No. 21-711

In the Supreme Court of the United States

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

v.

HASBRO, INC., ET AL.

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

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.

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