

# UIC REVIEW OF INTELLECTUAL PROPERTY LAW



## THE SCOPE OF EMPLOYMENT TEST UNDER THE WORK-MADE-FOR-HIRE DOCTRINE REVISITED: HOW COVID-19, REMOTE WORKING, AND THE RESTATEMENT (THIRD) OF AGENCY COULD CHANGE IT

DIANA J. SIMON

### ABSTRACT

COVID-19 has impacted almost every facet of our lives, but has it impacted intellectual property rights? Possibly. This article explores the intersection between the work-made-for-hire doctrine under the Copyright Act of 1976, agency theory, the updated Restatement (Third) of Agency, and our changing workforce in a post-COVID-19 world. Specifically, as of now, whether an employee was “in the scope of employment” at the time a work was created is evaluated, in part, by whether the work occurred “substantially within time and space limits.” But this test is derived from the Restatement (Second) of Agency, which has been amended, and the Restatement (Third) no longer includes this as a factor. On top of the changing Restatement, employment conditions for many in this country have also changed dramatically. Now, where home is not only where the heart is but where the office is, this raises complex issues about whether the test for scope of employment should change and discusses the implications of such a change.

Keywords: restatement of agency, COVID-19, intellectual property, copyright

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I. THE STORY OF HOW THE WORK-MADE-FOR-HIRE DOCTRINE BECAME ENTWINED WITH THE RESTATEMENT (SECOND) OF AGENCY.....	233
II. THE RESTATEMENT’S SCOPE OF EMPLOYMENT THREE-PART TEST: HOW COURTS HAVE INTERPRETED IT. ....	234
III. COPYRIGHT LAW AND AGENCY LAW: PURPOSES AND GOALS. ....	235
IV. IN 2019, THE THIRD CIRCUIT, IN A COPYRIGHT CASE INVOLVING A WORK-FOR-HIRE ISSUE, FIRST REFERENCES THE THIRD RESTATEMENT OF AGENCY, PUBLISHED IN 2006. ....	238
A. <i>TD Bank</i> . ....	238
B. The Restatement (Third) of Agency, Section 7.07.....	239
V. THE POST-COVID-19 WORKFORCE: THE DEATH KNELL TO 9-TO-5 IN AN OFFICE ENVIRONMENT. ....	240
VI. WHETHER A COURT WOULD ADOPT THE UPDATED RESTATEMENT IN A CASE INVOLVING A WORK-FOR-HIRE ISSUE INSTEAD OF THE RESTATEMENT (SECOND) OF AGENCY: A PATCHWORK OF APPROACHES. ....	242
A. The Wishy-Washy Approach .....	244
B. Yes, We Will Adopt the Updated Version with Little or No Discussion... ..	245
C. No, We Will Not Use the Updated Version of the Restatement Provision. ....	246
D. Hell No, We Will Not Adopt Updated Versions of the Restatement.....	246
VII. ELIMINATION OF TIME AND SPACE LIMITS IN LINE WITH CHANGES IN WORKFORCE AND NEW RESTATEMENT—EMPLOYER AND EMPLOYEE PERSPECTIVES.....	247
VIII. CONCLUSION.....	249

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Our country has changed in fundamental ways since COVID-19 hit in March of 2020. In what seemed like an instant, we were all sent home to work (except, of course, our essential workers in healthcare and elsewhere), and many of us stayed home for months on end. In the meantime, copyright law, which did not come to a standstill during COVID-19, still evaluates whether an employee's work is within the scope of employment by assessing, in part, whether the work occurred "substantially within the authorized time and space limits."<sup>1</sup> But this test is derived from section 228 of the Restatement (Second) of Agency, a section that has since been supplanted by section 7.07 of the Restatement (Third) of Agency, which has abandoned this factor. Thus, this article discusses whether this factor should be abandoned in favor of an approach that recognizes the realities of our new remote workforce and the more recent Restatement provision.

This article approaches the issue above in seven parts. Part I briefly traces the genesis of how copyright law became intertwined with agency law. Part II focuses on the current state of the test for whether an employee was within the scope of employment when preparing a work. Part III focuses on the differences between the purposes underlying copyright law, on the one hand, and agency law for tort purposes, on the other hand. Part IV traces how the Restatement (Third) of Agency appeared in copyright law and addresses the changes to the relevant section of the Restatement and the reasons behind those. Part V discusses the changes in our workforce since COVID-19, some of which may become permanent. Part VI addresses how courts have addressed changes in Restatements after the adoption of aspects of them. Parts VII and VIII conclude with a discussion of whether the test for scope of employment should change based on both the updating of the Restatement and changes in our workforce looking at how such a change would impact both employers and employees.

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<sup>1</sup> *E.g.*, U.S. Auto Parts Network, Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1015 (9th Cir. 2012) (quoting RESTATEMENT (SECOND) OF AGENCY, § 228 (AM. L. INST. 1958) (amended 2006)).

I. THE STORY OF HOW THE WORK-MADE-FOR-HIRE DOCTRINE BECAME ENTWINED WITH  
THE RESTATEMENT (SECOND) OF AGENCY

Under the Copyright Act (“the Act”), the copyright in a work “vests initially in the author or authors of the work.”<sup>2</sup> The Act, however, carves out an exception for “works made for hire.”<sup>3</sup> Under section 201(b) of the Act, if the work is one made for hire, “the employer or other person for whom the work was prepared is considered the author for purposes of this title, . . . and . . . owns all of the rights comprised in the copyright.”<sup>4</sup> The Act, however, does not further define work for hire or otherwise provide guidance on the subject. The Supreme Court, however, tackled the issue in *Community for Creative Non-Violence v. Reid* (“CCNV”).<sup>5</sup> There, the Court, after noting that the terms “employee” and “scope of employment” are nowhere defined in the Act itself, determined that Congress intended to use these terms as understood by “common-law agency doctrine.”<sup>6</sup> It then turned to section 220 of the Restatement (Second) of Agency (among other authorities), which sets forth a non-exhaustive list of factors relevant to determine whether a hired party is an employee.<sup>7</sup> Based on these factors, because the Supreme Court determined that the party was not an employee but an independent contractor, the Court did not determine whether the work was prepared within the scope of employment.<sup>8</sup>

Subsequently, the Fourth Circuit, taking its direction from the Supreme Court, applied the Restatement (Second) of Agency in analyzing whether a party, indisputably an employee, created a work within the scope of thier employment.<sup>9</sup> Based on *CCNV*, the court turned to section 228 of the Restatement (Second) of Agency and laid out the three-part test from that section as follows: A servant’s conduct is within the scope of employment if: “(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.”<sup>10</sup> Other circuits then followed suit.<sup>11</sup> Thus, the Copyright Act, and the work-for-hire doctrine became enmeshed with the common-law agency doctrine and the Restatement (Second) of Agency.

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<sup>2</sup> 17 U.S.C. § 201 (a) (2021).

<sup>3</sup> 17 U.S.C. § 201 (b) (2021).

<sup>4</sup> *Id.*

<sup>5</sup> 490 U.S. 730 (1989).

<sup>6</sup> *Id.* at 740.

<sup>7</sup> *Id.* at 753.

<sup>8</sup> *Id.*

<sup>9</sup> *Avtec Sys. Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994). While this was the first court of appeals to adopt this test, lower district courts did so in the five years between the decisions in *CCNV* and *Avtec*. *E.g.*, *Miller v. CP Chems., Inc.*, 808 F. Supp. 1238, 1243 (D.S.C. 1992) (“this court finds that the general common law of agency would also be relevant to the analysis of the term ‘within the scope of employment.’”).

<sup>10</sup> *Avtec*, 21 F.3d at 571 (quoting the RESTATEMENT (SECOND) OF AGENCY, § 228 (1958)).

<sup>11</sup> *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004); *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1015 (9th Cir. 2012); *TD Bank N.A. v. Hill*, 928 F.3d 259, 276–77 (3d Cir. 2019).

## II. THE RESTATEMENT'S SCOPE OF EMPLOYMENT THREE-PART TEST: HOW COURTS HAVE INTERPRETED IT

While some commentators and courts alike have characterized the three-part test above as rules that are either “not rigid”<sup>12</sup> or just factors, none of which are dispositive,<sup>13</sup> the courts have not been uniform in this approach. First, the test itself is worded in the conjunctive, as opposed to the disjunctive, which could be why courts have stated that the test is conjunctive requiring that all three prongs must be satisfied.<sup>14</sup> Second, some courts refer to the prongs as “elements,”<sup>15</sup> and elements, as opposed to factors, are “a component of a legal test that must be proved . . . and [a]s constituent parts, all of the elements . . . must be proved to establish the legal claim in question.”<sup>16</sup> Third, on the time and space factor, some courts have held that the work was not for hire because the employee did the work at home during off hours, and thus, the employer “failed to meet its burden of proof” on the second prong.<sup>17</sup> For example, the United States District Court for the District of Columbia, after stressing that the employer must demonstrate all three factors to prove a work is one for hire, held that the computer program at issue was not created within time and spatial bounds because the employee spent 3,000 hours outside of normal hours working on it, even though he did test each module at work.<sup>18</sup> Similarly, when a police officer created a workbook and training manual at home during off hours, the court held that the defendant employer utterly failed to meet its burden of proof that the employee used authorized hours to create the work.<sup>19</sup>

Nonetheless, several courts have said that the second factor—time and space limits—is given less weight assuming the work was the kind the employee was hired to perform,<sup>20</sup> or have found that the factor was satisfied even though the work was done at home or during off hours. For example, the Fourth Circuit held that the source code an employee created was within authorized space limits even though it was created at home because there was no strict differentiation between “work and home,

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<sup>12</sup> Robert A. Kreiss, *Scope of Employment and Being an Employee Under the Work-Made-For-Hire Provision of the Copyright Law: Applying the Common-Law Agency Tests*, 40 U. KAN. L. REV. 119, 128 (1991).

<sup>13</sup> *Kurakyn Holdings, LLC v. Ciro, LLC*, 242 F. Supp. 3d 789, 804 (W.D. Wis. 2016).

<sup>14</sup> *Woodson v. Atlantic City Bd. of Educ.*, No. 19-14572, 2020 WL 1329918, at \*5 (D.N.J. Mar. 23, 2020); *Quinn v. City of Detroit*, 988 F. Supp. 1044, 1049 (E.D. Mich. 1997); *City of Newark v. Beasley*, 883 F. Supp. 3, 7–8 (D.N.J. 1995) (noting that “the [employer] must prove all three elements set forth in the Restatement” because the test is worded in the conjunctive); *Roeslin v. Dist. of Columbia*, 921 F. Supp. 793, 798 (D.D.C. 1995). Interestingly, in the context of determining vicarious liability using these same three factors in a tort case, several courts have also held that all three criteria must be met. *E.g.*, *Bagent v. Blessing Care Corp.*, 862 N.E.2d 985, 992 (Ill. 2007); *Grager v. Schudar*, 770 N.W.2d 692, 699 (N.D. 2009) (observing that the scope of employment determination requires consideration of each element in section 228).

<sup>15</sup> *Avtec*, 21 F.3d at 571; *Kurakyn Holdings, LLC*, 242 F. Supp. 3d at 804.

<sup>16</sup> Michael R. Smith, *Elements v. Factors*, 39 WYO. LAW. 46, 46 (2016).

<sup>17</sup> *Beasley*, 883 F. Supp. at 8.

<sup>18</sup> *Roeslin*, 921 F. Supp. at 798.

<sup>19</sup> *Beasley*, 883 F. Supp. at 8.

<sup>20</sup> *E.g.*, *Avtec*, 21 F.3d at 571; *see also* *TD Bank N.A. v. Hill*, 928 F.3d 259, 277 (3d Cir. 2019) (“Although the test is phrased in the conjunctive, meaning all three factors must be satisfied . . . courts must consider time and spatial bounds with care.”).

or between work hours and off hours.”<sup>21</sup> Similarly, the Second Circuit held that work done at home was still within authorized bounds because the “very nature of a teacher’s duties involves a substantial amount of time outside of class.”<sup>22</sup>

The reasoning behind giving less weight to the time and space factor in an increasingly mobile society, was well articulated by the Third Circuit in 2019 as follows:

This factor is most probative for employees who work shifts or otherwise have regular hours and definite workplaces . . . . In our increasingly mobile work culture, however, many executives and professionals—for better or worse—lack obvious temporal or spatial boundaries for their work . . . . For such employees, the second factor will illuminate little, and a fact-finder cannot indulge in the fiction of a 9-to-5 workday. On the other hand, even when an employee’s position has ascertainable temporal and spatial boundaries, her unilateral decision to continue working at home or beyond normal hours has little bearing if a copyrighted work is clearly “of the kind” that the employee was hired to create.<sup>23</sup>

Thus, some courts have recognized that because times have changed (certainly since 1958, when the Second Restatement of Agency was published, and even since the Supreme Court’s reference to the Restatement (Second) of Agency in *CCNV* in 1989), this factor should not carry the same weight as the others.

### III. COPYRIGHT LAW AND AGENCY LAW: PURPOSES AND GOALS

While it made sense for the Supreme Court to turn to agency law in interpreting the phrase “scope of employment,” it seems implausible that the drafters of the Restatement (Second) of Agency had copyright law in mind when they drafted it.<sup>24</sup> Because these areas of the law arose in two different contexts, both should be looked at in analyzing whether federal courts should incorporate updates in the Restatement of Agency when ruling on matters involving works made for hire.

Broadly speaking, the main purpose of copyright law is to incentivize authors to create culturally valuable works by giving authors exclusive rights in them for a limited duration.<sup>25</sup> In fact, protection of intellectual property as a goal in America goes back to the adoption of the Constitution, which expressly authorized Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to

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<sup>21</sup> *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1018 (9th Cir. 2012).

<sup>22</sup> *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004).

<sup>23</sup> *TD Bank, N.A.*, 928 F.3d at 277.

<sup>24</sup> Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (amended 1976). One piece of evidence supporting this is timing alone. The 1909 Copyright Act’s entire work made for hire doctrine consisted of a single line: “[T]he word ‘author’ shall include an employer in the case of works made for hire.” Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 254 (codified at 17 U.S.C. § 101 (1982)). The Restatement (Second) of Agency was published in 1958, and it was not until 1976 that the drafters of the Copyright Act wrote a more definitive statement on the work made for hire doctrine.

<sup>25</sup> Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 *EMORY L.J.* 71, 74 (2014).

Authors and Investors the exclusive Right to their respective Writings and Discoveries.”<sup>26</sup>

More specifically, the work-made-for-hire provision in the 1976 Act had several goals: it sought to codify and clarify existing law under the doctrine, and it made a clear distinction between employer-employee relationships and those involving independent contractors.<sup>27</sup> In the employment setting, it usually will be an employee who creates a work, but the employer, for its part, may have largely supported the creation of that work through the investment of valuable resources and thus wants to claim ownership of it.<sup>28</sup> Congress, through the 1976 Act, sought to create a compromise between the interests of employers and the actual creators of the various copyrightable works.<sup>29</sup> In fact, the definition of a work made for hire “reflects a carefully worked out compromise’ between the artistic guilds, whose members disfavored the work-for-hire doctrine because of their lesser bargaining power, and the major publishers, studios, and record labels, which supported a broader work-for-hire doctrine to facilitate the acquisition of rights.”<sup>30</sup>

In the typical dispute involving a potential work made for hire, the dispute is between the employer and the employee.<sup>31</sup> Because ownership in valuable intellectual property is at stake, the employee has every incentive to argue that the work was not created within the scope of employment at the time.<sup>32</sup>

In contrast, because the scope of employment issue under agency law serves a different function in assessing liability of employers for the acts of their employees, vis a vis injured third parties, an employee is incentivized to argue the opposite: that the employee was within the scope of employment at the time.<sup>33</sup>

Broadly speaking, the law of agency is significant and intellectually distinctive because of its “focus on relationships in which one person, as a representative of another, has derivative authority and a duty as a fiduciary to account for the use made of the representative position.”<sup>34</sup> Agency law touches on a broad range of topics and,

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<sup>26</sup> U.S. CONST. art. I, § 8.

<sup>27</sup> *CCNV v. Reid*, 490 U.S. 730, 749 (1989); James B. Wadley & JoLynn M. Brown, *Protecting Intellectual Property Rights in the Workplace*, 68 J. KAN. B.A. 28, 28 (Sept. 1999).

<sup>28</sup> Wadley & Brown, *supra* note 27, at 28.

<sup>29</sup> *Id.*

<sup>30</sup> *TD Bank N.A. v. Hill*, 928 F.3d 259, 272 (3d Cir. 2019) (quoting *CCNV*, 490 U.S. 730, 745–48 & n.11-14 (1989)).

<sup>31</sup> *See, e.g., Avtec Sys. Inc. v. Peiffer*, 21 F.3d 568, 569 (4th Cir. 1994) (describing the dispute between a space-related computer services company and its employee); *TD Bank*, 928 F.3d at 265 (describing the dispute between a bank and its former CEO).

<sup>32</sup> *E.g., TD Bank*, 928 F.3d at 267 (involving ownership of a book that became available on Amazon and was publicized through interviews with Jim Cramer, the host of Mad Money on CNBC); *Pavlica v. Behr*, 397 F. Supp. 2d 519, 525 (S.D.N.Y. 2005) (involving a teacher who argued he created a manual without any direction or input from his employer).

<sup>33</sup> Kreiss, *supra* note 12, at 129–30.

<sup>34</sup> Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1037 (1998). DeMott’s conclusions about the significance of agency law should be given great weight inasmuch as she is listed as the Chief Reporter of the Restatement (Third) of Agency published in 2006, eight years after she wrote this article addressing the need for a third restatement to identify critical issues not addressed in the Second Restatement or matters that should be deleted or truncated due to developments after 1958, the publication date of the Second Restatement. Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 145, 159 (2007).

while it is a separate body of law from either tort or contract law, it impacts and addresses both areas.<sup>35</sup> For example, as a consequence of agency, if an agent acts with actual or apparent authority, the principal is bound to contracts entered into by the agent.<sup>36</sup> Similarly, under the doctrine of *respondeat superior*, an employer or principal is vicariously liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.<sup>37</sup>

Vicarious liability is assessed, in part, with the help of section 228 of the Second Restatement, the same section circuit courts have cited in addressing whether a work is one made for hire under copyright law.<sup>38</sup> Thus, in actions involving an injured plaintiff against an employer and its employee for negligence, courts have evaluated, among other factors, whether the employee's conduct occurred "substantially within the authorized time and space limits" a factor contained in section 228 (b) of the Second Restatement of Agency.<sup>39</sup>

In assessing this and other factors, courts justify vicarious liability based on three policy reasons: (1) it prevents recurrence of the tortious conduct; (2) it gives greater assurance of compensation for the victim; and (3) it ensures that the victim's losses will be equitably borne by the those who benefit from the enterprise that gave rise to the injury.<sup>40</sup>

Thus, the parties on opposite sides of the ring are different for tort liability, on the one hand, and copyright ownership disputes, on the other hand. In a case involving vicarious liability, an injured party is suing an employer and/or an employee, while in a copyright dispute involving a work for hire, the employer and employee are suing each other. In a case involving vicarious liability, the employee is motivated to argue that the event was within the scope of employment (so that the costs and damages can be borne by the employer with the deeper pocket) while the employee is motivated to argue the opposite in a work for hire dispute (so the employee can then claim ownership of the copyright). Yet another difference is the policies underlying the different claims. In a claim involving vicarious liability, a court may be motivated to impose liability upon an employer so that an injured victim can be compensated, and the cost will be borne by a party most able to bear it. In contrast, in a case involving a work for hire dispute, if the law was intended to strike a compromise between the rights of both sides, then the scales of justice would seem to be weighted more equally.

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<sup>35</sup> DeMott, *supra* note 34, at 1038.

<sup>36</sup> *Id.*

<sup>37</sup> *E.g.*, Engler v. Gulf Interstate Eng'g, 280 P.3d 599, 601 (Ariz. 2012); Hass v. Wentzlaff, 816 N.W.2d 96, 102–03 (S.D. 2012).

<sup>38</sup> *Hass*, 816 N.W.2d at 103 n.3 ("Restatement (Second) of Agency has played a prevalent role in our vicarious liability jurisprudence as we often look to it for guidance.")

<sup>39</sup> *E.g.*, Spencer v. VIP, Inc., 910 A.2d 366, 367–68 (Me. 2006) (determining that the employee's travel occurred substantially within authorized time and space limits and thus there was a genuine issue of fact whether the travel was within the scope of the employee's employment, reversing the summary judgment entered in favor of the employer); Carter v. Reynolds, 815 A.2d 460, 465 (N.J. 2003) (citing section 228 of the Restatement in analyzing whether an action was within the scope of the employee's employment).

<sup>40</sup> Farmers Ins. Group v. Cnty. of Santa Clara, 906 P.2d 440, 454–55 (Cal. 1995); see Rhett B. Franklin, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. REV. 570, 574–77 (1994).



Therefore, while the wording of the factor is the exact same in both the tort and copyright scenarios, the alignment of the parties, and their motivations and interests, are different.

IV. IN 2019, THE THIRD CIRCUIT, IN A COPYRIGHT CASE INVOLVING A WORK-FOR-HIRE ISSUE, FIRST REFERENCES THE THIRD RESTATEMENT OF AGENCY, PUBLISHED IN 2006.

A. *TD Bank*

The Third Restatement first entered the copyright scene in 2019, but it did not make a big splash—it was a fleeting reference indirectly supporting the court’s position.<sup>41</sup> There, a bank sued its former chief executive officer alleging that a portion of a book he published and marketed after leaving the bank infringed on an earlier manuscript the CEO wrote while working at the bank using bank resources.<sup>42</sup> The trial court had entered summary judgment in favor of the bank, holding that the initial manuscript was a work made for hire based upon a letter agreement signed by the parties.<sup>43</sup> On appeal, the court disagreed that the letter agreement itself vested exclusive ownership with the bank, explaining that for an employee’s work to receive work-for-hire treatment, the work must actually come within the scope of employment.<sup>44</sup>

Addressing whether the earlier transcript fell within the scope of the CEO’s employment, the court said the issue was one of first impression in the Third Circuit.<sup>45</sup> It explained that “taking their cue from *CCNV*, other Courts of Appeals have concluded that a work falls within the scope of employment only if” it meets the three prongs contained in section 228 of the Restatement (Second) of Agency.<sup>46</sup> It then agreed with its sister circuits that the Second Restatement’s test should be adopted, with one further explication: “courts must consider time and spatial bounds with care.”<sup>47</sup> In support of this, the court quoted comment b to section 7.07 of the Third Restatement of Agency to support abandonment of this factor because it “does not naturally encompass the working circumstances of many managerial and professional employees.”<sup>48</sup> It then explained that this second factor on time and space will “illuminate little.”<sup>49</sup>

Unfortunately, because the district court had not applied the scope of employment test below, the court of appeals had no option but to remand the case so that the trier of fact could resolve the underlying issues if the parties “wish[ed] to open

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<sup>41</sup> *TD Bank N.A. v. Hill*, 928 F.3d 259, 277 (3d Cir. 2019).

<sup>42</sup> *Id.* at 265–66.

<sup>43</sup> *Id.* at 267.

<sup>44</sup> *Id.* at 272. Specifically, the Third Circuit stated that the district court confused an original vesting of ownership under the work-for-hire doctrine with a transfer of ownership rights through an assignment.

<sup>45</sup> *Id.* at 276.

<sup>46</sup> *TD Bank*, 928 F.3d at 277.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (quoting RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (AM. L. INST. 2006)).

<sup>49</sup> *Id.* See *infra* p. 222 and note 23.

yet another chapter in this litigation.”<sup>50</sup> It would appear the parties did not wish to do so because no other developments in this case have been reported.

After the Third Circuit referenced the Third Restatement of Agency, the floodgates did not open with parties urging courts to adopt the Third Restatement and thus totally abandon the second space and time factor. Although, in the litigation time zone, where things move at a snail’s pace, not much time has passed since the decision was issued in 2019. Still, one district court within the Third Circuit had the opportunity to fall in line with the Third Restatement and abandon the time and space factor after *TD Bank* if it wanted to, but it did not.

In 2020, the United States District Court for the District of New Jersey granted an employer’s motion to dismiss a complaint for copyright infringement because the allegations of the complaint established that the work was a work for hire and was barred by the statute of limitations.<sup>51</sup> In laying out the work for hire test, not only did the court omit any reference to the Third Restatement, it reverted back to the idea that the test is a three-part test enumerated in the Second Restatement, listed in the conjunctive, and requiring the defendant to prove all three parts.<sup>52</sup> In fact, although the court cited *TD Bank* as indirect support for the work for hire doctrine in general, it did not cite the case in support of the three-part test but instead relied upon an earlier district court decision handed down in 1995.<sup>53</sup>

*B. The Restatement (Third) of Agency, Section 7.07*

The Third Restatement substantially changes the three-part test for scope of employment contained in section 228 of the Second Restatement. A side-by-side comparison of the relevant wording makes this apparent:

Section 228 of the Restatement (Second) of Agency	Section 7.07 (2) of the Restatement (Third) of Agency
<p>Conduct of a servant is within the scope of employment, if, but only if:</p> <ul style="list-style-type: none"> <li>it is of the kind he is employed to perform;</li> <li>it occurs substantially within the authorized time and space limits;</li> <li>it is actuated, at least in part, by a purpose to serve the master, and . . .</li> </ul> <p>(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.</p>	<p>(2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control. An employee’s act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.</p>

<sup>50</sup> *Id.*

<sup>51</sup> *Woodson v. Atlantic City Bd. of Educ.*, No. 19-14572, 2020 WL 1329918, at \*3 (D.N.J. Mar. 23, 2020).

<sup>52</sup> *Id.* at \*5.

<sup>53</sup> *Id.* at \*5–6 (citing *City of Newark v. Beasley*, 883 F. Supp. 3, 7 (D.N.J. 1995), as amended (May 5, 1995)).

Comment b to section 7.07 discusses the rationale for the formulation of subsection (2) and explains its relationship with its counterparts in section 228 and in cases.<sup>54</sup> That comment explains that the formulation of section 7.07 differs from the formulation in sections 228 and other sections because “it is phrased in more general terms.”<sup>55</sup> Specifically, elimination of the time and space provision was rationalized because the factor does not make sense based on the contemporary workforce:

This formulation [looking at authorized time and space limits] does not naturally encompass the working circumstances of many managerial and professional employees and others whose work is not so readily cabined by temporal or spatial limitations. Many employees in contemporary workforces interact on an employer’s behalf with third parties although the employee is neither situated on the employer’s premises nor continuously or exclusively engaged in performing assigned work.<sup>56</sup>

Thus, there is no doubt that the authors of the Restatement have now eliminated a factor that courts have relied upon in varying degrees for the last quarter of a century<sup>57</sup> in determining scope of employment for copyright purposes.

#### V. THE POST-COVID-19 WORKFORCE: THE DEATH KNELL TO 9-TO-5 IN AN OFFICE ENVIRONMENT

When the drafters of the comments to the Third Restatement of Agency referenced the conditions of “contemporary workforces” in 2006,<sup>58</sup> they never could have envisioned the seismic changes to our workforce in 2020 when the pandemic hit. Many believe COVID-19 has changed the workforce “permanently.”<sup>59</sup> While estimates vary on how many employees are currently working from home, the numbers are significant. Estimates suggest that by April of 2020, 62 percent of employed Americans worked at home compared with just 25 percent in 2018.<sup>60</sup> In a survey conducted in

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<sup>54</sup> RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. a (AM. L. INST. 2006).

<sup>55</sup> *Id.* cmt. b.

<sup>56</sup> *Id.*

<sup>57</sup> *Avtec Sys. Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994).

<sup>58</sup> RESTATEMENT (THIRD) OF AGENCY § 7.07, cmt. b.

<sup>59</sup> *E.g.*, Falon Fatemi, *3 Ways Covid-19 Will Permanently Change the Future of Work*, FORBES (June 3, 2020), <https://www.forbes.com/sites/falonfatemi/2020/06/03/3-ways-covid-19-will-permanently-change-the-future-of-work/>; *Coronavirus: How the world of work may change forever*, BBC (Oct. 23, 2020), <https://www.bbc.com/worklife/article/20201023-coronavirus-how-will-the-pandemic-change-the-way-we-work> [hereinafter *Coronavirus*].

<sup>60</sup> Brodie Boland et al., *Reimagining the office and work life after Covid-19*, MCKINSEY & CO. (June 8, 2020), <http://www.mckinsey.com/business-functions/organization/our-insights/reimagining-the-office-and-work-life-after-covid-19>. Obviously, however, people who are able to work from home tend to be privileged and have high incomes, and the new remote life leaves out the six in 10 American workers who cannot work from home. See Claire Cain Miller, *The Office Will Never Be the Same*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/style/office-culture.html>.

April and May, the finding was that about half are working from home.<sup>61</sup> In fact, more than half of the entire global workforce is working remotely.<sup>62</sup>

And most employees enjoy working from home. According to McKinsey research, 80 percent of people report they “enjoy working from home.”<sup>63</sup> In another survey conducted by Morning Consult for the New York Times, which polled 1,123 people representing a range of jobs and income levels of America’s remote workers, 86 percent said they were satisfied with remote work.<sup>64</sup> In fact, only one in five said that they wanted to go back full-time.<sup>65</sup> And in a more targeted study of 4,700 employees of Slack, a business communication platform, the majority said they never wanted to go back to the office as their workplace. Only 12% wanted to go back full-time, and 72% wanted to work in a hybrid remote-office model.<sup>66</sup>

In fact, working remotely appears to be a trend that will continue well into 2021. One forecaster estimated that 25-30% of the workforce will be working from home multiple days a week by the end of 2021.<sup>67</sup> Another researcher from Gartner, a leading research and advisory company, found that nearly 75% of chief financial officers expect to transition a number of previously on-premises employees to remote work setups permanently in the aftermath of COVID-19 primarily driven by desire to cut commercial real estate costs.<sup>68</sup>

Indeed, the news has been full of announcements from larger companies that are now dispensing with historical preferences for in-office work and embracing remote work indefinitely.<sup>69</sup> For example, in July of 2020, following similar announcements by Twitter, Square, and Facebook, Google announced that it would allow its 200,000

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<sup>61</sup> Gil Press, *The Future of Work Post-Covid-19*, FORBES (July 15, 2020), <https://www.forbes.com/sites/gilpress/2020/07/15/the-future-of-work-post-covid-19/>.

<sup>62</sup> Fatemi, *supra* note 59.

<sup>63</sup> Boland et al., *supra* note 60.

<sup>64</sup> Miller, *supra* note 60.

<sup>65</sup> *Id.* As the pandemic has dragged on, though, that rosy picture has changed because, as the condition becomes more permanent, it has impacted workers’ mental health, and it has been difficult for working mothers, who are trying to supervise children who are in a remote learning situation. Fatemi, *supra* note 59. According to a remote work report done in 2019, even before the pandemic, 19% of remote workers experienced loneliness, and another study done by Mind Share Partners found that more than 60% of workers say their mental health affects their productivity. One professor of psychology also referred to the fact that the pandemic came in the middle “of a loneliness epidemic among the 20-somethings for the better part of the last two decades, and the remote work is a particular problem for young new graduates moving to a new city on their first job.” In addition to mental health concerns, gender equality issues have also worsened with the pandemic. According to one study, women were 1.8 times more likely to lose their jobs than men because of the pandemic. Further, the pandemic has worsened the divide between those who have good bandwidth connectivity and those that do not because for those that do not, they are struggling or out of work, leading to growing social and income inequality. These considerations are beyond the scope of this article, but they are real and troubling.

<sup>66</sup> *Coronavirus*, *supra* note 59.

<sup>67</sup> *Work-At-Home After Covid-19—Our Forecast*, GLOBAL WORKPLACE ANALYTICS, <https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast> (last accessed Nov. 26, 2020).

<sup>68</sup> Fatemi, *supra* note 59.

<sup>69</sup> Jack Kelly, *Zillow Joins The Growing Ranks of Companies Offering Employees the Option of Working Remotely Indefinitely*, FORBES (Aug. 4, 2020), <https://www.forbes.com/sites/jackkelly/2020/08/04/zillow-joins-the-growing-ranks-of-companies-offering-employees-the-option-of-working-remotely-indefinitely/>.

employees the option to continue to work from home until at least June 2021.<sup>70</sup> Further, Zillow announced in August of 2020 that it was going to offer about 90% of its 5,400 employees to work from home as an ongoing option.<sup>71</sup> In fact, a wide array of companies, including Shopify, Coinbase, Upwork, Lambda Schools, Box, Microsoft, Morgan Stanley, JPMorgan, Amazon, PayPal, Slack and others have extended their remote and work-from-home options.<sup>72</sup> While most companies have set some type of parameters, Twitter and Square, through their CEO, have said they are open to having employees work from home “forever.”<sup>73</sup> In addition, the chief economist for LinkedIn has stated that LinkedIn, which has a job listings feature, has seen four times the number of job listings that offer remote work since March globally and the same trend from jobseekers: the volume of job searches using the “remote” filter on LinkedIn has increased approximately 50% since the beginning of March, and the share of remote job applications has increased nearly 2.5 times globally since March.<sup>74</sup>

Companies also are thinking about how to provide resources for employees working at home—which certainly could factor into disputes arising about who owns work created at home. The most obvious form of support is a remote office budget.<sup>75</sup> Shopify, a software services company that helps customers create shopping websites, is one example of a company that has offered its employees a \$1,000 stipend to purchase office equipment to help ease the transition to remote work.<sup>76</sup> However, in one survey of almost 300 organizations in North America employing 4.4 million employees, only one in 10 employers have taken actions to offer employees subsidies to manage the costs of working remotely.<sup>77</sup>

In sum, therefore, where and when employees work, in terms of time and spatial boundaries, has experienced a massive shift. The issue, then, is whether that shift, combined with the elimination of this consideration in the Restatement (Third) of Agency, means that courts should expressly eliminate this factor when assessing whether a work was created within the scope of employment.

## VI. WHETHER A COURT WOULD ADOPT THE UPDATED RESTATEMENT IN A CASE INVOLVING A WORK-FOR-HIRE ISSUE INSTEAD OF THE RESTATEMENT (SECOND) OF AGENCY: A PATCHWORK OF APPROACHES

While it would be foolish to predict what a court would hold if a party in a copyright lawsuit requested it to apply the Third Restatement instead of the Second

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<sup>70</sup> *Id.* See also Rob Copeland & Peter Grant, *Google to Keep Employees Home Until Summer 2021 Amid Coronavirus Pandemic*, WALL ST. J. (July 27, 2020), <http://www.wsj.com/articles/google-to-keep-employees-home-until-summer-2021-amid-coronavirus-pandemic-11595854201>.

<sup>71</sup> Kelly, *supra* note 69.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Fatemi, *supra* note 59.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Actions to Restore Stability Survey*, WILLIS TOWERS WATSON (Aug. 3, 2020), <https://www.willistowerswatson.com/en-US/Insights/2020/07/actions-to-restore-stability-survey>.

Restatement, because the best predictor of future behavior is past behavior,<sup>78</sup> it is helpful to see how courts have behaved in the past under similar circumstances.<sup>79</sup>

Before launching into the cases, however, a brief review of what restatements are is in order. Restatements are “a series of treatises that articulate the principles or rules for a specific area of law.”<sup>80</sup> They are secondary sources of law written and published by the American Law Institute to clarify the law.<sup>81</sup> As such, they are only a source of persuasive authority unless courts adopt them, which would then make such provisions mandatory authority.<sup>82</sup>

The American Law Institute is a private, independent, nonprofit organization.<sup>83</sup> Its membership consists of eminent judges, lawyers, and law professors from all areas of the United States and from many foreign countries.<sup>84</sup> It has completed Restatements in many areas including, without limitation, Torts, Agency, Conflict of Laws, Contracts, Employment Law, The Foreign Relations Law of the United States, Judgments, Property, Restitution and Unjust Enrichment, Trusts, Products Liability, and Unfair Competition.<sup>85</sup>

Interestingly, there currently is no Restatement devoted to copyright law. In fact, in 2014, one commentator devoted an article to making the point that one should be created, opining as follows:

To untangle the practical applications of the work for hire doctrine, one would need to look at court opinions to chart the ways in which the work for hire doctrine has functioned or led to disputes under a variety of factual situations. Consultation with an interpretative guide such as a treatise or Restatement could be an efficient way to parse this out, at least initially. If the guide was accurate, straightforward, and comprehensive, using it would be a smart and productive first step. Unfortunately, no such guide exists.<sup>86</sup>

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<sup>78</sup> This saying has been attributed to everyone from psychologists, such as Albert Ellis, Walter Michel, and B.F. Skinner, to writers such as Mark Twain, and more recently, to Dr. Phil. Joshua Wood, *The Best Predictor of Future Behaviour is Past Behaviour, Except . . .*, LINKEDIN (Feb. 25, 2017), <https://www.linkedin.com/pulse/best-predictor-future-behaviour-past-except-joshua-wood>.

<sup>79</sup> The author readily acknowledges that while using other examples are useful to see the range of responses courts have had, such examples are limited in their ability to provide proof as to what would happen with an issue involving a work for hire because the cases addressed below involve different judges, different courts, different issues, different parts of the Restatement, and different facts.

<sup>80</sup> *Restatement of the Law*, LEGAL INFO. INST. [https://www.law.cornell.edu/wex/restatement\\_of\\_the\\_law#:~:text=Restatements](https://www.law.cornell.edu/wex/restatement_of_the_law#:~:text=Restatements) (last visited Dec. 4, 2020).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Frequently Asked Questions*, AM. L. INST., <https://www.ali.org/about-ali/faq/> (last visited Dec. 4, 2020).

<sup>84</sup> *Membership*, AM. L. INST., <https://www.ali.org/members/> (last visited Dec. 4, 2020).

<sup>85</sup> *Shop ALI Publications*, AM. L. INST., <https://www.ali.org/publications/#publication-type-restatements> (last visited Dec. 4, 2020).

<sup>86</sup> Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 460–61 (2014).

Though such a guide does not exist, it is in the works.<sup>87</sup> According to the American Law Institute's website, several chapters have been drafted and council approved but not membership approved.<sup>88</sup> Although the project was on the 2020 Annual Meeting agenda, that meeting was cancelled (no doubt another byproduct of COVID-19), and while tentative drafts were produced and posted online, no motions or voting occurred.<sup>89</sup>

In the meantime, courts have grappled with how to handle the situation when an updated version of a restatement has been published after a court has already approved and relied upon a previous version. After reviewing caselaw primarily focused on the tort arena and the Section 7.07 Restatement provision, the courts' approaches can be placed into one of four categories: (1) wishy-washy, where it is hard to tell how a court has resolved the issue; (2) accepting the new version without much discussion; (3) rejecting the new version with some discussion (the "no" approach, and we will tell you why); or (4) soundly rejecting a new version (the hell no approach).<sup>90</sup>

#### A. *The Wishy-Washy Approach*

In these cases, although courts included a brief discussion of two versions of the restatement on the same issue, the courts never satisfactorily resolved the issue of which one to adopt. For example, in a wrongful death case in Missouri arising from a radiologist's alleged negligence in conducting a CT scan, the issue was whether the radiologist was an employee of the defendant hospital at the time.<sup>91</sup> The court cited both the Second and Third Restatements of Agency, in addition to Missouri statutory law, for how to make this determination.<sup>92</sup> Instead of picking one or the other, however, the court instead came to this vague conclusion: "Because the factors stated in the Restatement (Third) and the Restatement (Second) are substantially consistent, we need not endorse one over the other. Rather, we view the list in the Restatement (Third) simply as a more recent iteration of the same basic principle explained in the earlier version."<sup>93</sup>

Similarly, an Illinois court, addressing whether a carpenter was acting within the scope of his employment when he injured the plaintiff, set forth the three-part test in section 228 of the Restatement (Second) of Agency because that is where "Illinois courts look."<sup>94</sup> But then, in a surprising twist, the court cited to the Third Restatement of Agency but just concluded that the updated version "states the test in more general terms, but with essentially the same meaning."<sup>95</sup> Nowhere did the court indicate that

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<sup>87</sup> *Restatement of the Law, Copyright*, AM. L. INST., <http://www.ali.org/publications/show/copyright/> (last visited Dec. 4, 2020).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> As should be obvious, these categories are the author's own creation. No court or other authority has categorized or classified these decisions in this manner.

<sup>91</sup> *Jefferson ex rel. Jefferson v. Mo. Baptist Med. Ctr.*, 447 S.W.3d 701, 704–05 (Mo. Ct. App. 2014).

<sup>92</sup> *Id.* at 709.

<sup>93</sup> *Id.* at 711 n.10.

<sup>94</sup> *Hoy v. Great Lakes Retail Servs., Inc.*, 52 N.E.3d 386, 391 (Ill. Ct. App. 2016).

<sup>95</sup> *Id.* at 391 n.1.

it was moving toward or away from the Second Restatement to the Third Restatement of Agency.

Finally, the Washington Court of Appeals took a similar approach when it cited to both Restatements of Agency but did not say whether it would adopt one or the other.<sup>96</sup> There, the issue was whether an employee on a mandated, employer sanctioned break was within the scope of employment.<sup>97</sup> The court, after first stating the test under Washington law, explained that that test was similar to the test found in section 228 of the Restatement, so it quoted that test.<sup>98</sup> Then, however, it quoted section 7.07 of the Third Restatement of Agency and stated, “this version is consistent with the previous one.”<sup>99</sup> It then concluded that “Washington courts have applied the reasoning found in the *Restatement*” and cited to both the old and new versions.<sup>100</sup>

In sum, in all of the above cases, as well as others, if you were to opine on whether the jurisdiction has adopted the Second or Third Restatement of Agency, or both, there would be no clear right answer.<sup>101</sup>

#### B. *Yes, We Will Adopt the Updated Version with Little or No Discussion*

The second category of cases are those where courts have adopted the Third Restatement with either little or no discussion.<sup>102</sup> For example, the Arizona Supreme Court expressly adopted section 7.07 of the Restatement (Third) of Agency when deciding whether an employee was within the course and scope of his employment when he injured a motorcycle driver after returning from dinner on a business trip.<sup>103</sup> Initially, the court noted that its approach to the issue was endorsed by the Second Restatement of Agency, specifically quoting the factors found in section 228.<sup>104</sup> But then it referenced the Restatement (Third) of Agency and stated that section 7.07 essentially consolidated many different sections of the previous version, and thus, it

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<sup>96</sup> Melin-Schilling v. Imm, 205 P.3d 905, 907–08 (Wash. Ct. App. 2009).

<sup>97</sup> *Id.* at 907.

<sup>98</sup> *Id.* at 907–08.

<sup>99</sup> *Id.* at 908.

<sup>100</sup> *Id.*

<sup>101</sup> See Hass v. Wentzlaff, 816 N.W.2d 96, 103 n.3 (S.D. 2012) (noting that the Restatement (Second) of Agency has played a prevalent role in the courts’ vicarious liability jurisprudence and that the Restatement (Third) of Agency, which no party in the case had urged the court to adopt, had changed the foreseeability inquiry, but the law in South Dakota embodies aspects of both Restatements in any event.); Kirlin v. Halverson, 758 N.W.2d 436, 456 (S.D. 2008) (Meierhenry, J., concurring) (writing that the foreseeability test in section 228 of the Second Restatement for scope of employment analysis has been revised in section 7.07 of the Third Restatement so the court should “perhaps consider the approach adopted by the Restatement (Third) of Agency in the future.”); Picher v. Roman Catholic Bishop of Portland, 974 A.2d 286, 296 (Me. 2009) (after stating that Maine looks to the Second Restatement of Agency and section 228, it then stated: “We express no opinion as to the applicability of either section 7.07 or section 7.08 of the Restatement (Third) of Agency to the facts of this case, except to say that on remand, the court may look to these sections.”).

<sup>102</sup> Barnett v. Clark, 889 N.E.2d 281, 284 (Ind. 2008) (quoting and appearing to adopt section 7.07 of the Restatement (Third) of Agency.).

<sup>103</sup> Engler v. Gulf Interstate Eng’g, 280 P.3d 599, 600 (Ariz. 2012).

<sup>104</sup> *Id.* at 602.



agreed that the Restatement (Third) “sets forth the appropriate test . . . and we adopt it here.”<sup>105</sup>

*C. No, We Will Not Use the Updated Version of the Restatement Provision*

The third category of cases are those where courts have opted not to adopt the Third (Restatement) of Agency. For example, a Delaware court opted not to apply the Third (Restatement) of Agency “because our State has embraced the Restatement (Second) of Agency, and § 228 in particular, for decades now, and the . . . test works well to fairly determine when *respondeat superior* liability is appropriate.”<sup>106</sup> Similarly, the Tennessee Supreme Court, after a robust discussion of how other jurisdictions have approached the newer Restatement (Third) of Agency, concluded that the Restatement (Second) of Agency “provides a more instructive framework” for its analysis and thus declined to adopt the Restatement (Third) of Agency.<sup>107</sup> And finally, the Maine Supreme Court also decided to stick to the Restatement (Second) of Agency, even though the Restatement (Third) of Agency was extant because, at the time the dispute arose, the Second Restatement was operative.<sup>108</sup>

*D. Hell No, We Will Not Adopt Updated Versions of the Restatement*

In areas of the law outside of vicarious liability, there is a fourth category of cases where courts not only refused to adopt an updated version of a restatement but were brutal in their treatment of the creators of those updates. Some of this criticism has come from justices on the Supreme Court.<sup>109</sup> In fact, Justices Scalia and Thomas have criticized the Restatements in general—the modern ones especially.<sup>110</sup> For his part, Justice Scalia wrote separately in *Kansas v. Nebraska* for the sole purpose of criticizing the modern Restatements, stating as follows:

The object of the original Restatements was ‘to present an orderly statement of the general common law.’ . . . Over time, the Restatement authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be . . . Restatement sections . . . should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed, without further inquiry,

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<sup>105</sup> *Id.*

<sup>106</sup> *Sherman v. State Dep’t of Public Safety*, 190 A.3d 148, 169 n.130 (Del. 2018).

<sup>107</sup> *Hughes v. Metro. Gov’t of Nashville*, 340 S.W.3d 352, 365 (Tenn. 2011).

<sup>108</sup> *Spencer v. VIP, Inc.*, 910 A.2d 366, 367–68 n.1 (Me. 2006).

<sup>109</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1953 (2020) (Thomas, J., dissenting); *Kansas v. Nebraska*, 574 U.S. 445, 475–76 (2015) (Scalia, J., concurring in part and dissenting in part).

<sup>110</sup> *Liu*, 140 S. Ct. at 1953 (Thomas, J., dissenting), *Kansas*, 574 U.S. at 475–76 (Scalia, J., concurring in part and dissenting in part).

that a Restatement provision describes rather than revises current law. . . .<sup>111</sup>

Subsequently, in *Liu v. SEC*, decided in 2020, Justice Thomas dissented and not only quoted Justice Scalia’s comments from *Kansas v. Nebraska* but added his own views of the Third Restatement of Restitution, stating that the “Restatement’ is an inapt title for this edition of the treatise.”

Further, the United States District Court for New Mexico, quoting Justice Scalia’s comments in *Kansas v. Nebraska* about modern Restatements, refused to adopt the Restatement (Third) of Agency on a matter involving a theory of vicarious liability.<sup>112</sup> The writing was already on the wall that it was not inclined to do so when the first thing the court said about the Third Restatement was this: “After itself creating the aided-in-agency theory in 1958, the Restatement of Agency now distances itself from the theory—more-or-less pretending it never existed.”<sup>113</sup> The court then gave several reasons why the Third Restatement’s change in its theory was of “minimal importance.”<sup>114</sup> First, neither the American Law Institute nor the Restatement “series” is a “monolithic or continuous institution to which the Court should necessarily ascribe internally consistent decisionmaking.”<sup>115</sup> Second, neither the American Law Institute nor the Restatement is an “institution” like the Supreme Court that courts must turn to.<sup>116</sup> Third, the Restatement is nothing more than persuasive authority and not very persuasive at all when it ignores a half-century of precedent.<sup>117</sup> Thus, the court concluded that having brought the aided-in-agency theory into the world, the Restatement had no right to now take it out.<sup>118</sup>

Thus, there seem to be a variety of approaches that courts use when deciding whether to incorporate a new Restatement into its rules after adopting an earlier version.

## VII. ELIMINATION OF TIME AND SPACE LIMITS IN LINE WITH CHANGES IN THE WORKFORCE AND THE NEW RESTATEMENT—EMPLOYER AND EMPLOYEE PERSPECTIVES

Assuming a dispute arises in a post-COVID world involving a work for hire issue, as it most certainly will, the question then arises whether the court should adopt the Third Restatement, and how employers, on the one hand, and employees, on the other, would be impacted if a court did.

If the time and space factor were no longer considered, this would largely benefit employers, as it would be one less hurdle for employers to jump when proving a work is for hire. And employers have legitimate and compelling arguments in their favor. First, adoption of the Restatement (Third) of Agency, already cited in a Third

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<sup>111</sup> *Kansas*, 574 U.S. at 476–77 (Scalia, J., concurring in part and dissenting in part).

<sup>112</sup> *Peña v. Greffet*, 110 F. Supp. 3d 1103, 1116 n.4 (D.N.M. 2015) (quoting Justice Scalia’s opinion in *Kansas*, 574 U.S. 445 at length.).

<sup>113</sup> *Id.* at 1138.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Peña*, 110 F. Supp. 3d at 1139.

<sup>118</sup> *Id.*

Circuit work for hire case, does not represent a major shift in precedent. Many courts have already minimized the importance of the time and space factor, and with the advent of the Restatement, employers can argue that it is time to make it official. Second, the realities of the workforce in a post-COVID world (a concern that the Restatement authors had even pre-COVID-19, at least with respect to a large swath of the workforce) present even more reason to eliminate a factor already on life support. In short, it seems apparent that many logical reasons can be constructed in favor of adopting section 7.07 of the Restatement (Third) of Agency.

On the other hand, employees have equally persuasive arguments for why this factor should not be eliminated. First, the Restatement (Second) of Agency has been part of our work for hire jurisprudence since the Supreme Court decided *CCNV* in 1989, and there is no compelling reason to undo that history until the Supreme Court says so (and judging by Justice Thomas's scathing indictment of the Third Restatement, and the current composition of the Court, the Court does not seem to be heading in the direction of greeting updated versions of the Restatement with open arms).

Second, the original aim of the work for hire doctrine was to strike a balance and compromise between the interests of employers, on the one hand, and interests of employees, on the other hand. Unlike the doctrine of vicarious liability, where public policy favors the compensation of injured victims, the policy here was not designed to have the cards stacked against employees, which elimination of one of three factors would essentially do. In other words, the delicate balance of equities between employers and employees would be disturbed.

Third, removal of the time and space factor would certainly deprive all professional and managerial employees, who are most likely to be able to work from home—of an important weapon in their arsenal of proof that the work was not work for hire. Because many of these employees are working from home and may be doing so long into the future, it would be virtually impossible to create work that was not deemed for hire if everyone is essentially an employee within the scope of employment 24/7. The only exception to this might be if the work was wholly unrelated to the employee's regular job. The cases most likely to reach the point of litigation, however, would be the close cases where the work was arguably within the scope of the employee's job description and duties.

For example, assume an attorney is charged with ensuring that the office meets all deadlines in an efficient way. To achieve this goal, the attorney hires a consultant to select software and train people on it. The lawyer then buys separate software that is purchased on an employer-supplied computer at home (because the lawyer is working remotely at all times because of COVID-19), and after the lawyer is done with work for the office, the attorney creates a case management system that other law firms could use. This case management system, like the lawyer's other work, is created at home. If the time and space factor is abandoned, would the employer own it? Probably. While a court might find that the lawyer was not charged with the duty of a creating a software program, this result is not guaranteed, and certainly a case management program would benefit the lawyer's employer. However, when a similar scenario arose in 1997, the court held that the work was *not* a work for hire in part because the lawyer created the program "outside the authorized time and space limits

of his job.”<sup>119</sup> Specifically, the lawyer designed the software package “at home” on his *own* time using a software package that he bought with his own money.<sup>120</sup> And, with regard to the third factor, whether the employee developed the program in part to serve the interests of his employer, the court agreed that he did.<sup>121</sup> Thus, the court held that the work was not for hire, a result that would not necessarily be reached if courts abandoned the time and space factor.

Fourth, such a result would not only harm professional and managerial employees, but other types of employees. For example, take a motorcycle parts designer who is now working from home because of COVID-19. Assume this designer sends a logo for an electric scooter to a company that manufactures electric scooters and does so after hours (assume the employee is only obligated to work until 5). Would that logo be a work for hire? Probably. Designing logos is the kind of work the employee was hired to do, the logo might benefit the company because it could be placed on motorcycles too, and it would not matter whether the work was done at home or after hours.<sup>122</sup> Thus, this is another scenario where the result might change if the time and space factor is abandoned.

One solution to the problem that would be consistent with the compromise purpose of the work for hire is to eliminate the time and space factor but place the burden squarely on the employer’s shoulders to prove the remaining two elements now expressed in section 7.07 of the Restatement (Third) of Agency. They should be treated as elements, instead of factors, so that both need to be proven. Thus, the employer would have to prove that the “performing work was assigned by the employer” and that the employee did not “serve any purpose of the employer.”<sup>123</sup> In addition, courts should give great weight to an employee’s stated intention in creating the work, evidence that courts have already taken into account in a work-for-hire determination.<sup>124</sup>

## VIII. CONCLUSION

In the work for hire world, the fact is that there are no injured victims and no good vs. evil from a moral standpoint. While employers most likely have more resources to litigate copyright disputes than employees, if employers invest time and

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<sup>119</sup> *Quinn v. City of Detroit*, 988 F. Supp. 1044, 1051 (E.D. Mich. 1997). While the court also found that this work was not of the kind the lawyer was hired to perform, one could imagine that a court could have gone the other way, and factual scenarios could arise where the issue is grayer because the job description and the skills involved in the creation of the work are similar.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1051–52.

<sup>122</sup> These facts are loosely based on the facts in *Kuryakyn Holdings, LLC v. Ciro, LLC*, 242 F. Supp. 3d 789, 804 (W.D. Wis. 2017). In *Kuryakyn*, the court held that a snake logo design was not a work for hire and not within authorized time and space limits because the logo was created on the employee’s laptop at home, and the e-mails containing the design were sent well after his workday ended at 5:00 p.m.

<sup>123</sup> RESTATEMENT (THIRD) of AGENCY, § 7.07 (AM. L. INST. 2006).

<sup>124</sup> See *City of Newark v. Beasley*, 883 F. Supp. 3, 9 (D.N.J. 1995) (holding that a police officer was not motivated by a desire to serve his employer because he hoped the materials would be used by a number of different cities, not just the city he worked for); *Roeslin v. Dist. of Columbia*, 921 F. Supp. 793, 798–99 (D.D.C. 1995) (even though the system “benefitted his employer,” the court nonetheless concluded that the employee was “primarily motivated by self-fulfilling purposes.”).

money into their employees, and employees use that talent to produce works within the scope of employment, employers should be able to reap the benefits of the resulting intellectual property. On the other hand, just because someone works for someone else should not mean that any creation or work that uses the talent the employer saw in the first place should belong to the employer. It remains to be seen whether litigants urge the courts to adopt a new test for a work for hire, and if so, how courts will respond. In the meantime, if a new Restatement on Copyright is published that addresses the issue, as would be expected, it will be interesting to see what that provides and if courts turn to that instead.