



Appendix E

## "Work Made for Hire" under the 1909 Copyright Law

This leaflet is intended to provide information and references that may be helpful in determining the facts of authorship for works copyrighted under the provisions of the 1909 copyright law, which remained in effect until January 1, 1978.

Section 26 of that law provided that the definition of an author "shall include an employer in the case of a work made for hire." The law did not define a "work made for hire," however, or establish criteria for determining whether a work was "made for hire."

In making such a determination under the 1909 law, courts<sup>1</sup> have considered many factors, such as whether the author was a full-time salaried employee at the time the work was created and, in the case of commissioned or independently contracted works, whether the work was created at the "instance and expense" of the employer, and whether the employer was the "motivating factor" in its creation.

Here are some guidelines an applicant may consider in determining whether a work copyrighted under the 1909 law was "made for hire":

1. The existence of a contract or other written agreement which addresses the circumstances of a work's creation or authorship.
2. Payment of wages or other remuneration.
3. The right of the "employer" to direct and supervise the creation of a work.

It is important to note that the particular facts of each case must be considered in determining whether a work was "made for hire" under the 1909 law. The Copyright Office cannot make the determination; it is the applicant who must determine it, based on the facts and specific circumstances of the case.

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<sup>1</sup>Several relevant court cases are listed here for reference purposes only, in the event an applicant would find the information helpful:

Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d. Cir.), cert denied 309 U.S. 686, 60 S. Ct. 891, 84 L. Ed. 1029 (1940)

Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 567(2d Cir. 1966)

Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213, 1216 (2d Cir.), cert denied, 409 U.S. 997, 93 S. Ct. 320 (1972)

Murray v. Gelderman, 566 F.2d 1307 (5<sup>th</sup> Cir. 1978)

Easter Seal Soc. v. Playboy Enterprises, 815 F.2d 323 (5<sup>th</sup> Cir. 1987)