelance creators will, in effect, cover only a one-time use vesting all future copyright interests in the creator.

Although the recent Supreme Court decision dealt with a sculptor, it effects all "artists." This section will retrospectively examine several cases with recurring issues in the field of entertainment that might have been decided differently under the Supreme Court's rationale, and therefore, will demonstrate the applicability of *CCNV* to all artists.

A. Case Analysis:

1. *Picture Music, Inc. v. Bourne, Inc.*⁹⁰

In May, 1933, Walt Disney Productions, Inc. released the cartoon film "The Three Little Pigs." Ann Ronell, appellant's predecessor in interest, assisted with the film's soundtrack including the popular song "Who's Afraid of the Big Bad Wolf?"⁹¹ The Second Circuit decided that this was a work made for hire on the basis that "the motivating factor in producing the work was the employer who induced the creation."⁹²

Picture Music was decided prior to the enactment of the 1976 Act. If decided today under the recent Supreme Court's interpretation of the 1976 work made for hire provision, the result should be different. The creator here would not fit within section 101(1) because the Supreme Court in *CCNV* defined "employee" using common law agency principles.⁹³ In *Picture Music*, the Second Circuit explicitly labeled Ronell an independent contractor thereby disallowing the creation to be a work for hire in the absence of an ex-

90. 457 F.2d 1213 (1972).

91. *Id.*

92. *Id.* at 1216. The court reasoned that Disney "controlled the original song, they took the initiative in engaging Ronell to adapt it, and they had the power to accept, reject or modify the work." *Id.* at 1217. The court further stated that although "she acted in the capacity of an independent contractor [this] does not preclude that the song was done for hire." *Id.* at 1217.

93. See *supra* notes 69-81 and accompanying text (discussing the common law agency principles discussed in *CCNV*).

press agreement.⁹⁴ Furthermore, there was no agreement expressing anything to the contrary.⁹⁵ Therefore, under the CCNV rationale, Ronell would retain all copyright interest in her work.

Under section 101(2), in order for a work to be considered "for hire," it would have to fit within one of the enumerated categories and be the subject of an express agreement labeling it as such.⁹⁶ In *Bourne*, the song "Who's Afraid of the Big Bad Wolf?" clearly fits into one of the categories since it was a contribution to the collective work, "The Three Little Pigs." There was no express written agreement, recognizing that the work was "for hire." Therefore, contrary to what the Second Circuit held in 1972, under the CCNV analysis, Ronell retains the copyright interest in the song.

2. *Bertolino v. Italian Line*⁹⁷

In *Bertolino*, plaintiff (Mario Bertolino) entered into a recording contract with Italian Line Records to produce sixty compositions, perform concerts and to receive a 2.7% royalty rate on the retail price of all records sold.⁹⁸ In return, Italian Line was given the right to supervise production of the recordings, and direct the net profits. The contract explicitly stated that Italian Line retained all right, title and interest in the recordings.⁹⁹

The district court held that where an agreement called for a singer to devote his services exclusively to producing sixty recordings, and provided that "the producers would direct, underwrite, and supervise production of the recordings, . . . the singer had no copyright interest absent a contractual reservation."¹⁰⁰

The district court did not discuss whether Bertolino was an employee, because all copyright interest was explicitly granted to Italian Line as per the agreement.¹⁰¹ In the absence of such, under the CCNV rationale, Bertolino would probably be considered an employee in the traditional agency sense. Therefore, the copyright interest would remain with Bertolino.

94. *Picture Music*, 457 F.2d at 1217. Using the pre-1976 Act and pre-CCNV rationale the court in *Picture Music* stated: "That she acted in the capacity of an independent contractor does not preclude a finding that the song was done for hire." *Id.*

95. See generally *Picture Music*, 457 F.2d 1213.

96. See *supra* note 23 (setting forth text of section 101(2)).

97. 414 F. Supp. 279 (S.D.N.Y. 1976).

98. *Id.* at 281.

99. *Id.*

100. *Id.* at 284. In *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966), the court stated: "[T]here is a presumption in the absence of an express contractual reservation to the contrary, that the copyright shall be in the person at whose instance and expense the work is done." *Id.* at 567. In *Bertolino*, no such contractual reservation existed. *Bertolino*, 414 F. Supp. at 284.

101. *Id.* at 281.

This is true primarily because of the longevity of Bertolino's contract with Italian Line. The opera singer was required to create over sixty albums. Also, Italian Line retained a substantial degree of control over Bertolino, and under section 201(b),¹⁰² the organization who commissions the work becomes the author and receives the author's copyright when the creation is a "work made for hire."

Suppose, however, Bertolino created only one album and the agreement did not specify that the work was for hire. Then, Bertolino would clearly retain copyright ownership unless the facts indicated otherwise that he was an employee in the traditional sense under section 101(1).¹⁰³

3. *Evans Newton, Inc. v. Chicago Systems Software*¹⁰⁴

In *Evans Newton*, plaintiff (Evans Newton) wrote the system bid guidelines with programming specifications for a school record-keeping program including flow diagrams, numbering and coding systems.¹⁰⁵ In addition, he developed sample printouts and reports.¹⁰⁶ While the Seventh Circuit cited no evidence that the defendant (Chicago Systems) actually controlled the independent programmer, it held that the evidence provided was sufficient to satisfy the requirements of section 101(1), and therefore, that the defendant was the statutory author on the theory that the work was for hire. Thus, the work product of independent programmers was considered a work for hire.¹⁰⁷ Ironically, at least one commentator stated that there is a need for the Supreme Court or Congress to rule on the copyright ownership of computer programs created by independent programmers.¹⁰⁸

The Supreme Court resolved this problem in *CCNV*. If the *Evans Newton* case were decided under the *CCNV* test, then the work product of the independent programmers would not be considered a work for hire under section 101(1) of the 1976 Act, since the

102. See *supra* note 21 (setting forth text of section 201(b) of the 1976 Act).

103. See *supra* note 23 (setting forth text of section 101(1)).

104. 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986).

105. *Id.* at 891.

106. *Id.*

107. In reaching this conclusion, the Seventh Circuit utilized the *Aldon* Approach. See *supra* notes 42-51 and accompanying text (discussing the *Aldon* Approach). Judge Harlington Wood stated in *Evans Newton* "[w]e find the Second Circuit's analysis and conclusion [in *Aldon*] compelling." *Evans Newton*, 793 F.2d at 894.

108. See Reece, *Computer Law: The Work For Hire Doctrine - A Trap for the Unwary Company*, Nat'l L.J., April 3, 1989, at 40-41. Mr. Reece stated that "[u]ntil the Supreme Court resolves the controversy or Congress provides a legislative solution to the issue, the treatment of computer programs written by independent programmers is very much dependent on the jurisdiction in which the dispute arises." *Id.*

programmer was clearly independent, and not an employee in the conventional sense.

B. *Future Effects*

1. What Contracting Parties Must do to Safeguard Their Interests

In summary, after *CCNV*, businesses that commission independent creators cannot rely on a broad interpretation of the term "employee" in section 101(1) to acquire copyright ownership, as most independent creators are likely not to be conventional employees.¹⁰⁹ Instead, a hiring party must enter a written agreement with the creator.¹¹⁰ If the work fits into any one of the nine categories of section 101(2) of the 1976 Act, the agreement must explicitly recognize that the work is made for hire.¹¹¹ Alternatively, if the work does not fit into any of these categories, the written agreement must explicitly assign to the commissioning party the creator's ownership of the copyright and his right to renew.¹¹²

Employers in the entertainment industry, therefore, must make it a practice to safeguard any copyright ownership they wish to retain. For example, record companies who contract with independent recording artists for single records should specify that a work is done for hire.

Suppose an independent composer writes a song for the soundtrack of a film. Absent an express agreement, most courts would find that under section 101(1) an employment relationship did not exist and therefore the work would not be for hire and the artist would retain all copyright interest. Furthermore, while the one track would be a compilation to a collective work (the entire soundtrack), under 101(2), the copyright ownership will remain with the composer unless an explicit agreement says otherwise.

Creative works which have already been created by independent authors under an arrangement which did not provide in writing for an assignment of copyright to the hiring party are likely to be found to belong to the author. Businesses which plan to re-use such works, including recorded music, photographs, and computer programs, should not proceed on the assumption that they own the rights, and should arrange to obtain the right of use. This might, however, require additional compensation, particularly if the commissioning party does not have an ongoing relationship with the creator.

109. See *supra* notes 52-89 and accompanying text (discussing *CCNV* decision).

110. *Id.*

111. *Id.*

112. *Id.*

IV. LEGISLATIVE ACTION IS NECESSARY AND IMMINENT

The Supreme Court has outlined a test for courts to apply, but it is not enough to resolve this long-standing conflict that has perplexed courts for over a decade. The Supreme Court's rationale is valid for most cases, but not if a conventional "employee" performs an act unrelated to his conventional duties. The following hypothetical situations will illustrate this dilemma.

For example, Mr. Singer has been working for Fordham Record Co., for ten years, and his contract states that he will write music exclusively for Ms. Songstress on a work for hire basis, which he has been doing. Suppose Mr. Singer now has written a song exclusively for Ms. Topforty to be published by Fordham Records. Who owns the copyright in Ms. Topforty's song? Fordham or Singer? Since Mr. Singer is a conventional employee, it could be argued that the copyright interest would probably lie with Fordham. However, according to his agreement, the scope of his employment is to write solely for Songstress with no mention of other work. It could be argued, under general agency principles, that Singer is acting outside the scope of his employment, and therefore, he is not an "employee" when he writes for Topforty and retains copyright interest in that song. [Compare how it falls short under the CCNV Test].

Now suppose Singer is an independent writer under the same contract who writes for Topforty at his leisure in his own home, and is not supervised by Fordham at all. Singer would not be considered a conventional employee, but an independent contractor. Furthermore, there is no explicit agreement designating the Topforty song as a work for hire, because the contract states that the work is to be done exclusively for Ms. Songstress.

Cases like these will blur the clear-cut distinction made by the Supreme Court in *CCNV*. Consequently, Congress should resolve this judicial dilemma by amending the 1976 Act.¹¹³ Granted, even an amendment will not solve all the problems, but it is definitely a step in the right direction.

Since 1982, Senator Thad Cochran (R-Miss.) has introduced proposals to clarify the work made for hire definitions of "employee" and "scope of employment" in favor of freelance artists. Shortly following the *CCNV* decision, Cochran introduced his latest work made for hire bill, S.1253.¹¹⁴

113. One commentator warns that the works made for hire dilemma is alive and well even after *CCNV*. Goldberg, *Copyright Law: Work For Hire Resolved?* N.Y.L.J., July 21, 1989 at 3, col. 1. Mr. Goldberg stated that "[n]otwithstanding the Supreme Court's clarification of the work made for hire definition in the statute, the battle between creators and users over this issue may not be over." *Id.* at 4, col. 5.

114. The bill was introduced to the Senate and referred to Senate Judiciary Committee on June 22, 1989. Hearings began by Patents/Copyright Subcommittee on

The bill proposes four changes for section 101 of the 1976 Act. First and foremost, the bill makes it clear that sections 101(1) and 101(2) are mutually exclusive. Second, the bill explicitly defines employee as "a formal salaried employee."¹¹⁵ This would solve the hypothetical discussed above.

The third change deals with section 101(2), and it seeks to bar the so-called "blanket" work for hire agreements by requiring agreements to be entered into for each commissioned work.¹¹⁶

The fourth proposed change operates after the fact and would require the agreement to be signed before the commencement of the work. "It seeks to counter the practice of stamping a work for hire provision on the back of a check forwarded to the freelancer in payment for the commissioned work."¹¹⁷

Publishers, are opposed to the new bill stating that it would create inflexibility in the statute.¹¹⁸ Artists, however, feel that the amendments are essential to protect the rights of all parties involved.¹¹⁹

September 20, 1989 and are still pending. "Contending that the Supreme Court used agency principles because it was unable to determine conclusively what Congress intended 'employee' to mean, Senator Cochran . . . urges that his bill seeks to fill that void and responds to a perceived invitation by the court for further legislative clarification." See Goldberg, *supra* note 112, at 4. See also S. Rep., 101st Cong., 2d Sess., 136 Cong. Rec. § 10345, July 24, 1990. At legislative hearings in July of 1990, Senator Cochran discussed abuses of the work for hire doctrine. Senator Cochran stated that "one of those abuses is the practice of requiring a creator to sign a blanket work for hire agreement, under which the creator surrenders . . . his rights to a commissioned work." 136 Cong. Rec. § 10345 (July 24, 1990).

115. S. Rep. No. 10345, 101st Cong., 2d Sess. (1989). See also S. Rep. No. 1253, 101st Cong., 2nd Sess. (1989).

116. *Id.* A "blanket" work for hire agreement covers all creative works in general and does not specifically itemize the works. *Id.*

117. *Id.*

118. *Copyrights, Publishers Oppose Work-For-Hire Legislation at Senate Hearing*, The Bureau of Nat'l Affairs, Inc., Daily rep't for executives, Sept. 28, 1989, at A-5. Publishers expressed their dissent with Senator Cochran's bill at a hearing before the Senate Subcommittee on Patents, Copyrights and Trademarks on Sept. 20, 1989. *Id.* Particularly in opposition were Michael R. Klipper, of the Committee for America's Copyright Community, and Victor A. Kovner of the National Publishers of America. *Id.* Klipper stated that:

The bill . . . would make major changes in the Copyright Act's work for hire definition . . . at a time when employers and commissioning parties are assessing the impact of the Supreme Court's decision in *CCNV v. Reid*. It would ignore the malleability in the current law with rigid, inflexible rules that ignore the realities of the business world and the marketplace.

Id.

119. *Id.* Author Tom Clancy noted that writers are creators of ideas that receive royalties based on how successful the ideas become. He further stated "publishers gamble their money on the writers ideas but they retain the advantage of making the rules under which the publishing business operates. The good of society comes from protecting those who produce ideas . . . not from protecting those who exploit them." *Id.*

Nicholas A. Veliotis, of the Association of American Publishers, Inc., on the

The proposed revisions in the 1976 Act are a necessary step en route to clarifying the work made for hire doctrine, which has troubled the courts for too long. The first two proposals of the Cochran Bill are a codification of the *CCNV* decision by finally giving a clear definition of "employee" and recognizing the explicit dichotomy between sections 101(1) and 101(2). The proposed revisions also seek to clarify any misunderstandings under 101(2) which were not mentioned by the Supreme Court. The four amendments virtually leave no room for error as they force parties to protect themselves by explicitly stating what the agreement constitutes.¹²⁰

CONCLUSION

The proposed changes in the recent Senate bill will definitely tidy up many loose ends of the 1976 Copyright Act and will subsequently reduce litigation. While these alterations are both necessary and imminent, however, they will solely effect future agreements. Since the Constitution forbids the passing of *ex post facto* laws,¹²¹ there are still potentially numerous agreements made

other hand, feels that publishers and authors are not at odds. He stated that "we have worked to improve the process by which rights are contractually established and transferred Our system can continue to thrive, so long as its inherent balances are left undisturbed." *Id.*

According to R. Jack Fishman of the National Newspaper Association, "[i]f the paternity right were applied to newspapers, a publisher would have to determine exactly who was the author of each piece . . . a difficult task that would consume a great deal of time." *Id.* He further stated that a "writer would retain the ability to veto edits of their stories, which would create an unacceptable conflict between reporters and editors." *Id.*

120. Additionally, the proposed Senate Bill seeks to clarify the definition of a "Joint Work" under the 1976 Act. *Id.* Section 101 defines a "joint work" as "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 (1976). In *CCNV*, the Court stated that although *CCNV* was not an employer for hire, *CCNV* might be the "author" of a joint work. This issue was remanded to the trial court. *CCNV*, 490 U.S. at 732. "*CCNV* nevertheless may be a joint author of the sculpture . . . if, on remand, the District Court determines that the parties prepared the work with the intention that their contributions be merged into inseparable and interdependent parts of a unitary whole." *Id.* Based on the 1976 Act, the district court will have to decide whether *CCNV* and Reid prepared the work with the intention that "their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* Thus, here we go round the interpretation merry-go-round once again.

In anticipation of this, Senator Cochran's Bill amends the definition of a "joint work" in favor of freelance creators. S. Rep. No. 1253, 101st Cong., 2d Sess. (1990). It would require that each author of the joint work "contribute original or copyrightable subject matter to the work." *Id.* See also Goldberg, *supra* note 113, at 4. In addition, the amendment would require that in the case of a specially ordered work, the parties must designate that the work will be a "joint work" before the commencement of the work. *Id.*

121. U.S. Const. art. I, § 9, cl. 3.

under the guidance of the 1976 Act, that could be contested. These prospective controversies, must confer with the analysis offered in *Community for Creative Non-Violence v. Reid*.¹²² After all, it is this decision that has paved the way for prospective amendments to the 1976 Copyright Act.

In a desperate attempt to interpret the language of the work made for hire doctrine, Circuit Courts begged the Supreme Court for assistance. The Court recently heeded to the call en route to a clarification of an age-old doctrine. The decision must eventually lead to the enactment of several legislative amendments, and together they should put all interpretive controversies regarding employer/employee relationships and works made for hire to rest, once and for all.

Nicholas C. Katsoris

122. *CCNV*, 490 U.S. 730.