## 法學英文

林利芝 /編著

攻略I

Legal English



新學林出版股份有限公司



### Legal English

本書每一篇皆從英文原文的案例出發,到最後的測驗複習,每一環節的精心設計都出自於作者自身教學經驗所得。經由這樣的導引,讀者可以逐步攻略法學英文當中的"閱讀技巧"、"搜尋技巧"、"分析技巧"以及"寫作技巧"。這些技巧可以幫助讀者眼明手快地找出法律爭議,自信滿滿地去適用解決爭議的法律或法則,並且能舉一反三地將法律或法則靈活運用在其他的具體事實情況。經過這樣長期的訓練累積,讀者便能有條理地分析與應用,進而躋身成為具有十足國際競爭力的法律人。

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#### 寫在前面

許多法律人認為,目前律師考試科目並無法學英文一門,因此對於學校所開設的英美法學習較不熱衷。雖然通過律師考試是目前成為我國律師的主要途徑,但是臺灣的法律系學生與律師必須了解,對身處於國際地球村時代的法律人而言,涉獵多國法律是相當必要的,而英美法更應是學習外國法律的重點。

學習英美法,從案例直攻,對於法律人有很多的好處:

第一,幫助法律人打破平日所自囿的思考模式,以更開闊的視野面對律師考試或其他類型的考試。像是法學英文"閱讀技巧"的訓練,可以幫助讀者迅速找出法律爭議。"搜尋技巧"可以用來確認適用在法律爭議上的法律或法則。"分析技巧"可以將正確的法律或法則適用在具體的事實情況。而"寫作技巧"則能幫助讀者有條理地分析考題。

第三,對於想要精通專利法、著作權法、商標法、營 業秘密法、及公平交易法等新興法律領域的讀者有非常大



的幫助。臺灣許多法律受到英美法,尤其是美國法的影響 甚深。眾多法律的制定與修正,亦經常借鏡美國的相關的 法律制度。研讀美國法律和案例的英文原文,很自然地會 學習到法律條文中專用的法學英文字彙,並且直接地了解 這些法律設計的目的,進而去比較我國與美國法律的差異 與制度的優劣,最後有能力去重新審視並建構適合我國國 情的法律。

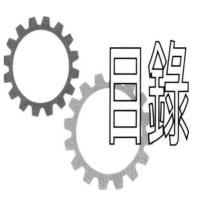
本書的目的是希望法律人在了解到學習法律英文的好處以及重要性之後,能用不同的心情面對這門學科。也希望藉由本書可以減少法律人在學習英美法時所產生的焦慮與苦惱。本書是根據作者身為美國法學院 J. D. 學生的經驗來撰寫,希望讀者在閱讀本書之後能用更寬闊的視野面對自己的法律專業。

林利芝 台北,2004.03



 Community for Creative Non-Violence Et Al. v. Reid The Work-Made-for-Hire Doctrine 「聘僱著作」法則 07

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此篇英文原文是摘錄自美國最高法院判決 Community for Creative Non-Violence Et Al. v. Reid, 490 U.S. 730 (1989)



In this case, an artist and the organization that hired him to produce a sculpture contest the ownership of the copyright in that work. To resolve this dispute, we must construe the "work made for hire" provisions of the Copyright Act of 1976 (Act or 1976 Act), §101 and 201(b), and in particular, the provision in §101, which defines as a "work made for hire" a "work prepared by an employee within the scope of his or her employment" (hereinafter §101(1)).

Petitioners are the Community for Creative Non-Violence (CCNV), a nonprofit unincorporated association dedicated to eliminating homelessness in America, and Mitch Snyder, a member and trustee of CCNV. In the fall of 1985, CCNV decided to participate in the annual Christmastime Pageant of Peace in Washington, D. C., by

sponsoring a display to dramatize the plight of the homeless. Snyder and fellow CCNV members conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform 'pedestal,' or base, within which special-effects equipment would be enclosed to emit simulated 'steam' through the grid to swirl about the figures. They also settled upon a title for the work -- 'Third World America' -- and a legend for the pedestal: 'and still there is no room at the inn.'

Snyder made inquiries to locate an artist to produce the sculpture. He was referred to respondent James Earl Reid, a Baltimore, Maryland, sculptor. In the course of two telephone calls, Reid agreed to sculpt the three human figures. CCNV agreed to make the steam grate and pedestal for the statue. Reid proposed that the work be cast in bronze, at a total cost of approximately \$100,000 and taking six to eight months to complete. Snyder rejected that proposal because CCNV did not have sufficient funds, and because the statue had to be completed by December 12 to be included in the pageant. Reid then suggested, and Snyder agreed, that the sculpture would be made of a material known as "Design Cast 62," a synthetic substance that could meet CCNV's monetary and time constraints, could be tinted to resemble bronze, and could withstand the elements. The parties agreed that the

project would cost no more than \$15,000, not including Reid's services, which he offered to donate. The parties did not sign a written agreement. Neither party mentioned copyright.

After Reid received an advance of \$3,000, he made several sketches of figures in various poses. At Snyder's request, Reid sent CCNV a sketch of a proposed sculpture showing the family in a crechelike setting. Reid testified that Snyder asked for the sketch to use in raising funds for the sculpture. Snyder testified that it was also for his approval. Reid sought a black family to serve as a model for the sculpture. Upon Snyder's suggestion, Reid visited a family living at CCNV's Washington shelter but decided that only their newly born child was a suitable model. While Reid was in Washington, Snyder took him to see homeless people living on the streets. Snyder pointed out that they tended to recline on steam grates, rather than sit or stand, in order to warm their bodies. From that time on, Reid's sketches contained only reclining figures.

Throughout November and the first two weeks of December 1985, Reid worked exclusively on the statue, assisted at various times by a dozen different people who were paid with funds provided in installments by CCNV. On a number of occasions, CCNV members visited Reid to check on his progress and to coordinate CCNV's construction of the base. CCNV rejected Reid's proposal to use suitcases or shopping bags to hold the family's personal belongings, insisting instead on a shopping cart. Reid and CCNV members did not



discuss copyright ownership on any of these visits.

On December 24, 1985, 12 days after the agreed-upon date, Reid delivered the completed statue to Washington. There it was joined to the steam grate and pedestal prepared by CCNV and placed on display near the site of the pageant. Snyder paid Reid the final installment of the \$15,000. The statue remained on display for a month. In late January 1986, CCNV members returned it to Reid's studio in Baltimore for minor repairs. Several weeks later, Snyder began making plans to take the statue on a tour of several cities to raise money for the homeless. Reid objected, contending that the Design Cast 62 material was not strong enough to withstand the ambitious itinerary. He urged CCNV to cast the statue in bronze at a cost of \$35,000, or to create a master mold at a cost of \$5,000. Snyder declined to spend more of CCNV's money on the project.

In March 1986, Snyder asked Reid to return the sculpture. Reid refused. He then filed a certificate of copyright registration for "Third World America" in his name and announced plans to take the sculpture on a more modest tour than the one CCNV had proposed. Snyder, acting in his capacity as CCNV's trustee, immediately filed a competing certificate of copyright registration.

Snyder and CCNV then commenced this action against Reid and his photographer, Ronald Purtee, seeking return of the sculpture and a determination of copyright ownership. The District Court granted a preliminary injunction, ordering the

sculpture's return. After a 2-day bench trial, the District Court declared that "Third World America" was a "work made for hire" under §101 of the Copyright Act and that Snyder, as trustee for CCNV, was the exclusive owner of the copyright in the sculpture. The court reasoned that Reid had been an "employee" of CCNV within the meaning of §101(1) because CCNV was the motivating force in the statue's production. Snyder and other CCNV members, the court explained, "conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season," and "directed enough of Reid's effort to assure that, in the end, he had produced what they, not he, wanted."

The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that Reid owned the copyright because "Third World America" was not a work for hire. Adopting what it termed the "literal interpretation" of the Act as articulated by the Fifth Circuit in Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises, the court read §101 as creating "a simple dichotomy in fact between employees and independent contractors." Because, under agency law, Reid was an independent contractor, the court concluded that the work was not "prepared by an employee" under §101(1). Nor was the sculpture a "work made for hire" under the second subsection of §101 (hereinafter §101(2)): sculpture is not one of the nine categories of works enumerated in that subsection, and the parties had not agreed in writing that the sculpture would be a work for hire. The court suggested that



the sculpture nevertheless may have been jointly authored by CCNV and Reid, and remanded for a determination whether the sculpture is indeed a joint work under the Act. We granted certiorari to resolve a conflict among the Courts of Appeals over the proper construction of the "work made for hire" provisions of the Act. We now affirm.

The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. The Act carves out an important exception, however, for "works made for hire." If the work is for hire, "the employer or other person for whom the work was prepared is considered the author" and owns the copyright, unless there is a written agreement to the contrary. Classifying a work as "made for hire" determines not only the initial ownership of its copyright, but also the copyright's duration, and the owners' renewal rights, termination rights, and right to import certain goods bearing the copyright. The contours of the work for hire doctrine therefore carry profound significance for freelance creators -- including artists, writers, photographers, designers, composers, and computer programmers -- and for the publishing, advertising, music, and other industries which commission their works.

Section 101 of the 1976 Act provides that a work is "for hire" under two sets of circumstances: "(1) a work prepared by an employee within the scope of his or her employment; or