Work Made for Hire – Analyzing the Multifactor Balancing Test

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Authorship, and hence, initial ownership of copyrighted works is oftentimes controlled by the 1976 Copyright Act’s work made for hire doctrine. Under this doctrine, works created by an employee within the scope of their employment are works made for hire and are consequently owned by the employer. One key determination in this analysis is whether the hired party is an employee or independent contractor. In 1989, the U.S. Supreme Court, in *CCNV v. Reid*, answered the question of how employees are distinguished from independent contractors. In making this determination, the Supreme Court set forth a list of thirteen factors that courts should balance.

Three years later, in 1992, the Court of Appeals for the Second Circuit decided *Aymes v. Bonelli* and noted that not all factors are equally weighted. The *Aymes* court went further still and opined that five of the thirteen factors would “be significant in virtually every situation.” This analysis was supported by looking at all of the work made for hire cases decided in the three year period since *Reid* – six cases in total.

This article expands what the Second Circuit did in *Aymes* and analyzes how lower courts have utilized the thirteen factors in the twenty-four years since *Reid*. In particular, this study has identified forty-five copyright cases where the courts have decided whether a hired party was an employee or independent contractor and uses the data from these cases to describe what factors appear to be the best predictors of the conclusions.

The results of this study may confirm what *Aymes* concluded – that a small subset of factors is virtually always significant. Likewise, some factors, which were not deemed by *Aymes* to be of great importance, might, in fact, be important to the courts. Another possibility is that the results could illustrate that certain factors are virtually meaningless in the work made for hire analysis. The preliminary results of this study suggest that all three of these outcomes may be true. The results of this study will be used to look back at the goals Congress sought to achieve generally in the 1976 Copyright Act and specifically in its modifications to the work made for hire doctrine and to assess whether these goals have been achieved given the courts’ subsequent interpretations.