

FEDERAL LEGISLATION UPDATE

FREELANCERS UNDER FIRE

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DISCLAIMER

- **ALTHOUGH I STILL HAVE THE “JD” AFTER MY NAME, I CLOSED MY LAW PRACTICE AND RETIRED IN 2021. THIS PRESENTATION IS FOR INFORMATIONAL & EDUCATIONAL PURPOSES ONLY AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE. THE INFORMATION INCLUDED HERE WAS, TO THE BEST OF MY KNOWLEDGE, UP TO DATE THROUGH MAY 14, 2022, BUT IS LIKELY TO CHANGE IN THE FUTURE CONSIDERING POLITICIANS ARE INVOLVED. FOR SPECIFIC QUESTIONS AND UPDATES, PLEASE CONSULT AN ATTORNEY. THE OPINIONS EXPRESSED HERE ARE MINE AND MAY NOT REPRESENT THE POLICY OF AHP—OR OF ANYONE ELSE.**

TOPICS FOR TODAY

- 1. DEFINITIONS**
- 2. THE PROBLEM—MISCLASSIFICATION BY EMPLOYERS**
- 3. THE PRO ACT (PROTECT OUR RIGHT TO ORGANIZE, PENDING IN CONGRESS)**
- 4. THE CASE ACT (COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT ACT), PASSED ON DECEMBER 27, 2020**
- 5. QUESTIONS**

MY DEFINITIONS

- **“APP-BASED” WORKER—A WORKER IN BUSINESSES LIKE UBER, LYFT, DOORDASH AND OTHER BUSINESSES WHERE SERVICE IS INITIATED THROUGH AN APP**
- **EMPLOYEE—A WORKER WHO HAS ONE EMPLOYER, TYPICALLY WITH BENEFITS**
- **FREELANCER—A WORKER WHO OPERATES AN INDEPENDENT BUSINESS WITH MANY CLIENTS, TYPICALLY WITH NO BENEFITS**
- **“GIG” ECONOMY—THE GROWING IMPORTANCE OF INDEPENDENT WORKERS IN THE AMERICAN ECONOMY**
- **“GIG” WORKER—TERM TYPICALLY USED INCORRECTLY BY POLITICIANS TO REPRESENT ALL NON-EMPLOYEE WORKERS**
- **INDEPENDENT CONTRACTOR—ANY WORKER NOT CLASSIFIED AS AN EMPLOYEE**
- **MISCLASSIFICATION—WHEN A WORKER WHO SHOULD BE AN EMPLOYEE IS CLASSIFIED BY AN EMPLOYER AS AN INDEPENDENT CONTRACTOR, OR VICE VERSA**

EMPLOYEE OR INDEPENDENT CONTRACTOR?

EMPLOYEE

- **COVERED BY FEDERAL/STATE ANTI-DISCRIMINATION LAWS**
- **HEALTH INSURANCE AND VACATION (MAYBE)**
- **UNEMPLOYMENT & WORKER'S COMP**
- **TAXES WITHHELD—IRS W-2**
- **EQUIPMENT ALLOWANCE**

INDEPENDENT CONTRACTOR

- **NONE OF THE USUAL BENEFITS ASSOCIATED WITH EMPLOYEE STATUS**
- **NO TAXES WITHHELD—IRS 1099**
- **QUARTERLY TAXES**
- **QUESTIONABLE JOB SECURITY**

EMPLOYEE OR INDEPENDENT CONTRACTOR?

EMPLOYEE

- **LITTLE TO NO FREEDOM ABOUT WORK ASSIGNMENTS**
- **EMPLOYER IS THE “AUTHOR” OF MOST WORKS BY AN EMPLOYEE FOR COPYRIGHT PURPOSES**
- **RED TAPE FOR EMPLOYER**

INDEPENDENT CONTRACTOR

- **FREEDOM TO WORK WHEN AND WHERE YOU WANT, AND WITH DIFFERENT PUBLICATIONS**
- **FREELANCER RETAINS INITIAL OWNERSHIP OF COPYRIGHT**
- **NO RED TAPE BEYOND 1099**

MISCLASSIFICATION OF WORKERS

- **HARD NUMBERS ARE DIFFICULT TO COME BY, BUT ONE ESTIMATE IS THAT 10%-15% OF EMPLOYERS MISCLASSIFY AT LEAST ONE WORKER AS AN INDEPENDENT CONTRACTOR WHEN THAT WORKER ACTUALLY MEETS THE CRITERIA TO BE CONSIDERED AN EMPLOYEE**
- **EVEN THOUGH DONE IN GOOD FAITH OR BY MISTAKE, MISCLASSIFICATION OF A WORKER IS A CRIME THAT CAN LEAD TO FINANCIAL PENALTIES FOR THE EMPLOYER AND, FOR SERIOUS INFRACTIONS, JAIL TIME.**
- **SO HOW SHOULD EMPLOYERS CLASSIFY THEIR WORKERS?**

WORKER CLASSIFICATION

COMMON LAW TEST

- **CREATES A PRESUMPTION THAT THE WORKER IS AN INDEPENDENT CONTRACTOR**
- **USED BY THE IRS AND A MINORITY OF STATES**

PRO ACT'S "ABC" TEST

- **CREATES A PRESUMPTION THAT THE WORKER IS AN EMPLOYEE**
- **ON THE BOOKS IN A MAJORITY OF STATES (BUT SELDOM ENFORCED—UNTIL AB5 WAS PASSED IN CALIFORNIA IN 2019)**
- **USED BY THE US DEPT. OF LABOR**

WORKER CLASSIFICATION

COMMON LAW TEST

- **BEHAVIORAL CONTROL**
- **FINANCIAL CONTROL**
- **RELATIONSHIP AND EXPECTATIONS OF THE PARTIES**
- **WORKER IS IC IF THE EMPLOYER CONTROLS ANY OF THESE FACTORS**

PRO ACT'S "ABC" TEST

- **ABSENCE OF CONTROL**
- **WORK MUST BE "UNUSUAL" AND TYPICALLY DONE OFF-SITE**
- **SEPARATE BUSINESS ENTITY ENGAGED FOR PROFIT ON THE OPEN MARKET**

COMMON LAW STATES

ALABAMA

ARIZONA

DISTRICT OF COLUMBIA

FLORIDA

IOWA

KENTUCKY

MICHIGAN

MINNESOTA

MISSISSIPPI

MISSOURI

NEW YORK

NORTH CAROLINA

NORTH DAKOTA

SOUTH CAROLINA

SOUTH DAKOTA

TEXAS

“ABC” (OR SOME VARIATION) STATES

ALASKA

ARKANSAS

CALIFORNIA

COLORADO (A&C)

CONNECTICUT

DELAWARE

GEORIGIA

HAWAII

IDAHO (A&C)

ILLINOIS

INDIANA

KANSAS

LOUISIANA

MAINE

MARYLAND

MASSACHUSETTS

MONTANA (A&C)

NEBRASKAS

NEVADA

NEW HAMPSHIRE

NEW JERSEY

NEW MEXICO

OHIO

OKLAHOMA (A&B/A&C)

OREGON

PENNSYLVANIA (A&C)

PUERTO RICE

RHODE ISLAND

TENNESSEE

UTAH

VERMONT

VIRGINIA (A&B/A&C)

WASHINGTON

WEST VIRGINIA

WISCONSIN (A&C)

WYOMING (A&C)

“ABC, IT’S EASY AS 123” IN CALIFORNIA

- **S.G. BORELLO & SONS V. DEPT. OF INDUSTRIAL RELATIONS (COMMON LAW, 1989)**
- **DYNAMEX OPERATIONS WEST V. SUPERIOR COURT OF L.A. (ABC, BUT LIMITED, 2018)**
- **ASSEMBLY BILL 5 (“AB5”) (APPLIED THE DYNAMEX ABC TEST TO ENTIRE LABOR CODE INCLUDING FREELANCE WRITERS & PHOTOGRAPHERS, 2019)**
- **ASJA & NPPA FILE FEDERAL LAWSUIT CLAIMING FREE SPEECH & FREEDOM OF THE PRESS 1ST AMENDMENT VIOLATIONS IN AB5 (2019)**
- **TRIAL COURT DECIDED AGAINST ASJA/NPPA (2019)**
- **APPEAL TO NINTH CIRCUIT (2019), APPEAL DENIED (2021)**
- **MOTION FOR SUPREME COURT REVIEW FILED (2022, PENDING)**

“PRO ACT” PROBLEMS

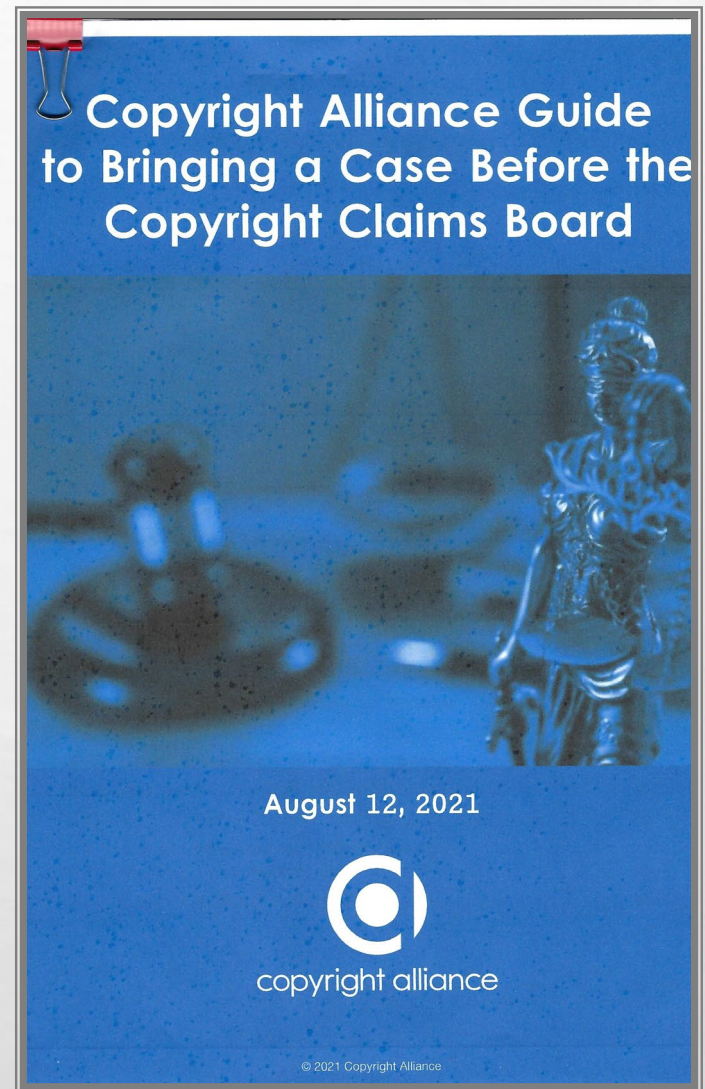
- **ALTHOUGH A MAJORITY OF THE STATES HAVE SOME VERSION OF THE “ABC” TEST ON THEIR BOOKS, THE REGULATION IS SELDOM ENFORCED (EXCEPT FOR CALIFORNIA & AB5)**
- **IF PASSED, PRO ACT WOULD ESTABLISH A FEDERAL “ABC” TEST**
- **PROponents ARGUE THAT THE PROPOSED PRO ACT TEST WOULD HAVE LIMITED APPLICATION., BUT PRESIDENT BIDEN AND OTHERS IN HIS ADMINISTRATION STRONGLY SUPPORT THE PRO ACT AS AN EXPANSIVE CHANGE TO NATIONAL LABOR LAW AND INCREASE UNION MEMBERSHIP**

THE “CASE ACT”

SIGNED ON DECEMBER 27, 2020

DUE TO TAKE EFFECT JULY 1, 2022

[HTTPS://COPYRIGHTALLIANCE.ORG/WP-CONTENT/UPLOADS/2021/08/CA_GUIDE_CASE_ACT_8-12-2021.PDF](https://copyrightalliance.org/wp-content/uploads/2021/08/CA_GUIDE_CASE_ACT_8-12-2021.PDF)



WHY DO WE NEED THE “CASE ACT”?

- **US FEDERAL COURTS (“ARTICLE III” COURTS) HAVE ALWAYS HAD EXCLUSIVE JURISDICTION OVER COPYRIGHT INFRINGEMENT CLAIMS**
- **LITIGATING IN FEDERAL COURT IS EXPENSIVE: IN A 2019 SURVEY, THE AVERAGE COST OF AN INFRINGEMENT CASE FROM START THROUGH APPEALS WAS \$397,000!**
- **THE EFFECT WAS THAT ONLY LARGE CORPORATIONS COULD ENFORCE THEIR COPYRIGHTS**
- **THE CASE ACT ESTABLISHES A “SMALL CLAIMS” TRIBUNAL FOR THE REST OF US IN THE US COPYRIGHT OFFICE**
- **NO TRAVEL OR ATTORNEYS REQUIRED**

THE DEVIL IS IN THE DETAILS

- **THE TRIBUNAL IS CALLED THE COPYRIGHT CLAIMS BOARD, “CCB”**
- **THE CCB IS SCHEDULED TO START HEARING CASES IN LATE JUNE 2022**
- **“TIMELY” REGISTRATION OF THE COPYRIGHT IS REQUIRED (EITHER BEFORE THE INFRINGEMENT STARTS OR WITHIN THREE MONTHS AFTER THE FIRST PUBLICATION IF THE INFRINGEMENT BEGAN AFTER THE WORK WAS FIRST PUBLISHED)**
- **THE CASE ACT REQUIRES THAT (1) THE COPYRIGHT OWNER HAS SUBMITTED A COMPLETED REGISTRATION APPLICATION, AND (2) THE COPYRIGHT OFFICE HAS EITHER ISSUED A REGISTRATION CERTIFICATE OR THE APPLICATION IS PENDING**

MORE DETAILS

- **THE CCB PROCESS IS VOLUNTARY, WHICH MEANS THAT A RESPONDENT WHO IS SUED CAN “OPT OUT” WITHIN 60 DAYS, TERMINATING THE CCB PROCEEDING**
- **THE COPYRIGHT OWNER THEN HAS THE OPTION OF PROCEEDING IN FEDERAL COURT**
- **POTENTIAL DAMAGES UNDER THE CASE ACT ARE SMALL**
 - **“ACTUAL” DAMAGES = THE OWNER’S FINANCIAL LOSS RESULTING FROM THE INFRINGEMENT, WITH A MAXIMUM OF \$15,000**
 - **“STATUTORY” DAMAGES = MAXIMUM OF \$15,000 PER WORK INFRINGED, WITH A TOTAL AMOUNT OF DAMAGES IN EACH CASE SET AT \$30,000**

STILL MORE DETAILS

- **FILING FEES ARE SET, SORT OF, WITH THE TOTAL FILING FEE SET BETWEEN \$100 AND \$402 (THE FILING FEE IN FEDERAL COURT)**
- **THE COPYRIGHT ALLIANCE IS AN EXCELLENT REFERENCE FOR INFORMATION ABOUT THE CASE ACT. THE HOME PAGE IS:**
[HTTPS://COPYRIGHTALLIANCE.ORG/](https://copyrightalliance.org/)

QUESTIONS?

**(ANNOYING QUESTIONERS MAY
BE EATEN)**



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