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The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification

by BENNETT J. FIDLOW*

Introduction

Perhaps the most basic element of copyright law is the concept that an author is entitled to protection for his work. This right is wholly a creation of federal statute and is given substance by Article I, section 8 of the United States Constitution, which vests in Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their . . . writings . . ." Pursuant to this power, Congress enacted the first Copyright Act in 1790. The nearly two intervening centuries have witnessed several revisions in copyright law, which are now codified in the Copyright Act of 1976 (17 U.S.C.).

Unfortunately, application of copyright law has always been complicated by a basic definitional uncertainty. Section 201 of the 1976 Act recognizes that copyright ownership vests in the

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author of a work, but nowhere in the Act, or in past Acts, is there a definition of "author." On its face, this does not seem to be a serious problem since the meaning appears obvious: the author should be the person who creates the work. However, the Copyright Act itself precludes such a simplistic construction since, in some instances, it requires that copyright protection be given to a person other than the creator. The confusion resulting from this apparently paradoxical situation has generated a body of law known as the "works made for hire" doctrine, which attempts to deal with the problem of determining copyright ownership of a work created by one party at the behest of another party. The doctrine is described in the 1976 Act by section 201(b), which reads:

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 [ownership of copyright], and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Although the omission of a statutory definition of "author" may seem relatively harmless, it opens the door for ambiguity and interpretation. When coupled with the uncertainty in applying the "works made for hire" doctrine, due to its own lack of definitional clarity, the resulting confusion has generated volumes of writings, reports, studies, committee prints, hearing

5. The pertinent part of § 201 reads "[c]opyright in a work protected under this title vests initially in the author or authors of the work." 17 U.S.C. § 201(a) (1982).

6. Section 101 of the 1976 Act, headed "Definitions," does not list the term "author." See 17 U.S.C. § 101. Section 26 of the 1909 Act, headed "Terms Defined," only mentions "author" to say that the word "shall include an employer in the case of a work made for hire." See 1909 Act § 26. This same use of the word "author" is included in the 1976 Act in § 201(b), but no additional definition is offered. 17 U.S.C. § 201(b).

7. In 1884, the U.S. Supreme Court looked at the problem created by the lack of a statutory definition for the term "author" and quoted with approval the definition "he to whom anything owes its origin; origination; maker..." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

8. In certain situations, the 1976 Act requires that the employer of the creator be considered the author and therefore be granted ownership rights in the work. See, e.g., 17 U.S.C. §§ 201(b), 304(a) (1982).

9. This is not to be confused with the situation in which one party works with another party in creating the work. This would result in a "joint work." See id. §§ 101, 201(a), 302(b).

10. Id. § 201(b).

11. See infra notes 35-39 and accompanying text.
notes, and bill proposals,\textsuperscript{12} as well as a large body of case law.\textsuperscript{13} All of these works, academic, legislative and judicial, have attempted to set guidelines for establishing copyright ownership in light of these definitional omissions; none, however, have been entirely successful. The confusion that still exists is the focus of this note.

The 1976 Act bases several important ownership issues on whether or not a work is classified as "made for hire." They are: 1. initial ownership protection;\textsuperscript{14} 2. copyright duration;\textsuperscript{15} 3. renewal rights;\textsuperscript{16} and 4. termination rights.\textsuperscript{17}

1. Initial Ownership Protection. As previously mentioned, ownership protection is granted to authors in section 201(a),\textsuperscript{18} however, the author of a "work made for hire" is the employer, not the creator of the work.\textsuperscript{19}

2. Copyright Duration. As stated in the U.S. Constitution, copyright protection is granted for only a limited time.\textsuperscript{20} In a work created on or after January 1, 1978 (the date on which the


\textsuperscript{13} For a history of the case law development of the doctrine, see Easter Seal Soc'y v. Playboy Enters., 815 F.2d 323, 325-34 (5th Cir.), reh'g denied, 820 F.2d 1223 (5th Cir.), petition for cert. filed, 56 U.S.L.W. 3338 (1987) (inviting Solicitor General's brief expressing view of the United States).

\textsuperscript{14} 17 U.S.C. § 201(b) (1982).

\textsuperscript{15} Id. § 302(c).

\textsuperscript{16} Id. § 304(a).

\textsuperscript{17} Id. § 203(a).

\textsuperscript{18} See supra note 5 and accompanying text.

\textsuperscript{19} 17 U.S.C. § 201(b).

\textsuperscript{20} See supra note 1 and accompanying text.
1976 Act took effect), copyright protection remains in force for a period equal to the life of the author plus fifty years.\(^{21}\) If this same work has been classified as "made for hire," however, the protection lasts "for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first."\(^{22}\)

3. Renewal Rights. If the work was created before January 1, 1978, the copyright must be renewed in order to extend the protection to approximate the new duration dates set by the 1976 Act.\(^{23}\) In most instances, the author is entitled to a renewal and extension. In a "work made for hire" situation, however, the employer is considered the author; it is therefore the employer, not the creator, who is entitled to these rights.\(^{24}\)

4. Termination Rights. When the rights to a work are transferred or licensed to another party, the copyright statute provides that the author may terminate the grant or license after thirty-five years.\(^{25}\) If a work is classified as "made for hire," however, it is not subject to termination.\(^{26}\)

Section 101 of the 1976 Act\(^ {27}\) defines a "work made for hire" as:

- (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,\(^ {28}\) as a part of a motion picture\(^ {29}\) or other audiovisual work,\(^ {30}\) as a translation, as a work made for hire.

\(^{22}\) Id. § 302(c).
\(^{23}\) See id. § 304(a).
\(^{24}\) Id. For further discussion of copyright renewals in "works made for hire," see Angel & Tannenbaum, supra note 12, at 216-21; STUDY NO. 31, supra note 12.
\(^{26}\) Id.
\(^{27}\) Id. § 101.
\(^{28}\) Section 101 defines a "collective work" as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." Id.
\(^{29}\) Section 101 defines "motion pictures" as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." Id.
\(^{30}\) Section 101 defines "audiovisual works" as: works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any.
"WORKS MADE FOR HIRE" DOCTRINE

supplementary work,[31] as a compilation,[32] as an instructional text,[33] 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.[34]

Subsection (1) of the above definition, concerning employee works, has long been recognized and respected as viable;[35] subsection (2), dealing with commissioned works, however, has engendered critical and interpretive conflict throughout its history.[36] This subsection can have devastating results for an independent contractor who is "specially ordered or commissioned" to create a work since, if the work is classified as "made for hire," he is forced to give up all of the copyright protections.

The specific problem addressed by this analysis centers around the fact that the wording of the "work made for hire" definition was substantially revised in the 1976 Act.[37] Some argue that this was done to allow added protection to the independent contractor by removing the old presumption that

regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

Id.

31. Section 101 defines a "supplementary work" as:
   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. . . .

Id.

32. Section 101 defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." Id.

33. Section 101 defines an "instructional text" as "a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities." Id. See also Legislative History, supra note 3, at 121.


37. See Legislative History, supra note 3, at 121.
copyright automatically vested in the commissioning party.\textsuperscript{38} Others disagree, saying that the revision was meant to be a clarification and not a drastic change in the methods of determining copyright ownership.\textsuperscript{39}

Recently, a conflict among several of the federal circuit courts has reflected these opposing views.\textsuperscript{40} The Second Circuit, in 1984, ruled in favor of the latter, more conservative view in \textit{Aldon Accessories Ltd. v. Spiegel, Inc.}\textsuperscript{41} and was followed in 1986 by the Seventh Circuit in \textit{Evans Newton, Inc. v. Chicago Systems Software.}\textsuperscript{42} Most recently, in April 1987, the Fifth Circuit announced its decision in \textit{Easter Seal Society v. Playboy Enterprises,}\textsuperscript{43} which strongly opposes the \textit{Aldon} view.\textsuperscript{44} Although this case seems to be fairly isolated, its reasoning is persuasive and is the foundation of the viewpoint adopted by this note. The United States Supreme Court has also shown some interest in the \textit{Easter Seal Society} case. On November 9, 1987, the Court invited the Solicitor General to file a brief expressing the position of the United States;\textsuperscript{45} accordingly, the Court may soon attempt to judicially clarify the current ambiguity in the copyright statute by resolving the opposing circuit opinions.

Section I of this note discusses the history of the “works made for hire” doctrine and the problems associated with it up through the 1976 statutory revision. Section II reviews the current variations in statutory interpretation and the opposing circuit court rulings. Section III looks at the attempts since 1976 at correcting the “works made for hire” confusion through fur-

\begin{footnotesize}
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\item See O'Meara, \textit{supra} note 12, at 525. O'Meara termed this view “conservative.” \textit{Id.} at 527. See also \textit{Aldon}, 738 F.2d at 551-53. The opposing view, supported by Melville Nimmer, was termed by O'Meara as the “radical” view since it called for a radical departure from the pre-1976 Act interpretation. See O'Meara, \textit{supra} note 12, at 527.
\item See, e.g., \textit{Easter Seal Soc'y}, 815 F.2d at 323; \textit{Aldon}, 738 F.2d at 548; Evans Newton, Inc. v. Chicago Sys. Software, 793 F.2d 889 (7th Cir.), cert. denied, 107 S. Ct. 434 (1986).
\item The court in \textit{Aldon} upheld the trial judge's jury instruction, which stated in part, "It does not matter whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation." \textit{Aldon}, 738 F.2d at 551.
\item \textit{Evans Newton}, 793 F.2d at 894 n.5.
\item \textit{Easter Seal Soc'y}, 815 F.2d at 334-35.
\item See \textit{infra} notes 164-79 and accompanying text.
\end{enumerate}
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ther statutory revision. This note concludes that although the U.S. Supreme Court may unify the current application of the doctrine, the best solution is for Congress to amend the Copyright Act to include workable definitions which would more clearly differentiate between an employee working "within the scope of his or her employment" and an independent contractor creating "a work specially ordered or commissioned."

I

History of the Doctrine

A. The 1909 Act and the Courts

Although Congress enacted the first copyright law in 1790, the basic concepts embodied in the "works made for hire" doctrine were not officially recognized until the early 1900's. In 1903 the Supreme Court, in *Bleistein v. Donaldson Lithographing Co.*, stated that an employer owned the copyright to advertisements which had been created by an employee in the course of his employment. Although ownership of the copyright by the employer was not the major issue in the case, later cases and commentators point to *Bleistein* as the origin of the "works made for hire" doctrine.

The rule that employers owned the copyright in works created by their employees was first codified six years after *Bleistein* in the Copyright Act of 1909 (1909 Act). The statute accomplished this by providing that "the word 'author' shall in-

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46. *See supra* note 2 and accompanying text.
47. 188 U.S. 239 (1903).
48. *Id.* at 248. In the opinion, written by Justice Holmes, the Court stated, "There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things." *Id.*
clude an employer in the case of works made for hire,\textsuperscript{51} thereby giving employers all of the copyright ownership rights usually reserved for the creator of a work. The only other section of the 1909 Act dealing with the employer-employee relationship was the provision for copyright renewal.\textsuperscript{52}

By specifically setting off "works made for hire" as a separate category of copyrightable material, Congress made it crucial, in determining both ownership and renewal rights, to define the original relationship between the creator and anyone with whom he may have worked in commercially exploiting his creation. Unfortunately, the 1909 Act did not define "employee" or "works made for hire,"\textsuperscript{53} and the legislative history of the Act offers little guidance in this area.\textsuperscript{54} The courts, therefore, had to determine the factual relationship between the parties in each case, thereby judicially defining the limits of the "works made for hire" doctrine on a case-by-case basis.

When deciding "works made for hire" cases, courts followed the principle set out in \textit{Bleistein}, which held that proof indicating that employers owned the copyright in works created by their employees\textsuperscript{55} was a rebuttable presumption rather than a conclusive one.\textsuperscript{56} It was also established that the employer need not actually participate in the creation process to obtain copyright ownership. This was expressed in a leading case involving renewal rights in works made "for hire," \textit{Shapiro, Bernstein \& Co. v. Bryan}.\textsuperscript{57} In \textit{Shapiro}, Judge Learned Hand

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\item \textsuperscript{51} 1909 Act § 26.
\item \textsuperscript{52} \textit{Id.} § 24. Normally renewal rights remained with the creator of the work even if he had previously contracted away his rights. The pertinent part of section 24 reads, "[I]n the case of any . . . copyrighted works, . . . the author of such work . . . shall be entitled to a renewal and extension of the copyright . . . ." \textit{Id.} In the case of a work considered "made for hire," however, the employer was entitled to the renewal. The part of section 24 which referred to "works made for hire" reads, "[I]n the case of any . . . work upon which the copyright was originally secured . . . by an employer for whom such work [was] made for hire, the proprietor of such copyright shall be entitled to a renewal and extension . . . ." \textit{Id.} For further discussion of the renewal provisions, see generally \textit{supra} notes 23-24 and accompanying text.
\item \textsuperscript{53} See 1909 Act § 26. See also \textit{STUDY} NO. 13, \textit{supra} note 12, at 128; OMeara, \textit{supra} note 12, at 524; \textit{Easter Seal Soc'y}, 815 F.2d at 325.
\item \textsuperscript{54} See, \textit{e.g.}, \textit{STUDY} NO. 13, \textit{supra} note 12, at 128.
\item \textsuperscript{55} See \textit{supra} notes 47-49 and accompanying text.
\item \textsuperscript{57} 123 F.2d 697 (2d Cir. 1941).
\end{itemize}
\end{footnotesize}
considered the scope of the "works made for hire" doctrine, finding:

[Although the employees] argue that that phrase [works made for hire] does not include works of which employees are the real authors, but only those to which they make some ancillary contribution to the "employer" who is the chief author, ... the words [of the 1909 statute] suggest no such distinction. ... 58

As the case law developed, the courts established a set of standards to use when testing for the employment relationship. The most important standard that developed was the right of the employer to exercise supervision and control over the work. This was described as the "hallmark" of the "employment for hire" relationship. 59 As the Second Circuit — the de facto copyright court in the United States 60 — explained in Scherr v. Universal Match Corp.: 61

The essential factor in determining whether an employee created his work of art within the scope of his employment ... is whether the employer possessed the right to direct and to supervise the manner in which the work was being performed. 62 Other pertinent, but non-essential, considerations, are those indicating at whose insistence, expense, time and facilities the work was created. 63 Additionally, the nature and amount of compensation [if any] received by the employee ... may be considered; 64 but ... it is of minor relevance. 65

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58. Id. at 700. See also Easter Seal Soc'y, 815 F.2d at 326 n.7 (citing Picture Music as saying that it is the theoretical right to direct and supervise an employee's work which makes it "for hire").

59. Epoch Producing Corp. v. Killiam Shows, 522 F.2d 737, 744 (2d Cir. 1975), cert. denied, 424 U.S. 955 (1976); see generally 1 M. Nimmer, supra note 12, § 5.03[B] at 5-21 n.18; N. Boorstyn, supra note 38, at 84.

60. See Easter Seal Soc'y, 815 F.2d at 325 (describing the Second Circuit's well-known reputation for copyright decisions).


62. Id. at 500; Picture Music, 457 F.2d at 1216; see generally 11 A.L.R. Fed. 457, supra note 50, § 5(a).

63. See, e.g., Scherr, 417 F.2d at 500; Brattleboro, 369 F.2d at 568; Picture Music, 457 F.2d at 1216; Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965); see generally 11 A.L.R. Fed. 457, supra note 50, § 5(b).


65. See Scherr, 417 F.2d at 500-01 (citing M. Nimmer, Copyright § 62.2 (1968)).
B. The Independent Contractor Problem

The effect of the "works made for hire" doctrine regarding employees was unclear, with respect to the status of a work created by an independent contractor. The independent contractor relationship is similar, but not identical, to the settled employer-employee relationship. A contractor is under some obligation to the commissioning party, but not as a full employee. Usually, the contractor works under different conditions and on a less formal basis than an employee. In return, the commissioning party avoids the obligation of providing benefits to the contractor which are normally provided for employees, such as a regular salary and insurance coverage.66 The 1909 Act and its legislative history do not mention independent contractors.67

As early as 1900, the courts had articulated the rule that commissioned art works were presumed to belong totally to the hiring party.68

In general when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist himself. If a patron gives a commission to an artist, there appears . . . a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron.69

The early cases presumed that the copyrights were assigned to the patron and did not rely on a "made for hire" theory;70 how-

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66. The types of employment benefits mandated by law vary from state to state. In many states, employers are required to pay for workers' compensation programs, unemployment insurance, social security taxes, and retirement plans. In California, for example, see CAL. LABOR CODE § 227 (West Supp. 1987) (pension fund payments), and § 3600 (workers' compensation), as well as CAL. UNEMP. INS. CODE §§ 601-2113 (West Supp. 1987) (unemployment insurance).

67. See 1909 Act § 26. See also STUDY NO. 13, supra note 12, at 128; O'Meara, supra note 12, at 524; Easter Seal Soc'y, 815 F.2d at 325.


69. Id. at 894.

70. See, e.g., id. at 892; Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir. 1939), cert. denied, 339 U.S. 686 (1940); Lumiere v. Robertson-Cole Distrib. Corp., 250 F. 550 (2d Cir.), cert. denied, 259 U.S. 583 (1922). This is best seen in Yardley, where the court ruled that "if an [artist] is solicited by a patron to execute a commission for pay, the presumption should be indulged that the patron desires to control the publication of copies and that the artist consents. . . ." Id. at 31 (emphasis added). The distinction between ownership by "consent" (resulting in an assignment) and initial ownership by operation of statute (resulting in a classification as a "work made for hire") should not be overlooked. See Easter Seal Soc'y, 815 F.2d at 326.
ever, later courts often confused the distinction and treated works made by contractors as the equivalent of works made by employees in the course of their employment. Both were considered "works made for hire."\(^7\)

It was not until 1966 that a court expressly used the "works made for hire" doctrine to decide an independent contractor case. In \textit{Brattleboro Publishing Co. v. Winmill Publishing Corp.},\(^7\) the Second Circuit created a new expanded definition of the "works made for hire" doctrine by summarizing the existing employer-employee copyright ownership presumption and then stating that it saw "no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor."\(^7\) With this new interpretation, the "works made for hire" doctrine stood for the presumption that copyright ownership automatically vested in the employer or the \textit{hiring party} because of his right to control the work, although no actual control had to be asserted.\(^4\)

Although the \textit{Brattleboro} court might have expected its judicial extension of the "works made for hire" presumption to solve the copyright ownership questions in the independent contractor area, it did not.\(^7\) The independent contractor anomaly was considered in the revision of the copyright statute.\(^7\)

\textbf{C. The Legislative History}

Suggestions for the revision of copyright law in the "works made for hire" area date back to the early 1900's.\(^7\) However, it was not until the mid-1950's that efforts were successful in re-

\(^7\)1. See, e.g., \textit{Picture Music}, 457 F.2d at 1216-17; \textit{Brattleboro}, 369 F.2d at 567-68. For example, the court in \textit{Picture Music} refused to consider the differences between employees and contractors, saying that "the purpose of the [1909] statute is not to be frustrated by conceptualistic formulations of the employment relationship. . . . That [the creator] acted in the capacity of an independent contractor does not preclude a finding that the [work] was done for hire." \textit{Picture Music}, 457 F.2d at 1216-17.

\(^7\)2. 369 F.2d 565 (2d Cir. 1966).

\(^7\)3. \textit{Id.} at 568 (citing \textit{Yardley}); \textit{but see id.} at 569 (Lombard, C.J. concurring).

\(^7\)4. \textit{See Picture Music}, 457 F.2d at 1216 (citing \textit{Brattleboro} and \textit{Yardley}). \textit{See also Easter Seal Soc'y}, 815 F.2d at 326.


\(^7\)6. Evidence of the independent contractor anomaly consideration is apparent in the various studies on the legislative history of the 1976 Copyright Act, \textit{supra} note 12 (discussed below).

\(^7\)7. \textit{See STUDY No. 13, supra note 12, at 128 n.4. See also infra} notes 111-12 and accompanying text.
vising the statute, sweeping aside the common law through which the courts had interpreted the "works made for hire" doctrine. As a result of the United States becoming a party to the Universal Copyright Convention, interest grew in revising the U.S. Copyright Law. Through the Legislative Appropriations Act of 1955, Congress ordered a series of thirty-five studies on most of the substantive issues for copyright revision. The 1958 report, known as Study No. 13 and entitled Works Made For Hire and on Commission, was one of the first reports to consider separate treatment of independent contractors. The report was a comprehensive study of the legislative history and court decisions as well as a commentary on relevant foreign law.

The study showed that there had been many attempts to change the treatment of works made for hire and on commission after the passage of the 1909 Act. It examined the numerous bills which had been proposed to Congress over the years, all of which contained variations and explanations which were similar to the sections eventually enacted in 1976. The study also analyzed the basic issues underlying the pressure for revision and suggested some solutions. One of the suggestions centered around the analogous use of the "shop right" doctrine in patent law. The study described this doc-
trine as being "in the nature of an implied nonexclusive license [given to the employer] to utilize the patent [owned by the employee] throughout the term of protection."85

Prior to its publication, copies of the study were sent to several copyright authorities of the day, asking for their responses and suggestions. Most of the responses stated that no change in the law concerning "works made for hire" was warranted, and specifically that no distinction should be made concerning commissioned works.86

The second major work concerning the revision was a report submitted in 1961 by Abraham L. Kaminstein, who was then Register of Copyrights.87 His report recommended that no change be made to the general "works made for hire" rules, arguing that "[i]n the case of a work made for hire (defined as a work created for an employer by an employee within the regular scope of his employment), the employer should have the right to secure copyright."88 Kaminstein did, however, advocate change regarding commissioned works, since he went on to recommend that "[i]n the case of any other commissioned work [excluding portraits], the author [should] have that right unless expressly assigned."89


86. See STUDY NO. 13, supra note 12, at 149-55 (subsection entitled Comments and Views Submitted to the Copyright Office on Works Made for Hire and on Commission). One of the few early advocates of change was Professor Melville Nimmer, who, until his recent death, was regarded as the leading authority on copyright law in the United States. See id. at 153-54.

87. COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW, 87th Cong., 1st Sess. (1961) [hereinafter 1961 REPORT]; see also KAMINSTEIN, supra note 12, at 335; Deutsch, supra note 12, at 441-42.

88. See 1961 REPORT, supra note 87. See also KAMINSTEIN, supra note 12, at 335; Deutsch, supra note 12, at 442.

89. See supra note 88.
Between 1961 and 1964, there were numerous panel discussions sponsored by the Copyright Office in which representatives from a wide range of industries affected by the revisions participated.\textsuperscript{90} Representatives of authors, screenwriters, and composers advocated greater rights for those creating the works, while representatives of publishers and the motion picture industry generally advocated restraint in changing the "works made for hire" doctrine.\textsuperscript{91}

In 1965, a revised bill,\textsuperscript{92} which for the first time conditioned the "work made for hire" status of a commissioned work on the type or category of work being considered, was submitted to Congress.\textsuperscript{93} The bill attempted to change the "works made for hire" definition to include "a work specially ordered or commissioned to be used as a contribution to a collective work, as part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire."\textsuperscript{94}

The Register's Supplementary Report, which commented on the bill, states that the "works made for hire" definition is a "carefully worked out compromise aimed at balancing legitimate interests on both sides."\textsuperscript{95} It also noted that the additional requirement of a writing, which is included in the 1976 Act,\textsuperscript{96} was considered but discarded as useless because authors could easily be forced into signing away their rights.\textsuperscript{97} Extensive hearings on the bill were held in both Houses, but the 89th Congress adjourned before further action could be taken.\textsuperscript{98}

\textsuperscript{90} See Legislative History, supra note 3, at 47.
\textsuperscript{91} See KAMINSTEIN, supra note 12; Angel & Tannenbaum, supra note 12, at 31 n.10 (citing Hearings on H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835, Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 1 (1966) [hereinafter Hearings]). See also O'Meara, supra note 12, at 526; Note, supra note 12, at 284-85.
\textsuperscript{92} H.R. 4347, 89th Cong., 1st Sess. (1965); see also KAMINSTEIN, supra note 12, at 355; Deutsch, supra note 12, at 442.
\textsuperscript{93} H.R. 4347, 89th Cong., 1st Sess. (1965); see also KAMINSTEIN, supra note 12, at 355; Deutsch, supra note 12, at 442-43.
\textsuperscript{94} See supra note 93.
\textsuperscript{95} See Deutsch, supra note 12, at 443, (citing COPYRIGHT LAW REVISION PART VI SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 66 (1965) [hereinafter REGISTER'S SUPPLEMENTARY REPORT]).
\textsuperscript{97} REGISTER'S SUPPLEMENTARY REPORT, supra note 95, at 67; see also Deutsch, supra note 12, at 443.
\textsuperscript{98} See Legislative History, supra note 3, at 48.
It is interesting to note that the concept of a compromise between creators and employers resurfaces in several official reports as part of the legislative history. The comments and criticisms made by several private interest groups during the committee hearings now part of the record, strongly suggest that lobbying from the various industries affected by the doctrine was in large part responsible for shaping the current law. For example, House of Representatives Report No. 1476, which is considered to be the official legislative history of the 1976 Act, states that the amendments proposed by the representatives of the screenwriters and composers were considered but rejected as unworkable. The amendments again suggested the use of the "shop right" doctrine found in patent law.

Between the submission of the 1965 bill and the enactment of the 1975 bill, many similar bills and committee reports were approved but unsuccessfully sent through Congress. It was not until Senate Bill 22 was introduced in 1975 that enough congressional support was gathered to incorporate the proposed changes into the bill, which was signed by President Ford on October 19, 1976.

D. The 1976 Revision

During the process of revising the 1909 copyright statute, two important changes were considered in the "works made for hire" area. The first change dealt with the scope of the employer's copyright in relation to employee-created work. The second change was a much larger and totally new concept to

99. Compare Register's Supplementary Report, supra note 95, at 66, with Legislative History, supra note 3, at 121.
100. See Legislative History, supra note 3, at 121.
101. Id. See also supra notes 90-91 and accompanying text.
102. Legislative History, supra note 3.
104. See Legislative History, supra note 3, at 121. See also supra notes 84-85 and accompanying text.
105. S. 22, 94th Cong., 2d Sess. (1976); see also Angel & Tannenbaum, supra note 12, at 29.
106. See Legislative History, supra note 3, at 48-50; see generally Kaminstein, supra note 12, at 345-77.
statutory protection: recognizing the rights of the independent contractor as a new category of creator.

In the early revision discussions of the 1909 Act, a modification to the basic "works made for hire" theory was proposed. It suggested that the employee/author retain some rights in his creation in contexts outside the scope of his employer's business.108 Representatives of various authors' lobbying groups urged that the employer be given the exclusive right to use the employee-created work only in direct relation to his legitimate business interests, with the employee retaining the rights in all non-competitive areas.109 This proposal was based on the analogous patent law theory of "shop right," which allows an employee to retain rights in his inventions under similar conditions.110

The idea of limiting the employer's ownership by splitting the copyright was not new to the post-1909 Act's revisions. A memorandum draft bill of March 2, 1906111 had suggested an even narrower definition than the one based on non-competition. It proposed that "works made for hire" should be limited to "works produced by an employee during the hours for which his salary is paid."112 This suggestion, however, did not find its way into the 1909 Act.

The suggestion to limit the employer's rights based on the "shop right" analogy was not accepted during the revision discussions,113 but in a somewhat altered form, limitations were eventually incorporated into what became the 1976 Act.114 The Act confines "made for hire" status to those works "prepared by an employee within the scope of his or her employment."115 This means that, absent a written agreement to the contrary, any works which are produced as part of an employee's regular

108. See 1963 Discussion, supra note 85 (statements in opposition to the suggestions put forth in the Register's Supplementary Report); see also KAMINSTEIN, supra note 12, at 332-33.
109. See Hearings, supra note 91.
110. Id. See supra notes 84-85 and accompanying text.
111. Study No. 13, supra note 12, at 128 n. 4.
112. Id.
113. See Legislative History, supra note 3, at 121. Although the limitation of the employer's rights was officially suggested as early as 1958 (in Study No. 13) it was not incorporated into any of the later, revised bills. The final version of the revision did attempt to limit the employer's rights, but it made no analogy to patent law. See S. 22, 94th Cong., 2d Sess., § 101 (1976); 17 U.S.C. § 101 (1982 & Supp. III 1985).
115. Id. (emphasis added).
duties belong to his employer. However, absent a clear test to determine when a work is "within the scope of employment," this rule still results in great uncertainty because the parties to an employment relationship rarely put into writing beforehand the exact nature of the employment, or the nature of works which are to be regarded as emanating from the employment. As one court has pointed out, "no one sells or mortgages all the products of his brain to his employer by the mere fact of employment."

The more significant issue in revising the "works made for hire" doctrine for the 1976 Act involved the status of the independent contractor. The main problem in this area was determining when an independent contractor's work should be classified as "made for hire."

The legislative history of the 1976 Act seems to indicate that Congress was intent on protecting the rights of independent contractors. It reads:

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 statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those special categories of commissioned works that can be considered "works made for hire" under certain circumstances.

Unlike the 1909 Act, the 1976 revision attempted to define a "work made for hire;" in doing so, it considered separately works made by "employees" and those "specially commissioned" from independent contractors. The 1976 Act specifically enumerates nine categories under which commissioned

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116. See 1 M. Nimmer, supra note 12, § 5.03[B][1][b], at 5-14 to 5-18.
117. Id. See also Angel & Tannenbaum, supra note 12, at 44.
119. Id. See Legislative History, supra note 3, at 121.
120. See Legislative History, supra note 3, at 121.
121. Id. (emphasis added).
123. 17 U.S.C. § 101; see generally Legislative History, supra note 3, at 121.
works are to be considered "for hire." The 1976 Act goes even further in limiting the commissioned works which can be considered "for hire" by stating that even if a commissioned work falls within one of these categories, it still will not receive a "for hire" classification unless "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

Unfortunately, when compiling the single "works made for hire" definition, Congress failed to clearly differentiate the two separate problems which it had considered during the revision process. The distinction between employees and independent contractors is still uncertain and leaves room for varied interpretations. In an effort to clarify and codify a complex doctrine, Congress has left the courts with an ambiguous and confusing statute.

II

Interpretations of the 1976 Act

Early commentators on the changes to the "works made for hire" doctrine in the 1976 Act pointed out that Congress had done much to resolve the ambiguities that had confused the ownership issue of works created by independent contractors. Even though Congress created a statutory "works made

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124. 17 U.S.C. § 101; see also supra notes 27-34 and accompanying text.
126. 17 U.S.C. § 101; see supra note 29.
129. 17 U.S.C. § 101; see supra note 32.
130. 17 U.S.C. § 101; see supra note 33.
132. Id. See also 1 M. Nimmer, supra note 12, § 5.03[B][2][b], at 5-20 to 5-21.
134. See Angel & Tannenbaum, supra note 12, at 239; 1 M. Nimmer, supra note 12, § 5.03[B][2][c], at 5-21 to 5-25; Note, supra note 12, at 273. See, e.g., Childers v. High
for hire” definition, there was still room for confusion since neither the Act nor its legislative history supplied clear definitions of the Act’s essential terms: “employee,” “scope of employment,” and “work specially ordered or commissioned” (referring to work made by an independent contractor). These ambiguous definitions have raised two interrelated questions in applying the “works made for hire” doctrine: 1) can “works specially ordered or commissioned,” those created by independent contractors, only be classified as “for hire” if they fall into one of the enumerated categories and are expressly made “for hire” in a writing? and 2) are employees and independent contractors two distinct groups of creators, the first covered exclusively by subsection (1) of the statutory definition and the other exclusively by subsection (2)?

As a result of these uncertainties in the statute, it can be difficult to determine whether an individual should be considered an employee or a contractor, and, if a contractor, whether his category of work is meant to be considered “for hire.”

As the Supreme Court wrote in 1944, there is a view that:

“common-law standards” are those the courts have applied in distinguishing between “employees” and “independent contractors” when working out various problems. The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true.

It is generally recognized that there are two major opposing positions regarding what qualifies as a “work made for hire” under the 1976 Act. These contrasting views highlight the
present disagreement among federal circuit courts.\textsuperscript{141}

A. The Literal View

Using a literal interpretation of the wording of the 1976 Act, which is the method advocated by Professor Nimmer,\textsuperscript{142} a commissioned work can only be considered "made for hire" if it satisfies both of the following statutory requirements: (1) it must fall into one of the enumerated categories;\textsuperscript{143} and (2) there must be a signed writing expressly stating the parties' intention that the work be made "for hire."\textsuperscript{144} According to this strict standard, if either of these elements is missing, the commissioned work cannot be a "work made for hire."\textsuperscript{145} A failure to meet the standard would ordinarily result in the creator, and not the hiring party, being considered the "author" and copyright owner.\textsuperscript{146}

In \textit{May v. Morganelli-Heumann & Associates},\textsuperscript{147} where an architect sued for alleged copyright infringement of his drawings, the Ninth Circuit, in dicta, followed this literal interpretation standard. The court noted that, in promulgating the 1976 Act, "Congress [had] changed the copyright law in its entirety."\textsuperscript{148} The court stated that May was "an independent contractor rather than an employee, so under Section 101, May's drawings would not be subject to the 'work for hire' doctrine, both because of the absence of a written agreement so providing, and

\textsuperscript{141} \textit{Easter Seal Soc'y}, 815 F.2d at 323; \textit{Evans Newton}, 793 F.2d at 889; \textit{Aldon}, 738 F.2d at 548.

\textsuperscript{142} 1 M. NIMMER, \textit{ supra} note 12, § 5.03[B][2][a], at 5-19 to 5-20; \textit{see also} N. BOORSTYN, \textit{ supra} note 38, § 3.3, at 85-86; \textit{but see} O'Meara, \textit{ supra} note 12, at 526-27 (labeling the method "radical" since it called for a drastic change from the pre-1976 presumption).

\textsuperscript{143} \textit{See supra} notes 124-31 and accompanying text.

\textsuperscript{144} \textit{17} U.S.C. § 101; \textit{see also} 1 M. NIMMER, \textit{ supra} note 12, § 5.03[B][2][b], at 5-20.

\textsuperscript{145} \textit{See 1 M. NIMMER, \textit{ supra} note 12, § 5.03[B][2][b], at 5-20; Angel & Tannenbaum, \textit{ supra} note 12, at 56; N. BOORSTYN, \textit{ supra} note 38, § 3.3, at 85-86; O'Meara, \textit{ supra} note 12, at 526-27 (radical interpretation); \textit{but see} O'Meara, \textit{ supra} note 12, at 527-28 (conservative interpretation); Simon, \textit{ supra} note 47, at 492.


\textsuperscript{147} 618 F.2d 1363 (9th Cir. 1980).

\textsuperscript{148} \textit{Id.} at 1368 n.4.
because the drawings do not fall within one of the prescribed categories of work.”

The main weakness of this argument, stressed by opponents of this strict standard, is that if Congress had specifically desired such a drastic change in the existing law, there would have been a stronger indication of this intention — either in the wording of the revision itself, or in its legislative history. Instead of ambiguous congressional records and hearing reports, there should have been a clear statement of purpose.

While Congress may have attempted to compromise among the various competing interests, its stated intent was to change the status of commissioned works by providing a definition which “spells out those specific categories of commissioned works that can be considered ‘works made for hire’...” As one court recently held, “this interpretation makes sense out of the nine narrow categories in section 101(2): The nine categories are statutory permission to allow certain kinds of independent contractors to sign away their authorship to their buyers.” This view appears even more sensible when compared to the earlier revision attempt, which had defined a “work made for hire” as “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.”

Seen in this light, Congress obviously did consider the 1976 Act to be an “extensive revision” of the existing “works made for hire” presumption, even if it failed to clarify exactly what the revised presumption is and how it should be applied.

B. The Aldon Approach

Other recent court decisions have reinforced the preexisting

149. Id. The action had originally been filed prior to the adoption of the 1976 revisions. Since the 1976 Act is not retroactive, the court was forced to apply the pre-1976 standards to the facts of the case, thereby making its earlier analysis dicta. This dicta, however, may be persuasive since the Ninth Circuit has not, to date, ruled in this area.

150. See, e.g., Easter Seal Soc’y, 815 F.2d at 330-31; Aldon, 738 F.2d at 552; see also O’Meara, supra note 12, at 533.

151. Legislative History, supra note 3, at 121.

152. Easter Seal Soc’y, 815 F.2d at 335 (emphasis added).

153. See S. 3008, 88th Cong., 1st Sess. (1964) (emphasis added); see also COPYRIGHT LAW REVISION, PT.3, DISCUSSIONS AND COMMENTS ON THE PRELIMINARY DRAFT OF THE REVISED UNITED STATES COPYRIGHT LAW 15 n.11 (1964); KAMINSTEIN, supra note 12, at 351 n.11; Comment, supra note 103, at 709.

154. See Legislative History, supra note 3, at 121; Easter Seal Soc’y, 815 F.2d at 331. See also supra notes 120-21 and accompanying text.
“works made for hire” presumption, which seems to directly oppose the literal view. In Aldon Accessories Ltd. v. Spiegel, Inc., the Second Circuit held:

It does not matter [in categorizing a work as “for hire”] whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation.\textsuperscript{156}

The Seventh Circuit, in Evans Newton, Inc. v. Chicago Systems Software,\textsuperscript{157} has followed the Aldon court’s finding.\textsuperscript{158} These courts viewed Congress’ 1976 changes to the “works made for hire” language merely as a rewording of the existing presumption.\textsuperscript{159} Their rulings reestablished the definition of a “work made for hire” based on the old test of employer/hiring party supervision and control even though the employee/contractor was not a regular or formal employee.\textsuperscript{160}

The Aldon court pointed out that if an independent contractor is working under the supervision and control of the hiring party, the contractor is, in fact, acting as an employee of the hiring party and should be statutorily classified as such.\textsuperscript{161} In bringing the contractor under the same scrutiny as is used for an “employee within the scope of his employment,”\textsuperscript{162} the Aldon court created a loophole which allowed it to avoid asking the statutory questions whether the work fits within one of the nine enumerated categories of commissioned works, and whether there is a signed writing.\textsuperscript{163}

\begin{enumerate}
\item \textsuperscript{155} 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984).
\item \textsuperscript{156} Aldon, 738 F.2d at 551.
\item \textsuperscript{157} 793 F.2d 889 (7th Cir.), cert. denied, 107 S. Ct. 434 (1986).
\item \textsuperscript{158} Evans Newton Inc. v. Chicago Sys. Software, 793 F.2d 889, 894 n.5 (7th Cir.), cert. denied, 107 S. Ct. 434 (1986) (citing Aldon).
\item \textsuperscript{159} Aldon, 738 F.2d at 552; Evans Newton, 793 F.2d at 894; see also Iris Arc v. S.S. Sarna, Inc., 621 F. Supp. 916, 919 (E.D.N.Y. 1985). The Aldon court explained that “nothing in the 1976 Act or its legislative history indicates that Congress intended to dispense with this prior law . . . .” Aldon, 738 F.2d at 552.
\item \textsuperscript{160} Aldon, 738 F.2d at 552; Evans Newton, 793 F.2d at 894. The Aldon court stated: Under the 1909 Act and decisions construing it, if an employee supervised and directed the work, an employer-employee relationship could be found even though the employee was not a regular or formal employee. . . . [W]e believe and hold that Congress intended the prior law in such situations to remain unchanged.
\item \textsuperscript{161} Aldon, 738 F.2d at 552.
\item \textsuperscript{162} 17 U.S.C. § 101 (subsection (1) of the “works made for hire” definition).
\item \textsuperscript{163} Id. § 101 (subsection (2) of the “works made for hire” definition).
\end{enumerate}
Recently, the Fifth Circuit, in *Easter Seal Society v. Playboy Enterprises*, specifically rejected the *Aldon* approach. It suggested that the *Aldon* court may have been forced into its position in order to avoid a seemingly unjust result given the facts of that case.

The *Easter Seal Society* court also pointed out that the "exercise of supervision and control" test, which the *Aldon* court revived, is ultimately unreliable since it is a subjective test left to the discretion of the court and cannot be predicted with sufficient accuracy by the parties during the course of their business relationship. The court stated, "The rule of *Aldon Accessories* makes business arrangements exceedingly difficult. . . . [T]he 'actual control' test . . . makes the outcome of 'work for hire' analysis too fact-specific for each work and therefore less predictable. . . ." This test undermines the idea of consistency inherent in a "doctrine" since the results can vary unpredictably with each transaction.

The *Easter Seal Society* court also found a third problem with the *Aldon* court's reasoning. The Fifth Circuit, stating that "any [employer] satisfying a seriously enforced 'actual control' test will ordinarily be a co-author of the work. . . .," suggested an analysis that the *Aldon* Court seemed to have overlooked. Instead of fighting over which party — the contractor, or the hiring party — owns the copyright in a new work, a court could simply compel the parties to share ownership. If an employer/hiring party sufficiently participates in creating the work, whether in conjunction with an employee (regardless of whether or not within the scope of his employment), or with an independent contractor, the employer would be considered a

164. 815 F.2d at 323.
165. Id. at 334. The *Easter Seal Society* court analyzed the *Aldon* decision and reasoned that, "There is simply no way to milk the 'actual control' test of *Aldon Accessories* from the language of the statute. . . . Therefore, we reject the rule of *Aldon Accessories.*" Id.
166. Id. at 333. The *Easter Seal Society* court pointed out that:
The "work for hire" issue in *Aldon Accessories* arose as a defensive tactic adopted by a third-party infringer to dispute the validity of the plaintiff's copyright. This posture makes the "literal" reading of the 1976 Act particularly unattractive, because it is the infringer and not the independent contractor who will benefit from a ruling that the work was not made "for hire."

167. *Easter Seal Soc'y*, 815 F.2d at 333-34.
168. Id.
169. See id.
170. Id. at 333.
co-author of a "joint work." In the case of a "joint work," both co-authors are given equal rights in the work and each can exercise any of the protections granted to individual authors under copyright law. This was the result in *Mister B. Textiles v. Woodcrest Fabrics*.

Finally, the *Easter Seal Society* court pointed out that while the *Aldon* court discussed the doctrine as based on the actual exercise of the employer's right of supervision and control, there is a strong likelihood that the rule will revert back to the old presumption that the employer merely has the right, with no requirement that he actually exercise it.

The *Easter Seal Society* court demonstrated that this is not simply pessimistic speculation by referring to the Seventh Circuit case, *Evans Newton, Inc. v. Chicago Systems Software*. In that case, the appellate court was unable to find any specific evidence in the trial record that the hiring party actually controlled the work done by the contractor; however, after quoting the test as set out in *Aldon*, the Seventh Circuit refused to overturn the lower court's finding that the work was "for hire" and therefore belonged to the hiring party.

**C. The Easter Seal Society Compromise**

The Fifth Circuit, in *Easter Seal Society*, suggested a solution which, in effect, is a compromise between the *Aldon* approach and the literal standard. After a lengthy examination of alternative approaches, the court held that a work is "made for hire" if and only if: 1) the contractor is an employee within the meaning of agency law, which would bring the work

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175. *See Easter Seal Soc'y*, 815 F.2d at 334.
176. 793 F.2d 889 (7th Cir.), cert. denied, 107 S. Ct. 434 (1986); *see Easter Seal Soc'y*, 815 F.2d at 334.
177. *See Easter Seal Soc'y*, 815 F.2d at 334.
178. *Id. Evans Newton*, 793 F.2d at 894.
179. *Evans Newton*, 793 F.2d at 894.
180. *See Easter Seal Soc'y*, 815 F.2d at 329-34.
181. *Id.* at 334-35. Because adopting state agency law would not give copyright law the requisite national uniformity, federal courts can turn to the general principles embodied in section 220 of the *Restatement (Second) of Agency*, when considering
under the “employee” section of the statutory definition, 182 or 2) the hiring party and the contractor strictly comply with the requirements of the “commissioned works” section of the statute. 183

The Restatement (Second) of Agency Law, which may be said to summarize “general common law,” 184 provides guidelines for defining an “employee” and includes criteria for differentiating between an “employee” and an “independent contractor.” 185 The Easter Seal Society court reasoned that using this guide offers the greatest stability and uniformity since the test for determining an “employee” is based on established principles of law, and will afford contracting parties more predictability when structuring agreements. 186

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182. 17 U.S.C. § 101 (subsection (1) of the “works made for hire” definition); Easter Seal Soc’y, 815 F.2d at 334-35.
183. 17 U.S.C. § 101 (subsection (2) of the “works made for hire” definition); Easter Seal Soc’y, 815 F.2d at 334-35.
184. See Easter Seal Soc’y, 815 F.2d at 335 n.19 (discussing use of the Restatements as “general common law”).
185. See Restatement (Second) of Agency, supra note 181, § 220.
186. Easter Seal Soc’y, 815 F.2d at 335.
III
Further Revision

A. The Need for Consistency

The problem of determining copyright ownership of a work created by one party at the behest of another is dependent on whether the work is classified as "made for hire," which in turn is dependent on whether the creator is classified as a statutory employee. The lack of clear definitions in the 1976 Act, and of any other decisive guidelines for making these determinations, indicates the need for further revision to increase the effectiveness of the current copyright statute.

While no clear rule for deciding whether a creator is an employee or an independent contractor is currently favored, there is a trend among commentators and recent cases toward the use of agency law in this context. Professor Nimmer suggested using the Restatement (Second) of Agency as a source since it provides some helpful criteria for testing the "master-servant" relationship. The Easter Seal Society court also based its solution on the use of agency law. Even the Aldon court found this a valid suggestion, although it never actually included a review of agency law in its opinion.

With the modern trend toward greater proliferation of independent contractors in the technology fields and the rapidly changing copyright laws in that area, the need for clear guidelines regarding copyright ownership is critical under the "works made for hire" doctrine. Legislative action should be taken that will provide copyright owners and the courts a clear vision of what should be done.

B. Attempted Legislative Revisions Since 1976

Attempts at revising and clarifying the 1976 Act have been

187. See 1 M. Nimmer, supra note 12, § 5.03[B][1], at 5-12 & n.13.1 (suggesting the use of section 220 of the Restatement (Second) of Agency).
188. See supra note 181 and accompanying text.
189. See Easter Seal Soc'y, 815 F.2d at 335.
190. See Aldon, 738 F.2d at 552 (citing 1 M. Nimmer).
made on both the state and federal levels. Since the federal statute is confusing, some states have tried to enact their own definitions in order to standardize the application of the federal statute in their courts. For example, the California Legislature amended its Labor Code in 1978\textsuperscript{193} to include a definition of "employee" for the purpose of "works made for hire." The statute reads:

\begin{quote}
"Employee" includes ... [a]ny person while engaged by contract for the creation of a specially ordered or commissioned work of authorship in which the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in Section 101 of Title 17 of the United State [sic] Code, and the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work.\textsuperscript{194}
\end{quote}

California has also adopted these "works made for hire" provisions for the purpose of determining the employer-employee relationship in connection with its Unemployment Insurance Code.\textsuperscript{195}

Similar legislation has been introduced in New York. A 1980 bill\textsuperscript{196} would have amended the New York General Business Law to read:

\begin{quote}
Any contract for the creation of a specially ordered or commissioned work of art that is stated to create a work-for-hire relationship between the artist making the work of art and the
\end{quote}

\textsuperscript{193. Cal. Labor Code § 3351.5(c) (West Supp. 1987).}
\textsuperscript{194. Id.}
\begin{quote}
For purpose of this division only, "employment" includes any service in an artistic or literary capacity performed by an individual pursuant to a collective bargaining agreement between an employer and a labor organization in the motion picture, radio or television industry where the employer has the right to control and direct the services to be performed and the individual is defined as an employee under the terms of the collective bargaining agreement.
\end{quote}
\textsuperscript{Cal. Unemp. Ins. Code § 601.5. Section 686 defines "employer" as follows:}
\begin{quote}
"Employer" also means any person contracting for the creation of a specially ordered or commissioned work of authorship when the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in Section 101 of Title 17 of the United States Code, and the ordering or commissioning party obtains ownership of all of the rights comprised in the copyright in the work. The ordering or commissioning party shall be the employer of the author of the work for the purposes of this part.
\end{quote}
\textsuperscript{Id. § 686 (footnote omitted).}
\textsuperscript{196. N.Y. Assembly Bill 10010 (March 4, 1980).}
ordering or commissioning party shall automatically give to
the artist the status of an employee under the laws of the state
of New York with respect to that transaction.\textsuperscript{197}
This bill failed to make it out of committee despite strong sup-
port. There are plans, however, to reintroduce a modified ver-
sion of the bill following the success of the California legis-
lation.\textsuperscript{198}
However, since the federal copyright statute preempts state
law,\textsuperscript{199} proper revision on the federal level would be more ap-
propriate. Since 1982, several bills proposing changes have
been introduced in Congress. The first bill, submitted by Sena-
tor Chad Cochran (D-Miss.) in 1982,\textsuperscript{200} proposed altering the
second clause of the “works made for hire” definition. The bill
merely attempted to delete several of the enumerated catego-
ries in order to broaden a creator’s rights.\textsuperscript{201} The bill sought to
strike out the sections of the definition referring to “a contribu-
tion to a collective work; a part of a motion picture or other
audiovisual work; . . . instructional text; and . . . indexes.”\textsuperscript{202} It
“died,” however, in the Senate subcommittee at the end of the
congressional session. Cochran introduced another similar bill
in 1983,\textsuperscript{203} but this one also failed to win Senate approval. In
1984, Representative Barney Frank (D-Mass.) introduced a bill
in the House identical to Cochran’s 1983 proposal,\textsuperscript{204} but this

\textsuperscript{197} Id.
\textsuperscript{198} Barry, Legislative Proposals for “Works for Hire,” N.Y.L.J., May 18, 1984, at
5, col. 1.
\textsuperscript{199} Section 301 of the 1976 Act provides for a single federal copyright system, and
indicates which state laws are preempted by that system. 17 U.S.C. § 301 (1982). Two
conditions must be met to preempt state law. First, the right regulated by state law
must be “equivalent to any of the exclusive rights within the general scope of copy-
right as specified by section 106.” Id. § 301(a). Second, the right must be “in works of
authorship that are fixed in a tangible medium of expression and come within the
subject matter of copyright as specified by sections 102 and 103.” Id. See also Com-
ment, supra note 88, at 717.
\textsuperscript{200} S. 2044, 97th Cong., 2d Sess. (1982).
\textsuperscript{201} The text of the bill, in pertinent part, read as follows:
[S]ection 101 of Title 17, United States Code, is amended in clause (2) of the
definition of “work made for hire” by —
(1) striking out “as a contribution to a collective work, as part of a motion
picture or other audiovisual work;”
(2) striking out “as an instructional text;” and
(3) striking out “indexes,” through the end of such clause and inserting in
lieu thereof “indexes.”
Id.
\textsuperscript{202} Id.
also stalled in committee due to lack of support.

Most recently, Senator Cochran submitted a third bill to the 99th Congress which revised his last effort.\textsuperscript{205} This bill represented a better-focused attempt to resolve the uncertainties left after the \textit{Aldon} decision. It proposed to qualify the definition of "work prepared by an employee within the scope of his or her employment"\textsuperscript{206} by adding a phrase allowing the category to apply only where the "employee" is provided with full benefits and incidents of employment according to applicable state and federal law, including withholding taxes.\textsuperscript{207} Such a change would serve to sharpen the distinction between regular employees and independent contractors. Unfortunately, this bill also stalled in subcommittee at the end of the congressional session, but is expected to resurface in the 100th Congress.\textsuperscript{208}

\textbf{Conclusion}

The 1976 Act's simplification of the "works made for hire" doctrine only further cluttered it. In works created in the employment context, distinguishing between employees and independent contractors in determining the initial ownership of copyright is crucial. It ultimately remains for the trier of fact to make the distinction. Because of the recent conflicting circuit court decisions, however, the criteria are now unclear; court decisions have, as a result, become unpredictable. Clearly, greater uniformity is needed.

To remedy the situation, either Congress needs to further revise the copyright statute to more clearly define the goals and expected effects of the doctrine (by better defining the meanings of "employee," "scope of employment," and "works specially ordered or commissioned"), or the Supreme Court could render an opinion settling the dispute among the circuits. The "works made for hire" doctrine can only be effective if parties can predict their rights and obligations, and the doctrine can only meet these goals through clarity in its wording and application.

Senator Cochran's latest attempt to clarify these defini-

\textsuperscript{205} S. 2330, 99th Cong., 2d Sess. (1986).
\textsuperscript{206} 17 U.S.C. § 101.
\textsuperscript{207} See S. 2330, 99th Cong., 2d Sess. (1986); see also 32 Pat. Trademark & Copyright J. (BNA) no. 778, 10, 18 (May 1, 1986).
\textsuperscript{208} See 1986-87 Legislative Review and Outlook, 33 Pat. Trademark & Copyright J. (BNA) no. 816, 320 (Feb. 5, 1987).
tions would go far toward eliminating the Aldon loophole of reclassifying contractors as statutory employees. The Easter Seal Society court's suggestion of judging the "employee-independent contractor" status on a combination of agency principles and the category and writing requirements currently existing in the copyright statute would also afford a workable solution. Neither, however, has gained the needed legislative or judicial support.

The Supreme Court's recent attention to the Easter Seal Society case indicates that it may soon decide to unify the application of the doctrine. This would go far in restoring its predictability and therefore its usefulness. However, instead of simply clarifying the doctrine's effect, the better solution would be for the statute itself to be made more understandable. Congress should act to revise the law. Major corporate employers, who exert a strong influence in Congress through lobbying, are not going to simply stand by and let the valuable "bundle of rights" inherent in copyright ownership slip away after decades of control. It may be too simplistic to portray this struggle as one between the powerful corporation and the individual artist, but at least in the sense of having the power to effect change the analogy is appropriate.

Until legislative and judicial reforms bring greater consistency into the application of the "works made for hire" doctrine, perhaps the only realistic solution is to educate the individuals that do business in the various industries that are affected by this dilemma. Whether or not an employer-employee relationship exists becomes a moot issue if an independent contractor expressly reserves all copyrights when entering into a contract. If the hiring party then wants to obtain these rights, he can negotiate for them at the start of the relationship. The rights involved in the copyright would in essence become part of the bargained-for consideration of the contract and

209. See supra notes 205-08 and accompanying text.
210. See supra notes 155-63 and accompanying text.
211. See supra notes 180-86 and accompanying text.
212. See N. Boorstyn, supra note 38, at 97 (discussing the rights described in section 106(1)-(5) of Title 17 of the United States Code).
213. The legislative history indicates that Congress recognized the author's need for protection: "[P]rovision safeguarding authors . . . is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." Legislative History, supra note 3, at 124.
copyright ownership would then be as certain as any other contract provision.