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WORK MADE FOR HIGHER UNDERSTANDING OF THE COPYRIGHT ACT OF 1976: 
HI-TECH VIDEO PRODUCTIONS, INC. v. CAPITAL CITIES/ABC, INC.

I. INTRODUCTION

Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc.1 is a strict interpretation by the United States Court of Appeals for the Sixth Circuit of the "work made for hire" doctrine.2 The phrase "work made for hire" is codified in copyright law under 17 U.S.C. § 201(b), which states that the employer or person for whom the work is prepared is considered the author of the work for purposes of copyright registration and ownership.3 Traditionally, an artist could easily hire help, use that help to create copyrightable material, and register a copyright in that material.4 Presently, and with an awareness of the Sixth Circuit's strict interpretation of this doc-

1. 58 F.3d 1093 (6th Cir. 1995).
2. "Work made for hire" is defined in 17 U.S.C. § 101, which states, in pertinent part, that a "work made for hire" is:
(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 . . . .
4. Decisions prior to 1989 were based on a much broader definition of "work made for hire." The United States Court of Appeals for the Second Circuit, in Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984), upheld the trial court instruction which read:
A work for hire is a work prepared by what the law calls an employee working within the scope of his employment. What that means is, a person acting under the direction and supervision of the hiring author, at the hiring author's instance and expense. It does not matter whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation.
The test set forth in Aldon is simpler and broader in scope than that followed today. For a discussion of the test followed today, see infra notes 86-99 and accompanying text.

(191)
trine, those interested in obtaining copyrights on works created with the help of others should take heed. Currently, care must be taken to execute the production of copyrightable material in accordance with this new strict definition if one wishes to register a copyright in the work as his own.

Hi-Tech specifically addresses the common law interpretation of 17 U.S.C. § 101(1). Because no definition is given in the statute itself for "employee," courts have struggled to give the word a precise meaning. In Community for Creative Non-Violence v. Reid, the Supreme Court set forth a list of elements which, when applied to certain employment situations, purports to determine whether the employee is included within the copyright statute. Those elements, however, must be applied to the facts of every case, and courts have not done so with consistency. This Note analyzes the elements currently relevant to determine whether someone is an

5. Under the Hi-Tech analysis, it is more difficult for an employer to hire help for a particular work and still protect that work under copyright law. The employer must meet strict criteria if he wishes to copyright the work completed with the help of his hired parties. For a short explanation of the development of the test, see infra notes 6-13 and accompanying text. Prior to 1989, many courts used the broad test set forth in Aldon, 738 F.2d 548 (2d Cir. 1984), to determine whether a work was indeed one "made for hire." In 1989, the Supreme Court narrowed the test in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The United States Court of Appeals for the Sixth Circuit further constricted the doctrine by interpreting the Reid test narrowly in Hi-Tech. For a more detailed discussion of the progression of the doctrine, see infra notes 34-121 and accompanying text.

6. The strict test is set forth at infra notes 86-99 and accompanying text. Furthermore, the Hi-Tech court rigidly applied the facts of the case to this already strict test of over ten different elements. The result is a very narrow field within which an employer may operate and still register a copyright in his works. For a more detailed discussion of this strict test and how it was applied in Hi-Tech, see infra notes 123-173 and accompanying text.

7. For a discussion of what is needed to establish a work as one made for hire, see infra notes 86-99 and accompanying text. Aldon was specifically rejected by the Supreme Court in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

8. Hi-Tech, 58 F.3d at 1095. The Sixth Circuit Court of Appeals correctly stated, "Hi-Tech does not claim that the parties signed a written agreement to consider the video a 'work made for hire.' Thus, we are not asked to find Hi-Tech's copyright valid under § 101(2) of the Act." Id.


11. See id. at 751-52. For a discussion of Reid and a list of the elements, see infra notes 86-99 and accompanying text.

12. See Ossola, supra note 9.
“employee” within the meaning of the Copyright Act of 1976,13 and how courts should apply those elements.

This Note begins with a discussion of the facts surrounding *Hi-Tech Video Productions, Inc.* Section III focuses on the background of statutory and case law upon which the Sixth Circuit relied in reaching its holding. Section IV examines specifically the Sixth Circuit’s analysis in *Hi-Tech.* Section V explores the two leading cases decided between *Reid* and *Hi-Tech,* and how these cases may have influenced the outcome of *Hi-Tech.* Section VI discusses the impact of *Hi-Tech* on the future of the “work made for hire” doctrine and the rights of the employer to claim work as his own.

II. FACTS

*Hi-Tech Video Productions, Inc.* (Hi-Tech) was a business engaged in the production and creation of commercials and other promotional video tapes.14 Hi-Tech was owned solely by Stan Akey.15 In May of 1990, Hi-Tech released a video entitled “Mackinac Island: The Mackinac Video.”16 To aid him in the production and creation of this video, Akey hired three assistants.17 Ted Cline was hired as an aerial videographer, Steve Cook as a scriptwriter/narrator, and Michael Mueller as the principal videographer.18 Upon completion, Akey registered a copyright in the video.19 This copyright registration became effective on August 3, 1990 as a “work made for hire.”20 In early 1990, the producers of “Good Morning America,” an ABC morning news and information show, featured a story on Mackinac Island’s annual Lilac Festival.21 On

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14. See *Hi-Tech,* 58 F.3d at 1094. Most of the videos and tapes created by Hi-Tech were produced at the request of clients. See *id.* As in this case, however, some videos were created independent of any client request. See *id.*
15. See *id.* at 1094.
16. See *id.* Mackinac Island is a tourist attraction, and the video was intended to promote travel to the island. See *id.*
17. See *id.*
18. See *id.* at 1094. Ted Cline provided his own plane. See *id.*
19. See *Hi-Tech,* 58 F.3d at 1094.
20. See *id.*
21. See *id.* Donna Vislocky, an associate producer of Good Morning America was responsible for preparing the background video for the Mackinac feature. See *id.* Vislocky obtained footage from the Hi-Tech video through the executive director of the Mackinac Island Chamber of Commerce and used parts of the Hi-Tech video for her broadcast feature video. See *id.* at 1094-95. At trial, Vislocky contended that she “received permission for such use from the Chamber of Commerce, which she believed owned the video.” *Id.* at 1095. The United States District Court for the Western District of Michigan resolved this factual issue against ABC. See *id.* The United States Court of Appeals for the Sixth Circuit
June 8, 1990, the show aired with footage from Hi-Tech's video, though without Hi-Tech's narration or music. As a result, Akey sued Good Morning America and ABC for infringement of his copyrighted Mackinac Video.

The United States District Court for the Western District of Michigan, at the end of a two day bench trial, denied ABC's motion to dismiss the complaint due to the invalidity of Hi-Tech's copyright. The district court entered judgment in favor of Hi-Tech, "rejected ABC's affirmative defense of fair use, trebled the award of damages in light of ABC's 'willful' infringement of copyright, and awarded Hi-Tech attorney's fees and costs." The Sixth Circuit reviewed the case de novo, made several factual determinations and reversed the district court. The court held that the video was not "work made for hire."

Specifically, the Sixth Circuit held that the definition of "work made for hire" set forth in 17 U.S.C. § 101 and developed by the Supreme Court in Community for Creative Non-Violence v. Reid does not support a finding that the three subcontractors hired by Akey were employees within the meaning of the statute. The Sixth Circuit found that Akey's control over his assistants' work was not significant, that Akey himself viewed his assistants as independent contractors, and that Akey ran his business such that it was within

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the normal scope of his business to hire independent contractors. Consequently, the work of interest was not "work made for hire," and therefore the copyright registration upon which Akey relied was found invalid.33

III. BACKGROUND

The law defining the "work made for hire" doctrine is young and developing. Originally, the "work made for hire" doctrine was codified in the Copyright Act of 1909. The Copyright Act of 1909, however, only addressed the doctrine in general terms. The Copyright Act of 1976 (Act) sets forth the most recent formulation of the doctrine.

The 1976 Act for the first time codified the ideas of the doctrine in detail. Unfortunately, the Act does not explicitly define the term "employee," a determinative concept within the "work made for hire" doctrine. Consequently, the courts became the arbiters of this pivotal term, and several theories developed.

32. See id. at 1097-99.
33. See id. at 1099. Interestingly, the three hired assistants were not made parties to the suit. Had Akey originally joined them as plaintiffs, he may have been able to establish standing even when the work made for hire registration was held invalid. At that point, he could have attempted to show, in the alternative, that it was a joint work. Alternatively, he may have been able to obtain common law copyright protection. This was never, however, mentioned by any court associated with this case. Perhaps Akey felt that joining his assistants would have weakened his argument that it was a valid work made for hire.
36. See PATRY, supra note 34 at 117-18.
37. 17 U.S.C. §§ 101, 201(b) (1977). Section 201(b) states that the employer or person for whom the work was prepared is considered the author for purposes of the copyright laws. Such work is known as "work made for hire." Section 101 states that a "work made for hire" is:

(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.
39. See id.
40. For a discussion of the various theories used by the courts prior to Reid, see infra notes 54-85 and accompanying text.
The determination of whether someone is an employee or independent contractor is crucial to an employer who is trying to protect his work under Section 101(1) of the Act. Simply stated, if an employer hires an employee for help on a copyrightable work, the employer may register the copyright in the work as his own under the "work made for hire" doctrine.41 If, however, the employer hires an independent contractor, the doctrine does not apply and the work may not be registered by the employer as his own.42

In 1989, the Supreme Court addressed the reigning theories on the issue.43 The Court set forth a test in Community for Creative Non-Violence v. Reid44 to determine whether someone is an employee within the meaning of the Act.45 The Reid decision became the seminal case for determining whether a worker was an "employee" or an "independent contractor."46

In Reid, an anti-homelessness association hired an artist to create a sculpture.47 The association developed the basic concept for the sculpture, but the artist performed the actual creation.48 Upon completion of the sculpture, the sculptor and the association each argued that it owned the copyright for the work.49 Reid, the artist, argued that he was an independent contractor and the copyright for the sculpture therefore belonged to him.50 The association argued that the copyright belonged to them because Reid was an employee and the sculpture was therefore a "work made for hire."51 The Supreme Court granted certiorari52 to "resolve a conflict among the Courts of Appeals over the proper construction of the 'work made for hire' provisions of the Act."53

42. See 17 U.S.C. § 101(1) (1977). There are ways for an employer to copyright a work as one "made for hire" even when he has hired an independent contractor, but the work must fall within the language of 17 U.S.C. § 101(2), which is beyond the scope of this Note. For the language of 17 U.S.C. §§ 101(1), (2), see supra note 2.  
44. See id.  
45. See id. at 751-52.  
46. For a listing of several articles discussing Reid and its ramifications on the "work made for hire" doctrine, see infra note 98.  
47. See Reid, 490 U.S. at 730. The association in Reid was not for profit and unincorporated. See id.  
48. See id. at 733-35.  
49. See id. at 735.  
50. See id. at 736.  
51. See id.  
53. Reid, 490 U.S. at 736.
The Reid Court examined the four lower court interpretations then in existence for the definition of "employee" within the meaning of the Act.\textsuperscript{54} The first interpretation was referred to as the "right to control test."\textsuperscript{55} Specifically, this interpretation stated that work "is prepared by an employee whenever the hiring party retains the right to control the product."\textsuperscript{56}

This test had been established earlier in Clarkstown v. Reeder.\textsuperscript{57} In Clarkstown, the township claimed that a handbook written for them by the defendant was their property, and registrable as a "work made for hire."\textsuperscript{58} The court stated that the crucial factor was whether the alleged employer had the right to direct and supervise the manner in which the writer performed his work.\textsuperscript{59} In considering this factor, the court found that the defendant was an employee because he was under the control of the township at all times during the creation of the handbook.\textsuperscript{60} The court consequently held that the township owned the copyright as a "work made for hire" because the defendant was an employee of the township.\textsuperscript{61}

The second test discussed in Reid was set forth by the United States Court of Appeals for the Second Circuit in Aldon Accessories Ltd. v. Spiegel, Inc.\textsuperscript{62} Under this test, "a work is prepared by an employee under § 101(1) when the hiring party has actually wielded control with respect to the creation of a particular work."\textsuperscript{63} This standard is a slightly narrower variation of the first test, in which the "right to control," as opposed to actual control, is all that is needed to establish ownership.

\begin{itemize}
\item \textsuperscript{54} See id. at 738-40.
\item \textsuperscript{55} Id. at 738 (citing Peregrine v. Lauren Corp., 601 F. Supp. 828, 829 (D. Colo. 1985)).
\item \textsuperscript{56} Id. at 738.
\item \textsuperscript{57} 566 F. Supp. 137, 142 (S.D.N.Y. 1983). See also Peregrine v. Lauren Corp., 601 F. Supp. 828 (D. Colo. 1985) ("The view that a work for hire relationship exists when an employer has the right to control the party doing the work has received wide judicial acceptance.").
\item \textsuperscript{58} Clarkstown, 566 F. Supp. at 140.
\item \textsuperscript{59} See id. at 141 (citing M. NIMMER, NIMMER ON COPYRIGHT § 5.03(B)(a), at 5-12 (1982)).
\item \textsuperscript{60} See id. at 142.
\item \textsuperscript{61} See id. at 142-43.
\item \textsuperscript{62} 738 F.2d 548 (2d Cir. 1984).
\item \textsuperscript{63} Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989)(citing Aldon, 738 F.2d at 551). The Aldon court stated that the relevant question was whether the "hiring author caused the work to be made and exercised the right to direct and supervise the creation." Aldon, 738 F.2d at 551. This test was adopted by other circuits. See, e.g., Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co., 810 F.2d 410 (4th Cir. 1987) (adopting Aldon test); Evans Newton, Inc. v. Chicago Sys. Software, 793 F.2d 889 (7th Cir.) (following Aldon).
\end{itemize}
In *Aldon*, Aldon Accessories hired an independent contractor to create statuettes for Aldon Accessories to sell in the United States. Spiegel, Inc. began selling identical statuettes and when Aldon discovered Spiegel's activity, Aldon Accessories sued Spiegel for copyright infringement of Aldon Accessories' statuettes. Although the employment situation admittedly did not meet the requirements set forth in Section 101(2), Aldon Accessories argued that the work was protected as “work made for hire” under Section 101(1). The trial court agreed and found that the party hired to produce the statuettes was under Aldon Accessories' control and supervision to the extent that an employer-employee relationship existed.

On appeal, Spiegel argued that the statuettes were not protected because they were produced by an independent contractor and therefore not registrable by Aldon Accessories as “work made for hire.” Specifically, Spiegel argued that regular employees and independent contractors were treated separately under the Act. Spiegel reasoned that independent contractors are covered exclusively by subdivision (2) of the definition provided in Section 101, and any attempt to classify the contractors under subdivision (1) was not consistent with the statutory language. By Spiegel's reasoning, Aldon Accessories' works could only be considered works made for hire if they fell within Section 101(2), because that section and that section alone addresses independent contractors. The court rejected Spiegel's argument and upheld the lower court's instruction which stated that a “work made for hire” is one prepared by a person acting under the direction, supervision, and expense of the hiring author.

64. See *Aldon*, 738 F.2d at 549-51.
65. See *id.* at 549.
68. See *Aldon*, 738 F.2d at 551.
69. See *id.*
70. See *id.*
71. See *id.* Section 101(1) addresses the case where an employee is hired to do work for an employer where that employer wants to copyright the work as his own. 17 U.S.C. § 101(1) (1977). Section 101(2) addresses the case where the person hired is not an employee per se, but helps with works which fall into the categories specifically listed in that section. 17 U.S.C. § 101(2) (1977). For the language of these sections, see *supra* note 2.
72. See *Aldon*, 738 F.2d. at 551.
73. See *id.* The Second Circuit concluded by posing the test as a question: “[I]s the contractor ‘independent’ or is the contractor so controlled and super-
The third test examined in *Reid* was set forth by the United States Court of Appeals for the Ninth Circuit in *Dumas v. Gommerman*. This test established that the term "employee" only refers to formal, salaried employees. In *Dumas*, the successor-in-interest of a graphic artist alleged that Gommerman had infringed upon her late husband's copyrights. The Ninth Circuit held that a non-salaried graphic artist who performed work on a subject suggested by the hiring party was not that party's employee for purposes of "work made for hire" protection. Further, the Ninth Circuit stated that the degree of control exercised by the hiring party is irrelevant.

The final test examined in *Reid* stated that the word "employee" within Section 101(1) carries its common-law agency law meaning. This was the view of the United States Court of Appeals for the Fifth Circuit as stated in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*. In *Easter Seal*, the court found that the *Aldon* test was inherently flawed. The Fifth Circuit stated that the language in the Copyright Act does not support the "actual control" test of *Aldon*. The court concluded that a work is "made for hire" only where the hired party is an employee vised in the creation of the particular work by the employing party that an employer-employee relationship exists. [sic]. The latter is covered by subdivision (1)."


75. *See Dumas*, 865 F.2d at 1102.

76. *See id.* at 1095. Gommerman owned and operated an art gallery which sold works created by Dumas' late husband, Patrick Nagel. *See id.* at 1094.

77. *See id.* at 1099.

78. *See id.*

79. *Reid*, 490 U.S. at 739 (citing *Easter Seal Soc'y for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enters.*, 815 F.2d 323 (5th Cir. 1987)). In *Easter Seal*, the Easter Seal Society contracted with a public television station to videotape a parade and a musical recording session. *See Easter Seal*, 815 F.2d at 324. Playboy Enterprises later obtained and used part of the video in a production of their own. *See id.* at 325. The Easter Seal Society sued Playboy for copyright infringement. *See id.* The court held that the public television station hired by the Easter Seal Society was an independent contractor, and the work was not protected as "work made for hire" under Section 101(1). *See id.* at 337.

80. 815 F.2d 323 (5th Cir. 1987).

81. *Id.* at 334.

82. *See id.*
within the meaning of agency law, 83 or where the parties comply with the requirements of Section 101(2). 84 Moreover, the Fifth Circuit specifically rejected the Aldon test and created the more literal interpretation of the 1976 Act. 85

After examining these four tests, the Supreme Court held that an “employee” within the meaning of the Act is one who meets the definition of an “agent” under agency law, effectively accepting the test set forth in Easter Seal. 86 The Court rejected the “right to control” and “actual control” tests discussed previously because it found that neither test is consistent with the text of the Act. 87 Specifically, the Court found that these tests are not consistent with the language of Section 101(1), and additionally, “distort the meaning of the ensuing subsection, § 101(2).” 88 The Court relied on the fact that Section 101 “plainly creates two distinct ways in which a work can be deemed for hire: one for works prepared by employees, the other for those specially ordered or commissioned works which fall within one of the nine enumerated categories and are the subject of a written agreement.” 89 The Court continued by stating that the two tests at issue do not allow this dichotomy, and that the nine specific categories set forth in Section 101(2) would already be, in

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83. See id. at 334-35. Generally, someone is an employee within the meaning of agency law if he is hired by the principal/employer as a specific extension of that principal/employer’s own activity. Harold Gill Reuschlein and William A. Gregory, Handbook on the Law of Agency and Partnership, 1 (1979).

The basic theory of the agency device is to enable a person, through the services of another, to broaden the scope of his activities and receive the product of another’s efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed.

Id.

84. See Easter Seal, 815 F.2d at 334-35. The Fifth Circuit recognized that “this interpretation is a radical break from [the] doctrine under the 1909 Act, but [that] there are good reasons for this break.” Id. According to the Fifth Circuit in Easter Seal, the 1909 Act contained a presumption that in the absence of agreement to the contrary, where an artist was paid to create a work, the solicitor of the artist controlled the publication of copies. See id. at 325 (citing Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir. 1939)). The Fifth Circuit recognized that the language of the 1976 Act was intended to modify the “work for hire” doctrine. See id. at 327. The court then identified the dichotomy set up between the two subsections in Section 101, and stated that its interpretation of the Act is “the best interpretation of the actual language of the ‘work made for hire’ definition of the 1976 Act.” Id. at 335.

85. See id. at 334.


87. See id. at 741.

88. Id.

89. Id. For a listing of these nine categories, see supra note 2.
most cases, "works made for hire" under Section 101(1) if either of the above two tests was used. Moreover, the Supreme Court concluded that the "language and structure of § 101 of the Act do not support either the right to control the product or the actual control approaches."91

The Court also rejected the third test, namely that "employee" refers only to formal, salaried, employees.92 The Court wrote, "[w]hile there is some support for such a definition in the legislative history, . . . the language . . . cannot support it. The Act does not say 'formal' or 'salaried' employee, but simply 'employee.'"93

The Court then reviewed the definition of agent within the agency law.94 "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."95 The Court continued by listing twelve factors relevant to the inquiry of whether control of the manner and means existed.96 These twelve factors, when applied to a set of facts and combined with the overall notion of control, allow the determination of whether an employee or independent contractor relationship exists.97 The factors listed by the Court as relevant to whether an agency relationship exists are: (1) the skill required, (2) the source of the instrumentalities and tools, (3) the location of the work, (4) the duration of the relationship between the parties, (5) whether the hiring party has the right to assign additional projects to the hired party, (6) the extent of the hired party's discretion over when and how long to work, (7) the method of payment, (8) the hired party's role in hiring and paying assistants, (9) whether the work is part of the regular business of the hiring party, (10) whether the hiring party is in business, (11) the provision of em-

90. See id. at 741.
91. Reid, 490 U.S. at 742.
92. See id.
93. Id. at 742 n.8.
94. See id. at 751.
95. Id. (citing Hilton Int'l Co. v. NLRB, 690 F.2d 318, 320 (2d Cir. 1982)).
97. See id.
ployee benefits, and (12) the tax treatment of the hired party.\textsuperscript{98} The Court concluded this section with a statement that "[n]o one of these factors is determinative."\textsuperscript{99}

After Reid, it may seem that the Supreme Court had clarified the definition of an employee for purposes of the "work made for hire" doctrine.\textsuperscript{100} There is still, however, uncertainty in applying agency law principles to the facts of individual cases.\textsuperscript{101} Since Reid, two Circuits have attempted to apply the Reid test in detail.

The United States Court of Appeals for the Third Circuit recently attempted to apply the Reid test in Marco v. Accent Publishing Co., Inc.\textsuperscript{102} The plaintiff, Marco, a photographer, worked for a monthly trade journal owned by Accent Publishing Company.\textsuperscript{103} The Third Circuit found that Marco was an independent contractor, and held that his photographs were not "work made for hire."\textsuperscript{104} For support the court cited the Reid factors, focusing particularly on the ninth element of the Reid test — whether the work performed by the hired party was part of the regular business of the hiring party.\textsuperscript{105} Generally, where the work done by a hired party falls within the business of the hiring party, evidence exists for an employee relationship.\textsuperscript{106} The Third Circuit determined that although the work done by Marco was indeed the type of work regularly done by the publishing company, the type of work was well

\textsuperscript{98} See id. at 751-52 (citing Restatement (Second) of Agency § 220(2) (1957)).


\textsuperscript{99} Reid, 490 U.S. at 752.

\textsuperscript{100} For an illustration of the clarity thought to have been provided by the Reid decision, see Marik, supra note 98.

\textsuperscript{101} For a discussion of this uncertainty, see infra notes 174-237 and accompanying text.

\textsuperscript{102} 969 F.2d 1547 (3d Cir. 1992).

\textsuperscript{103} See id. at 1548.

\textsuperscript{104} See id. at 1552.

\textsuperscript{105} See id. at 1551. This is the ninth element of the twelve element test presented in Reid. For a discussion of this test, see supra notes 86-99 and accompanying text.

\textsuperscript{106} For a discussion of this area of agency law, see Reuschlein, supra note 83.
suited for an independent contractor. The court furthered this reasoning and ultimately held that an independent contractor relationship existed. Thus, although a straightforward application of the "regular business" element would suggest a finding that an employee relationship existed, the Third Circuit simply decided that the element instead supported the existence of an independent contractor relationship.

In Aymes v. Bonelli, the United States Court of Appeals for the Second Circuit examined a case in which Aymes, a computer programmer, filed a copyright infringement suit against Bonelli, the owner of a swimming pool business. Bonelli hired Aymes to write software for Bonelli's swimming pool business. Bonelli had no significant computer programming experience. The Second Circuit held that the program was not a "work made for hire" under the Reid test, thereby entitling Aymes to ownership of the copyright. In reaching this conclusion, the Second Circuit relied primarily on Bonelli's right to control Aymes, the level of skill required by Aymes, Bonelli's financial treatment of Aymes, and Aymes' right to assign other projects. As in Marco, the United States Court of Appeals for the Second Circuit discussed the ninth element of the Reid test, namely, whether the work is part of the regular business of the hiring party. The court found that this element carried little weight because computer software, even if its purpose is to support a swimming pool business, is not a part of the swimming pool business. Oddly, the court did not cite this element as support for finding an independent contractor relationship, but rather afforded it negligible weight.

The court in Aymes, while following Reid, pointed out that weight must be assigned to each element in proportion to that ele-

107. See Marco, 969 F.2d at 1551.
108. See id.
109. See id.
110. 980 F.2d 857 (2d Cir. 1992).
111. See id. at 859.
112. See id.
113. See id. at 862.
114. See id. at 864.
115. See Aymes, 980 F.2d at 862-64. The right to control the work is the general consideration given in the Reid test. The remaining factors used by the Second Circuit in Aymes were the first, fifth, eleventh, and twelfth factors given in Reid. For a discussion of these factors, see supra notes 86-99 and accompanying text.
117. See id.
118. See id.
ment's applicability to the facts of the particular case.\textsuperscript{119} Additionally, the court in \textit{Aymes} stated that the factors should not "merely be tallied but should be weighed according to their significance in the case."\textsuperscript{120} The court reasoned that such a technique suggests a more equitable result because it adjusts the elements to fit within the facts specific to a particular situation.\textsuperscript{121}

\textit{Hi-Tech} falls in line behind \textit{Aymes} and \textit{Marco} as a case decided after \textit{Reid} in which proper application of the \textit{Reid} test has been attempted by a federal appellate court.\textsuperscript{122} \textit{Hi-Tech}, \textit{Aymes}, and \textit{Marco} all illustrate that while \textit{Reid} has tightened the criteria for applying the "work made for hire" doctrine, it has not solved all of the problems associated with this already confusing area of law.

\section*{IV. Narrative Analysis}

At issue before the United States Court of Appeals for the Sixth Circuit in \textit{Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc.}\textsuperscript{123} was whether the assistants hired by the owner of Hi-Tech Video Productions were employees within the meaning of the Copyright Act of 1976.\textsuperscript{124} The Sixth Circuit identified the relevant

\begin{flushleft}
\textsuperscript{119} See \textit{id.} at 861.
\textsuperscript{120} See \textit{id.}
\textsuperscript{121} See \textit{Aymes}, 980 F.2d at 861. Where a court is asked to weigh factors, more room is allowed for an equity argument. Where the test is cut sharply from a rigid list of factors, less room is allowed for equity. "The district court in \textit{Aymes} was reversed in part because it 'tallied' rather than 'weighed' the relevant factors." Ossola, \textit{supra} note 9.
\textsuperscript{122} See \textit{Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc.}, 58 F.3d 1093 (6th Cir. 1995).
\textsuperscript{123} 58 F.3d 1093 (6th Cir. 1995).
\textsuperscript{124} See \textit{id.} For a discussion of the facts of \textit{Hi-Tech}, see \textit{supra} notes 14-33 and accompanying text.
\end{flushleft}
and applied the *Reid* test to the facts of the case.\(^{126}\)

The *Reid* test allows the court to determine whether an individual is an "employee" within the meaning of the Copyright Act of 1976 through the weighing of a nonexclusive group of factors.\(^ {127}\)

The court found four of these factors applicable: (1) the extent to which Akey controlled the work and the artistic ability required by him during that control, (2) Akey's financial treatment of his assistants,\(^ {128}\) (3) Akey's perceptions of his hired assistants, and (4) whether the work performed by the assistants was a regular part of Akey's business.\(^ {129}\)

Prior to performing its analysis of the case, the Sixth Circuit identified those areas where it believed the district court erred.\(^ {130}\) First, the court specifically rejected the district court's factual find-

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\(^{125}\) *See id.* at 1096. Hi-Tech's certificate of copyright classified the video as a "work made for hire." *See id.* at 1095. The court therefore identified the two relevant sections of the United States Code. "[T]he Copyright Act of 1976 ('the Act') considers the employer or person for whom the work was prepared to be the 'author' for purposes of copyright registration and ownership." *Id.* at 1095 (citing 17 U.S.C. § 201(b) (1977)). The court continued by supplying the statutory definition of "work made for hire":

Section 101 of the Act defines a 'work made for hire' in two ways: (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 . . . , if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire . . . .

*Id.* at 1095 (quoting 17 U.S.C.A. § 101 (1977)). Hi-Tech did not claim any written agreement; therefore, the court was not concerned about Section 101(2). *See id.*

The court framed the issue by focusing on whether the video was prepared by employees or independent contractors of Hi-Tech. *See id.* Since there was no claim by ABC that the work was not prepared by the hired assistants acting in the scope of their employment, that question was not addressed. *See id.* Moreover, the question was simply whether or not the video was prepared by employees or independent contractors; if it was prepared by employees, the copyright would have been held valid and infringed. *See id.*

\(^{126}\) *See Hi-Tech,* 58 F.3d at 1096 (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)). For a discussion of the *Reid* test, see supra notes 86-99 and accompanying text.

\(^{127}\) *See supra* notes 86-121 and accompanying text (discussing *Reid* test and its use).

\(^{128}\) *See Hi-Tech,* 58 F.3d at 1096. This is a combination of factor 7, the method of payment; factor 11, employee benefits; and factor 12, the tax treatment. For a discussion of these factors as explained in *Reid,* see infra notes 142-50 and accompanying text.

\(^{129}\) The third factor listed above, Akey's perceptions of his hired assistants, is not a factor explicitly stated in *Reid.* For a discussion of the introduction of this factor, see infra notes 151-55 and accompanying text. For the list of factors set forth in *Reid,* see supra note 98 and accompanying text.

\(^{130}\) *See Hi-Tech,* 58 F.3d at 1096.
ings on several of the Reid factors.\textsuperscript{131} Contrary to the district court, the Sixth Circuit found that Akey did not supply the equipment to his assistants.\textsuperscript{132} The Sixth Circuit also found that Akey did not retain the right to assign his assistants additional projects.\textsuperscript{133} Second, the Sixth Circuit rejected the district court's reasoning regarding its application of the common law of agency.\textsuperscript{134} The Sixth Circuit stated that the district court misapplied several factors, and noted that weight must be accorded to the factors in proportion to the degree in which they are applicable to this case.\textsuperscript{135} After identifying the problems with the district court's ruling, the Sixth Circuit discussed those factors of the Reid test which it found most important.\textsuperscript{136}

The first element discussed by the court was the extent to which Akey controlled the work at issue and the artistic skill required by him during that period of control.\textsuperscript{137} The Sixth Circuit followed Reid by applying agency principles to the idea of control over the "employee."\textsuperscript{138} Under this test, the right to exercise control over production is not completely determinative in the "work made for hire" analysis.\textsuperscript{139} The court stated that while Akey did have the right to control the "manner and means by which the video was completed," he still relied on the skill of his assistants to

\textsuperscript{131} See id. The Sixth Circuit's review of the district court was de novo. See id. at 1095. The district court found that Akey supplied his own equipment to his assistants, and that Akey retained the right to assign additional work to his assistants. See id. at 1096. The Sixth Circuit simply disagreed with the district court's findings of fact. See id.

\textsuperscript{132} See id. at 1096. The district court found that Akey had supplied the equipment used by his assistants because Akey supplied some photographic equipment to his hired parties. See id. The Sixth Circuit found that because some equipment was supplied by the hired parties, Akey did not supply equipment to them. See id.

\textsuperscript{133} See id. The district court had found that Akey retained the right to assign additional work to the assistants because there was no agreement to the contrary. See id. The Sixth Circuit found that because Akey hired the men for this job specifically, he did not retain the right to assign additional work. See id.

\textsuperscript{134} Id.

\textsuperscript{135} See Hi-Tech, 58 F.3d at 1096 (citing Aymes v. Bonelli, 980 F.2d 861 (2d Cir. 1992)). Specifically, the Sixth Circuit wrote, "it does not necessarily follow that because no one factor is dispositive all factors are equally important, or indeed that all factors will have relevance in every case. The factors should not merely be tallied but should be weighed according to their significance in the case." Id.

\textsuperscript{136} See id. at 1097-99.

\textsuperscript{137} See id. at 1097.

\textsuperscript{138} See id. (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989)). For a discussion of applicable agency principles, see supra notes 86-121 and accompanying text.

\textsuperscript{139} See Hi-Tech, 58 F.3d at 1097 (citing Reid, 490 U.S. at 742-43).
accomplish those objectives.\textsuperscript{140} This reliance on the skill of his assistants led the court to find that Akey had insufficient involvement, at least with respect to this element, for a finding that his assistants were his employees.\textsuperscript{141}

The second element discussed by the court concerned Akey's financial treatment of his assistants.\textsuperscript{142} Three elements combine in this area of inquiry: the method of payment, employee benefits and tax treatment.\textsuperscript{143} The court found that examination of these factors also favored a finding of independent contractor status.\textsuperscript{144} Specifically addressing each of these three factors, the court began with the method of payment.\textsuperscript{145} While the court admitted that Akey paid Mueller on a per diem basis, indicating an employee relationship, the court also noted that Mueller only worked for Akey for five days.\textsuperscript{146} The court then stated that such a short duration of employment suggests independent contractor status.\textsuperscript{147} The court concluded its discussion on the method of payment by stating that the evidence, overall, is indeterminate.\textsuperscript{148} The court, however, looked at the remaining two elements of this set and noted that no benefits were provided to the assistants and no payroll taxes were withheld.\textsuperscript{149} From this analysis the court found that this area of inquiry, albeit a combination of three \textit{Reid} factors, favors a finding of independent contractor status.\textsuperscript{150}

The third element relied upon by the Sixth Circuit for support of its holding was Akey's statements.\textsuperscript{151} Though this factor was not given in \textit{Reid} as an appropriate element to examine, the Sixth Circuit supported its use of the element by stating, "[i]n applying the common law of agency to copyright cases, the Supreme Court typi-

\begin{itemize}
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} See \textit{id.} at 1097. Specifically, the court held that "Akey's control of the video production thus weighs in favor of finding an employer-employee relationship, but not significantly, in light of the skill required of the assistants, as well as the assistants' artistic contributions to the product." \textit{Id.}
  \item \textsuperscript{142} \textit{Id.}
  \item \textsuperscript{143} See \textit{id.}. The court stated, "[i]n virtually every case, a strong indication of a worker's employment status can be garnered through examining how the employer compensates the worker . . . ." \textit{Id.}
  \item \textsuperscript{144} See \textit{Hi-Tech}, 58 F.3d at 1097.
  \item \textsuperscript{145} See \textit{id.}
  \item \textsuperscript{146} See \textit{id.}
  \item \textsuperscript{147} See \textit{id.}
  \item \textsuperscript{148} See \textit{id.}
  \item \textsuperscript{149} See \textit{Hi-Tech}, 58 F.3d at 1097. Specifically, the court wrote, "[c]ontrary to the district court's analysis, these factors weigh very heavily in favor of finding independent contractor status." \textit{Id.}
  \item \textsuperscript{150} See \textit{id.}
  \item \textsuperscript{151} See \textit{id.}
\end{itemize}
cally refers to the Restatement of Agency for guidance.” 152 The court further explained that the Restatement considers perceptions or understandings of the parties relevant to a worker’s employment status. 153

At trial, Akey referred to his assistants as “freelancers,” “independent contractors” and “subcontractors.” 154 While the district court did not weigh these statements heavily, these characterizations were used by the Sixth Circuit for support of its finding that Akey did not recognize his assistants as his employees. 155

Finally, the court concluded with a discussion of the scope of Akey’s business in determining his assistants’ status. 156 The court stated that if the work is not a part of the hiring party’s regular business, the hiring party is more likely to hire an independent contractor on a periodic basis than hire a full-time employee. 157 The court also stated, however, that “similarity between the hiring party’s regular business and the hired party’s work does not necessarily weigh significantly in favor of finding an employer-employee relationship.” 158 The court then stated that because Akey could use independent contractors to perform normal business, his hiring three assistants was not particularly persuasive evidence that an employee relationship existed. 159

After the main discussion of these four factors, the court briefly noted that the record did not indicate the extent to which the work was completed on Hi-Tech’s property, whether Akey had discretion over working hours, or whether the assistants had assisted Akey on previous projects. 160 The court also noted that the fact that Akey’s assistants did not hire additional workers, and that Hi-Tech was in business, do not carry any significance one way or another. 161 Finally, the court stated that such issues, in light of the facts of this

152. Id. (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 n.31 (1989)).
153. See id. (citing Restatement (Second) of Agency § 220(2)(i) (1957)).
154. Hi-Tech, 58 F.3d at 1097.
155. See id. The district court did not mention this element as a controlling factor. See id. The Sixth Circuit, however, applied great weight to Akey’s statements, stating, “[t]his Court considers Akey’s perceptions highly indicative of his assistant’s independent contractor status.” Id. at 1098.
156. See id. at 1098.
157. See id.
158. Id. (citing Marco v. Accent Publishing Co., 969 F.2d 1547 (3d Cir. 1992)). For a discussion of Marco, see supra notes 102-09 and accompanying text.
159. See Hi-Tech, 58 F.3d at 1098.
160. See id.
161. See id. at 1098-99.
case, were not dispositive because neither suggested employee status nor independent contractor status.\textsuperscript{162}

Judge Bell, writing for the majority, summarized the court's holding as follows: "[t]he economic treatment of the assistants, the skill required of the assistants, and Akey's own perceptions of the assistants' status compel the conclusion that Cline, Mueller, and Cook were independent contractors."\textsuperscript{163} Because the assistants were independent contractors, and not employees within the meaning of the copyright statute, the work was not one "made for hire."\textsuperscript{164} Consequently, the copyright registration in the video was held invalid, and the district court ruling was reversed.\textsuperscript{165}

In his dissenting opinion, Judge Jones challenged the majority's application of the \textit{Reid} factors.\textsuperscript{166} Judge Jones argued that a correct application of the \textit{Reid} factors finds that Akey's assistants were employees within the meaning of the statute.\textsuperscript{167} Judge Jones noted that since Akey filmed the scene of the island from the airplane, edited the footage, and compiled the video from the edited footage, Hi-Tech could indeed copyright the work as "work made for hire."\textsuperscript{168} Judge Jones distinguished \textit{Hi-Tech} from \textit{Reid}, and argued that in \textit{Reid}, the "employers" were non-artists in an anti-homelessness agency.\textsuperscript{169} In \textit{Reid}, the non-artist association hired an artist, Reid, to create a sculpture.\textsuperscript{170} Judge Jones also stated that Akey did maintain significant control over the final product.\textsuperscript{171} In support of this position, Judge Jones noted Akey's decision-making power over which shots would be included in the final video, the order that

\begin{itemize}
\item \textsuperscript{162} See id.
\item \textsuperscript{163} Id. at 1099.
\item \textsuperscript{164} See \textit{Hi-Tech}, 58 F.3d at 1099. For a discussion of the Copyright Act of 1976 and its definition of "work made for hire," see supra notes 2-3 and accompanying text.
\item \textsuperscript{165} See \textit{Hi-Tech}, 58 F.3d at 1099.
\item \textsuperscript{166} See id. at 1099-1100 (Jones, J., dissenting).
\item \textsuperscript{167} See id. 1099 (Jones, J., dissenting). Judge Jones referred to Akey as an employee of Hi-Tech. See id. 1099 (Jones, J., dissenting). This reference was opposed by the majority, which stated, "Akey is not an employee of Hi-Tech; Akey is Hi-Tech." Id. at 1096. For a discussion of this difference of classification, see infra note 194.
\item \textsuperscript{168} See id. at 1100 (Jones, J., dissenting).
\item \textsuperscript{169} See id. (Jones, J., dissenting).
\item \textsuperscript{170} See \textit{Hi-Tech}, 58 F.3d at 1099 (Jones, J., dissenting). Judge Jones wrote that in a case where the hired party brings with him all of the artistic ability involved in the work, a court should perhaps find that the work is his own, and not that of the hiring party. See id. at 1100 (Jones, J., dissenting). Where the artist is hired by a non-artist, it is not the place of the copyright law to give ownership of the work to the non-artist, absent some other specific agreement to the contrary. See id. (Jones, J., dissenting).
\item \textsuperscript{171} See id. at 1100 (Jones, J., dissenting).
\end{itemize}
these shots would be presented and the transitions between these shots. Judge Jones concluded that the district court's finding that nearly all of the creativity encompassed in the work was contributed by Mr. Akey, should not be disturbed.

V. CRITICAL ANALYSIS

Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc. propagates the inconsistent and unpredictable line of authority construing the "work made for hire" doctrine. Since the Reid decision, the question of who is an employee within the meaning of the Copyright Act has been somewhat less difficult to answer. The test simply asks whether the hired party is an employee within the meaning of agency law. If he or she is an employee, then the work is made for hire and protected by the Copyright Act. Consistent application of this test, however, has been a challenge to courts attempting to use it — and with inconsistent application comes unpredictability. This unpredictability finds its origins in Reid, where the Supreme Court presented a laundry list of factors but did not offer lower courts guidance regarding the use and weight of each factor. Add to this the further complication that the Supreme Court did not state which factors should necessarily be used in a given case, and uncertainty abounds. Examples of the uncertainty created by this lack of specific direction are found in Marco and Aymes.

172. See id. (Jones, J., dissenting). Judge Jones wrote that Akey also "supplied the cameras and other equipment ... , completely controlled all aspects of hiring and paying assistants ... ", and was within his area of business. Id. (Jones, J., dissenting).

173. See id. (Jones, J., dissenting).

174. For a discussion of the Reid test and its definition of employee, see supra notes 86-99 and accompanying text.


176. For a discussion of this test, see supra notes 86-99 and accompanying text.

177. For a discussion of the vagueness that still exists within the Reid test through an examination of Marco and Aymes, see supra notes 100-21 and accompanying text.

178. For a discussion of Reid, see supra notes 43-99 and accompanying text.

179. For an example of judicial attempts to apply the Reid test, see Marco v. Accent Publishing Co., Inc., 969 F.2d 1547 (3d Cir. 1992) (interpreting ninth Reid factor incorrectly); Aymes v. Bonelli, 980 F.2d 857 (2d Cir. 1992) (applying no weight to factor instead of applying weight where factor supported finding of independent contractor status).
Marco v. Accent Publishing Co., Inc. well illustrates this uncertainty. In Marco, the United States Court of Appeals for the Third Circuit misconstrued the ninth element of the Reid test, which requires analysis of whether the work performed by the hired party was part of the regular business of the hiring party. The court took an element which, when applied to Marco, should have been support for an employee relationship, and misapplied it to find an independent contractor relationship. The court in its own opinion recognized that the type of work done by the hired party was within the scope of work typically done by the hiring party. The court further admitted that this finding normally suggests an employee relationship. Regardless of these admissions, the court found that while the work was of the type regularly done by the hiring party, it is work which is well suited for an independent contractor. Through this twist of logic, and independent of precedential or statutory authority, the Marco court apparently decided that the best way for a monthly trade journal to obtain photographs is to hire independent contractors, not employees. The court imposed its own view of the hiring situation without regard to the Reid test. Perhaps the court knew already what it was going to hold and wished to garner as much support as it could for its position. Whatever the reason, the misapplication of this element is cause for concern. A court seems to be free to rule either way upon examining a particular element.

Aymes v. Bonelli provides another example of the problems created where courts are given excessive freedom in deciding “work made for hire” cases. In Aymes, the United States Court of Appeals for the Second Circuit also addressed the ninth element of the Reid test, among others, and determined that the element carried no weight in the final determination of employment status. The court determined that computer software design, even if its

180. For a discussion of Marco v. Accent Publishing Co., Inc., see supra notes 102-09 and accompanying text.

181. It should be noted that the Third Circuit’s holding in Marco seems quite agreeable. However, that court’s application of this particular element, while not ultimately detrimental to Marco, is nonetheless cause for concern. For a discussion of the ninth element of the Reid test and how it is used to differentiate between an employee and an independent contractor, see supra notes 105-06 and accompanying text.

182. See Marco, 969 F.2d at 1551. This notion makes sense because work outside the normal scope is well suited for an independent contractor.

183. See Marco, 969 F.2d at 1551.

184. For a discussion of Aymes, see supra notes 110-21 and accompanying text.

185. See Aymes, 980 F.2d at 863.
purpose is to support a swimming pool business, is not part of the swimming pool business.\textsuperscript{186} The court stated that this determination suggests that Aymes was an independent contractor.\textsuperscript{187} However, the court chose to dismiss the element as negligible rather than cite it as support for its finding of independent contractor status.\textsuperscript{188} Although the court ultimately did find that an independent contractor status existed, it is nonetheless disturbing that a probative element can so easily be excluded because a court deems it negligible.

While some flexibility in the application of the \textit{Reid} test is generally a good idea, the dismissal or blatant misapplication of certain elements can adversely affect the outcome of a particular case. Flexibility within the bounds of reason and limited to the extenuating circumstances in a particular case is consistent with fairness. However, even flexible rules can be broken. The application of the \textit{Reid} test in \textit{Aymes} and \textit{Marco} has shown that what one court sees as irrelevant may in fact be relevant and persuasive support for the opposing argument. What the \textit{Marco} court began was finished by the court in \textit{Aymes}. Together those cases removed what predictability this element may have possessed in its short life between \textit{Reid} and the \textit{Aymes} and \textit{Marco} decisions in 1992.

That agency law elements apply to the determination of who is an employee within the meaning of the Copyright Act is undisputed after \textit{Reid}.\textsuperscript{189} It is the application of agency law elements which continues to be the stumbling block for courts attempting to follow \textit{Reid}.\textsuperscript{190} The Second and Third Circuits' varied and inconsistent application of the \textit{Reid} test discussed previously, apparently gave the Sixth Circuit freedom to abuse the \textit{Reid} test in \textit{Hi-Tech}. \textit{Hi-Tech}, along with \textit{Aymes} and \textit{Marco}, illustrate that under the \textit{Reid} test, a court has considerable leeway in making "work made for hire" determinations.

\begin{itemize}
\item \textsuperscript{186} As with \textit{Marco}, the court's ultimate ruling seems agreeable. However, the Second Circuit's finding in \textit{Aymes} that the ninth element should be afforded no weight is cause for concern. That element can easily be used to support a finding of independent contractor existence.
\item \textsuperscript{187} For a discussion of the ninth element of the \textit{Reid} test and how it is used to differentiate between an employee and an independent contractor, see \textit{supra} notes 105-06 and accompanying text.
\item \textsuperscript{188} See \textit{Aymes}, 980 F.2d at 863.
\item \textsuperscript{189} For a discussion of the holding in \textit{Reid}, see \textit{supra} notes 86-99 and accompanying text. Specifically, the Supreme Court wrote that an "employee" within the meaning of the Act is one who meets the definition of an "agent" under agency law. \textit{Reid}, 490 U.S. at 751.
\item \textsuperscript{190} For a discussion of the problems with consistent application, see \textit{supra} notes 100-21 and accompanying text.
\end{itemize}
In *Hi-Tech*, the Sixth Circuit applied the *Reid* test in an unpredictable manner. As such, the *Reid* test has grown from a fact-sensitive test to a hyper-fact-sensitive test, allowing a court to rule almost indiscriminately on any given copyright infringement action brought under the "work made for hire" doctrine. *Reid* sets forth a list of elements to which facts are to be applied in conjunction with recognized agency law principles. This seemingly simple test did not, however, prevent the district court and the court of appeals from reaching opposite results while applying the same law to the same facts.

In its determination that Cline, Cook, and Mueller were independent contractors, the Sixth Circuit relied on four elements of...
the test proscribed in *Reid*. The *Reid* test does not require all twelve elements to be used in every case, and the Sixth Circuit selected the elements which it thought were applicable to the facts surrounding Hi-Tech's claim.

The Sixth Circuit looked first and most importantly to Akey's control of the work and the artistic ability required by him during that period of control. Second, the court looked at Akey's financial treatment of his assistants. Third, the Sixth Circuit placed heavy emphasis on Akey's perceptions of his hired assistants. Fourth, the court looked at whether the work performed by the assistants was a regular part of Akey's business. The court's finding that Akey's financial treatment of Cline, Cook, and Mueller suggested the existence of an independent contractor relationship is sound. However, the court's treatment of the first, third, and fourth elements is both questionable and unsettling.

The court's treatment of these three elements raises concern for the future predictability of the "work made for hire" doctrine. The first area of concern is the majority's finding that Akey did not control the production of the work sufficient to find that he was the assistants' employer. This holding suggests that an employer is unable to hire individuals with skill or artistic ability to help him create a copyrightable work. The Sixth Circuit also overemphasized Akey's perceptions of his assistants' status. Finally, the court's conclusion that Akey's business is well suited for hiring independent contractors, though it is regularly involved with the creation of

196. For a discussion of the elements selected by the Sixth Circuit and that court's application of the facts to those elements, see supra notes 122-173 and accompanying text.
198. See id.
199. See id.
200. See id. at 1098.
201. See id. at 1097.
videos, is distressing. This finding raises serious doubt about the effectiveness of this factor in predicting how a court will rule.

A. Participation in Production of the Work

The Sixth Circuit stated that Akey's participation in the video production "weighs in favor of finding an employer-employee relationship, but not significantly, in light of the skill required of the assistants . . ."202 The court did not state what degree of participation would suffice to establish a significant role, such that an employer-employee relationship could be found. The Sixth Circuit justified its belief that Akey lacked "significance" by noting that he relied on his assistants' creative and artistic ability.203 While Akey did rely on his assistants' abilities, it is difficult to imagine a situation where a person would hire someone to do work in the hope that the person hired would not contribute skill, creativity or ability. Virtually all people hired to help with a creative work are hired for their creative and artistic talents.

This assertion is evidenced by the Supreme Court's statement in Reid that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."204 Thus, a key factor in determining whether a hired party is an employee, within the meaning of agency law, is whether his artistic abilities are under the control of the hiring party.205 In other words, where a hiring party controls the overall creation by controlling the "manner and means" by which it is created, the parties are in an employer-employee relationship.206 If

202. See Hi-Tech, 58 F.3d at 1097.
203. See id.
205. Obviously, in any kind of employment relationship, whether it is an independent contractor relationship or employee relationship, the hired party is, in a general sense, under the control of the hiring party. Here, the Supreme Court has drawn a distinction between a general control of the hired party and a control of the artistic aspects of the creation. For a general discussion of the general control element and its rejection, see supra notes 55-73 and accompanying text, and supra notes 86-91 and accompanying text.
206. For a discussion of this control element and its place within the Reid test, see supra note 95.

The United States Court of Appeals for the Second Circuit in Hilton Int'l Co. v. NLRB stated, referring to the "manner and means" by which something is produced, that the "test is difficult to apply since the result is necessarily a function of the manner and means employed." Hilton Int'l Co. v. NLRB, 690 F.2d 318, 320 (2d Cir. 1982). Moreover, the resultant product is in existence because of the manner and means by which it was produced. Even a strict use of the phrase "manner and means" would require one to acknowledge that the skill and ability
the "manner and means" by which something is produced includes the artistic ability, skill and creativity of the ones producing it, then the Supreme Court's consideration of the control of the "manner and means" suggests that people hired to produce the work are in an employer-employee relationship when their artistic abilities are under the control of the hiring party.207 Certainly, where no such control exists, a court should find an independent contractor relationship. In Hi-Tech, the Sixth Circuit wrote that Akey had controlled the artistic aspects of the creation,208 yet held that he lacked the requisite control to establish that the assistants were his assistants.209 This does not seem to be consistent with the Supreme Court's position in Reid that a determination of employee status should rest largely on a showing of control of the artistic aspects.210

This emphasis on the hiring party's control over the hired party's artistic ability should not be confused with the Aldon test, rejected by the Supreme Court in Reid.211 In that case, the only element examined was whether the hiring party controlled the hired party.212 Here, in the application of this element, the question is whether the hiring party controlled the artistic ability of the hired party. The distinction between controlling the hired party and controlling the artistic ability of the hired party is the difference between the Aldon test, rejected by the Supreme Court, and the Reid test. In any case where one party hires another, the hiring party retains some degree of control, however minimal. Important in this analysis, however, is whether the artistic ability of the hired party is directed, instructed, and otherwise controlled such that the artistic aspects of the final creation are the result of the desires of the hiring party.213

The Sixth Circuit found that Akey coordinated the entire project from beginning to end, but held that Cline, Cook, and Mueller
were not Akey's employees. Akey controlled the creative aspects of the tape and coordinated the efforts of all the people who worked for him. In support of its holding the court stated that although Akey controlled the artistic aspects of the work, he also relied on the skill of his assistants. Apparently, Akey would have been unable to rely on the skill of his assistants and still claim the work as one "made for hire." Akey, according to the record, did everything short of the actual, physical, complete production, yet lacked sufficient control to claim the work as his own. The Sixth Circuit seems to have told Akey that he may not hire similar artistic help on future projects like the Mackinac video and expect to obtain a valid copyright registration.

To understand where the line should be drawn between independent contractor and employee, and to see why Hi-Tech may have been incorrectly decided, it might help to examine cases in which control of the artistic aspects of the work lacked to a degree such that no employer-employee relationship existed. Judge Jones pointed out in his dissenting opinion in Hi-Tech that Reid might be a better demonstration of a situation in which the hiring party lacked sufficient control because the hiring party was a non-artistic anti-homelessness agency who hired an artist. Judge Jones believed that an artistically inexperienced and unskilled organization

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215. See id. Akey was involved with every step of the creative and administrative processes involved with the video. See id. Akey "coordinate[d] the entire project from its inception to completion, the creative input into the tape, and coordinate[d] the efforts of all the freelance people who worked with [him]." Id.

216. See id.

217. See id. The Sixth Circuit acknowledged the fact that Akey controlled the project effort, but found that this was outweighed by his assistants' abilities. See id. The Sixth Circuit wrote, "[n]evertheless, while Akey may have had control of the artistic objectives of the project, it is also true that Akey relied on the skill of the artists . . . ." Id. Of particular importance to the Sixth Circuit was the fact that Akey's assistants had artistic ability. Hence, the Sixth Circuit here suggests that those hired must not have artistic ability if the one hiring them wishes to claim a "work made for hire."

218. See supra notes 102-210 (discussing Akey's role and fact that court held it insufficient to establish ownership).

219. See Hi-Tech, 58 F.3d at 1100 (Jones, J., dissenting). Reid worked "in his own studio in Baltimore, making daily supervision of his activities from Washington [D.C.] practically impossible." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989). Additionally, Reid was an artist, and the court pointed out that creating sculptures was not part of the regular business of the hiring party. See id. These statements by the Supreme Court indicate that where the hiring party is not himself an artist or at least not involved with the artistic aspects of the work for which he has hired help, he cannot exercise the requisite control.
could not exercise control over the artistic abilities of the hired artist because they did not have the expertise necessary to do so.\textsuperscript{220}

Another edifying foil to \textit{Hi-Tech} is \textit{Aymes v. Bonelli}. \textit{Aymes} exemplifies a situation in which the hiring party did not have sufficient control of the hired party's skills to the extent necessary that the doctrine should attach.\textsuperscript{221} In that case, a businessman with no computer experience hired a programmer to design software for his business, and the court held that the work was not one "made for hire."\textsuperscript{222} In cases like \textit{Reid} and \textit{Aymes}, it is easy to accept that the hiring party should not receive rights to the work because he did not significantly contribute artistic skill or ability. Moreover, where the hiring party has little or no experience in the "manner and means" by which the work is created, it is clear that the hiring party cannot sufficiently control the hired party in the artistic aspects of the creation.\textsuperscript{223} In such a situation, it is fair to say that the work is not one "made for hire."\textsuperscript{224}

\section*{B. Perception of Hired Assistants}

The majority in \textit{Hi-Tech} also over-emphasized the importance of Akey's perception of his assistants. First, the employer's perception of his workers is not a factor in \textit{Reid}.\textsuperscript{225} The Sixth Circuit justified its introduction of this element by noting that it is included in the \textit{Restatement (Second) of Agency} as a factor in determining agency existence.\textsuperscript{226} In \textit{Reid}, the Court cited the \textit{Restatement (Second) of Agency} as support for the factors given explicitly as relevant to the determination of the type of employee relationship.\textsuperscript{227} In \textit{Hi-Tech}, the Sixth Circuit introduced this factor as an extrapolation of the \textit{Reid} test.\textsuperscript{228} Even if the application of this factor is a permissive reading of \textit{Reid}, the Sixth Circuit placed too much emphasis on it in finding that the work was not one made for hire.

\begin{itemize}
\item \textsuperscript{220} See \textit{Hi-Tech}, 58 F.3d at 1100 (Jones, J., dissenting).
\item \textsuperscript{221} For a discussion of \textit{Aymes}, see \textit{supra} notes 110-21 and accompanying text, and \textit{supra} notes 184-88 and accompanying text.
\item \textsuperscript{222} See \textit{Aymes v. Bonelli}, 980 F.2d 857, 862 (2d Cir. 1992).
\item \textsuperscript{223} See \textit{Hi-Tech}, 58 F.3d at 1100 (Jones, J., dissenting).
\item \textsuperscript{224} See \textit{id}.
\item \textsuperscript{225} For a discussion of the \textit{Reid} factors, see \textit{supra} notes 86-99 and accompanying text.
\item \textsuperscript{226} For a discussion of the Sixth Circuit's introduction of this element to the \textit{Reid} test, see \textit{supra} notes 151-55 and accompanying text.
\item \textsuperscript{227} See \textit{Community for Creative Non-Violence v. Reid}, 490 U.S. 730, 752 (1989).
\item \textsuperscript{228} See \textit{Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc.}, 58 F.3d 1093, 1097 (6th Cir. 1995).
\end{itemize}
The Sixth Circuit found Akey's statements "highly indicative" of the assistants' status.\textsuperscript{229} This construction places too much emphasis on Akey's words. The court further stated that it considered "Akey's perceptions highly indicative of his assistants' independent contractor status."\textsuperscript{230} The court is referring to Akey's reference on the record to the assistants as his "freelancers," "independent contractors," and "subcontractors."\textsuperscript{231} However, had Akey known that his characterization of his assistants would harm him, he likely would have spoken differently in court.\textsuperscript{232} Attaching extreme consequences to the specific words of a layman when that layman lacks knowledge of any profound meaning of those specific words seems to place too much importance on those words. Had Akey known the result of his word choice, it is likely that he would have referred to the assistants as his employees.

The Sixth Circuit, by relying so heavily on this factor, actually weakens its position that the assistants were independent contractors. When a person cites strong evidence and significant facts to support his position, the objective scholar has a difficult time criticizing. When a person points to certain facts for support and those facts lack identifiable significance, that person's position is more questionable. While a court often needs less support for its position than a person to avoid criticism, some general principles nonetheless exist.

C. Whether Work Done is Part of Regular Business

The third criticism exists both with regard to the fourth element used by the Sixth Circuit, and with regard to its reliance on \textit{Marco v. Accent Publishing Co.} The Sixth Circuit addressed the \textit{Reid} test's ninth element, whether the work done is part of the hiring party's regular business.\textsuperscript{233} Generally, if the work is within the scope of the hiring party's regular business activity, support exists to find an employee relationship. Conversely, if the work falls outside the normal scope, it is assumed that an independent contractor has

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{229} See id. at 1098.
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Akey could easily have referred to the men as his employees without committing perjury. Akey is in court because he thinks the hired parties were his employees and Capital Cities/ABC, Inc. thinks the hired parties were independent contractors. If he had called them his employees, the court could not have found that he perjured himself because it would not have been until after the holding was made that anyone, including Akey, knew that the men were contractors.
\item \textsuperscript{233} See \textit{Hi-Tech}, 58 F.3d at 1098.
\end{enumerate}
\end{footnotesize}
been utilized. The Sixth Circuit relied on Marco, stating that although the work done was in fact within the normal scope of business, the type of work done was well suited for an independent contractor. In so doing, the court misapplied the element. Though this result is inconsistent with the Reid test, it is typical when a list of factors is given without guidance on how those factors should be applied. Moreover, while the Reid test's ninth element might seem to suggest the finding of employee status, it can just as easily be construed by a court to support the finding of independent contractor status.

The Sixth Circuit did examine all of the relevant factors set forth by the Supreme Court in Reid. Its application and conclusion, however, are questionable. The Sixth Circuit justified some of its conclusions with support from the record, but certain conclusions lack strength. The Sixth Circuit's ruling in this case significantly affects the "work made for hire" doctrine and employers who wish to utilize it in the future.

VI. IMPACT

The United States Court of Appeals for the Sixth Circuit has made it difficult for many employers to obtain copyright protection for work created with the help of hired assistants. While the court was apparently trying to solidify this area of law, several questions arise from its analysis in Hi-Tech. First, the degree of control over the hired party necessary to establish an employee relationship is not defined. Second, if people with artistic ability are hired to do work and the hiring party wishes to register a copyright in that work, what the hiring party should do to protect his claim is uncertain.

The Sixth Circuit has left unanswered its own question concerning the degree of artistic control the hiring party must exercise if he wishes to claim his work as one "made for hire." Because the Sixth Circuit stated that Akey did not have enough control over the production of the video, while admitting that he "had control of the artistic objectives of the project ... from its inception to completion ...", one must wonder how much artistic control the

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234. See id.
235. For a discussion of Marco, see supra notes 102-09 and accompanying text. For a discussion of the Sixth Circuit's use of that case in ruling on Hi-Tech, see supra notes 180-83 and accompanying text.
236. See Hi-Tech, 58 F.3d at 1098.
237. See id. at 1096-99.
238. See id. at 1097.
hiring party must exercise. Apparently the court here wanted to see less artistic ability on the part of the hired party. Such an expectation is unrealistic for artists who wish to hire assistants to aid them in their work. The degree of control which the hiring party must exercise to trigger protection from the doctrine, at least in light of the Sixth Circuit’s decision in *Hi-Tech*, is unclear.

The other area of uncertainty surrounding the required degree of control pertains to the supply of equipment to the hired parties. The Sixth Circuit determined that Akey did not supply the production equipment.239 The court justified its factual conclusion by stating, “Akey provided the camera for principal photographer Mueller, but not the computer with which Mueller developed the video’s graphics.”240 The Sixth Circuit seems to be suggesting that the hiring party must supply all equipment in order for the court to conclude that he provided the equipment.241 The Sixth Circuit’s conclusion is arguably reasonable, but it does not answer the question of how much equipment must be supplied.242 Because Akey supplied some of the equipment to his assistants and the court found that he did not supply production equipment to his assistants,243 an employer apparently must supply all or nearly all equipment to his assistants to meet this requirement. However, no explicit statement to this effect is made by the Sixth Circuit.

On a more general note, a troublesome aspect of this case is the Sixth Circuit’s apparent loss of the big picture. Had this case followed the more common scenario of this type of litigation, the hired assistants would be bringing an action against Akey in an effort to obtain their own registration. In such a case, it is wise to determine critically, among two parties who both share an interest in the work, who should own the rights to the copyright. In so doing, it is important to look at the rationale underlying the “work made for hire” doctrine. The underlying rationale is that the right

239. See id. at 1096.

240. Id.

241. The Sixth Circuit concluded that although Akey supplied the camera to one of his assistants, he did not “suppl[y] the production equipment to his assistants.” *Hi-Tech*, 58 F.3d at 1096. Therefore, the *Hi-Tech* court is stating, perhaps implicitly, that all equipment must be supplied by the hiring party for this element to support a finding of “work made for hire.”

242. There is a basis for stating that Akey did not supply the equipment. It is true that the aerial videographer supplied his own plane and that one hired man provided his own computer. See id. However, Akey supplied the camera to one of the hired men. See id. So there is also a basis for the finding of the district court that Akey did supply equipment.

243. See id.
to exploit the copyrighted work should be assigned to the most deserving party. That is the reason the doctrine was developed. Here, however, the litigants are a party who has an interest in the work as at least a partial creator, and a party who used the work without any kind of permission from anyone. Has the court lost sight of who is suing whom for what, and instead rigidly and blindly applied mechanistic factors of a test in such a way as to ignore the values under which the test was developed?

This whole problem may be eliminated in the future if the hiring party uses the term "agent" in an employment contract. More specifically, since courts now use agency law principles to determine if there is an employer-employee relationship, a hiring party would benefit by constructing the contract for services as an agency agreement. If the hiring party expressly hires an "agent" to assist him in his creation, it is unlikely that a court could find an independent contractor situation. Although unlikely, a finding of independent contractor status is not beyond the realm of possibilities—particularly if the elements of principal/agent relationship are not met in fact.\textsuperscript{244} To lower the likelihood of litigation, the employer should insure that as much work as possible is done in accordance with the elements set forth in \textit{Reid}.\textsuperscript{245} The hiring party's initial efforts will be reaped in the end when he registers the work as his own under the copyright laws.\textsuperscript{246}

This interpretation of the "work made for hire" doctrine begs the following question. Why should one who wishes to create something which was generally accepted as registrable by that party now have to go through all of this work in order to insure his product is protected? Perhaps the Sixth Circuit is trying to broaden the rights of skilled and artistic members of the workforce. Perhaps the Sixth Circuit is attempting, at the expense of Akey, to teach those involved in this area of law that they should set up an explicit agency agreement if they wish to enjoy copyright protection under this doctrine. The Sixth Circuit is apparently not trying to reduce the number of copyrights, for even work not "made for hire" is still registrable, in most cases, as a joint work or solely by the hired party.

\textsuperscript{244} For a discussion of these elements, see \textit{supra} notes 86-99 and accompanying text.

\textsuperscript{245} For a discussion of these elements, see \textit{supra} notes 86-121 and accompanying text.

\textsuperscript{246} For a general discussion of techniques for the proper construction of employment contracts to insure copyright ownership, see generally, D. Peter Harvey, \textit{Structuring Employment Relationships to Insure Ownership and Control of Intellectual Property}, 403 \textit{PLTI/PAT} 35 (1995).
The underlying reason seems to be one of sympathy for the working artist, and perhaps an attempt by the Sixth Circuit to decrease the likelihood of possible future litigation. At this point, one thing is certain. Cases litigated under the “work made for hire” doctrine are so fact sensitive that there is no way to predict what a court will hold. Until this area of law is settled such that the doctrine is predictable, those people who hire assistants for their creative abilities might better refer to the statute as one defining “work made for someone else.”

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