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AUTHOR GENERALLY OWNS COPYRIGHT UNLESS EMPLOYEE OR "WORK FOR HIRE"

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In the course of their operations, many recreation and park agencies may utilize non-employees to create a wide range of publications, photographs, art work, videos and other media for their programs and services. Who is entitled to claim ownership in such works under federal copyright law?

As illustrated by U.S. Supreme Court opinion described herein, *Community for Creative Non-Violence v. Reid*, the individual who actually creates the work is generally considered the "author" of a particular work under federal copyright law. Specifically, a non-employee or "independent contractor," whether paid or unpaid, is generally considered the "author" of the work and, thus, entitled to copyright protection, unless the parties have expressly agreed in writing that a particular work created by a non-employee is a "work for hire." However, where the individual is an employee and the work is produced within the scope of employment, the employer is generally considered the "author" for copyright purposes.

As a result, in determining whether the agency or a particular individual is entitled to claim copyright in a publication or other work, courts will ascertain whether or not an employment relationship exists between the agency and the individual. In so doing, courts will consider "the hiring party's right to control the manner and means by which the product is accomplished." In addition, courts will consider the following factors:

> actual control over the details of the work, the hired party's occupation, local custom, the skill required, source of tools, work location, length of employment, the right to assign more work, the hired party's discretion over work hours, payment method, the regular business of the hiring party, the parties' understanding, the hiring party's role in hiring assistants, tax treatment, employee benefits, and whether the hiring party is in business.

For federal copyright purposes, the critical issue is, therefore, "whether sufficient control is present to establish an employer-employee relationship" between the agency and the individual writer, photographer, or artist, particularly where there is no expressed agreement designating a particular creation a "work for hire."

NON-EMPLOYEE AUTHOR?

In the case of *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989), the U.S. Supreme Court defined the "work made for hire" provisions of the Copyright Act of 1976 to include a "work prepared by an employee within the scope of his or her employment." In so doing, the Supreme Court noted the significance of the "work for hire" determination is establishing ownership of copyright under federal law.

> The contours of the work for hire doctrine therefore carry profound significance for freelance creators -- including artists, writers, photographers, designers, composers, and computer programmers -- and for the publishing, advertising, music, and other industries which commission their works.

Specifically, the "work made for hire" provisions of federal copyright law create an exception to the general rule that "copyright ownership vests initially in the author or authors of the work."

> As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.
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> The Act carves out an important exception, however, for "works made for hire." If the work is for hire, the employer or other person for whom the work was prepared is considered the author and owns the copyright, unless there is a written agreement to the contrary...

In this particular instance, the Community for Creative Non-Violence hired an artist to create a sculpture. Following its creation, both the artist and the organization claimed ownership of the copyright in the sculpture. The facts of the case were as follows:

> The Community for Creative Non-Violence (CCNV) is a nonprofit unincorporated association dedicated to eliminating homelessness in America. In the fall of 1985, CCNV decided to participate in the annual Christmas time Pageant of Peace in Washington, D.C., by sponsoring a display to dramatize the plight of the homeless.
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> [CCNV member and trustee Mitch] Snyder and fellow CCNV members conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a street side steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform "pedestal," or base, within which special-effects equipment would be enclosed to emit simulated "steam" through the grid to swirl about the figures. They also settled upon a title for the work --

“Third World America” -- and a legend for the pedestal: “and still there is no room at the inn."

Snyder made inquiries to locate an artist to produce the sculpture. He was referred to respondent James Earl Reid, a Baltimore, Maryland, sculptor. In the course of two telephone calls, Reid agreed to sculpt the three human figures. CCNV agreed to make the steam grate and pedestal for the statue. Reid proposed that the work be cast in bronze, at a total cost of approximately $100,000 and taking six to eight months to complete. Snyder rejected that proposal because CCNV did not have sufficient funds, and because the statue had to be completed by December 12 to be included in the pageant. Reid then suggested, and Snyder agreed, that the sculpture would be made of a material known as "Design Cast 62," a synthetic substance that could meet CCNV's monetary and time constraints, could be tinted to resemble bronze, and could withstand the elements. The parties agreed that the project would cost no more than $15,000, not including Reid's services, which he offered to donate. The parties did not sign a written agreement. Neither party mentioned copyright.

After Reid received an advance of $3,000, he made several sketches of figures in various poses. At Snyder's request, Reid sent CCNV a sketch of a proposed sculpture showing the family in a creche like setting: the mother seated, cradling a baby in her lap; the father standing behind her, bending over her shoulder to touch the baby's foot. Reid testified that Snyder asked for the sketch to use in raising funds for the sculpture. Snyder testified that it was also for his approval. Reid sought a black family to serve as a model for the sculpture. Upon Snyder's suggestion, Reid visited a family living at CCNV's Washington shelter but decided that only their newly born child was a suitable model. While Reid was in Washington, Snyder took him to see homeless people living on the streets. Snyder pointed out that they tended to recline on steam grates, rather than sit or stand, in order to warm their bodies. From that time on, Reid's sketches contained only reclining figures.

Throughout November and the first two weeks of December 1985, Reid worked exclusively on the statue, assisted at various times by a dozen different people who were paid with funds provided in installments by CCNV. On a number of occasions, CCNV members visited Reid to check on his progress and to coordinate CCNV's construction of the base. CCNV rejected Reid's proposal to use suitcases or shopping bags to hold the family's personal belongings, insisting instead on a shopping cart. Reid and CCNV members did not discuss copyright ownership on any of these visits.

On December 24, 1985, 12 days after the agreed-upon date, Reid delivered the

> completed statue to Washington. There it was joined to the steam grate and pedestal prepared by CCNV and placed on display near the site of the pageant. Snyder paid Reid the final installment of the $15,000. The statue remained on display for a month. In late January 1986, CCNV members returned it to Reid's studio in Baltimore for minor repairs. Several weeks later, Snyder began making plans to take the statue on a tour of several cities to raise money for the homeless. Reid objected, contending that the Design Cast 62 material was not strong enough to withstand the ambitious itinerary. He urged CCNV to cast the statue in bronze at a cost of $35,000, or to create a master mold at a cost of $5,000. Snyder declined to spend more of CCNV's money on the project.
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> In March 1986, Snyder asked Reid to return the sculpture. Reid refused. He then filed a certificate of copyright registration for "Third World America" in his name and announced plans to take the sculpture on a more modest tour than the one CCNV had proposed. Snyder, acting in his capacity as CCV's trustee, immediately filed a competing certificate of copyright registration.

Snyder and CCNV then commenced this action against Reid seeking return of the sculpture and a determination of copyright ownership.

The federal district court determined that "Third World America" was a "work made for hire" under federal copyright law ordered the sculpture's return to CCNV, the exclusive owner of the copyright in the sculpture. In so doing, the district court reasoned that "Reid had been an 'employee' of CCNV within the meaning of § 101(1) because CCNV was the motivating force in the statue's production. In the opinion of the district court, Snyder and other CCNV members "conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season," and "directed enough of Reid's effort to assure that, in the end, he had produced what they, not he, wanted."

The federal appeals court reversed this decision. In the opinion of the appeals court, "Reid owned the copyright because 'Third World America' was not a work for hire." In so doing, the federal appeals court found a "literal interpretation" of the Act," specifically section 101, created "a simple dichotomy in fact between employees and independent contractors." In this particular instance, the appeals court found that "Reid was an independent contractor" and, therefore, the "the work was not 'prepared by an employee' under § 101(1)." Moreover, the appeals court found that the sculpture a "work made for hire" under the second subsection of § 101 because the sculpture was "not one of the nine categories of works enumerated in that subsection, and the parties had not agreed in writing that the sculpture would be a work for hire."

The appeals court, however, suggested that "the sculpture nevertheless may have been jointly authored

by CCNV and Reid" and remanded (i.e., sent back) this case "for a determination whether the sculpture is indeed a joint work under the Act."

The U.S. Supreme Court granted CCNV's petition to review this decision and determine "the proper construction of the 'work made for hire' provisions" of federal copyright law.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

As cited by the Supreme Court, Section 101 of the 1976 Act provides that a work is "for hire" under two sets of circumstances:

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

In this particular instance, the Court found that the sculpture "does not fit within any of the nine categories of 'specially ordered or commissioned' works" enumerated in subsection 101(2). Further, the Court noted that "no written agreement between the parties establishes "Third World America" as a work for hire." Accordingly, the specific issue before the Court was "whether 'Third World America' is 'a work prepared by an employee within the scope of his or her employment' under § 101(1)." As noted by the Supreme Court, federal copyright law did not define these terms. In the "absence of such guidance," the Supreme court acknowledged that "[t]he starting point for our interpretation of a statute is always its language."

> The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.
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> In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.
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> Nothing in the text of the work for hire provisions indicates that Congress used the words "employee" and "employment" to describe anything other than "'the conventional relation of employer and employee.'" On the contrary, Congress' intent to incorporate

> the agency law definition is suggested by § 101(1)'s use of the term, "scope of employment," a widely used term of art in agency law.

The Supreme Court, therefore, "agree[d] with the Court of Appeals that the term 'employee' should be understood in light of the general common law of agency."

> To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101.

"In determining whether a hired party is an employee under the general common law of agency," the Supreme Court would "consider the hiring party's right to control the manner and means by which the product is accomplished."

> Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party... No one of these factors is determinative.

Applying these principles to Reid's production of "Third World America," the Supreme Court agreed with the federal appeals court that "Reid was not an employee of CCNV but an independent contractor."

> True, CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications. But the extent of control the hiring party exercises over the details of the product is not dispositive. Indeed, all the other circumstances weigh heavily against finding an employment relationship.
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> Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. Reid was retained for less than two months, a relatively short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work. CCNV paid Reid $15,000, a

> sum dependent on completion of a specific job, a method by which independent contractors are often compensated.
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> Reid had total discretion in hiring and paying assistants. Creating sculptures was hardly 'regular business' for CCNV. Indeed, CCNV is not a business at all.
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> Finally, CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.

Having found "Reid was an independent contractor," the Supreme Court found further that "Third World America" was not a "work for hire" because it did not satisfy the terms of § 101(2), viz., it was not one of the nine types of "specially ordered or commissioned" works enumerated as exceptions in § 101(2). Moreover, the parties in this particular instance had not "expressly agreed in a written instrument signed by them that the work shall be considered a work made for hire." The Supreme Court, therefore, held that "CCNV is not the author of 'Third World America' by virtue of the work for hire provisions of the Act."

In so doing, the Supreme Court agreed with the appeals court that "CCNV nevertheless may be a joint author of the sculpture if, on remand, the District Court determines that CCNV and Reid prepared the work 'with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.' 17 U. S. C. § 101." If that proved to be the case, the Supreme Court stated that "CCNV and Reid would be co-owners of the copyright in the work."

As a result, the Supreme Court concluded that "the district court incorrectly held the work for hire doctrine applicable to the dispute between Reid and CCNV over copyright in the sculptural work 'Third World America'." The Supreme Court, therefore, reversed the judgment of the district court in favor of CCNV and ordered "further proceedings consistent with this opinion, particularly, for comprehensive consideration whether the sculpture called 'Third World America' is a joint work and, if it is, for determination of the owners of copyright in the work."