

# Notes

## The Work Made for Hire Doctrine Under the Copyright Act of 1976: Employees, Independent Contractors and the Actual Control Test

### I. INTRODUCTION

A significant debate in copyright law involves the question of how to decide when a person creates a copyrightable work<sup>1</sup> within the scope of an employment relationship for purposes of determining copyright ownership. At the center of this debate is the application of the work made for hire doctrine which operates to vest in employers the copyrights to works prepared by their employees. The most contested issue under the doctrine involves works created by people who have characteristics of both independent contractors and employees.

The scope of the work made for hire doctrine covers a spectrum of potential employment relationships. At either end of the spectrum there is little dispute as to which party should own the copyright. At one end of the spectrum are the traditional employees.<sup>2</sup> Traditional employees are those who work for their employer in return for payment of a regular salary. The copyright to any artistic works created by these regular salaried

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1. Congress stated the general guidelines for determining what are copyrightable works as follows:

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

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

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102 (1982).

2. See, e.g., *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326 (N.D. Ind. 1986).

employees always vests in the employer unless the parties agree otherwise.<sup>3</sup> At the opposite end of the spectrum are the independent contractors.<sup>4</sup> These individuals work alone with their own materials and they often create their works before communicating with prospective buyers. Generally, these artists own, or should own, the copyright to works they create.<sup>5</sup>

Between these two ends of the spectrum lie various fact situations in which the creators have characteristics of both employees and independent contractors. The uncertainty in the law arising in this muddled area of the spectrum, as illustrated by the recent split among the circuits of the United States Court of Appeals,<sup>6</sup> concerns the labeling of these artists as employees or independent contractors. The resulting characterization determines whether they will own the copyright to works they created. The disagreement among the circuits deciding work made for hire cases concerns the proper judicial test to use in determining the classification of these anomalous creators as employees or independent contractors.

Since the enactment of the Copyright Act of 1976,<sup>7</sup> the United States Supreme Court has had several opportunities to resolve this dispute among the courts of appeals but has yet to address the issue.<sup>8</sup> In the most recent case on the question, *Community for Creative Non-Violence v. Reid*,<sup>9</sup> the District of Columbia Circuit Court of Appeals rejected the holding in a

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3. However, critics of the present rule say that the copyright should vest in the employee/creator of the work regardless of whether it was created within the scope of his employment. See, e.g., Comment, *Sufficiently Supervised Commissioned Workers: Mythical Beasts Sculpted from Old Law*, 14 PEPPERDINE L. REV. 381, 383-84 (1987) [hereinafter Comment, *Sufficiently Supervised Commissioned Workers*].

4. See, e.g., *Everts v. Arkham House Publishers, Inc.*, 579 F. Supp. 145 (W.D. Wis. 1984).

5. *Id.* at 149.

6. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir.), cert. granted, 109 S. Ct. 362 (1988); *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), cert. denied, 108 S. Ct. 1280 (1988); *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Evans Newton Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), cert. denied, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984).

7. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1982)).

8. See *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), cert. denied, 108 S. Ct. 1280 (1988); *Evans Newton Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), cert. denied, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984); *Whelan Assocs. v. Jaslow Dental Laboratory, Inc.*, 609 F. Supp. 1307, amended in part, 609 F. Supp. 1325 (E.D. Pa. 1985), aff'd, 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987).

9. 846 F.2d 1485 (D.C. Cir.), cert. granted, 109 S. Ct. 362 (1988).

similar case decided by the Second Circuit Court of Appeals in 1984<sup>10</sup> and adopted the view of the Fifth Circuit Court of Appeals.<sup>11</sup> The Supreme Court agreed to hear the case in the October 1988 term.<sup>12</sup>

Historically, the work made for hire doctrine favored employers. The United States Supreme Court first recognized the doctrine in the 1903 case of *Bleistein v. Donaldson Lithographing Co.*<sup>13</sup> Although the Court did not specifically set out the rule, the case nevertheless is cited by courts<sup>14</sup> and commentators<sup>15</sup> as the Supreme Court's first recognition of the doctrine that the copyrights to works created by employees within the scope of their employment belonged to their employers.<sup>16</sup>

In order to secure more rights for independent contractors,<sup>17</sup> Congress revised the work made for hire definition when it enacted the Copyright Act of 1976. The new definition provides as follows:

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 part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>18</sup>

Unfortunately, most independent contractors are no better off now than before the revision, primarily because Congress failed to define

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10. *Id.* at 1494 (rejecting *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984)).

11. *Id.* (following *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988)).

12. 109 S. Ct. 362 (1988).

13. 188 U.S. 239 (1903). *Bleistein* involved three lithographs created by the plaintiff's employees for the defendant's use in advertising its circus. The defendant later copied the designs in reduced form and the plaintiff sued for copyright infringement. *Id.* at 248.

14. *See, e.g.*, *Murray v. Gelderman*, 566 F.2d 1307, 1309 (5th Cir. 1978).

15. *See, e.g.*, Levin, *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 (1987) [hereinafter Levin, *Misinterpretation*]; Simon, *Faculty Writings: Are They "Works Made For Hire" Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485, 487 (1982-83).

16. 188 U.S. at 248 (citing *Gill v. United States*, 160 U.S. 426 (1896); *Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 F. 152 (C.C.S.D.N.Y. 1899); *Carte v. Evans*, 27 F. 861 (C.C.D. Mass. 1886)).

17. The 1976 Act provides that only certain categories of commissioned works fall within the scope of the works made for hire definition. 17 U.S.C. § 101 (1982).

18. *Id.*

“employer,” “employee” or “scope of employment.” Because many artists have characteristics of both employees and independent contractors, the courts have been compelled to devise their own tests to decide if a particular artist is an “employee” working “within the scope of his or her employment.” The result has been the existing conflict among the circuit courts of appeals.<sup>19</sup>

On one side of the debate concerning works made for hire, writers, composers, painters, and other artists argue that they do not receive sufficient compensation for their creativity. Furthermore, they complain that, once a creation becomes a work made for hire, the artist loses all reproduction rights to the creation. To compensate for the meager living they earn selling their underpriced works, the artists want to retain reproduction rights to those works.<sup>20</sup>

In response to the artists' complaints, the publishers, motion picture producers, and other employers contend that, once they pay an artist to create a copyrightable work, the employer should own the reproduction rights to the work. They argue that employers incur serious financial risks in marketing the works.<sup>21</sup>

This Note will discuss the origins and history of the work made for hire doctrine in case law under the 1909 and 1976 Copyright Acts and will analyze attempts to devise a fair test for defining an employment relationship. This Note also will discuss the recent revision to the doctrine in the 1976 Copyright Act and problems interpreting the Act. Finally, this Note will show why the extent of actual control an employer exercises over the creation of a copyrightable work should be the determining factor in deciding whether an employment relationship exists.

## II. STATUTORY PROVISIONS ADOPTING THE WORK MADE FOR HIRE DOCTRINE AND COURT INTERPRETATIONS

The framers of the Constitution recognized the importance of protecting those involved in the creative and useful arts.<sup>22</sup> They gave Congress

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19. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988); *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988); *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Evans Newton Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

20. See *infra* notes 116-17 and accompanying text.

21. See DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 109, 155 (1963), *reprinted in* G. GROSSMAN, Part 2, 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976) (statement of Joseph Dubin) (“[The employer is] entitled to some consideration, too, for the financial investment he makes in the product that’s finally a result of a composite endeavor of all people concerned.”).

22. U.S. CONST. art. I, § 8, cl. 8.

the power "To 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."<sup>23</sup> Congress employed this power to enact the Copyright Act of 1909.<sup>24</sup>

### A. Copyright Act of 1909

The 1909 Copyright Act represented a codification of the work made for hire doctrine first recognized in *Bleistein v. Donaldson Lithographing Co.*<sup>25</sup> The 1909 Act stated that "the word 'author' shall include the employer in the case of works made for hire."<sup>26</sup> Obviously concerned with the constitutional provision empowering Congress to protect "authors" with respect to copyrights to their works, the drafters of the Act simply broadened the definition of "authors" so that it included the artists' employers. Interpretation problems with the 1909 Act arose because the works made for hire provision defined neither "employer" nor "works made for hire" and because the provision did not distinguish between regular employees and independent contractors.

1. *Interpretations of the 1909 Act.*—Because the 1909 Act did not define "employee," the earliest cases interpreting the 1909 Act were free to include independent contractors among "employees" in the works made for hire doctrine. In two early cases,<sup>27</sup> the United States Court of Appeals for the Second Circuit applied the doctrine to photographic portraits. The court held that when a person hires a photographer to take his picture and pays that photographer, the copyright belongs to the sitter, not the photographer, but a photographer who gratuitously solicits to photograph the sitter is owner of the copyright.<sup>28</sup> One commentator stated that the reason for vesting ownership of the copyright in the sitters in certain cases is that courts may have been concerned with the sitters' privacy rights not to have their likenesses reproduced without their consent.<sup>29</sup>

23. *Id.*

24. Copyright Act of 1909, Pub. L. No. 349, ch. 320, 35 Stat. 1075 (1909) (repealed 1947).

25. 188 U.S. 239 (1903).

26. Copyright Act of 1909, Pub. L. No. 349, ch. 320, § 62, 35 Stat. 1075, 1088 (repealed 1947). See Pub. L. No. 281, ch. 391, § 26, 61 Stat. 652, 660 (1947) (repealed 1976). The 1909 Act also provided that "the works for which copyright may be secured under this Act shall include all the writings of an author." Copyright Act of 1909, Pub. L. No. 349, ch. 320, § 4, 35 Stat. 1075, 1076 (1909) (repealed 1947).

27. *Lumiere v. Robertson-Cole Distributing Corp.*, 280 F. 550 (2d Cir.), *cert. denied*, 259 U.S. 553 (1922); *Lumiere v. Pathe Exch.*, 275 F. 428 (2d Cir. 1921).

28. 280 F. at 552-53; 275 F. at 428.

29. STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COP-

Later, in *Yardley v. Houghton Mifflin Co.*,<sup>30</sup> the Second Circuit Court of Appeals applied its prior holdings to a painting. Again, the controlling factor was whether the artist received payment for his work.<sup>31</sup>

These holdings later developed into a more general "instance and expense" test enunciated in *Lin-Brook Builders Hardware v. Gertler*,<sup>32</sup> in which the Ninth Circuit Court of Appeals held:

[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, 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.<sup>33</sup>

In *Lin-Brook*, the plaintiff hired an artist to prepare drawings for its hardware catalogue. The defendants later displayed similar drawings in their hardware catalogue. Finding that the plaintiff, as the hiring party, owned the copyright in the drawings, the court held that the defendants infringed the plaintiff's copyright.<sup>34</sup>

A similar version of the instance and expense test appeared in *Picture Music, Inc. v. Bourne, Inc.*,<sup>35</sup> in which the Second Circuit Court of Appeals stated that the rationale for the works made for hire doctrine is that "the motivating factor in producing the work was the employer who induced the creation."<sup>36</sup> In *Murray v. Gelderman*,<sup>37</sup> the Fifth Circuit Court of Appeals, equating the instance and expense test with the

RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., STUDY No. 13: WORKS MADE FOR HIRE AND ON COMMISSION 123, 142 n.58 (Comm. Print 1960) (authored by B. Varmer), reprinted in 1 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 123, 142 n.58 (1976) [hereinafter STUDY No. 13].

30. 108 F.2d 28 (2d Cir. 1939), cert. denied, 309 U.S. 686 (1940).

31. *Id.* at 31.

32. 352 F.2d 298 (9th Cir. 1965).

33. *Id.* at 300 (emphasis added).

34. *Id.* at 300-02. See also *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966):

[The works for hire doctrine] is applicable whenever an employee's work is produced at the *instance and expense* of his employer. In such circumstances, the employer has been presumed to have the copyright.

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 567-68 (citations omitted) (emphasis added).

35. 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972).

36. *Id.* at 1216 (quoting Note, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 716 (1944)).

37. 566 F.2d 1307 (5th Cir. 1978).

motivating factor test, held that a corporate employer owned the copyright to a book written by the hired party.<sup>38</sup> In addition, the court noted that the hired party cannot avoid the scope of the doctrine merely by demanding artistic freedom.<sup>39</sup>

Another factor courts developed to determine whether the work for hire doctrine applied to a creation under the 1909 Act, was the employer's right to supervise, direct, and exercise control over the manner in which the artist created his or her work. In *Scherr v. Universal Match Corp.*,<sup>40</sup> the Second Circuit Court of Appeals found this to be the most determinative factor in contrast to the "instance and expense" test which the court said was "pertinent but non-essential."<sup>41</sup> Actual exercise of the right to supervise was not controlling.<sup>42</sup>

A third factor used under the 1909 Act to determine if an employment relationship existed was the nature or existence of the compensation paid to the creator.<sup>43</sup> For example, in *Epoch Producing Corp. v. Killiam Shows, Inc.*,<sup>44</sup> the issue was whether D. W. Griffith directed and produced the film, *The Birth of a Nation*, as the employee for hire of the plaintiff, Epoch Producing Corp., or its predecessor, Majestic Motion Picture Co. The Second Circuit Court of Appeals held that no employment relationship existed between Griffith and either company.<sup>45</sup> In addition to finding a lack of supervision over Griffith, the court found no evidence that either company paid for the film's production. The court concluded that the film was not a work made for hire and, therefore, Epoch could not maintain a suit for copyright infringement against Killiam Shows.<sup>46</sup> Generally, however, the nature of compensation has been found to have lesser significance than the other factors.<sup>47</sup>

The extent of the overlap among these three factors was in dispute. In addition, courts took note of other factors, such as the bearing of

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38. *Id.* at 1310. Compare *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909 (2d Cir. 1974) (work for hire did not exist with respect to comic strip because the comic strip was developed before employment relationship began and therefore was not produced at the instance and expense of the employer).

39. 566 F.2d at 1311.

40. 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

41. *Id.* at 500. See also *Picture Music Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).

42. *Id.* at 501. See also *Murray*, 566 F.2d at 1310.

43. *Murray*, 566 F.2d at 1310; see also *Scherr*, 417 F.2d at 501. The courts did not expand on the meaning of the "nature" of compensation paid. Most likely, they were referring to a distinction between salaries or lump sum payments.

44. 522 F.2d 737 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976).

45. *Id.* at 744.

46. *Id.* at 745.

47. See *Murray*, 566 F.2d at 1310; *Scherr*, 417 F.2d at 501.

expenses and the place of creation, to determine if the works were created for hire.<sup>48</sup> The courts could agree only that they developed these factors tests to arrive at the intent of the parties to the relationship.<sup>49</sup>

Several of the factors tests used by these courts paralleled certain factors listed by the American Law Institute in its Restatement (Second) of Agency.<sup>50</sup> However, one court noted that these cases "developed into an almost irrebuttable presumption that any person who paid another to create a copyrightable work was the statutory 'author' under the 'work for hire' doctrine" which extended the class of "employee" well beyond the definition of "servant" under agency law.<sup>51</sup> Under this presumption, artists could not retain the copyrights in works they created unless they created the works entirely alone, in their own studies, and prior to contacting any interested buyers. Even under these circumstances, the artists would be wise to have the buyers agree in writing to let the artists retain the copyrights.

The original purpose of the factors tests was to arrive at the intent of the parties concerning copyright ownership when the parties did not

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48. See Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 596 (1987).

49. See, e.g., *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965).

50. The Restatement provides as follows:

§ 220. Definition of Servant

(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).

51. *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988).

express that intent. However, the courts used these tests to such an extent that they turned virtually every relationship into one of employer/employee. As a result, they defeated the original purpose of the factors tests. Artists who manage to retain their artistic freedom when they create works, in reality, do not intend to give all reproduction rights to employers who contributed nothing except funds to the creation.

### B. Copyright Act of 1976

Because of the confusion existing under the 1909 Act's work made for hire provision, Congress found it necessary to reexamine and redefine the doctrine. The Copyright Act of 1976 provides for ownership of copyright as follows:

(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.

(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.<sup>52</sup>

Section 101 of the Act specifies which works should be considered "made for hire." The definition of works made for hire contains two parts. The first part includes "work[s] prepared by an employee within the scope of his or her employment."<sup>53</sup> The second part includes nine specific categories of commissioned works prepared by independent contractors whose employers may obtain the copyright if the parties sign a written agreement vesting copyright in the employer: (1) a contribution to a collective work; (2) a part of a motion picture or other audiovisual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for a test; and (9) an atlas.<sup>54</sup> These categories clearly indicate Congressional intent to adopt prior law with respect to works prepared within the scope of the employment relationship.<sup>55</sup> However, Congress substantially revised the

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52. 17 U.S.C. § 201(a), (b) (1982).

53. 17 U.S.C. § 101 (1982).

54. *Id.*

55. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5736. The report stated: "Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire

rule for works prepared by independent contractors.<sup>56</sup>

There is little dispute over the status of works prepared in the typical employer/employee relationship (one in which the employee receives a regular salary from the employer and performs tasks pursuant to the employer's instructions). The employer owns the copyright unless a written agreement, signed by the parties, provides otherwise.<sup>57</sup> Furthermore, when it is clear that the creator of the work is an independent contractor (one who creates a work, completely alone, at the employer's request which merely describes a finished product), courts and commentators agree that the second part of the works made for hire definition governs the situation.<sup>58</sup> In other words, unless the work falls within one of the definition's nine categories and a written agreement gives the copyright to the employer, the copyright will vest in the independent contractor.<sup>59</sup>

The major subject of dispute concerns how to treat works created by those who have characteristics of both independent contractors and employees.<sup>60</sup> As the litigation in the work for hire area illustrates, scenarios frequently arise in which artists have characteristics of both independent contractors and employees in varying degrees.<sup>61</sup> Although

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the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise." *Id.* This reflects an affirmation by Congress of the 1909 Act's statement that "the word 'author' shall include an employer in the case of works made for hire." Copyright Act of 1909, Pub. L. No. 349, ch. 320, § 62, 35 Stat. 1075, 1088 (repealed & reenacted 1947). *See* Pub. L. No. 281, ch. 391, § 26, 61 Stat. 652, 660 (1947) (repealed 1976).

56. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN NEWS 5659, 5736-37.

57. 17 U.S.C. § 201(b) (1982).

58. *See, e.g.,* *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); Comment, *Sufficiently Supervised Commissioned Workers*, *supra* note 3.

59. 17 U.S.C. § 101 (1982).

60. *Compare Easter Seal*, 815 F.2d 323, *with Aldon*, 738 F.2d 548.

61. *See, e.g.,* *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988) (employer exercised minimum control and guidance over commissioned artist); *Easter Seal*, 815 F.2d 323 (specially commissioned work during which plaintiff's representative gave layman's directions); *Weinstein v. University of Illinois*, 311 F.2d 1091 (7th Cir. 1987) (university professors are on a payroll but generally work independently); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986) (plaintiff and defendant were in similar businesses and plaintiff gave some guidance to defendant); *Aldon*, 738 F.2d 548 (plaintiff worked closely with commissioned artists); *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326 (N.D. Ind. 1986) (salaried employee worked independently); *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 609 F. Supp. 1307, *amended in part*, 609 F. Supp. 1325 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*,

the 1976 Act attempted to resolve this question, it did little to clear up the confusion.<sup>62</sup> The most obvious problem was that the Act did not include, within section 101, definitions for "employee" or "within the scope of one's employment." Furthermore, the legislative history reflected the assumption that the line between employees and independent contractors was a bright one and that it would be simple to determine whether a person fell into one category or the other.<sup>63</sup>

Because of the ambiguities in the new Act, the courts once again had to determine how to interpret the statute and what factors to consider in deciding whether to call someone an employee or an independent contractor.<sup>64</sup> The cases fall into three different categories of interpretation.<sup>65</sup>

*1. The Literal Interpretation.*—Some courts follow the literal interpretation of the Act, also called the radical interpretation because it adopts a radical change from prior law.<sup>66</sup> These courts hold that the two subsections of the Act's work made for hire definition are mutually exclusive.<sup>67</sup> In other words, under the literal interpretation, the first subsection includes only regular salaried employees. Subsection (2) of

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479 U.S. 1031 (1987) (plaintiff, computer programmer, consulted defendant concerning defendant's needs with regard to computer program, but then created program with little input from defendant); *Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981) (plaintiff's employee worked closely with commissioned fabric designer).

62. Because of the lack of a definition in the Act for "employee" some courts resorted to the pre-1976 factors tests used to distinguish employees from independent contractors under the 1909 Act. *See, e.g.*, *Brunswick Beacon v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987) (Hall, J., dissenting); *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453 (D.D.C. 1987) *rev'd*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 108 S. Ct. 362 (1988); *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).

63. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5737.

64. *See Easter Seal*, 815 F.2d 323; *Aldon*, 738 F.2d 548; *Peregrine*, 601 F. Supp. 828.

65. The different methods of interpretation were set out in the most recent case on the subject, *Easter Seal*. *See also* O'Meara, "Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations, 15 CREIGHTON L. REV. 523 (1981-82) [hereinafter O'Meara, *Two Interpretations*].

66. *See* O'Meara, *Two Interpretations*, *supra* note 65.

67. *See, e.g.*, *May v. Morganelli-Heumann Assocs.*, 618 F.2d 1363 (9th Cir. 1980); *Whelan Assocs. v. Jaslow Dental Lab, Inc.*, 609 F. Supp. 1307 (E.D. Pa. 1985), *amended in part*, 609 F. Supp. 1325 (E.D. Pa. 1985) *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Everts v. Arkham House Publishers, Inc.*, 579 F. Supp. 145 (W.D. Wis. 1984); *Childers v. High Soc'y Magazine, Inc.*, 557 F. Supp. 978, *aff'd on rehearing*, 561 F. Supp. 1374 (S.D.N.Y. 1983); *Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981); *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981).

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. Employers commissioning works covered by subsection (2) must meet the additional requirement that both parties sign an agreement that the creations should be considered works made for hire.

A recent case applying the literal interpretation of the 1976 Act is *Easter Seal Society For Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*.<sup>68</sup> The Fifth Circuit Court of Appeals noted in *Easter Seal* the three different interpretations of the 1976 Act: the literal interpretation, discussed above, the conservative interpretation which holds that the 1976 Act did little to change prior law, and the *Aldon Accessories*<sup>69</sup> compromise. In *Aldon*, the Second Circuit held that an employer hiring an artist to create a specific work must at least exercise actual control over the manner in which the artist created his work for that artist to be considered an employee of the commissioning party.<sup>70</sup> The *Easter Seal* court rejected the *Aldon* compromise, stating that it misinterpreted the statute, and adopted the literal interpretation.<sup>71</sup>

The *Easter Seal* case involved the creation of videotapes of a staged "Mardi Gras" style parade and a "Dixieland" musical jam session for the plaintiff, Easter Seal, and the alleged unauthorized use of parts of the videotape by the defendant, Playboy, in an adult film.<sup>72</sup> The original videotapes were created and edited for use in a National Easter Seal Telethon. The principal parties who created the videotape were entertainer Ronnie Kole, working on behalf of Easter Seal, and the employees of New Orleans public television station WYES. Although Kole was the principal "on camera" actor, he gave only layman's suggestions regarding the technical aspects of filming the "parade" and jam session. The WYES staff made the final aesthetic and technical decisions and created the finished edited version from the "raw video footage."<sup>73</sup>

The court thoroughly discussed the cases under the 1909 Act and the three interpretations under the 1976 Act and then addressed several defects in the literal interpretation.<sup>74</sup> First, the court noted that the language in section 201(b), providing that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared

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68. 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988).

69. *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984). For a discussion of *Aldon*, see *infra* notes 95-107 and accompanying text.

70. 738 F.2d at 552.

71. *Easter Seal*, 815 F.2d at 334.

72. *Id.*

73. *Id.* at 324.

74. *Id.* at 325-34.

is considered the author for purposes of this title," is too broad to be consistent with requirements of the subsection 101(2).<sup>75</sup> The court found this language to be more like "an affirmation of the 1909 Act 'work for hire' doctrine."<sup>76</sup> The court then stated that if Congress intended a literal reading of the statute, which would result in a radical departure from prior law, there would have been more discussion in the legislative history to indicate that intention.<sup>77</sup>

Despite its concerns regarding the literal interpretation, the court adopted that view.<sup>78</sup> Recognizing that this ruling was a "radical break from the 'work for hire' doctrine under the 1909 Act,"<sup>79</sup> the court noted that "a work is 'made for hire' within the meaning of the Copyright Act of 1976 if and only if the seller is an employee within the meaning of agency law, or the buyer and seller comply with the requirements of § 101(2)."<sup>80</sup>

The court concluded that the literal view was the most sensible interpretation of the actual language used in the 1976 definition of work made for hire given the vague language and structure of the Act's definition.<sup>81</sup> In support of its conclusion, the court emphasized the division in the definition between employees' works in the first part and the nine specific kinds of specially commissioned works in the second part.<sup>82</sup> Although the court did not expressly mention the importance of a regular salary as the distinguishing characteristic of an employee, its discussion implies that only those artists receiving a regular salary may be called employees.

In a more recent case, *Community for Creative Non-Violence v. Reid*,<sup>83</sup> the District of Columbia Circuit reversed the district court which

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75. *Id.* at 330 (emphasis in original).

76. *Id.* Actually the words "or other person for whom the work was prepared" can be read consistently with any one of the three interpretations. *See infra* text accompanying notes 141-43.

77. *Id.* at 330-31. The court noted that, under the 1909 Act, buyers of commissioned works were almost always the "authors." The court said that, if the 1976 Act is read literally, it represents a fundamental change in the work for hire doctrine as it applies to independent contractors. Independent contractors, under a literal interpretation of the new Act, are almost always the statutory "authors." *Id.*

78. *Id.* at 334.

79. *Id.* at 335.

80. *Id.* at 334-35. The requirements of the second part of the work for hire definition are that the work be one of the nine types of works enumerated in that section and that the parties agree in writing that the work is a work made for hire. Although the court approved of the Restatement definition of employee which adopts the right to control test, *see supra* note 50, the court contradicted itself and rejected other cases adopting the right to control test.

81. *Id.* at 335.

82. *Id.*

83. 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988).

relied on the pre-1976 factors tests to determine whether a sculptor was an employee or independent contractor.<sup>84</sup> In this case, the Community for Creative Non-Violence ("CCNV") hired a sculptor to create a statute for CCNV's display in the Christmas Pageant of Peace on the Ellipse in Washington, D.C. The agent for CCNV developed the basic idea for the statute, a modern Nativity scene with a homeless family, in place of the traditional Holy Family, huddled over a streetside steam grate.<sup>85</sup>

CCNV's agent provided the sculptor with human models to pose for the work and took him to view steam grates, and some other CCNV members visited him on occasion to check his progress. No one from CCNV directed the sculptor during the process of creating the statue.<sup>86</sup> The district court held, however, that the statue was a work made for hire because CCNV was the motivating factor in the statue's creation and because CCNV had the right to direct the manner in which the statue was created.<sup>87</sup>

In reversing the district court, the court of appeals followed *Easter Seal's* literal interpretation of the Act.<sup>88</sup> The court further solidified the literal view by discarding the doubts expressed by the *Easter Seal* court.<sup>89</sup>

2. *The Conservative Interpretation.*—In contrast to the literal view, fewer courts have relied on the conservative interpretation of the 1976 Act.<sup>90</sup> The conservative interpretation applies the factors tests developed in cases decided under the 1909 Act to determine whether an artist is an "employee" under the first part of the section 101 definition of work made for hire.<sup>91</sup> Therefore, if the work was created at the instance and expense of the buyer or if the buyer had the right to supervise the manner in which the work was created, then the creator became an "employee" under the first part of section 101.<sup>92</sup> The specific categories

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84. *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1456 (D.D.C. 1987), *rev'd*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988). *See supra* notes 32-49 and accompanying text for descriptions of these factors tests.

85. 846 F.2d at 1487 (quoting 652 F. Supp. at 1454).

86. 652 F. Supp. at 1455.

87. *Id.* at 1456.

88. *Id.* at 1494.

89. *Id.*

90. *See, e.g., Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987) (Hall, J., dissenting); *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453 (D.D.C. 1987) *rev'd*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988); *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).

91. *See, e.g., Peregrine*, 601 F. Supp. at 829 (citing *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965)); *Town of Clarkstown*, 566 F. Supp. at 141 (citing *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976)).

92. 17 U.S.C. § 101 (1982).

under the second part of section 101 are the only commissioned works which are not works made for hire unless the parties signed an agreement stating that the works are made for hire.<sup>93</sup>

In other words, paragraph (1) of the definition restates the existing case law where, for copyright purposes, an independent contractor is considered to be an employee. Paragraph (2) carves out exceptions to the old case law comprising specially commissioned works not considered works made for hire in the absence of a writing executed by both parties.<sup>94</sup>

While the literal interpretation results in a substantial change in prior law, courts following the conservative view assume that Congress intended very little change in prior law.

3. *The Aldon Compromise*.—In a 1984 case, *Aldon Accessories Ltd. v. Spiegel, Inc.*,<sup>95</sup> the Second Circuit Court of Appeals devised a compromise between the two conflicting views underlying the literal and conservative interpretations. In *Aldon*, the court held that if the employer hiring someone to create a copyrightable work exercises sufficient supervision and control over the manner in which the artist creates the work, then the employer is the author of the work under the first part of section 101.<sup>96</sup>

This actual control requirement differs from the literal interpretation in that it encompasses more situations than those involving regular salaried employees. 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.<sup>97</sup>

The plaintiff in this case, Aldon, was a company formed by two brothers. Aldon designed and marketed figurines and other pieces for interior design. In 1977, one of the brothers, Arthur Ginsberg, contacted a Japanese trading firm about creating statuettes representing mythological creatures, including a unicorn and a Pegasus. Ginsberg also sent sketches of his idea and worked closely with the artists hired by the trading company in developing models of the horse-like figures.<sup>98</sup> In

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93. *Id.*

94. O'Meara, *Two Interpretations*, *supra* note 65, at 528.

95. 738 F.2d 548 (2d Cir. 1984), *cert. denied*, 469 U.S. 982 (1984).

96. *Id.* at 552-53.

97. *Id.* at 552.

98. *Id.* at 549. The court related that "Ginsberg testified at length as to the precise nature of his interaction with the artists. The gist of his testimony was that while he is not an artist and did not do the sketching or sculpting, he actively supervised and directed the work step by step." *Id.* at 550.

1981, Aldon displayed samples of the finished statuettes at a trade show. A buyer for Spiegel attended the show and expressed an interest in the statuettes. Although Spiegel did not purchase any of the statuettes from Aldon, Ginsberg later noticed that Spiegel advertised the same pieces in the Spiegel catalogues. Spiegel's actions prompted Aldon to file suit for copyright infringement. Aldon contended that the statuettes were works made for hire and, therefore, Aldon was the owner of the copyright.<sup>99</sup>

Spiegel argued, following the literal interpretation of the Act, that the Japanese trading company and its hired artists constituted independent contractors because they were not regular salaried employees of Aldon. Therefore, only subdivision (2) of the works made for hire definition would apply. Spiegel contended that, because sculpture is not included among the nine narrow categories in subdivision (2), the statuettes could not be works for hire and, therefore, Spiegel did not infringe Aldon's alleged copyright.<sup>100</sup>

The Second Circuit agreed with Spiegel that, if the case were to be governed by subdivision (2) of the definition, the statuettes would not be works made for hire.<sup>101</sup> However, the court found that Spiegel gave an overly restrictive interpretation of the first part of the definition.<sup>102</sup> The court concluded that the statuettes were, in fact, works prepared by an employee within the scope of his employment.<sup>103</sup> The court discussed the 1976 Act's effect on prior law:

Under the 1909 Act and decisions construing it, if an employer supervised and directed the work, an employer-employee relationship could be found even though the employee was not a regular or formal employee. Nothing in the 1976 Act or its legislative history indicates that Congress intended to dispense with this prior law applying the concepts of "employee" and "scope of employment." The new Act does not define these key terms, thus suggesting that it is necessary to look at the general law of agency as applied by prior copyright cases in applying subdivision (1) under the new Act.<sup>104</sup>

The court thus found that the 1976 Act changed only the treatment of independent contractors.<sup>105</sup>

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99. *Id.* at 549-50.

100. *Id.* at 551.

101. *Id.*

102. *Id.*

103. *Id.* at 551-52.

104. *Id.* at 552 (citations omitted).

105. *Id.*

The court noted that cases decided under the 1909 Act showed that a presumption existed, even in the case of independent contractors, that the hiring party owned the copyright unless contrary proof existed.<sup>106</sup> The 1976 Act, according to *Aldon*, switched the burden by creating the presumption that, in the absence of contrary proof, the work prepared by an independent contractor on special order or commission was not a work for hire.

The court then noted that cases cited by Spiegel in favor of the literal interpretation were compatible with the court's decision because the same question still remains: what is an employee working within the scope of his employment?<sup>107</sup> Therefore, the only difference between *Aldon* and the cases favoring the literal interpretation is that the *Aldon* court looked into the relationship between the hiring party and the creator and applied agency principles to determine if an employment relationship existed. The literalists, on the other hand, summarily assumed that an employment relationship did not exist unless the creator was a regular salaried employee.

In summary, the differences among the three interpretations of the 1976 Act's definition of works made for hire center on Congress' failure to define "employee" or "scope of employment." The literal view implicitly assumes that only those artists receiving a regular salary are employees. The conservative view uses the factors tests that arose under 1909 Act cases to determine if an artist is an employee. Finally, the *Aldon* actual control test requires a finding that an employer exercised sufficient supervision and control over an artist for an employment relationship to exist.

Another method of comparing the three interpretations is to visualize a spectrum of factual situations in which one end comprises undisputed independent contractors and the other end comprises undisputed employees.<sup>108</sup> The middle of the spectrum includes artists having characteristics of both employees and independent contractors.

Under the literal interpretation, almost all artists on the spectrum are independent contractors because anyone not receiving a regular salary is an independent contractor. Under the conservative interpretation, almost all the artists are employees because the effect of the factors tests (the right to control test, the instance and expense test and the nature of compensation test) is to include almost all artists in the category of

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106. *Id.*

107. *Id.* The court held: "but that simply frames the issue: is the contractor 'independent' or is the contractor so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship exists." *Id.*

108. *See supra* notes 2-6 and accompanying text.

“employee.” The division between employee and independent contractor under the *Aldon* actual control test is closer to the middle of the spectrum. Not everyone who hires an artist to create a particular work will exercise control over the creation of the work to the extent that the employer’s input is reflected in the final product. For those employers who exercise sufficient control, the artists will be considered their “employees” under the work made for hire doctrine.

### III. ANALYSIS: REVIVING *ALDON*

Since the Second Circuit handed down its decision in *Aldon*, courts and commentators in favor of the literal interpretation have rallied against the actual control test.<sup>109</sup> Although some of the criticism stands on solid ground, many of *Aldon*’s critics fail to recognize the advantages that the *Aldon* compromise has over both the literal and conservative views. The remainder of this Note will discuss the strengths and weaknesses of the three interpretations and why the decision in *Aldon* is the most favorable for curing the ambiguities left by the new Act’s failure to define “employee.” This Note stands alone in its support for the *Aldon* actual control test. Nonetheless, an overview of the three interpretations will reveal that the actual control test is more consistent with the legislative history of the Act and with agency law principles and that the actual control test is workable and equitable.

#### A. *The Conservative Interpretation is Inconsistent With Legislative History and Causes Courts to Reach Inequitable Decisions*

As stated above, the conservative interpretation of the 1976 Act’s definition of works made for hire assumes little change from prior law.<sup>110</sup> The support for this view comes from Congress’ adoption of the prior work made for hire doctrine as it applies to employees. The legislative history states: “Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise.”<sup>111</sup>

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109. See, e.g., *Community for Creative Non-Violence v. Reid*, 846 F.2d 1985 (D.C. Cir.), cert. granted, 109 S. Ct. 362 (1988); *Easter Seal Soc’y for Crippled Children and Adults of La., Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), cert. denied, 108 S. Ct. 1280 (1988); Comment, *The Works Made for Hire Doctrine of the 1976 Copyright Act After Aldon Accessories Ltd. v. Spiegel, Inc.*, 5 CARDOZO ARTS AND ENT. L. REV. 265 (1986); Levin, *Misinterpretation*, supra note 15; Comment, *Sufficiently Supervised Commissioned Workers*, supra note 3.

110. See supra text accompanying notes 91-94.

111. H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5736.

This statement, together with the absence of a definition for "employee" or "scope of employment" and the provision giving copyright of a work made for hire to "the employer *or other person for whom the work was prepared*,"<sup>112</sup> led conservative courts to apply the pre-1976 tests to possible work for hire situations. Consequently, these courts distinguished independent contractors from employees by the employer's "right to control" the employee, by determining "at whose instance and expense" the work was created, and by the "nature of compensation" paid to the employee.<sup>113</sup>

One obvious defect with the conservative view is its inconsistency with a later provision in the legislative history dealing with independent contractors which states as follows:

The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a special order or commission that should be considered "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.<sup>114</sup>

This statutory line-drawing by Congress gives the impression that, considering the lack of a detailed definition for "employee," the distinction between employees and independent contractors is obvious and is consistent with the view that only regular salaried artists are employees. The specially-commissioned works section would cover all other artists even if they also have characteristics of employees. The result of this assumption would be that no artist/independent contractor would cross the statutory line toward becoming an "employee" regardless of how much control an employer exercised over the manner in which the artist created the work.

A second defect in the conservative view is that, if Congress intended prior law to govern under the new Act, it would not have revised the

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112. 17 U.S.C. § 201(b) (1982) (emphasis added).

113. See, e.g., *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453 (D.D.C. 1987) *rev'd*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988); *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 414-15 (4th Cir. 1987) (Hall, J., dissenting); *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).

114. H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5737.

1909 Act's statement of the doctrine.<sup>115</sup> Clearly, Congress intended to enact some change in the determination of works for hire. The conservative interpretation contradicts this obvious conclusion.

The most important problem with the conservative interpretation is that it causes courts to reach inequitable decisions. Freelance artists suffered inequities because they received little compensation for their creations<sup>116</sup> and because, under the 1909 Act and cases construing it (and cases following the conservative interpretation under the 1976 Act), they lost all reproduction rights to their work. One of Congress' purposes in changing the doctrine was to avoid these inequities that independent artists had suffered for too long.<sup>117</sup>

One example of the inequitable results of the conservative interpretation is *Peregrine v. Lauren Corp.*<sup>118</sup> In *Peregrine*, a federal district court found that an advertising agency that hired a photographer to take photographs for a brochure was the owner of the copyright to the photos under the work made for hire doctrine.<sup>119</sup> The court reached this decision despite its specific finding that the photographer was an independent contractor.<sup>120</sup> The court found that the photographs were

115. Compare Copyright Act of 1909, Pub. L. No. 349, ch. 320, 35 Stat. 1075 (1909) (repealed 1947) with 17 U.S.C. § 101 (1982).

116. One freelance illustrator, Robin Brickman, testified before the Committee on the Judiciary concerning her earnings as a freelance artist under the 1976 Act. Her 1979 income was \$6,995. In 1980, her income was \$8,455, fifty-nine percent of which came from work made for hire. *A Bill to Amend the Copyright Law Regarding Work for Hire: Hearing on S. 2044 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 3* (1982) (statement of Robin Brickman).

117. For example, during the debates before Congress, one of the commentators recited the following examples:

I give the example of a lady who came in to me with a paper, and said, "I have written half a dozen songs. I took them to a recording company and they've given me this contract to sign. Shall I sign it?" . . . I looked at the contract, which provided: "We hereby employ you to write the following songs." The songs had been written 6 months before, but she didn't know that the proposed contract, drawn ostensibly as an employment agreement, would have given to the recording company the renewal rights in the copyright.

*Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee of the Judiciary 55*, 106-07 (1961), reprinted in 3 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 55, 106-07 (1976) (statement of John Schulman).

118. 601 F. Supp. 828 (D. Colo. 1985).

119. *Id.* at 829.

120. *Id.* The court stated:

Given that defendant's method of paying Mr. Peregrine points toward a finding that Mr. Peregrine was an independent contractor rather than an employee, it is instructive to consider the longstanding presumption that the mutual intent of the parties to the creation of an artistic work, whether employer/employee or independent contractor, was to vest title to the copyright in the person at whose insistence and expense the work was done.

*Id.* (citing *Lin-Brook Builders Hardware v. Gertler*, 362 F.2d 298 (9th Cir. 1965)).

taken at the insistence of the advertising agency and that the agency also had the right to supervise the work.<sup>121</sup>

This dispute arose from the advertising agency's refusal to pay for the photographs because the agency thought the charge was excessive. The court, finding for the agency, stated that the photographer was free to proceed in a state court for *quantum meruit* collection.<sup>122</sup> As a result, not only did the photographer lose the copyright to the photographs<sup>123</sup> and the right to withhold delivery of them (the dispute over price arose after the plaintiff delivered the photographs), but he also lost the right to bargain for his loss of copyright in the price for the photographs.

This case shows how the conservative interpretation leads to results which defeat the purpose for changing the doctrine in the first place.<sup>124</sup> The purpose for revising the Act was to provide more opportunities for freelance artists to retain the copyright in their works. However, the cases following the conservative view put these artists in the same position as before 1976. Few courts have used the conservative interpretation and that view, because of its unfairness to freelance artists, probably will fall into disuse.

#### *B. The Literal Interpretation is Inflexible and Inconsistent With Agency Law Principles*

The literal interpretation assumes that Congress intended a radical change from prior law in the work made for hire doctrine. This view has several points in its favor. The first point cited by courts which have adopted this view concerns the structure of the statute itself.<sup>125</sup> The definition of works made for hire under section 101 is divided into two

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121. *Id.* The court found:

Although Mr. Peregrine made suggestions during the course of the shooting sessions which were followed more often than not, it is clear that at any point the employer could have vetoed any of Mr. Peregrine's ideas or otherwise radically changed the course, scope or fact of Mr. Peregrine's photographic exertions on the project.

*Id.*

122. *Id.* at 830.

123. *Id.* at 829.

124. *See also* Joseph J. Legat Architects v. United States Dev. Corp., 625 F. Supp. 293 (N.D. Ill. 1985) (finding that the decisive factor, whether the alleged employer had the right to direct and supervise the manner in which the work was performed, did not make architectural plans works made for hire only because of the custom in the profession that an architect uses independent judgment in drawing plans); Town of Clarkstown v. Reeder, 566 F. Supp. 137 (S.D.N.Y. 1983).

125. *See, e.g.,* Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters., 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988); Levin, *Misinterpretation*, *supra* note 15.

subsections.<sup>126</sup> The plain language of the statute, along with its legislative history referring to the change in treatment of independent contractors,<sup>127</sup> gives one the impression that Congress intended the first half of the definition to include only regular employees on a payroll and the second half to include everyone else.

Although all three interpretations refer to the factors listed in section 220 of the Restatement (Second) of Agency,<sup>128</sup> the literal view applies a much stricter standard in determining what factors, if present, are sufficient to conclude that an employment relationship exists. For example, although the Restatement places significant emphasis on the employer's control or right to control the manner in which the worker performs his work,<sup>129</sup> the literal interpretation requires more evidence of an employment relationship. The literalists would require the employer to have the worker on the payroll and to provide the worker with benefits available to salaried employees, and would require the employer to withhold social security and income taxes before characterizing the relationship as that of employer and employee.<sup>130</sup> In a scenario involving what initially appears to be that of employer and independent contractor, where the employer exercises control over the work being performed, application of the literal interpretation would result in a conclusion that a joint work,<sup>131</sup> rather than a work for hire, was created.<sup>132</sup>

The literal view is preferable to the conservative view because it excludes more freelance artists from the work made for hire characterization, thereby giving more credit to the actual creator of the work.

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126. 17 U.S.C. § 101 (1982).

127. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5737.

128. RESTATEMENT (SECOND) OF AGENCY § 220 (1958), *supra* note 50, *quoted in Easter Seal*, 815 F.2d at 335 n.20.

129. The Restatement (Second) of Agency, section 220 comment e distinguishes between employees and independent contractors as follows:

The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

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

130. Comment, *Sufficiently Supervised Commissioned Workers*, *supra* note 3, at 387-88.

131. "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). The 1976 Act provides that "[t]he authors of a joint work are coowners of copyright in the work." 17 U.S.C. § 201(a) (1982).

132. *See, e.g., Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981).

Some freelancers will not be able to avoid having their work characterized as a work made for hire if a contract is signed to that effect. Other freelancers, however, will own the copyright to works they created because their works will not fall into one of the nine categories in part two of the definition, notwithstanding the existence of a contract calling the creation a work made for hire.

For instance, had the federal district court in *Peregrine v. Lauren Corp.*<sup>133</sup> followed the literal interpretation of the Act, it undoubtedly would have found the plaintiff was an independent contractor. The photographer's copyright could not be signed away through the use of a contract calling his photographs works made for hire. Because photographs are not among the works enumerated in section 101's definition regarding specially commissioned works, an employer's use of a contract calling photographs works made for hire would be insufficient to vest the copyright in the employer.

In a factually similar case, *Childers v. High Society Magazine, Inc.*,<sup>134</sup> another federal district court did, in fact, find for a freelance photographer by following the literal interpretation. In *Childers*, the plaintiff, a professional photographer, photographed well-known actresses whose portraits were then marketed by Sygma Photo News, Inc., agent for the sale of one-time, non-exclusive reproduction rights to the photographs.<sup>135</sup> When certain of these photographs appeared on covers of High Society Magazine, the photographer sued the magazine and its publisher for unauthorized use.<sup>136</sup>

In granting plaintiff's motion for summary judgment, the court stated the obvious—that the plaintiff was never the “employee” of the actresses for purposes of the first half of section 101 of the Act.<sup>137</sup> The court then found that the photographs did not fall under the second half of section 101 because the parties executed no written contract to vest copyright in the actresses and because photographs are not listed among the nine categories in that subsection.<sup>138</sup>

Despite its advantages over the conservative view, the literal view also contains defects. Most important among these defects is the literalists' assumption that the statutory definition of employee includes only those workers who are on the regular payroll of their employers. The word “employee” was not defined in the new Act. Therefore, “employee”

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133. 601 F. Supp. 828 (D. Colo. 1985). See *supra* text accompanying notes 118-23 for a discussion of this case.

134. 557 F. Supp. 978, *aff'd on rehearing*, 561 F. Supp. 1374 (S.D.N.Y. 1983).

135. 557 F. Supp. at 980.

136. *Id.* at 982.

137. *Id.* at 984.

138. *Id.*

must be interpreted to have its common law meaning<sup>139</sup> which, contrary to the literal interpretation, includes more than regular salaried employees.

In addition, the lack of discussion in the legislative history of the Act contradicts the literalists' view that Congress intended to radically change prior law. Congress expressly adopted the common law presumption that employers own the copyright to any works created by their employees within the scope of their employment.<sup>140</sup> This is an affirmation of prior law, not a radical departure from prior law. Furthermore, the provision that the employer "or other person,"<sup>141</sup> for whom a work is created owns the copyright indicates Congress' reluctance to radically change the doctrine.

Of course, the phrase "or other person" could be interpreted as consistent with either the literal or conservative view. Under the literal view, "or other person" can be said to mean those limited employers in the nine narrow categories of the second part of the work made for hire definition.<sup>142</sup> Under the conservative view, "or other person" would be anyone found to be an employer under the pre-1976 tests.<sup>143</sup>

However, the phrase "or other person" indicates an intention to arrive at a compromise between prior law under which virtually all artists were "employees" and a definition that would call all artists independent contractors. If Congress did intend "or other person" to mean only those qualifying under the second part of the definition, it could easily have stated such an intention. For example, Congress could have written section 201 to vest copyright in the "employer of a creator who is on the employer's regular payroll, or commissioning party who qualifies under section 101(2) of the work made for hire definition."

Another troubling aspect of the literal interpretation is that this view is overly restrictive. Congress may have intended to limit courts to the nine narrow categories in the definition dealing with specially commissioned works.<sup>144</sup> However, this position stands on the assumption that Congress presumed itself to be qualified to determine which types of artists are more deserving of retaining the copyright to their works than others. This assumption contradicts the long standing policy that an original work need not be one of aesthetic merit or receiving critical acclaim to be copyrightable.<sup>145</sup> Anyone with an original work of au-

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139. See *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

140. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5737.

141. 17 U.S.C. § 201(b) (1982).

142. *Id.* § 101.

143. See *supra* notes 32-51 and accompanying text.

144. 17 U.S.C. § 101 (1982).

145. See comments accompanying 17 U.S.C. § 102 (1982), H.R. REP. NO. 1476,

thorship can protect that idea with a copyright by producing it in some kind of tangible medium.<sup>146</sup>

Finally, when confronted with a case similar to *Aldon*,<sup>147</sup> a court employing the literal interpretation would reach an inequitable result. The literal view does not protect someone who commissions another to produce a work, exercises significant control over the person he hired to do the work, and makes substantial contributions to the final appearance of the work. As long as our society would label the hired individual an "artist" and the hiring individual a "businessman" or "merchant," the hiring party's contributions would be deemed insignificant under the literal interpretation.<sup>148</sup>

The literalist's remedy for a situation similar to *Aldon* would be to label the work a joint work.<sup>149</sup> However, treatment of a work as a joint work requires an intention of the parties that the work be treated as a joint work, which would mean the parties also would intend to be bound by the legal consequences that arise from such a characterization. One necessary consequence is that, because coowners of joint works are treated as tenants in common, each coowner must account to all the other coowners for any profits he earns from marketing that work.<sup>150</sup> This would be unfair to the party who took the financial risk of marketing the work.

### C. *The Aldon Compromise*

The *Aldon* compromise makes the most sense of the three interpretations in light of the ambiguous nature of the 1976 Act arising from

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94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5664 ("This standard [of originality] does not include requirements of novelty, ingenuity, or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.").

146. This longstanding policy directly conflicts with the views of Mr. Irwin Karp who represented the Authors League of America in the debates on the copyright bill. Mr. Karp indicated his sentiment that one had to be recognized by society as an "artist" in order to have his or her work protected by copyright laws when he said: "It's tempting to get off into a debate with anybody who claims that a lawyer or an accountant or a businessman helped to write any work of art. That's a lot of baloney." PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 255, 269 (1964), *reprinted in* 3 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 255, 269 (1976) [hereinafter *Preliminary Draft*].

147. *Aldon Accessories Ltd. v. Spiegel*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). For a discussion of the facts in *Aldon*, see *supra* notes 95-107 and accompanying text.

148. See Comment, *Sufficiently Supervised Commissioned Workers*, *supra* note 3.

149. See *supra* note 131. A finding that a joint work existed was the result in *Mister B Textiles v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981).

150. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5736.

the Act's failure to define "employee." Although the actual control test requires courts to do more work, the test is more flexible in its approach. The actual control test allows courts more freedom in adjudicating fact situations, such as that in *Aldon*, not envisioned by Congress.

1. *The Actual Control Test is More Consistent With Legislative History.*—As the cases and commentaries suggest, all three views can cite to the legislative history of the 1976 Act for support.<sup>151</sup> However, excerpts from the legislative history also contradict each view. A more in-depth view of the legislative process leading up to the Act reveals that the actual control test is most consistent with the legislative history and the Act.

Research for purposes of revising the work made for hire doctrine began in 1958 with a study prepared by Borge Varmer at the request of the Senate Judiciary Committee's Subcommittee on Patents, Trademarks and Copyrights.<sup>152</sup> In addition to discussing the case history under the 1909 Act, other bills introduced in Congress and foreign copyright laws, the Varmer study summarized the basic issues that should be considered.<sup>153</sup>

The study divided works into two categories: the first is "works made for hire" and the second is "works prepared on special order or commission."<sup>154</sup> Varmer noted a difference in treatment by the courts of the employer-employee relationship and that of the parties to a contract for a commissioned product.<sup>155</sup> He said this difference in treatment extended into the area of statutory copyright law.<sup>156</sup> The rationale for this distinction between employees and independent contractors is "the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor."<sup>157</sup> This expla-

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151. See *supra* notes 111-12, 125-27 and accompanying text.

152. *Study No. 13, supra* note 29.

153. *Id.* at 143.

154. *Id.* The final law, however, grouped works prepared by employees and works prepared on special order or commission under the same general category, "works made for hire." 17 U.S.C. § 101 (1982). Whether this indicates Congressional intent to call some independent contractors employees or whether this categorization is a mere oversight is not evident. If Congress consciously grouped works prepared by employees with specially commissioned works under "works made for hire," this certainly would indicate that Congress acknowledged that, in some cases, independent contractors and employees might be indistinguishable.

155. *Study No. 13, supra* note 29, at 142.

156. However, the 1909 statute was sufficiently ambiguous for courts to extend the "works made for hire" doctrine to all works prepared on special order or commission by independent contractors. See, e.g., *Brattleboro Publishing Co. v. Winmill Publishing Co.*, 369 F.2d 565 (2d Cir. 1966).

157. *Study No. 13, supra* note 29, at 142.

nation lends support to the *Aldon* compromise which, in effect, held that once a contractor becomes sufficiently supervised, he is no longer independent, but rather is an employee of the commissioning party.

Varmer's recommendation for the language of the new statute is particularly noteworthy. He stated:

Regardless of the substantive provisions finally adopted, it might be helpful to clarify the scope of the concept "works made for hire." A new definition might take the form of "works created by an employee within the scope of his employment." This would serve to make it clear that works created by an employee on his own initiative outside of his employment, are not included. If the employment-for-hire rule is not to extend to works created on commission at a fixed fee, the definition might further specify "employment on a salary basis."<sup>158</sup>

The final version of the statute incorporated only part of Varmer's recommendation. Subsection (1) of the works made for hire definition includes a "work prepared by an employee within the scope of his or her employment."<sup>159</sup> However, Congress did not add "on a salary basis" to the definition. Therefore, perhaps Congress recognized that there would be some situations in which the distinction between independent contractors and employees would be hazy and that, in some cases, independent contractors might cross the line and actually become employees. The addition of "on a salary basis" to the definition of employee would have supported the literalists' view.

The actual control test for determining what Congress meant by "employee" is also consistent with the pattern that emerged from the various versions of the bill. The 1976 Copyright Revision Act received several changes during the sixteen year drafting process.

The 1909 Act merely provided that "the word 'author' shall include an employer in the case of works made for hire."<sup>160</sup> The preliminary draft bill prepared by the Copyright Office in 1963 defined a work made for hire as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."<sup>161</sup> Objections to the draft, calling it excessively restrictive of the scope of the work for hire doctrine, led Congress to change the definition to include "a work prepared on special order or

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158. *Id.* at 141.

159. 17 U.S.C. § 101 (1982).

160. Copyright Act of 1909, § 62, Pub. L. No. 349, ch. 320, 35 Stat. 1075, 1088 (repealed & reenacted 1947). See Pub. L. No. 281, ch. 391, § 26, 61 Stat. 652, 660 (1947) (repealed 1976).

161. *Preliminary Draft*, *supra* note 146, at 15 n.11.

commission if the parties expressly agree in writing that it shall be considered a work made for hire."<sup>162</sup> Subsequent revisions and discussions resulted in the present definition.<sup>163</sup>

Obviously, Congress attempted to reach a compromise between the employers and the artists. The pattern of these revisions does not reveal whether Congress intended to limit the work for hire doctrine or to expand it. Some commentators argue that the preliminary draft indicates that Congress intended to limit the scope of the doctrine and only made exceptions in certain situations where compelling objections were raised.<sup>164</sup> However, it is also logical to read the pattern of revisions as congressional intent to broaden the scope of the doctrine, which was too severely restricted by the definition first proposed by the Copyright Office.<sup>165</sup>

Furthermore, even if Congress did intend to limit the doctrine's application to independent contractors, the question concerning the scope of the definition of "employee" in section 101 remains open. Finding congressional intent to limit the work-for-hire doctrine with regard to independent contractors does not avoid the preliminary step of determining if a creator is an employee or an independent contractor.

2. *The Actual Control Test is More Consistent With the Application of Agency Law.*—The courts agree that agency law principles are authoritative when determining if an employment relationship exists.<sup>166</sup> The Restatement (Second) of Agency lists several factors, the presence of which may indicate that the relationship is that of employer and employee.<sup>167</sup> The first factor is the extent of control that may be exercised by the hiring party over the one doing the work.<sup>168</sup> The comments to the Restatement stress the importance of control over the worker.<sup>169</sup> Yet

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162. 1964 REVISION BILL WITH DISCUSSION AND COMMENTS 1, 31 (1964), *reprinted in* 4 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976).

163. 17 U.S.C. § 101 (1982). See *supra* text accompanying note 18 for the text of the provision.

164. See, e.g., Comment, *Sufficiently Supervised Commissioned Workers*, *supra* note 3, at 400.

165. See *supra* text accompanying note 161.

166. See, e.g., *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 109 S. Ct. 362 (1988); *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

167. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958), *supra* note 50.

168. *Id.* § 220(2)(a).

169. *Id.* comment d ("control or right to control the physical conduct of the person giving service is important and in many situations is determinative"); *id.* comment e ("the important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results").

the literalists dismiss the consideration of control if the worker is not on the employer's regular payroll.<sup>170</sup>

The problem of distinguishing an employee from an independent contractor is not unique to copyright law. Cases involving labor disputes parallel the problem faced by courts making work for hire determinations.

In *NLRB v. United Insurance Co. of America*,<sup>171</sup> the United States Supreme Court noted the difficulty in many cases of determining whether a person is an employee or an independent contractor.<sup>172</sup> In *United Insurance*, the Court deemed it necessary to apply the common law agency test, in addition to examining the legislative history, to determine if debit agents of United Insurance, whose jobs were to collect premiums from policy-holders, prevent lapsing of policies and occasionally sell new policies, were employees or independent contractors. The Court weighed factors for and against finding the existence of an employment relationship and concluded that the NLRB's decision that the debit agents were employees should stand. One important factor was a letter from the company's chairman of the board in which he warned the agents to follow company rules when engaging in company business.<sup>173</sup>

The factors listed in the Restatement (Second) of Agency also have been used to determine if an employment relationship exists in cases involving payment of employment taxes,<sup>174</sup> eligibility for employee retirement plans<sup>175</sup> and other employee benefits,<sup>176</sup> and for purposes of labor management agreements,<sup>177</sup> in addition to numerous cases involving tortious conduct of alleged independent contractors.<sup>178</sup> The extent to which the hiring party exercises supervision over the worker is a decisive factor in determining whether that worker is an employee. Thus, the actual control test cannot be dismissed as easily as the supporters of the literal view insist.

Although agency law considers the *right* to control as a factor to determine if an employment relationship exists (also the view of the conservatives), *actual* control, for purposes of copyright ownership, more

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170. See, e.g., *Easter Seal*, 815 F.2d at 336; Comment, *Sufficiently Supervised Commissioned Workers*, *supra* note 3.

171. 390 U.S. 254 (1968).

172. *Id.* at 258.

173. *Id.* at 259-60.

174. *Avis Rent A Car Sys., Inc. v. United States*, 503 F.2d 423 (2d Cir. 1974).

175. *D.P. Oil Corp. v. Mabe*, 370 A.2d 554 (Md. App. 1977).

176. *Todd v. Benal Concrete Constr. Co.*, 710 F.2d 481 (9th Cir. 1983) (employee fringe benefit trust funds), *cert. denied*, 465 U.S. 1022 (1984).

177. See *Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974).

178. See *Kelley v. Southern Pac. Co.*, 419 U.S. 318 (1974); *Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396 (1960); *Baker v. Texas Pac. Ry. Co.*, 359 U.S. 227 (1959).

accurately reflects the identity of the true creator of a copyrightable work. Employers of artists who are on the employers' regular payrolls can support their copyright ownership with arguments that they provided the workers with various benefits available to regular employees and supplied the materials and workplace. The employer of one who is normally characterized as an independent contractor, however, at least should prove that he actually supervised the worker in the process of creating the work.

In copyright law, a more equitable rule vests copyright ownership in someone who took an active part in the creative process and denies copyright ownership to someone who had an unexercised right to control. This actual control requirement more consistently conforms with the goal of the framers of the Constitution which led to the provision protecting authors and inventors.<sup>179</sup> Additionally, use of the right to control test may lead some courts to assume a work for hire relationship exists merely because of an employer's veto rights over the final product.<sup>180</sup> If only veto rights were necessary to create a work for hire situation, virtually all works would become works for hire.

3. *The Actual Control Test is Workable and Equitable.*—Admittedly, the *Aldon* compromise requires courts to conduct a deeper inquiry: However, contrary to the opinion of those supporting the literal view,<sup>181</sup> the actual control test is workable. Granted, a court will have to do more than look at an employer's payroll to determine if the creator of the work in question is an employee. The actual control test, however, only requires the trier of fact to examine the nature of the relationship to determine if the alleged employer exercised a sufficient amount of control over the manner in which the artist created the work.<sup>182</sup>

The majority of cases decided under the literal interpretation actually would have been decided similarly using the actual control test. For example, in *Childers v. High Society Magazine, Inc.*,<sup>183</sup> which involved a photographer whose portrait photographs were copied without permission by the defendant,<sup>184</sup> the photographer clearly was not an employee of the actresses he photographed. The actresses exercised no control over

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179. U.S. CONST. art. I, § 8, cl. 8.

180. See, e.g., *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985).

181. See, e.g., *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 333-34 (5th Cir. 1987), cert. denied, 108 S. Ct. 1280 (1988).

182. See *Aldon Accessories Ltd. v. Spiegel, Inc.* 738 F.2d 548, 552 (2d Cir.), cert. denied, 469 U.S. 982 (1984).

183. 557 F. Supp. 978 (S.D.N.Y. 1983).

184. See *supra* notes 134-38 and accompanying text.

the manner in which he performed his work. In an almost identical case, *International Sygma Photo News, Inc. v. Globe International Inc.*,<sup>185</sup> the same district court that decided *Childers* employed the actual control test to reach the same result.<sup>186</sup> The court cited *Aldon* for the propositions that a "formal or regular relationship of employment is not a necessary condition for 'employee' status within the meaning of section 101" and that the extent of control exercised over the commissioned worker is determinative.<sup>187</sup>

The case of *Everts v. Arkham House Publishers, Inc.*,<sup>188</sup> decided under the literal interpretation, also would have had the same result under the *Aldon* actual control test. In *Everts*, a poet, whose poems the plaintiff wanted to publish, worked without the plaintiff's supervision.<sup>189</sup> A court using the *Aldon* test would easily have concluded that no work for hire situation existed.

Two other cases supporting the literal view which would receive the same result under the actual control test concerned architects. The first, *May v. Morganelli-Heumann & Associates*,<sup>190</sup> was decided under the 1909 Act. In dictum, however, the Ninth Circuit noted that the 1976 Act changed prior law, so that specially commissioned works subject to the work for hire doctrine were limited to the nine exclusive categories of works in the second part of the definition.<sup>191</sup> In the second case, *Meltzer v. Zoller*,<sup>192</sup> which was decided under the 1976 Act, a district court limited commissioned works falling under the doctrine to those in the nine categories listed in section 101(2). Because architectural drawings are not included in those categories, the court concluded that the designs at issue were not works made for hire.<sup>193</sup> A court applying the actual control test easily would reach the same result in both of these cases.

The reason that the architect cases would achieve similar results under the actual control test is that, as both courts noted, there is a custom in the architectural profession that when an architect prepares drawings for a construction project, the architect, not the commissioning party, retains ownership in the copyright to those drawings.<sup>194</sup> The custom arises both from the extensive regulation and licensing of architects and

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185. 616 F. Supp. 1153 (S.D.N.Y. 1985).

186. *Id.* at 1156.

187. *Id.*

188. 579 F. Supp. 145 (W.D. Wis. 1984).

189. *Id.* at 146-47.

190. 618 F.2d 1363 (9th Cir. 1980).

191. *Id.* at 1363 n.4.

192. 520 F. Supp. 847 (D. N.J. 1981).

193. *Id.* at 855.

194. *May*, 618 F.2d at 1365; *Meltzer*, 520 F. Supp. at 856.

because architects' works must abide by the standards of that profession. No one can contend seriously that laymen who hire architects would be able to control the manner in which the architects perform their work.<sup>195</sup>

Even the federal district court that decided the *Easter Seal* case<sup>196</sup> used the *Aldon* test to conclude that the work in question was not a work made for hire.<sup>197</sup> The Fifth Circuit, however, charged that the *Aldon* actual control test easily can become the right to control test.<sup>198</sup> If the actual control test could slip into the right to control test, this transformation would mark the return of a pre-1976 work made for hire doctrine.

To support the proposition that the right to control test could be revived, the Fifth Circuit pointed to *Evans Newton, Inc. v. Chicago Systems Software*.<sup>199</sup> The Seventh Circuit applied the *Aldon* test in *Evans* to find that a work for hire existed even though the circumstances less convincingly supported a finding of an employment relationship.

The dispute in *Evans* arose out of the alleged infringing use of the plaintiff's computer program. Evans Newton, Inc. ("ENI") developed a computerized recordkeeping system for educational institutions compatible with programmable calculators. ENI contacted Chicago Systems Software ("CSS") to adapt its educational management program to the new, rapid, low-cost, programmable microcomputers increasingly available to ENI's customers. ENI's president developed the idea for ENI's Computer Managed Instruction Program but needed CSS's expertise to adapt the program to a Commodore computer.<sup>200</sup>

CSS spent about 200 to 300 hours developing the program, demonstrated the program during an in-house training session and introduced the program to ENI's customers. The customers requested functional changes which CSS made.<sup>201</sup> In summary, although ENI's president thought of the idea for the computerized management instruction program, CSS developed the idea into a program compatible with the new programmable computers and responded to ENI's customers' requests.

When CSS began to market a competitive program resembling ENI's program, ENI sued for copyright infringement, alleging that the program

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195. Aitken, Hezen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 258 (D. Neb. 1982).

196. Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters., 815 F.2d 323 (5th Cir. 1987), cert. denied, 108 S. Ct. 1280 (1988).

197. *Id.* at 333.

198. *Id.* at 334.

199. 793 F.2d 889 (7th Cir.), cert. denied, 479 U.S. 949 (1986), cited in *Easter Seal*, 815 F.2d at 334.

200. 793 F.2d at 891.

201. *Id.* at 891-92.

was a work made for hire.<sup>202</sup> The court, citing the *Aldon* actual control test, agreed with ENI.<sup>203</sup> The court did not use the right to control test as the court in *Easter Seal*<sup>204</sup> contended, but the court did apply the actual control test to a much more difficult fact situation than that in *Aldon*. The extent of control ENI exercised over creation of the program may have been insufficient. However, this is necessarily a question of fact to be determined by the trial court.

The *Easter Seal* court's prediction that the actual control test would evolve into the right to control test did materialize, however, in *Marshall v. Miles Laboratories, Inc.*<sup>205</sup> Although the facts clearly indicated that the plaintiff, Marshall, was a regular employee of Miles working within the scope of his employment, the court cited *Aldon* and *Evans* for the proposition that the employer's right to control or supervise the creation determines whether an employment relationship existed.<sup>206</sup>

Other cases, however, ran contrary to the Fifth Circuit's prediction that the right to control test would grow out of the actual control test. The case of *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*<sup>207</sup> is an example of proper commitment to the actual control test set out in *Aldon*. This case concerned advertisements prepared and published by the plaintiff newspaper for the paper's customers. The same advertisements later appeared in defendant's newspaper.<sup>208</sup> The Fourth Circuit cited *Aldon* for the premise that "in some circumstances, temporary and transitory situations exist in which an employee of one may be regarded as an employee of another."<sup>209</sup> Because the court found no evidence that the advertisers supervised the manner in which the advertisements were prepared, the court concluded that no work made for hire situation existed.<sup>210</sup> Therefore, the plaintiff (the newspaper that prepared the advertisements) owned the copyright.

The copyright statute is in need of another revision. Commentators agree that the terms "employer" and "scope of employment" require some clarification concerning the meaning of the word "employee."<sup>211</sup>

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202. *Id.* at 892-93.

203. *Id.* at 894.

204. *Easter Seal Soc'y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 334 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988).

205. 647 F. Supp. 1326 (N.D. Ind. 1986).

206. *Id.* at 1331.

207. 810 F.2d 410 (4th Cir. 1987).

208. *Id.* at 411.

209. *Id.* at 412.

210. *Id.*

211. *See, e.g., Levin, Misinterpretation, supra* note 15; O'Meara, *Two Interpretations, supra* note 65; Comment, *Sufficiently Supervised Commissioned Workers, supra* note 3.

To protect those employers who participate in creating a copyrightable work, the legislature should incorporate the actual control test into the definition of works made for hire. This also would protect those employers who take the risk of investing in production and marketing of the copyrightable work. By requiring actual exercise of the right to control, the actual control test also would protect those freelance artists who retain their artistic freedom.

#### IV. CONCLUSION

Because of the harsh results for freelance artists arising from the conservative interpretation<sup>212</sup> of the 1976 Act, the conservative view appears to be approaching extinction. The literal interpretation, however, is still very much alive.<sup>213</sup> The Supreme Court finally hear a case this term concerning works made for hire under the 1976 Act.<sup>214</sup> The time is ripe for the Supreme Court to settle the dispute over the proper test to be used to arrive at congressional intent.

Although those advocating the literal interpretation of the 1976 Act criticize *Aldon*, their real complaint is with the statute. First, the literalists criticize the Second Circuit's interpretation of the statute. However, because the word "employer" was never defined, the actual control test is just as likely to reveal legislative intent as is the literal interpretation. Furthermore, the actual control test conforms with the common law of agency regarding the distinction between employees and independent contractors.

Second, the literalists criticize *Aldon* because they contend that the actual control test injures more freelance artists than those already affected by the Act. The large majority of cases decided under the literal interpretation, however, would receive the same ruling under the actual control test. In most cases, those who employ freelance artists to create artistic works exercise little, if any, control over the manner in which the freelancers create the works. In some cases, in fact, the freelancers create the works even before communicating with the buyers. In addition, the actual control test rewards those employers who invested time and money in the works.

Congress should clarify the works made for hire doctrine in the Copyright Act by providing a precise definition of the word "employee."

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

213. See, e.g., *Community for Creative Non-Violence, Reid*, 846 F.2d 1485 (D.C. Cir.), cert. granted, 109 S. Ct. 362 (1988); *Easter Seal Soc'y for Crippled Children and Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987), cert. denied, 108 S. Ct. 1280 (1988).

214. *Community for Creative Non-Violence*, 846 F.2d 1485.

If Congress intended only artists who receive a regular salary from the employers to be considered employees for purposes of the doctrine, then the Act should have provided for this intent. The more logical and equitable solution, however, would be to incorporate the actual control test into the definition of employee.

CATHERINE A. KLING

#### Addendum

The United States Supreme Court recently approved the analysis of the Courts of Appeals for the District of Columbia and the Fifth Circuits in determining whether a work is made for hire. *Community for Creative Non-Violence v. Reid*, No. 88-293, slip op. (U.S. June 5, 1989). The Court held that a person is determined to be an employee according to common law agency principles, referring to the Restatement (Second) of Agency 220. *Id.* at 19-20.

The Court properly rejected the notion that only formal, salaried employees are "employees" within section 101 of the Copyright Act. *Id.* at 11. However, in rejecting the actual control test, the Court ignored the Restatement's acknowledgment of the importance of the employer's control over the hired party. *See supra* note 169. The Court also overlooked the fact that the actual control test does not disturb the dichotomy of section 101 because it is merely a means of determining whether someone is, in fact, an employee within the meaning of section 101(1). Slip op. at 11. Furthermore, the Court's depreciation of the actual control test would mean that the copyright to works of certain groups such as university professors would belong to their employers, a questionable result.

By emphasizing the actual control exercised over an artist's work, a court is more likely to give credit where it belongs by rewarding all the parties whose input is reflected in the finished work.

