"WORKS MADE FOR HIRE" UNDER THE COPYRIGHT ACT OF 1976—TWO INTERPRETATIONS

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INTRODUCTION

The Copyright Act of 19761 replaced the Copyright Act of 1909.2 It is clear from the legislative history of the new act that Congress did not intend a mere codification of the case law that had developed after the enactment of the Copyright Act of 1909. Rather, a comprehensive new body of law was created which significantly changed the existing copyright law of the United States.3 However, in many areas, the extent to which the new act has changed the law is unclear.

The new Copyright Act changed the respective ownership rights of creators and exploiters of various copyrightable works. The Copyright Act of 1909 vested ownership of the copyright in the "author" of the work.4 "Author" was defined to include "an employer in the case of works made for hire."5 Thus, when an employee created a work the copyright vested in the employer and not the employee. This provision of the 1909 Act codified existing case law. The rule was articulated in Dielman v. White:6

In general, when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist himself. If a patron gives a commission to an artist, there appears to me a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron. It is not necessary to decide if the artist retains the right to make for another a replica. Reproduction by the

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5. Id. at § 62, 35 Stat. at 1088.
artist may be a question of artistic ethics rather than of law; but that the patron has a right to make and permit, to any extent, reproductions of the work of art sold to him, appears to me plain, unless the contrary is plainly set out in the contract.\(^7\)

The 1909 Act clearly followed this rationale by making an "employer" the author and owner of the copyright of a "work made for hire." However, the 1909 Act did not define "employer" or "work made for hire." A work prepared on special order or commission by an independent contractor raised the question whether the person for whom the work was prepared was an "employer" within the meaning of the act. Ownership of the copyright turned on the intention of the parties.\(^8\) When there was no written agreement, and the intention of the parties could not be ascertained, a few cases suggested a presumption of the copyright vesting initially in the person preparing the work.\(^9\) However, most decisions held that there was a presumption of the copyright vesting in the party commissioning the work.\(^10\) This presumption was indulged in the absence of express contrary contractual reservation whenever one person engaged another, whether as employee or as independent contractor.\(^11\) Thus, under the old act, the distinction between an "employee" and an "independent contractor" was a distinction without a difference.

Commentators have argued that the new Copyright Act drastically changes the law with respect to copyright ownership of works

\(^7\) Id. at 894.


prepared for a commissioning party by independent contractors.\textsuperscript{12} This article argues that, with minor exceptions, the law remains the same as under the 1909 Act.

**WORK MADE FOR HIRE PROVISIONS OF THE 1976 ACT**

The provisions of the 1976 Act relating to work made for hire provide:

Initial ownership.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

Works Made for Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.\textsuperscript{13}

A “work made for hire” is defined as

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.\textsuperscript{14}

The first paragraph in the definition of work made for hire is


\textsuperscript{13} 17 U.S.C. § 201(a)-(b) (1976).

clear: with respect to a person who is an employee and not an independent contractor, the law remains effectively unchanged. Under the ownership provision of the 1976 Act, "the employer or other person for whom the work was prepared is considered the author for purposes of this title. . . ."15 Thus, under the old act and the new act, where the person who prepares the work is an employee working within the scope of his employment and the parties have not signed an agreement to the contrary, the employer will be considered the "author" of the work. Both acts provide that the "author" is the owner of the copyright in the work.

The second paragraph of the definition of work made for hire of the new act creates some uncertainty as to the ownership of works prepared by independent contractors for commissioning parties. The terms "employer," "employee," "scope of employment," and "specially commissioned works" are not defined in the new act. It is initially unclear what Congress intended by the ambiguous language in the second paragraph of the definition of works made for hire.

Legislative research for copyright law revision began with the Legislative Appropriations Act of 1955.16 Copyright ownership of works made for hire was the subject of numerous debates. Representatives of authors, screenwriters, and composers advocated greater rights for those preparing the works. Representatives of publishers and the motion picture industry generally advocated restraint in changing the law.17 As a result of the many different opinions expressed over the years, it is possible to recite legislative history in support of nearly any interpretation of work made for hire. The final House and Senate reports state that the works made for hire provisions represented a compromise.18 But the meaning of that compromise is unclear.

**Radical Interpretation**

To be considered a work made for hire, a work must fit into one of two mutually exclusive categories. A work may qualify as a work made for hire if it is prepared by an employee and meets the criteria of paragraph (1) or it may qualify if it is prepared by a

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specially commissioned party (i.e., an independent contractor) and meets the criteria of paragraph (2).19 However, if the work is prepared by an independent contractor and does not meet the criteria of paragraph (2), it may not qualify as a work prepared by an employee under paragraph (1) because independent contractors may not be considered employees. Under this interpretation of the statute, most works prepared by independent contractors will not be considered works made for hire because the criteria for paragraph (2) is very restrictive.

Thus, if a specially commissioned work is either: (1) a contribution to a collective work, (2) a part of a motion picture or other audio-visual work, (3) a translation, (4) a supplemental work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, or (9) an atlas; and if the parties expressly agree in a written instrument signed by both of them that the work shall be considered a work made for hire, only then will a specially commissioned work be considered a work made for hire.20 In other words, no specially commissioned work will be considered a work made for hire without a signed writing and most specially commissioned works will not be considered works made for hire even with a writing purporting to establish them as such, because most works do not fall within the nine listed categories. Generally, the copyright to a work prepared by an independent contractor for a commissioning party will vest in the independent contractor.

For purposes of clarity, throughout the remainder of this article, the interpretation of the statute described above will be referred to as the “radical” interpretation because it substantially changes the prevailing work made for hire doctrine. In the context of this article, “radical” is intended to mean only this and should not be construed to include various political nuances often associated with the word. Similarly, “conservative” is used to describe an interpretation favoring minimal change in the law.

Conservative Interpretation

Under a more conservative interpretation of the statute, the definition of works made for hire in section 101 would not establish mutually exclusive categories for works prepared by “employees” and works prepared on “special order or commission.” The second paragraph of the definition requires that the enumerated types of specially commissioned works qualify as works made for hire if the parties expressly agree in a written instrument that the work shall
be considered a work made for hire. This may mean that the second paragraph exempts the enumerated types of specially commissioned works from application of the general works made for hire doctrine unless the parties have agreed otherwise in writing. Except for the enumerated types in paragraph (2), the old case law would still be applicable. In other words, paragraph (1) of the definition restates the existing case law where, for copyright purposes, an independent contractor is considered to be an employee. Paragraph (2) carves out exceptions to the old case law comprising specially commissioned works not considered works made for hire in the absence of a writing executed by both parties.

SUPPORT FOR THE RADICAL INTERPRETATION

Professor Nimmer advocates the radical view. "If a work does not fall within one of the [nine categories specified in section 101(2)] then even if it has been prepared by one person upon the special order or commission of another, it will not qualify as 'a work made for hire,' with the special legal consequences which flow from this designation."21 In May v. Morganelli-Heumann & Associates,22 where an architect sued for alleged copyright infringement of his drawings, the court in dicta followed Nimmer's view. The Ninth Circuit found that "Congress changed copyright law in its entirety." Section 101 limited works made for hire by independent contractors to nine specific categories:23

Section 201 of the 1978 Act provides that the employer or the person for whom the work is prepared is the author of a work made for hire "and, unless the parties have previously agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

We view May as an independent contractor rather than an employee, so under Section 101, May's drawings would not be subject to the "works for hire" doctrine, both because of the absence of a written agreement so providing, and because the drawings do not fall within one of the prescribed categories of work.24

However, the court goes on to point out that the new act is not applicable to that case as the act was not meant to have a retroactive effect.25

22. 618 F.2d 1363 (9th Cir. 1980).
23. Id. at 1368 n.4.
24. Id.
25. Id. The court in May stated:
In *Meltzer v. Zoller*, Meltzer claimed authorship of the architectural plans of his house. Meltzer contracted with a builder for the construction of his home. The builder thereafter contracted with an architect to prepare plans in accordance with Meltzer's requirements. The architect working from stock drawings and Meltzer's "thumbnail sketches" prepared the plans and the house was built. After a second home was planned on the basis of the same drawings, Meltzer brought an action for copyright infringement. The court rejected Meltzer's claims of copyright ownership.

The original plans were created prior to the effective date of the 1976 Copyright Act but the allegedly infringing plans were created after that date. The court stated that the issues of infringement and copyright ownership must be determined on the basis of the new law.

Not every work prepared by an independent contractor on special order or commission is considered the equivalent of a "work made for hire." Rather, the only "works made for hire" are those which fall within one of the statutory categories set forth in 17 U.S.C. Section 101, and concerning which the parties enter into an express written agreement designating the work as such.

As architectural drawings were not included in the categories set forth in section 101, they do not qualify as works made for hire.

The court found that although the plaintiff argued that the architectural plans of the Meltzer home were commissioned works for hire of which he was the author, the plaintiff could not take advantage of the works for hire doctrine of authorship since architectural plans did not fall within one of the statutorily prescribed categories of work. Nor was there the required express written agreement between Meltzer and the architect designating the architectural plans as a work made for hire. Any copyright interest

Neither party has suggested that we give Sections 101 and 102 retroactive effect, and we decline at this stage to do so. See Nimmer, §§ 1.11 and 5.03 [B] [2] [C]. The cases under section 26 [of the Copyright Act of 1909] do not distinguish between types of independent contractors. What is necessary is that the artist produce the work at the instance and expense of the employer (or commissioning party), Brattleboro, 369 F.2d at 567; Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213, 1216 (2nd Cir.), *cert. denied*, 409 U.S. 997, 93 S. Ct. 320, 34 L.Ed.2d 262 (1972) (employer the "motivating factor"). Those factors are present here.

*Id.*

27. *Id.* at 857.
28. *Id.* at 854.
29. *Id.* at 855.
which exists in the plans for the Meltzer home belonged to the architectural firm as preparers of the plans.\textsuperscript{30}

The court explained that under prior law the architect would be considered the owner of the drawings since the builder, not Meltzer, was the commissioning party and the pattern of dealings between the builder and the architect made it clear that, as between them, the intention was for the architect to retain ownership of the copyright.\textsuperscript{31} The court also rejected Meltzer's claim to joint ownership of the plans based on his creative input because the architect, not Meltzer, had "fixed" the idea in the drawings.\textsuperscript{32}

A similar view is presented in \textit{Mister B. Textiles, Inc. v. Woodcrest Fabrics, Inc.}\textsuperscript{33} An employee of the plaintiff Mister B Textiles, Inc., engaged the services of a private design firm, Nina Lewin, Inc., to create a textile design. Mister B Textiles paid the designer for the design, and filed for and obtained a copyright registration on the design. Woodcrest Fabrics, Inc., a competing firm, began using an identical fabric design and Mister B Textiles sued for copyright infringement. As a defense, Woodcrest contended that the private design firm, not Mister B Textiles, was the copyright owner and Mister B Textiles had no right to sue for infringement.\textsuperscript{34} The court noted that the work was performed after January 1, 1978 and the 1976 Copyright Act was controlling.\textsuperscript{35} The court recognized this as the first instance in which a federal court was asked to construe the "work for hire" provision of the new copyright law.\textsuperscript{36} The defendant argued that the amended copyright law "only allows the 'work for hire' doctrine to operate in situations involving the types of specifically enumerated works found in the statutory definition."\textsuperscript{37} If this argument is correct it "would mean that a fabric design produced by an independent contractor at the request of another party could not be a work for hire."\textsuperscript{38} The court understood this argument to mean that the independent contractor was the "author" and copyright owner of the work and the "person who contracted for production of the fabric design could only become the copyright owner upon a written transfer as required by the

\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 857.
\textsuperscript{33} [1981 Transfer Binder] \textit{COPYRIGHT LAW} (CCH) 16,216, 80 Civ. 6014 (S.D.N.Y. 1981) [hereinafter cited as \textit{COPYRIGHT LAW}].
\textsuperscript{34} \textit{Id.} at 16,218.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.} at 16,219.
\textsuperscript{37} \textit{Id.} at 16,218.
\textsuperscript{38} \textit{Id.}
The court examined the statute and the legislative history. Initially, the defendant's argument appeared correct and seemed to be borne out by the legislative history of P.L. 94-553, which described the operation of the work for hire provision:

The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.40

However, the legislative history of the Copyright Revision Act also revealed clearly that "under the Bill, as under present law, co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use or license the work. . . ."41 The court ruled that contribution to the fabric design by Ms. Lombardi, an employee of Mister B Textiles, made Mister B a co-owner of the copyright with standing to sue. The court found that the defendant's argument, even if correct, was not dispositive of the ownership question. The facts indicated that Ms. Lewin created the design with the participation of Ms. Lombardi. The court concluded that "Ms. Lombardi played a significant role in the creation of the plaintiff's copyrighted fabric."42 Ms. Lombardi's involvement in creating the fabric made her under section 201(a) one of the authors of a joint work. Ms. Lombardi and Ms. Lewin were owners of the copyright. Moreover, the court found that "since Ms. Lombardi was employed by the plaintiff when she participated in design . . . her rights in the copyright would pass to her employer" under section 201(b). Thus Mister B was co-owner of the copyright.43

The opinions in May, Meltzer and Mister B Textiles indicate adherence to Professor Nimmer's radical interpretation. Section

42. COPYRIGHT LAW, supra note 33, at 16,219.
43. Id.
201(b) may support this interpretation further by providing: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title. . . ." If the term "employer" were intended to include "independent contractor" within its meaning then there would have been no need to include the emphasized language. "Other person for whom the work was prepared" must refer to independent contractors meeting the special criterion of paragraph (2) of the works made for hire definition. Therefore, section 201(b) supports the view that the definition of works made for hire in section 101 creates mutually exclusive categories for work prepared by employees and work prepared by independent contractors.

Support for the Conservative Interpretation

To date no court has adopted the conservative interpretation, and only one case, Mister B Textiles, was squarely decided on the basis of the works made for hire provisions of the new act. May, a dispute over the ownership of architectural plans prepared in 1969, was decided on the basis of the old law. The court's comments on the new law were dicta. In Meltzer v. Zoller, there was no need for the court to apply the works made for hire provisions of the new act. The plans had been prepared prior to January 1, 1978 so the works made for hire provision of the old law should have been applied. The Meltzer court provided an alternate holding that the plaintiff was not the copyright owner even under the old law. However, if the plaintiff could not be considered the copyright owner under the old law, then a decision based on the new law would have had the same outcome under either the conservative or radical interpretation. The radical interpretation articulated by the court is again dicta.

The unjust results that are likely to flow from the radical interpretation of the works made for hire definition are well illustrated by Mister B Textiles. Mister B had been the motivating factor in development of a fabric design and had paid the design firm for its work. However, under the court's interpretation of the statute, the design work was not considered work made for hire. Except for the fact that one of Mister B's employees had been involved in the design work, Mister B would have been prevented from protecting its fabric design from an infringer. Creating joint ownership in co-authors prevented an unjust result in this case. But the joint ownership rational will not always produce a desirable result. For ex-

ample, if the copyright infringer in *Mister B Textiles* desired to continue producing the disputed fabric, it could negotiate a copyright license with Mister B's design firm. As a co-owner of the copyright, the design firm would have the legal right to license the copyrighted work subject to sharing its profits with Mister B, a joint owner of a copyright. Thus, Mister B is left with no adequate remedy to protect its work under the copyright law except outbidding the infringer in negotiations with the design firm. Such a windfall for the independent contractor is manifestly unfair to the party who commissioned and paid for the work.

It may be argued by those supporting the court's rationale in *Mister B Textiles* that Mister B could have protected itself by obtaining a copyright assignment from the design firm as a contract condition. It will be seen from the discussion below that such an assignment may not protect the assignee's copyright interest. Also, in *Mister B Textiles* the court's consideration of the legislative history of the act was very abbreviated. The statements from the legislative history relied upon by the court are ambiguous and will support either interpretation of works made for hire. Closer examination of the House Report reveals that Congress did not intend to substantially change the law with respect to independent contractors. Perhaps what is most instructional in the House Report is that which was not said. Under the 1909 Act and the existing case law, "employer" had come to mean the party for whom a work was prepared and "employee" had come to include independent contractors as well as workers under an employer's constant supervision.45 No mention is made of any change in the law with respect to the meaning of "employers" or "employees" and no mention is made of "independent contractors." If Congress had intended to make sweeping changes with respect to works prepared by independent contractors, it would have been clearly mentioned in the report. The court in *Mister B Textiles* relied on the House Report which drew a "statutory line between those works written on special order or commission that should be considered as 'works made for hire,' and those that should not." The House Report stated that the bill provided a definition that "represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances."46

The last clause, "under certain circumstances," makes the last

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45. See notes 10-11 *supra*.
sentence indefinite. If works in the listed categories can be considered works made for hire only "under certain circumstances," does this mean that they should ordinarily not be considered works made for hire? If works in the specific categories are ordinarily not considered works made for hire, does this imply that works not in the listed categories should be considered works made for hire? The conservative approach answers both questions affirmatively. The case law presumption that copyright to a work which is made at the instance and expense of a commissioning party is owned by the commissioning party remains in effect for all works except those specifically listed in paragraph (2) of the definition. For those specifically listed works, the case law presumption is reversed and copyright to those works will not be presumed the property of the commissioning party absent a signed writing.

In Frontino v. Avon Products, Inc.,47 Avon Products used the services of a printing firm to prepare a package design for one of its products. The printing firm obtained the services of a free-lance package designer for the art work and the package designer employed other free-lance artists. A dispute arose over the fees to be paid the free-lance designer and he sued Avon for copyright infringement claiming that he was the copyright owner. The court found that the free-lance artist was an independent subcontractor employed by the printing firm. The copyright belonged to Avon Products, the employer of the printing firm.48

This application of the works made for hire doctrine resolves problems that might otherwise arise between a commissioning party and a party preparing the work who are not in privity of contract. Congress intended that as to works made for hire, "the employer or other person for whom the work was prepared" was to be considered the author.49 In Frontino the person at whose instance and expense the work was prepared was not the immediate employer of the party preparing the work. Absent the expression of a clear congressional intent to change the law, an interpretation in close conformity with existing case law should be presumed. Thus, the correct interpretation of the statute is that copyright to most works prepared by independent contractors, where the intentions of the parties cannot be ascertained, will be vested in the commissioning party. Policy reasons for this result and the injustice that might result from an improper interpretation of the work

48. Id. at 714.
made for hire definition can best be illustrated by specific examples.

**Example I**

A rural fire district hires an architectural firm to design a new fire station. No written contract is prepared but the fire district agrees to pay the architect for the work at regular intervals as it is completed and billed out. Working drawings of the fire station are prepared and the architect's bill for $20,000 is paid after the fire district obtains a copy of the working drawings. A copy of the drawings are submitted to the county zoning authority and additional copies are prepared for contractors interested in submitting bids for the fire station construction. The architectural firm would ordinarily take care of these details and supervise the construction of the fire station, and would bill the client accordingly. However, friction has developed between the fire district and the architect and the fire district hires a local engineer to supervise the construction. The architect threatens to sue the fire district and any contractor who makes a copy of its working drawings unless it is retained for the remainder of the project. The architect claims that the working drawings were specially commissioned works not falling into one of the statute's listed categories. As such, the drawings may not be considered works made for hire and the architectural firm therefore owns the copyright.\(^{50}\)

**Example II**

A restaurant owner hires a private advertising firm to develop a restaurant logo picturing a steer and his name, which he intends to use on a sign in front of his restaurant and in advertising literature. There is no written contract. The advertising firm prepares an ink drawing which the restaurant owner likes. He pays the advertising agency the agreed-upon price of $1,000 and takes the drawing. He then uses the logo on his restaurant sign and in newspaper and television advertising. The advertising agency contacts the restaurant owner and informs him that unless it receives a royalty for each advertising use of the logo, it will sue for copyright infringement. The advertising agency claims to be the copyright owner of the logo, since the logo was a specially commissioned work prepared by an independent contractor.

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\(^{50}\) For dicta indicating the possibility of such a result, see 618 F.2d at 1368-69.
**Example III**

In a slight variation, assume that a private draftsman had created the logo and had assigned all his copyright in the logo to the restaurant owner in a signed writing as required by section 204 of the 1976 Copyright Act. The restaurant owner registers the copyright and the assignment and places the proper copyright notice on all uses of the logo and also obtains a federal trademark registration. At the end of thirty-five years the children of the draftsman terminate the copyright assignment as provided by section 203.51

The draftsman’s children as copyright owners demand that the restaurant owner made no further copies of the logo. The restaurant owner argues that he is the owner of the registered trademark and abandonment would be extremely costly in terms of lost advertising and good will. The new copyright owners reply, “you may continue to use the trademark so long as you do not make any future copies of the logo, or you may agree to pay copyright royalties.”

If the logo had been a work made for hire the problem would not have occurred, since works made for hire are specifically excluded from the termination right of section 203. However, if the radical interpretation of the statute is followed, the creator, or his heirs, of any commissioned work not included in the innumerated categories may recapture his copyright ownership in the work after thirty-five years. Moreover, any purported relinquishment of the creator’s termination right is ineffective.52

**Example IV**

A textile manufacturer wants to introduce a fabric with an In-

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51. 17 U.S.C. § 203, Termination of Transfers and Licenses Granted by the Author, provides in pertinent part:
   
   (a) Conditions for Termination.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by a will, is subject to termination under the following conditions:
   
   (1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author’s termination interest.
   
   (2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren.

   Id. (emphasis added).

dian art pattern and commissions an east coast design firm to produce the pattern. The design firm contracts with an Indian craftsman in Arizona to produce the pattern. The design firm gives the pattern to the textile manufacturer, warrants that it is the "copyright owner" of the design pattern, and assigns all its copyright interest to the textile manufacturer. The textile manufacturer registers the copyright and assignment and tools up to produce the fabric. A few months after the new fabric appears on the market, the Indian craftsman files for copyright infringement, seeking an injunction to prevent any further copying of the fabric design, unless substantial royalties are granted.

**Example V**

Aircraft Company has contracted with Airline to design and manufacture a fleet of supersonic passenger aircraft. Aircraft Company contracts with an aerospace professor at State University to design fasteners to attach the aircraft skin to the frame. The aerospace professor hires a free-lance draftsman to prepare working drawings of his fastener design. The professor is paid for his work and assigns all of his copyright interest in the design and specifications to Aircraft, but forgets to get an assignment from his draftsman. Aircraft makes photocopies of the plans received from the professor and incorporates them into its own production drawings. After the first few airplanes have been constructed, the professor mentions to the draftsman that his drawings are being used in the multi-million dollar project. The draftsman brings suit against Aircraft for copyright infringement and seeks damages, as well as an injunction to prevent further construction of the aircraft. The draftsman claims to be owner of the copyright in the plans, since the plans were specially commissioned works not falling within the specified categories of paragraph (2) of the works made for hire definition.

The above examples demonstrate compelling policy reasons for adopting an interpretation of the work made for hire provisions which is consistent with the previous case law.

Examples I and III illustrate how the use of the radical interpretation results in a commissioning party's not receiving what he bargained for. A set of construction plans or a sheet of advertising copy has little value if the owner cannot freely copy it. The commissioning party might have protected himself with a written assignment of copyright from the independent contractor. However, it seems undesirable to create a rule of law which imposes such a severe penalty on a party who has already paid for the work. If the
conservative interpretation of the statute were followed, the work prepared by the independent contractor is within the definition of work made for hire under paragraph (1). In the absence of evidence of the intentions of the parties, the commissioning party is considered the author and owner of the work. Moreover, this does not create an undue hardship for the independent contractor who may resort to various mechanic's or artisan's liens to recover any unpaid balance due for his services.

The conservative interpretation of the statute allows certain independent contractors to retain ownership of their copyright under conditions which would ordinarily not create a hardship for the commissioning party. For instance, when a writer makes a contribution to a "collective work" (one of the enumerated categories of specially ordered or commissioned works under paragraph (2) of the definition) he retains the copyright to his contribution in the absence of a signed writing. Thus, if a future Ernest Hemingway is commissioned to write an article about trout fishing for *Field and Stream Magazine*, he will not lose his copyright in the article and will be able to include it in his own publication of short stories at a later date. *Field and Stream* owns copyright to the magazine as a collective whole, but may not republish or license copying of separate articles.

Example III shows that the radical interpretation of the work made for hire provision would make an independent contractor's copyright interest less than completely alienable because of the act's recapture provision. An independent contractor cannot convey away all of his future copyright interest to the commissioning party. This poses a formidable problem for works of long term value such as trademarks, paintings, and photographs. If the radical interpretation is adopted, the result may be that independent contractors will not be commissioned to prepare work of continuing value. Under the conservative interpretation most works of independent contractors will be considered works made for hire and exempt from the recapture provisions.

Perhaps the most detrimental effect which could result from adopting the radical interpretation of work made for hire is the uncertainty that would accompany commercial dealings with independent contractors. Even if a commissioning party had the foresight to obtain a copyright assignment and other warranties from the independent contractor with whom he deals, it will afford him no protection against unknown independent subcontractors. Large business interests would cease dealing with independent contractors and perform all work possible with in-house personnel.
If property cannot be exchanged with certainty, then commerce will suffer. Under the existing case law embraced by the conservative interpretation, no such problem is encountered. A subcontractor unknown to a commissioning party is considered an employee and his contributions to a work are included in the commissioning party's copyright.53

Thus, the conservative interpretation of the work made for hire provisions is proper in view of the language of the statute and is justified by a number of important policy considerations.

A conservative interpretation of a statute is generally preferable to one which changes the law and creates uncertainty in business dealings. It would reverse the existing case law presumption in those few cases where the independent contractor is most vulnerable, and give the courts discretion to decide when a presumption of copyright ownership in the commissioning party is overcome. Moreover, the radical interpretation has serious defects. It is paternalistic and interferes with the parties' right to enter into contracts. Its recapture provisions prevent free alienation of property. It disrupts commercial practices because of the threat of lawsuits brought by undisclosed authors. It is generally unfair to the party who has initiated and paid for the work. Finally, the radical interpretation provides an inflexible mechanical rule for determining copyright ownership in place of the prior rule involving a rebuttable presumption.

COPYRIGHT CREATION AND FORFEITURE

Co-ownership of a copyright by parties who both contribute to the underlying work is closely related to the work made for hire doctrine. If the radical view is followed, co-ownership will become a central issue in many disputes. Section 201(a) of the Copyright Act of 1976 provides: "The authors of a joint work are co-owners of copyright in the work."54 A "joint work" is defined in section 101 as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."55 The meaning of "joint work" is amplified in the House Report on the Copyright Act of 1976:

The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either "inseparable" (as in the case of a novel or paint-

55. Id. at § 101.
ing) or “interdependent” (as in the case of a motion picture, opera, or the words and music of a song). The definition of “joint work” is to be contrasted with the definition of “collective work,” also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of “separate and independent works... into a collective whole.”

In *Mister B Textiles, Inc.*, the plaintiff, a textile manufacturer, was found to be co-author of a joint work with the right to sue for copyright infringement. However, one’s co-ownership of a copyright may not be sufficient to prevent other parties from copying a work, since the other co-owner may copy or reproduce the work or license third parties to copy the work. A co-owner may prepare derivative works based upon the copyrighted work and distribute copies of the copyrighted work to the public. A joint owner cannot be liable for copyright infringement to another joint owner, since one cannot infringe one’s own copyright. The duties of one co-owner to another co-owner of the copyright are those of a tenant in common. In the absence of an agreement to the contrary, all joint authors share equally in the ownership of the joint work, even where it is clear that their respective contributions are not equal.

A commissioning party able to establish that it is co-owner of a copyright may still be required to account to the other co-owner for his profits from the use of the copyright. Since a finding of co-ownership of copyright has the effect of splitting title, the use of this concept would be of only limited utility in preventing harsh results under the radical interpretation.

**CO-OWNERSHIP OF COPYRIGHT**

The new copyright act has liberalized many of the formal re-

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59. There is also no need for a specific statutory provision concerning the right and duties of the co-owners of a work; case law on this point is left undisturbed. Under the bill, as under the present law, co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits. *H.R. Rep., supra* note 3, at 121, [1976] U.S. CODE CONG. & AD. NEWS at 5736.

Under prior law, copyright to a work was lost by publishing the work without a proper copyright notice. However, under present law, the harsh effect of publishing without notice has been lessened by a number of curative provisions:

Sec. 405. Notice of Copyright: Omission of Notice

(a) Effect of Omission on Copyright.—The omission of copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) The notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

The effect of this section, especially of paragraph (2), may be to give copyright owners a five-year grace period to correct the omission of copyright notice from published copies.

Under prior law, many charges of copyright infringement were defeated by a showing of publication of the work without notice. With the curative provisions of the new act, this defense will be much more difficult to sustain. In addition, since many unpublished works created prior to the act were given statutory copyright as of January 1, 1978, advocates of the radical interpretation may argue that the copyright to those works which were prepared by independent contractors are owned by the independent

61. Nimmer, supra note 12, at § 2.02, 2-16.
CONCLUSION

Depending on the interpretation of the work made for hire provisions of the new act, the old act work made for hire doctrine may be either drastically altered or left substantially unchanged. The "radical" interpretation of the statute stated in Professor Nimmer's treatise and adopted by three district courts may be most easily inferred from the language of the statute. However, a careful analysis of the language and a number of policy considerations should lead courts to adopt a more conservative interpretation.

The radical view will necessitate the courts developing new legal doctrines to avoid harsh applications. A copyright rule analogous to the commercial law bona fide purchaser doctrine might be necessary to protect commissioning parties and copyright assignees from undisclosed subcontractors who later assert a copyright in the commissioned work. A novel interpretation of the work made for hire provisions of the statute will alter business contracts and general business practices and can be expected to produce considerable litigation.