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The Freelancer's Trap: Work for Hire under the Copyright Act of 1976

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THE FREELANCER'S TRAP: WORK FOR HIRE UNDER
THE COPYRIGHT ACT OF 1976*

I. INTRODUCTION

Section 201(a) of the Copyright Act of 1976' (hereinafter, the 1976 Act) pro-
vides that copyright vests initially in the author of a work. However, under section
201(b) of the 1976 Act, the author of a "made for hire" work is considered to
be the employer or other person for whom the work was prepared. Consequently,
one an artist or writer agrees to sell his creation as a work "made for hire," he
retains no rights whatsoever in the work. The true creator of the work is viewed
by law as the buyer.

Presently, work for hire covers such works as contributions to journals,
newspapers and anthologies, as well as magazine articles, photographs and illustrations. The theory underlying the doctrine is that since the employer conceived, con-
trols and bears the financial risk of a certain creative project, he should be entitled
to authorship of the work. Many disgruntled freelance writers and artists believe,
however, that publishers' demands that they perform work for hire as employees
in the eyes of the law—but without the benefits or protection of employees—are
unconscionable. The freelance creator complains that the doctrine applies even when
the publisher exercises little or no control over the creation of the work.

This Note will present an analysis of the work for hire issue, including a discus-
sion of recent developments which have highlighted the controversy between creators
and publishers. A 1983 decision of the Court of Appeals for the Second Circuit
serves as a legal showcase for the issues involved with respect to work for hire. In Roth v. Pritikin,2 a declaratory judgment action was brought by freelance jour-
nalist June Roth against Nathan Pritikin and Patrick M. McGrady claiming that
she was the owner of one-third of the copyright of the best-selling book, The Pritikin
Program for Diet and Exercise. Roth sought to recover a portion of the royalties
realized from the book's sale.3 The facts of Roth v. Pritikin and the court's ra-
tionale in ruling against the freelance writer will be developed fully later in this Note.

Another development involves legislation introduced into Congress by Senator
Thad Cochran of Mississippi to amend the copyright law regarding work for hire. Hearings were held on Senator Cochran's bill, S. 2044,4 before the Committee on

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* This Note has been entered in the Nathan Burkan Memorial Competition.


3 Petition for writ of certiorari at 6, Roth v. Pritikin, 710 F.2d 934 (2d Cir.), cert. denied, 104

4 S. 2044, 97th Cong., 2d Sess. (1982), provided as follows:
Be it enacted by the Senate and House of Representatives of the United States of America
in Congress assembled, that section 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 a part of a motion picture
or other audiovisual work'; and
(2) striking out 'as an instructional têx'; and

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the Judiciary in October, 1982; however, the bill died without being reported out of the committee. In November, 1983, the Senator introduced S. 2138 which, like its predecessor, S. 2044, would substantially revise the work for hire doctrine. Senator Cochran’s amending legislation will be discussed more fully later in this Note. Other areas to be discussed here are the nature and purpose of copyright, the traditional standard of copyright ownership and cases involving works made for hire under the 1976 Act.

II. WORK FOR HIRE: A "CONVENIENT LOOPHOLE" IN THE COPYRIGHT LAW?

Robin Brickman, a self-employed freelance illustrator, cogently expressed the plight of the freelancer in a hearing before the Committee on the Judiciary, United States Senate, as follows:

It is important for you to understand what work for hire means to me. I do not have any of the usual benefits an employee can expect. I have to pay for my studio, utilities, art supplies and equipment. I do not get group health insurance, paid vacations, sick leave or unemployment insurance. I feel trapped.

Work for hire is a convenient loophole in a law that was drafted to protect me in my work. The minimal pay I get for work for hire means that I have to take any job I can get....

When I think of all my art that is lost to me now, I realize that, in signing work for hire, I signed away part of my future. The theft of my income was sanctioned by the copyright law.5

Like Robin Brickman, many freelance artists and writers have begun to express dissatisfaction with their present situation. They believe that the work for hire provisions of the 1976 Act allows buyers of creative work to use raw marketplace power to force authors and artists to give up future rights to their creations at bargain prices.6

It is appropriate to note at the outset that the constitutional clause governing copyright was written for creators, not investors. Article I, section 8, clause 8 of the United States Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (The patent statutes and the copyright laws of the United States are based, therefore, on a section of the Constitution which does not employ the words "patent" or "copyright."

(3) striking out ‘indexes,’ through the end of such clause, and inserting in lieu thereof

‘indexes.’


2 Id.

James Madison, chronicler of the debates in the Constitutional Convention, noted the following with respect to the patents and copyright clause:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at Common Law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.\(^8\)

The United States Supreme Court in *Continental Paper Bag Co. v. Eastern Paper Bag Co.* added further support to the historical significance attached to the creator's titular role in promotion of the sciences and useful arts. The Court reasoned that, "It has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by giving an exclusive right to an inventor . . . . The language of complete monopoly has been employed."\(^9\) And in 1907 the Supreme Court, in *American Tobacco Co. v. Werckmeister,*\(^10\) referred to copyright as "a property in notion" and stated that "the statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the incentive genius that has produced the work."

In practice, work for hire under the 1976 Act has been used to secure the "exclusive rights," provided by the Constitution, for commissioning parties—the publisher-investor, for instance—rather than the hard-working freelance creator.\(^11\) In 1982 Senator Cochran of Mississippi introduced into the 97th Congress a bill, S. 2044,\(^12\) to amend the copyright law regarding work for hire. His bill represented a valuable initiative in returning to the intent of our founding fathers concerning the preeminence of the creator in copyright matters. Hearings were held on Senator Cochran's bill in October, 1982, before the Committee on the Judiciary; however, the bill died without being reported out of the committee.\(^13\) Senator Cochran introduced legislation, S. 2138, in November, 1983, which would substantially revise the work for hire doctrine, as originally proposed by S. 2044.\(^14\)

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\(^8\) *Hamilton, Madison & Jay, The Federalist* 294 (1901) (emphasis added).

\(^9\) 210 U.S. 405, 429 (1908) (emphasis added).

\(^10\) 207 U.S. 284, 299 (1907).


\(^12\) See * supra* note 4.

\(^13\) Telephone interview with June Walton, Assistant to Senator Thad Cochran (Sept. 12, 1983).

\(^14\) Like S. 2044, S. 2138 would amend the definition of "work made for hire" by deleting contributions to a collective work, audiovisual works other than motion pictures, certain supplementary works and instructional texts from the list of works that could be subject to a "work for hire" agreement. S. 2138 would also add a new subsection (f) to section 201, entitled "Unjust Enrichment," which would create a cause of action to terminate or reform a transfer of contributed works if "profits received by the transferee . . . are strikingly disproportionate to the compensation . . . received by the author . . . ."

S. 2138 also proposes to clarify the definition of "employee" in section 101 by basing the determination of an employer-employee relationship on compliance with the withholding requirements of the federal tax laws. 27Pat. Trademark & Copyright J. (BNA) No. 657, at 114.
Briefly, S. 2044 was designed to alter the balance of power between buyer and seller by removing the work of most freelance authors and artists from coverage under the Act. The works exempted by S. 2044 would not be subject to work made for hire provisions of the Copyright Act; therefore, the buyers would be forced to negotiate only for the rights they need. Buyers could then obtain freelance work inexpensively while also allowing artists and authors to retain some negotiated control over their creations.6 Currently, the 1976 Act includes within the definition of work made for hire certain works which are specially ordered or commissioned. The proposed legislation would have prevented works commissioned for use in a collection, works commissioned for use in a motion picture or other audiovisual works, and works commissioned for use as educational texts from being considered to be works made for hire.6

According to a statement of The Authors League of America, S. 2044 would have prevented publishers of collective works from compelling nonemployee authors to sign agreements that transform their writings into works made for hire, which thus deprives the authors of the valuable right to terminate long-term or perpetual transfers of copyrights, thirty-five years after execution, and recover their rights.7 Today, freelance writers and artists are victimized by the "tie-in" transfer, a condition employed by publishers whereby the author is required to transfer not only the right of periodical publication (or first publication), but also all of the other rights—"subsidiary rights"—in the author's work. Such rights include other publications, recording rights, motion picture rights, television rights and rights to make use of the author's creation by other means.8 Publishers accomplish the "Clause (2) agreement" by artificially converting the work into one made for hire; thus, the publisher becomes the "author" and all rights are automatically vested in it.9

It is important to note that the proposed bill would not prevent publishers from requiring an author to assign his copyright and all rights under it as a condition for the publisher's agreement to publish the work in its periodical.10 Such a

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10 See supra note 5, at 1-2.
11 Id. at 1.
12 Id. at 7.
13 Id. at 9.
14 Id. In a memorandum to regular contributors, publishers of The New York Times, for instance, set forth its "standard agreement" for contributors, which is typical throughout the publishing industry. The memorandum stated:

material accepted by The New York Times is considered "work made for hire." This gives us all rights in the material throughout the world for which (the contributors) are paid the regular fee, per diem page rate or whatever is agreed at the time of the assignment. This does not change the fact that when you write for The Times you do so as an independent freelance contributor, not as an employee of The Times. Acceptance of your next check constitutes acceptance of this policy.

Id. at 26.
15 Id. at 9.
contract is effective if it is in writing and signed by the author. Therefore, the publisher can acquire the rights for thirty-five years or for the duration of the copyright if the termination right is not exercised.\(^{21}\)

In supplementary testimony to the judiciary committee, Robin Brickman, the freelance illustrator quoted earlier in this Note, described work for hire as "an unconscionable interference in the marketplace."\(^{22}\) She continued:

Even on assignments where the art director does rough sketches inhouse, the reason they seek an outside illustrator is the skill and creativity that I, as a professional visual communicator, bring to my work. . . . In every case, the art director seeks me out because of the creative expression I bring to the assignment.

[Work for hire] absolutely prevents me from negotiating a value-for-value exchange. Rather than carefully balancing and reconciling the respective interests of buyer and creator, it puts all the eggs in the buyer's basket.

My understanding is that the copyright law derives from the constitutional requirement for protection for creators. Work for hire is a provision of that law that clearly provides windfalls and protections for the buyers of art.\(^{23}\)

### III. What is Copyright?

In order to understand the work for hire provisions under the 1976 Act, it is essential to first address the nature and purpose of copyright. Copyright was neatly defined in *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*\(^{24}\) as the "sole right of multiplying copies" of the protected work. The proprietor of a copyright has a bundle of five rights under the Act: to reproduce the work, to prepare derivative works from the original, to distribute copies of the protected work to the public, to perform the work and to display the work publicly.\(^{25}\) A copyright is a type of protection granted to the authors of literary, musical, artistic, dramatic and other types of intellectual works. Copyright does not prevent others from using the ideas or information contained in the work; its protection only extends to the particular form or expression in which an author conveys ideas or information.\(^{26}\) For a work to be entitled to copyright protection under the 1976 Act, it must be fixed in a "tangible medium of expression"\(^{27}\)

\(^{21}\) Id.
\(^{22}\) Id. at 34.
\(^{23}\) Id.

\(^{24}\) 281 F. 83, 94 (2d Cir.), cert. denied, 259 U.S. 581 (1922).


\(^{27}\) 17 U.S.C. § 102 (1982) provides:

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

(1) literary works;

(2) musical works, including any accompanying words;
and must constitute an "original work of authorship." 28

There are two opposing interests which need to be balanced with regard to copyright—the public interest in having the progress of science and the useful arts promoted 29 by widespread and rapid dissemination of new works or inventions and the interest of inventors and authors in securing a return for their labors. 30 One of the basic problems of copyright is to attempt a balance between the tensions generated by those two opposing interests. 31 The United States Supreme Court emphasized in Mazer v. Stein 32 that the primary purpose underlying copyright protection is public rather than private. 33 The Court stated:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. 34

Both common law and statutory copyright rest on the assumption that there are limited forms of expression, which should not be divulged to the public without their author's consent. 35

Nothing in the Constitution dictates copyrighted matter to be strikingly novel or unique. All that is necessary to satisfy the Constitution and the statute is that the author contributed something more than a merely "trivial variation" and something "recognizably his own." 36 In this context, originality means little more than a prohibition of actual copying. 37 As the Supreme Court stated in Bleistein v. Donaldson Lithographing Co., "[n]o matter how poor artistically the author's

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29 U.S. Const. art. I, § 8, cl. 8.
30 Copyright Revision Act of 1976, supra note 26, at 7.
31 Id.
33 See Olson, Copyright Originality, 48 Mo. L. Rev. 29, 35 (1983).
34 347 U.S. at 219.
37 191 F.2d at 103. See, e.g., Hoague-Sprague Corp. v. Frank C. Meyer, Inc., 31 F.2d 583, 586 (E.D.N.Y. 1929).
addition, it is enough if it be his own." Moreover, copyright does not protect against an independently created work since, by definition, it is not copied. Therefore, as illustrated in the case of Fred Fisher, Inc. v. Dillingham, similar or identical works may exist without the occurrence of infringement.

Under the 1976 Act, copyright protection is subject to limitations such as a series of exemptions from infringement liability, including the important exception for "fair use." The 1976 Act also imposes compulsory licenses on copyright owners for certain types of uses, such as cable systems, phono records, jukeboxes and public broadcasting. The imposition of compulsory licenses on copyright owners for these certain types of uses has created problems for the future of the fundamental concept that an author should have the right to control the use of copyrighted work.

IV. TRADITIONAL STANDARD OF COPYRIGHT OWNERSHIP

A. Generally

Succinctly stated, a work is made for hire pursuant to the traditional standard of the 1909 Act whenever an employee, in the normal course of employment, creates something which may be copyrighted. A lyricist employed by a firm studio knows that the songs he writes belong to the studio. When a pillowcase designer for a linen company creates a new design, the company gets both the pillowcase and the copyright on the design. Congress chose to retain the traditional standard in the 1976 Act, despite opposition and testimony from groups of employees in diverse occupations. Special treatment is accorded to works made for hire under both the 1909 and 1976 Acts. "[T]he employer or other person for whom the [for hire] work was prepared is considered the author for [copyright] purposes. . . ." The "work for hire" proviso of section 101 defines such work as "[W]ork prepared by an employee within the scope of his or her employment. . . ." Section 10 contains a second definition which transcends the limits of the employment rela-

10 Id.
12 Id. at § 101.
tionship and enables publishers to convert works by nonemployee authors into works made for hire—to the benefit of publishers and to the author's considerable detriment.\textsuperscript{3} Clause (2) of section 101 provides that a contribution to a periodical or other collective work, an instructional text or a work in other specified categories is a work made for hire if:

(a) it is specially ordered or commissioned; and

(b) if the parties (author and publisher) expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Since copyright vests initially in the author,\textsuperscript{4} this means that the employer rather than the employee is initially the copyright owner. Consequently, in situations where the copyrightability of a work turns on the nationality or domicile of its author,\textsuperscript{5} the determinative factor will be the employer's domicile or nationality.\textsuperscript{6} Moreover, no copyright may be claimed in a work written in a for-hire relationship if the employer is the United States government.\textsuperscript{7}

B. Duration of Copyright

It is important to note that the duration of copyright and of grants of copyright may be affected if the work was created in a for-hire relationship. With regard to works in which statutory copyright subsisted prior to January 1, 1978 (the effective date of the current Copyright Act), such works are subject to renewal of copyright after the initial twenty-eight year term. The person entitled to claim such renewal will vary depending upon whether the work was originally written in a for-hire relationship.\textsuperscript{8} As to works created but not published or subject to statutory copyright before January 7, 1978, and works first created on or after January 1, 1978, the term of protection varies depending upon whether the work was originally written in a for-hire relationship.\textsuperscript{9} The 1976 Act also provides for termination of grants by operation of law;\textsuperscript{10} however, such termination provisions are not applicable to works made for hire.\textsuperscript{11} Therefore, it is important under the 1976 Act to determine whether a work has been made for hire. The Arizona case of \textit{Rhoads v. Harvey Publications}\textsuperscript{12} held that if an author is falsely told by

\textsuperscript{3} See supra note 5, at 8.
\textsuperscript{4} 17 U.S.C. § 201(a) (1982).
\textsuperscript{5} Id at § 104(b)(1) & (4). See M. Nimmer, \textit{supra} note 50, at § 503(a).
\textsuperscript{6} See M. Nimmer, \textit{supra} note 50, at § 505(C), (D).
\textsuperscript{8} 17 U.S.C. § 304(a). See M. Nimmer, \textit{supra} note 50, at § 903(D). Section 304(a) provides that in the case of an employer in a work for hire situation, the proprietor of the copyright "shall be entitled to a renewal and extension of the copyright in such work for the further term of 47 years. . . ."
\textsuperscript{9} 17 U.S.C. §§ 302(c), 303 (1982).
\textsuperscript{10} Id. at § 203(a), § 304(c).
\textsuperscript{11} See M. Nimmer, \textit{supra} note 50, at § 11.02(A)(2).
the party commissioning his work that there is a for-hire relationship between them (and thus has no copyright interest), an action may lie against the commissioning party for fraud in the acquisition of copyright.

C. Presumption of Copyright Ownership in the Employer

When courts apply the concept of copyrightable works created by employees, an employee relationship has always been the central issue. In 1903 the United States Supreme Court first implicitly recognized ownership of copyright by the employer, rather than the employee, in the case of *Bleistein v. Donaldson Lithographing Co.* The alleged infringements in *Bleistein* involved the copying in reduced form of three chromo lithographs prepared by plaintiff's employees for circus advertisements. The Court stated summarily: "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." Cases and commentators alike point to *Bleistein* as the origin of the works made for hire doctrine since, at that time, federal copyright law did not provide for "works made for hire."

The 1909 Act codified the notion that employers necessarily own the copyright in works of their employees. That Act provided that "the word 'author' shall include an employer in the case of works made for hire." Since article I, section 8, clause 8 of the United States Constitution provides for the protection of "authors," the constitutional command was satisfied by the 1909 Act which deemed employers "authors" in a work for hire situation.

D. Court-Created Tests in Construing the 1909 Act

1. Employer's right to supervise

Since the 1909 Act contained no guidelines for courts to use when interpreting the works made for hire definition, courts were forced to create their own tests when construing the statute. One issue that the courts carefully studied in determining whether a work was, indeed, for hire revolved around scope of employment considerations. In *Scherr v. Universal Match Corp.* it was held that 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 supervise the manner in which the work was being performed. In *Scherr* two

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63 See Simon, supra note 48, at 487.
64 188 U.S. 239 (1903).
65 Id. at 248.
66 See Simon, supra note 48, at 487.
67 Id.
68 Copyright Act of 1909, 35 Stat. 1075, ch. 320, §§ 1-65 (amended entirely).
69 See Simon, supra note 48, at 487.
71 417 F.2d 497 (2d Cir. 1969), cert. denied, 397 U.S. 936.
ex-soldiers brought a copyright infringement action against the United States and a corporation based on the commercial exploitation of a statue that the plaintiffs had created at the government's request while they were serving as draftees in the Army. The statue had been constructed during the plaintiffs' regular duty hours and substantially at the Army's expense. The action for copyright infringement was prompted by Universal's commercial manufacture and sale of matchbooks bearing a picture of the statue, entitled "The Ultimate Weapon." Prior to its unveiling at Fort Dix, New Jersey, the plaintiffs affixed a notice of copyright to the finished statue. Anticipating possible difficulties with the Army if anyone became aware of the copyright claim, they intentionally placed the notice where it would not be easily seen—on the soldier's pack twenty-two feet above the ground. The plaintiffs never attempted to secure a copyright for their original clay model.

In affirming a summary judgment for the defendant, the Second Circuit Court of Appeals stated:

[I]n light of the voluntary nature of plaintiffs' work; the compensation received, though assertedly minimal; and the absence of any concrete evidence of legislative intent to exclude from the coverage of 17 U.S.C. §26 any works created by military personnel while fulfilling their obligation to serve their country, we must conclude that the Government did not violate any right of the plaintiffs when it agreed that defendant Universal could depict "The Ultimate Weapon" upon its matchbook covers.

Moreover, in Picture Music, Inc. v. Bourne the court said that the right of an employer to direct and supervise the manner in which work is performed is a "crucial indicant" of an employment for hire. Suit was brought in Bourne to determine the ownership of copyright interests, original and renewal, in the popular song, "Who's Afraid of the Big Bad Wolf?" and for an accounting. From evidence presented in the case, famous composer Irving Berlin received the assistance of Ann Ronell to publish an adaptation and arrangement of the vocal music and lyrics in the Walt Disney Production, Inc. cartoon of the "Three Little Pigs," for use as a popular song. The theme words of the source material were used as the title. In dismissing the complaint, the court stated that it could not "see any room to doubt that when Miss Ronell finished her work on the source material and handed

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72 Id. at 498. For about nine months, the plaintiffs were relieved of their regular duties as illustrators to devote nearly all of their work hours and some of their leisure time to the 25-foot-high project. The Army supplied the necessary physical facilities, equipment, materials and labor force; the government's total expenditure was $12,367.90. The plaintiffs were always accountable to their Army superiors to whom they submitted progress reports. Id. at 499.

73 Id.
74 Id.
75 Id. at 501.
77 Id. at 642.
78 Id. at 652.
over the product and had it reviewed and revised by Berlin's music editor and arranger and it was sent on to Disney, that it was intended to become Disney's property exclusively."

The court continued:

The creative spark emanated from the original work. Nothing materially new was added. The additions were too insubstantial to induce an owner to share its copyrights or their ownership or do more than pay fair compensation for the services rendered which was here cast in terms of the royalty income returned. . . . The work done by Miss Ronell, for which Disney paid Miss Ronell, belonged—by intent of the parties as well as by operation of law—to Disney. . . .

2. At whose expense, insistence and time was the work created?

A long line of cases have held expressly or by necessary implication that an element indicative of whether an employee created his work as a work made for hire within the scope of his employment is whether the work was created at the employer's insistence, expense, time and facilities. While the Scherr and Bourne decisions also serve to highlight this test, the case of Lumiere v. Robertson-Cole Distributing Corp. is particularly illuminating. In Lumiere the appellant was a photographer and Robertson-Cole was a motion picture producer which employed Carpentier, a pugilist, to appear as an actor in its motion pictures. The appellant/photographer brought an infringement action, claiming that he had a right to copyright in the photographs he had taken of Carpentier at Robertson-Cole's behest. The court held that where a photographer takes photographs of a person who has been sent to him—and is paid for the photographs and for his services—the copyright is not in the photographer, but in the sitter or in the person sending the sitter to be photographed. The court elaborated: "The work is done for the person procuring it to be done and the negative, so far as it is a picture . . . belong[s] to the person."

3. Nature of compensation

The courts have relegated compensation to a low priority when assessing the factors to determine if a work has been performed in the course of employment. In Tobani v. Carl Fischer, Inc. the appellants were the children of a deceased music arranger who had been employed by the Carl Fischer company to adapt musical compositions. They claimed eight of their father's original compositions

79 Id. at 653.
80 Id.
81 280 F. 550 (2d Cir. 1922).
82 Id. at 552-53.
83 Id. The court further stated that "where a photographer solicits persons to come to his studio and takes photographs gratuitously, for his benefit and at his expense, the right to copyright is in him." Id. at 553.
84 See Simon, supra note 48, at 489.
85 98 F.2d 57 (2d Cir. 1938).
which had been produced during his employment and pursuant to his contract.\textsuperscript{46} A regular negotiated salary was a factor in the \textit{Tobani} court's decision, but it was not essential to its holding that Tobani had assigned his rights away. "The author here parted with his absolute property in the work and could not himself, if living, secure a renewal of the copyright," the court stated.\textsuperscript{47}

A recent case, \textit{Murray v. Gelderman},\textsuperscript{88} held that a work was made for hire although no salary arrangement existed and none was anticipated. In \textit{Murray} a corporation was formed to publish and market a menu book, "New Orleans A La Carte," which contained menus of famous New Orleans restaurants.\textsuperscript{9} Defendant Gelderman approached Murray about the possibility of doing some work on the book. An agreement was reached whereby Murray would take the lead in putting the book together, and the defendants would contribute the capital. Murray would receive one-third of the book's profits, and would be reimbursed for any out-of-pocket expenses. After the book was published, the copyright was issued in the name of the company. Soon thereafter, the relationship between the parties disintegrated, and Murray filed suit for copyright infringement.\textsuperscript{90}

The court found Murray's argument that she was a partner in the venture to be unavailing. The fact she was to share in the profits did not preclude the determination that the book was done "for hire," the court stated,\textsuperscript{91} adding that she had failed to overcome the presumption that the mutual intent of the parties was that the title to the copyright should be in the employer.\textsuperscript{92}

E. \textit{Works Made on Commission}

The scope of employment tests, combined with the presumption of employer ownership, led courts to apply the work made for hire provision of the 1909 Act to works made on commission as well as those created by a regular employee.\textsuperscript{93} Under the statutory definition\textsuperscript{94} of the 1976 Act, the "for hire" status is applicable only to works specially ordered or commissioned for use as:

\begin{itemize}
  \item \textsuperscript{46} \textit{Id.} at 58. All of the compositions sued on were merely arrangements by Tobani. Some of the compositions so arranged were the copyrighted property of appellee's predecessor, but most were in the public domain.
  \item \textsuperscript{47} \textit{Id.} at 60.
  \item \textsuperscript{88} 563 F.2d 773 (5th Cir. 1977), \textit{vacated}, 566 F.2d 1307 (1978).
  \item \textsuperscript{9} \textit{Id.} at 774.
  \item \textsuperscript{90} \textit{Id.}
  \item \textsuperscript{91} \textit{Id.} at 775. The court further stated that the corporation absorbed all expenses in producing the book, and that the defendant Gelderman was the motivating force behind the project. "Appellant did not originate the project and had no control over the corporation or its shareholders. Under these circumstances, appellant has failed to overcome the presumption that the mutual intent of the parties is that the title to the copyright shall be in the employer," the court said. \textit{Id.} at 776.
  \item \textsuperscript{92} \textit{Id.} at 776.
  \item \textsuperscript{93} \textit{See, e.g.,} Simon, \textit{supra} note 48 at 490.
  \item \textsuperscript{94} 17 U.S.C. § 101 (1982).
\end{itemize}
(1) A contribution to a collective work;
(2) A part of a motion picture or other audiovisual work;
(3) A translation;
(4) A supplementary work;
(5) A compilation;
(6) An instructional text;
(7) A test;
(8) Answer material for a test;
(9) An atlas.\textsuperscript{95}

If a work does not fall within one of the above categories, then even if it has been prepared upon commission, it will not qualify as a "work made for hire" with the special legal consequences which flow from this designation.\textsuperscript{96} Citing the statute,\textsuperscript{97} Nimmer stresses that even if a work prepared by special order or commission falls within one of the above categories, it still will not be considered a work made for hire unless the parties expressly agree in a written instrument signed by them that the work shall be considered to be one for hire.\textsuperscript{98}

Prior to January 1, 1978, when the 1976 Act became effective, the determination of whether copyright initially vested in the independent contractor preparing the work on commission or in the commissioning party always turned on the intention of the parties, if that intention could be ascertained.\textsuperscript{99} It was generally held that if an artist, writer, photographer, architect or other "author" is commissioned to create a work, the copyright in such work would vest in the person commissioning the work.\textsuperscript{100} The leading case is \textit{Brattleboro Publishing Co. v. Winmill Publishing Corp.},\textsuperscript{101} in which the court held that certain store advertisements belonged to the commissioning advertiser and not to the newspaper publishing them. Apparently, the \textit{Brattleboro} court believed that extending the concept of works made for hire to commissioned works was logically the next step in the analysis:

\textsuperscript{95} See supra note 4 for a discussion of how Senator Cochran’s now defunct bill would have amended section 101 of the 1976 Act.
\textsuperscript{96} See, e.g., Nimmer, supra note 50 at § 5.03(B). See, e.g., May v. Morganelli-Heumann & Assoc., 618 F.2d 1363 (9th Cir. 1980), which held that architectural work is not within one of the above categories.
\textsuperscript{97} 17 U.S.C. § 101 (1982).
\textsuperscript{98} See, e.g., Nimmer, supra note 50 at § 5.03(B). Nimmer further noted that the written instrument requirement is necessary in order to render a given work as one “made for hire” only if the work is prepared on commission. “If, alternatively, the work is prepared by an employee within the scope of his employment, no such writing is required in order to constitute the work one ‘made for hire.’”
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} 369 F.2d at 565.
While the "works for hire" doctrine has been invoked most frequently in instances involving music publishers, it is applicable whenever an employee's work is produced at the instance and expense of his employer. In such circumstances, the employer has been presumed to have the copyright. . . . We see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor. 102

F. Recognition of a Constructive Trust Relationship

In Sawyer v. Crowell Publishing Co. 103 the court held that where an employee creates something in connection with his duties, the thing created is the property of the employer; if an employee obtains a copyright for the property, it is deemed held in trust for the employer. In Sawyer the plaintiff, while an employee of the United States Department of the Interior, was sent to Alaska on a government mission. He subsequently prepared the "Great Circle Map" by using materials furnished by the government. 104 In asserting that the map did not belong to the government, the plaintiff took the position that there was "not the remotest connection" between his employment in the Department of Interior and the creation of the map. 105 The court concluded from the evidence, however, that any property right which the plaintiff may have had in the map belonged to the United States Government. The court stated: "It follows that even if a valid copyright exists in the plaintiff, it is deemed held in trust for the United States Government." 106

G. Supreme Court has Avoided the Works Made for Hire Question

Since the Bleistein decision, the Supreme Court has avoided the works made for hire question. The issue has most recently been before the Supreme Court in Public Affairs Associates, Inc. v. Rickover; 107 however, the Court declined to address the matter in Rickover on the grounds of an insufficient record. In Rickover the plaintiff, an educational publishing corporation, asked the defendant, Vice Ad-

102 369 F.2d at 567-68 (footnotes omitted) (emphasis added). Prior to Brattleboro, courts looked at sales price to ascertain whether it reflected an intent to transfer ownership of copyright to the one commissioning the work, with a higher fee serving to transfer the copyright. See Simon at 491, citing Judge Friendly's dissent in Scher. Judge Friendly argued that an unusually low price, in that case army pay, should become a factor in the equation when looking at commissioned works. Scherr, 417 F.2d at 502.


104 Id. at 472. The defendant in Sawyer printed a republished, amended version of the map. The plaintiff's charge of infringement related solely to his original copyrighted map, with no claim being made against the defendant for having copied the additional matter contained in the republished copy. Id. at 472-73.

105 Id. at 473.

106 Id. at 473-74. Several other cases have added the constructive trust "twist" to the works made for hire doctrine. See Scherr, 417 F.2d 497, which cited Sawyer and United States Ozone Co. v. United States Ozone Co. of America, 62 F.2d 881 (7th Cir. 1932), which held that a sterilizer company became the equitable owner of the copyrighted paper and that a research chemist held the registration in trust for his employer.

mira! Rickover, for permission to publish, to an undefined extent, uncopyrighted speeches he had delivered. The plaintiff claimed that Rickover could have no copyright in speeches written while he was an admiral in the United States Navy because the speeches belonged to the government.

Since Rickover threatened restraint of the publishing company's use of his speeches, the plaintiff sought declaratory relief.

The Court stated that in the past it had "cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations." The Court said that since the case related to claims to intellectual property arising out of public employment, questions were thus raised "touching the responsibilities and immunities of those engaged in the public service, particularly high officers, and the rightful demands of the Government and the public upon those serving it." The Court continued:

These are delicate problems; their solution is bound to have far-reaching import. Adjudication of such problems, certainly by way of resort to a discretionary declaratory judgment, should rest on an adequate and full-bodied record. The record before us is woefully lacking in these requirements.

It is interesting to note that the district court in Rickover held that the Admiral's speeches were not in the public domain (that is, unprotected by copyright), but remained his property, and that his rights were not affected by the fact that he was a government officer or employee. The district court reasoned that no one sells or mortgages "all the products of his brain" to his employer by the mere fact of employment. The officer or employee still remains a free agent, and his intellectual products do not automatically become the property of the government. The court stated that it is in the public interest for the government to encourage intellectual development of its officers and employees and to look favorably upon their literary and scientific contributions.

The court of appeals (one judge dissenting) held that Rickover did have the

\[\text{id.}\]
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common law rights of an author in his uncopyrighted speeches, but that he had forfeited his rights by reason of their “publication.” As to his copyrighted speeches, the court remanded the case to the district court so that it could determine to what extent “fair use” was open to the plaintiff.\textsuperscript{117}

Two members of the Supreme Court, Chief Justice Warren and Justice Whittaker, dissented in \textit{Rickover}, stating that sufficient evidence had been presented to conclude that Rickover’s speeches had been dedicated to the public domain,\textsuperscript{118} thus implying that the Admiral did have rights as an author despite the fact that he was a government employee at the time the speeches were written. Justice Harlan, in a separate dissenting opinion,\textsuperscript{119} stated that the basic issue of the case did not merely turn on whether the Admiral’s speeches were made in “the line of duty,” but also on whether the speeches were in any event “publications of the United States Government.” He indicated that he agreed with the result reached by the court of appeals, implying, as did his brethren, Chief Justice Warren and Justice Whittaker, that the Admiral did have rights in the speeches as an author despite his governmental duties.

\section{V. Works Made for Hire Under the 1976 Copyright Act}

While the 1976 Act apparently changes little in the works made for hire area, the major difference is creation of the statutory presumption that a work belongs to the employer, a presumption which is stronger than the court-made one. The new statute provides that:

\begin{quote}
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 the rights comprised in the copyright.\textsuperscript{120}
\end{quote}

The statute is clear: once a court finds that a work was created within the course of employment, only an express, written, signed agreement between the employer and employee will suffice to rebut the statutory presumption. The legislative history bolsters the strong words of the provision.\textsuperscript{121} Congress stated that the 1976 Act adopted “one of the basic principles of the present law.”\textsuperscript{122} That is, in the case of a work made for hire, the employer is considered its author and is regarded as the initial copyright owner unless there has been a contrary agreement.\textsuperscript{123}

The work made for hire provisions of the statute represented “a carefully

\textsuperscript{118} Id. at 117-18.
\textsuperscript{119} Id. at 118.
\textsuperscript{120} 17 U.S.C. § 201(b) (1982).
\textsuperscript{122} Id.
\textsuperscript{123} Id.
balanced compromise,"¹²⁴ according to the legislative history. As such, the provisions did not incorporate proposed amendments by screenwriters and composers for motion pictures which sought a recognition of something similar to the "shop right" doctrine of patent law. Under their proposal, the employer would acquire the right to use the employee's work to the extent necessary for his business, but the employee would retain all other rights as long as he refrained from authorizing competing uses.¹²⁵ Congress said that while the change proposed by the screenwriters and composers might theoretically improve the bargaining position of screenwriters and others as a group, "the practical benefits that individual authors would receive are highly conjectural."¹²⁶ Congress stressed that the presumption that initial ownership rights vest in the employer for hire is 'well established' in American copyright law."¹²⁷ To exchange the presumption for the "uncertainties" of the shop right doctrine would not only be of "dubious value" to employers and employees alike, but might also reopen a number of other issues,¹²⁸ according to the legislative history.

With regard to works prepared on special order or commission, the present definition,¹²⁹ which alters completely the status of commissioned works, represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered works made for hire under certain circumstances. Congress singled out one of the most important categories as being that of "instructional texts," with the concept being intended to include "textbook material."¹³⁰ According to the legislative history, the basic characteristic of "instructional texts" is the purpose of their preparation for "use in systematic instructional activities" and are to be distinguished from works prepared for use by a general readership.¹³¹

Other differences between the current Act and the 1909 Act with regard to work for hire concern the duration of copyright and the option to terminate transfer of rights. Copyright in a work made for hire lasts seventy-five years, while a personal copyright is valid during the author's lifetime and fifty years thereafter. The proprietor of a copyright in a work made for hire has no termination power, whereas a personal copyright carries the power to terminate any transfer of rights under the copyright after thirty-five years.¹³²

VI. CASES INVOLVING WORKS MADE FOR HIRE UNDER THE NEW ACT

Litigation under the 1976 Act with regard to the work for hire issue has been

¹²⁴ Id.
¹²⁵ Id. at 5736-37.
¹²⁶ Id. at 5737.
¹²⁷ Id.
¹²⁸ Id.
¹³⁰ Id.
¹³¹ Id.


This case presented the first instance in which a federal court was asked to construe the reach of the work for hire provision of the 1976 Act. In order to prove infringement, a plaintiff must show ownership of a valid copyright and copying by the defendant. In *Mister B* the defendant contended that the plaintiff was not the owner of a copyright because the fabric design at issue was produced by an independent contractor. The plaintiff contended, however, that it owned the copyright to the pattern at issue because the design was a “work for hire.” *Mister B* came before the court on a motion by the plaintiff, Mister B, for a preliminary injunction to prevent the defendant, Woodcrest, from selling certain fabrics which allegedly infringed on copyrighted fabrics manufactured by the plaintiff.

From the facts presented, in 1979 a Ms. Toni Lombardi, then employed by the plaintiff, hired a design firm, Nina Lewin, Inc., to create a new design to be used by the plaintiff. Ms. Lombardi presented Ms. Lewin with pictures of two garments taken from foreign magazines and instructed her to modify the designs to adapt them to the American fabric market. The pictures were to be used to make a single new design suitable for sale in the United States. The plaintiff paid Ms. Lewin $350 for her efforts.

The resulting design was entitled “Pattern 2011-Swept Away” by the plaintiff, who subsequently applied for and received a certificate of copyright registration for the design. In February, 1980, the plaintiff began manufacturing fabric incorporating the copyrighted design. Upon becoming aware of Woodcrest's alleged infringement of the fabric design, Mister B brought this action for a preliminary injunction.

With respect to ownership, Woodcrest contended that since Mister B had admitted that the fabric design at issue was produced by Ms. Lewin at Mister B's request, the plaintiff was not the owner of the copyright. The court, therefore, had to determine the status of the copyright ownership. All parties agreed that...
since the fabric at issue was designed after January 1, 1978, the issue should be
determined under the 1976 Act. 142

Woodcrest contended that the works made for hire section 143 of the 1976 Act
was inapplicable since the statutory definition 144 only allows the doctrine to operate
with regard to specifically enumerated works. 145 If Woodcrest's argument was cor-
correct, a fabric design produced by an independent contractor at the request of another
party would not be a work for hire. The independent contractor would be the
"author" of the work and thus own the copyright. The court stated that, under
the statute, the person who contracted for production of the fabric design could
become the copyright owner only upon a written transfer. 146

Although the district court in Mister B concluded that the plaintiff was the
owner of the copyright, the court did note that the defendant's argument was borne
out by the legislative history of the 1976 Act, which, in describing the operation
of the work for hire provision, stated in pertinent part:

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 107,
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 specific categories of commissioned works that
can be considered "works made for hire" under certain circumstances. 147

Even if correct, the court said, the defendant's argument was not dispositive
of the ownership question. The facts indicated the plaintiff's employee, Ms. Lombardi,
played a significant role in the creation of the plaintiff's copyrighted fabric,
with her involvement in the creation of the fabric making her "one of the authors
of a joint work for purposes of 17 U.S.C. § 201(a), the initial ownership section
of the revised copyright law." 148 As such, she and Ms. Lewin were co-owners of
copyright in the work, the court said, and since Ms. Lombardi was employed by

142 Id.
143 See 17 U.S.C. § 201(a), (b) (1982).
144 According to the statute, a "work made for hire" is not only a work prepared by an employee
within the scope of his or her employment, but it is also 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.
146 Id. See 17 U.S.C. § 204(a) (1982) which reads: "A transfer of copyright ownership, other than
by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of
the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly author-
ized agent."
147 See supra note 121 (emphasis added by the court).
148 523 F. Supp. at 24-25.
Mister B when she participated in the design, her rights would therefore pass to her employer. Quoting from the legislative history of the 1976 Act, the court said that "co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use or license the work..." Therefore, plaintiff's co-ownership was a sufficient ownership interest to maintain the suit.

B. May v. Morganelli-Heumann & Associates

In January, 1969, Fletcher Jones hired Cliff May, an architect, to design Westerly Stud, a residence and horse training facility. May was required to prepare preliminary design drawings and then final drawings and specifications. The contract did not specify ownership of the copyright to either set of drawings, nor did it contain a provision giving Jones a right to use May's work should May be discharged before completion of the project. Displeased with May's progress, Jones discharged May in June, 1969, and hired the architectural firm of Morganelli-Heumann & Associates to finish Westerly Stud. Shortly before May agreed to settle a state court suit (where he sought damages from Jones for breach of contract in the amount of $34,055.28), he discovered some of his preliminary drawings of Westerly Stud in Morganelli-Heumann's files. He then sued in district court for copyright infringement and unfair competition, contending that the architectural firm had copied several of his drawings. The United States District Court for the Central District of California rendered a summary judgment for the defendants, and the architect appealed. In granting summary judgment, the district court made a finding of fact that Jones discharged all his contractual obligations to May in the state court suit, which made possible the court's conclusion of law that Jones owned the copyright to the drawings under the "works for hire" doctrine. The district court made three additional findings of fact which were important to its disposition of the case:

1) Jones had paid May $44,962.75 for the project drawings and in satisf-
tion of the state court litigation all contractual obligations concerning the preliminary
drawings for the Westerly Stud Project;

2) There is a custom and usage in the architectural profession for an architect
to freely utilize preliminary plans prepared by another architect where the owner
has severed his contractual relationship with the original architect and has paid
for his services in preparing the preliminary plans;

3) Within the architectural profession, the architect who prepared preliminary
plans has no right to object, under custom and usage, if another architect utilizes
the preliminary plans under the circumstances described above. 158

The court of appeals held that the lower court erred in ruling that Jones had discharger
ed all his contractual obligations to May and that by bringing the state suit May
had elected a remedy that barred him from bringing the infringement action. 159

The appeals court reasoned that May was not required to treat Jones' alleged
breach as total; nor did he do so, the court found. May elected to treat Jones' alleged
breach as partial, thus preserving whatever cause of action that he might
have with respect to both the third installment of the fee for the preliminary drawings
and any use of those drawings by Jones which were contrary to the terms of the
contract. 160 May's recovery ultimately turned on the custom and usage of the archi-
tectural profession. May offered the affidavit of another architect to show that
the prevailing custom was for the architect to maintain ownership and control of
his drawings unless the parties agreed otherwise in a writing which provided for
"appropriate compensation" to the architect who prepared the drawings. 161 The
affidavit also stated that May had not received "appropriate compensation." 162
The appeals court concluded, therefore, that a genuine dispute existed as to a material
fact in the case—the relevant custom and usage of the architectural profession. 163

Morganelli-Heumann argued that the appeals court's conclusion (that summary
judgment for the defendants was improper) was inconsistent with the "work for hire"
doctrine, contending that May's evidence of custom and usage was insuffi-
cient to rebut the work for hire presumption that Jones owned the copyright. 164
It is important to note here that while the alleged infringement in this action occurred
in the early 1970's, the appeals court followed the provisions of the 1976 Act
in reaching its decision. Neither party in the suit suggested that the court give sections
101 and 201 of the 1976 Act retroactive effect, and the court declined to
do so in making its determination. 165 The appeals court stated that section 201 of
the 1976 Act provides that the employer is the author of a work made for hire

158 Id. at 1366.
159 Id.
160 Id. at 1367.
161 Id. at 1367-68.
162 Id. at 1368.
163 Id.
164 Id. at 1368-69.
165 Id. at 1368 n.4.
"and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." The appeals court continued:

We view May as an independent contractor rather than an employee, so under section 101, May's drawings would not be subject to the "works for hire" doctrine, both because of the absence of a written agreement so providing, and because the drawings do not fall within one of the prescribed categories of work.

In addressing the defendant's argument that May's evidence of custom and usage was insufficient to rebut the work for hire presumption that Jones owned the copyright, the court cited Lin-Brook Builders Hardware v. Gertler where that court addressed the question of the type of evidence necessary to rebut the presumption. In Lin-Brook the court considered extrinsic evidence to rebut the works for hire inference. Therefore, the appeals court in the instant case thought it proper to consider extrinsic evidence, which included prevailing custom and usage, to determine whether the parties intended to contract contrary to the presumption of the works for hire doctrine. The court stated: "May has offered evidence that professional custom allows the architect to retain control over his work, and that his fee arrangement permits the inference that the parties agreed to follow such custom in the Westerly Stud contract."

C. Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.

One constant problem with regard to work for hire concerns the question: Who is an employee? Since common law standards for distinguishing between an employee and an independent contractor must be used, great uncertainty results, as each case must be determined on its own facts.

In a still another case involving copyright infringement of architectural drawings, the Nebraska district court in Aitken held that the definitional section of the 1976 Act limited works made for hire by the independent contractors to prescribed categories and only to those situations where parties expressly agree in a signed written instrument that the work is considered to be work made for hire.

In 1962 Empire, a land developer, purchased a tract of land along Knox Street in Lincoln, Nebraska, and, subsequently, in November, 1977, employed Belmont, a construction firm, to construct a multi-unit apartment complex on the property. At that time, a Mr. Witt, who was acting in behalf of Empire and Belmont, engaged the plaintiff firm to provide architectural services in developing the apartment complex. Belmont engaged the plaintiff to design the apartment complex

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166 Id.
167 Id.
168 Id. at 1369 (citing 352 F.2d 298 (9th Cir. 1965)).
169 618 F.2d at 1369.
170 Id.
through all design stages. The parties' agreement was entirely oral, with no discussion as to copyright ownership of the plans to be created. 172

During the development of the architectural plans by the plaintiff there were several meetings between the parties to discuss the design of the complex. 173 As a result of these discussions, the preliminary drawings for the roof, floor system and footings were revised. At the time the plaintiff delivered the preliminary plans and blueprints to Belmont, it retained possession of the original drawings but had not registered its copyright in the architectural plans; none of the sheets contained a "copyright," "c," or other notation of the copyright ownership of the plaintiff. 174 Using the plaintiff's plans, Belmont completed construction of the complex at the site in 1979. The plaintiff was paid $13,440.93 by Belmont for preparation of the architectural plans. 175

In 1979 Empire employed Belmont to construct another apartment complex on the Knox Street property. Belmont, without the permission or knowledge of the plaintiff, copied the architectural plans prepared by the plaintiff for the first complex for use in the construction of the second complex. In early March, 1980, the plaintiff discovered that Belmont had copied the architectural plans. It subsequently hand-delivered to Belmont and Empire a bill for $35,973 for the plaintiff's "services rendered" in connection with the second complex. Both Belmont and Empire denied any liability for the claimed services. 176 In June, 1980, the plaintiff initiated this lawsuit under the 1976 Act, seeking damages for copyright infringement.

Defendant Belmont 177 contended that, because the plaintiff was not the sole author and owner of the copyright in the architectural plans, the infringement claim should fail. Belmont argued that it was the sole owner of copyright in the plans under the work made for hire doctrine or, alternatively, that it was co-owner of the copyright because it was a joint author of the plans. 178

In its analysis, the court stated that section 201(b) of the 1976 Act adopted one of the basic principles of American copyright law—that in the case of works

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172 542 F. Supp. at 254.
173 Id. Belmont provided sketches and verbal descriptions of its general ideas as to the type of apartment complex it intended to build; and Belmont also supplied the plaintiff with the necessary information concerning plumbing fixtures, kitchen cabinets and fireplace liners which it intended to use in the apartment complex.
174 Id.
175 Id. at 255.
176 Id. The plaintiff filed a mechanic's lien against the real estate in the same amount as the bill, and the plaintiff's action in state court on the lien was dismissed for failure to establish an express or implied contract for the provision of services in connection with the second project. Id.
177 The plaintiff had not publicly asserted its copyright claim in the plans prior to April 26, 1980. On April 25, 1980, the plaintiff placed notice of its copyright on the originals of the plans it had prepared. On April 29 the plaintiff's application for registration of copyright became effective. Id.
178 542 F. Supp. at 256.
for hire the employer, not the employee, is the author of the work. However, the
court added, "the definitional section constitutes a major revision in prior law with
respect to works made for hire by independent contractors."\textsuperscript{179} The court noted
that most court decisions interpreting the work made for hire doctrine under the
1909 Act viewed an independent contractor in the same light as an employee. Thus,
without an expressed intention to the contrary, copyright ownership was presumed
to vest in the employer.\textsuperscript{180}

Citing May and Mister B, the court stated that the 1976 Act’s definitional sec-
tion does not adopt this judicially created presumption but instead limits works
made for hire by independent contractors to prescribed categories. In addition,
the parties can expressly agree in a signed writing that the work will be considered
a work made for hire.\textsuperscript{181} The court concluded in Aitken that the architectural plans
were not a commissioned work as defined by section 101 of the 1976 Act because
(1) they did not fall within any of the listed categories, and (2) because there was
no written agreement between the parties that the plans should be considered a
work made for hire.\textsuperscript{182}

The court reasoned that the relationship between Belmont and the plaintiff
was clearly that of employer and independent contractor because Belmont did not
exercise and did not have the right to exercise the degree of control over the plain-
tiff’s work necessary for the plaintiff to be considered its employee. The court stated:

While Belmont had the right to direct the result to be accomplished by the plain-
tiff’s work—i.e., architectural plans for a multiplex apartment building with cer-
tain design features—it did not have the right to control and direct the detail and
means by which that result was accomplished. Put simply, Belmont had the right
to direct what should be done, but not how it should be done. Rather, it was the
plaintiff’s obligation, as a professional architectural and engineering firm, to use
its independent professional knowledge and experience in designing the architec-
tural plans in question.\textsuperscript{183}

The court also said that the relationship between Belmont and the plaintiff lacked
other factors characteristic of an employer-employee relationship. For example, the
plaintiff furnished its own employees, drawing tools and place to work. The plain-
tiff was not continuously, nor exclusively, “employed” by Belmont, but was in-

\textsuperscript{179} Id. at 257.
\textsuperscript{180} Id.
\textsuperscript{181} Id. Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981), also held that architectural drawings
do not qualify as works made for hire within the 1976 Act. In Meltzer the plaintiff prepared sketches
illustrating some details that he and his wife desired in their new house. The plaintiff also contributed
ideas, made changes and exercised approval power. The court held that the architectural firm “created”
the plans and was “author” of the plans for the purpose of copyright interests. The court said that
the ideas and sketches contributed by the plaintiff did not sufficiently constitute fixed expressions of
ideas. Therefore, the plaintiff was not the creator of the house plans and had no cause of action either
under the work for hire doctrine or as owner of the plans.
\textsuperscript{182} 542 F. Supp. at 257.
\textsuperscript{183} Id. at 258.
stead working simultaneously with many clients. It scheduled work on its various projects according to time priorities. Moreover, Belmont had no control when the plaintiff worked on its commissioned project or how the work was performed. Therefore, the court concluded, the plaintiff was an independent contractor and not an employee of the defendant Belmont. Thus, under the 1976 Act, copyright ownership vested in the plaintiff. The court concluded that Belmont and Empire were jointly and severally liable for the actual damages suffered by the plaintiff in the amount of $9,840.93 and for court costs. Belmont was held liable for its profits in the amount of $16,845.52.

D. *Roth v. Pritikin*

1. Discussion of decisions in the district court and court of appeals

The most recent decision involving the work for hire doctrine involves the challenge of a freelance writer to recover a portion of royalties received by the co-authors of a best-selling diet book to which she contributed recipes. In 1976 Patrick McGrady, a prominent medical writer and freelance journalist, spent a month at Nathan Pritikin's "Longevity Center" in Santa Barbara, California, which offered treatment, based upon Pritikin's diet and exercise plan, for persons suffering from a variety of physical afflictions. McGrady was so impressed with Pritikin's program that he wrote an article for *Woman's Day* magazine discussing Pritikin's nostrums.

In December, 1976, McGrady and Pritikin entered into an agreement whereby McGrady would be primarily responsible for writing a book about Pritikin's program with Pritikin lending his name and expertise to the project. Grosset & Dunlap purchased the publication and distribution rights.

Realizing that the book should necessarily include recipes, McGrady approached freelance writer June Roth in the spring of 1977, and she agreed in principle to create the recipes. She had previously contributed to many cookbooks and had authored several articles on food-related topics. McGrady provided her with a list of dietary specifications embodied in Pritikin's program.

On August 30, 1977, McGrady and Roth met to discuss the details of her participation in the writing endeavor. Roth rejected McGrady's offer of "several hundred dollars" in compensation for her efforts but compromised on a payment of either $1,500 in addition to a portion of the royalties from serialization rights or, alternatively, a flat fee of $3,000. Roth disputed McGrady's account of the August

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184 Id.
185 Id. at 268.
186 See supra note 2.
187 710 F.2d at 935.
188 Id. at 935-36.
189 Id. at 936.
meeting, contending that they agreed to a $3,000 advance on her share of the book's royalties.\footnote{190 Id.}

McGrady mailed Roth a letter acknowledging his version of the agreement on September 16, 1977, stating that Pritikin preferred a $3,000 flat fee, and asked her to respond "if this does not accord with your understanding." Several days later McGrady reconfirmed, by telephone, the arrangement with Roth. Roth contended that neither of these communications were ever made.\footnote{191 Id.}

Roth delivered her recipes in October, 1977, and received $3,100 for her labors, with the initial check, dated November 11, 1977, including the notation "one-third payment for recipes."\footnote{192 Id.} The book, The Pritikin Program for Diet and Exercise, was finally published in the spring of 1979. It became an immediate success and remained on best-seller lists for 52 weeks.\footnote{193 Id.} Pritikin and McGrady had received more than $1 million in royalties, and, as the court stated, "Roth's pride at the book's favorable reception was tempered by the realization that her financial reward was marginal."\footnote{194 Id.} After making several requests for additional compensation, Roth ultimately refused McGrady's offer of an additional $2,000. Instead, she filed suit in the southern district of New York, contending first that she had never entered into a valid contract relating to the payment of her recipes and, alternatively, if any such agreement had been made, it was rendered invalid by the subsequent enactment of the 1976 Act (which became effective in 1978). The defendants' responded that Roth had accepted $3,000 as full compensation.\footnote{195 Id.}

After a three-day bench trial, the district judge concluded that Roth had entered into a binding contract in August, 1977, in which she consented to accept $3,000 in return for creating the recipes.\footnote{196 Id.} The district court determined that Roth was a "writer for hire" with no interest in the copyright under the law existing at the time the agreement was executed. Finally, the judge rejected Roth's claim that the 1976 Act applied retroactively to invalidate the agreement concerning Roth's participation in the book.\footnote{197 Id. at 936-37 (citing District Judge Griesa's oral opinion).}

The Second Circuit Court of Appeals affirmed the district court decision, holding that Roth had entered into a lawful contract and had consented to accept $3,000 in return for creating the recipes. It held that the rules of the 1976 Act governing work for hire agreements were applicable prospectively, but not retroactively.\footnote{198 Id. at 934.}
In addressing the "core legal issue" of the dispute between Roth and the defendants, the court of appeals noted that the parties disagreed on the significance of the new copyright statute. Appellant Roth asserted that all copyrights are governed by the new Act and, accordingly, her rights as the author of a substantial portion of the book should be determined with reference to the new statute.\(^9\) The appellees asserted, however, that the 1976 Act had no impact upon agreements entered into prior to its effective date.\(^2\) The court of appeals rejected Roth's contentions, stating that the Act's language, its legislative history and general rules of statutory interpretation "all mandate prospective application of the rules governing work for hire agreements."\(^2\)\(^0\)

Since Roth's understanding with Pritikin and McGrady was not transcribed, she asserted that her contribution should not be viewed as a work for hire. Section 201(b) of the 1976 Act provides that a work specially ordered or commissioned for use as a contribution to a collective work is not considered to be a work for hire unless the parties expressly agree that it is such in a written instrument signed by them.

Resolution of the issue depended, of course, on the new Act's application to the present dispute. Roth relied on section 301 of the 1976 Act\(^2\)\(^2\) to support her view that the Act applied retroactively; however, the court stated that while her interpretation of section 301 was "imaginative," it was wholly unsupported by congressional intent. The court stated: "Section 301 does not . . . purport to determine who holds a copyright for works created before January, 1978. It merely clarifies the rights of individuals owning copyrights on that date, whomever they may be."\(^2\)\(^3\)

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\(^9\) Id. at 937.

\(^2\) The effective date of the 1976 Act was January 1, 1978.

\(^0\) 710 F.2d at 937.

\(^2\) Section 301 provides that on or after January 1, 1978, "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date . . . are governed exclusively by this title." 17 U.S.C. § 301 (emphasis added). Roth claimed that the phrase "whether created before or after that date" demonstrated a clear congressional intent to apply the provisions of the 1976 Act to all copyrights in effect on the date of enactment. 710 F.2d at 938. However, the Graphic Artists Guild, Inc. argued in an amicus curiae brief to the Second Circuit Court of Appeals that "sound policy reasons" existed for having the 1976 Act govern the outcome of the Roth case. The brief stated:

It is important not only for the plaintiff, but for the many similarly situated writers and creators who discussed, negotiated or began work on assignments, at any time before 1978, concerning works that were completed, published and/or copyrighted after January 1, 1978. To allow the defendants to gain benefits under the new law without holding them to the punctilio of its provisions would lessen the intended effect of the Copyright Act of 1976 and deny significant artistic and financial rights to many creators.

Brief amicus curiae of Graphic Artists Guild, Inc., 83-7013, Roth v. Pritikin, 710 F.2d 934 (2d Cir. 1983).

\(^2\) 710 F.2d at 938.
The court added that it is "well-settled" that retrospective application will not be given to a statute unless such be the "unequivocal and inflexible import of the terms, and the manifest intention of the legislature." Moreover, the court said that it would "seem anomalous" for the legislature to defer the effective date of the statute if it intended the Act, when implemented, to govern retrospectively. In affirming the district court decision, the court of appeals stated that Roth "knowingly and purposefully" entered into the 1977 contract, thus consenting to create recipes for inclusion in the book in return for $3,000.

2. Roth's petition for a writ of certiorari

   a. Statement of the case. Roth brought a petition for a writ of certiorari to have the Supreme Court of the United States review the judgment of the Second Circuit Court of Appeals in its October 1983 term, thus providing the Court with the opportunity to rule on the work for hire controversy. In the statement of the case pursuant to the petition, Roth stated that "it is undisputed that recipes are the most important part of a diet book." The brief continued:

   One may read the text, but it is the recipes to which interested parties keep turning. Because the Pritikin Diet suggested sweeping changes in eating habits and even respondent McGrady characterized the food Pritikin served as "rabbit food, this is dreadful stuff," there ensued a difficult task of making the program palatable.

   Roth asserted in the petition that when she and McGrady met on August 30, 1977, he told her he was under tremendous financial pressure because he could not pay his rent and was under threat of being dispossessed. Realizing that the project would require at least 100 recipes, Roth advised McGrady that she needed an advance of $3,000 to cover the work and that she wanted a portion of the royalties for her services. McGrady said that he would have to discuss the matter with Pritikin. The lower courts found, on the basis of McGrady's testimony and a letter dated September 16, 1977, (which he claimed he wrote, but which Roth said she never received) that they agreed for Roth to furnish the recipes for a flat fee of $3,000. According to Roth's petition:

   Right from the beginning, petitioner claims she "nagged" McGrady about fixing her portion of royalties. At one period, his father became ill and then died. After

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204 Id. at 939 (quoting Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913)).
205 710 F.2d at 939. The May decision, see supra note 134, also commented on the retroactivity of the work for hire standard and declined to adopt Roth's position. In addition, Professor Nimmer argued in his treatise that the 1976 Act did not affect the ownership rights of persons holding copyrights prior to January, 1978. 710 F.2d at 939 (citing 3 M. NIMMER, NIMMER ON COPYRIGHT, § 10.03(B)(2) (1983).
206 710 F.2d at 940.
208 Id.
209 Id.
210 Id. at 7-8.
211 Id. at 8.
WORK FOR HIRE

a respectable period, petitioner again approached McGrady. On each occasion, he put petitioner off by saying he had to talk to Pritikin. He never did.212

b. Reasons the writ should be granted. Roth's petition offered the court two bases for granting the writ. The first argument was: “[T]he decision below conflicts with applicable decisions of this Court and has created principles of copyright law which merge the property right in a book with the copyright, contrary to the nature and essence of copyright.”213 The second argument was: “[T]he court below created a contract when there was none.”214

With regard to Roth's first argument, the petition stated that since the court of appeals decided that Roth entered into an agreement to deliver the recipes prior to January 1, 1978, the effective date of the 1976 Act, the court of appeals also decided that she transferred her property interest in the recipes to the respondents "and this effected a transfer to them of the right to copyright her recipes." 215

The petition stated that in order to protect and reward authors, Congress has "continued and codified the idea that ownership in the work to be copyrighted is different from ownership of the future right to reproduce which is the essence of copyright." 216 The petition cited section 202 of the 1976 Act which states in part:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object; nor in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Roth's petition asserted that no version of the arrangement between the parties offered by the respondents contained the "slightest suggestion" that Roth transfer-

312 Id.
313 Id. at 9.
314 Id. at 17.
315 Id. at 9.
316 Id. at 10. The petition cited Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834), which held that an author at common law has a property in his manuscript and may obtain redress against anyone who deprives him of it, or "by improperly obtaining a copy, endeavors to realize a profit by its publication." This is a different right, Wheaton held, from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.
317 Petition for certiorari at 11.
red the right to copyright to them, not even in the letter offered into evidence by McGrady.\footnote{218} The petition further asserted that McGrady and Pritikin had no interest as such in the copyright when the new statute came into effect on January 1, 1978. "All that existed at the time, so far as respondents were concerned, was a rebuttable presumption of copyright in their favor,"\footnote{219} the petition stated. Moreover, Roth cited section 201(b) of the 1976 Act to stress that a work is not a work for hire unless it is both specifically ordered or commissioned and the parties have expressly agreed in a written instrument signed by them that the work shall be considered a work made for hire. "There was no such writing,"\footnote{220} the petition stated, adding that the respondents had no copyright when the new Act went into effect. "The presumption was not the equivalent of a property right,"\footnote{221} according to the petition, which further explained:

In applying the new statute to the facts, there would be no retrospective application. The application for the copyright was made on June 6, 1979, a year and a half after the statute came into effect. In deciding that applying the statute would be retrospective, the courts overlooked the basic principle that copyright is a monopoly which may be achieved only if the conditions set by Congress are met.\footnote{222}

Finally, the petition stated with regard to its first argument that the Court should take "judicial notice" that books are often years in the writing after contracts have been signed. The application of the new statute to contracts made before its effective date will be a recurring problem.\footnote{223} If the decision of the Second Circuit Court of Appeals in the case is permitted to persist, the petition suggested, "the perception that copyright, the right to reproduce in the future, is different from the right to own will be extinguished and significant portions of the new statute rendered meaningless."\footnote{224}

In arguing its second point—that the court of appeals created a contract when there was none—the petition stressed that the parties did not agree until July, 1978, on the quantity of recipes which Roth was to create and deliver.\footnote{225} "It is essential to a contract for goods or services that the quantity be agreed upon. No such agreement took place in the case at bar. The contract was vague and indefinite,"\footnote{226} the petition asserted. Moreover, the petition stated:

[W]hile at first blush it would seem that a requirement to supply three weeks of menus and recipes and then a week of gourmet recipes and then two weeks of

\footnotesize{\begin{itemize}
  \item \footnote{218} \textit{Id.}
  \item \footnote{219} \textit{Id.} at 12.
  \item \footnote{220} \textit{Id.} at 13.
  \item \footnote{221} \textit{Id.} at 14.
  \item \footnote{222} \textit{Id.}
  \item \footnote{223} \textit{Id.} at 16.
  \item \footnote{224} \textit{Id.}
  \item \footnote{225} \textit{Id.}
  \item \footnote{226} \textit{Id.} at 17.
\end{itemize}
family recipes and single recipes provides for an ascertainable amount, on analysis it turns out to be purely ephemeral.227

The amount of recipes was something that would have to be worked out later, over a period of time, with McGrady, the publisher and Pritikin. The parties did not reach agreement until July, 1978, six months after the statute went into effect, when Roth delivered the last batch of recipes,228 the petition stated. The petition also distinguished a menu from a recipe, stating that a menu might be a regimen of food or a meal, while a recipe has specific application to a particular item within a meal. "Thus, the number of recipes for a breakfast would depend on the cook's creativity,"229 the petition stated. The petition concluded that since McGrady himself had testified that the number of recipes had not been agreed upon, then no agreement was reached until 1978 and, therefore, there was no agreement by which Roth gave up any rights.230

VII. DISCUSSION OF THE HEARING BEFORE THE COMMITTEE ON THE JUDICIARY WITH REGARD TO SENATE BILL 2044

Work made for hire has become an issue charged with emotion on both sides of the table.231 Freelance photographer Phillip Leonian stated before the United States Senate Committee on the Judiciary, with regard to S. 2044 (the bill to amend the definition of works made for hire, which died in committee in late 1982), that clause 2 of section 101 of the 1976 Act works against the "best interests" of the author, the publisher and the public.232 Leonian continued:

The young, who are most vulnerable to its routine application in its most onerous form—the open-ended agreement—have their future prospects dimmed . . . . The acquisition of unlimited rights by those who commission work provide them with a store of material which can be used at will without additional payment, and reduces the opportunity for future employment not only for the photographer or other creator who signs a work for hire agreement, but for all photographers and creators. Reduction of demand insuitably reduces the pool of talent available to publishers. This results in a thinning of the texture and richness of the nation's publications, and the impoverishment of our culture.233

On the "other side of the table," there is support for the current phrasing

227 Id.
228 Id. at 18. According to the brief for Defendant-Appellee McGrady submitted to the Second Circuit Court of Appeals (83-7013), Roth's work was reviewed by Pritikin and his staff to assure it complied with the Pritikin diet guidelines. In their exercise of control over the contents of the recipes, Pritikin and his staff made substantial changes in the recipes submitted by Roth and chose not to include all of Roth's recipes in the book. According to the brief, many recipes included in the book were not Roth's.
229 Id.
230 Id.
231 See supra note 5 (statement by Phillip Leonian at 159).
232 Id.
233 Id.
of the 1976 Act with regard to work for hire. As E. Gabriel Perle, speaking on behalf of the Magazine Publishers Association, stated in the judiciary committee hearing:

[It] is only fair that the party who conceived of the need for a specific work, who commissioned the work, who assumed the entire entrepreneurial risk in connection with that work, and who removed any economic risk on the part of the contributor should be allowed to own what he has caused to come into being and, indeed, to own what he and the contributor mutually agreed that he, the commissioning party, should own.234

Perle asserted that S. 2044 would constitute an "unwarranted interference" with the literary marketplace and the right of parties to bargain freely within that marketplace.235

Perle contended that statutory provisions for work made for hire in the 1976 Act are incapable of becoming a mechanism for oppressing individual contributors. Safeguards granted to the individual contributor in clause 2 of section 101, Perle said, are: first, that only the enumerated categories of material can be work made for hire; second, the work must be specially ordered or commissioned for use as a contribution; and third, that the parties must expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.236

The Association of American Publishers, Inc., provided a statement at the Senate hearing enumerating the principal effects of a commissioned work being considered to be made for hire. First, the commissioning party is deemed to own all of the rights comprised in the copyright, pursuant to section 201(b). This will occur only if the individual author so agrees, in writing, as set forth in section 101. The individual author who does agree in writing may, in any event, negotiate an agreement varying this effect in whole or in part, pursuant to section 201(b).237

Second, the rights acquired by the commissioning party are not subject to statutory termination. Under section 203 of the 1976 Act, authors are permitted by law to terminate their agreements with publishers during a period beginning thirty-five years from the date of the contract or from publication. Section 203(a) provides that works that are considered to be made for hire are not subject to statutory termination.238 The statement of the publishers' association contended that while this exclusion might appear on the surface to be a limitation on the individual author's rights, such a conclusion would be "wholly superficial" because:

234 See supra note 5 (statement by E. Gabriel Perle at 61).
235 Id. at 62.
236 Id. at 58. Perle further noted that the "solicitude" shown for the contributor in the 1976 Act is "even greater" than that provided by the Statute of Frauds. The Statute of Frauds requires that an instrument be signed only by the party to be charged, while the 1976 Act requires that both parties sign in order to evidence their mutual intent that work specially ordered or commissioned be work made for hire. Id.
237 See supra note 5 (statement of the Association of American Publishers, Inc. at 66).
238 Id. at 66.
a) the exclusion cannot apply unless the author of a commissioned work expressly agrees, in writing, that the work should be considered as one made for hire;

b) the termination opportunity is itself an encumbrance upon the general principle that authors and publishers, as well as others, are free to reach agreements (e.g., as to the term of contract) between them;

c) the particular circumstances of those limited classes of commissioned works—such as instructional texts and contributions to encyclopedias—that are subject to work made for hire treatment typically render the termination principle inapposite.\textsuperscript{239}

According to the publishers’ association, distinctions between staff employees and commissioned authors—particularly with respect to encyclopedias and instructional texts—are illusory for purposes of the 1976 Act. The processes of revision and updating would be severely inhibited in the absence of a single identifiable copyright owner of the whole and its constituent parts.\textsuperscript{240} Further, the ability to adapt or license particular versions and uses (e.g., abridgements, special adaptations, foreign language editions, and microforms, data base and electronic media versions) would be “significantly impaired.”\textsuperscript{241} The publishers’ association asserted: “[S]ubjecting discrete segments of larger interwoven units (whether paragraphs of particular entries or sections of the entire work) to myriad terminations of the publisher’s rights would be virtually intolerable.”\textsuperscript{242}

In conclusion, therefore, on one side of the work for hire controversy there are the freelance authors, photographers and artists who contend that the work for hire provisions of the 1976 Act permit buyers of creative work to use raw marketplace power to force them to give up future rights to their creations at bargain prices. They believe that the current work for hire doctrine is an “unconscionable

\textsuperscript{239} Id. at 66-67. The statement by the publishers’ association noted that the typical encyclopedia is comprised of contributions from literally thousands of individual authors. According to the statement: No encyclopedia publisher can employ all those experts in the variety of fields necessary to produce a quality work. Instead, these many contributors are ‘commissioned’—in the terms of the Act, “hired” for a specific task—at the instance and inspiration (and risk) of the publisher, and the publisher applies its creative talents to direct, review, refine, and merge all these efforts into discrete sections and a single work that will serve the anticipated needs of the public. In addition, these works are periodically revised after first publication. In some cases, particular portions of the whole may remain the same over long periods of time, extending well beyond the 35 year termination period (e.g., a biographical entry for a deceased individual or section on past history); in others, both retention of parts and revision may be necessary (e.g., a section on scientific theory or current geopolitics). In many cases, virtually every paragraph, or sentence, of a single entry will reflect the separate, integrated, contributions—whether made over many months of review and editing for first publication, or many years of revision—of numerous authors.

\textsuperscript{240} Id. at 67-68.

\textsuperscript{241} Id. at 69.

\textsuperscript{242} Id.
interference in the marketplace. The buyers of the freelancers’ creative endeavors, on the other side of the controversy, however, argue that the 1976 Act provides full safeguards for the interests of the individual authors. The 1976 Act, they believe, permits the orderly and efficient development, revision, administration and marketing of particular works and rights therein, thus serving the public interest. The publishers maintain that if there are particular situations in which pertinent provisions have caused legitimate difficulties for authors, these are isolated instances that do not call for blanket revision of the “balanced, workable and fair resolution” presently represented in the 1976 Act.

VIII. CONCLUSION

In White-Smith Music Publishing Co. v. Goff the court stated that there are “at least sentimental reasons for believing that Congress may have intended that the author, who according to tradition receives but little for his work, and afterwards sees large profits made out of it by publishers, should later be brought into his kingdom.” June Roth’s petition for a writ of certiorari for Supreme Court review of the judgment of the Second Circuit Court of Appeals in Roth v. Pritikin provided the Court with the opportunity to rule on the work for hire question for the first time since Bleistein in 1903. However, in not granting certiorari, the Court failed to bring Roth into her “kingdom.” This commenter believes that the Court should have granted certiorari in Roth’s case. The freelance writer drafted several very good arguments in her behalf, the most persuasive being the contention that the lower court created a contract where there was none. The parties in Roth did not reach agreement on the quantity of recipes which Roth was to create and deliver until July 1978, six months after the 1976 Act went into effect, when Roth delivered the last batch of recipes. Therefore, the 1976 Act should have applied in Roth’s case. Furthermore, since her understanding with the defendants was not transcribed, her contribution could not be viewed as a work made for hire. Consequently, she would possess an interest in the copyright covering the book.

Another possibility for change and clarification in the status of freelance creators—to bring them into their “kingdom”—depends upon the fortunes of Senator Cochran of Mississippi in pushing his work for hire amending legislation through Congress. It should be noted, however, that Senator Cochran’s amending legislation would not have ended another serious abuse—the use of publisher’s superior bargaining power to compel an author to transfer all rights in his work

241 See supra note 22.
242 See supra note 240.
243 187 F. 247, 251 (1st Cir. 1911).
244 See supra note 3.
246 As noted numerous times in this paper, “work for hire” is defined under the 1976 Act to include “a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” See supra note 123.
as a condition for first publication in a magazine, newspaper or other collective work. Adoption of the legislation will only stop publishers from becoming the titular owners of the copyright, therefore eliminating the author's right of termination. However, it will not stop a publisher from insisting on acquiring all rights in the contribution, as publishers have done and will continue to do. Additional legislation is needed to deal with this problem. Only then will freelance creators begin to receive an equitable monetary return for their unique and valuable endeavors.

Johanna Fisher Stewart