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# A CRITICAL ASSESSMENT OF *REID'S* WORK FOR HIRE FRAMEWORK AND ITS POTENTIAL IMPACT ON THE MARKETPLACE FOR SCHOLARLY WORKS

SHERRI L. BURR\*

Congress' paramount goal in adopting the 1976 Copyright Act was to enhance "the predictability and certainty of copyright ownership."<sup>1</sup> In the marketplace for copyright works, it is important that "the parties negotiate with an expectation that one of them will own the copyright in the completed work."<sup>2</sup> Through the negotiation process, the parties can settle on relevant contractual terms such as the price for the work and the ownership of the bundle of rights that comprise the copyright.<sup>3</sup>

This article focuses on the marketplace for copyrighted works produced by academics. Academics are hired by universities with the understanding that in addition to teaching, they will conduct research, analyze their research, and publish the results of their analysis. The custom has been at many universities that academics retain the copyright in their scholarly publications<sup>4</sup> and in their lectures when they are reduced to tangible form.<sup>5</sup>

The recent decision by the United States Supreme Court in *Community for Creative Non-Violence v. James Earl Reid*<sup>6</sup> sug-

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1. *Community for Creative Non-Violence v. James Earl Reid*, 109 S. Ct. 2166, 2177 (1989) (citing H.R. Rep. No. 1476, 94th Cong., 2nd Sess., at 129 (1976) *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5749).

2. *Reid*, 109 S. Ct. at 2178 (quoting *Dumas v. Gommerman*, 865 F.2d 1093, 1104-05 n.18 (9th Cir. 1989)).

3. *Reid*, 109 S. Ct. at 2178. See 17 U.S.C. § 106 (1988).

4. See *Weinstein v. University of Illinois*, 811 F.2d 1091, 1094 (7th Cir. 1987).

5. *Sherrill v. Grieves*, 57 Wash. L. Rep. 286 (D.C. 1929).

6. 109 S. Ct. 2166 (1989).

gests that if this custom were to be challenged in court, the result would be difficult to determine.

This article examines *Reid's* construction of the "work made for hire" definition in the 1976 Copyright Act and assesses its potential impact on academics. Part I provides an overview of the "work made for hire" doctrine, from its judicial inception to its codification in the 1976 Act and the subsequent controversial court interpretations of the doctrine under that Act. Part II provides a discussion of the thirteen factors that comprise the *Reid* framework for determining when a hired party is an employee or an independent contractor, and applies these factors to the academic context. Part III assumes that the academic is an employee and then provides an analysis of the extent to which the university can claim the copyright to the creative products of the academic that are fixed in tangible form as arising out of the scope of employment.

#### I. AN OVERVIEW OF THE WORK FOR HIRE DOCTRINE: CONTROVERSIAL INTERPRETATIONS IN FEDERAL COURTS

The Constitutional provision that empowers Congress "[t]o promote the Progress of . . . Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings"<sup>7</sup> provided the basis for the original Copyright Act of 1790<sup>8</sup> and four subsequent major revisions,<sup>9</sup> the most recent being the Copyright Act of 1976.<sup>10</sup> Under the Copyright Act of 1976, the copyright vests initially with the author or authors of the work.<sup>11</sup> In most instances, the person who actually creates the work is considered the author of the copyright.<sup>12</sup> The judiciary created a limited exception to this general rule,<sup>13</sup> which Congress codified into law in the 1909 Copyright

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7. U.S. CONST. art. I, § 8, cl. 8.

8. Act of May 31, 1790, ch. 15, 1 Stat. 124.

9. See Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, ch. 230, 16 Stat. 212; Act of March 4, 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075; Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-901 (1988)).

10. 17 U.S.C. § 101 (1988).

11. *Id.* § 201(a).

12. In controversies over where the initial ownership should vest, courts have been consistent in granting it to the person who actually created the work. See, e.g., *Belford v. Scribner*, 144 U.S. 488 (1892) (married woman who wrote the book was entitled to copyright protection as against defendant's contention that her husband was owner of copyrighted book by virtue of his marital rights); *DeWit v. Brooks*, 7 F. Cas. 575 (C.C. N.Y.) (No. 3,851) (biographer who wrote book owned copyright; not party who provided biographer with factual material which enabled biographer to write book); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4,901) (letter-writer, and not the person to whom letter was addressed, was entitled to copyright).

13. In *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248-49 (1903), the Court noted that the designs at issue "belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establish-

Act<sup>14</sup> and expanded upon in the 1976 Copyright Act.<sup>15</sup> In the 1976 Act, the exception provides that "[i]n the case of work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."<sup>16</sup> Classifying a work as "made for hire" determines not only the initial ownership of its copyright, but also the copyright duration,<sup>17</sup> the owner's renewal rights with respect to works published before

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ment to make those very things," and thus "the copyrights were taken out in the proper names." This concept of works made for hire appears to have sprung from a basic belief that the fruits of an employee's labor belong to the employer. Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485, 486 (1983). In 1967, a similar concept was evident in § 286 of the California Labor Code, which provided "that everything which an employee acquires by virtue of his employment, except the compensation which is due him from his employer, belongs to the employer." *Williams v. Weisser*, 153 U.S.P.Q. (BNA) 866, 867 (Cal. Sup. Ct. 1967).

14. Section 26 of the 1909 Act defined the word "author" to include "an employer in the case of a work for hire." Copyright Act of 1909, Pub. L. No. 60-349, § 26, 35 Stat. 1075-88. Section 23 of the 1909 Act provided that in the case of any work copyrighted by an employer for whom such a work was made for hire, the proprietor of such copyright would be entitled to the copyright. *Id.* § 23.

For a discussion of the work for hire doctrine under the 1909 Act, see Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 594-98 (1989); DuBoff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC'Y 17, 18-23 (1984); Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, 17 J. ARTS MGMT. & L. 23, 28-31 (1987).

15. 17 U.S.C. §§ 101(1),(2) (work made for hire) & 201(b).

16. 17 U.S.C. § 201(b). The bundle of rights that comprised the copyright are contained in 17 U.S.C. § 106 and include the right:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106(1)-(5).

The implication from § 201(b) is that the parties could agree in writing for the creator of the work to retain some of the rights contained in § 106, but in the absence of such an agreement, the employer or other person for whom the work was prepared obtains all of the creator's § 106 rights. *Id.* § 201(b).

17. "In the case of . . . a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first." 17 U.S.C. § 302(c). This term contrasts with the term for works created by individual authors, which expires fifty years after the author's death, and with the term for works created by joint authors, which expires fifty years after the death of the last surviving author. 17 U.S.C. § 302(a),(b).

January 1, 1978,<sup>18</sup> the owner's termination rights,<sup>19</sup> and sometimes whether the work is copyrightable at all.<sup>20</sup>

As defined in Section 101, a work made for hire is:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as 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.<sup>21</sup>

The plain language of this definition indicates that a "work made for hire" arises from status and can only be prepared by either an employee or a person specially commissioned or ordered to prepare the work. If the work is prepared by an employee, then the work must be within the scope of her employment to qualify as a "work made for hire" under subsection (1). If the work is prepared on special order or commission, then the work must fall within one of the nine enumerated categories to qualify as a "work made for hire" under subsection (2). While no written instrument is required in the case of an employee work, a written instrument is required in the case of a work prepared on special order or commission to make it a "work made for hire." This requirement of a writing for specially ordered works under subsection (2) means that the creator of that type of work must consciously give up the copyright to the work that he or she would normally have as the creator of the work. Conversely, with employee works produced within the scope of employment under subsection (1), the 1976 Act presumes the employer to be the author and requires an express written instrument signed by both parties for the employee to retain any of the rights comprised in the copyright.<sup>22</sup>

While it may appear clear on its face that by enacting subsection (2) Congress intended to "draw a statutory line between those works written on special order or commission that should be consid-

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18. Where the copyright was originally secured "by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years." 17 U.S.C. § 304(a).

19. Works for hire are excluded from § 203 of the 1976 Act which permits the termination of "exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright." 17 U.S.C. § 203(a).

20. No copyright may be claimed in a work written in a for hire relationship if the employer is the United States Government or if the employer is not a national of the U.S. See 17 U.S.C. § 105; 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 5.03 (1990).

21. 17 U.S.C. § 101(a),(b).

22. See 17 U.S.C. § 201(b).

ered as 'works made for hire' and those that should not,"<sup>23</sup> courts have not always adhered to a statutory line. Since the 1976 Act was adopted, much controversy has developed in the federal courts over how section 101 "work made for hire" (1) & (2) should be interpreted, with some courts finding "commissioned works that clearly do not meet the standards of subsection (2) to be 'employee' works for hire under subsection (1)."<sup>24</sup> The most egregious of these cases was the Second Circuit case of *Aldon Accessories Ltd. v. Spiegel, Inc.*,<sup>25</sup> which was followed by the Seventh Circuit in *Evans Newton Inc. v. Chicago Systems Software*<sup>26</sup> and the Fourth Circuit in *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*<sup>27</sup>

The *Aldon* case arose out of the Spiegel Corporation's sale, through its widely circulated catalogs, of brass unicorn statues that the jury found infringed a valid copyright held by Aldon.<sup>28</sup> On appeal, Spiegel objected to the following jury instruction:

A work for hire is a work prepared by what the law calls an employee working within the scope of his employment. What that means is, a person acting under supervision of the hiring author, at the hiring author's instance and expense. It does not matter whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation.<sup>29</sup>

Spiegel contended that the 1976 Act intended to treat regular employees and independent contractors separately, and that this jury instruction defeated that purpose by permitting "the jury to find a work for hire by an independent contractor if the work was 'at the hiring author's instance and expense' and if 'the hiring author . . . exercised the right to direct and supervise the creation,' without reference to the categories of subdivision (2) or to the requirement

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23. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 121 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5737.

24. Ossola, *supra* note 14, at 35.

25. 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

26. 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986). The court agreed with the *Aldon* court and refused to characterize the issue as a distinction between defendant's status as an employee or independent contractor. Instead, the court characterized the issue as "[was] the contractor 'independent' or [was] the contractor so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship exist[ed]." *Id.* at 894.

27. 810 F.2d 410 (4th Cir. 1987). In *Brunswick Beacon*, the court concluded that "the copyright is owned by the newspaper publisher whose employees prepared it [instead of by the advertiser who ran the advertisement in the newspaper], unless there is a written agreement signed by it and the advertiser that the work should be considered for hire." *Id.* at 414.

28. *Aldon*, 738 F.2d at 549.

29. *Id.* at 551.

of a written instrument."<sup>30</sup>

In affirming the judgment of the district court and in concluding that the jury instruction was not incorrect, the Second Circuit chose to follow a line of cases developed under the 1909 Copyright Act, concluding that Congress did not intend to dispense with these cases when it adopted the 1976 Copyright Act.<sup>31</sup> The *Aldon* Court formulated an "actual control test,"<sup>32</sup> which stated that "if an employer supervised and directed the work, an employer-employee relationship could be found even though the employee was not a regular or formal employee."<sup>33</sup> *Aldon* has been criticized by many copyright scholars and commentators.<sup>34</sup>

In contrast to the Second Circuit's conclusion in *Aldon*, the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*<sup>35</sup> and the Ninth Circuit in *Dumas v. Gommerman*<sup>36</sup> both concluded that Congress

30. *Id.*

31. *Id.* at 552.

32. This "actual control test" is distinguished from the "right to control test" developed in other circuits. See *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 828-29 (D. Colo. 1985) (citing 1 M. NIMMER & D. NIMMER, *supra* note 20, at § 5-12, 5-12.1 ("the crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work")); *Clarkstown v. Reeder*, 566 F. Supp. 137, 141 (S.D.N.Y. 1983) (citing 1 M. NIMMER & D. NIMMER, *supra* note 20, at § 5.03 (B)(9) ("The crucial factor to be considered . . . 'is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work'")).

33. *Aldon*, 738 F.2d at 552.

34. For criticism of *Aldon*, see A. LATMAN, *LATMAN'S THE COPYRIGHT LAW* 123-24 (6th ed. 1986); Dreufus, *supra* note 14, at 590; Ossola, *supra* note 14, at 35-39; Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); Comment, *Commissioned Works as Works Made for Hire under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1293 (1987); Note, *The Works Made for Hire Doctrine of the 1976 Copyright Act after Aldon Accessories Ltd. v. Spiegel, Inc.*, 5 CARDOZO ARTS & ENT. L. J. 265 (1986); Note, *The Works Made for Hire Doctrine under the Copyright Act of 1976—A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc.*, 20 U.S.F. L. REV. 649 (1986). At least one scholar, David Nimmer, had disagreed with the criticism of *The Aldon* decision. Telephone interview with David Nimmer (Aug. 3, 1990).

35. 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988). This case concerned whether the Easter Seal Society, which hired the New Orleans public television station WYES to videotape a stage "Mardi Gras-style" parade and a "Dixieland" musical jam session, owned the copyright to the resulting tape because it was a work made for hire. Thus, the Society could prohibit Playboy Enterprises from using portions of the tape in an "adult" film entitled *Candy, the Stripper*. The court ruled that the Easter Seal Society was not the statutory "author" of the tape because WYES was an independent contractor when it created the tape. *Id.* at 337.

36. 865 F.2d 1093 (9th Cir. 1989). The issue considered was whether Patrick Nagel, the graphic artist and commercial illustrator, was an independent contractor or an employee when he created four works of art for ITT Cannon. The court ruled that Nagel was an independent contractor. *Id.* at 1105.

intended to dispense with the reasoning developed by courts interpreting the 1909 Copyright Act, and to create a simple dichotomy between employees and independent contractors.<sup>37</sup> While both Circuit Courts noted that Congress did not define "employee" and "scope of employment" within the 1976 Copyright Act, the Fifth Circuit concluded that Congress intended these terms to be interpreted according to the common law of agency,<sup>38</sup> and the Ninth Circuit concluded that "only works produced by formal, salaried employees are covered by 17 U.S.C. § 101(1)."<sup>39</sup>

## II. REID'S RESOLUTION OF THE CONFLICT: A THIRTEEN FACTOR FRAMEWORK

In resolving this split among the circuits, the Supreme Court in *Community for Creative Non-Violence v. James Earl Reid* rejected the "actual control test" articulated by the Second Circuit in *Aldon Accessories*,<sup>40</sup> and the "formal, salaried" employee test articulated by the Ninth Circuit in *Dumas*.<sup>41</sup> The Court chose, instead, to follow the conclusion reached by the Fifth Circuit in *Easter Seal*, which held that the term "employee" within section 101(1) carries its common law of agency meaning.<sup>42</sup> The Court stated "that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law."<sup>43</sup> According to Justice Marshall, the structure of section 101 indicates that "a work for hire can arise through one of two mutually exclusive

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37. See *Dumas*, 865 F.2d at 1096-97; *Easter Seal Soc'y*, 815 F.2d at 329.

38. *Easter Seal Soc'y*, 815 F.2d at 334-35.

39. *Dumas*, 865 F.2d at 1105. The Ninth Circuit, in *Dumas*, adopted its own bright line, concluding that the statutory reference to employee in § 101(1) covers only formal, salaried employees. *Id.* In *Reid*, the Supreme Court declined to follow this conclusion, instead choosing to rest its decision on common law principles of agency law, which the *Dumas* court had rejected as not fitting well within the copyright context. *Reid*, 109 S. Ct. at 2178 (citing *Dumas*, 865 F.2d at 1104 n.18).

40. *Reid*, 109 S. Ct. at 2174, 2177 ("Indeed, importing a test based on a hiring party's right to control or actual control of a product would unravel the 'carefully worked out compromise aimed at balancing legitimate interests on both sides.'").

41. *Id.* at 2174 n.8.

42. *Id.* at 2172-74.

43. *Id.* at 2173. Section 220 of the Restatement (Second) of Agency (1957) reads:

### Definition of a Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.



means, one for employees and one for independent contractors."<sup>44</sup> In reaching this conclusion, Marshall articulated a framework in *Reid* for determining whether an individual is an employee or an independent contractor.

A. *Reid's Framework: Is a Hired Party an Employee or an Independent Contractor?*

In the fall of 1985, Community for Creative Non-Violence (CCNV), a Washington, D.C. organization dedicated to eliminating homelessness, entered into an oral agreement with James Earl Reid to produce a statue to dramatize the plight of the homeless for display at a 1985 Christmas pageant in Washington, D.C.<sup>45</sup> While Reid worked on the statue in his Baltimore, Maryland studio, CCNV members visited him on a number of occasions to check on his progress and to coordinate CCNV's construction of the sculpture's base in accordance with the parties' agreement.<sup>46</sup> After the completed work was delivered to Washington, CCNV paid Reid the final installment of the agreed upon price for the cost of the materials and assistants—Reid donated his services.<sup>47</sup> The parties, who never discussed copyright, filed competing copyright registration certificates. CCNV filed suit in the District Court seeking a determination that the organization was entitled to copyright ownership because the statue was a "work made for hire" as defined in the 1976 Copyright

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(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

44. *Reid*, 109 S. Ct. at 2174.

45. *Id.* at 2169.

46. *Id.*

47. *Id.* at 2170.

Act.<sup>48</sup> The District Court ruled for CCNV.<sup>49</sup> The D.C. Court of Appeals reversed, holding that the sculpture was not a "work made for hire" under the 1976 Copyright Act since it was not "prepared by an employee within the scope of his or her employment."<sup>50</sup> CCNV then appealed to the Supreme Court, which granted certiorari to resolve a conflict among the Courts of Appeals over the proper construction of the "work made for hire" provision of the 1976 Copyright Act.<sup>51</sup>

In affirming the decision of the D.C. Court of Appeals, Marshall enumerated thirteen factors to be used in determining "whether a hired party is an employee under the general common law of agency."<sup>52</sup> The court considered these thirteen factors to be an indicia of an employment relationship between the hiring party and the hired party: (1) the hiring party's right to control the manner and means by which the product is accomplished;<sup>53</sup> (2) the skill required;<sup>54</sup> (3) the source of the instrumentalities and the tools;<sup>55</sup> (4) the location of the work;<sup>56</sup> (5) the duration of the relationship between the parties;<sup>57</sup> (6) whether the hiring party has the right to assign additional projects to the hired party;<sup>58</sup> (7) the extent of the hired party's discretion over when and how long to work;<sup>59</sup> (8) the method of payment;<sup>60</sup> (9) the hired party's role in hiring and paying

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48. *Id.*

49. *Reid*, 109 S. Ct. at 2170.

50. *Id.*

51. *Id.* at 2170-71.

52. *Id.* at 2178.

53. *Id.* This factor was also articulated in *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 320 (2d Cir. 1982); *NLRB v. Maine Caterers, Inc.*, 654 F.2d 131, 133 (1st Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957).

54. *Reid*, 109 S. Ct. at 2178; *see also*, *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947); *Hilton Int'l Co.*, 690 F.2d at 320; *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3rd Cir. 1979); RESTATEMENT (SECOND) OF AGENCY § 220(2)(d) (1957).

55. *Reid*, 109 S. Ct. at 2178; *see also* *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968); *United States v. Silk*, 331 U.S. 704, 717-18 (1947); *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989); RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (1957).

56. *Reid*, 109 S. Ct. at 2178; *see also* *United Ins. Co. of Am.*, 390 U.S. at 258; *Dumas*, 865 F.2d at 1105; *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 705 (4th Cir. 1986); RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (1957).

57. *Reid*, 109 S. Ct. at 2178; *see also* *United Ins. Co. of Am.*, 390 U.S. at 259; *Bartels*, 332 U.S. at 132; RESTATEMENT (SECOND) OF AGENCY § 220(2)(f) (1957).

58. *Reid*, 109 S. Ct. at 2179; *see also* *Dumas*, 865 F.2d at 1105.

59. *Reid*, 109 S. Ct. at 2179; *see also* *United Ins. Co. of Am.*, 390 U.S. at 258; *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567, 574 (8th Cir. 1984).

60. *Reid*, 109 S. Ct. at 2179; *see also* *Dumas*, 865 F.2d at 1105; *Darden*, 796 F.2d at 705; *Holt v. Winpisinger*, 811 F.2d 1532, 1540 (D.C. Cir. 1987); RESTATEMENT (SECOND) OF AGENCY § 220(2)(g) (1957).

assistants;<sup>61</sup> (10) whether the work is part of the regular business of the hiring party;<sup>62</sup> (11) whether the hiring party is in business;<sup>63</sup> (12) the provision of employee benefits;<sup>64</sup> and (13) the tax treatment of the hired party.<sup>65</sup>

When the Court applied these thirteen factors to the facts in *Reid*, it concluded that James Earl Reid was not an employee of the Community for Creative Non-Violence when he created the statue "Third World America," but an independent contractor<sup>66</sup> who thus could claim rights of authorship in the work. The Court acknowledged that "CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications," but stated that "the extent of control the hiring party exercises over the details of the product is not dispositive."<sup>67</sup> Thus, while the first factor weighed in favor of finding that Reid was an employee of CCNV, "all the other circumstances weigh[ed] heavily against finding an employment relationship."<sup>68</sup> The court then concluded that since Reid was not an employee when he created the statue "Third World America," CCNV could not be considered the author of the statue by virtue of 17 U.S.C. § 202(b). The following is a critical assessment of each of these thirteen factors and their potential impact on academics:

*1) The Hiring Party's Right to Control the Manner and Means by Which the Product is Accomplished*

The Restatement (Second) of Agency defines a servant as "a person employed to perform services in the affairs of another who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."<sup>69</sup> One of the factors that determines whether a person acting for another is a servant or an independent contractor is "the extent of control which, by the agreement, the master exercises over the details of the work."<sup>70</sup> The control or right to control needed to establish the relationship of master and servant may be extensive or it may be

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61. *Reid*, 109 S. Ct. at 2179; see also *Bartels*, 332 U.S. at 132; *Silk*, 331 U.S. at 719; *Darden*, 796 F.2d at 705; *Short*, 729 F.2d at 574.

62. *Reid*, 109 S. Ct. at 2179; see also *United Ins. Co. of Am.*, 390 U.S. at 259; *Silk*, 331 U.S. at 718; *Dumas*, 865 F.2d at 1105.

63. *Reid*, 109 S. Ct. at 2179; see also RESTATEMENT (SECOND) OF AGENCY § 220(2)(j) (1957).

64. *Reid*, 109 S. Ct. at 2179; see also *United Ins. Co. of Am.*, 390 U.S. at 259; *Dumas*, 865 F.2d at 1105; *Short*, 729 F.2d at 574.

65. *Reid*, 109 S. Ct. at 2179; see also *Dumas*, 865 F.2d at 1105.

66. *Reid*, 109 S. Ct. at 2179.

67. *Id.*

68. *Id.*

69. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957).

70. *Id.* § 220(2)(a).

attenuated.<sup>71</sup> The operative factor is that the employer has the right to determine not only the results sought but also to control the means by which those results are achieved.<sup>72</sup> The important distinction is between service in which the actor's physical activities and time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results.<sup>73</sup> The more detailed the supervision and the stricter the enforcement standards, the greater the likelihood that an employer-employee relationship exists.<sup>74</sup> Those rendering service but retaining control over the manner of doing it are not servants,<sup>75</sup> but are independent contractors.

In *Reid*, the Court acknowledged that "CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications," but stated that "the extent of control the hiring party exercises over the details of the product is not dispositive."<sup>76</sup> Reid had an obligation to accomplish a result, i.e., to use his skill as a sculptor to produce a sculpture representing the homeless. In fashioning the sculpture, "Third World America," Reid rendered service to CCNV, but retained control over the manner in which he did so.

In the academic context, permeating the relationship between the faculty member and the university is the tradition of academic freedom, which "guarantees a faculty member the right to teach and conduct research freely . . . without fear of retribution or arbitrary dismissal."<sup>77</sup> Academic freedom rests on the assumption that intellectual inquiry can only exist in an unfettered environment.<sup>78</sup> Historically, academic freedom has been viewed as a protection of

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71. *Id.* § 220 comment d. In *Dumas*, the court explained "[w]hile the degree of control and input exercised by the buyer may be relevant to an inquiry into joint authorship, . . . it will not ordinarily be relevant in determining the employment status of the artist, just as this factor is not relevant in distinguishing between, for example, in-house and outside counsel." *Dumas*, 865 F.2d at 1105.

72. *NLRB v. Maine Caterers*, 654 F.2d 131, 132 (1st Cir. 1981); see also *United States v. Silk*, 331 U.S. 704, 717 n.11 (1947) ("The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers as is necessary to establish a legal relationship of employer and employee between the appellee and the workers in question.").

73. RESTATEMENT (SECOND) OF AGENCY § 220 comment e (1957).

74. *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 320-21 (2d Cir. 1982) (finding that while the hotel controlled each band's final product—working hours, locations, type of music played—the band leaders exercised all the significant control over the manner of their own and their musicians' performance).

75. RESTATEMENT (SECOND) OF AGENCY § 220 comment e (1957).

76. *Reid*, 109 S. Ct. at 2179.

77. *Olswang & Fantel, Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles*, 7 J.C. & U.L. 2 (1980-81).

78. *Id.*

scholars' independence to teach not only what they have found, but also what other scholars have found and thought.<sup>79</sup> Thus, when a university contracts for a faculty member's services, it does so knowing that it may not "prescribe the nature of the service to be rendered."<sup>80</sup>

Accordingly, the university historically has not controlled the manner and means by which professors produce scholarly output. While most universities require academics to produce scholarly works for promotion and tenure consideration, academics, even more than Reid, retain control over the manner in which they produce their work. Professors choose the subject matter, when to write, what to say, and where to publish. Academics must produce scholarly output that enhances knowledge, but they retain control over the manner in which they do so. In this sense, academics act more like independent contractors than servants.

However, to the extent that the production of scholarly works is a condition for promotion and tenure, the university may exercise control over the number of such works that are to be produced. For the nontenured faculty member, the university may require the production of a certain number of works to obtain tenure. For the tenured faculty member, the university may condition production of a certain number of works on promotion, pay increases, and other less concrete benefits such as travel allowances and research support. Thus, while universities may not control the manner and means by which academics produce scholarly works, they may control the quantity of output.

## 2) *The Skill Required*

The relation of master and servant is usually indicated by "work which does not require the services of one highly educated or skilled."<sup>81</sup> Unskilled labor is usually performed by those customarily regarded as servants,<sup>82</sup> whereas skilled labor is usually performed by independent contractors. However, there are, of course, employment relationships where the persons rendering the services are highly skilled, such as the relationship between staff physicians and hospitals or between in-house counsel and corporations. In these situations, the custom to control a particular occupation, together with the skill required in the occupation, can be given conclusive weight.<sup>83</sup> In the *Reid* case, Reid was a sculptor, a skilled

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79. *Id.* at 3.

80. *Id.* at 4 (quoting Lovejoy, *Academic Freedom*, 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 384 (1930)).

81. RESTATEMENT (SECOND) OF AGENCY § 220 comment h (1957).

82. *Id.* § 220 comment i.

83. *Id.*

occupation.<sup>84</sup> This fact would tend to make him an independent contractor.<sup>85</sup>

Similarly, to become a university faculty member requires a considerable amount of education and skill. To be employed as a law school faculty member, for example, the candidate must have received a B.A. degree and a J.D. degree or its equivalent LL.B. (a Ph.D. may sometimes be used as a substitute). The individual must also be able to teach, research, produce scholarship, and demonstrate a commitment to serving the law school, the university, and the general community. Thus, while the faculty member is highly skilled, which would lead to viewing him or her as an independent contractor, one must also look to the custom to control the particular occupation. Unlike staff physicians and in-house counsel, the university does not control the details of the faculty member's work. These facts lend weight to the view that the university faculty member is an independent contractor for copyright purposes.

### 3) *The Source of the Instrumentalities and the Tools*

The fact that a worker supplies his own instrumentalities and tools is of evidential value that he is not a servant.<sup>86</sup> Where the employer supplies the tools or instrumentalities, particularly those of substantial value, that may indicate that the worker is expected to follow the directions of the owner in their use.<sup>87</sup> Similarly, where the worker uses his hands and only provides tools such as picks and shovels, an inference arises that the worker is an employee and not an independent contractor.<sup>88</sup> In *Reid*, Justice Marshall noted that "Reid supplied his own tools," an indication that he was an independent contractor.<sup>89</sup>

This factor is less clear in the academician's case because the academic works with both tangible and intangible tools, which are supplied from different sources. In most instances, universities provide the tangible tools of office space, office furniture, computers, typewriters, photocopiers, telephones, a library, books, paper, pads, pens and pencils. The faculty member, however, provides the intangible tools, such as the source of the ideas and the expression of the ideas. As one court has noted, "no one sells or mortgages all the products of his brain to his employer by the mere fact of employ-

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84. *Reid*, 109 S. Ct. at 2179.

85. *Id.* at 2169.

86. RESTATEMENT (SECOND) OF AGENCY § 220 comment k (1957).

87. *Id.*

88. *United States v. Silk*, 331 U.S. 704, 716-18 (1947) (finding that workers who worked with their hands and provided only picks and shovels were not independent contractors).

89. *Reid*, 109 S. Ct. at 2179.

ment."<sup>90</sup> Thus, this factor weighs in both the university's and the faculty member's favor.

#### 4) *The Location of the Work*

When a person works primarily away from the company's offices, chooses his or her own hours of work and work days, and has independence, the person's status as an "employee" becomes less obvious.<sup>91</sup> If the work is done upon the employer's premises with the employer's machinery by persons who agree to obey the general rules regulating the conduct of employees, the inference is strong that the person is a servant of the owner.<sup>92</sup> If, however, the employer's rules are made only for the general policing of the premises, mere conformity to such regulations does not indicate that the person is a servant of the employer.<sup>93</sup> In the *Reid* case, Reid clearly met this test of the independent contractor because he "worked in his own studio in Baltimore, making daily supervision of his activities impossible."<sup>94</sup>

In the academic context, the determination is less clear. While the faculty member teaches and may conduct research at the university, part of the faculty member's preparation for teaching and writing of scholarly articles may take place at home. For most professors, the research of a problem takes place in the university library, but the analysis and writing of the problem can take place either at home or at the university. Moreover, the rules of the university tend to be made for general policing of the premises, and not to regulate how faculty members conduct their work. Thus, the location of the work is not a determinant factor, particularly when one considers that employees who create copyrighted works are less likely to work regular hours than are other employees.<sup>95</sup> Indeed, at least one court has noted that the distinction between work hours and leisure time is illusory for academics.<sup>96</sup>

#### 5) *The Duration of the Relationship Between the Parties*

If the time of employment is short, the worker is less apt to let

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90. *Public Affairs Ass'n v. Rickover*, 177 F. Supp. 601, 604 (D.D.C. 1959), *rev'd on other grounds*, 284 F.2d 262 (D.C. Cir. 1960), *vacated for insufficient record*, 369 U.S. 111 (1962).

91. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968).

92. RESTATEMENT (SECOND) OF AGENCY § 220 comment l (1957).

93. *Id.*

94. *Reid*, 109 S. Ct. at 2179.

95. Simon, *supra* note 13, at 489 (citing *Brown v. Cosby*, 433 F. Supp. 1331 (E.D. Pa. 1978)).

96. *Williams v. Weisser*, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542, 153 U.S.P.Q. (BNA) 866, 867 (1967).

the employer control the detail of the work.<sup>97</sup> The implication is that the longer the duration of the relationship between the parties, the more likely the worker is controlled by the hiring party and, thus, to be considered an employee.<sup>98</sup> In *Reid*, this factor supported a conclusion that Reid was not an employee of CCNV because he "was retained for less than two months, a relatively short period of time."<sup>99</sup>

In the academic context, the relationship between the university and most of its faculty members is entered into with the intent that it be long term. Tenured employees can remain employed with the university until retirement age and are guaranteed that they will only be terminated for a proven cause or grave infractions of university policies.<sup>100</sup> The university appoints tenure track employees with the understanding that if the relationship progresses satisfactorily, then the university will grant them tenure. Contract employees are appointed for shorter periods of time, but even these periods of time are usually much longer than the two months involved in the *Reid* case. However, even though the relationship is typically long in duration, the university has less control over the details of the faculty member's work than it might over other staff members.<sup>101</sup> Nevertheless, this factor might support a conclusion that the faculty member is an employee of the university for copyright purposes.

#### 6) *Whether the Hiring Party has the Right to Assign Additional Projects to the Hired Party*

When the hiring party has the right to assign additional projects to the hired party, the implication is that the hired party is more likely to be considered an employee.<sup>102</sup> In *Reid*, Marshall found that during and after the two months relationship between CCNV and Reid, "CCNV had no right to assign additional projects to Reid,"<sup>103</sup> which indicated that Reid was an independent contractor.

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97. RESTATEMENT (SECOND) OF AGENCY § 220 comment j (1957).

98. See *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947) (holding that the band leader was the employer of the band members because the relations between the band leader and the other members of the band are permanent; whereas those between the band and the person hiring the band are transient).

99. *Reid*, 109 S. Ct. at 2179.

100. *Olswang & Fantel*, *supra* note 77, at 5, 12 n.52 (quoting F. DELON, LEGAL CONTROLS ON TEACHER CONDUCT: TEACHER DISCIPLINE 11 (1977)).

101. See *supra* notes 69 through 80 and accompanying text for discussion on the right to control test.

102. See *Reid*, 109 S. Ct. at 2179; *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989).

103. *Reid*, 109 S. Ct. 2179.



In the academic context, this factor weighs in favor of finding that the faculty member is an independent contractor. At the beginning of the contractual relationship with the faculty member, the university sets out criteria for the faculty member's employment and promotion. Usually, the university requires that the faculty member teach a certain number of courses each year, produce a certain number of scholarly works within a specified period, and participate in the governing of the university by serving on a certain number of university and/or department committees. While the university may assign specific duties within these broad categories, the categories of obligation cannot be augmented. Of the three broad categorical requirements, many universities place the greatest emphasis on the production of scholarship because published scholars "attract prestige and students to institutions."<sup>104</sup> Indeed, a university may decrease some of its faculty members' regular duties, by reducing a teaching load or by granting a sabbatical leave of a semester or a year, in order to increase the production of scholarship.<sup>105</sup> Nevertheless, while the university may emphasize the production of scholarship, it cannot arbitrarily assign additional projects to the faculty member. Thus, the faculty member may meet this test of the independent contractor.

7) *The Extent of the Hired Party's Discretion Over When and How Long to Work*

The hired party who retains control over the manner of doing a project is more likely to be considered an independent contractor.<sup>106</sup> Hired parties who choose their own hours of work and work days are not as obviously employees as are production workers in a factory, whose hours are chosen for them by the company.<sup>107</sup> In *Reid*, "[a]part from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work."<sup>108</sup> Thus, Reid met this test of an independent contractor.

In the academic context, while a faculty member is required to be on campus at certain times to teach, to host office hours, or to attend committee meetings, a faculty member can prepare for class for as many hours as it takes and at whatever location the faculty member pleases. The faculty member can also exercise discretion

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104. Simon, *supra* note 13, at 503.

105. *Id.* at 504.

106. RESTATEMENT (SECOND) OF AGENCY § 220 comment e (1957).

107. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). *See also* Short v. Central States, Southeast and Southwest Areas Pension Fund, 729 F.2d 567, 574 (8th Cir. 1984) (finding that in one of the appellee's cases must be added the facts that he had considerable freedom to decide when and how long he would work and that he could take vacation days without company approval).

108. *Reid*, 109 S. Ct. at 2179.

over the amount of time devoted to scholarly endeavors. Thus, this factor weighs in favor of finding that the faculty member is an independent contractor.

### 8) *The Method of Payment*

When a hired party is paid by the hour or month, over a considerable period of time with regular hours, and works full time with one employer, the relationship is more likely to be considered that of employee/employer.<sup>109</sup> Employees usually work for wages or salary under direct supervision, whereas independent contractors undertake a job for a price, decide how the work will be done, frequently hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.<sup>110</sup> In *Reid*, "CCNV paid Reid \$15,000, a sum dependent on 'completion of a specific job, a method by which independent contractors are often compensated'."<sup>111</sup>

The compensation that a faculty member receives is most likely to be considered a salary, but it might also be considered a contract price for a specific job. Faculty members are paid a fee for a specified period of time, often for eight, nine, ten, or eleven months work, which they can elect to have paid out over a longer period of time. A more difficult issue may arise in the context of the summer research grant or sabbatical leave, whereby the university compensates the faculty member for devoting a summer, semester or year to producing a scholarly work. The summer grant or sabbatical leave is usually provided after a letter or memorandum outlining the research project is submitted to the dean or department head. The dean or department head usually issues the grant, or permits the sabbatical leave, with a note to the faculty member that the time is to be spent working on the agreed upon project and not on consulting or similar activities. Thus, this factor has equities on both sides because the faculty member's remuneration could be considered a salary or a contract price for a specified job.

### 9) *The Hired Party's Role in Hiring and Paying Assistants*

This might be considered the "whoever-pays-the-piper-calls-the-tune" factor in the sense that independent contractors tend to

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109. RESTATEMENT (SECOND) OF AGENCY § 220 comment h (1957).

110. *NLRB v. Maine Caterers, Inc.*, 654 F.2d 131, 132 (1st Cir. 1981) (citing H.R. Rep. No. 245, 80th Cong., 1st Sess. at 18 (1947)). This House Report on the legislation establishing the Labor Management Relations Act of 1947 specifically excluded "independent contractor" from the definition of "employee."

111. *Reid*, 109 S. Ct. at 2179.

hire and pay their assistants, whereas employees do not.<sup>112</sup> Under traditional common law principles, a hired party who has discretion to hire and fire clerical employees without securing approval, even though the hired party does not have discretion to hire counterparts, is likely to be considered an independent contractor and not an employee.<sup>113</sup> In *Reid*, Reid had total discretion in hiring and paying assistants,<sup>114</sup> a factor which weighed in favor of finding that he was an independent contractor.

A more difficult case arises in the academic setting because while the faculty member may select and supervise his or her research assistants, it is the university that usually sets the wage scale and pays the assistants. In some instances, however, the faculty member may pay the research assistants out of their own pocket or from funds from an outside grant or contract. Furthermore, the faculty member may have less discretion in hiring clerical employees than in hiring colleagues. In most institutions, the faculty members either decide or make recommendations on faculty appointments and promotions,<sup>115</sup> but the hiring of clerical employees is done out of the dean's or department head's office. Thus, this particular factor has merits for both the argument that a faculty member is an employee and the argument that the faculty member is an independent contractor.

#### *10) Whether the Work is Part of the Regular Business of the Hiring Party*

Employees work in the course of an employer's trade or business.<sup>116</sup> They do not operate their own independent business, but perform functions that are an essential part of the company's normal operations.<sup>117</sup> An inference that a hired party is a servant may arise when the occupation is one which ordinarily is considered incident to the employer's business establishment or to the function of

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112. See generally *United States v. Silk*, 331 U.S. 704, 719 (1947) (where the truckmen hire their own assistants, own their own trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success, they must be held to be independent contractors); *Short*, 729 F.2d at 574 (finding the fact that both drivers were responsible for hiring and paying extra help when it was needed as a factor that weighed against finding of employee status).

113. *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 705 (4th Cir. 1986) (finding that an insurance agent, who was able to hire and fire clerical employees without securing the insurance company's approval, though the agent could not on his own hire additional insurance agents, would most probably not qualify as an employee).

114. *Reid*, 109 S. Ct. at 2179.

115. *La Noue, Tenure and Title VII*, 1 J.C. & U.L. 206, 206 (Spring 1974).

116. *Silk*, 331 U.S. at 718.

117. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 259 (1968).

the household staff.<sup>118</sup> Thus, even highly skilled actors, such as cooks and gardeners, who resent or even contract against interference, may be considered servants if they are regularly employed.<sup>119</sup> In *Reid*, “[c]reating sculptures was hardly ‘regular business’ for CCNV.”<sup>120</sup> CCNV was a nonprofit unincorporated association dedicated to eliminating homelessness in America.<sup>121</sup>

Given that the university is also a nonprofit association, like CCNV, this factor could weigh against the university, on the one hand. On the other hand, it is part of the mission of the university to aid in the understanding and development of knowledge. It does this by requiring its faculty members to conduct research and publish the results of their analysis of their research. In this sense, faculty publications could be considered to be part of the regular business of the university.

### 11) *Whether the Hiring Party is in Business*

Whether the hiring party is in business is a factor in determining whether there exists an employment relationship between the hiring and hired parties.<sup>122</sup> The implication is that if the hiring party is in business, then the relationship between the two parties is more likely to be one of employer and employee. In the *Reid* case, CCNV was not in business at all, and that factor weighed against finding that Reid was an employee of CCNV.<sup>123</sup>

In the academic case, this factor is difficult to weigh because while both public and private universities are nonprofit educational institutions, they do provide a service for a fee to a client, i.e. students. An exchange of money does take place; students and their parents are buying a service or group of services.<sup>124</sup> Indeed, universities have not hesitated to go into court to collect the money owed to them by students and their parents.<sup>125</sup> Thus, a university could be considered to be “in business,” as distinguished from the finding in *Reid* that CCNV was not in business because it was strictly a nonprofit institution that raised money and spent it either directly on the homeless or to draw attention to the plight of the homeless.

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118. RESTATEMENT (SECOND) OF AGENCY § 220 comment i (1957).

119. *Id.*

120. *Reid*, 109 S. Ct. at 2179.

121. *Id.*

122. RESTATEMENT (SECOND) OF AGENCY § 220(h) (1957).

123. *Reid*, 109 S. Ct. at 2179.

124. Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student University Relationship*, 8 J.C. & U.L. 141, 150 (1980-82).

125. *Id.* (citing *Trustees of Columbia Univ. v. Jacobsen*, 53 N.J. Super. 539, 148 A.2d 63, *appeal dismissed*, 31 N.J. 221, 156 A.2d 251 (1959), *cert. denied*, 363 U.S. 808 (1960); *Cornell Univ. v. Dickerson*, 100 Misc. 2d 198, 418 N.Y.S.2d 977 (N.Y. Sup. Ct. 1979)).

A finding that the university is in business would weigh in favor of the university.

### 12) *The Provision of Employee Benefits*

When the hired party receives the benefits of the hiring party's vacation plan and group insurance and pension fund, these facts weigh in favor of finding that an employer/employee relationship exists between the hired and hiring party.<sup>126</sup> In *Reid*, CCNV did not provide any employment benefits, or contribute to unemployment insurance or worker's compensation funds for Reid, and this fact weighed in favor of finding that Reid was an independent contractor and not an employee of CCNV.<sup>127</sup>

In the academic context, this factor weighs in favor of the university because it does provide its faculty members with benefits. The university usually provides its faculty members with the "unfunded" benefits of vacations, holidays, leaves of absence and sick leave; and the "funded" benefits of a retirement fund, disability insurance, life insurance, health insurance, dental insurance, and eye insurance.<sup>128</sup> Some universities also provide additional fringe benefits such as travel accounts to attend professional meetings and book accounts to purchase books. Universities have also been known to waive fees for university courses for the faculty member or his family and to pay professional dues, such as ABA membership fees for law professors.

### 13) *The Tax Treatment of the Hired Party*

The relationship of employer and employee determines the liability for employment taxes under the Social Security Act, with employers required to pay employment taxes for employees but not for independent contractors.<sup>129</sup> Individuals performing services as independent contractors are not employees.<sup>130</sup> Further, "physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public are independent contractors and not employees."<sup>131</sup> Where the hired party declares himself or herself to be an independent contractor for tax purposes, this weighs against a find-

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126. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 259 (1968).

127. *Reid*, 109 S. Ct. at 2179.

128. Middleditch, *College and University Fringe Benefits*, 1 J.C. & U.L. 172, 172-73 (Winter 1973-1974).

129. *United States v. Silk*, 331 U.S. 704, 718 (1947); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

130. *Silk*, 331 U.S. at 714 n.8 (quoting Treasury Regulation 90, promulgated under Title IX of the Social Security Act Art. 205).

131. *Id.* at 715 n.8 (quoting 26 CFR § 400.205).

ing that the hired party is an employee, particularly when the hiring party does not withhold state or federal taxes from the hired party's salary.<sup>132</sup> In *Reid*, CCNV did not pay payroll or social security taxes for Reid, and this was one of the facts that led to the Court finding that there was not an employment relationship between Reid and CCNV.<sup>133</sup>

In the academic context, the university pays unemployment, worker's compensation, payroll, and social security taxes for its faculty members. These facts would thus lead to a conclusion that faculty members are employees for copyright purposes.

### B. *Assessment of Reid's Framework*

The Supreme Court's determination that Reid was an independent contractor, which entitled him to claim copyright ownership in the sculpture, was easy because twelve of the thirteen factors weighed in Reid's favor. When these factors are applied to other facts, the conclusion of whether the hired party is an employee or an independent contractor may be more difficult to reach because the Supreme Court did not provide any significant guidance on how to assess the results. Even though the Restatement (Second) of Agency Law conditions the determination of whether the hired party is a servant on whether the hired party is subject to the hiring party's control or right to control,<sup>134</sup> the Supreme Court deliberately stated in *Reid*, as it has done on other occasions,<sup>135</sup> that while the right to control was important, it is not dispositive.<sup>136</sup> The Court emphasized the totality of the circumstances as controlling.<sup>137</sup> Therefore, in some cases, the Court's opinion may allow some factors to be accorded more weight than others.<sup>138</sup> Whereas, decisions in other cases may rest on a majority of the factors weighing in favor of one party or the other.

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132. *Short v. Central States, Southeast and Southwest Areas Pension Fund*, 729 F.2d 567, 574 (8th Cir. 1984).

133. *Reid*, 109 S.Ct at 2179.

134. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957).

135. See *Silk*, 331 U.S. at 716; *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

136. *Reid*, 109 S. Ct. at 2179.

137. *Bartels*, 332 U.S. at 130.

138. For example, Congress provided four factors to be used in determining whether a particular use of a copyrighted work was fair: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. Courts have consistently stated that the fourth factor is to be accorded the most weight. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) ("This last factor is undoubtedly the single most important element of fair use.") Thus, a defendant could have made an infringing use of a copyrighted work under factors one to three, but a non-infringing use under factor four and the use would still be considered fair.

If one applies a majority test to the academic context, the result is difficult to determine. Scholarly works produced by academics may or may not be considered works for hire because while four of the thirteen factors weigh in favor of the faculty member and four of the factors weigh in favor of the university, the remaining five factors have equities for both sides. A determination that scholarly works were not works for hire would not be contrary to previous decisions that have specifically considered whether a particular work prepared by an academic was a work for hire.

In *Weinstein v. University of Illinois*,<sup>139</sup> the Seventh Circuit concluded that a work prepared by an assistant professor was not a work for hire. The court stated that it has been a tradition since copyright law began that if a professor of mathematics, for example, proves a new theorem in the course of his employment, he will own the copyright to his article containing that proof.<sup>140</sup> In the context of lectures by professors, the Supreme Court of the District of Columbia held in *Sherrill v. Loren C. Grieves*<sup>141</sup> that because a professor is not obliged to reduce his or her lectures to writing, if he or she does so the lectures do not become the property of the employing institution. Thus, heretofore, the result of law and custom is that faculty members and universities alike have assumed that the faculty member owned the copyright to the scholarly work.<sup>142</sup>

If the contrary result were reached that the university owned the copyright to scholarly publications and academic lectures, a *threat* to academic freedom and a conflict between book publishers and universities could develop. Book publishers often obtain a written assignment of the copyright to academic texts under subsection (2) of the work for hire definition because academic texts are one of the nine enumerated categories. If the university claimed the copyright under subsection (1) as the employer of the academic, there would be two competing claims to the copyright.

The determination of which claim was superior would come from determining whether the work at issue was produced within the scope of employment.

### III. DETERMINING THE SCOPE OF EMPLOYMENT

Since the Court decided that Reid was an independent contractor and not an employee, it did not reach the next issue of whether the work was prepared within the scope of Reid's employment. For an employer to claim authorship under section 201(b), the work

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139. 811 F.2d 1091, 1094 (7th Cir. 1987).

140. *Id.* at 1094 (citing M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1][b](1978 ed.)).

141. 57 Wash. L.R. 286 (Apr. 23, 1929), J. Copyright Decisions 675, 687.

142. Simon, *supra* note 13, at 486.

must have been produced within the scope of the employment. The employer does not have automatic rights to everything the employee does. In a case considering whether speeches prepared by a government employee, at home after normal working hours, or while traveling, constituted government publications in which no copyright could subsist, the District of Columbia Circuit concluded that none of the speeches were government publications.<sup>143</sup>

Drawing the line between where specific duties begin and end within the scope of employment has been difficult.<sup>144</sup> One commentator<sup>145</sup> has deciphered three criteria that courts developed construing the 1909 Act's "work made for hire" provision to determine if an employee work was produced within the scope of employment: (1) whether the work was produced at the employer's place of business; (2) whether a work is completed within the normal business hours; and (3) whether the work is produced at the instance and expense of the employer.<sup>146</sup> The commentator applied these criteria to academics and concluded that copyrightable works produced by a professor within his field of expertise probably fall within the scope of the professor's employment.<sup>147</sup>

There are two observations that need to be made. First, these three criteria overlap with factors 4, 7, and 1 of the *Reid* framework, which the Supreme Court developed to determine whether the individual is an employee or an independent contractor. Second, these factors stem from cases construing the 1909 Act. When it adopted the 1976 Act, Congress may have intended to dispense with the reasoning developed by courts to interpret the 1909 Act.<sup>148</sup> Thus, these factors may no longer be relevant to the inquiry.

A more simple two-part test might suffice. The first part of the inquiry would determine what is required for an employee to fulfill satisfactorily the duties of his or her job. The second part of the inquiry would determine whether the work created by the individual falls within the duties of the job. For the faculty member, application of this two part test would have varying results for different works.

The faculty member is required to lecture, or in the law school context to conduct socratic dialogue with students, but is not required to fix that lecture in a tangible form. Thus, once the faculty member fixes that lecture in a tangible form—either written or on

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143. *Public Affairs Ass'n, Inc. v. Rickover*, 284 F.2d 262, 269 (D.C. Cir 1960).

144. Duboff, *supra* note 14, at 31.

145. *Id.*

146. *Id.* at 31-2.

147. *Id.* at 34.

148. See *Dumas v. Gommerman*, 865 F.2d 1093, 1096-97 (9th Cir. 1989); *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 329 (5th Cir. 1987).



videotape—he or she would retain the copyright since fixation of lectures was not required to fulfil the faculty member's teaching duties. This result accords with the conclusion in *Sherrill v. Grieves*.<sup>149</sup>

As for scholarly works, those publications required as a condition of promotion and tenure and produced during the university contract period may be considered within the scope of employment because they are required to fulfil the professor's duties to the university. Similarly, when the university grants academic release time during the semester, or a sabbatical leave, or a summer research grant to complete a specific work, the resulting work might also be considered a work for hire because the work was prepared to fulfil an official obligation to the university.

Nevertheless, there will also be scholarly works that fall outside the academician's duties or works that are produced outside of the contract period, and are, therefore, outside the scope of the academician's employment. Some examples could be works produced by nontenured faculty members beyond the number needed for promotion and tenure purposes as determined by the university's department, and perhaps all works produced by tenured faculty members that are not a condition for merit raises. Other examples could be works that are prepared during the one day a week that universities usually allow for outside work, or works that are prepared during a summer when the faculty member did not receive a research grant.

#### CONCLUSION

The suggested test for determining the scope of employment, along with refinement of the *Reid* test for determining whether an employee relationship exists at the outset, would bring predictability to section 101 "work made for hire" (1) of the 1976 Act. Both employers and employees could feel confident about which works are within the scope of employment and which are not. Those works that are within the scope of employment, but to which the employee wishes to retain the copyright, can then become the subject of negotiation between the parties.<sup>150</sup>

With this predictability, there should not be any adverse affects on the incentive to create academic works. The incentive to create in the early part of the academic's career would come from promo-

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149. 57 Wash. L.R. 286. See *supra* text accompanying note 5 for the holding in *Sherrill*.

150. See Simon, *supra* note 13, at 509. Most universities currently acknowledge in faculty handbooks that the faculty member shall retain the copyright in his or her scholarly works. The handbooks also provide instances in which a work prepared by a faculty member can be considered a work for hire.

tion and tenure expectations, at a time when financial rewards are likely to be limited. Later in the academic's career, the copyright would remain the academic's and he or she would have an incentive to exploit the copyright at a time when the financial rewards are likely to be greater because of more opportunities to create works that pay royalties.

In both instances, the university would benefit from the prestige that faculty writings bring, particularly in the later years when an already established reputation has been enhanced by publication. Thus, both tests, in addition to being predictable, result in comparable equities to both the faculty member and the university.

