

Works Made for Hire and the 1909 Act

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Objectives

- Overview of WMFH doctrine under the 1909
- Focus on commissioned works
- Case law decided under 1909 Act
- 1976 case law
- Legal fiction of corporate authorship

1909 Act Background

- Late 19th century--reallocating ownership
- 1909 Incorporates WMFH
- Section 26 of 1909 Act
 - The word “*author*” shall include an employer in the case of works made for hire
 - Act does not define works made for hire
- Did Congress intend that doctrine be

1909 Case Law

Two generations of cases

- 1st generation of judicial decisions
 - Literal interpretation:
 - Any work prepared by a salaried employee in the course of his employment constituted a work made for hire
- 2nd generation
 - Dramatic broadening of concept
 - Works prepared by independent contractors for their customers

1909 Case law

Commissioned works

Progressive Broadening

1. Work created at the customer's *instance and expense*
 - “*motivating factor in producing the work was the employer who induced the creation*”
2. Actual supervision or control not required if customer retained right to supervise and control

From Ownership to Authorship

- Presumption of ownership changes into a presumption of authorship
- *“whenever an employee’s work is produced at the instance and expense of his employer ... We see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor” Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F. 2d 565 (2d Cir. 1966)*

The 1909 Act in the 21st Century

Twentieth Century Fox Film Corp. v. Entertainment Distrib.,
429 F.3d 869 (2d Cir. 2005)

- Dastar in copyright mode
- If the book was a work made for hire, then the copyright was properly renewed
- *“well established in this circuit, that works by independent contractors may qualify as works made for hire so long as they were created at the insistence and expense of commissioning party”*
- Doubleday paid lump sum (not royalties), and gave editorial help

Estate of Burne Hogarth v. Edgar Rice
Burroughs, Inc., 342 F.3d 149 (2d Cir
2003)

- Ownership status of illustrations in Tarzan
- Created at insistence and expense of ERB
- Copyright registrations in Hogarth's name for over 20 years had no binding effect
- Registration creates rebuttable

Progressive Attrition of Employee Ownership

- Authorship as an ideological construct
- From the mid-19th to turn of the 20th—changing conceptions of authorship
 - Decline of employee ownership
 - Changing context of creation
 - Rising forms of collaborative activities

The Legal Fiction of Corporate Authorship

- By calling a corporation an author
 - Simplified statutory drafting
 - Avoided constitutional questions
 - Skirted moral issues
- Enables the development of efficient markets for creative products

- “The death of the author was announced in literary circles some time ago. Rumors of author’s demise were ... premature. The author isn’t dead; he just got a job.”
- Catherine L. Fisk, *Authors at Work: The Origins of the Work Made for Hire Doctrine*, 15 *Yale J.L. & Human.* 1 (2003)