

Copyrights Ownership – Reconsidering the CCNV Case

Assaf Jacob

It has been more than 15 years since the U.S. Supreme Court, in its landmark decision in *Community for Creative Non-Violence v. Reid*¹ adopted the common law of agency for the interpretation of the term “employee” in the context of “work made for hire”. Since then, despite some criticism, the agency test has become the norm. This paper argues the Supreme Court’s inclination to apply the work for hire doctrine through agency law is misguided. The agency test, which is based on Tort law principles, is clearly anomalous in the context of Copyright Law, which differs significantly from Tort law in its underlying rationales. This paper further argues that lacking clear guidelines, the work for hire case law has failed in its objective to achieve consistency and certainty.

My proposal is that the "work made for hire" doctrine should be applied from the vantage point of Copyright Law. The test should focus on incentives to create on the one hand and public access to created works on the other. These are the goals of Copyright Law as stated in the Constitution. Thus, the new test should re-interpret the term ‘employee’ in a manner that complies with the needs of Copyright Law. Most importantly, ‘employee’ should be interpreted to give the first entitlement to the party most apt to achieve the goals of the Constitution: Instead of using agency test factors such as employee benefits and tax treatment, the courts should consider factors such as the parties’ relative incentive to create new works, public accessibility, transaction costs, and the parties relative ability and motivation to disseminate works to the public. The partnership of individual creativity with the employer's resources yields a significant engine for creative production in society. Revising the ‘work made for hire’ test would re-align this important issue with the rest of intellectual property law.

¹ 490 U.S. 730 (1989) (hereinafter *CCNV*).