COMMENTS

Free Lance Artists, Works for Hire, and the Copyright Act of 1976*

Congress intended for the Copyright Act of 1976 to protect commissioned artists from work for hire contracts. Publishers, however, regularly confront artists with work for hire contracts as a condition of employment. This comment identifies the manner in which publishers apply the work for hire provision contrary to congressional intent. It then analyzes the financial hardships that artists face as a result of this misapplication. Finally, it proposes amendments to the Copyright Act that would solve this problem.

INTRODUCTION

The Copyright Act of 1976 (New Act)[1] has narrowed the definition of works "made for hire." Under the New Act, a work made for hire is one that is prepared by an employee within the scope of her employment, or created pursuant to a special order or commisson.[2] Under prior law, most courts presumed that copyright in a commissioned work vested in the commissioning

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[1] 17 U.S.C. §§ 101-810 (Supp. III 1979) [hereinafter cited as New Act].

[2] *Id.* § 101. The employer or commissioning party is considered the author of a work made for hire. Since copyright vests in the author, *id.* § 201(a), the employer, rather than the employee, owns the copyright in the work. The designation of a work as made for hire also determines copyright renewal rights and duration, the existence of termination rights, and in some cases, eligibility of the work for United States copyright protection. *See generally* Angel & Tannenbaum, *Works Made For Hire Under S. 22,* 22 N.Y.L. SCH. L. REV. 209 (1976).

party unless the artist[3] expressly reserved the copyright.[4] Under the New Act, however, only certain enumerated commissioned works are considered works made for hire, and then, only if the artist and commissioning party agree to that treatment.[5]

These statutory changes have altered the manner in which publishers use work for hire contracts.[6] Most significantly, pub-

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[3] The term "authors" in the constitutional sense (*see* U.S. CONST. art. I, § 8, cl. 8, set forth in note 17 *infra*) includes artists, composers, cartographers, architects, photographers, sculptors, and compilers, as well as writers of prose and poetry, dramatic and otherwise. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.06[B], at 1-38 (rev. ed. 1981). Throughout this comment the term "artist" will be used to describe the creator of any copyrightable medium.

[4] *See* notes 18-20 and accompanying text *infra*.

[5] The Coyright Act of 1909 controlled copyrights before 1978. 17 U.S.C. §§ 1-216 (1970) (revised by Pub. L. No. 94-553, tit. I, § 101, 90 Stat. 254). The 1909 Act did not provide for commissioned works or works made pursuant to special order. Courts, however, developed the general principle that in the absence of an express contractual reservation of copyright in the free-lance artist, the copyright would vest in the commissioning party. *See, e.g.*, Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965); Yardley v. Houghton Mifflin Co., 108 F.2d 28, 31-32 (2d Cir. 1939). The New Act allows the commissioned artist to retain the copyright unless the work falls within one of nine enumerated categories *and* the parties agree to treat the work as one made for hire. *See* 17 U.S.C. § 101(b) (Supp. III 1979). Section 101 of the New Act limits the "for hire" status of specially ordered or commissioned works to:

(1) a contribution to a collective work;
(2) a part of a motion picture or other audio-visual work;
(3) a translation;
(4) a supplementary work;
(5) a compilation;
(6) an instructional text;
(7) a test;
(8) answer material for a test;
(9) an atlas.

Id. § 101. *But see* O'Meara, *'Works Made For Hire' Under the Copyright Act of 1976 — Two Interpretations*, 15 CREIGHTON L. REV. 523 (1982), for the unique proposition that the New Act has not changed the law with respect to copyright ownership of works prepared for a commissioning party by independent contractors.

[6] A work for hire contract provides that, for copyright purposes, the employer will be considered the author of the work. Since copyright vests in the author, *id.* § 201(a), the employer, rather than the artist, will own the copyright in the artwork under such a contract.

To date, only two reported cases have interpreted the work for hire provision of the New Act. Interestingly, both cases involve the copyright ownership of commissioned architectural plans. *See* May v. Morganelli-Heumann & Assocs., 618 F.2d 1363 (9th Cir. 1980) (summary judgment improper because factual

lishers use work for hire contracts for commissioned work more frequently than they did under the Copyright Act of 1909 (Old Act).[7] Ironically, Congress intended to limit the types of assignments that may be considered work for hire in order to increase protection for artists.[8] Publishers, however, have taken advantage of some poorly drafted provisions of the New Act.[9] Under these provisions publishers may obtain work for hire agreements

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issues existed regarding whether parties intended to contract contrary to work for hire presumption); Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981) (although commissioning party contributed ideas, architectural firm was author of plan for copyright purposes).

[7] 17 U.S.C. §§ 1-216 (1970) (revised by Pub. L. No. 94-553, tit. I, § 101, 90 Stat. 2541) [hereinafter cited as Old Act]. Since under the Old Act courts presumed that a commissioned work was done for hire, there was no need for publishers to obtain contracts stating that a work was made for hire. The current Copyright Act, however, requires the parties to "expressly agree . . . in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101 (Supp. III 1979). Thus, although the number of works that are done on a for hire basis may have remained constant, the use of work for hire contracts has increased due to the provisions of the new law. *See* notes 47-48 & 54 and accompanying text *infra*.

[8] The House Committee on the Judiciary recognized that publishers could use their superior bargaining power to extract overbearing contracts. H.R. REP. No. 1476, 94th Cong., 2d Sess. 124, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5740. As a result, an initial draft of the work made for hire provision prohibited treatment of commissioned works as made for hire. *See Copyright Law Revision, Pt 3, Discussions and Comments on the Preliminary Draft of the Revised United States Copyright Law* 15 (1964) [hereinafter cited as *Copyright Law Revision, Pt. 3*].

Publishers strongly opposed the initial draft on the ground that a great many works are prepared "on special order or commission but which by their nature deserve to be treated as work made for hire." *Copyright Law Revision, Pt. 5, Discussions and Comments on the Preliminary Draft of the Revised United States Copyright Law* 66 (1965). [hereinafter cited as *Copyright Law Revision, Pt. 5*]. Publishers noted that translations, maps, illustrations in books, front matter, appendices, contributions to dictionaries and encyclopedias, and parts of motion picture scripts, which free-lance authors prepare at the insistence, direction, and risk of a publisher or producer fell within that category. *Id.* In an effort to reconcile these conflicting views, the final draft of the bill listed nine cases in which a commissioned work might be considered one made for hire. 17 U.S.C. § 101 (Supp. III 1979). *See* note 5 *supra*. The bill's authors reasoned that even if the publisher did exercise unequal bargaining power to obtain a work for hire contract from the artist, the publisher deserved the copyright in these nine instances. H.R. REP. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5737.

[9] *See* text accompanying notes 57-62 *infra*.

for all types of assignments.[10] Since most publishers have superior bargaining power,[11] they can extract work for hire contracts from artists as a condition of employment.[12] If the artist refuses to do the work on a for hire basis, the publisher simply hires a different artist.[13]

The use of work for hire contracts creates another inequity. Publishers often treat artists as employees for copyright purposes, but refuse to treat them as employees for any other purpose.[14] As a result, artists may not receive benefits that state law grants to other employees.[15]

This comment identifies the problems that artists encounter under the New Act's work for hire provision.[16] It first describes the congressional intent underlying the new work for hire provision. It next illustrates the manner in which publishers apply the work for hire provision contrary to congressional intent. It then analyzes the financial hardships that artists face as a result of this misapplication. Finally, this comment proposes amendments to the Copyright Act that would solve the current problems.

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[10] *See* note 47 and accompanying text *infra*.

[11] *See* notes 37-38 and accompanying text *infra*.

[12] *Id.*

[13] *Id.*

[14] *See* text accompanying notes 64-71 *infra*.

[15] The types of employment benefits mandated by state law vary from state to state. In most states, however, employers are required to pay for worker's compensation programs, unemployment insurance, social security taxes, and retirement plans. *See, e.g.*, CAL. LAB. CODE § 227 (West Cum. Supp. 1981) (pension fund payments); *id.* § 3600 (workers' compensation); CAL. UNEMP. INS. CODE §§ 601-2113 (West Cum. Supp. 1981) (unemployment compensation); N.Y. WORK. COMP. LAW § 10 (McKinney 1965) (workers' compensation); TENN. CODE ANN. §§ 50-901 to -1211 (1981 Cum. Supp.) (workers' compensation); *id.* §§ 50-1301 to -1364 (unemployment insurance).

[16] 17 U.S.C. § 201(b) (Supp. III 1979). This provision states,

> 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.

Id.

I. The Copyright Act of 1976

A. Works for Hire Under the New Act

By narrowing the definition of work made for hire, Congress has redefined who should be considered an "author" for copyright purposes. Although the United States Constitution limits federal copyright and patent legislation protection to "authors and inventors,"[17] early case law established that the artist's employer may be considered the author of a work made for hire.[18] Under the Old Act, courts extended the work made for hire doctrine to work done on commission when the parties agreed that the commissioning party was the "author."[19] When the intent of the parties could not be determined, courts presumed that the copyright vested in the commissioning party.[20] The New Act, however, increases protection for the true author by confining the work for hire principle to instances where the hiring party is considered, theoretically at least, the creator.[21]

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[17] U.S. Const. art. I, § 8, cl. 8 enables Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

[18] Early common law provided that an employer held the copyright in the literary product of a salaried employee. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (copyright to certain advertisements created by employer). *See also* Colliery Eng. Co. v. United Correspondence Schools Co., 94 F. 152 (S.D.N.Y. 1899); Little v. Gould, 15 F. Cas. 612 (N.D.N.Y. 1852) (No. 8395). The *Little v. Gould* holding was codified in the 1909 Act. *See* 17 U.S.C. § 26 (1970) (revised by Pub. L. No. 94-553, tit. I, § 101, 90 Stat. 2541).

[19] The courts found in special order or commission situations, that the parties could decide who received the copyright. *See, e.g.,* Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 567-68 (2d Cir. 1966).

[20] *See, e.g., id.;* Yardley v. Houghton Mifflin Co., 108 F.2d 28, 31 (2d Cir. 1939) (city held the copyright in a mural that the city employed the artist to paint because the artist's employment contract did not reserve the copyright), *cert. denied,* 309 U.S. 686 (1940); Goldman-Morgen, Inc. v. Dan Brechner & Co., 411 F. Supp. 382, 391 (S.D.N.Y. 1976) (commissioning party was considered the author of a novelty coin bank designed and manufactured by an independent contractor). *But see, e.g.,* Uproar Co. v. NBC, 81 F.2d 373 (1st Cir. 1939) (scripts furnished by radio artist remained property of the artist); Hartfield v. Herzfeld, 60 F.2d 599 (S.D.N.Y. 1932) (developer of a telegraphic code retained sole right to copy and sell); W. H. Anderson Co. v. Baldwin Law Publishing Co., 27 F.2d 82 (6th Cir. 1928) (it may be properly inferred that parties did not intend an independent contractor to surrender a copyright for consideration of a sum less than the bare cost of the work).

[21] The legislative history concerning Congress' rationale for narrowing the scope of the works for hire provision is ambiguous. The House Report states

Unlike the prior copyright law, the New Act distinguishes work prepared on commission and work prepared by an employee within the scope of employment. The New Act codifies prior law by providing that a work prepared by a salaried employee within the scope of her employment is a work made for hire.[22] Congress considered work for hire treatment to be proper in this situation because the employer has the right to direct and supervise the manner in which the artist performs her work.[23]

The status of work prepared on special order or commission was a major controversy in developing the statutory definition of work made for hire.[24] At issue was whether commissioning parties should receive the copyright in the work that they commission.[25] Representatives of artists guilds argued that since the Constitution emphasizes protecting "the author,"[26] any principle that deprives an artist of her copyright must be narrowly confined to situations where she is an employee and the employer

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that "[t]he basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'work made for hire,' and those that should not." H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5737. The report did not, however, specifically identify what considerations went into determining when a work "should" or "should not" be considered as made for hire.

The many definitional changes of "work for hire" that occurred during the legislative process, however, strongly indicate that Congress intended to limit work for hire contracts to situations where the commissioning party could be considered the creator. The current definition of work on commission is in large measure due to the comments and criticisms of the representatives of different interest groups during the discussions and hearings. Angel & Tannenbaum, *supra* note 2, at 230. The comments from both publishers' and artists' groups reveal a common understanding of the nexus between creativity and the application of the work for hire principle. *See* notes 27-30 and accompanying text *infra*.

[22] 17 U.S.C. § 101 (Supp. III 1979).

[23] Congress justified this rule on several grounds: (1) The work is produced on behalf of and under the direction of the employer; (2) the employee is paid for the work; and (3) the employer, who pays all the costs and bears all the risks of loss, should reap any gain. *Copyright Law Revision, Pt. 1, Report of the Register Of Copyrights on the General Revision Of The United States Copyright Law* 85 (1961).

[24] H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5737. *See also* note 21 *supra*.

[25] *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5737. *See also* note 21 *supra*.

[26] *See* U.S. CONST. art. I, § 8, cl. 8, set forth at note 17 *supra*.

exercises creative control over her work.[27] This argument was so persuasive that an earlier draft of the New Act defined a work for hire as "[a] work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."[28] Publishers, however, strenuously opposed this definition, arguing that it failed to permit work for hire treatment where the publisher was the true creative force behind the commissioned work.[29] The New Act's definition represents a compromise which enumerates those specific categories of commissioned works that can be considered work made for hire under certain circumstances.[30]

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[27] *See* note 21 *supra*.

[28] *Copyright Law Revision, Pt. 3 supra* note 8, at 15 n.11. This definition precluded the possibility of works made on special order or on commission from being considered for hire, even if the parties desired to contract to that effect.

[29] *Id.* at 340-41. The publishers gave examples of such works: translations, maps and illustrations in books, front matter and appendices, contributions to dictionaries and encyclopedias, and parts of motion pictures, which are prepared by free-lance authors at the instance, direction, and risk of a publisher or producer. Publishers argued that in these instances the same legal and policy considerations dictating special treatment of works made for hire in a regular employment situation (where it is generally conceded that the employer should be considered the true creator) applied equally to commissioned works. *Id.*

The 1964 bill tried to solve this problem by including in the definition "a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." *Copyright Law Revision, Pt. 5, supra* note 8, at 9. This approach drew even heavier fire from the representatives of artists' organizations, who argued that an author could easily be induced to sign a form contract stating that her work is "made for hire," and that ordinary book publishing contracts, signed before the author has completed the work and calling for an advance against royalties, could be converted into "employment agreements" as a matter of course. *Copyright Law Revision, Pt. 6, Supplementary Report of the Register of Copyrights on the General Revision of the United States Copyright Law: 1965 Revision Bill* 67 (1965) [hereinafter cited as *Copyright Law Revision, Pt. 6*].

[30] H.R. REP. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5737.

The 1965 bill defined a "work made for hire" as:

> (1) a work prepared by an employee within the scope of his 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, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for

By affording artists greater protection, Congress implicitly rejected the courts' prior treatment of works for hire. Before the adoption of the New Act, courts presumed that an artist had contracted to allow her employer to be the author, and not merely the artist's assignee.[31] Courts considered this presumption to be neither harsh nor beyond the scope of the copyright clause.[32] They felt that the underlying purpose of copyright law was to advance the public welfare by securing the personal gain of authors and inventors via limited monopolies on their creations.[33] Courts reasoned that if an employer directs the content of an employee's work, the employer has created the work and should, consistent with the purpose of the copyright clause, receive copyright protection.[34] Courts also believed that this treat-

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hire.

Copyright Law Revision, Pt. 6, supra note 29, at 174. Although this definition represented a political compromise, it also reflected congressional judgment that in these instances the commissioning party was properly considered the creator.

The New Act, however, adds several important other works which may be considered a work made for hire. These include audiovisual works (other than motion pictures), compilations, instructional texts, tests, answer material to tests, and atlases. 17 U.S.C. § 101 (Supp. III 1979).

[31] *See* notes 17-20 and accompanying text *supra.*

[32] *See* Scherr v. Universal Match Co. 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting).

[33] In Mazer v. Stein, 347 U.S. 201 (1954), the Court stated "the economic philosophy behind the [copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Id.* at 219. This reasoning closely parallels that in *Federalist* paper no. 43, wherein James Madison wrote that in the copyright area, the public good fully coincides with the claim of the individual. THE FEDERALIST No. 43, at 272 (J. Madison) (C. Rossiter ed. 1961).

[34] *See, e.g.,* Scherr v. Universal Match Co., 417 F.2d 497 (2d Cir. 1969). Judge Friendly's dissent in *Scherr* raises an interesting argument against depriving the artist for hire of copyright protection. He recognized that, "the emphasis is on protecting 'the author' and that any principle depriving him of copyright and vesting this in another without his express assent must thus be narrowly confined." *Id.* at 502 (Friendly, J., dissenting). Judge Friendly notes that "the course of decision has gone past the point where an argument could be mounted" that the word "author" in the copyright clause means only the true author of the work. *Id.* However, he felt that in order to be constitutionally viable, the work for hire presumption "must be limited to instances where an assignment of future copyright may fairly be implied." *Id.* Although Judge Friendly did not explain all the factors which would make a copyright assignment fair, his dissent suggests that vesting copyright in a work's creator is not

ment of works for hire was equitable. Since both parties should have expected the purchaser to own the work and its copyright, the artist should have set her price accordingly.[35] To allow the artist to retain the copyright in these situations would deprive the purchaser of her bargain and give the artist a windfall.[36]

Congress, however, did not accept the premises upon which the courts had based their reasoning. First, Congress recognized that the nature of the publishing industry precluded artists from freely contracting for the true value of the copyright in their work.[37] Congress understood that most artists lack the bargaining power that is required to negotiate successfully with publishers.[38] As a consequence, artists faced the undesirable alternative of signing a contract that denied them the copyright or refusing to undertake the specified work. This unequal bargaining power barred artists from receiving reasonable compensation for their work.

Second, Congress considered it more consistent with the purpose of the copyright clause to vest the copyright in the artist commissioned to do the work than in the commissioning party.[39] Since the purpose of granting a copyright is to reward an individual's ingenuity and effort,[40] it did not make constitutional sense to deny the copyright to the artist responsible for the ingenuity and effort put into the artwork.[41] A commissioning party does not exercise the control and direction over a work that an employer often exerts over his employee.[42] In an employment situation, the employee will likely receive a regular salary and work on the employer's premises under the employer's supervision.[43] A free-lance artist, on the other hand, usually works individually on each assignment and receives compensation for suc-

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only fair, but is also consistent with the policy behind granting copyrights. *Id.*

[35] *Id.* (Friendly, J., dissenting).

[36] *Id.*

[37] H.R. REP. No. 1476, 94th Cong., 2d Sess. 124, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5740.

[38] *Id.*

[39] *See* notes 21 & 27-30 and accompanying text *supra.*

[40] *See* note 33 *supra.*

[41] *Cf.* Scherr v. Universal Match Co., 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting), *discussed in* note 34 *supra.*

[42] Angel & Tannenbaum, *supra* note 2, at 228.

[43] *Id.*

cessfully completing the job.[44] Congress, therefore, sought to narrow the application of the work made for hire doctrine to those situations in which the commissioning party exercises creative control over the final product.[45]

B. Abuse of the Work for Hire Provision

Despite congressional efforts to protect artists from loss of copyright by limiting the types of works that may be made for hire,[46] these contracts still pervade the publishing industry.[47]

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[44] *Id.*

[45] *See* notes 8, 21 & 29-30 and accompanying text *supra.*

[46] *See* notes 8, 21 & 29-30 and accompanying text *supra.*

[47] The National Endowment for the Arts has received a number of letters from both individuals and organizations that demonstrate the pervasiveness of this problem. Tad Crawford, General Counsel of the Graphic Artists Guild of New York, wrote that the Guild's President believes that *all* of the Guild's several thousand professional members are confronted on a regular basis with work for hire contracts. Letter from Tad Crawford to Robert Wade, General Counsel of the National Endowment for the Arts (Sept. 12, 1980) (copy on file at U.C. Davis Law Review office).

To document these practices the Graphic Artists Guild appended to a letter to Rep. Robert Kastenmeier (D-Wis.) a sampling of form work for hire contracts that artists frequently face. These contracts were issued by the following publishing houses: Bantam Books, Dell Publishing Company, Harcourt Brace Jovanovich, McCormick-Mathers Publishing Company (a division of Litton Educational Publishing), McGraw-Hill, Marvel Comics Group (a division of Cadence Industries Corp.), Meredith Corporation, Parents Magazine Enterprises, Rand McNally & Company, Readers Digest Association, Robert A. Becker Advertising, and Ziff-Davis (copies on file at U.C. Davis Law Review office). The contracts from Meredith Corporation and Robert A. Becker Advertising are "lifetime" contracts that apply to *all* future assignments given the artist. The contract from Marvel Comics Group is written on the back of a check, so it clearly comes *after* rather than before the assignment. The appendix also contains an artist's letter to the Guild stating that Designs for Medicine, Inc., refused to hire him when he would not sign a work for hire contract, although he had previously illustrated three books for the same company. Letter from Sam Jones to Graphic Artist's Guild (May 1, 1978) (copy on file at U.C. Davis Law Review Office).

In addition, many publishers rely on their bargaining position to extract "all rights" contracts from artists. These publishers include Ballantine, Franklin Philatelic Society, Alfred A. Knopf, North American Publishing Company, Pantheon, Pocket Books, Random House, Redbook Publishing Company, Times Mirror Magazines, and Vintage (copies of these contracts on file at U.C. Davis Law Review office).

Finally, some publishers use work for hire contracts but assign certain limited rights back to the artist. Publications of Time-Life, including *Fortune,*

Congress assumed that publishers would continue the established trade practice of buying "one time use only" rights in the works that they commissioned.[48] However, this trade practice developed when courts presumed that a commissioning party would get the copyright in the commissioned work. The New Act explicitly changes this presumption.[49] As a result, many publishers believe that if they do not secure a written guarantee of their copyright ownership, they will not obtain the reproduction rights necessary to publish the commissioned work.[50] Moreover, the favorable treatment that works made for hire receive under the New Act discourages publishers from buying "one time only" rights.[51]

Sports Illustrated, and *Time*, have relied on this tactic. Letter from Tad Crawford to Rep. Robert Kastenmeier (June 26, 1978) (copy on file at U.C. Davis Law Review office).

[48] *See Copyright Law Revision, Pt. 3, supra* note 8, at 261. Mr. Irwin Karp, representative of the Author's League of America, stated at the Meeting on the Preliminary Draft for Revised United States Copyright Law,

> Every reputable publisher that I know of willingly reassigns to the author, immediately after publication of the periodical, all rights except first periodical or first serial rights . . . . There are very few contracts between article and story-writers and their publishers as to what's to happen. It is simply the practice of the trade that, when the magazine has published, it reassigns all rights except first serial rights.

Id. at 261-62.

[49] *See* text accompanying notes 31-42 *supra*.

[50] Letter from Stuart Kahan, Executive Director of The American Society of Magazine Photographers, to Robert Wade, General Counsel of National Endowment for the Arts (Jan. 25, 1980) (discussing confusion caused by the current work for hire provision) (copy on file at U.C. Davis Law Review office).

[51] In the case of works not 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 is subject to termination after 35 years from the date of the grant's execution. 17 U.S.C. § 203 (Supp. III 1979). However, if a work is made for hire, the publisher can use the work for a term of 75 years from the year of its first publication, *id.* § 302, rather than the 35-year term mandated by § 203.

Additionally, the Copyright Act gives the copyright owner the rights of reproduction, adaptation, publication, performance, and display. *Id.* § 106. These enumerated rights may be subdivided indefinitely, and in connection with the ownership provision of § 201, "any of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately." *Id.* § 201(3).

Since the publisher of a work for hire obtains the entire bundle of rights subsumed within a copyright, she is in a much better position to exploit the work. For example, if a comic book publisher commissioned an artist to develop a character like Superman on a work for hire basis, then in addition to

An unanticipated loophole in the definition of works for hire permits publishers to demand work for hire agreements. Contrary to congressional belief,[52] the nine specific categories of commissioned work[53] have not insulated artists from work for hire contracts.[54] The two categories responsible for the expanded scope of works made for hire are "contributions to collective works"[55] and "supplementary works."[56] Publishers have interpreted these classes of works as including any work whose creation involves more than one person.[57] For example, publishers

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using the character in comic books, the publisher could also reap the profits from marketing the character in alternate markets such as movies, T-shirts, and drinking glasses. If the publisher obtained only a license for the reproduction rights necessary to publish the comic book, however, then the artist could undertake those alternate marketing schemes.

[52] *See* note 8 *supra.*

[53] *See* note 5 *supra.*

[54] In a letter to the author, Tad Crawford, the General Counsel to the Graphic Artists Guild stated that

> [T]he work-for-hire problem is widespread and substantial. Almost every artist is confronted with such contracts. While empirical studies have not been done to document what percentage of billings are done under work-for-hire contracts, I can assure you that it is a significant amount. Moreover, artists in certain fields find that work-for-hire contracts have become the norm; these artists rarely are given the opportunity to negotiate a limited rights contract. Those who try this are simply not used anymore. Here again, I speak from personal experience as General Counsel to the Guild.

Letter from Tad Crawford to the author (March 30, 1981) (copy on file at U.C. Davis Law Review office).

[55] A collective work is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole. 17 U.S.C. § 101 (Supp. III 1979).

[56] A supplementary work is a work prepared for publication as an 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. *Id.* An "instructional text" is a literary, pictorial, or graphic work prepared for publication and for use in systematic instruction activities. *Id.*

[57] This interpretation of the law is probably correct. The New Act defines a collective work as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." *Id.* Since the word "number" can be interpreted to mean two, an artwork that involves the "sepa-

could contend that while the artist may have singularly created the artwork for a magazine advertisement, the contributions of other people were necessary to prepare that advertisement for publication in the magazine.[58] Consequently, publishers argue, the artwork constitutes a contribution to a collective work. Thus, the artwork would be a "work made for hire," entitling the publisher to preferential treatment.[59]

Before the New Act's adoption, publishers testified that the work for hire classification should apply to contributions to collective and supplementary works because publishers often closely supervise the composition of a finished work from many discrete parts.[60] Due to the publisher's superior bargaining power, however, many artists agree to work for hire contracts for assignments that they do in their own style, in their own studio, and without any real supervision.[61] Publishers often use work for hire contracts for assignments in which they do not exercise close supervision or contribute creatively.[62] Thus, publishers have applied the New Act's work for hire provisions in a manner contrary to legislative intent.[63]

C. Loss of Financial Security

A free-lance artist suffers a substantial adverse financial impact when a commissioned work is classified as made for hire. Since the artist works on a job-by-job basis, she receives none of the security and benefits associated with regular employment.

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rate and independent" work of more than one artist would seem to be a collective work.

[58] *Cf. Copyright Law Revision, Pt. 3, supra* note 8, at 267. Mr. E. Gabriel Perle, Associate General Counsel of Time, Inc., stated,

> I know in our business we ask people to create very specific things—whether they be articles, stories, books, photographs, illustrations—merely as a supplement to an existing work, or what have you. We will ask these people to do it with the express intention that we will be the authors of that—that we will be the owners of that, not just for the immediate purpose of publication in a book or a magazine, but also for all other purposes.

Id.

[59] *See* note 51 *supra.*

[60] *Copyright Law Revision, Pt. 3, supra* note 8, at 341.

[61] *See* note 47 and accompanying text *supra.*

[62] Letter from Tad Crawford to Rep. Robert Kastenmeier (June 26, 1978) (copy on file at U.C. Davis Law Review office).

[63] *See* notes 37-45 and accompanying text *supra.*

Therefore, it is extremely important for the commissioned artist to receive the income associated with the work's copyright. Classification of a work as made for hire, however, deprives the artist of the work's copyright.[64] Moreover, a publisher with superior bargaining power may extract the work for hire contract without adequately compensating the artist for the copyright,[65] or providing the employee benefits normally required by state laws.[66] Indeed, in many cases, work for hire contracts expressly state that the artist will not be deemed an employee.[67]

Some members of the New York Legislature are attempting to remedy the poor bargaining position of artists by regulating work for hire relationships. Proposed legislation would require that any artist who signs a work for hire contract for the creation of a commissioned work must receive employee status for purposes of New York's laws governing employer/employee relationships.[68] The bill is designed to insure that an artist who is

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[64] *See* 17 U.S.C. § 201 (Supp. III 1979).

[65] In a letter to the author, Tad Crawford, General Counsel to the Graphic Artists Guild, stated,

> First, there is no doubt that the money paid by publishers for work-for-hire is the same as that paid for limited rights transfers. The price levels are generally not high in publishing, and publishers have no desire to make extra payments for rights they do not immediately contemplate using. Their superior bargaining strength allows them to demand such additional rights without additional compensation.

Letter from Tad Crawford, to the author (March 30, 1981) (copy on file at U.C. Davis Law Review office).

[66] *See* note 15 *supra*.

[67] For example, a memorandum to regular contributors of *The New York Times* stated:

> Our standard agreement with contributors is that all their material accepted by the New York Times is considered 'work made for hire.' This gives us all rights in the material throughout the world for which they are paid the regular fee, per diem page rate or whatever is agreed at the time of the assignment. This does not change the fact that when you write for the Times you do so as an independent freelance contributor, not as an employee of the Times. Acceptance of your next check constitutes acceptance of this policy.

See proposed NEW YORK VISUAL ARTISTS AND ART BUYERS FAIR PRACTICE ACT OF 1980, at 6-7 (copy on file at U.C. Davis Law Review office).

[68] In New York — the headquarters of several major publishing houses — representatives from several artists groups lobbied the state legislature for protective legislation. The proposed New York bill, AB 10010, introduced in 1980,

forced to give up the copyright in her work will at least receive the benefits of regular employment. If all states adopted similar legislation, artists may find work for hire arrangements more palatable.

However, since federal law preempts state law dealing with copyrights, state legislation regarding employer/employee relationships may be preempted where copyright is at issue.[69] Even in the absence of federal preemption, the right of artists to receive either the copyright in their work or the employment benefits normally required by state law[70] is substantial enough to warrant a congressional amendment of the New Act's work for hire provisions. For these reasons, many artists' guilds feel that amendment of the work for hire provision would be the most satisfactory resolution of this problem.[71]

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states:

> Any contract for the creation of a specially ordered or commissioned work of art that is stated to create a work-for-hire relationship between the artist making the work of art and the ordering or commissioning party shall automatically give to the artist the status of an employee under the laws of the state of New York with respect to that transaction.

Id.

Publishers have lobbied extensively to defeat the bill. To date, the bill has not left the Assembly Committee on Tourism, Sports, and Arts.

[69] Section 301 of the New Act provides for a single federal copyright system, and governs which state laws are preempted by that system. Two conditions must be met to preempt state law. First, the right regulated by state law must be "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301(a) (Supp. III 1979). Second, the right must be "in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103." *Id.*

The difficult question is whether the right vindicated by the state law is equivalent to copyright. The equivalency test was intended to eliminate state schemes that could substitute for or be confused with federal copyright protection as delineated in section 106. 122 CONG. REC. 10910 (daily ed. Sept. 22, 1976) (statement of Mr. Seiberling). Thus, whether federal law preempts the state legislation depends on the character of the right that the state law would grant. The states would seem to be able to regulate work for hire relationships because the state laws would be governing employer/employee relationships and would not in themselves convey any copyright attaching to the work. However, since there are no cases on point, the preemption issue is unresolved.

[70] *See* note 15 *supra*.

[71] Letter from Tad Crawford to Robert Wade, General Counsel to the National Endowment for the Arts (September 12, 1980) (copy on file at U.C. Da-

II. Proposed Revision of the Copyright Act

Congress should amend the work for hire provision in order to give artists increased economic incentives to produce creative works. Currently publishers may usurp the copyright claims of individual artists through the use of work for hire contracts.[72] To correct this situation Congress should modify the copyright law to insure that the copyright in a work vests in its creator. This modification would encourage artists to create specific pieces of art by fostering a financial environment that is conducive to undertaking art as a profession.

To encourage artistic creativity Congress should amend the work for hire provision in two important respects. First, Congress should amend the provision to grant employee status, for purposes of determining employment benefits, to artists who are treated as employees for purposes of determining copyright ownership.[73] Second, Congress should delete "contributions to collective works" and "supplementary works" from the categories of work made for hire, thereby allowing artists to retain greater rights in their works.[74]

A. Employment Status for Artists Covered by Works for Hire Contracts

Congress should amend the New Act to specify that an artist who is not treated like an employee for employment benefit purposes cannot be considered an employee for purposes of determining whether a work is made for hire.[75] This amendment would insure that the independent artist either retained the copyright in her work or, upon loss of the copyright to the publisher,[76] received state-mandated employee benefits.[77] Publishers

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vis Law Review office).

[72] *See* note 47 *supra*.

[73] *See* notes 75-78 and accompanying text *infra*.

[74] *See* notes 81-88 and accompanying text *infra*.

[75] *See* notes 64-68 and accompanying text *supra*.

[76] The publisher receives the copyright for an artwork only when the work is done on a for hire basis. 17 U.S.C. § 201 (Supp. III 1979). The New Act, however, limits works for hire to specific types of commissioned works, or works "prepared by an employee within the scope of his or her employment." *Id.* § 101. Therefore, if the publisher commissions a free-lance artist to create an artwork not listed in § 101 the publisher cannot receive the copyright. In these situations, if the publisher wants the copyright she must regularly employ the

would have to decide whether the value of certain copyrights justified the payment of regular employee benefits to the artist. The amendment would prevent publishers from denying artists both the copyright in their work and the benefits granted to other employees.[78]

B. Deletion of Collective and Supplementary Works

Congress should exclude the categories of "contributions to collective works"[79] and "supplementary works"[80] from the works that may be considered "for hire" because these are the categories in which abuses have developed. Congress intended to limit the commissioned works that may be considered for hire to situations in which the commissioning party was the creative force.[81]

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artist, and the artist must create the artwork within the scope of her employment.

Unfortunately, it is unclear what constitutes employment for work for hire purposes. Neither the New Act nor the committee reports define the term "employee." 1 M. NIMMER, NIMMER ON COPYRIGHT § 5.03[B] at 5-11 to -12 (rev. ed. 1981). This lack of clarity will undoubtedly lead to different interpretations of what constitutes employment, and will result in litigation over whether a work was done within the scope of an employment relationship. *See* Angel & Tannenbaum, *supra* note 2, at 239. For example, publishers may try to label a freelance artist as an employee only for the duration of each assignment, *see* note 67 *supra*, thus completely circumventing the distinction between commissioned works and works done within the scope of employment.

Case law under the Old Act, however, indicates that courts will reject such specious job descriptions. Under the Old Act, when courts sought to determine whether a work was done within an employment relationship, they looked to the relationship that in fact existed between the parties, and not the parties description of that relationship. Further, courts held that an employment relationship did not exist notwithstanding the use of the word "employment" in a contract between a writer and a corporation. Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc., 375 F.2d 639 (2d Cir. 1967). *See also* Olympia Press v. Lancer Books, Inc., 267 F. Supp. 920 (S.D.N.Y. 1967) (no employment relationship despite use of term "salary," where alleged employee worked on his own premises and was not subject to control over style and content). Therefore, if a publisher wants to insure that courts will consider an artist an employee, she should give the artist a salary, give her the employment benefits required by state laws, and have her work on a continuing basis. *See* Angel & Tannenbaum, *supra* note 2, at 237.

[77] *See* note 15 *supra*.

[78] *See* notes 64-68 and accompanying text *supra*.

[79] *See* note 55 *supra*.

[80] *See* note 56 *supra*.

[81] *See* notes 24-30 and accompanying text *supra*.

As examples of collective and supplementary works that publishers consider to be their creations, publishers' lobbyists pointed to the limited cases of "translations, maps, illustrations in books, front matter and appendices, contributions to dictionaries and encyclopedias"[82] and "similar reference and collective work."[83] However, publishers have interpreted "contributions to collective and supplementary works" so broadly that they may obtain work for hire contracts on commissioned works in which they have absolutely no creative input.[84]

If the publisher is truly the creative force in an artwork, her copyright claim may be protected without interfering with the artist's rights. For example, the statute could permit work for hire treatment for works such as dictionaries, encyclopedias, maps, or other specific types of work in which the publisher is actually a creator. This approach would maximize the reward for creative efforts, and thereby stimulate the development of literature, music, and other artistic creations.

Publishers may continue to argue that the work for hire distinction provides a necessary incentive for them to compile works that might not otherwise be published.[85] However, this argument is specious. Work for hire arrangements do not necessarily enable publishers to secure the reproduction rights necessary to produce a collective or supplemental work with less expense. Indeed, publishers dealing with well-known artists often pay more for work for hire contracts than they would for more limited reproduction rights.[86] It is the young, unknown, and more easily intimidated artist who may be forced to enter a work for hire contract that only pays fees comparable to those paid for limited use of the artwork.[87] In these cases, the work costs the publisher the same regardless of the arrangement with the artist, but the work for hire characterization allows the publisher to seize the entire copyright without paying for the privilege.

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[82] *Copyright Law Revision, Pt. 6, supra* note 29, at 66-67.

[83] *Id.*

[84] *See* notes 47 & 51 and accompanying text *supra.*

[85] *Copyright Law Revision, Pt. 3, supra* note 8, at 267.

[86] *See* Letter from Barbara Gordon, President of the Society of Photographers and Artist Representatives, to Robert Wade, General Counsel to the National Endowment for the Arts (January 22, 1980) (copy on file at U.C. Davis law Review office).

[87] *Id.*

The copyright law should encourage and reward publishers for producing artistic work. Any rewards given to publishers via copyright protection must, however, further the basic objective of granting copyrights — the promotion of public availability of literature, music, and other artistic products.[88] Allowing publishers to require work for hire contracts for commissioned collective and supplemental artwork only marginally secures the general benefit to be derived from the labors of artists. Vesting the copyright in the artist responsible for creating the work better stimulates artistic creativity by providing additional economic incentives for artists.

CONCLUSION

The broad scope of commissioned artworks that may be considered work made for hire has resulted in unfair treatment of artists. Publishers have obtained copyrights to commissioned works even when the artists were the actual creators of the works. Indeed, many publishing companies use standard form contracts that treat commissioned work as work for hire and automatically transfer ownership of the copyright to the publisher. Since most artists and writers lack the bargaining power to reject such provisions, they are deprived of the fruits of their creative labor.

The Copyright Act must be amended to prevent these abuses and to encourage artistic endeavors. This comment's proposals meet these goals by bringing the bargaining position of artists into parity with that of publishers. Vesting the copyright of a creative work in an artist will prevent publishers from using their greater economic leverage to demand that commissioned work be done on a for hire basis. The comment's proposals will not significantly affect the extent of copyright coverage. Instead, they merely change the allocation of copyright income between publishers and artists. This reallocation will help to create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions envisioned by the framers of the Constitution to facilitate the release of creative talent.

Walter R. Sadler

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[88] U.S. CONST. art. I, § 8, cl. 8.