

RECENT DEVELOPMENTS

THE WORK MADE FOR HIRE DOCTRINE UNDER THE COPYRIGHT ACT OF 1976: WHAT ABOUT THE INDEPENDENT CONTRACTOR?

When the Fifth Circuit Court of Appeals decided *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*¹ it created a split in the circuits on the issue of when an independent contractor is considered an employee for purposes of the "work made for hire" doctrine contained in the Copyright Act of 1976.²

Early common law dictated that one who commissioned an artist presumptively owned the copyright in the artist's creation.³ The Copyright Act of 1909⁴ codified that rule.⁵ Thus, the 1909 Act made an "employer" the author and initial copyright holder of "works made for hire."⁶ The statute, however, did not define either "employer" or "work made for hire."

Work prepared on special order or commission, *i.e.*, work done by an independent contractor, raised the issue of whether the person who commissioned such work was an "employer" under the statute and thereby entitled to the copyright.⁷ Courts consistently answered this in the affirmative. In a series of cases culminating in *Siegel v. National Periodical Publications, Inc.*,⁸ the Second Circuit developed a rule whereby the

1. 815 F.2d 323 (5th Cir. 1987).

2. 17 U.S.C. §§ 101-810 (1976).

3. *Dillman v. White*, 102 Fed. 892 (C.C.D. Mass. 1900). See O'Meara, "Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations, 15 CREIGHTON L. REV. 523 (1982).

4. Pub. L. No. 60 Stat. 1075 (1909).

5. See O'Meara, *supra* note 3. See also Angel & Tannenbaum, *Works Made for Hire Under S. 22*, 22 N.Y.L.S.L. REV. 209 (1976) (authors give thorough discussion of law under the 1909 Act).

6. 815 F.2d at 325. See 17 U.S.C. § 26 (1976).

7. See O'Meara, *supra* note 3, at 524.

8. 508 F.2d 909 (2d. Cir. 1974). The copyright law regarding independent contractors under the Copyright Act of 1909 began with a line of cases culminating in *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir.), *cert. denied*, 309 U.S. 686 (1939). There the court held that a patron who commissions an artist is presumed to have a copyright in the work unless the artist expressly reserved the copyright to himself. *Id.* at 31. The early cases do not even mention the work made for hire doctrine because they assumed that the commission contracts assigned the copyrights to the patron. See 815 F.2d at 325-26. The rights to renewal were more limited for an assignee than those given to an "employer" under the statute; therefore, the *Yardley* rule was actually inconsistent with the work made for hire doctrine contained in the 1909 Act. *Id.*

work made for hire doctrine applied to an independent contractor when that person created the work at the employer's "instance and expense."⁹ That is, when the employer was the "motivating factor" in producing the creation, the copyright vested in him.¹⁰ Under this rule the employer did not actually need to direct and supervise the work being prepared. He merely had to have the right to control the work process.¹¹

In *Murray v. Gelderman*¹² the Fifth Circuit further expanded the work made for hire doctrine of the 1909 Act. The author of a book contracted for complete control over the work. She claimed that she never would have taken the job if the employer had demanded a right to control her product. The author contended that her book was not a work made for hire because the usual "right to control" rules didn't apply to her.¹³ The *Murray* court disagreed with the author because such a rule would allow authors to circumvent the work made for hire doctrine by demanding artistic control as a condition of employment.¹⁴ Thus, the common law interpretation of the work made for hire doctrine under the Copyright Act of 1909 developed into a virtually irrebuttable presumption that anyone who paid another to create a copyrightable work was the statutory author and thereby entitled to a copyright in the product.¹⁵

Congress replaced the Copyright Act of 1909 with the Copyright Act of 1976.¹⁶ The new Act does not change the work made for hire doctrine

9. 508 F.2d at 914. The Second Circuit expressly applied the work made for hire doctrine of the 1909 Act for the first time to independent contractors in *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966). That court also applied the "instance and expense" test to an independent contractor-employer relationship. *Brattleboro* involved one newspaper suing another for using advertisement copy that plaintiff had prepared for merchants who later advertised in defendant's newspaper. The court found no infringement because the merchants who bought the ads were the "authors" under the statute and therefore held the copyright. *Brattleboro* could have been limited to its facts because the same judgment could have been reached by examining the probable intent of the newspaper advertising contract. *Id.* at 569.

In *Picture Musical, Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972), the Second Circuit dispelled any doubt as to whether the work made for hire doctrine applied to independent contractors. The *Picture Music* court affirmatively held that whoever commissioned a work was presumed the statutory author. *Id.* at 1217.

10. 508 F.2d at 914. See 457 F.2d at 1217.

11. 457 F.2d at 1216-17.

12. 566 F.2d 1307 (5th Cir. 1978).

13. *Id.* at 1311.

14. *Id.*

15. 815 F.2d at 327.

16. The effective date of the current Copyright Act was January 1, 1978. See 1 NIMMER & NIMMER, NIMMER ON COPYRIGHT § 5.03[a], at 5-10 (1986), for a discussion of why the identity of the author is of great importance.

as it applies to regular employees.¹⁷ Initial copyright ownership still rests in the employer of the creator¹⁸ because, unless the parties otherwise agree in writing, "the employer or other person for whom the work was prepared is considered the author" of a work made for hire.¹⁹

The new Copyright Act differs from its predecessor in that it defines "work made for hire." Under section 101 of the 1976 Act, work made for hire is either 1) a work prepared by an employee within the scope of his employment, or 2) a work specially ordered or commissioned for use in one of nine narrow categories accompanied by a written agreement that the product will be considered a work made for hire.²⁰ This definition has caused confusion among the circuits as to how the new statute applies to independent contractors.

Courts have developed three interpretations of the independent contractor issue under the 1976 Act. The first approach is the conservative interpretation.²¹ A few district courts give little weight to the statutory

17. The provisions of the 1976 Act relating to work made for hire include § 201:

a) **INITIAL OWNERSHIP.**—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors as a joint work are coowners of copyright in the work.

b) **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.

17 U.S.C. § 201(a),(b) (1977).

The court defines a "work for hire" in § 101:

(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 illustration, 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.

17 U.S.C. § 101 (1977).

18. 17 U.S.C. § 201(a).

19. 17 U.S.C. § 201(b).

20. See *supra* note 17.

21. See, e.g., *Community for Creative Non-Violence v. Reid*, 652 F. Supp. 1453 (D.D.C. 1987); *Peregrine v. Lauren Corporation*, 601 F. Supp. 828, 829 (D. Colo. 1985); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137, 141-42 (S.D.N.Y. 1983) (town of Clarkstown had right to control defendant's preparation of a youth court handbook and manual, therefore the town was a statutory employer).

change and thus follow the pre-1976 law in applying the work made for hire doctrine.²² These courts first do a traditional work for hire analysis by using the "instance and expense" and "right to control" tests to determine whether the seller is an employee and the buyer is an employer under section 101(1).²³ If the buyer is an employer, and therefore owner of the copyright under the traditional analysis, then these courts look to see if the disputed work falls within the nine categories in section 101(2).²⁴ If so, then the buyer will be an employer-author only if there is a written agreement giving the buyer a copyright. The effect of section 101(2) under the conservative interpretation is to provide a small group of independent contractors protection from the expansive common law doctrine of the 1909 Act.²⁵

In *Aldon Accessories Ltd. v. Spiegel, Inc.*²⁶ the Second Circuit provides the second, and most prevalent, interpretation of the work made for hire doctrine under the 1976 Act. Aldon Accessories Ltd. designed and marketed figurines. The company decided to produce a line of statuettes depicting mythological creatures. Arthur Ginsberg, a principal of Aldon, contacted a Japanese firm to help design and produce the statuettes.²⁷ Production took three days and Ginsberg was with the artists every moment. He stood over the artists and directed them until they produced

22. See O'Meara, *supra* note 3. The author discusses the conservative interpretation and a literal reading of the statute, which he calls the radical interpretation. The article favors the conservative approach because an interpretation of the work made for hire doctrine that is drastically different from the 1909 Act "will alter business contracts and general business practices and can be expected to produce considerable litigation." *Id.* at 542. In addition, the author bases his conservative approach on the legislative history of the 1976 Act—or, more appropriately, what is not said in the legislative history. Congress did not discuss any change in the law with respect to the meaning of "employers," "employees," or "independent contractors." The author thus concludes that if Congress had intended to make radical changes with respect to works prepared by independent contractors, the House Report would have clearly detailed such changes. *Id.* at 533. See also H.R. REP. NO. 1476 & S. REP. NO. 437, 94th Cong., 2d Sess., 47-59 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5660-63 [hereinafter H.R. REP. & S. REP.]. But see *Easter Seal Soc. v. Playboy Enterprises*, 815 F.2d at 331 for a criticism of the conservative interpretation.

23. See *supra* notes 8-10 and accompanying text.

24. 815 F.2d at 331.

25. *Id.*

26. 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984). *Accord* Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co., 810 F.2d 410 (4th Cir. 1987); *Evans Newton, Inc. v. Chicago Systems Software*, 793 F.2d 889, 894 (7th Cir.), cert. denied, — U.S. —, 107 S. Ct. 434 (1986); *M&A Associates, Inc. v. VC, Inc.*, 657 F. Supp. 454 (E.D. Mich. 1987); *Sandwiches, Inc. v. Wendy's Int'l., Inc.*, 654 F. Supp. 1066 (E.D. Wis. 1987); *Nadel & Sons Toys Corp. v. Shaland Corp.*, 657 F. Supp. 133 (S.D.N.Y. 1987).

27. 738 F.2d at 549.

something he accepted.²⁸

Aldon Accessories eventually marketed copies of this statuette. Spiegel, Inc., began selling similar figurines. Aldon Accessories sued for copyright infringement and won at trial.²⁹ On appeal, the Second Circuit held that despite Aldon Accessories' use of independent contractors to create the figurines,³⁰ it owned the copyright under the work made for hire doctrine because Ginsberg actually participated in and controlled the creative process.³¹

The *Aldon* court saw nothing in the 1976 Act or its legislative history that indicated a Congressional intent to dispense with the law under the 1909 Act regarding the concept of "employee" and "scope of employment."³² Congress, however, did apparently feel that the "right to control" test of the prior law worked an injustice in situations where the independent contractor did all the work and the hiring party did little or nothing.³³ Hence, the *Aldon* court fashioned a new work made for hire test: whether the contractor is "independent" or is so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship exists.³⁴ The latter is covered by section 101(1).³⁵

In *Evans Newton Inc. v. Chicago Systems Software*³⁶ the Seventh Circuit followed the Second Circuit's interpretation of new work made for hire doctrine. Evans Newton provides record keeping systems to educational institutions. In 1979 it developed a management program for use with programmable microcomputers. The president of Evans Newton wrote the guidelines and programming specifications, including coding systems. Chicago Systems provides custom programming services in addition to designing and selling software. Evans hired Chicago Systems to provide the computer programming and manual of operations for its project. After finishing work for Evans Newton, Chicago Systems attempted to market its own competing computer program and manual. At trial,

28. *Id.* at 550.

29. *Id.* at 549.

30. *Id.* at 551.

31. *Id.* at 552. Ginsberg is a regular § 101(1) employee. Therefore, the copyright passed through him to his employer, Aldon Associates, by operation of § 201(b).

32. *Id.* See Nimmer, *supra* note 16, at § 5.03[B][1].

33. *Id.* See H.R. REP. & S. REP., *supra* note 22, at 5737.

34. 738 F.2d at 553.

35. *Id.*

36. 793 F.2d 889 (7th Cir. 1986).

Evans successfully sued Chicago Systems for, among other things, copyright infringement.³⁷

On appeal, Chicago Systems argued that it owned a copyright in the program because it was an independent contractor and its product, therefore, was not work made for hire under the 1976 Act. The Seventh Circuit disagreed and cited the *Aldon* actual control test.³⁸ The appellate court recognized that Evans Newton supervised and directed the work, and that Chicago Systems merely used its programming skills to produce the work according to Evans Newton's specifications.³⁹ Thus, Chicago Systems was an "employee" under section 101(1) and its product was a work made for hire under section 201(b).

In *Brunswick Beacon v. Schock-Hopchas Publishing Co.*⁴⁰ the Fourth Circuit also adopted the *Aldon* actual control test to determine whether independent contractors were "employees" under the new work made for hire doctrine. Advertisers hired employees of a local newspaper, the *Beacon*, to develop advertising layouts to be used in the newspaper. The *Beacon* placed a notice of copyright on the ads. A competing newspaper reproduced the same ads in its paper, deleting the *Beacon's* copyright notice.⁴¹ The *Beacon* successfully sued its competitor for copyright infringement.

The court determined that nothing in the facts of the case suggested that the *Beacon's* employees who prepared the advertisements were temporary "employees" of the advertisers even though they were putative independent contractors.⁴² The advertisers told the *Beacon* what kind of ad they wanted, but there was no suggestion that the advertisers supervised *Beacon* employees as they created the advertisements or directed the way in which those employees completed the work. Because the advertisers did not exercise their right to control the creative process, the copyright in the advertisements belonged to the *Beacon* under the new work made for hire doctrine.⁴³

Recently, in *Easter Seal Society for Crippled Children and Adults of*

37. *Id.* at 891.

38. *Id.* at 894.

39. *Id.* See *infra* notes 60-63 and accompanying text.

40. 810 F.2d 410 (4th Cir. 1987).

41. *Id.* at 412.

42. *Id.* See *supra* note 8. The *Brattleboro* case, decided under the 1909 Act, involved facts similar to *Brunswick Beacon*. The effect of the Copyright Act of 1976 and the *Aldon* actual control test is demonstrated by the contrary results in these newspaper cases.

43. *Id.*

*Louisiana, Inc. v. Playboy Enterprises*⁴⁴ the Fifth Circuit broke new ground and explicitly established a third interpretation of the work made for hire doctrine of the 1976 Act. The Easter Seal Society (the "Society") contracted with the New Orleans public television station (PBS) for a staged "Mardi-Gras-style" parade for use in the National Easter Seals Telethon. The parties did not discuss copyrights. During production, the Society's representative suggested particular scenes to look for and camera angles to use in filming the parade. The PBS director supervised all PBS employees and controlled all technical matters. PBS post-produced the segment, and it subsequently aired nationally.⁴⁵

Some time later, PBS sent a copy of the tape to a Canadian producer upon request. The Canadian producer then used portions of the tape in an "adult" film *Playboy* broadcasted nationally.⁴⁶ The Society sued *Playboy* for copyright infringement. The district court ruled in favor of *Playboy* and held that PBS was not an "employee" of the Society under the Copyright Act of 1976.⁴⁷

The Fifth Circuit Court of Appeals affirmed this opinion, using what it termed a "literal interpretation" of the 1976 Act.⁴⁸ The court held that a work is "made for hire" under the Copyright Act of 1976 if and only if the independent contractor is an employee within the meaning of agency law,⁴⁹ or the employer and independent contractor comply with the re-

44. 815 F.2d 323 (5th Cir. 1987).

45. *Id.* at 324.

46. *Id.* at 325. The film, entitled "Candy, the Stripper," was shown four times on cable television in May 1983. One or more viewers in the New Orleans area recognized themselves in the Mardi Gras footage used in the film.

47. *Id.* at 325.

48. *Id.* at 334. The court states that the literal interpretation is implicit in a number of cases. *Id.* at 329. See, e.g., *May v. Morganelli-Heumann & Associates*, 618 F.2d 1363, 1368 n.4 (9th Cir. 1980); *Whelan Associates v. Jaslow Dental Lab, Inc.* 609 F. Supp. 1307, 1319 (E.D. Pa. 1985), *aff'd on other grounds*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 877 (1987); *Everts v. Arkham House Publishers, Inc.*, 579 F. Supp. 145, 148 (W.D. Wis. 1984); *Childers v. High Society Magazine, Inc.* 557 F. Supp. 978, 984 (S.D.N.Y. 1983); *BPI Systems, Inc. v. Leith*, 532 F. Supp. 208, 210 (W.D. Tex. 1981); *Mister B. Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21, 24 (S.D.N.Y. 1981); *Meltzer v. Zoller* 520 F. Supp. 847, 854-55 (D.N.J. 1981).

49. The Restatement of Agency Law reads:

§ 220. 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.

(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;

quirements of section 101(2).⁵⁰ The court did not consider PBS an employee of the Society under agency law, and the parties did not comply with section 101(2) because PBS did not give away its copyright in writing. PBS, therefore, retained a copyright in the Mardi Gras film.

The *Easter Seal* opinion first criticized the conservative interpretation and the Second Circuit's approach in *Aldon* before endorsing the literal interpretation. The conservative approach all but discounts the effect of the statutory change in the 1976 Act.⁵¹ The *Easter Seal* court felt that Congress had intended to "tighten up" the work made for hire doctrine and, therefore, refused to follow the pre-1976 Act conservative approach.⁵² The court noted the incongruous result reached by the conservative interpretation of section 101(2).⁵³ That approach effectively gives special protection to nine narrow categories of workers when such protection would be more appropriate for others.⁵⁴ That is, the court wondered why the author of "answer material for a test" should be guarded from the traditional, expansive work made for hire doctrine when a sculptor or musician is not.⁵⁵

After denouncing the conservative approach, the *Easter Seal* court criticized the Second Circuit's *Aldon* opinion.⁵⁶ The *Easter Seal* court deemed the *Aldon* actual control test a compromise between the "literal" and "conservative" approaches.⁵⁷ The Fifth Circuit views this approach as unnecessary because an employer who exercises the requisite control of the creative process will be a statutory co-author anyway.⁵⁸ A co-author has a copyright in the work and thus can sue for copyright infringement.⁵⁹

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- (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;

RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

50. 815 F.2d at 334-35.

51. *Id.*

52. *See supra* notes 21-24 and accompanying text.

53. 815 F.2d at 331.

54. *Id.*

55. *See supra* notes 21-24 and accompanying text for an explanation of the effect of the conservative interpretation.

56. 815 F.2d at 331. *See supra* note 17.

57. *Id.* at 331-34. *See supra* notes 32-35 and accompanying text for a discussion of the operation of the actual control test.

58. *Id.* at 333.

59. *Id.* The court cites *Mister B. Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21, 24

The *Easter Seal* court also criticized the *Aldon* approach because it fails to create uniformity.⁶⁰ The court used the facts of *Aldon* itself to demonstrate how the employer there could later enlist the independent contractor to make additional mythological statuettes based on the contractor's knowledge of what the employer likes. The employer would lose a subsequent infringement suit based on the actual control test.⁶¹ Hence, according to the Fifth Circuit, the *Aldon* interpretation makes business arrangements difficult to predict.⁶²

Finally, the *Easter Seal* court criticized the *Aldon* actual control test because it can "gradually slide" into the old "right to control" test of the 1909 Act.⁶³ The court cited *Evans Newton* to support this proposition.⁶⁴ The Fifth Circuit did not see any evidence in *Evans Newton* that the employer "actually controlled" the independent contractor's production of the computer program or manual.⁶⁵ The Seventh Circuit in *Evans Newton*, however, concluded without discussion that the district court's finding that the employer "supervised and directed the work" was not clearly erroneous.⁶⁶ Thus, the *Easter Seal* court denounced the *Aldon* actual control test as too easily modified and not supported by the actual language of the statute.⁶⁷

In support of its own literal interpretation, the Fifth Circuit relies primarily on the actual language of the statute. The court views this approach as the only one that makes sense of the nine narrow categories delineated in section 101(2).⁶⁸ The court also favors this literal interpre-

(S.D.N.Y. 1981), as a case using the co-author theory to allow an employer to sue for copyright infringement. Note, however, that this assertion does not deal with the case in which the independent contractor/co-author licenses or gives away his copyright. Thus, a putative employer would not be satisfied to share co-authorship with the independent contractor in all instances because he would lack exclusive control.

60. 815 F.2d at 333.

61. *Id.* The validity of this assertion is evidenced by the divergent results reached in *Evans Newton* and *Brunswick Beacon*. See *supra* notes 36-43 and accompanying text. The amount of control exercised by the employers in both cases, *i.e.*, both employers told the independent contractor what results they desired, is difficult, if not impossible, to distinguish.

62. 815 F.2d at 333.

63. *Id.* at 334.

64. *Id.*

65. *Id.* See *supra* notes 33-39 and accompanying text.

66. 815 F.2d at 334.

67. *Id.*

68. *Id.* at 335. The court also cites the H.R. REP. & S. REP., *supra* note 22, as supporting its interpretation. The court, however, admits that the legislative history is "highly ambiguous" and only somewhat supports their position. 815 F.2d at 329. While citing the entire legislative history of

tation because it unites the work made for hire doctrine with the comparatively settled law of agency.⁶⁹ The Fifth Circuit urges federal courts to adopt state agency law as it is espoused in the Restatement of Agency Law.⁷⁰ The court reasoned that this approach gives all parties the greatest predictability and provides a "moral symmetry" in that an employer will be a statutory "author" only if he is responsible for the negligent acts of the independent contractor.⁷¹

As a result of the Fifth Circuit's holding in *Easter Seal* courts are now faced with three distinct interpretations of the work made for hire doctrine under the Copyright Act of 1976: The conservative approach, the *Aldon* actual control approach, and the literal approach. The *Easter Seal* opinion is a bold step in that the Fifth Circuit chose to break with the Second Circuit, which is considered the *de facto* copyright court of the United States.⁷² The Fifth Circuit not only has broken with the Second Circuit but has radically changed the work made for hire doctrine as it has been known in the twentieth century. Whether such a departure from precedent, based on ambiguous statutory language and legislative history, is wise is yet to be determined. One can only wait, intrigued, to discover how this conflict is ultimately resolved.

Steven E. Garlock

the work made for hire doctrine of the 1976 Act, the court points to no specific language which supports its interpretation.

Although disagreeing with his approach, the court indicates that Professor Nimmer also supports their interpretation. See Nimmer, *supra* note 16, at §§ 5-12.

But see 815 F.2d at 330. The court admits that the language of § 201(b), "the employer or other person for whom the work was prepared is considered the author," sounds like an affirmation of the 1909 Act. *Id.* Thus, the court recognized their own interpretation's weakness yet concluded the literal approach is still superior.

69. 815 F.2d at 335.

70. *Id.* See *supra* note 49.

71. 815 F.2d at 335.

72. *Id.* at 325.