OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL., Petitioners, V. JAMES EARL REID

CASE NO: 88-293

PLACE: WASHINGTON, D.C.

DATE: March 29, 1989

PAGES: 1 - 55

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.,

Petitioners,

v. No. 88-293

JAMES EARL REID,

Washington, D.C.
Wednesday, March 29, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ROBERT ALAN GARRETT, Washington, D.C.; on behalf of Petitioners.

JOSHUA KAUFMAN, Washington, D.C.; on behalf of Respondent.

LAWRENCE S. ROBBINS, Asst. to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Respondent.

C O N T E N T S

P R O C E E D I N G S

10:02 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 88-293, Community for Creative Non-Violence, et al., versus James Earl Reid. Mr. Garrett.

ORAL ARGUMENT OF ROBERT ALAN GARRETT

ON BEHALF OF PETITIONERS

MR. GARRETT: Mr. Chief Justice, and may it please the Court:

This case, your Honors, involves a dispute over who has the rights, under the 1976 Copyright Act, to authorize reproductions of a statue entitled "Third World America."

The Community for Creative Non-Violence, which is a homeless activist organization located here in Washington, originally had Third World America produced in order to serve as a symbol of the cause that they espouse and to help raise national consciousness about the plight of the homeless here in America.

Consistent with that purpose, we would like to be able to disseminate as widely as possible throughout the United States reproductions of Third World America in the form of Christmas cards, posters, and other media, and then to apply whatever revenues are generated

by those reproductions to help fund the work that we do with the homeless.

Mr. Reid, however, says that we cannot do so without negotiating his permission. Mr. Reid claims that he and he alone has the right to authorize reproductions of Third World America and to profit -- and to derive any of the profits that are associated with those reproductions.

Now, there's no written agreement in this case between Reid and CCNV. We basically had a handshake agreement. CCNV, which depends upon volunteers to perform all of its services, asked Mr. Reid to donate his services to sculpt figures in Third World America. Mr. Reid agreed to do so, saying that he too was concerned about the homeless. And believing that all parties here were pursuing a common objective, we then proceeded to pay Mr. Reid $15,000 to cover his expenses, such as the rent on his studio, the various utilities, bills, the cost of his assistants, and the materials.

After the project was completed, after we had paid Mr. Reid the $15,000, and after we had given him the experience that we had of years of dealing with the homeless and our creative direction in sculpting the statue, Mr. Reid told us for the first time that his concerns for the homeless did not extend so far as to

relinquishing his claim to what he considers to be the very valuable reproduction rights in Third World America.

Believing that this was inconsistent with the spirit of the arrangement that we had worked out with Mr. Reid to begin with, and believing that any revenues that should be derived from Third World America should go to the benefit of the homeless and not to the benefit of any single individual, we filed this litigation.

The issue before the Court --

QUESTION: Excuse me. It goes to some individual, either to Mr. Reid or to your organization. If your organization chooses to give it to the homeless, that's certainly your organization's business. You don't assume -- you don't assert you're bound to give it to the homeless.

MR. GARRETT: We will --

QUESTION: You just assert you're entitled to it.

MR. GARRETT: We will in fact use it --

QUESTION: So it really isn't the homeless against Mr. Reid. It's you against Mr. Reid, as I understand the case.

MR. GARRETT: We will in fact use the revenues that are derived from this, your Honor, to benefit the homeless, to help fund the various programs that --

QUESTION: Well, that's nice, but you don't have to.

MR. GARRETT: That is correct, your Honor.

QUESTION: And Mr. Reid could come in and say the same thing. It wouldn't make any difference to the case.

MR. GARRETT: Our only purpose, your Honor, is to serve the homeless. The only programs that we run are for the homeless. There is no other place that we will use the --

QUESTION: But that has nothing to do with this case. Your legal position would be unchanged if you were going to use the money to -- whatever -- for any other purpose, right?

MR. GARRETT: That is correct, your Honor.

QUESTION: Okay.

MR. GARRETT: The legal issue before the Court is whether during that seven-week period that Mr. Reid worked full-time on the Third World America project he and CCNV had an employment relationship within the meaning of the work-for-hire provisions of the 1976 Copyright Act.

In resolving this issue, the Court will effectively establish guidelines for determining the circumstances under which one who hires an artist to

produce a work will be the copyright owner of that work absent a written agreement to the contrary.

QUESTION: Mr. Garrett, I take it the principle to be established, though, has far-reaching consequences and would affect software programs commissioned by a company or employer.

MR. GARRETT: That is correct, Justice O'Connor.

QUESTION: And written work and research that's ordered to be produced by someone.

MR. GARRETT: Yes, your Honor. I think from various amici briefs that have been filed in this case it is clear that the issue to be decided here has ramifications well beyond our organization and extends generally throughout the entire copyright community.

After our two-day bench trial, the district court found that we had the right to artistic control of the production of Third World America. In applying what has been referred to as the historic control standard that had originally been developed by the courts under the 1909 Copyright Act, the district court held that there was a work-for-hire employment relationship between CCNV and Reid and, thus, Third World America is a work-for-hire.

Now, before the district court, the choice of the standard to be applied under the 1976 Act was

essentially non-controversial. Both Mr. Reid and CCNV agreed that that was the standard by which one determines an employment relationship not only under the 1909 Act but under the 1976 Act which, of course, we were proceeding under.

The case was therefore tried on the basis that there really was no dispute between the parties as to the legal standard. The district court, as I said, applying that standard held that this is a work-for-hire. And no one disputes in this case -- and, indeed, the D.C. Circuit did not dispute -- that if one applies that historic control standard, that this is a work-for-hire employment relationship.

Now, rather, the dispute that has come before this Court turns on whether that standard, the historic standard, is the correct standard under the 1976 Copyright Act. We agree with the position of the Second, the Seventh and Fourth Circuits, as well as Professor Nimmer, that the historic standard is indeed the correct standard and the district court acted properly in applying it in this case here.

Reid and his various amici, however, have suggested that Congress abandon the historic test of the 1976 Act and they have provided to this Court a variety of different possibilities of tests that the Court could

adopt in place of the old historic test.

One interesting fact from our perspective is that neither Mr. Reid nor, with one exception, any of his amici, actually urged that this Court adopt the standard on which they won before the D.C. Circuit, which was essentially an agency law standard.

Now, we believe that the reason that so much distance has been placed between the court of appeals agency law standard and the historic standard is that there really is not much difference between the two. Both turn on the right-to-control.

Now, while there may be some differences that are unexplained by the court of appeals below and by the Fifth Circuit which also adopted that test, again, they basically are going to be looking at the same totality of circumstances to determine whether the hiring party here has the right-to-control.

QUESTION: Well, Mr. Garrett, I take it the Register of Copyrights supports your -- the Respondent's view here.

MR. GARRETT: That is correct, Justice O'Connor.

QUESTION: And presumably there would be some deference owing, perhaps, to the Register's understanding of the copyright law?

MR. GARRETT: Your Honor, as we have pointed

out in our brief, for a period of almost ten years following the passage of the 1976 Copyright Act the Copyright Office agreed with our position, that it is a right-to-control standard that determines whether there is an employment relationship under the meaning of not only the 1909 Act but the 1976 Copyright Act. They took that position consistently in communications with Congress and in various publications that they made to the public.

And had the Copyright Office maintained that position consistently, I would agree with you, your Honor, that he should be entitled to some deference. But they haven't done that.

A couple of weeks ago, in the context of filing amicus brief in this case, the Copyright Office announced for the first time that it was switching from the historic standard to what they call a formal salaried employee approach.

QUESTION: Mr. Garrett, can you tell me your proposed standard. You say it's right-to-control, but the Respondent's really assert that what you're applying is a de facto control. Is your test whether control could be asserted or could have been asserted, or whether it in fact was asserted?

MR. GARRETT: Justice Scalia, our position is

the historic test, and the historic test is a right-to-control test. As we point out on page 19 of our brief, it is a right-to-control test. But the fact of the matter is that in a litigation context that we have here and in most of the cases that arise in the work-for-hire doctrine it's going to be very difficult to establish that right without showing actual supervision and control. Actual control.

And, in fact, that is what happened in this case. Much of the testimony that was heard by the district court over the two-day bench trial focused on actual control in order to establish that right-to-control. But it is right-to-control.

QUESTION: May I ask you another question? You say there is not much difference between your right-to-control standard and the common law employee standard. You say they're pretty much the same.

MR. GARRETT: Yes, your Honor, in the sense that they both turn on concepts of right-to-control.

QUESTION: But I -- you see, I understand what you mean by right-to-control, the right-to-control the product. Whether the statute should have these characteristics and what not. And I don't think that's at all what the common law agent -- master/servant law means by right-to-control.

That is to say, even -- even if -- even if you have no right to -- even if you have the right-to-control the product, the individual may still be an independent contractor. You can tell the independent contractor, "I want the wall with eight angles," then you may change your mind and say, "No, I want it with nine angles." And he has to do your bidding. But he could still be an independent contractor.

What is needed is the right-to-control his physical activity. To tell him, "I want you to put the bricks in this way," "Knock off at 12:00, come back at 2:00," and so forth. And you're not asserting anything like that. You're just asserting the right-to-control the nature of the work. That's quite different from the master/servant law -- common law, as I understand it.

MR. GARRETT: Justice Scalia, I believe you are correct. And that is the difference, as one -- as we would see it.

They both turn on the right-to-control. They both talk about looking at the totality of the circumstances to determine whether some kind of control is present. Ours is control of the artistic production here. It is the test, as Professor Nimmer notes in his treatise, that is a variant of the agency law standard.

It is one that has been adopted, really, to serve the purposes and policies underlying the Copyright Act, as opposed to serving the purposes and policies underlying tort law or agency law.

QUESTION: One would think when he uses the word "employee" in a statute that it would connote that brand new thing which is nothing like -- which is nothing like what it means at common law.

MR. GARRETT: The position that we take, your Honor, is that this is not a brand new thing that is being connoted here, that this is a test of employment that had been developed under the 1909 Copyright Act and applied for a number of years by the courts. And that when Congress chose to use the word "employee" in Section 101 of the 1976 Act, it was basically carrying forward the same test of employment that had existed prior to the Act.

The position taken by the Copyright Office and Mr. Reid, however, is that it wasn't, even adopting your common law agency stance, but rather some type of formal salaried employee approach.

QUESTION: Do you see the Copyright Office as taking a third approach as between the court of appeals here and the Fifth Circuit on the one hand and then still the courts of appeals that you rely on?

MR. GARRETT: Yes, your Honor. It's a third approach. It's an approach that is styled as a formal salaried employee approach. In fact, the approach that the Copyright Office takes is somewhat different from the approach that Mr. Reid takes and somewhat different from the approach that was taken by the Ninth Circuit in the recent Dumas decision, and it's somewhat different from the approaches taken by various of the amici in this case.

They are all united under the rubric of a formal salaried employee approach, but each has his own slightly different version of what is a formal salaried employee. And in our view, none of those versions was a version that was adopted by Congress when it adopted the 1976 Act. Our view is that Congress carried over into the 1976 Act the historic standard.

QUESTION: Well, most of the scholarly writers on the subject, as pointed out by the court of appeals' opinion that we're reviewing here, supported the view, and do support the view, that works made for hire within the meaning of the statutory definition are limited to salaried or like employees and do not include independent contractors even if their work is closely supervised or controlled.

MR. GARRETT: Well, your Honor, unfortunately

the court of appeals does not point out, nor does Mr. Reid or any of his amici, that Professor Nimmer takes a quite different view.

QUESTION: Well, he stands almost alone in the scholarly writing in taking that view. I -- I --

MR. GARRETT: I would respectfully disagree, your Honor. We have cited in our reply brief, on the final two pages or so, a number of other commentators who also take the same position that we do in this case.

QUESTION: Of course, Nimmer is a respected -- long-respected voice in the copyright field, isn't he?

MR. GARRETT: He certainly is, your Honor, and this court has on other occasions certainly looked to his treatise to help understand the copyright laws.

The basic concern in this case, as in any case with statutory interpretation, is, of course, starting with the language of the Act. I think the position of Mr. Reid and the Copyright Office and the other amici in this case, is that Congress in fact changed the law in the 1976 Act because it adopted a definition of the term "work-for-hire" for the first time. There was no such definition in the 1909 Act.

The 1909 Act, however, said in the case of a work-for-hire, the employer is considered to be the copyright owner of the work. That was Section 26. In

Section 201 of the 1976 Act Congress said in the case of a work made for hire, it is the employer or other person for whom the work has been prepared who is the copyright owner.

And I think it's that simple comparison of language that suggests what Congress was doing in the 1976 Act was adding an entirely different category, a new category, the definition of work made for hire. Not those that are prepared by employers -- or, by employees acting within the scope of employment. But, rather, those that are being prepared for someone other than the employer. What they were referring to there was, of course, what eventually became subdivision 2 of Section 101 dealing with commission works.

The essence of the argument on the other side is that Congress, by dealing with this category of commissioned works in Section 101, had effectively abrogated the old historic right-to-control standard. And we submit that that's not the case.

There is a great deal of controversy over what kinds of works ought to be considered commissioned works and treated as works for hire. But throughout that controversy there was no suggestion -- and there is no suggestion anywhere in either the Act itself, in the reports accompanying the Act, in the Congressional

debates, the hearings, the Register of Copyright Office report -- that suggests that the old historic standard is being abandoned and replaced by something called "formal salaried employee" simply because Congress was choosing to deal with commissioned works.

Congress did make a change in the 1976 Act. It dealt with commissioned works and established law, or clarified the law, and changed the law in some respects, that had developed under the 1909 Act with respect to commissioned works. But it did not change the law that had developed under this right-to-control test.

QUESTION: Why didn't they just say right-to-control? I mean, if what you say is true, I find it extraordinary that they should choose to describe this -- what you call this old law by the phrase "a work prepared by an employee within the scope of his or her employment." That's just a very strange way to say that.

MR. GARRETT: Well, I --

QUESTION: They could have said right-to-control -- they could have said.

MR. GARRETT: They could have said formal salaried employee. They could --

QUESTION: I agree.

MR. GARRETT: -- have said continuous salaried

--

QUESTION: I agree with you that too. I'm with you on that one.

MR. GARRETT: But they didn't. Our view is, your Honor, that having said "employee," they meant exactly what it meant in the law as it existed up through 1976, and that is the right-to-control test.

QUESTION: That's not what it meant in the law. I mean, what it meant in the law was -- was master/servant.

MR. GARRETT: You're correct, as a general matter, your Honor. But I'm talking about what it meant in the copyright law. We're dealing here with a special -- a term that has had its own meaning developed in the copyright law, which is a variant of the meaning that it has developed over the years and the agency law.

And I say they both derive from the notion of right -- right-to-control here.

QUESTION: Of course, to the extent that one who pays for the work really is concerned about protecting his or her artistic contribution, I suppose that under the statutory scheme that person who hires can simply contract. I know hindsight is always difficult to deal with, but in this -- in this situation you had the perfect right to contract with the sculptor

to say that the copyright would be exclusively yours.

MR. GARRETT: You're absolutely correct.

QUESTION: And that's a very simple statutory scheme.

MR. GARRETT: You're absolutely correct, your Honor. This problem can be dealt with by contract by the parties. As I said at the outset of my argument, what you're dealing with here, the situation is in which the parties have not dealt with it by contract. We are establishing, and the Court is establishing -- and the Court is disserting, more precisely, the guidelines that Congress established in the 1976 Act.

And, given the number of amici who participated in this case, this is obviously not a problem that is -- that is where there is no contract. It's not obviously a problem that's simply limited to our particular factual situation where we have a voluntary society dealing with an artist who presumably knew what contract or copyright law means and who never took the time to either tell us that he was reserving for himself the copyright or what he intended to do with the work afterwards.

But you are right. It can be dealt with by a contract here.

One of the problems that is noted by Mr. Reid

and the Copyright Office is that this is a right-to-control test. It is a test that is going to result in artists, freelance, artists always giving up their rights. It is an easy test to satisfy.

And that is not our case. I think one has to distinguish, as the courts have distinguished, between the right-to-control and supervision and direction, and the right to simply approve or reject a work.

The right-to-control test is not a difficult -- or, is a difficult test to meet in the facts of the case. They were met here, as the district court found, at the --

QUESTION: Are you saying the right-to-control test as traditionally applied in master/servant law, workmen's compensation, that sort of thing, to define a distinction between an employee and an independent contractor?

MR. GARRETT: No, your Honor. I am saying that it's the right-to-control test, the right-to-control the artistic production, as Justice Scalia noted at the outset, which as Professor Nimmer notes, is a variation of the --

QUESTION: Well, then you have a very difficult time with the word "employee" in Subsection 1, it seems to me.

MR. GARRETT: Well, our position, your Honor, is that the term "employee" had been construed under the 1909 Copyright Act to encompass this right-to-control test, a right to artistic control, a right to supervise the manner in which the work is performed. That is the test that the district court applied in this case, and found that it was satisfied.

QUESTION: Mr. Garrett, I do think that -- for me, at least -- it's important to your case that the word "employee" was used in the pre-76 old law, as you call it in that sense. And I'm not sure that's true.

One of your major authorities for what the old law was, is Varmer, his 1958 study. And the part of that study that you choose to italicize because you think it's so crucial is the following sentence. "Underlying this," -- it's on page 21 of your brief.

MR. GARRETT: Yes, sir.

QUESTION: "Underlying this distinction between," that is, between employer/employee and commissioned products, "is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor."

I read that to say that the reason the

copyright law has drawn the line at the old master/servant line is that generally speaking the master exercises more control. But the criterion is master/servant. The reason we've selected that criterion is because he generally exercises more control over the artistic product.

But that's not the test. That's how I would read Varmer anyway.

MR. GARRETT: I think Varmer recognizes that there are situations in which that control is not going to be exercised, and that's why he uses the term "generally." It is, as we said earlier, a right-to-control test.

What has been done here is simply to adopt the standard under the old law that had some meaning for copyright law. What we're talking about in a copyright law is encouraging creative activity -- encouraging creativity, the type of creativity that we think CCNV has supplied in this particular case.

The test that the courts had applied was one of right-to-control that artistic production.

QUESTION: I think the court of appeals, though, agreed with you that prior to 1976 the right-to-control test had predominated?

MR. GARRETT: Yes, your Honor. The view of the

court of appeals, however, was that that test had been changed in the 1976 Act.

QUESTION: By the Act? MR. GARRETT: By the Act. By the fact that Congress in Section 101 subdivision (2) dealt with commissioned works. Our view is that that's all Congress dealt with in Section 101(2), is with commissioned works. It was not intending to abrogate a standard that had already existed in the law here.

QUESTION: And that standard, under the prior Act, was an interpretation of employee or employer? Which?

MR. GARRETT: The only word used in the 1909 Copyright Act was "employer," your Honor.

QUESTION: Employer.

MR. GARRETT: The courts, however, had taught generally in terms of right -- in terms of the employment relationship, as Professor Nimmer notes in his 1963-1976 versions of the Treatise on Copyright Law.

Much of what has been discussed by the Copyright Office and Mr. Reid goes to the concern of predictability and really policy arguments that have been raised here. The notion that the control test is one that is unpredictable and, therefore, should not be adopted.

Our view, of course, is that the test is no more or less predictable than it was prior to the 1976 Act. It's no more or less predictable than the agency law control standards. And, indeed, when one looks at the Ninth Circuit case, the Dumas case which lists a whole series of factors that one looks at in order to determine even formal salaried employment relationship, our test, the historic test, is no more or less predictable than that either.

Questions of predictability are questions that ought to be addressed, if at all, to Congress. Congress, of course, has been presented with the formal salaried employee argument by various amici participating in this case ever since the year 1982. Our position is that's the first year in which that particular test has ever been surfaced before Congress.

If they feel that this is a better test, it's Congress that should be the one to adopt it. Now, they didn't do so in the 1976 Act.

With your Honor's permission, I would like to reserve the remainder of my time for rebuttal, please.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Garrett.

I neglected to say at the opening of this session that Justice Brennan is unavoidably absent due

to a death in the family. He will participate in today's cases on the basis of the transcripts and the tapes.

Mr. Kaufman.

ORAL ARGUMENT OF JOSHUA KAUFMAN

ON BEHALF OF RESPONDENT

MR. KAUFMAN: Mr. Chief Justice, and may it please the Court:

In the fall of 1985 Mitch Snyder called James Reid. They had two conversations on the phone. Mr. Reid then agreed to create a work of art for CCNV. At the inception of their relationship James Earl Reid was an independent contractor and he was going to create a commission. And that is true under any standard or any test.

Section 2 of the work-for-hire definition deals with commissions. It lists nine very specific categories of works which can be deemed works for hire when created by independent contractors. Sculpture is not one of those nine works or categories listed. It also requires a writing. There was no writing in this case. No work-for-hire situation, relationship, was created under the language of the Act.

As the Ninth Circuit just found in Dumas, if one holds himself out as an independent contractor, the

commissioner is on notice, and that they must take certain actions to insure that the Section 2 requirements are fulfilled.

James Earl Reid --

QUESTION: Mr. Kaufman, how do you distinguish the test used by the Ninth Circuit in Dumas from that used by the CADC in the opinion we're reviewing?

MR. KAUFMAN: I think that the Dumas test provides a greater degree of predictability. The salaried formal employee and the agency test are slightly different. There are certainly areas of overlap but we look to --

QUESTION: The Ninth Circuit would say unless you're a salaried employee -- that's it?

MR. KAUFMAN: It looks at Section 1, an employee within the scope of his or her employment. And that's an employee. It looks at the ordinary meaning of the word, the one that is understood by most people, and that's where they stop.

In Section 2 it deals with independent contractors and commissions. And those are very understood words. A commission --

QUESTION: You think the Ninth Circuit would not look to the old common law of master/servant?

MR. KAUFMAN: No, I do not. I think only where

that would apply to a salaried employee. But I think it's a different criteria and I think they look at the most common ordinary use, the most predictable use.

QUESTION: And what standard do you suggest is proper?

MR. KAUFMAN: We believe that the Dumas test is the best standard. We believe it provides the greatest predictability.

QUESTION: So you don't support the standard adopted by the CADC?

MR. KAUFMAN: We believe they came to the correct conclusion and we think that it is the second-best test. Compared to the Aldon test it is by far superior. But we think that the Dumas test, as recently enunciated just a month ago, does provide the best test of the three that are before the courts by the various circuits.

QUESTION: Well, can you give an example of a case which would come out differently as between the D.C. and the Ninth Circuits?

MR. KAUFMAN: The situation where you would have someone who would be an agent but not a salaried employee.

QUESTION: What about a piece worker?

MR. KAUFMAN: You would have a -- a piece

worker -- under the agency which we look at respondeat superior perhaps a piece worker where they don't have FICA withholdings and you don't get some of the other benefits -- but they are under the control, the ten categories of control that are set out in the restatement, you might have a situation -- and probably not regularly but not infrequently -- where you would not have some indicia of formal salaried employees, workmen's comp, like I said, withholding, FICA, and some of those others, but would satisfy the various control tests.

QUESTION: Mr. Kaufman, I don't really agree with you that the common meaning of employee is salaried employee. I think when you mention employee to the person in the street the first they think of is a salaried employee. Just as if you mention a dog, the first thing they think of is an animal with four legs and a tail. But I have a dog that doesn't have a tail and nobody thinks it isn't a dog.

(Laughter.)

QUESTION: And I think if you describe -- if you describe to somebody on the street a pieceworker, as Justice White just suggested, let's say somebody that works for the International Ladies' Garment Workers Union but gets paid instead of per -- you know, by the

hour, by the number of dresses that he or she completes. I don't think the person would think that that person suddenly is no longer an employee.

I think you've snatched this concept of hourly wages just out of the air. Most employees are like that but I don't -- I don't know that that's a common meaning of employee.

MR. KAUFMAN: Well, I don't think that a formal salaried employee is --the method of payment in the sense of a salary is merely a weekly -- it could be based on a long-term job. It could be based on piece. It could be on commissions, commission and salary. There are many ways that a formal salaried employee --

QUESTION: What about the people that your client hired to help him in -- in doing this statue? Suppose he told them, "I just want you to help me on this one job and don't you to help me on any others. And I'm going to pay you $500 for the whole job. I want you to follow my instructions. Where I tell you to curve, you curve. Where I tell you to make a sharp corner, you do that. You report to work when I tell you. You leave when I tell you." They are not employees within the meaning that you would urge upon us, right?

MR. KAUFMAN: No, they would not be employees.

They would --

QUESTION: Well, that's very strange.

MR. KAUFMAN: Under agency law they probably would, but not under the formal salaried --

QUESTION: I think even the man in the street would consider them employees, plus the traditional legal connotation of employee.

MR. KAUFMAN: We think they would fall outside this definition.

QUESTION: But the statute says employee within the scope of his or her employment. So, you have to read something else into that language --

MR. KAUFMAN: Correct.

QUESTION: -- for your view.

MR. KAUFMAN: You have a full-time salaried employee -- let's assume they work 9:00 to 5:00 or whatever the hours are.

QUESTION: Well, I suppose that just includes wages too, doesn't it?

MR. KAUFMAN: Pardon me?

QUESTION: That just includes what would be called wages, I suppose.

MR. KAUFMAN: Salary would be wages, yes. Well, whatever they would be.

QUESTION: Okay.

MR. KAUFMAN: They could be commissions. It could be -- but --

QUESTION: Excuse me. Who doesn't work for wages? I mean, if that's all you mean by salaried. You mean it just excludes those who are working for free?

MR. KAUFMAN: No. You can have many different forms of wages. You look at the entire picture to see -- when they are an employee, you look at the various criteria that Dumas has set out. You look for the various aspects of benefits, taxes --

QUESTION: Well, you've given me a whole new theory. I thought salaried meant what salaried normally means, you get paid on a regular basis. Weekly, monthly, annually. Not by the piece.

MR. KAUFMAN: But if your long-term relationship with your employer is based on a piece salary, on a commissioned salary, you can be on salary and commission both. I'm not looking at it in the sense of -- I don't believe the Dumas court looked at it that it has to be that you're paid biweekly for a salary. A salary can take many different forms. And as long as it is there on a regular --

QUESTION: Including commission?

MR. KAUFMAN: Of course. You can have people on --

QUESTION: Oh, boy.

MR. KAUFMAN: -- a commission as well as a -- you know, you get paid "x" dollars an hour plus a commission and be a regular salaried employee. Yes.

QUESTION: I thought they were opposites. You know, do you work on salary or you want commission? I work on commission. You're telling me it's al the same. Salary is anything.

MR. KAUFMAN: As long as it maintains a regular type of pattern, it could be a salary. Yes.

QUESTION: I don't think you had an opportunity to finish answering Justice O'Connor's question.

MR. KAUFMAN: That's correct, your Honor.

Under the salaried employee test or under the definition -- excuse me -- of the copyright law, you have the opportunity to work for your employer within the scope of the employment from the 9:00 to 5:00 position, and if you create something outside of that scope, it is the creator's. It is not the employer's.

That's one of the interesting problems with the test presented by Petitioner. It's that everything created under their test, by definition, becomes part of the scope of the employment. There is nothing that you can create as part of the relationship that is outside the scope of employment, thus, rendering the second half

of the definition meaningless.

One of the interesting points when we were discussing -- Petitioner was bringing up the issue of this historic definition. It was historic -- it was in existence for nine years, from 1966 to 1975. Prior to 1966 independent contractors were never considered employees under the work-for-hire doctrine.

And if the Court looks at the legislative history of this case, which is very similar to the legislative history in Mills Music which you ruled on, it was the same legislative history, and it took place in 1965. In 1965 independent contractors were not employees within the scope of employment. There were other problems with them. And it was the law in 1965 which is what was enacted in 1976.

The legislative history for this law was very unique. What happened was that we had a 1909 Act that was becoming rapidly obsolete because of the technological advances. Many special interest groups were before the Congress and they could not pass legislation. There was a legislative gridlock, so to speak. So Congress, through its agent, the Copyright Office, went out on a different trail to break this impasse.

What they did was they commissioned studies and

reports. And then they brought all the players together. The Copyright Office picked representatives who they felt represented the various interests, sat them down, and forced them to negotiate together until they came up with a consensus.

And this consensus -- and this type of process happened in cable, fair use, termination, manufacturing clauses. It is replete throughout the whole process. And those compromises is what was enacted into law in 1976. In 1965 the termination and the work-for-hire hearings all took place and ended. And in 1976 when the law was enacted, it was almost identical language that came out of these negotiations and hearings in 1965. That is the language in the statute.

And the law at the time did not have independent contractors, employees for hire. That came afterwards. That was not what was before the Congress. It was not the compromise, as part of the compromise which they adopted. And that is clear from the case law and from all the different participants at the hearings. We cite extensive quotes. And it didn't matter which side of the table they were on, be it industry or the artists, they all used the term "employee" as a formal salaried employee. We think that is what was meant at the time.

QUESTION: You have a statement in your brief that says, "When interpreting the meaning of the statute, one looks to the ordinary meaning of the words used."

MR. KAUFMAN: And we believe that the Dumas court was correct in looking at it as the salaried employee. I know Judge --

QUESTION: Is that the -- you can't really believe that that's the ordinary meaning of employee. Just salaried employees?

MR. KAUFMAN: I think when people are -- the ordinary meaning of the word "salaried employee" --

QUESTION: But you're willing to go by that then, to take the ordinary meaning of the word rather than what's revealed in the hearings or something like that?

MR. KAUFMAN: No. I think the hearings are in sync with that. When they -- if you look at the language of the participants in the hearings and the cases prior to 1965, you'll see they used the term "employee" in the formal sense of the word. And they had -- again, we have quotes in there where they talk about how -- oh, we don't have to put these people on the payroll and make them salaried people, that would be such a problem, and so on. And it is -- the record is

replete with references to salaried employees, and that's what the case law also was in 1965.

I do believe that the man on the street, if you say to them the ordinary meaning of who is an employee, they think of the very traditional relationship of somebody who goes to work 9:00 to 5:00, gets benefits, taxes withheld. I think that's what people think of as an employee. I think agency -- the definition of agency is very widely used but it's a lawyer's definition of the word. It is not the ordinary common -- I think when you take a step back --

QUESTION: Mr. Kaufman, do you take the position that the employee must have been an employee before the arrangement for the particular work of art was made?

MR. KAUFMAN: Either before or that was part of the negotiations at the outset of it. You can go to somebody, hire them as a formal employee so that the work that is created afterwards can be --

QUESTION: Can you provide in the agreement that he'll be discharged when the work is completed?

MR. KAUFMAN: If it's for a sufficient amount of time.

QUESTION: Supposing in this case, say, it takes five months to build this work of art. Supposing

at the start when they talked about $15,000, they said, "We'll pay you $3,000 on the first of each month," and by then you've already indicated you'll be through with the job. And we'll pay you that amount no matter what time you finish but presumably within the time. Would the artist have been an employee then?

MR. KAUFMAN: It depends on the rest of the contract. Will they be getting other benefits?

QUESTION: Well, the rest of the contract is we want you -- you know, we want to get this work of art done and --

MR. KAUFMAN: No. Then they would be --

QUESTION: -- and we want you to prepare it the way we designed it. It's our idea and we want you to build this work of art.

MR. KAUFMAN: No, I don't believe if it was "go create it and we'll give you $3,000 at the beginning of every month" -- I think he's an --

QUESTION: No, not "go create." Prepare it in accordance with our conception of the plan.

MR. KAUFMAN: I still think that's an independent contractor. If they said, come into our shop where you can accrue benefits, we'll do workmen's comp, we'll do withholdings and the other indicia of salaried employee --

QUESTION: Do you think you need workmen's comp and withholding?

MR. KAUFMAN: They vary -- withholdings, workmen's comp, and how they treat their other employees. Do they give them vacations?

QUESTION: Well, their other employees don't get anything in this particular organization. Under that test it seems to me you might well not be so successful

MR. KAUFMAN: The --

QUESTION: Because they don't treat other employees by paying -- by taking withholding and all the rest of it.

MR. KAUFMAN: They may not have any employees, is what I believe. They have volunteers and people who are independent contractors who do their work. But I don't think any of the people who volunteer for CCNV are employees. No. I think there has to be an employment relationship, not a volunteer relationship.

QUESTION: Mr. Kaufman, can I ask you about your assertion earlier that we should adopt your interpretation because only that gives meaning to the phrase "within the scope of his or her employment" in the statute. I don't know -- let's go back to the example earlier. You acknowledged that if your -- if

the workers that your client hired were just paid by the job. Say, "Work for me and I'll give you $500 and I want you to follow my directions." You acknowledged that they would not be employees under your interpretation.

MR. KAUFMAN: Correct.

QUESTION: Don't you think the meaning of "within the scope of his or her employment" would be clear under an ordinary -- if you adopted the court of appeals' interpretation here and used agency, ordinary agency principles, wouldn't it be clear what "within the scope of their employment" means? Anything they did in connection with the statue would be covered. If they created some new statute on their own at home, it would be outside the scope of their employment. I don't see the problem.

MR. KAUFMAN: Under the agency law test, scope of employment has meaning. Under the Aldon test, it has none, is what we're saying.

QUESTION: Under the Aldon test.

MR. KAUFMAN: The Aldon test, the test proposed by the Petitioners --

QUESTION: I see. I see.

MR. KAUFMAN: -- supervision. Then it has no meaning. Under agency it absolutely has -- meaning.

QUESTION: Okay.

QUESTION: How about under your test?

MR. KAUFMAN: Under our test it certainly has a meaning. At 5:00 it's -- the scope of employment is --

QUESTION: Well, I take it that -- should we be very upset about this case? After all, the statute allows you to contract any way you want to. Just word of mouth -- is that so frequent and pervasive that --

MR. KAUFMAN: What is important here -- word of mouth in this area is very, very pervasive. And what we are doing is requiring people under our test, or even under the agency law test -- requiring people to negotiate up front their contract so a commissioning party cannot come in through the back end after the fact and say, "Oh, I supervised him directly." The artist says, "No, you didn't." "Yes, I did." And it's this hijack the copyright at the end.

They have negotiate. The commissioning party, the businesses have to go to the creators and say up front this is what we want and this is what we will pay. And you do not allow this back door hijacking.

QUESTION: But, of course, if Mr. Snyder had a homeless lawyer with him, he might have contracted for --

MR. KAUFMAN: And so he should have if that was

his intent. The burden is on the people, the commissioning parties under the Copyright Law -- and the '76 Act is replete where the leveling of the playing field is recognized, where the artist and the creators have been at a disadvantage.

QUESTION: You're talking about Section 2 now?

MR. KAUFMAN: Yes. And if you want to obtain a copyright, if you want to obtain the rights -- the rights that you want to obtain from a creator must be negotiated up front, not after the fact. It cannot be -- you cannot make an independent contractor, unknown to himself, inadvertently an employee, which is what they're test will allow. And that, I propose --

QUESTION: -- suppose an employer and an employee could agree that the copyright would be owned by the employee?

MR. KAUFMAN: There are provisions for that. However, under this direction and supervision test, you could even have a situation where a salaried employee, if he was not directed and supervised by his employer might be able to claim, "Well, I wasn't directed and supervised. That's the standard. It's mine," even though it was created in the scope of employment. And we think that's an absurd result, but it is a result that can occur under the Aldon test, not under the other

tests.

The Aldon test doesn't work. The other two tests do work and we think the Dumas test is the most predictable of all of the tests and is the most in sync with the legislative history and is the one that we hope that the court adopts.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kaufman.

Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS

AS AMICUS CURIAE, SUPPORTING RESPONDENT

MR. ROBBINS: Thank you. Mr. Chief Justice, and may it please the Court:

In October 1985 when Mr. Snyder called Mr. Reid on the phone and proposed that he sculpt the three human figures for the statue Third World America, the two men had never met before. They'd never done any business before. And except for suing each other, they've done no business since the statue was created.

(Laughter.)

MR. ROBBINS: In short, their entire relationship was defined by the particular project that Mr. Reid agreed to create. That kind of relationship is what I think most people mean by the word "commission."

Indeed, "commission" is the very word that Mr. Snyder used himself no fewer than eight times at trial to describe his relationship with Reid. That is the same word that Mr. Snyder's trial counsel used when he summed up the trial, and it's the precise finding made by the trail court when it explained that "Third World America was commissioned by CCNV and made on commission by the artist."

Now, as it happens, there was a provision in the work made for hire definition that speaks directly to commissioned works. And the Court has not heard very much about that provision this morning. That subsection, which is Subsection 2, states that specially ordered or commissioned works will be treated as works made for hire when they satisfy both of two conditions. That they fall within the nine enumerated categories, and that there is a writing executed by the parties.

The position of the Register of Copyrights in this case is simple and straightforward. The word "commissioned" in Subsection 2 should be taken at its word, should be given its plain and literal meaning. And when that meaning is honored, it's perfectly clear that Third World America is a commissioned work.

The court need not struggle with the various historical definitions of the word "employee" because

this is a case about the word "commission." And if --

QUESTION: But we should struggle with the various historical definitions of "commission"?

(Laughter.)

MR. ROBBINS: Well, I think, Mr. Chief Justice, that in fact that is -- if it's a struggle at all -- is a rather lesser struggle. And I think that it has a word that embraces more uniformity and a wider acceptance. And the fact of the matter is that this relationship, where an artist is engaged to sculpt a particular project and nothing more, is what I think most people take the word "commission" to mean, and it's perfectly clear that that's what the draftsmen of this statute took the word to mean.

QUESTION: Well, Mr. Robbins --

QUESTION: Mr. Robbins, these are not mutually exclusive categories. A thing can be both specially -- you could specially commission an employee to do a job.

MR. ROBBINS: Well, I think, Justice Stevens, that it is -- it is theoretically possible to have these categories be overlapping in part.

QUESTION: What I mean, it's reading the language -- that it's linguistically possible.

MR. ROBBINS: There is no question that it is linguistically possible. I think --

QUESTION: And if it's as clear as you say it is, the thing that I'd just like you to talk about for a minute is how is it that the Register of Copyright and Professor Nimmer got it so wrong for so many years?

MR. ROBBINS: Well, let me address the subject I can address with more authority --

QUESTION: All right.

MR. ROBBINS: -- how it is that the Register of Copyrights got it wrong. It's our view that the Register of Copyrights did get it wrong. But for so long is something that I might want to quarrel with. It is true that --

QUESTION: Six years.

MR. ROBBINS: It is true that in response to inquiries from Congress in the mid-80s the Register of Copyrights offered a position quoting from Nimmer that is at odds with his present one.

I think, however, that if you look back to the position of the Register when these provisions were in fact being adopted, when they were being negotiated, and when the understanding of the parties was fresh, the Register's position was very much like its present one. But, in any event, in light of this litigation the Register has revisited the issue in detail and frankly has disavowed those previous filings.

QUESTION: Oh, I don't question the authority of the Register to change his or her mind. But it just -- if it's as perfectly clear as we all seem to think it is on the face of the plain language, it's kind of hard to understand how anybody could have made a mistake.

MR. ROBBINS: Well, it wouldn't be the first time that words end up having a plain meaning as to which other people disagree. But I'd like to talk a little bit about Subsection 2 because the thing that is as clear as anything else --

QUESTION: But would you first explain to me your earlier statement, that we can just do this on the basis of Subsection 2 alone. I can't understand -- I could understand that if Subsection 2 said it includes -- work-for-hire includes special ordered or commissioned works only if they come within these nine categories. But it doesn't -- it doesn't say that. It says it happens to include those special-ordered or commissioned works. It doesn't say it does not include any other special-ordered or commissioned work.

So you're ultimately driven back to one, aren't you, to see whether it comes within one?

MR. ROBBINS: No.

QUESTION: No?

MR. ROBBINS: Justice Scalia, I think that's

not correct. And the reason it's not correct is that if there is nothing else clear from the history of Subsection 2, as reflected in the accompanying House report both in the '76 Act and in all the prior revisions, the fact is clear that the nine categories were intended to be the only ways, the only kinds of commissioned works that could ever become works made for hire.

And the central fallacy of Petitioner's argument this morning is that even if you fail to come in with one of those nine categories, Subsection 2 will get you to the promised land under their test. Even if you're a sculptor and you're not within the nine categories, why, then, you can still become a work made for hire if you satisfy what they call the historic standard, which, by the way, is as historic as 1966 in the Second Circuit's Brattleboro decision --

QUESTION: Well --

MR. ROBBINS: -- and goes back no further than that.

QUESTION: However clear you think a commission is, the claim here in this case, and which the court of appeals certainly ruled on -- the claim is that this is a work-for-hire because there was an employment relationship. We have to rule on that claim.

MR. ROBBINS: My understanding, Justice White, is in fact that the court of appeals held that it was not a work made for hire because they --

QUESTION: I understand that.

MR. ROBBINS: -- the court construing Subsection 1 under the --

QUESTION: I know. They construed it. And you say we don't even need to. The court below did and I would think we would have to because the claim is here by the Petitioner that -- that there was an employment relationship.

MR. ROBBINS: That's --

QUESTION: We certainly have to dispose of that -- rule on that claim.

MR. ROBBINS: Well, Justice White, we have offered what we think the correct interpretation of Subsection 1 is. But I think --

QUESTION: And so you struggled with what an employee is, eh?

MR. ROBBINS: Well, we've done our best.

(Laughter.)

QUESTION: Well, I guess we have to too.

MR. ROBBINS: But -- but --

QUESTION: Well, may I ask on that point. You urged, apparently, in the brief that we adopt the Dumas

view. And yet that is a little more difficult to do under the language than the common law master/servant approach.

MR. ROBBINS: No, I don't think so, Justice O'Connor. I think the reason we agree with the Dumas construction of Subsection 1 is that that is the conception of the employee that the draftsmen of Subsection 1 had in mind.

This so-called historic right-to-control test is something that emerged in 1966 when these provisions were set in stone by the people who came up with them. And they were then enacted in whole cloth by Congress 11 years later, much as the derivatives works exception was handled by Congress in the Mills Music situation.

But the fact of the matter is that in Subsection 2 those nine categories were intended to be exclusive. If this was a commissioned work, as that word was understood in its common parlance, then you had to satisfy Subsection 2. And if you didn't, it was simply not a work made for hire.

The central fallacy of Petitioners' argument is that it gives commissioned works another way to become a work made for hire, and there is nothing clearer than that is precisely what the draftsmen sought to avoid.

QUESTION: Well, they could have been so clear

if they had said one -- a work made for hire is, one, a work other than a special ordered or commissioned work prepared by an employee within the scope of his employment, or, two, a work specially ordered or commissioned for use, blah, blah, blah.

You just want us to read in that language into 1, which just isn't there.

MR. ROBBINS: Justice Scalia, I won't quarrel with the fact that Congress and the draftsmen could have done a better job, and maybe someday they will.

QUESTION: A better job of embodying your views.

MR. ROBBINS: I'm sorry?

QUESTION: A better job of embodying your views.

(Laughter.)

MR. ROBBINS: Well, I think they could have done a better job of embodying their own views. I think that we are as faithful as we can to what they had in mind.

The accompanying House report, for example, says, Justice Scalia, that Subsection 2 is a compromise intended to divide commissioned works between those that could be and could not be works made for hire. The only -- I think -- sensible way to read that language is that if you're not in Subsection 2 and you're commissioned, you're not a work made for hire.

They're not. They are commissioned. It's not a work made for hire. It's just that simple.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Robbins.

Mr. Garrett, you have four minutes remaining.

REBUTTAL ARGUMENT OF ROBERT ALAN GARRETT

ON BEHALF OF PETITIONERS

MR. GARRETT: Both Mr. Reid and the Government here refer to the historic standard as one that was adopted only nine years prior to the 1976 Copyright Act. They're both wrong. If you take a look at the very first edition of Nimmer on Copyright in 1963, you will see that even there he talks about the right-to-control standard as being a standard well ingrained in the copyright laws, and cites cases going back a number of years.

We cited cases in our brief going back as far as 1937 dealing with right-to-control standard. Furthermore, if you take a look at the letter that the Register of Copyright sent to Congress back in 1986, you'll see that he refers -- and this is on page 2(a) of the Appendix of our Reply Brief -- as this being a standard that has been part of our copyright laws for almost a hundred years.

QUESTION: That depends on what all those old

cases were referring to when they said right-to-control. I mean, you can describe the master/servant rule as a right-to-control rule also.

MR. GARRETT: That is correct, your Honor. But I think --

QUESTION: You have to assume that they're using right-to-control in the very narrow sense that you're using it. Not right-to-control physical activities but just to control the product, the outcome.

MR. GARRETT: I believe that the courts were using it, your Honor, in the various cases that we cite in our brief in the sense of right-to-control the artistic production of the work. Something that has meaning to what copyright law is all about. Not what chisel you use, but rather how you produce the particular statue. The kinds of contributions that we, CCNV, made in this particular case. That is exactly what they were referring to.

And there was no question in the district court's mind when it went to trial in this case that that was the kind of standard it was asked to look at. Indeed, that's the standard that Mr. Reid said we should look at, and that's the standard that he found was satisfied in this particular case.

And our view, your Honors, is that there is

going to be a new standard. And we talk about all of the different standards in our briefs that Mr. Reid's amici have adopted. This morning I have heard yet additional criteria and additional factors that one should look at in order to determine whether an employment relationship should be met.

But the fact of the matter is that none of these tests -- none of these tests -- was before the district court when we went to trial. We all went on the basis of the historic right-to-control test. And we believe that's the correct test.

But, if this Court is going to adopt a different test, as the court of appeals below did, then we ask that, at the very least, that this case be sent back to the district court so the district court can evaluate the relationship of the parties in light of whatever new-found standard is adopted here.

That is exactly the approach the court has taken in other cases that we cite in our brief, Kelly v. Southern Railway, for example, a case very much like this one where a different standard was adopted by the court of appeals to determine who was an employee. That was applied at the district court level. This Court held that the court of appeals was right with its standard, but sent it back so that the district court

could evaluate the facts of the case under that standard.

QUESTION: Is it --

QUESTION: The court of appeals remanded here, didn't it?

MR. GARRETT: But not on the work-for-hire issue, your Honor.

QUESTION: Joint?

MR. GARRETT: It remanded on the joint work theory --

QUESTION: On the joint work --

MR. GARRETT: -- which is entirely different.

QUESTION: But is it really at all questionable, Mr. Garrett, whether if you adopt the court of appeals' theory of the common law master/servant rule that your client was not a servant? That -- that -- I'm sorry -- that the artist here was not a servant?

MR. GARRETT: Well, I would --

QUESTION: That CCNV could not tell him what chisel to use, couldn't tell him when to come into work, and so forth.

MR. GARRETT: I would respectfully disagree, your Honor.

QUESTION: Really?

MR. GARRETT: We spent a good portion of our

brief talking about all of the agency law cases and why we feel that there are factors of this case that would in fact satisfy those standards.

And, furthermore, your Honor, if we had known that this was going to be an agency law type of an approach, as opposed to the historic approach, it's possible that we would have put our case on differently than we did.

The fact of the matter is we did control a great deal of the manner in which the artist in this case worked here. We set guidelines.

Thank you very much, Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Garrett.

The case is submitted.

(Whereupon, at 11:01 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL., Petitioners, V.

JAMES EARL REID. Case No. 88-293

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)