marketplace," the parties negotiate with an expectation that one of them will own the copyright in the completed work. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

To the extent that petitioners endorse an actual control test, CCNV's construction of the work for hire provisions prevents such planning. Because that test turns on whether the hiring party has closely monitored the production process, the parties would not know until late in the process, if not until the work is completed, whether a work will ultimately fall within §101(1). . . .

B

We turn, finally, to an application of §101 to Reid's production of "Third World America." 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. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *See* Restatement §220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee). No one of these factors is determinative. . . .

[The Court concluded that in light of these factors, the court of appeals had correctly determined that Reid was an independent contractor rather than an employee of CCNV. It remanded for a determination of whether, under §101, the sculpture was nonetheless a joint work co-authored by Reid and CCNV.]

Aymes v. Bonelli

980 F.2d 857 (2d Cir. 1992)

ALTIMARI, J.: . . . [Bonelli hired Aymes to create computer programs for Island, Bonelli's swimming pool business. Aymes worked on the programs from 1980 to 1982.]

During that period, Aymes created a series of programs called "CSALIB" under the general direction of Bonelli, who was not a professional computer programmer. CSALIB was used by Island to maintain records of cash receipts, physical inventory, sales figures, purchase orders, merchandise transfers, and price changes. There was no written agreement between Bonelli and Aymes assigning ownership or copyright of CSALIB. . . .

Aymes did most of his programming at the Island office, where he had access to Island's computer hardware. He generally worked alone, without assistants or coworkers, and enjoyed considerable autonomy in creating CSALIB. This autonomy was restricted only by Bonelli who directed and instructed Aymes on what he wanted from the program. Bonelli was not, however, sufficiently skilled to write the program himself.

Although Aymes worked semi-regular hours, he was not always paid by the hour and on occasion presented his bills to Bonelli as invoices. At times, Aymes would be paid by the project and given bonuses for finishing the project on time. It is undisputed that Aymes never received

any health or other insurance benefits from Island. It is similarly undisputed that Island never paid an employer's percentage of Aymes's payroll taxes and never withheld any of his salary for federal or state taxes. . . .

[After a bench trial, the district court ruled that Aymes had been Island's employee. The court of appeals disagreed.]

. . . *Reid* established that no one factor was dispositive, but gave no direction concerning how the factors were to be weighed. It does not necessarily follow that because no one factor is dispositive all factors are equally important. . . .

[T]here are some factors that will be significant in virtually every situation. These include: (1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party. These factors will almost always be relevant and should be given more weight in the analysis. . . .

[T]he district court gave each factor equal weight and simply counted the number of factors for each side in determining that Aymes was an employee. In so doing, the district court overemphasized indeterminate and thus irrelevant factors having little or no bearing on Aymes's case. . . .

[The court found that although Bonelli had the right to control the manner of creation and the right to assign additional projects, the other three factors listed above dictated the conclusion that Aymes was an independent contractor, and that the remaining *Reid* factors were "relatively insignificant." Regarding the employee benefits and tax treatment factors, the court observed: "Island deliberately chose to deny Aymes two basic attributes of employment it presumably extended to its workforce. This undisputed choice is completely inconsistent with their defense." The court noted that "[t]he importance of these two factors is underscored by the fact that every case since *Reid* that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes."]

NOTES AND QUESTIONS

1. To what extent does the test adopted by the *Reid* Court further the stated goals of predictability and certainty? Does the approach outlined in *Aymes v. Bonelli* further these goals?

2. Is the *Aymes* court's heavy emphasis on the employee benefits and tax treatment factors sensible? Would the *Reid* factors dictate a different result if Aymes had been hired by a software company? Should they do so?

3. In 2005 the American Law Institute adopted The Restatement (Third) of Agency, which is meant to supersede The Restatement (Second) of Agency. The wording of many of the sections has changed significantly and a different numbering scheme has been implemented. Section 7.07 is the parallel to old §220, and it no longer contains the list of factors that the Supreme Court discussed in *Reid*; instead, it simply states: "[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work." Restatement (Third) of Agency, §7.07(3)(a) (2005). Should a change in the Restatement affect how courts analyze whether an individual is an employee or an independent contractor for purposes of determining whether a work is a work made for hire?

4. Examine carefully the second subsection of the "work made for hire" definition. Why did *Third World America* not qualify as a work made for hire under §101(2)? Why did *Malcolm*

X qualify as such a work? If Aalmuhammed had signed a work made for hire contract would that have put an end to his arguments concerning joint authorship?

5. In *Reid*, the Supreme Court remanded for consideration of CCNV's co-authorship claim. Following the remand, the district court assisted the parties in negotiating a settlement, under which Reid was credited with sole authorship of the work and CCNV received sole ownership of the original sculpture. Reid received the exclusive right to make three-dimensional reproductions, but the agreement authorized both parties to make two-dimensional reproductions. *See CCNV v. Reid*, 1991 Copr. L. Dec. (CCH) ¶26,753 (D.D.C. Jan. 7, 1991). Had the case not settled, how would you have resolved the co-authorship issue?

Following negotiation of the settlement and entry of the consent judgment by the district court, Reid requested access to the sculpture so that he could make a mold of it, but CCNV refused access. The parties returned to court again, where the district judge initially ordered that "Reid is entitled to a limited possessory right of his own, in the nature of an implied easement of necessity, to cause a master mold to be made of the sculpture" to enable him to exercise his rights under the consent judgment. *CCNV v. Reid*, Civ. A. No. 86-1507(TPJ), 1991 WL 370138 (D.D.C. Oct. 16, 1991), *superseded by* Civ. A. No. 86-1507(TPJ), 1991 WL 378209 (D.D.C. Oct. 29, 1991). The superseding opinion contained detail on the various matters involved in having a master mold produced.

Note on Works Prepared Outside the United States

Many of the world's other copyright regimes do not recognize a works made for hire doctrine. In countries such as France and Germany, the "author" of a work is the natural person (or persons) who created it, and initial ownership of copyright vests in that person. In contrast, countries such as Ecuador, Ghana, India, Japan, and the United Kingdom follow the works made for hire model and vest initial authorship of employee-created works in employers.

In the U.S. and other countries that follow the works made for hire model, the rationale for assigning authorship and initial ownership to employers is economic. When copyrightable material is prepared by an employee, the employer assumes the economic risk associated with developing and marketing the work. *See* I. Trotter Hardy, *An Economic Understanding of Copyright Law's Work-Made-for-Hire Doctrine*, 12 Colum.-VLA J.L. & Arts 181 (1988). Presumably, this is also true of employers in countries that lack a works made for hire rule. Notably, many of the countries that lack a works made for hire rule expressly provide that the initial ownership of copyright in an employee-created work may be varied by contract. What effects would you predict on the negotiation of employment contracts in these countries? The U.S., meanwhile, also allows employers and employees to vary initial ownership of copyright by contract. *See* 17 U.S.C. §201(b). Given this possibility, what effects would you predict on the negotiation of employment contracts in the U.S.?

Several countries have adopted hybrid regimes intended to protect the economic interests of employers and the moral rights of employees. In China, for example, the author of certain copyrighted works has the sole right to be credited as the author, while all other economic and moral rights belong to the employer. This rule applies to engineering designs, product designs, maps, and computer software. For those works, the employer is also required to reward the author for creating the work. For all other works, China vests copyright ownership in the employee but gives the employer a two-year exclusive right to exploit the work within the scope of the employer's business. Other countries provide