

No. 21-711

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**In the Supreme Court of the United States**

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MARKHAM CONCEPTS, INC., ET AL., PETITIONERS,

*v.*

HASBRO, INC., ET AL.

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

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**BRIEF FOR RESPONDENT REUBEN KLAMER  
IN OPPOSITION**

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## QUESTION PRESENTED

The Copyright Act of 1909 provided that “the word ‘author’ shall include an employer in the case of works made for hire.” Pub. L. No. 60-349, § 62, 35 Stat. 1075, 1088. It did not further define “employer” or “works made for hire.” That provision still governs works created before 1978.

This case addresses how to apply the provision where one party commissioned an independent contractor to create a work. Here the First Circuit held that a work for hire includes a commissioned work if the work was created at the commissioning party’s “instance and expense,” in which case the commissioning party is the “author.” That interpretation of the 1909 Act followed holdings of courts around the country, including every circuit to apply the 1909 Act over the last five decades.

Petitioners contend that all those courts erred. They say that by using the word “employer” in 1909, Congress meant to cover only works created within the scope of an employer-employee relationship.

The question presented is:

Whether the First, Second, Fifth, Seventh, and Ninth Circuits have all erroneously held, consistently over the past 50-plus years, that the term “author” in the Copyright Act of 1909 is not limited to a party whose employee created the work within the scope of his or her employment.

(I)

II

**TABLE OF CONTENTS**

Question presented ..... I

Introduction ..... 1

Statement.....5

    A. Statutory background .....5

    B. Facts and procedural history .....10

Reasons for denying the petition.....14

    I. Like every other circuit, the decision below held that the instance-and-expense test governs whether a commissioned work is a work for hire under the 1909 Act .....14

    II. That settled interpretation of the 1909 Act is correct and does not conflict with *Reid* .....16

    III. The question presented is of limited and diminishing importance.....27

    IV. Significant reliance interests militate against disturbing settled law.....30

Conclusion .....31

III

TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Aldon Accessories Ltd. v. Spiegel, Inc.</i> , 738 F.2d 548 (2d Cir. 1984).....	15
<i>Altman v. New Haven Union Co.</i> , 254 F. 113 (D. Conn. 1918).....	7
<i>Brattleboro Publ'g Co. v. Winmill Publ'g Corp.</i> , 369 F.2d 565 (2d Cir. 1966).....	8, 21
<i>Brevet Press, Inc. v. Fenn</i> , No. CIV. 06-4056-KES, 2007 WL 9773251 (D.S.D. Sept. 17, 2007) .....	15
<i>Brumley v. Albert E. Brumley &amp; Sons, Inc.</i> , 822 F.3d 926 (6th Cir. 2016) .....	29
<i>Brumley v. Albert E. Brumley &amp; Sons, Inc.</i> , No. 3:08-CV-1193, 2010 WL 1439972 (M.D. Tenn. Apr. 9, 2010) .....	14
<i>Clingman v. Beaver</i> , 544 U.S. 581 (2005) .....	25
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989) .....	<i>passim</i>

IV

*Dastar Corp. v. Random House, Inc.*,  
548 U.S. 919 (2006) ..... 3

*Dielman v. White*,  
102 F. 892 (D. Mass. 1900)..... 5, 8, 20, 21

*Estate of Hogarth v. Edgar Rice  
Burroughs, Inc.*,  
No. 00-Civ.- 9569 (DLC), 2002 WL  
398696 (S.D.N.Y. Mar. 15, 2002)..... 22

*Estate of Hogarth v. Edgar Rice  
Burroughs, Inc.*,  
342 F.3d 149 (2d Cir. 2003)..... 7, 10, 14

*Estate of Hogarth v. Edgar Rice  
Burroughs, Inc.*,  
541 U.S. 937 (2004) ..... 3

*Forward v. Thorogood*,  
985 F.2d 604 (1st Cir. 1993)..... 8, 13, 14, 29

*Grant v. Kellogg Co.*,  
58 F. Supp. 48 (S.D.N.Y. 1944) ..... 8, 21

*The Indrani*,  
101 F. 596 (4th Cir. 1900)..... 18

*Larsen v. Home Tel. Co. of Detroit*,  
129 N.W. 894 (Mich. 1911)..... 19

*Lawrence v. Dana*,  
15 F. Cas. 26 (D. Mass. 1869) ..... 5, 20

*Lin-Brook Builders Hardware v. Gertler*,  
352 F.2d 298 (9th Cir. 1965) ..... 8, 21

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