RETHINKING THE WEIGHTED FACTOR APPROACH TO THE EMPLOYEE VERSUS INDEPENDENT CONTRACTOR DISTINCTION IN THE WORK FOR HIRE CONTEXT

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The contemporary workforce is made up of a significant proportion of contingent workers. ¹ The term "contingent worker" includes leased employees,² temporary employees,³ outsourced employees,⁴ part-time

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1. See generally Mark Diana & Robin H. Rome, Beyond Traditional Employment: The Contingent Workforce, N.J. LAW., THE MAGAZINE, Apr. 1999, at 8 (discussing various common contingent workforce arrangements). There are several reasons a company might prefer to use contingent workers. The use of contingent workers may enable a company to reduce its overhead costs and "[s]uch a change may potentially provide it with a competitive cost advantage over other companies." NANCY E. JOERG, WELCOME TO THE WORLD OF INDEPENDENT CONTRACTORS AND OTHER CONTINGENT WORKERS 6-7 (Lawrence M. Norris et al. eds., 1996) ("Using the contingent workforce can relieve administrative costs of complying with state and federal employment tax obligations, reduce unemployment insurance tax contributions, reduce costs associated with federal and state regulations that apply to employees, cut Social Security and Medicare taxes and more.").

2. Leased employees are "[e]mployees who are initially hired by a company and transferred to the payroll of a professional employer organization (PEO), which then 'leases' the workers back to the company. The PEO continues to perform human resources functions for the workers, such as administering the payroll and benefits and handling personnel matters." Diana & Rome, supra note 1, at 9.

3. Temporary employees are:

employees who are hired, trained and paid by a staffing firm and assigned by the firm to work for a particular company, normally to supplement the company's own workforce (usually on a task/assignment basis or for a specific time period). Companies using a large number of temporary employees may enter into a "master vendor" or "vendor on premises" arrangement with a staffing firm. Under this arrangement, the temporary staffing firm supplies all of the company's temporary employees and uses an on-site representative to manage them. The company also may enter into "temp-to-hire" or "temp-to-lease" arrangements in which a worker is assigned to the company with the understanding that he or she may receive an offer for full-time
employees,\(^5\) and independent contractors.\(^6\) Independent contractors make up the largest portion of contingent workers.\(^7\)

The recent increase in the use of non-traditional forms of employment has brought with it a plethora of legal complications for employers.\(^8\) The trouble can be compounded in claims where the worker's status is relevant or even dispositive. It has become increasingly difficult for employers to be certain that the courts will take the same view of their employment arrangements as the employers had intended.\(^9\) The difficulty is largely due to the fact that there are almost as many different tests for who qualifies as an "employee" as there are legal consequences attached to the employment relationship.\(^10\) Still, as difficult as the task is for employees and employers to be certain of their status under the various tests, the courts are complicating things even further by causing uncertainty even where the same test is applied under different statutes.

This note will focus on the application of the common law test of agency. The common law test is used to determine who is an employee under several different statutes and common law doctrines. Among these statutes are the Copyright Act of 1976 and the Employee Retirement

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4. "In an outsourcing situation, a firm undertakes full responsibility for managing a particular function for a company, including personnel and operations. Companies primarily outsource functions that are not essential to their operations, such as cafeteria, cleaning and security services." \(\text{Id.}\)

5. Part-time employees are "[e]mployees who are simply scheduled by a company to work less than the normal 40-hour work week. Part-time employees may be hired directly by the company or may be provided by a staffing firm." \(\text{Id.}\)

6. Independent contractors are "[w]orkers who are self-employed and engaged to provide specialized services on a contract basis. Again, independent contractors may be retained directly by the company or may be provided by a staffing firm." \(\text{Id.}\)


8. \textit{See, e.g.,} Paul Kellogg, \textit{Note, Independent Contractor or Employee: Vizcaino v. Microsoft Corp.,} 35 \textit{Hous. L. Rev.} 1775, 1776 (1999) ("The use of temporary workers and independent contractors has been growing steadily in the United States since World War II, but the bulk of that increase—and its concomitant problems—have occurred during the past two decades."). Kellogg cites to Richard Belous who compared benefits and compensation among full and part-time workers, and noted that part-time employees are generally less secure and receive fewer benefits. \(\text{Id.}\) at 1776 n.1 (citing RICHARD S. BELOUS, \textit{THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE} (1989)).


10. \textit{See generally id.}
Income Security Act of 1974 ("ERISA"). While some courts have suggested that weighing certain factors may be appropriate for analyzing these cases, other courts have been less certain that such an approach should be taken. By comparing the application of the test in the ERISA context with the application in the copyright context, it becomes clear that the weighing process is not only inappropriate as a matter of judicial interpretation, but also as a matter of fostering predictability and equity.

In Part I, I will review the Supreme Court holdings declaring how a worker's status is to be determined, first under the Copyright Act and then under ERISA. In Part II, I will examine lower court cases following Community for Creative Non-Violence v. Reid and Nationwide Mutual Insurance Co. v. Darden, which attempted to refine the common law test by weighing different factors in different situations. In Part III, I will discuss why the weighing test is wrong as a matter of interpretation and because of the practical effects of altering the test to be applied.

I. ORIGINAL INTENT FOR DETERMINING WHEN SOMEONE IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

In 1989 the Supreme Court resolved years of conflict regarding the test for who is an employee under the Copyright Act. Six years later, the
The Court addressed the issue of who is an employee under ERISA.\textsuperscript{17} The original intent of the Court's decisions in these two cases is discussed below.

\textbf{A. The Employee/Independent Contractor Distinction Under the Copyright Act}

The distinction between employees and independent contractors is critical in copyright law to determine both ownership of a copyright and the scope of rights accompanied with such ownership. The Copyright Act of 1976 ("Copyright Act") provides that the creator of a work is generally the owner of the copyright in that work.\textsuperscript{18} However, under certain circumstances, a work may be considered a "work for hire" making the employer the rightful owner of the copyright in a work created by his employee.\textsuperscript{19} A work may be considered a "work for hire" under either one of two sets of circumstances: (1) if it is "a work prepared by an employee within the scope of his or her employment"\textsuperscript{20} or (2) if the work is one of nine enumerated categories\textsuperscript{21} and "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."\textsuperscript{22}

Because a work created by an independent contractor must fall into one of the enumerated categories in order to qualify as a "work for hire," it is far more likely that the worker will retain copyright if he or she is classified as an independent contractor.\textsuperscript{23} Thus, the worker's status is crucial to determining ownership of the copyright. Furthermore, where a copyright infringement claim is filed by an employee against his employer,

\textsuperscript{17} See \textit{Darden}, 503 U.S. at 318 (holding that the common law definition of "employee" should apply).

\textsuperscript{18} Copyright Act, 17 U.S.C.A § 201(a) (1976) (determining that authors of works have initial copyright in them).

\textsuperscript{19} \textit{Id.} § 201(b).

\textsuperscript{20} \textit{Id.} § 101.

\textsuperscript{21} The works include:

- a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas . . . .

\textit{Id.}

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} This assumes that no agreement transferring copyright of the work has been signed. However, it is important to note that if a work qualifies as a work for hire, even where there is an agreement transferring copyright to the worker/creator, the work will still be treated as a work for hire for the determination of the duration, \textit{id.} § 201, renewal rights, \textit{id.} § 302(c), and the termination of a copyright transfer, \textit{id.} § 304(a). The only right affected by such an agreement is the ownership of the copyright and, consequently, the standing to sue for infringements.
or vice-versa, the employment status of the creator of the work can be the dispositive issue. For example, in Reid, if Reid had been found to be an employee under the Copyright Act, he would have had no legitimate claim to ownership of the copyright, and thus, no claim that his rights were infringed.24

Because of the importance of the worker's status under the Copyright Act, the issue of whether the creator is considered an employee or an independent contractor has become frequently litigated in a variety of business contexts.25 As the workforce becomes less traditional26 and more workers are creating copyrightable material, such as computer programs,27 copyright ownership becomes an important consideration in the overall scheme of bargaining between employers and employees. Where conflict is not anticipated, and an employee's status is not otherwise discussed, there is great potential for litigation.28

In addition to determining the initial ownership of the copyright, finding a work to be a "work for hire" will also affect the copyright's duration,29 the owners' renewal rights,30 termination rights,31 and the right to import certain goods bearing the copyright.32 As the Supreme Court correctly observed, "[t]he contours of the work for hire doctrine... carry profound significance for freelance creators—including artists, writers,

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25. The problem also arises in the arts, software design, and other industries. See, e.g., Kirk v. Harter, 188 F.3d 1005 (8th Cir. 1999) (determining copyright ownership of computer program); Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106 (2d Cir. 1998) (determining copyright ownership of fashion design); Lulirama Ltd. v. Acess Broad. Servs., Inc., 128 F.3d 872 (5th Cir. 1997) (determining copyright ownership of an advertising jingle).
28. The court in Respect, Inc. v. Committee on the Status of Women, observed that the issue of who owns the copyright when an organization hires someone to create or to rework materials in a way that meets the organization's needs without stating the creator's employment status in writing "frequently arises where a large corporation engages independent computer programmers to create software..." 815 F. Supp. 1112, 1114 n.1 (N.D. Ill. 1993) (citing Charles Ossola, "Joint Work" Theory Raises New Questions on Authors' Rights, NAT'L L.J., Jan. 18, 1993, at S10); see also Kirk v. Harter, 188 F.3d 1005 (8th Cir. 1999) (applying the common law rule of agency to determine employment status); Graham v. James, 144 F.3d 229 (2d Cir. 1988) (holding that a computer programmer was an independent contractor not an employee).
30. Id. § 304(a)(2)(A).
31. Id. § 203(a).
32. Id. § 601(b)(1).
photographers, designers, composers, and computer programmers—and for the publishing, advertising, music, and other industries which commission their works.\(^{33}\)

Having established that the consequences attached to the worker's status are significant and far reaching, I turn now to the question of who is an employee under the Copyright Act. Despite a list of definitions containing nearly fifty terms,\(^{34}\) the Copyright Act contains no definition of either "employee" or "independent contractor." Therefore, the courts have had to look beyond the language of the statute for the proper definitions. Presently, the courts rely on the common law definitions.\(^{35}\)

In the absence of an agreement, the controlling case for distinguishing employees from independent contractors under the Copyright Act is *Community for Creative Non-Violence v. Reid*.\(^{36}\) The court determined that the Copyright Act did not define the term "employee."\(^{37}\) Therefore, the Court employed the longstanding principle that "[w]here Congress uses terms that have accumulated settled meaning under... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."\(^{38}\) Consequently, the Court held that the general laws of agency should apply.\(^{39}\)

In support of this interpretation of the Copyright Act, the Court cited several prior instances where it gave the same statutory interpretation, and stated that the Court had in the past "concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine" where the word "employee" was included in a statute, but not defined.\(^{40}\) Additionally, the Court concluded that "[n]othing in the text of the work for hire provisions indicates that Congress used the words 'employee' and 'employment' to describe anything other than 'the conventional relation of employer and employee.'"\(^{41}\) Consequently, the Court turned to the Restatement of Agency to formulate a test to determine when a worker was a "conventional" employee.\(^{42}\)

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35. *See Reid*, 490 U.S. at 739 (holding that the court should apply the common law test of agency to determine if a work is a "work made for hire").
37. *Id.* at 739.
38. *Id.* (citing NLRB v. Amax Coal Co., 435 U.S. 322, 329 (1981)).
40. *Reid*, 490 U.S. at 740.
42. *See id.* at 740-41, 751-52 (noting that the Court was applying the "general common law of agency" to define the term "employee," rather than the law of any particular state).
As directed by the laws of agency, the Court stated that "[i]n 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." The Court then listed several factors to be evaluated in the inquiry. These factors include:

[T]he 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.

Lower courts may be tempted to refine this vague test in order to ensure predictability in the results among cases. However, this is the starting point from which the lower courts must make the determination of who is an employee under the Copyright Act.

B. The Employee/Independent Contractor Distinction Under ERISA

Similar to the Copyright Act, the disposition of a claim under ERISA can depend entirely on the crucial distinction as to whether the worker is classified as an employee or an independent contractor. ERISA authorizes a benefit plan "participant" to enforce its substantive provisions. The statute defines a "participant" as "any employee or former employee of an employer ... who is or may become eligible to

43. Id. at 751.
44. Id. at 751-52. For a more detailed discussion of each factor, see Corey L. Wishner, Note, Whose Work is it Anyway?: Revisiting Community for Creative Non-Violence v. Reid, in Defining the Employer-Employee Relationship Under the "Work Made for Hire" Doctrine, 12 Hofstra Lab. L.J. 393 (1994).
45. See Aymes v. Bonelli, 980 F.2d at 857, 861 (2d Cir. 1992) (claiming that "the Reid test can be easily misapplied, since it consists merely of a list of possible considerations that may or may not be relevant in a given case").
46. In conjunction with the standing issue of whether a worker is an employee, ERISA may determine whether state law claims will be preempted. See, e.g., Salameh v. Provident Life & Accident Ins. Co., 23 F. Supp. 2d 704, 710 (S.D. Tex. 1998) (discussing the elements and regulations promulgated under an ERISA "employee welfare benefit plan"); Schwartz v. Employers Health Ins. Co., 1995 U.S. Dist. LEXIS 6585, at *6 (N.D. Ill. May 12, 1995) ("If [a] plaintiff is an independent contractor, ERISA does not preempt her claims and she can maintain an action in state court.").
receive a benefit of any type from an employee benefit plan . . . ."48 Thus, by its terms, ERISA denies independent contractors the same statutory protection granted to employees. The Supreme Court acknowledged this distinction by noting that "[an] ERISA claim can succeed only if [the plaintiff] was [the defendant's] 'employee'."49

Like the Copyright Act, ERISA fails to provide any substantive definition to the term "employee." The term is defined only as "any individual employed by an employer."50 Thus, as in copyright law, the courts have looked elsewhere to determine the definition of an "employee" in the ERISA context.

In Nationwide Mutual Insurance Co. v. Darden,51 the Court unanimously, and with little discussion, followed the holding of Reid and, again, applied the "well established" principle that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . ."52 The Court overruled a Fourth Circuit holding that inquired into an employee's expectations53 in favor of the same general rule followed in Reid: where Congress used the term "employee" without defining it, they had determined that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."54

The Court further stated that this general rule sufficed as independent authority for the decision in Reid, and was independent authority for their decision in Darden.55 Thus, it is apparent that the question of "who is an employee" should, in theory, bring about the same answer in either context. At a minimum, it should result in the same analysis by the courts.

II. LOWER COURT APPLICATIONS OF THE AGENCY TEST

Based on the decisions in Reid and Darden, it seems that the Supreme Court intended the term "employee" to have the same definition. However, interpretations of these decisions by the lower courts may ultimately bring about very different determinations of an employee's status, even under very similar facts.

52. Id. at 322.
53. Id. at 326.
54. Id. at 322-23.
55. Id.
A. Cases Arising Under the Copyright Act

Over the past decade, as courts have struggled with the onerous task of applying the ten factor test, many courts have sought to find a way to make these factors more indicative of a result one way or the other. In doing so, some courts have determined that certain factors are to be given more weight in the analysis. Other courts give every factor consideration as warranted in the case, and still others have given all factors equal weight.

1. Weighted Cases

The case which sets a strong precedent for supporting a weighted approach is Aymes v. Bonelli. Suit was brought to determine ownership of the copyright in a computer program designed by Aymes. The district court, following Reid, applied the multi-factor test and determined that Aymes was an employee. On appeal, the Second Circuit observed that the district court applied the Reid test "thoroughly, factor-by-factor." However, the Second Circuit suggested that doing so was improper and that "[i]t does not necessarily follow that because no one factor is dispositive all factors are equally important, or indeed that all factors will have relevance in every case. The factors should not merely be tallied but should be weighed according to their significance in the case."

Moreover, the Aymes court specifically declared that certain factors should be given more weight. As support for this approach, the court cited numerous cases in which a "weighted approach" had been taken in applying the Reid test. The factors the Aymes court emphasized were "(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." The court went beyond suggesting

56. One article has suggested that there are four approaches to the agency test: (1) favoring control factors, (2) favoring tax and benefits factors, (3) ignoring tax and benefits, and (4) minimizing control. Jennifer Sutherland Lubinski, Comment, The Work For Hire Doctrine Under Community for Creative Non-Violence v. Reid: An Artist's Fair Weather Friend, 46 Cath. U. L. Rev. 119, 139 (1996). However, I disagree with much of the analysis and characterizations of the court opinions cited in this article, aside from the discussion regarding Aymes v. Bonelli. See infra note 57.

57. 980 F.2d 857 (2d Cir. 1992).
58. Id.
59. Id. at 860-61.
60. Id. at 860.
61. Id. at 861.
62. Id.
63. Id.
64. Id. The remaining factors were discussed, but for the sole purpose of demonstrating
that these factors should always be considered; rather, the Aymes court stated that, because these factors will almost always be relevant, they "should be given more weight in the analysis . . . ."65

In conducting the analysis, the court's language suggested that of these five factors, tax and benefits were the most determinative.66 The court particularly emphasized these factors, finding the failure to provide Aymes with benefits or to pay his taxes "highly indicative" of the fact that his employer considered him an independent contractor.67

The court's reasoning seemed to be based more on a sense of equity than on laws of agency. The opinion states that the denial of benefits and failure to pay taxes were behaviors which are "completely inconsistent" with the employer's claim that Aymes was, in fact, an employee.68 The court observed that Aymes' employer "benefitted [sic] from treating Aymes like an independent contractor when it came to providing benefits and paying a percentage of his payroll taxes."69 The reasoning the court offered for making these factors almost dispositive was that it was inequitable for an employer "in one context to be able to claim that Aymes was an independent contractor and ten years later deny him that status to avoid a copyright infringement suit."70

The future of the Aymes approach is unclear. The Second Circuit has followed a similar analysis in other cases. For example, in Carter v. Helmsley-Spear, Inc.,71 the Second Circuit approved the district court's analysis, which cited Aymes and addressed the five selected factors.72 Similarly, in Graham v. James,73 the court stated: "[w]e give greater weight to certain of the Reid factors."74 Courts outside of the Second Circuit have also cited the case to support the proposition that tax and benefits treatment is highly indicative of employment status.75 Moreover, the Aymes decision has been included in at least one copyright textbook.76

Some courts may be reluctant to modify the Reid test. Though they

65. Id.
66. Id. at 862.
67. Id. at 862-63.
68. Id. at 863.
69. Id. at 862.
70. Id.
71. 71 F.3d 77 (2d Cir. 1995).
72. Id. at 86.
73. 144 F.3d 229 (2d Cir. 1998).
74. Id. at 235.
75. See, e.g., Kirk v. Harter, 188 F.3d 1005 (8th Cir. 1999) (holding that failure to provide employment benefits or withhold social security taxes was evidence of a computer programmer's status as an independent contractor).
declined to answer whether *Aymes* should be followed, the court in *Respect, Inc. v. Committee on the Status of Women* specifically addressed the *Aymes* decision and noted that the Second Circuit "sought to structure a kind of weighted approach under which . . . some factors are more equal than others. For purposes of this opinion it is unnecessary to decide whether that gloss should be superimposed on what the ultimate authority—the Supreme Court—has said in *Reid*.

Although Lubinski characterized this holding as "overlooking the tax and benefit factors," the *Respect* court's opinion does not indicate an intent to afford the tax and benefits any less weight; it only offers the suggestion that, contrary to the *Aymes* opinion, these factors should be equal to all other factors.

2. Copyright Cases Taking an Unweighted Approach

There are other cases which do not place special emphasis on any particular factors. Among these cases are *Marco v. Accent Publishing Co.*, and *Respect, Inc. v. Committee on the Status of Women*.

These cases have been classified in various ways. Lubinski categorized *Marco* and *Respect* as "minimizing the right to control" and "overlooking tax and benefits," respectively. The *Aymes* court cited *Marco* among several cases which the court believed had adopted a "weighted approach by only addressing those factors found to be significant in the individual case." However, I do not believe that either of these characterizations are appropriate.

The *Aymes* court was correct in that *Marco* addressed only those factors significant in that case, but that does not, in my view, constitute a true "weighting" of factors. The court acknowledged all the factors, but found three factors to be indeterminate either because of a lack of evidence or, in the case of the right to hire an assistant, an inapplicability to the facts. Such a finding is vastly different from the statement in *Aymes* that certain factors should be given more weight, as they are usually "highly

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78. Id. at 1118 n.11.
79. Lubinski, supra note 56, at 142-43.
81. 969 F.2d 1547 (3d Cir. 1992).
82. 815 F. Supp. 1112. As this case was discussed above, I will not address it again here.
83. Lubinski, supra note 56, at 142-46.
85. Although the court found that the right to hire an assistant would be a legitimate factor to be weighed, they held that no assistant was required for this job, and thus this factor was inapplicable. Id. at 864.
probative of the true nature of the employment relationship." Nothing suggests that, had the lawyers presented evidence related to any of the other factors, such evidence would have been given any more or less weight than the others. Thus, the *Marco* decision is not maximizing or minimizing any factors, it simply evaluates all relevant and available information equally. Consequently, it provides more support for the idea that the determination of relevant factors is not impossible on a case-by-case basis, than it does for the *Aymes* idea that certain factors are always more important.

For more examples of unweighted applications of the *Reid* test, it is helpful to examine cases in the ERISA context.

**B. Cases Arising Under ERISA**

Though not as frequent as those in the work for hire context, several cases have applied the same *Reid* factors in the ERISA context. As in the copyright arena, courts do not necessarily apply all the factors in every case; however, unlike the copyright cases, courts do not weigh any factors or otherwise revise the multi-factor test. Thus, ERISA cases seem to follow the unweighted approach to the agency test discussed above.

In *Barnhart v. New York Life Insurance Co.*, the court applied the *Darden* test and found an equal number of factors (including the provision of benefits) in favor of employment and independent contractor status. However, unlike copyright cases, the court made no declaration that any factor was more important than the others. The court simply stated that "considering all factors as a whole," the insurance agent was an independent contractor.

The Eleventh Circuit also addressed the issue of employment status without weighing factors. In *Daughtrey v. Honeywell, Inc.*, the court overturned a district court's grant of a motion for summary judgement on the grounds that facts favoring employee status had not been considered.

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86. *Id.* at 861.
87. *See supra* pp. 341-42.
88. There are far fewer cases which are required to follow *Darden*. *Darden* is limited to defining an employee for standing, although the definition of an employee comes up in various ERISA-related matters. Many cases arise in the context of determining preemption of state law claims. Section 514(a) of ERISA broadly preempts all state laws which "relate to" any employee benefit plan, the definition of employee within a benefit plan, and in the summary judgment procedure. 29 U.S.C. § 1144(a) (1994).
89. 141 F.3d 1310 (9th Cir. 1998).
90. *Id.*
91. *Id.*
92. *Id.* at 1313.
93. 3 F.3d 1488 (11th Cir. 1993). The court did not reach a final decision as to Daughtrey's status since disputed facts existed.
94. *Id.* at 1493.
Nowhere in the opinion did the court suggest that any factor or set of factors was more important than others.95

There is only one case which arguably weighs factors, and even that case is tenuous. In Salameh v. Provident Life & Accident Insurance Co.,96 the court characterized the use of W-2 rather than 1099 tax forms as "strong evidence" of employee status.97 It also stated that a guaranteed base salary, the provision of fringe benefits, the reimbursement of expenses, and the availability of paid vacation "weigh strongly in favor of employee status."98 Notwithstanding, the court avoided promulgating a weighted test as a general rule.99 A statement that one factor weighs strongly in a particular direction does not suggest that it weighs more than the other factors as an empirical matter.100 The opinion also contained a thorough examination of the doctor's contract, which "define[s] his duties in greater detail and indicates the extent of the partnership's right of control."101 Again, avoiding a rule which favors certain factors, the court was careful to dismiss holdings prior to Darden which had:

[P]ut special emphasis on the issue of control, determining that 'the right of one party to control not only the result to be achieved by the other, but also the means and manner of performing the task assigned, is the most critical factor in ascertaining whether an employment relationship exists."102

The court warned that "[i]f control were the only factor, . . . 'then no professional who exercises professional judgment could be considered a[n] . . . employee . . . '."103 In the end, the court declared that it was "considering the full range of relevant factors."104 Thus, the precedent set by Salameh does not suggest the use of a weighted test to the extent that Aymes does.105

95. See id.
97. Id. at 715.
98. Id. at 714.
99. Id.
100. Id.
101. Id. at 713.
102. Id. at 712 (citing Holt v. Winnisinger, 811 F.2d 1532, 1536 (D.C. Cir. 1987), quoted in, Penn v. Howe-Baker Eng'rs, Inc., 898 F.2d 1096, 1101 (5th Cir. 1990)).
103. Id. at 712 (quoting Linkous v. United States, 142 F.3d 271, 276 (5th Cir. 1998)).
104. Id.
105. Compare id. at 715 (citing several factors in favor of plaintiff being an employee:

[They] provided [the plaintiff] with office space, furnished him the necessary medical equipment and supplies, paid for his medical malpractice insurance, provided him with disability, life, and health insurance, and paid for his continuing education courses and related travel. [They] also compensated him through the payment of an annual salary that was not based on the number of patients treated or the amount of fees collected, paid his additional expenses,
Comparing the ERISA cases to the copyright cases, the former do seem to take a more even-handed approach. Even if the courts ultimately have to determine which factors are more significant, it is important that, as a matter of doctrine, the initial approach observes the Supreme Court decree that no one factor is dispositive. As I will demonstrate, use of the weighted approach is incorrect as a matter of law and may lead to practical problems.

III. WHY FACTORS SHOULD NOT BE WEIGHTED

Courts that weigh different factors in determining an employee's status create two problems. The first is that this approach violates the intentions of Congress and the Supreme Court. The second involves the adverse impact on companies which use contingent workers.

A. Violating the Intentions of Congress and the Supreme Court

In my view, all of the cases which struggle to determine the most relevant factors oppose the Supreme Court's mandate and the intentions of Congress.

In order to make clear how the Reid decision should be followed, it is instructive to examine the tests used to determine who is an employee which the Court rejected. Prior to Reid, courts used four different tests to determine an individual's employment status: the actual control test, the right to control test, the agency law test, and the formal, salaried employee test.\(^\text{106}\) The tests explicitly rejected by the Reid court were: the actual control test, the right to control test, the agency law test, and the formal, salaried employee test.\(^\text{107}\) The Court rejected three of these in favor of the agency test.\(^\text{107}\) The tests explicitly rejected by the Reid court were: the actual control test, the


\(^\text{107}\) Reid, 490 U.S. at 741-43.
right to control test, and the formal salaried employee test.\textsuperscript{108}

The actual control test holds that "independent contractors who are so controlled and supervised in the creation of a particular work are deemed 'employees' under § 101(1)."\textsuperscript{109} The Court felt that there was little support for such a test.\textsuperscript{110} The provisions of the Copyright Act only allow a work for hire to be created either by commission or by virtue of the creator being an employee.\textsuperscript{111} Because nothing in the statute provides for creation of a work for hire based on an employer's control over the creation of the work, the Court rejected this test.\textsuperscript{112}

The right to control test holds that an employer is the owner of a work if he had the right to control the work.\textsuperscript{113} The Court believed that this was improper because the focus should be on the relationship between the employee and the employer, rather than between the employer and the work created.\textsuperscript{114}

The Court also "reject[ed] the suggestion . . . that the § 101(1) term 'employee' refers only to formal salaried employees."\textsuperscript{115} This test is based on the notion that this definition was the meaning of the term as understood by those negotiating the Copyright Act.\textsuperscript{116} The Reid court acknowledged that, although some legislative history supported the definition of employee as a formal, salaried employee, the statute, as enacted, does not reflect any such intention.\textsuperscript{117} The fact that within the statute the word "employee" was

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 742. This test was first used by the Second Circuit in \textit{Aldon Accessories, Ltd. v. Speigel, Inc.}, 738 F.2d 548, 551 (2d Cir.), \textit{cert. den.}, 469 U.S. 982 (1984), which approved an instruction to the jury that to determine if a work is a work for hire, "[i]t does not matter whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation." This test, or a variation thereof, was also followed by the Fourth and Seventh Circuits. \textit{See Brunswick Beacon, Inc. v. Shock-Hopkins Publ'g Co.}, 810 F.2d 410 (4th Cir. 1987); Evans Newton Inc. v. Chicago Sys. Software, 793 F.2d 889 (7th Cir. 1986). Although this rule was adopted by several circuits, it was also "criticized as a misinterpretation of the 1976 Copyright Act." Marik, \textit{supra} note 106, at 606 n.112 (citing Diane McNamara, \textit{Preserving the Creator's Right of Authorship to Works Made for Hire}, 7 ENT. & SPORTS LAW. 1, 1 & 13).
\textsuperscript{110} Reid, 490 U.S. at 742-43.
\textsuperscript{112} Reid, 490 U.S. at 738. \textit{But see} Peregrine v. Lauren Corp., 601 F. Supp. 828, 829 (D. Colo. 1985) (acknowledging that a "work for hire relationship exists when an employer has the right to control the party doing the work").
\textsuperscript{113} Reid, 490 U.S. at 739.
\textsuperscript{114} Id. at 741.
\textsuperscript{115} Id. at 742 n.8.
\textsuperscript{116} See Dumas v. Gommerman, 865 F.2d 1093, 1102 (9th Cir. 1989) (holding that "only the works of formal, salaried employees are covered by § 101(1)," and reasoning that this was the proper meaning of the term because it was the meaning understood by those negotiating the terms of the Copyright Act).
\textsuperscript{117} Reid, 490 U.S. at 742 n.8 (citations omitted). Others have agreed that this might be
not qualified by any terms such as "formal" or "salaried" led the Court to assume that such a qualification was not intended. Moreover, the Court noted that the determination of who is a "formal, salaried employee" is not an easily answered question.

The Court ultimately decided to adopt the agency test, used by the Fifth Circuit and the D.C. Circuit, in their decision below.

The Supreme Court rejected these tests in favor of the agency test that is based on cannons of statutory interpretation. It seems that, implicit in the rejection of these narrow tests for the broader agency test, no basis exists for finding that one of these factors outweighs the others. Basically, the Reid court expressly rejected three tests which focus on specific factors in favor of the agency test which requires that the rejected tests be applied simultaneously as one test. Whether the employer had a right to control or exercised any actual control is considered under the agency test, but clearly is not dispositive. The same is true for the "formal, salaried employee" test. Whether or not the creator of a work was "a formal, salaried employee" is accounted for in the consideration of the method of payment, tax treatment and benefits provided to the employee. The Reid court stated that although all of these factors should be considered, no one factor is dispositive. If one factor or set of factors were to be declared more relevant than the others, it would become the dispositive factor. If the most significant factors were the tax and benefit treatment, as Aymes seems to suggest, it would follow that the Supreme Court should have adopted the formal salaried employee definition, and enumerated the relevant factors in that inquiry. Thus, the Reid Court's rejection of the more specific tests would be virtually meaningless. Furthermore, if the tax and benefit factors were given more weight, then the test would effectively become a mere variation of the "formal, salaried employee" test, albeit under another name.

the appropriate reading. See, e.g., Weinberg, supra note 106, at 669 (arguing that the Reid court's adoption of the agency law definition "misconstrues congressional intent").

118. Reid, 490 U.S. at 742-43 n.8.
119. The Court compared briefs submitted by each of the parties offering different criteria to determine when an employee is a "formal, salaried employee." Id.
120. Id.; see also Easter Seal Soc'y v. Playboy Enters., 815 F.2d 323, 333-34 (5th Cir. 1987) (holding that the agency test should be used to determine whether a creator is considered an "employee" under the Copyright Act).
122. Reid, 490 U.S. at 750-51.
123. Id. at 751-52.
124. Id. at 752.
126. Id. at 862 (discussing the importance of tax and benefit treatments and explaining why these two factors are given greater weight).
Additionally, the Aymes court's justification for placing greater weight on the tax and benefit factors conflicts with Supreme Court holdings. In determining the appropriate test, the Supreme Court looked to principles of statutory construction, and concluded that common law principles apply.\textsuperscript{127} The Court then looked to past cases dealing with the common law of agency to extrapolate the relevant factors.

The Reid court's formulation of the multi-factor test was based on longstanding legal principles. In contrast, the Aymes court based the weighing of the tax and benefit factors largely on past cases that have found the hiring party was an independent contractor where no benefits had been received.\textsuperscript{128} However, these cases did not mention the other factors. For example, the Aymes court cites to Marco, but fails to mention that the Third Circuit found six factors that weighed in favor of independent contractor status, and three that weighed in favor of employee status.\textsuperscript{129} The court did not cite any fundamental principles of the common law of agency that would support such an emphasis on these factors. In fact, the Restatement of Agency, on which the Reid court relied for guidance,\textsuperscript{130} does not mention tax and benefit treatment.\textsuperscript{131}

Another inappropriate basis for modifying the Reid test relies on the premise that it is inequitable for a company to deny a worker tax and benefits, and yet retain copyright. Although the occasional inequitable result may occur, the Supreme Court was clear that the determination of who is an employee should not depend on "the end to be attained."\textsuperscript{132} The tone and reasoning of the Aymes opinion suggest that the facts are being considered in light of a particular agenda, namely, to ensure adequate consideration for the creator in exchange for ownership of the work created.\textsuperscript{133} There is nothing in the Reid opinion to suggest that this

\textsuperscript{127} See supra text accompanying notes 35-45.
\textsuperscript{128} Aymes, 980 F.2d at 863.
\textsuperscript{129} The remaining factors were found to be indeterminate. Id.
\textsuperscript{130} Reid, 490 U.S. at 752 n.31 ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency.").
\textsuperscript{131} Restatement (Second) of Agency § 220 (1958) (demonstrating that other factors may be reflected in the tax and benefit treatment: "the method of payment, whether by the time or by the job" and "whether or not the parties believe they are creating the relation of master and servant").
\textsuperscript{132} Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (abandoning prior cases construing the term employee in "the light of the mischief to be corrected and the end to be attained").
\textsuperscript{133} Others would agree that avoiding such inequity is the primary purpose of differentiating between employees and independent contractors in copyright law. Lubinski suggests that the work-for-hire provision recognizes a trade off between employment benefits and copyright ownership: where benefits are given, the employees "are adequately compensated and do not require the economic protection copyright ownership affords." Lubinski, supra note 56, at 155. She also states that misapplication of the test can result in a
approach should be taken.

There are additional reasons not to place such emphasis on tax and benefit treatment. An employer's tax and benefit treatment of a particular employee may depend largely on the employer's own belief as to the employee's status. The Aymes court used the evidence of tax treatment and benefits to determine that "Aymes was considered an outside independent contractor" by his employer.\(^{134}\) The Supreme Court, which listed several factors taken from the Restatement, conspicuously omitted consideration of whether the parties believed they were creating a master servant relationship.\(^{135}\) Thus, under Reid, placing great weight on the fact that "Aymes was considered an outside independent contractor" by his employer, as evidenced by the tax and benefit treatment, is improper.\(^{136}\)

An examination of ERISA cases makes it clear that we cannot allow the employer to determine the rights and responsibilities of the employment relationship. Darden specifically refuted the idea that the parties' expectations were an appropriate basis for a decision.\(^{137}\) In ERISA cases, courts often have to look beyond an agreement specifying an employee's status.\(^{138}\) Such an agreement would be direct evidence of the parties' intent regarding the relationship being created. Nonetheless, the courts should weigh all other factors equally. Naturally, where the parties do not intend for a worker to be considered a common law employee, they will often determine that they are not obligated to provide the benefits and tax treatment required for a common law employee. Thus, tax treatment and benefits are simply other manifestations of the employer's intent and/or beliefs.\(^{139}\) If the employee's intent or understanding of the situation, as

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\(^{134}\) Aymes, 980 F.2d at 862.

\(^{135}\) Compare Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (citing RESTATEMENT (SECOND) OF AGENCY § 220(i) (1958)) with RESTATEMENT (SECOND) OF AGENCY § 220(i) (1958). Even if the Court simply wanted to maintain a distinction between "master and servant" and "common-law employee," they still could have considered the parties intent, had they felt it relevant.

\(^{136}\) Aymes, 980 F.2d at 862.

\(^{137}\) Darden, 503 U.S. at 326 (determining that Congress intended to limit employer imposed conditions on employee expectations).

\(^{138}\) See, e.g., Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1492 (11th Cir. 1993) (finding that "[w]hile the characterization of the hired party as an independent contractor or employee may be probative of the parties' intent, 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive' . . . . The employment status of an individual for the purposes of ERISA is not determined by the label used in the contract between the parties.").

\(^{139}\) See Hensley v. Northwest Permanente P.C. Retirement Plan and Trust, 1999 U.S. Dist. LEXIS 13906, at *16 (D. Or. Aug. 12, 1999) (finding that, for ERISA purposes, it is improper "[t]o define an employee as one who receives a W-2 form simply based upon past
manifested in a contract, does not determine whether a worker is a common law employee, it seems illogical to allow the determination to rest on the employer's understanding of the situation as manifested by what the employer understands his responsibilities to be.\textsuperscript{140}

Such a decision would have absurd consequences. A worker would only be a common law employee when the employer thought he was a common law employee. Therefore, the bodies of law created to ensure that common law employees are not denied appropriate benefits or tax treatment would be rendered useless; the only workers who would pass the test for common law employees would be those already receiving the proper tax and benefit treatment.

B. Potential Impact on Companies Using Contingent Workers

Placing such a great weight on tax and benefit treatment may also lead to inequities for the employer. This is more evident when the work for hire analysis is examined, not in a vacuum, but by looking at all the legal implications of the employer-employee relationship. The Aymes court had a valid concern in preventing the employer from receiving a windfall by escaping payment of payroll taxes and benefits while gaining the value of copyright in a work created by an employee.\textsuperscript{141} However, it is also important to be aware of the potential to force employers into a position of providing benefits or payroll, which they are not otherwise obligated to pay, in order to keep from losing the copyright in a work to which they are entitled. Consider the following: an employer hires a worker, and the worker creates a copyrightable work. Suppose the worker is not receiving benefits and is not considered an employee for tax purposes. If tax treatment and benefits are the predominant factors, as in Aymes, a court is unlikely to consider the worker to be a common law employee.

However, the employee may qualify as a common law employee under the twenty factor test used by the IRS.\textsuperscript{142} The fact that he is not a

\textsuperscript{140} Id. (noting that it is possible for the employer to be incorrect in determining who should receive a W-2); see also Vizcaino v. Microsoft, 97 F.3d 1187, 1190 (9th Cir. 1996) (describing how plaintiffs were employed as independent contractors and treated as such for tax purposes until an IRS determination that they were, in fact, employees).

\textsuperscript{141} See also Lubinski, supra note 56, at 156 (discussing the windfall potential, Lubinski argued that the connection between copyright retention and employee benefits was necessary to an artist's survival since the artist has forgone "the employment benefits traditionally enjoyed by common law employees, such as insurance, vacation time, or pensions. If the artist is awarded copyright ownership, he or she will be reimbursed for sacrificing the security associated with traditional employment.").

\textsuperscript{142} See Darden, 503 U.S. at 324 (explaining that the multi-factor test adopted in Reid, and applied in Darden, is different from the twenty factor test used to determine who was a
common law employee under a different test should not prevent a finding that he is a common law employee under the Reid test. A weighted test requires, in effect, that to be considered a common law employee in the work for hire context, he must also be treated as a common law employee for tax purposes even when he does not meet the criteria set forth in the tax context. Alternatively, an unweighted test makes it more possible for the tax issue to be countered by other factors indicating that the worker is an employee. Under a test where all factors are equal, an employer can rely on the guidelines set forth solely by tax cases to determine his or her tax obligations, without concern about losing copyrights to which he or she is rightfully entitled.

Similarly, there are circumstances where a worker could, after applying the Reid factors, qualify as a common law employee within the context of ERISA, yet still legally be denied certain retirement benefits because he or she is not in the class of employees which is provided benefits under the company's benefit plan. Because the definition of an employee under ERISA is the same as under the Copyright Act, it seems logical that if one is a common law employee under ERISA, one should also be a common law employee under the Copyright Act. Seemingly, this equal treatment is in line with the result that the Aymes court attempts to achieve. However, courts have found that the legislature does not require an employer to provide benefits to everyone who is an employee even though the legislature does grant copyright ownership to the employer of an employee in all circumstances. Therefore, a weighted test may obligate

common law employee in various tax law contexts).

143. See id. at 322-24 (explaining that employee status under ERISA is determined not by the tax code, but by the common law of agency). Since ERISA law stems from the same agency principles as the work for hire doctrine, it follows that copyright ownership should not be determined by tax determinations.

144. The existence of cases like Darden reflect that there may be common law employees who are denied benefits. Furthermore, cases arising under ERISA make it very clear that a person may be a common law employee and still be exempted from an employee benefits plan. See, e.g., Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan, 102 F.3d 1435 (7th Cir. 1996) (holding that a benefit plan need not provide benefits to all employees who qualify as common law employees under the ERISA statute). Thus, a weighted test which reaches the conclusion that someone is an independent contractor based on a denial of benefits, may, in effect, deny an employer a right to which he would otherwise be entitled—retention of copyright in an employee created work based on the lawful decision to exempt a class of common law employees from the benefits plan.

145. See Aymes v. Bonelli, 980 F.2d 857, 862 (2d Cir. 1992) (explaining that if you are an employee for benefits purposes, you should be an employee for copyright purposes).

146. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (defining employee under the general common law of agency). It is also important to note that ERISA does not cover all "benefits." Generally, welfare benefits such as vacation and sick leave are covered by ERISA only in certain, rare circumstances. For a more thorough explanation, see JAMES O. CASTAGNERA & DAVID A. LITTELL, FEDERAL REGULATION OF
the employer to provide benefits beyond that which Congress has
demanded in order for the employer to enjoy a right that Congress granted
to the employer.147

This additional obligation of the employer seems to create the
possibility of a windfall to the employee and an unfair result for the
employer. If the company's benefit plan excludes certain common law
employees, which they legally are permitted to do, the same employee
would likely not be a common law employee under a weighted test. Thus,
it seems that, in theory, an employer can forfeit ownership of the copyright
in work produced by a worker who meets the standard for a common law
employee under an unweighted test if he does not exceed his statutory
obligations to the employee so as to meet the standards set under the
weighted test. This seems inequitable as well.

IV. CONCLUSION

It is undoubtedly a challenge for employers to be certain of the status
of their employees, and some believe that the task is much more difficult
when the legal test for classifying a worker varies from law to law.148
However, until a statutory or common law definition of "employee"
develops which applies to all aspects of the employment relationship, it is
important to maintain the boundaries of the laws that exist. With that in
mind, a weighted approach to the work for hire doctrine may not be the
wisest approach.

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147. Similar to the benefits issues, it is possible, at least conceptually, for the worker to
be an employee for tax purposes, but not for copyright purposes. See id. at 751-52 (setting
forth thirteen factors to be considered in determining who is an employee in the work for
hire context); cf. Rev. Rul. 87-41, 1987-1 C.B. 296, 298-99 (setting forth twenty factors to
be considered in determining whether an individual is an employee in the tax law context).
A weighted test declares that an employer's right to employ a work for hire may require a
certain obligation to the employee, beyond that which would otherwise legally be the duty
of the employer.

148. See Joerg, supra note 1, at 10.