

No. 21-711

IN THE
Supreme Court of the United States

MARKHAM CONCEPTS, INC., *et al.*,

Petitioners,

v.

HASBRO, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant certiorari to address a question that will not affect the outcome of this dispute because of findings of fact made by the District Court, and where the underlying issue concerning applying the work for hire doctrine under the Copyright Act of 1909 has been consistently decided by the lower courts for decades and Petitioners misread the relevant statutory language.

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INTRODUCTION AND SUMMARY

The Petition for Certiorari (“Petition”) seeks an academic determination that will not affect the outcome of this dispute. The Petition should be denied on that basis alone.¹

This matter arrives here after a 5-day bench trial concerning the copyright authorship of the Game of Life (the “Game”). At trial, Petitioners sought, but failed, to establish 1) that Bill Markham was the sole author of the Game, and 2) that the Game was not a work for hire. Pet. Appx. 29a, 43a. Petitioners needed to win on both points to accomplish their ultimate goal of terminating the copyright assignment of the Game to Respondent Hasbro, Inc. All of the parties agree that if the Game is a work for hire, no copyright assignment termination rights exist. Petitioners lost on both points. The Court of Appeals for the First Circuit affirmed the District Court’s Findings of Fact and Conclusions of Law in all respects.

The trial was not a close contest. The District Court was clear – Mr. Markham was not involved in creating the prototype of the Game’s board or its iconic box. Instead, two employees at Mr. Markham’s company created the copyrighted work. Therefore, the District Court’s findings of fact prove that the Game was a work for hire in two ways –one of which the Petition does not implicate.

1. The Court has previously denied certiorari on the same question concerning the proper application of the Copyright Act of 1909. *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869, cert. denied, sub nom. *Dastar Corp. v. Random House, Inc.*, 548 U.S. 919 (2006).

First, testimony relied on by the District Court establishes that two employees of a company owned by Bill Markham created the Game's prototype, including the box cover and a game board. The Game's rules were part of an interactive process involving a larger group, including the two employees. Thus, the Game was a work for hire even under the Petitioners' reading of the Copyright Act of 1909 (the "1909 Act") since traditional employees created it in the course of their employment. Second, additional testimony credited by the District Court confirmed that Markham's company created the Game as a work for hire at the behest of Respondent Reuben Klamer.

Besides presenting only a theoretical controversy, the Petition is also meritless as a matter of statutory interpretation. Petitioners' theory is that the Court should interpret the word "employer" as used in the 1909 Act as synonymous with the word "employee" contained in the Copyright Act of 1976 (the "1976 Act"). The problem with the Petitioners' approach is self-evident – they ask that the Court interpret the 1909 Act not as Congress drafted it, but as they apparently wish Congress had. Under the decisions of this Court, the word employer has a broader meaning than the word employee does, and includes independent contractor relationships. *See, e.g., St. Paul Water Co. v. Ware*, 83 U.S. 566, 576 (1872) (referring to one who employs an independent contractor as an "employer" and explaining "[c]ommon justice requires the enforcement of that rule, as if the contractor does the thing which he is employed to do the employer is as responsible for the thing as if he had done it himself."); *see also* Restatement (First) of Agency § 2, Cmt. b ("For this reason the term 'independent contractor' is used to indicate all persons for whose conduct, aside from their use of words, the

employer is not responsible.”) (emphasis added). Thus, the 1909 Act encompasses employer-independent contractor relationships in its work for hire definition.

Finally, the petition attempts to manufacture a circuit split where none exists. Every circuit to address the question presented by Petitioners has reached the same result as the First Circuit Court of Appeals here. The case Petitioners rely on to suggest otherwise involved the 1976 Act, not the 1909 Act.

STATEMENT OF THE CASE

I. Legal Background

Petitioners seek a declaratory judgment that they possess termination rights under Section 304 of the Copyright Act of 1976. Pet. Appx. 25a. In pertinent part, 17 U.S.C. § 304(c) states that:

In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following [circumstances].

Critically, the parties agree, and consistent authority confirms, that if the Game is a work for hire, no termination rights exist under 17 U.S.C. § 304(c). *See, e.g., Marvel*

Characters, Inc. v. Kirby, 726 F.3d 119, 137 (2d Cir. 2013) (“The hired party, although ‘the “author” in the colloquial sense,’ . . . never owned the copyrights to assign. It stands to reason, then, that there are no rights the assignment of which his or her heirs may now terminate.”) (internal citations omitted); *Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 156 (2d Cir. 2003).

The parties also agree that the 1909 Act governs whether the Game is a work for hire. At the time of the Game’s creation, the 1909 Act work for hire provision stated: “in the interpretation of the construction of this title . . . the word ‘author’ shall include an employer in the case of works made for hire.”² 17 U.S.C. § 26; *see also National Center for Jewish Film, Inc. v. Goldman*, 943 F. Supp. 113, 116 (D. Mass. 1996). Congress did not define “employer” or “made for hire” in 17 U.S.C. § 26. *Goldman*, 943 F. Supp. at 116.

Works created in an employment relationship are undisputedly works for hire. *See Martha Graham School and Dance Found., Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624, 636 (2d Cir. 2004) (stating that under 1909 Act a person’s status as an employee renders work created in scope of employment a work for hire). Under the 1909 Act, courts have overwhelmingly applied the work for hire doctrine to

2. There is no dispute that authorship requires the translation of an idea into a fixed medium. *See, e.g., Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737, 109 S. Ct. 2166, 2171, 104 L. Ed. 2d 811 (1989) (“As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”).

independent contractors. *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993) (“Although initially confined to the traditional employer-employee relationship, the doctrine has been expanded to include commissioned works created by independent contractors, with courts treating the contractor as an employee and creating a presumption of copyright ownership in the commissioning party at whose ‘instance and expense’ the work was done.”); *Goldman*, 943 F. Supp. at 116-17.

The Petition asks the Court to apply a decision of this Court interpreting the 1976 Act to limit the scope of the 1909 Act. The fatal flaw in this request, however, is that the language of the two versions of the statute materially differ. The 1909 Act defines a work for hire in terms of the “employer,” a word that encompasses the employer/independent contractor relationship. Conversely, the relevant portion of the 1976 Act defines a work for hire as “(1) a work prepared by an employee within the scope of his or her employment.” 17 U.S.C § 101. The change in the Copyright Act from employer to employee was both an intentional and a significant change. Thus, the Petition commits a cardinal sin of statutory interpretation by failing to read the statute as drafted.

II. Factual Background

The Petition inflates Bill Markham’s role in the Game and mischaracterizes the trial court’s factual findings about it. Contrary to the Petitioners’ claim, the District Court never held that Mr. Markham created a prototype of the Game’s board and box *with* two employees of his company California Product Development (“CPD”). *Compare* Petition at 13 (“Markham and his employees then

created a prototype game board and box . . .”) *with* Pet. Appx. 29a. (“As with the board, Markham had ‘nothing to do’ with the physical creation of the box cover.”).

Instead, the District Court found the following:³

In 1959, the president of Milton Bradley asked Rueben Klamer to develop a product to commemorate the toy company’s centennial. Pet. Appx. 25a-26a. Mr. Klamer agreed and looked through the Milton Bradley archives, where he found inspiration in an old board game called the Checkered Game of Life. Pet. Appx. 26a. Mr. Klamer developed the idea for the Game on his flight back to California from Milton Bradley’s Massachusetts headquarters. *Id.* “But Klamer was mostly an ideas man – he needed help refining his concept and, importantly, translating it into a prototype he could actually sell to Milton Bradley.” *Id.*

Mr. Klamer turned to CPD. Pet. Appx. 26a. “CPD employed two artists at the time, Grace Chambers and Leonard Israel, who were very good in Klamer’s estimation, and whose presence at CPD convinced Klamer to hire Markham’s firm over others he considered.” *Id.*⁴

The District Court “credit[ed] especially” the live testimony of Chambers and Israel about what happened next. Pet. Appx. 27a. “Klamer and Markham combined

3. The First Circuit Court of Appeals found no flaw in the District Court’s fact finding.

4. Petitioners have never challenged that Ms. Chambers and Mr. Israel were employees of CPD. Indeed, the Petition continues to refer to them as CPD employees.

to provide the big ideas, many ahead of their time.” *Id.* “Chambers and Israel both testified that they – not Markham or Klamer – were the ones at CPD who built the prototype.” Pet. Appx. 28a. These two artists testified consistently that Ms. Chambers created the prototype of the Game’s board, including all of its various components. *Id.* They also agreed that Mr. Israel created the prototype for the Game’s box cover. Pet. Appx. 28a-29a. Thus, as to the Game board and its box cover, the District Court unequivocally determined that CPD employees Ms. Chambers and Mr. Israel created the relevant prototypes. Finally, the District Court found that the Game’s rules were a “collective, iterative effort” by “everyone in and around the CPD” offices at the time. Pet. Appx. 29a.

Ultimately, Mr. Klamer successfully pitched the prototype to Milton Bradley. Pet. Appx. 29a-30a. Thereafter, Milton Bradley entered into a license agreement with a Klamer-affiliated company – Link Research Corporation (“Link”). Pet. Appx. 30a. The License Agreement granted Milton Bradley the exclusive right to manufacture and market the Game, which Link “had ... designed and constructed.” *Id.* Link also entered into an Assignment Agreement with Markham under which Markham assigned all “right, title, and interest in and to the Game” to Link. *Id.*

REASONS FOR DENYING THE PETITION

A. Granting the Petition Will Not Change the Outcome of this Case

The Petition concedes that under the 1909 Act a copyrightable work created by an employee is a work for hire. That admission, combined with the District Court’s

factual findings, is a fatal, incurable defect to Petitioners' request for a determination that the Markham license is subject to termination rights. Therefore, the Court need not address the statutory interpretation question presented by Petitioners. *See Wright v. West*, 505 U.S. 277, 295 (1992) (Court need not decide "far reaching" issues where other path to decision exists); *see also Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 78 n. 11 (2011) ("Because Ransom does not make payments on his car, we need not and do not resolve how the 'notwithstanding' sentence affects the vehicle-ownership deduction when a debtor has a loan or lease expense."); *N.L.R.B. v. Fin. Inst. Emps. of Am., Loc. 1182, Chartered by United Food & Com. Workers Int'l Union, AFL-CIO*, 475 U.S. 192, 209 n.13 (1986) ("Because we conclude that the Board has exceeded its authority under the statute, we need not address this issue.").

No party disputes that during the relevant period, Ms. Chambers and Mr. Israel were employees of CPD. The District Court found – after a bench trial – that Ms. Chambers translated various ideas into a fixed medium to create the board's prototype and that Israel did the same with respect to the Game's box. *See* Pet. Appx. 28a ("Chambers and Israel both testified that they – not Markham or Klamer – were the ones at CPD who built the prototype."). Thus, even under the interpretation of the 1909 Act advocated by Petitioners – the Game is a work for hire not subject to termination of assignment.

Mr. Markham's status as the owner of the company that employed Ms. Chambers and Mr. Israel does not alter the outcome on the question of termination rights. Under 17 U.S.C. § 304(c), all previous assignments by Markham

would continue since the Game was a work for hire and thus not eligible for copyright assignment termination. *See id.* (“In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, *other than a copyright in a work made for hire*, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination” under certain circumstances.”) (emphasis added).

The District Court recently reaffirmed that its adoption of Ms. Chambers and Mr. Israel’s testimony dooms Petitioners’ case from a factual standpoint.⁵ It explained: “There is no question from the Court’s point of view that once Chambers and Israel testified it was difficult to imagine a scenario where Plaintiffs would defeat the work-for-hire argument” *Markham Concepts, Inc. v. Hasbro, Inc.*, No. CV 15-419 WES, 2021 WL 5161772, at *4 n.9 (D.R.I. Nov. 5, 2021). At this stage, with the trial court having listened to live testimony and assessed credibility, it is impossible to concoct any scenario in which Petitioners can avoid a ruling that the Game was a work for hire. The District Court’s findings of fact leaves no room for Petitioners’ wishful thinking about Mr. Markham’s role in the Game. The factfinder was clear: Mr. Markham had “nothing to do” with the physical creation of the Game board or its box cover. Pet. Appx. 29a. Ms. Chambers and Mr. Israel – two employees – did the

5. The recent decision concerned whether Petitioners’ claims were frivolous and objectively unreasonable such that the District Court should award Respondents their attorneys’ fees.

critical work. *Id.* Thus, ultimately, to establish copyright assignment termination rights for Mr. Markham, the Petitioners would need to prove that the District Court made errors in its fact-finding. They do not even attempt to do so. The Petitioners disagree with the facts as found at trial, but that is not a reason to grant certiorari. *See* Supreme Court Rule 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

B. The Petition Impermissibly Misreads the 1909 Act

The Petition advocates for examining the question of whether the Game is a work for hire through the lens of common law agency. Petition at 11. Doing so, however, and reading the 1909 Act as Congress drafted it, establishes that the Petition should be denied. The only way to reach the result sought by the Petition is to conflate the term employee as used in the 1976 Act with the word employer in the 1909 Act, but the Court cannot do that.⁶ As it has explained, “[t]he role of this Court is to apply the statute as it is written.” *Burrage v. United States*, 571 U.S. 204, 218 (2014).

As set forth above, the 1909 Act states, “in the interpretation of the construction of this title . . . the word ‘author’ shall include an *employer* in the case of works made for hire.” 17 U.S.C. § 26. (emphasis added).

6. Without any legal support, the Petition claims that the language of the 1909 Act and the 1976 Act are “materially identical.” Petition at 19. As is clear from the face of the respective statutes, they differ in important ways, and as set forth below, have different meanings.

The Restatement (First) of Agency and the Restatement (Second) of Agency confirm that one who hires an independent contractor is an employer. *See* Restatement (Second) of Agency, § 2, Cmt. b (“For this reason the term ‘independent contractor’ is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible.”); *See* Restatement (First) of Agency § 2, Cmt. b.

Legion common law cases confirm that the term employer encompasses the one who engages an independent contractor. *See, e.g., Robbins v. City of Chicago*, 71 U.S. 657, 666–67 (1866) (“Few persons possess the skill to build a house. A particular class of persons must, to a greater or less degree, be intrusted (sic) with the execution of such a work. And the more completely the execution of it, and the manner of doing it, are placed by the *employer* in the hands of skillful and *independent contractors*, the more fully has he performed his duty to the public. He has thereby substituted the skillful management and independent control of another over the work, pending its execution, in the place of his own probable want of skill to direct.”) (emphasis added); *Evans v. Elliott*, 17 S.E.2d 125, 128 (N.C. 1941) (“The conditions under which an *employer* is held liable for negligence notwithstanding the employment of an *independent contractor*, are well understood.”) (emphasis added); *Swearsky v. Stanley Dry Goods Co.*, 186 A. 556, 558 (Conn. 1936) (“Where the work contracted for constitutes an obstruction or defect in the street, of such a nature that it will naturally expose travelers to probable injury unless properly guarded or protected, the employer as well as the contractor is liable for an injury directly resulting from the acts the contractor is engaged to perform.”).

Faced with this authority, the Petition relies predominantly on *Yardley v. Houghton Mifflin Co*, 108 F.2d 28 (2d Cir. 1939) and *Reid*. But neither case provides the foothold Petitioners require.

Yardley pertains to a mural created “pursuant to a written contract, dated January 14, 1904, between the City of New York and the general contractor for the erection of the school building.” *Id.* at 29. Thus, *Yardley* concerns a work created and registered for copyright prior to the passage of the 1909 Act. It provides no insight into the proper interpretation of the word employer as used in the work for hire provision of the 1909 Act.

Reid fares no better. First, *Reid* involved the 1976 Act – not the 1909 Act. Second, contrary to the Petition’s claims, *Reid* does not hold that both “employee” and “employer” must be read to refer to a traditional employment relationship. Instead, this Court explained that “[i]n the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Reid*, 490 U.S. 739-40. It continued to explain that where “[i]n past cases of statutory interpretation, when we have concluded that Congress intended terms such as ‘employee,’ ‘employer,’ and ‘scope of employment’ to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.” *Id.* at 740. The Court then concluded: “We thus agree with the Court of Appeals that the term ‘employee’ should be understood in light of the general common law of agency.” *Id.* at 740-741 (emphasis added).

Thus, *Reid* does not hold that the term *employer* refers only to traditional employment relationships. By arguing it does, the Petition makes the same fatal error in its interpretation of *Reid* that it does its reading of the 1909 Act. It erroneously assumes that the terms employer and employee can only have meaning as opposing parties in an employment relationship.⁷ This is incorrect.

Ultimately, the Petition's argument overlooks a core tenant articulated in *Reid*. "The starting point for our interpretation of a statute is always its language." *Id.* at 739.⁸ Here, the language drives the result – the terms employee and employer are not synonymous. The Petition should be denied.

7. As discussed above, the Restatement of Agency and various courts disagree.

8. Statutory language also drove the result in *Reid*.

We therefore conclude 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. The structure of § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.

490 U.S. at 742–43. Conversely, in the 1909 Act, Congress defined work for hire in terms of the employer – a word that covers both employee-employer relationships and independent contractor-employer dynamics.

**C. No Circuit Split Exists and the Petition Runs
Contrary to Nearly 60 Years of Consistent Precedent**

The Petition's claim that a circuit split exists warranting review by this Court does not withstand scrutiny. Petitioners rely on the Eleventh Circuit's decision in *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990) to support this claim. But *M.G.B.* involved the 1976 Act – not the 1909 Act. *Id.* at 1490 n.10. Therefore, any statement in *M.G.B.* about the 1909 Act was, at most, dicta.

In the end, the Petition is correct on one point – since the 1960s – the federal courts (including five Courts of Appeals) have interpreted the 1909 Act in the same way that the First Circuit did below. *See* Petition at 5-9. Petitioners offer no legitimate reason to disturb this nearly 60 year span of consistent precedent.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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