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Copyright Law: Legal Analysis of Works Made for Hire

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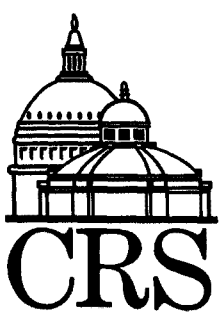

COPYRIGHT LAW: LEGAL ANALYSIS OF WORKS MADE FOR HIRE

SUMMARY

The works made for hire doctrine ("doctrine") under American copyright law entitles an employer or other person to the copyright ownership of 1) a work prepared by an employee within the scope of the employee's employment or 2) a specially commissioned work for a use described in the statute, if the parties expressly agreed in writing that the work was to be considered a work made for hire.

Under the Copyright Act of 1976, differing interpretations of the doctrine developed and the federal circuit courts were divided in their holdings. The Supreme Court in a 1989 decision, *Community for Creative Non-Violence v. Reid*, provided guidance for the implementation of the doctrine. The Court held that a determination must first be made, upon the common law principles of agency, whether the work was prepared by an employee or by an independent contractor. After such a determination, the court must then apply the appropriate section of the copyright statute. After such application, a determination is then to be made whether the work falls within the statutory definition of a work made for hire.

Following the Court's decision, concern arose regarding the application of common law agency principles for the determination of works made for hire situations. In response to these concerns, a bill was introduced in the first session of the 101st Congress to more precisely define the meaning and the designation of works made for hire. Hearings were held on the bill, but the bill had not emerged from committee before the adjournment of the first session.

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INTRODUCTION

Under American copyright law, the doctrine of works made for hire ("doctrine") is a concept of property ownership which entitles an employer or other person to the copyrights of: 1) a work prepared by an employee within the scope of the employee's employment; or 2) a specially commissioned work for a use described in the statute, if the parties expressly agreed in writing that the work was to be considered a work made for hire.[1] This doctrine has developed judicially and legislatively through the years and was most recently amended and codified in the Copyright Act of 1976.[2] The doctrine has been subject to intense judicial scrutiny in a recent U.S. Supreme Court decision,[3] discussed below, which analyzed the doctrine in detail and which provided specific criteria for its application. This report examines the legislative and judicial development of the doctrine, its current codification and underlying legislative history, the recent Court decision, and the bill introduced in the 101st Congress to modify the doctrine.

BACKGROUND

The Constitution grants to Congress the power to regulate copyrights. "The Congress shall have the Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries."[4] Upon the basis of this constitutional grant of authority, Congress, beginning in 1791, has enacted legislation dealing with the regulation of copyright.

Although American copyright was conceived traditionally as a means to protect the ownership rights of the "author" of the work, federal courts in the

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1 Henn, *Copyright Primer* 57-58 (1979). 17 U.S.C. § 101 (1988).

2 *Id.*

3 *Community for Creative Non-Violence v. Reid,* 109 S.Ct. 2166 (1989).

4 U.S. Const. Art. I, § 8, cl. 8.

late 1800's conceived of an equitable theory of ownership that placed the rights of copyright with the employer rather than with the "real author" of the work, in cases of works made for hire.[5] Examples of employment involving such works would be a newspaper photographer, a magazine illustrator, or a newspaper reporter. Hence, in the early 1900's, an employer was considered to own the copyrights in products created by his/her salaried employees.[6] Courts considered that the employer-employee relationship created an "express consent" on the part of the employee to automatically yield his copyright to his employer on works created within the realm of his employment.[7] The courts' rationale for these holdings--in the absence of statute--was that, because the idea and uniqueness of the work was derived from the employer, the employer should be considered the work's actual creator and should be entitled to the ownership of the copyright.[8]

Works Made for Hire under the Copyright Act of 1909

The Copyright Act of 1909[9] contained the first codification of the works made for hire doctrine. Under this legislation, the definition of the term "author" included an employer in the case of any work for hire; however, the term "work made for hire" was not defined and legislative distinctions were not made between employees and independent contractors. The courts developed a definition of works made for hire within the context of the legislation, and determined whether an independent contractor could be considered an employee for the statutory purposes of the works made for hire doctrine.[10]

In the absence of statutory guidance, the courts held that an employer owned the copyright to an employee's work when it was created within the

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[5] Note, *The "Work For Hire" Definition in the Copyright Act of 1976; Conflict over Specially Ordered or Commissioned Works*, 74 Cornell L. Rev. 559, 561-562 (1989)(cited to afterward as "Cornell").

[6] *See, Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); *Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 F. 152 (C.C.S.D.N.Y. 1899).

[7] *Bleistein*, 188 U.S. 245, 248 (1903).

[8] Cornell, at 561.

[9] Copyright Act of March 4, 1909, 35 Stat. 1075, *repealed* by Pub. L. 94-553, 90 Stat. 2541 (1976).

[10] Note, *Community for Creative Non-Violence v. Reid: Needed Insight in Interpreting the "Work for Hire" Provision of the Copyright Act of 1976*, 11 Geo. Mason U.Law Rev. 141, 144-146 (1989)(cited to afterwards as "Mason").

"scope of his employment."[11] In examining the employment circumstances to determine whether a work made for hire situation existed, the courts examined employment contracts, the person who commissioned or requested the work, and the employee's compensation. The chief determinative factor focused on agency principles and raised the question of whether the employer had a right to supervise and direct the performance of the work.[12] Utilizing these criteria, courts which interpreted the 1909 legislation created a rebuttable presumption that, absent evidence of a contrary agreement between employer/employee, the copyright to the completed work vested in the employer as the statutory author.[13] The courts based this theory on the rationale that the employer, who directed and supervised the production of work, and who took the financial and other risks, was entitled to reap the rewards of the copyrighted product. This theory was sometimes called the "right to supervise and control" test.[14]

The 1909 Act did not address whether commissioning parties or independent contractors were covered by the doctrine of works made for hire. Therefore, the question arose as to whether independent contractors could be considered statutory employees as, unlike regular employees, they were not necessarily subject to the control of the employer. Through a series of cases,[15] the courts expanded the concept of works made for hire to cover commissioned works and works prepared by independent contractors. Thus, the person commissioning or purchasing the work became the copyright owner under the 1909 Act, as interpreted by the courts.[16]

Works Made for Hire under the Copyright Act of 1976

Major congressional studies, debate, and deliberation ultimately resulted in the enactment of the Copyright Act of 1976.[17] The works for hire

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[11] *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1975), *cert. denied*, 409 U.S. 997 (1972). *See also*, Mason at 144-145.

[12] *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967).

[13] *See, Scherr v. Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969).

[14] *Id.*

[15] *See, Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966).

[16] *See* Cornell, at 566-567.

[17] Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976).

provisions were argued and debated by both the representatives of creative artists, as well as by the publishers and by others involved in the "employer" role. To strike a balance between the competing interests concerning works made for hire, a legislative compromise solution was reached. The legislative history indicates that the work made for hire provisions "represent a carefully balanced compromise."[18]

The 1976 Act provides a concise definition of the doctrine.

A "work made for hire" is--

> (1) a work prepared by an employee within the scope of his or her employment; or
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> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.[19]

In effect, subsection 1 provides the statutory definition of a work made for hire by an employee working within the breadth of his employment. Subsection 2 provides a list of nine special categories[20] of commissioned works which, if agreed upon in writing by the contracting parties are considered works made for hire for the purposes of copyright law.[21] From the legislative

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[18] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976).

[19] 17 U.S.C. § 101 (1988).

[20] This list of nine special categories of commissioned works contained in subsection 2 is: 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) an answer for a test; or 9) an atlas.

[21] 1 Nimmer, *Nimmer on Copyright* § 5.03 (1988).

history, it appears that the drafters intended the application of the works made for hire doctrine to be applied only under certain limited circumstances[22] and not to have the broad scope of coverage which developed under the works made for hire provisions of the 1909 Act.

Legal Effects of Designation as "Works Made for Hire"

The classification, designation, or categorization of a work as a "work made for hire" has several significant legal aspects. Section 101 of the 1976 Act provides the specific definitions for works made for hire: 1) ownership of copyright in a work prepared by an employee within the scope of his employment is generally vested in the employer absent an agreement to the contrary; and 2) certain categories of specially ordered or commissioned works are treated as authored by the commissioning party where there is a written agreement to treat the product as a work made for hire. The Act also deals with the concept of works made for hire within the framework of *ownership of copyright* in Section 201 which provides that the ownership of copyright in a work made for hire vests with the employer or the person commissioning the work, absent an agreement to the contrary.[23] This Section 201 language dovetails with the Section 101 definitional language.

> § 201 Ownership of copyright
>
> . . . .
>
> (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.[24]

Other unique statutory treatments of "work made for hire" include its term of duration of copyright protection,[25] its exemption from termination

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[22] H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 121 (1976).

[23] In the formal copyright registration form, if the work being registered is a "work made for hire," the employer or other person for whom the work was prepared is the author and should be named as the author in Space 2 of the application for copyright registration. *See,* Copyright Office, Circular 9, *Works-Made-For-Hire Under the 1976 Copyright Act* (1989).

[24] 17 U.S.C. § 201(b).

[25] The duration of copyright protection of a work made for hire is 75 years from its first publication or 100 years from its creation, whichever expires first. 17 U.S.C. § 302(c).

rights,[26] its special renewal provisions,[27] and its nonexemption from certain importation restrictions.[28] Thus, the classification of a work as a work made for hire has significant legal impact on how the work is treated under copyright law.[29]

JUDICIAL INTERPRETATIONS OF THE DOCTRINE

Since the changes brought about to the works made for hire doctrine by the 1976 Copyright Act, courts have interpreted the application of the statutory provisions dealing with the designation or the determination of certain works as works made for hire, and the legal effects resulting from the designation or the determination of certain works as works made for hire. Conflicts over the interpretation of the provisions arose among the federal circuits. Some of these conflicts have been resolved by the *Reid* case, discussed *infra*.[30]

Division of the Circuits

Prior to the 1989 *Reid* decision, two different interpretations of the works made for hire doctrine had been advanced and followed by the courts: 1) a conservative interpretation, and 2) a literal interpretation of the legislative provisions.[31] In essence, the conservative interpretation applied the traditional tests of "supervision and control" and "motivating factor" to determine whether the creator of a work was an employee or an independent contractor. The literal interpretation focused on the work itself and under this interpretation, a work created by an independent contractor had to fall

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[26] Copyright law provides that certain grants of rights in a work made by the author may be terminated 35 to 40 years after the grant is made or after publication, depending on circumstances. These termination provisions do not apply to works made for hire. 17 U.S.C. §§ 203, 304(c).

[27] 17 U.S.C. § 304(a).

[28] 17 U.S.C. § 601(b)(1).

[29] *See*, Nimmer at § 5.30[A].

[30] However, as will be discussed *infra*, commentators have argued that the *Reid* case left various unanswered questions regarding works made for hire.

[31] *See*, Mason, 147-149.

within one of the nine specified statutory categories[32] and be the subject of a written agreement transferring copyright to the hiring party.

In following and applying the conservative approach, courts adopted other tests such as an "actual control" test whereby an employer was in "actual control" of the employee and hence the work was a work made for hire.[33] Another related test involved the application of "supervision and control" to characterize a work as one made for hire.[34]

In their application of the literal interpretation, sometimes characterized as the "exclusive" interpretation,[35] courts used the clause two definition to serve as the exclusive test for determining whether an independent contractor's work was made for hire. Hence, under this interpretation, the only commissioned works that qualified for works for hire status were those nine specific categories contained in clause two. In addition, those categories were considered works made for hire only if they were accompanied by a writing signed by both parties designating the work as made for hire. The leading case supporting this interpretation was *Easter Seal Society v. Playboy Enterprises.*[36] In examining the works made for hire doctrine, the Fifth Circuit rejected the conservative approach and held that a work is made for hire under clause one of section 101 only if the seller is an employee within the realm of agency law, or under clause two if the buy
er and seller comply with that clause's requirements.[37] In addition, the court determined that clause two reversed the 1909 Act's presumption that any person who paid another to create a work automatically became the statutory author of that work.[38]

Thus, the federal circuits were divided in their interpretations of the doctrine of works made for hire. Some circuits followed the conservative or "supervision and control" test which was a more expansive interpretation of the doctrine. Other circuits followed the literal or "exclusive" interpretation

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[32] *See*, footnote 20.

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

[34] *Evans Newton, Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir. 1986), *cert. denied,* 479 U.S. 949 (1986).

[35] Cornell, at 575.

[36] 815 F.2d 323 (5th Cir. 1987), *reh'g denied*, 820 F.2d 1223 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 1280 (1988).

[37] *Id.* at 334-335.

[38] *Id.* at 335.

which followed a stricter reading of the statute. It was this legal setting, with a division of the circuits concerning works made for hire, that the District of Columbia Circuit examined the works made for hire doctrine within the context of the case *Community for Creative Non-Violence v. Reid.*

Community for Creative Non-Violence v. Reid

The Community for Creative Non-Violence ("CCNV") is a Washington, D.C., nonprofit organization dealing with homelessness.[39] CCNV's trustee and agent, Mitch Snyder, and other CCNV members chose to participate in the 1985 Christmas Pageant for Peace in Washington, D.C., through the display of a sculpture of a nativity scene with a homeless family in place of the traditional Holy Family. A Baltimore sculptor, James Earl Reid, orally agreed to sculpt the figures requested by CCNV. CCNV paid Reid for the costs of the project and offered various suggestions regarding the creation of the sculpture. There was no written contract involved in the transaction and copyright ownership was not discussed.

Following the display of the sculpture, CCNV planned to use the sculpture on fund-raising tours. However, Reid who was in possession of the sculpture objected to the tour because he believed that the sculpture would not physically survive the rigors of transportation and he refused to return the sculpture to CCNV. Reid filed a certificate of copyright registration and Snyder filed a competing certificate of copyright registration. Next, CCNV filed a suit against Reid seeking the return of the sculpture and a determination of copyright ownership.

In interpreting this situation within the context of the works made for hire doctrine, the U.S. District Court for the District of Columbia adopted the conservative "supervise and control test" and the "motivating factor test."[40] Applying these tests to the facts at hand, the district court ruled in favor of CCNV, determining that the sculpture was a work made for hire, granting CCNV ownership of the copyright in the sculpture, and ordered Reid to return the sculpture to CCNV.[41]

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[39] 846 F.2d 1485, 1487 (D.C. Cir. 1987).

[40] *Community for Creative Non-Violence v. Reid*, 652 F.Supp. 1453 (D.D.C. 1987).

[41] In determining that the sculpture was a work made for hire, the district court determined that CCNV:

> . . . was the motivating factor in the procreation of "Third World America." Snyder and his colleagues not only conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season, they did so in starkly specific detail. They

Reid appealed the holding of the district court.[42] The issue which was presented to the court of appeals for determination was whether CCNV was entitled to the copyright in the sculpture because of its supervision of Reid and because it was the "motivating factor" in the sculpture's inception. The court of appeals reversed the district court's ruling and determined that the sculpture did not qualify as a work made for hire, since Reid was an independent contractor, not an employee of CCNV within the structure of agency laws.[43] In addition, the court of appeals determined, using the literal theory of works made for hire, that sculpture "surely is not a category of commissioned work enumerated in [section] 101(2), and no written agreement existed between CCNV and Reid."[44] The court remanded the case for determination of the issue of joint authorship and determined that Reid had contributed more than a minimal amount of creativity to the sculpture. The court also observed that except for the confusion over the work for hire doctrine, this case might be considered a classic example of a jointly authored work in which the joint authors co-own the copyright.[45]

On appeal, the Supreme Court determined that the central issue in this case was whether the sculpture was a work prepared by an employee within the scope of his or her employment.[46] The Court noted the absence of legislative definitions for the terms "employee" and "employment" and examined the varying interpretations that courts have given the term, both expansive and restrictive. In determining which application to apply, the Court applied the common law theory that when Congress uses terms of established use, that established use or generally understood meaning is what Congress intended. "In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the

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then engaged Reid to utilize his representational skills, rather than his original artistic vision, to execute it. And while much was undoubtedly left to his discretion in doing so, CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs. 652 F.Supp. 1453, 1456 (D.D.C. 1987).

[42] *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988).

[43] *Id.*, at 1494.

[44] *Id.*

[45] *Id.*, at 1497.

[46] *Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166, at 2171 (1989).

conventional master-servant relationship as understood by common law agency doctrine."[47] Examining the text of the work for hire provisions, the Court concluded that nothing indicates that Congress used the terms "employee" and "employment" to describe anything other than the traditional relationship between the employee and the employer. The Court concluded that the legislative intent to apply agency law concepts was reinforced by the statutory use of the term "scope of employment" which is a widely used term of art in agency law. Therefore, the Court agreed with the court of appeals in the application of general principles of agency law to the case at hand.

In analyzing the various tests which had been advanced, i.e., "right to control," or "actual control," the Court rejected these tests in favor of a test based upon the structure of the definition of the work made for hire.

> The structure of § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.[48]

In support of this position, the Court examined and cited extensively the legislative history underlying the copyright revision. The Court concluded that the legislative history was significant for two primary reasons. First, Congress intended to provide two mutually exclusive ways to acquire work for hire status: one for employees and the other for independent contractors. Second, the legislative history underscored the intent of the statutory language that only enumerated categories of commissioned works were to be accorded work for hire status. Thus, the court rejected the hiring party's right to control the product; finding it not determinative of the work for hire status.

The Court articulated a specific test for the determination of whether certain works were to be considered or classified as works made for hire:

> To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making such determination, the court can apply the appropriate subsection of § 101.[49]

The Court applied this test to the circumstances surrounding the execution of the sculptural work and concluded that the first step to such a

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[47] *Id.*, at 2172.

[48] *Id.*, at 2174.

[49] *Id.*, at 2178.

determination was to ascertain whether a hired party was an employee under the general common law of agency. Next, the Court considered certain factors such as the hiring party's right to control the manner and means by which the product is executed. After examining all of these circumstances surrounding the creation of the sculpture, the Court agreed with the court of appeals that Reid was an independent contractor rather than an employee of CCNV.[50] Since Reid was determined to be an independent contractor, the Court turned to the second step of its analysis which was to determine whether the sculpture was a work made for hire under the terms of section 101(2). The Court examined the factual circumstances to see whether these circumstances could satisfy the conditions of section 101(2). In this case, the Court determined that the terms could not be satisfied. However, the Court agreed with the court of appeals in finding that CCNV may be a joint author of the sculpture. The case was remanded to the district court to determine whether CCNV prepared the work with the intent that their contributions be merged into inseparable or interdependent parts of a unitary whole.[51] If the district court found that Reid and CCNV prepared the work as joint authors, then they would be co-owners of the copyright in the work.[52] Thus, the court of appeals judgment was affirmed and the case was remanded for consideration of the issue of joint authorship.

The significance of this case lies in outlining the criteria for the determination of the work made for hire doctrine, thus settling some of the conflicting lower court interpretations of this provision. The Court utilized agency law principles. After a determination of the employer/employee relationship based upon the principles of agency law, then the specific terms of the statute were applied to the factual situation.

CONGRESSIONAL ACTION

The *Reid* case was decided by the Supreme Court on June 5, 1989. The Court's agency law approach depends on balancing a variety of factors in the determination of the employment relationship. It has been argued that the agency law approach, determined on a case-by-case basis, will not provide certainty in the business place.[53]

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[50] *Id.*, at 2179.

[51] *Id.*, at 2180.

[52] 17 U.S.C. § 201(a).

[53] *Unpublished Statement on S. 1253 of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary*, 101st Cong., 1st Sess. 4 (1989).

In the first session of the 101st Congress, one bill was introduced concerning works made for hire, S. 1253.[54] This bill proposed to amend copyright law with respect to works made for hire. Initially, the definition of work made for hire would be amended to read:

> (1) a work, other than a specially ordered or commissioned work, prepared by a formal salaried employee within the scope of his or her employment; or
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> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplemental work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if, with respect to each such work, the parties expressly agree in a written instrument signed by them before the commencement of the work, that the work shall be considered a work made for hire;[55]

The bill would also amend the definition of "joint work" by eliminating the phrase "their contributions" and adding the following language: "provided that, in the case of each specially ordered or commissioned work, no such work shall be considered a joint work unless the parties have expressly agreed in a written instrument, signed by them before the commencement of the work that the work shall be considered a joint work."[56]

The impact of this bill would be to clarify statutorily the meaning of work made for hire. A more explicit definition of the doctrine of work made for hire might eliminate some of the ambiguity surrounding the current situation. Likewise, statutory clarification of the definition of "joint work" would remove uncertainties.

On September 20, 1989, hearings were held on S. 1253 by the Patents, Copyrights and Trademarks Subcommittee of the U.S. Senate Committee on the Judiciary. Generally speaking, the creative community of artists, writers, and composers supported the adoption of the legislation which would clarify the current implementation of works made for hire. The representatives of publishers tended to prefer a continuation of the current system and they argued that the legislation ignored the realities of the business world and the market place.

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[54] 101st Cong., 1st Sess. (1989). This bill did not emerge from committee.

[55] *Id.*

[56] *Id.*

Some copyright observers do not believe that Congress will amend the works made for hire doctrine at this time.[57] "The common law agency principles advocated by the Supreme Court mandate a case-by-case approach to the issue, and Congress is unlikely to presume to find a better balance of the equities than that."[58]

CONCLUSION

The works made for hire doctrine ("doctrine") under American copyright law entitles an employer or other person to the copyright ownership of 1) a work prepared by an employee within the scope of the employee's employment or 2) a specially commissioned work for a use described in the statute, if the parties expressly agreed in writing that the work was to be considered a work made for hire.

Under the Copyright Act of 1976, differing interpretations of the doctrine developed and the federal circuit courts were divided in their holdings. The Supreme Court in a 1989 decision, *Community for Creative Non-Violence v. Reid*, provided guidance for the implementation of the doctrine. The Court held that a determination must first be made, upon the common law principles of agency, whether the work was prepared by an employee or by an independent contractor. If the court determines that the work was prepared by an employee, the court must then apply the appropriate section of the copyright statute to determine whether the work falls within the statutory definition of a work made for hire.

Following the Court's decision, concern arose regarding the application of common law agency principles for the determination of works made for hire situations. In response to these concerns, a bill was introduced in the first session of the 101st Congress to more precisely define the meaning and the designation of works made for hire. Hearings were held on the bill, but the bill had not emerged from committee before the adjournment of the first session.

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[57] Note, *Works for Hire*, 39 BNA Patent, Trademark & Copyright J. 233-234 (Jan. 25, 1990).

[58] *Id.*, at 234.