

Minnesota Intellectual Property Review

Volume 4 | Issue 2

Article 1

2003

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Recommended Citation

Elizabeth Townsend, *Legal and Policy Responses to the Disappearing "Teacher Exception," or Copyright Ownership in the 21st Century University**, 4 MINN. INTELL. PROP. REV. 209 (2003).

Available at: <https://scholarship.law.umn.edu/mjlst/vol4/iss2/1>

The Minnesota Journal of Law, Science & Technology is published by the University of Minnesota Libraries Publishing.



Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University*

Elizabeth Townsend**

INTRODUCTION

In recent years a number of law review articles and a recent Harvard University Press publication have all sought to tackle the question of academic ownership, with many of the works titled something like, “Who owns academic work,” and “Who owns course materials.”¹ These articles reflect the

* This article is published online at <http://mipr.umn.edu>.

** Ph.D., European History, University of California, Los Angeles, 1998; J.D., The University of Arizona, James E. Rogers College of Law, 2002; LL.M., The University of Arizona, James E. Rogers College of Law, expected 2003. A great number of people have helped me with this article, in their willingness to answer questions and point me in different directions. Thank you to Dean Toni Massaro, Alfred Yen, Kay Kavanagh, Sara Heitshu, Georgia Harper, David Perry, Nick Goodman, Andrew Silverman, Graeme Austin, Erica Rocush, SPARC, Jerrold E. Hogle, Sarita and Robert Townsend, Ron Gard, Dalia Tsuk, David Gantz, and Laurence Serra, who began this whole long journey with his innocent question of whether as an adjunct he owned the materials he created for a law course.

1. One work in the last year that received a good deal of attention was CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK: BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY (2001). McSherry’s argument seems to discourage academics from using the law and court systems to protect their work, demonizing those who do and accusing them of changing the tone of the university into a space fearing litigation. She also suggests that academics should not ask for anything more than what they are given, for fear of losing a gift economy, safe from a commercialized space. McSherry’s subtitle, “*Battling for Control of Intellectual Property*,” should have been “*Surrendering Control*.” See *id.* (emphasis added). This essay was written in great part before McSherry’s book was released, but in many ways can be seen as a response to her positions. For other examples, see Georgia Holmes and Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 BYU EDUC. & L.J. 165, and Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine’s Applicability to*

uncertainty in just who does own academic work: the university/school-employer or the scholar/teacher-creator. This article seeks to add to this discussion in three specific ways: first, by tracing the evolution of the disappearance of the “teacher exception,” and arguing against the notion that the 1976 Copyright Act signaled its demise; second, by looking at samples of what universities are currently constructing in their intellectual property policies regarding copyright ownership; and finally, by giving concrete suggestions to scholars who are concerned about keeping creative control of their works.

The world of copyright ownership in the university is in flux. This is a recent development. Before 1987, most believed that scholars owned their creative works, even though they were made for the classroom or during working hours. By owning one’s creations under the “teacher exception,” a teacher had freedom to use the works at other universities, make alternations and new creations from the initial works, and occasionally reap profit from publishing textbooks or, in rare cases, monographs. Today, the growing trend is to see the “teacher exception” as created not by judge-made law, but by individual university policies. Universities decide what they want to own and what they give *back* to the scholar/teacher-creator. The motives behind the policies are often the potential commercial profits of distance learning and other Internet-related opportunities.

Commercialization permeates the university, from the technology transfer offices that assist with licensing and patents in the sciences, to the enormous energy put into the commercial potential of sports, through broadcast rights, corporate sponsorship, and trademarked university merchandise. In recent years, the profit potential of distance learning and other multimedia projects have sparked the imagination of administrators and for-profit companies to mine the copyrighted works produced in classrooms across the university campus. But it is too easy simply to complain or rejoice that the university has become more corporate- or market- driven. We must first explore the context of this increased commercialization in the university. For copyrighted works, this means looking into changes in ownership and the disappearance of the “teacher exception” in the 1990s. This article focuses on academic copyrighted work – creations from

teaching, research, and writing – and how spaces of ownership are changing in universities entering the twenty-first century.

Questions of copyright ownership, prior to the Internet, were generally limited to discussions centering around the unauthorized publication of lecture notes by third parties not associated with the university.² From this, courts historically have given teachers ownership in lecture notes and other copyrighted works in what has become known as the “teacher exception.” Ownership gave teachers the autonomy needed for academic freedom, the ability to produce materials without interference regarding content, and the control to determine when a work should be published—both in the subjective sense as to when an author believes a work to be ready and the objective sense as to the timing of all the stages that lead up to constitute publication. Additionally, by owning the materials, academics were also able to take established lectures and deliver them to a new crowd of students when the academic moved to a different university, either permanently or temporarily. This notion of “teacher exception” has been called into question in the last twenty years, in part because of the new copyright law of 1976, and in part because of new technologies that increased potential economic interest in course content, scholarly writings, distance learning, commercial note-taking ventures, and multimedia and software projects.

Part I introduces the reader to the changing nature of the university as a commercialized environment, looking in particular at the development of profits for the university from patents and licensing in the university. Parts II, III, and IV form the core of the paper, which looks at how this new corporate culture is transforming copyrighted works throughout the university. Part II explains the basics of copyright and ownership of copyrighted materials in order to better understand the nature of the current struggles at hand. Part III traces the debates over and changes in the 1976 Copyright Law and relevant case law, and gives an explanation for the noticeable omission of the “teacher exception” in the 1976 Copyright Act. Part IV reviews some of the responses in the form of university policies around the country. Part V ends with suggestions of ways in which students, scholars, teachers, and other academics might approach their intellectual property

2. See *infra* Part IV.

creations in this new environment.

I. THE SPACES OF COMMERCIALIZATION IN THE UNIVERSITY

Commercialization in the universities has, until recently, focused on the impact of the 1980 congressional legislation that gave universities the ability to patent and license scientific inventions and discoveries to outside corporate entities.³ Eyal Press and Jennifer Washburn's article, "The Kept University," provides a nice window into the current concerns.⁴ The article begins with the illustration of a scientist, who peers into a microscope.⁵ We see a cartoon-like representation of what the scientist is viewing *overlayed* with a large dollar sign.⁶ Washburn and Press describe the increasing prevalence of corporate money throughout the university's science communities as well as its effect on the humanities.⁷ Through anecdotal stories, Press and Washburn present some of the most troubling developments in this area.⁸

One example concerns Novartis, the Swiss pharmaceutical company "and producer of genetically engineered crops," agreeing to fund \$25 million of basic research at Berkeley's Department of Plant and Microbial Biology.⁹ In return, Novartis had first right to negotiate on one-third of the department's discoveries, even if the research was government-funded.¹⁰ Moreover, Novartis was given *two of the five seats* on the department's research committee.¹¹ The latter agreement, according to Press and Washburn, was unprecedented,¹² sparking concerns over academic freedom and free exchange of ideas. One scientist explained, "[t]his deal institutionalizes the

3. See David Bollier, *The Enclosure of the Academic Commons*, ACADEME, Sept.-Oct. 2002, at 18.

4. Eyal Press and Jennifer Washburn, *The Kept University*, ATLANTIC MONTHLY, Mar. 2000, at 39, *available at* <http://www.theatlantic.com/issues/2000/03/press.htm> [hereinafter Press and Washburn]. Thank you to Kay Kavanagh, who put a copy of this in my mailbox.

5. *Id.* at 39. The illustration is by Seymour Chwast.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 40.

11. *Id.*

12. *Id.*

university's relationship with one company, whose interest is profit."¹³ Press and Washburn also note the increasingly common situation where university scientists have stock options and other incentives that might affect the impartiality of their research results.¹⁴ Furthermore, companies are requiring scientists to keep research secret for longer than they normally would, thereby stifling the community of sharing traditionally created within the sciences in the universities.¹⁵ Press and Washburn also cite studies finding that industry-sponsored research produced more industry-beneficial conclusions than research not funded by industry.¹⁶

Most of the attention has been paid to profitable patents in the university, as the Press and Washburn article demonstrates. However, fears abound as to where the commercialization of the university will lead. Some, like intellectual property professor James Boyle, fear that this intense privatization of scientific research at the university level will lead to "creators [being] prevented from creating," as the availability of material in the public domain drastically diminishes.¹⁷ Others fear that the humanities will receive even less funding and that departments will be cut because, in the view of a market-economy, less profitable departments will be less viable as they provide little economic capital.¹⁸ For this paper, however, the focus is not on these apocalyptic concerns, but rather on the consequences or implications of this move towards greater commercialization and its impact on our understanding of the role of copyrighted materials within the university.

The story of the transformation of the university into a more commercialized environment often centers on the impact of the Bayh-Dole Act of 1980, which first gave universities the

13. *Id.*

14. *Id.* at 41.

15. *Id.* at 41-42.

16. *Id.* at 42.

Mildred Cho, a senior research scholar at Stanford's Center for Biomedical Ethics. . . found [in his 1996 study published in the *Annals of Internal Medicine*, March 1, 1996, at 485-489] that 98 percent of papers based on industry-sponsored research reflected favorably on the drugs examined, as compared with 79 percent of papers based on research not funded by industry.

Id.

17. *Id.* at 48. There have been a great number of movements in this area, for example by law professors James Boyle and Laurence Lessig.

18. *Id.* at 51.

ability to own patents on projects funded by government research money.¹⁹ However, in the United States, an event over a hundred years earlier changed the trajectory of the elitist European-based model of the university to one more focused on commerce and industry. The Morrill Act of 1862 created land-grant universities whose missions became not only teaching and research, but also public service.²⁰ In part, public service was seen as developing research that could help strengthen the United States as an agricultural and industrial power: "The classical view of knowledge for knowledge's sake was supplanted by the public-service mission of 'knowledge for use.'"²¹ Currently, there are 105 land-grant institutions in the United States, with 29 tribal colleges.²² In the intervening years since the Morrill Act's initial passage in 1862, additional programs have been added to support higher learning.²³ However, the impact of the connection between the university and industry/agriculture went far beyond the land-grant institutions and helped to frame the concept of the role of the modern university in the United States.²⁴

19. The Patent and Trademark Law Amendments Act, Pub. L. No. 96-517 (1980). See also Council on Governmental Relations, *THE BAYH-DOLE ACT*, at <http://www.ucop.edu/ott/bayh.html> (last visited September 15, 2002).

20. Steven Andersen, *IP 101 Research Partners Face Culture Clash*, CORPORATE LEGAL TIMES, Oct. 1999, at 2. For the text of the Morrill Act see National Association of State Universities and Land-Grant Colleges, *First Morrill Act*, at http://www.nasulgc.org/publications/Land_Grant/LandMorrill.htm (last visited September 15, 2002).

21. Anderson, *supra* note 20, at 1. For a brief history on land-grant colleges and universities, see National Association of State Universities and Land-Grant Colleges, *The Land-Grant Tradition*, at http://www.nasulgc.org/publications/Land_Grant/Land_Grant_Main.htm (last visited September 15, 2002). A bibliography on the Land-Grant tradition is provided at http://www.nasulgc.org/publications/Land_Grant/Further_Reading.htm.

22. National Association of State Universities and Land-Grant Colleges, *The 105 Land-Grant Colleges and Universities*, at http://www.nasulgc.org/publications/Land_Grant/Schools.htm, (last visited September 15, 2002).

23. See, e.g., National Association of State Universities and Land-Grant Colleges, *A Chronology of Federal Legislation Affecting Public Higher Education* at http://www.nasulgc.org/publications/Land_Grant/Chronology.htm (last visited, September 15, 2002) (listing various pieces of federal legislation concerning higher education between 1787 and 1994).

24. The problems confronting the modern university are not limited to land-grant or even U.S. institutions. See Richard Poydner, *Ownership Tussle in Ivory Towers*, FINANCIAL TIMES (London), September 9, 2002, Inside Track

In order to further encourage universities to forge ties to industry and business, Congress passed the Bayh-Dole Act in 1980, which allowed universities to obtain patents created with federally-funded research.²⁵ In prepared testimony before the House Committee on Science, Fawwaz T. Ulaby, Vice President of Research at the University of Michigan, proudly reported that the economic boom of the 1990s was in great part due to this new development, as universities and corporations collaborated to create new commerce and economic prosperity.²⁶ The Bayh-Dole Act transformed the sciences in the universities and has created new pockets of wealth for universities, with technology transfer offices²⁷ in universities becoming centers of significant activity.²⁸ For instance, the University of California

Law & Business, at 16 ("A dispute over intellectual property rights (IPR) at the University of Cambridge has raised questions about academics' legal status and the increasing trend for universities to view themselves as businesses."). See also, Ross Anderson, *Not Broken, Don't Fix it*, TIMES HIGHER EDUCATION SUPPLEMENT, August 9, 2002 ("From 2003, patents, copyrights and trade secrets will be controlled by [Cambridge] university bureaucrats rather than us. Behind the change lurks the Department of Trade and Industry.").

25. Council on Governmental Relations, *supra* note 19. See also GAO finds poor record keeping on federally aided inventions, FEDERAL TECHNOLOGY REPORT, August 26, 1999, at 4. Two laws in addition to the Bayh-Dole Act created this environment: the Stevenson-Wydler Innovation Act of 1980 and one of its amendments, the Federal Technology Transfer Act of 1986 (FTTA), both of which focus on government laboratories. See *Prepared statement of Maria C. Friere, Ph.D., Director, National Institute of Health Office of Technology Transfer, before the Senate Appropriations Committee Subcommittee on Labor, Health and Human Services, Education and Related Agencies*, FEDERAL NEWS SERVICE, Jan. 12, 1999. Friere's testimony gives a concrete example of how technology transfer works between universities, corporate America, and the United States government, which often partially funds the research at the universities.

26. Friere, *supra* note 25. For a corporate view of the impact of the Bayh-Dole Act, see *Prepared Statement by Randolph J. Guschl, Director-Corporate Technology Transfer, Dupont Before the House Science Subcommittee, Committee on Technology*, FEDERAL NEWS SERVICE, Mar 17, 1998.

27. Association of University Technical Managers, *Defining Tech Transfer*, TEXAS BUSINESS REVIEW, June, 1998, at 4.

Technology transfer describes a formal transferring of new discoveries and innovations resulting from scientific research conducted at universities to the commercial sector . . . through patenting and licensing new innovations. The major steps in this process include: 1) disclosing innovations; 2) patenting the innovation concurrent with publication of scientific research; and 3) licensing the rights to innovations to industry for commercial development.

Id.

28. For the united university support of the Bayh-Dole Act, see *University Leaders Testify at Bayh-Dole Hearings*, 5 (7) TECHNOLOGY ACCESS REPORT,

(UC) took its existing central office for all of the universities of Patent, Trademark, and Copyright, and transformed it after the Bayh-Dole Act into the Office of Technology Transfer.²⁹ Individual campuses were then given the choice to create their own technology transfer and licensing offices, with some “provid[ing] management for commercializable software.”³⁰ Only in 1998 did a University of California Taskforce contemplate the need once again for a Copyright Office, with more sophisticated issues of ownership surrounding distance learning and other market-driven projects.³¹ The significance here is that it shows a shift from general management of intellectual property, to a more intense focus on profit-making entities, with copyright being seen as negligible to the point that an office is not even necessary for the whole University of California system. That the UC Taskforce was thinking in 1998 of creating a new copyright office is also telling of the latest shift in commercial expectations; copyrightable materials may be seen as more profitable in the future.

The numbers from technology transfer are impressive. The Association of University Technology Managers estimates that schools in the United States and Canada made \$592 million from royalties and licenses in one year.³² No longer are inventions and discoveries moving into the public domain through open publication; universities and corporations are capitalizing upon them before they can reach the public domain.³³ As the Press and Washburn article points out as well, this has raised questions as to the whole nature of science, tenure, publications, research sharing, and other issues that surround the now valuable work in the sciences.³⁴

May 1994.

29. University of California, “Institutional,” UNIVERSITYWIDE TASKFORCE ON COPYRIGHT: REPORT AND RECOMMENDATIONS (Oct. 1999), at 4 [hereinafter UC Taskforce on Copyright].

30. *Id.*

31. *Id.*

32. Brenda Warner Rotzoll, *Inventive Colleges Raking*, CHICAGO SUN-TIMES, Mar. 6, 1998.

33. Richard R. Nelson *explains the universities' license to patent*, 5(2) MICRO: THE MICRO-ECONOMIC POLICY ANALYSIS BRANCH BULLETIN 12, Summer 1998.

34. Press and Washburn, *supra* note 4. See also Bronislaus B. Kush, *Funding can blur line between research and business; Many institutions and journals are worried about conflicts*, TELEGRAM AND GAZETTE (Worcester, MA) Apr. 6, 1998, at A6, Health Care Delivery (noting results of zinc lozenges as helping to cure the common cold indicate that the researcher held stock in the

In the midst of this great science-based boom, trademark licensing of both sports and the university itself also took off, and the race to commercialize universities is not limited to those two arenas. In the 1990s, both universities and businesses saw new commercial potential for distance learning, *collaborating* in their efforts. However, they soon found themselves at odds over unauthorized commercial note-taking, with universities using the law to protect themselves and their monopoly on note-taking through state legislation, desist letters, and litigation.³⁵

Already in 1998, David Noble wrote: "During the last two decades campus commercialization centered upon the research function of the universities, but it has now shifted to the core instructional function, the heart and soul of academia."³⁶ This is driven, in great part, by the potential profits universities envision from online courses, but universities are also protecting themselves against the loss of profits from unauthorized commercial note-taking businesses. According to Noble, this push is driven by technology industries and corporations "looking for subsidized product development and a potentially lucrative market for [instructional hardware and software]," creating "a fundamental transformation of the nature of academic work and the relationship between higher educational institutions and their faculty employees."³⁷ For-profit companies, who demand faculty to assign copyright as

company that made the zinc lozenges: "After the stock soared, the researcher sold his shares and made \$ 145,000.").

35. A number of recent law review articles have specifically addressed issues of distance learning including: Nicolas P. Terry, *Bricks Plus Bytes: How "Click-and-Brick" Will Define Legal Education Space*, 46 VILL. L. REV. 95 (2001); Chanani Sandler, *Comment: Copyright Ownership: A Fundamental of Academic Freedom*, 12 ALB. L.J. SCI. & TECH. 231 (2001); Stephanie L. Seeley, *Note: Are Classroom Lectures Protected by Copyright Laws? The Case for Professors' Intellectual Property Rights*, 51 SYRACUSE L. REV. 163 (2001); James Ottavio Castagnera, Cory R. Fine and Anthony Belfiore, *Protecting Intellectual Capital in the New Century: Are Universities Prepared?*, 2002 DUKE L. & TECH. REV. 10 (June 2002); Michele J. Le Moal-Gray, *Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education*, 16 TOURO L. REV. 981 (Spring 2000); and Jon Garon, *The Electronic Jungle: The Application of Intellectual Property Law to Distance Education*, 4 VAND. J. ENT. L. & PRAC. 146 (Spring 2002).

36. David F. Noble, *The Coming Battle over Online Instruction: Confidential Agreements Between Universities and Private Companies Pose Serious Challenge to Faculty Intellectual Property Rights*, DIGITAL DIPLOMA MILLS, Part II, Mar. 1998, at <http://www.communication.ucsd.edu/dl/ddm2.html> (last visited Sept. 1, 2002).

37. *Id.*

part of employment, are using a business model rather than university tradition to run many online distance learning projects.³⁸

After interviewing InterEd online education consultant, Bob Tucker, reporter Joshua Green declared, “[t]his idea of wresting academic control from the faculty is at the heart of many business models.”³⁹ Green reported how “Tucker convinced Arizona State University to build its online program outside the reach of the faculty so it can be run like a business and avoid ‘the enormous bureaucratic red tape’ that faculty participation necessarily entails.”⁴⁰ A myriad of universities now have online courses, including UCLA, New School of Social Research, Arizona State University, and Columbia University, to name just a few.⁴¹

Universities are also trying to keep their star faculty from appearing in competing online projects. Harvard law professor Arthur Miller was told that he violated his employment contract when he agreed to tape eleven lectures for the new online Concord University of Law.⁴² It is a story that has made the rounds, for Miller argued that his actions were comparable to publishing a textbook, rather than teaching students.⁴³ He

38. Nobles’ two articles detail specific examples of university and for-profit connections in the online field, often at the faculty’s expense.

39. Joshua Green, *Superstars Online*, THE AMERICAN PROSPECT, Oct. 23, 2000, available at <http://www.prospect.org/print/v11/22/green-j-3.html>.

40. *Id.*

41. See Fathom, *Course Providers*, at http://www.fathom.com/about/course_providers.jhtml (including courses from Arizona State University, Columbia University, the BBC, Kaplan College, New School Online University, Sports Business University, UCLA Extension, University of British Columbia, University of San Diego, University of Washington, Concord Law School, Syracuse University, University at Buffalo, University of California Extension, Berkeley, University of Michigan-Flint, American Film Institute, the British Library, The British Museum, Cambridge University Press, London School of Economics, the Natural History Museum, New York Public Library, RAND, the Science Museum, University of Chicago, University of Michigan, Victoria & Albert Museum, and Woods Hole Oceanographic Institution) (last visited Sept. 15, 2002). See also, The University Alliance at <http://www.universityalliance.com/>, which includes Jacksonville University, Regis University, Saint Leo University, University of South Florida, Villanova University, and eArmyU (the U.S. Army) (last visited Sept. 15, 2002).

42. See Chanani Sandler, Comment, *Copyright Ownership: A Fundamental of “Academic Freedom,”* 12 ALB. L.J. SCI & TECH. 231, 232 (2001).

43. Erica B. Levy, *Harvard Tightens Faculty Policy*, HARVARD CRIMSON, April 25, 2000, available at Lexis, University News library, University Wire

explained that he also had participated in other visual endeavors, including selling his own videotapes, hosting a public television show, and appearing on *Good Morning America*. Harvard did not agree, and changed its policies to prohibit such online behavior without prior written approval.⁴⁴

According to Jon Garon, Professor of Law at Franklin Pierce Law Center, some online companies have yet to make a profit, even though places like Merrill Lynch “projects the U.S. online market in higher education will surge to \$7 billion, from \$1.2 billion, by 2003.”⁴⁵ He believes that so far the producers have been unable to successfully market to the general public, and that “the lack of success at Fathom [a consolidator of online courses from a myriad of universities, institutions and museums] has been attributed to its expensive, long courses.”⁴⁶ He also predicts that online courses may find their market in community college and corporate training courses.⁴⁷ He explains, “Abstract course content provided by the British Museum may be interesting, but Fathom has found no market for such content. In contrast, the University of Phoenix has an estimated 27,000 online enrollees for its highly focused, practical classes.”⁴⁸ Even so, Garon and others cite remarkable numbers for universities that are getting into the distance learning business. Garon believes 75% is a conservative estimate of the proportion of two-year and four-year colleges engaged in online courses.⁴⁹ Another oft-quoted statistic is that “in 2002, it is estimated that 2.2 million college students—15% of all higher education students—will take distance learning

file.

44. *Id.*

45. See Garon, *supra* note 35, at 147 (citing Sarah Parkin, *Adults Tap Into Web for College Big Time*, ARIZ. REPUBLIC, Dec. 13, 2000, at 8).

46. *Id.* at 148. See *supra* note 41, for a list of Fathom participants.

47. *Id.*

48. *Id.* (citing Donald MacLeod, *Higher Education: e for East End: Donald MacLeod Finds a Global Consortium Offering London History as One of its Short Courses Online*, GUARDIAN (London), Feb. 19, 2002, at 15, and Jennifer Medina, *Despite School Closing, Online Colleges Beckon: Cyberspace Market Expected to Grow*, BOSTON GLOBE, August 5, 2001, at B9).

49. *Id.* at 147. See also Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL'Y 275 (citing U.S. Copyright Office, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 10, 19 (1999) (citing International Data Corp., *Distance Learning Takes Off, Fueled by Growth in Internet Access*, (Press Release, Feb. 2, 1999)), <http://www.idc.com/Data/Consumer/content/CSB020999PR.htm>) (This link is no longer active.).

courses.”⁵⁰

On the other side is university and faculty concern over the unauthorized commercialization of faculty lecture notes, a problem California considered serious enough to pass legislation prohibiting unauthorized sale to commercial note-taking companies like Versity.com, Study24-7.com, Studyaid.com, and StudentU.com.⁵¹ None of these sites were still operating as of October 2002, perhaps because of the lack of profitability or efforts like Yale’s cease and desist letters.⁵²

All three arenas of intellectual property—from *patents* in the sciences, profits from *trademarks* on university merchandise and sports, and from *copyrights*, the potential markets for distance learning and other copyrighted works from the classroom—are deeply impacting how the university looks at intellectual property. The story is also more complex, particularly with copyrighted works, on which the rest of this article focuses. First, the laws governing copyright are giving universities a new opportunity to claim ownership on previously designated teacher-owned materials. Second, universities began drafting policies that took advantage of this change, putting universities at greater advantage if there were potential profits. The heart of this essay explores the evolution of these changes, looking specifically at case law, legislative history, and finally, current university intellectual property policies. Before embarking on this journey, however, some readers may need to understand a few copyright basics within the university setting.

50. Packard, *supra* note 49.

51. *Lecture Notes Will Protect Students from Illegitimate Services*, DAILY CALIFORNIAN, September 28, 2000, available from Lexis, University News library, University Wire file; Sharon Jayson, *Online Notes Debate; College Lecturers Split over Propriety of Free*, AUSTIN AMERICAN-STATESMAN, March 26, 2000 at B1 (“StudentU.com has 1,300 notetakers on more than 80 campuses. Study24-7.com claims a presence at more than 300 colleges and universities through the United States, Canada and the United Kingdom.”)

52. Stephane L. Seeley, Note, *Are Classroom Lectures Protected by Copyright Laws? The Case for Professors’ Intellectual Property Rights*, 51 SYRACUSE L.REV. 163, 165 (citing Ambika Kumar, *Duke U: Universities Fight Online Notes Phenomenon*, THE CHRONICLE (Duke University), Sept. 7, 2000, available at 2000 WL 24492307).

II. BASICS OF COPYRIGHT IN THE UNIVERSITY SETTING

A. CREATING COPYRIGHTED WORKS

Copyright surrounds the activities of teachers and scholars on an everyday basis. For example, a teacher creates a test for a class. Is the test copyrightable, what makes it copyrightable, and how does it become copyrightable? The answer depends on a number of legal factors found in the 1976 US Copyright Act, a federal statute passed by Congress and interpreted by case law. Copyright gives the copyright holder exclusive rights to reproduce, prepare derivative works, distribute, perform, display publicly, transfer ownership, license, or lend the original work of authorship.⁵³ For instance, only the copyright holder of John Barthe's novel *The Sot-Weed Factor* can authorize someone to make new editions or translations, make t-shirts with long quotes from *The Sot-Weed Factor*, or create and perform a musical version based on the novel *The Sot-Weed Factor*.⁵⁴ The Copyright Act protects the exclusive economic interests of the copyright holder.⁵⁵ Copyrightable works for teachers and scholars include lecture notes created for a course, websites created for courses, exam questions, syllabi, drafts and final versions of articles, dissertations, theses, and monographs—all of the materials that scholars create and with which teachers teach.

To be copyrightable, a work must have some modicum of original creativity and be in a fixed, tangible form.⁵⁶ The creativity threshold is low, but important.⁵⁷ For example, a

53. Copyright Act of 1976, 17 U.S.C. § 106, Public Law 94-553, 90 Stat. 2541, as amended through July 1, 1999.

54. See JOHN BARTHE, *THE SOT-WEED FACTOR* (1967).

55. 17 U.S.C., § 106.

56. 17 U.S.C. § 102 (a).

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

Id.

57. 17 U.S.C. § 102 (a). The originality requirement is easy to meet, requiring only "a slight amount [of originality to] suffice." *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 345 (1991).

multiple choice or essay test would, in most circumstances, meet the two requirements. However, if a teacher prepares an answer sheet that has the student circle either the "T" or the "F" for twenty-five questions, in all likelihood the answer sheet would not be copyrightable, because two columns with "T" and "F" in them would not meet the minimum qualifications for creativity or originality.⁵⁸ The policy behind this makes sense: if one teacher owned the copyright on that type of answer sheet, that one teacher could prevent everyone else from using that form, because having a copyright allows the owner to control the reproduction and distribution of the work, the creation of derivative works, the distribution of copies, and the public performance of the work.⁵⁹ A copyright does not protect the ideas within a work, but protects the expression of the work, a distinction commonly known as the idea-expression dichotomy. In an essay test, the phrasing and language—the art of creation—is protected; the facts and ideas expressed are not.⁶⁰ Someone else could read the test, and use the same main ideas for another test without infringing. It is when the expression of those ideas begin to resemble too closely the original that infringement occurs.

Lectures can pose a problem regarding the "fixed" requirement in copyright.⁶¹ Lectures have traditionally been given before a live audience. To copyright a lecture, the lecture must be in a tangible, fixed form.⁶² If a professor writes her lecture in a word processing program, or creates an outline or notes, those written versions of the lecture are protected by copyright.⁶³ Audio or video recording could also fix the lecture.⁶⁴ If a professor authorizes students to tape-record their lectures, the tape recording fixes the lecture sufficiently to establish copyright on the live version.⁶⁵ However, the permission in

58. *Id.*

59. 17 U.S.C. § 106.

60. 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.")

61. Interestingly, courts (pre-1976 Copyright Act) had given ownership of lectures to the lecturer (apart from the fixed in a tangible form requirement).

62. 17 U.S.C. § 102 (a).

63. These lecture notes, as unpublished works, are still protected by statutory copyright. The copyright begins from the moment of creation and lasts for the life of the author plus seventy years.

64. *Id.*, see also 17 U.S.C. § 102(a)(6).

65. Interestingly, it was with lectures that the issue of whether teachers

making the copy does not transfer any kind of ownership rights in the *copyright* to the student.⁶⁶ The rights to reproduce, distribute, and publicly perform that lecture elsewhere remain with the professor.⁶⁷ The student has ownership of the tape itself, not the legal intellectual property rights surrounding the content on the tape.⁶⁸ Issues of ownership in lecture came into focus early in legal history when someone in the audience tried to publish notes from the lecture. As this article will show, courts have given the right to control lecture and professionally created lecture notes to the professor, not the university; however, the 1976 Copyright Act and subsequent case law are quickly eroding long-established traditions.⁶⁹

The question here is one of control. Traditionally, scholars and teachers have had ownership—or control—over materials they create.⁷⁰ With a shift in ownership to the university, however, scholars and teachers will no longer control their creative product, which is bound to affect the nature of the profession. One can quickly see that works not economically valuable in an analog, live-classroom world may have great economic value in a digital age. In particular, the game may become entirely different when the classroom is transformed in a digital age. Does the teacher own the materials prepared for

own their materials began. The question was whether a student or audience member could print the notes from the lecture; courts, in the past, have found that the lecturer holds the copyright in the lecture, and not those jotting down notes; see *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. App. 1969).

66. See 17 U.S.C. § 202, “Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied.” One might consider making a condition of taping the lecture the transfer of the tapes to the instructor once the course is completed. Then the instructor would have a copy of her lectures without much fuss and would establish copyright in the lectures if the issue arose at a later time.

67. See 17 U.S.C. § 202, discussing ownership of copyright as distinct from ownership of a material object.

68. *Id.*

69. Today, however, new areas are arising concerning lectures, where third parties are marketing course notes. UCLA is one school that has filed lawsuits to protect the lectures, calling into question, of course, whether UCLA is claiming ownership in the lectures themselves. See Jonathan Alger, *Classroom Capitalism*, ACADEME, Jan.-Feb. 2000, available at <http://www.aaup.org/publications/Academe/00jf/JF00LgWa.htm>. (last visited Sept. 15, 2002). See also University of Texas, *Ownership of Lectures: Commercial Notetaking in University Courses*, available at <http://utsystem.edu/ogc/intellectualproperty/lectures.htm> (last visited Sept. 15, 2002) (claiming lecture materials are the property of faculty; therefore, the university will not file infringement suits).

70. See *infra* Part II.B.

the course, or does the university? Are the materials prepared for teaching owned by the university as part of the employment contract, or are they separate, creative creations of the individual teacher? Who profits from lecture notes, transparencies, tests, and web sites?

However, one need not go to the digital age to confront problems. For example, there are thousands of adjunct professors. What do they own? As they move nomadically from university to university, what is theirs to use again, and what must they leave behind at the university that hired them for only one semester? What about a professor who moves to a different university, or graduate students working as teaching assistants, or part-time lecturers? It is all a question of who owns the copyright, and the ideas about ownership are quickly changing.

B. COPYRIGHT OWNERSHIP BASICS

*"No one sells or mortgages all the products of his brain to his employer by the mere fact of employment."*⁷¹

Public Affairs Assoc., Inc. v. Rickover, (D.D.C. 1959)

Ownership has become complicated in the university realm. Previously, teachers owned their scholarly works as an exception to the work-for-hire doctrine under the 1909 Copyright Act. This was judge-made law, rather than part of the 1909 statute. To understand what the teacher exception means today requires an understanding of the ownership schemes available under the Copyright Act of 1976. Three basic types of ownership exist: author as owner, employer as owner under a work-for-hire doctrine, and employer as owner of a commissioned work by an independent contractor. The following will briefly explain the basics of all three.

Ownership of copyrighted works is sometimes separate from authorship.⁷² Normally, the creator of the work is also the

71. MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03[B][1][b][i] (2002) (citing Pub. Affairs Assoc., Inc. v. Rickover, 177 F. Supp. 601, 604 (D.D.C. 1959), *rev'd on other grounds*, 284 F.2d 262 (D.C. Cir. 1960), *vacated for insufficient record*, 369 U.S. 111 (1962)) (italics added).

72. Garon, *supra* note 35 at n.72.

The assignment of authorship is distinct from the assignment of the copyright. Any author may transfer his or her copyright at any time, but the assignment of copyright will be a narrower grant than the assignment of authorship, because the author retains certain rights to termination of a copyright assignment that are extinguished if the work is made pursuant to a work for hire relationship.

owner, giving the creator of the work all of the rights afforded a copyright owner.⁷³ Under the current copyright act, this means that the copyrighted work is protected for seventy years past the author's life.⁷⁴ If professors own their works under this scenario, the university has no claim of ownership.

Employers own the work if creation of the work falls under the scope of employment.⁷⁵ The Supreme Court, in *Community for Creative Non-Violence v. Reid* (hereinafter *CCNV v. Reid*), determined what constitutes employment for purposes of work-for-hire requirements.⁷⁶ This case is discussed later in this article. For now, it is sufficient to understand that most works of full-time teachers and faculty fall under the work-for-hire requirements. The 1976 Act did not codify this judge-made "teacher exception" as part of the statute thus its survival today is uncertain.⁷⁷

Finally, a work-for-hire can be commissioned from an independent contractor.⁷⁸ This, too, will be discussed in more detail, but many activities in which teachers engage, including creating instructional texts, translations, and supplemental works, fall under this category.⁷⁹ In both instances, specific requirements must be met before the exception will apply. That a work is commissioned, or someone works at a job, does not necessarily mean that the employer owns the work created.

III. UNRAVELING THE "TEACHER EXCEPTION"

Traditionally, case law and custom has dictated a "teacher exception," where scholars/teachers have owned the materials they create, despite traditional work-for-hire doctrine under which the employer would be considered the work's creator. This is well-trodden territory. Many law reviews have explored the development of the teacher exception and its current

Id.

73. 17 U.S.C. § 201(a) (2000).

74. One strategy suggested is joint authorship, which gives each party the rights associated with copyright. To be considered a work of joint authorship all of the authors involved in the preparation and ownership, contributed to the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17. U.S.C. § 101.

75. See NIMMER ON COPYRIGHT, *supra* note 71, § 5.03[A].

76. *Cnty. For Creative Non-Violence v. Reid*, 460 U.S. 730 (1989)

77. See generally 17 U.S.C. § 102.

78. See *infra* Part III.A.2 of this article, discussing *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. 1969).

79. 17 U.S.C. § 201(b).

demise. The teacher exception was established under the 1909 act by case law, but because the 1976 act did not incorporate it, the “teacher exception” was subsumed by a work-for-hire doctrine that the Supreme Court’s definition of employment in *CCVN v. Reid* places teachers’ materials under the scope of employment.⁸⁰ Thus the university-employers own their original creative works.⁸¹ No court has decided whether the “teacher exception” survived *Reid*, but the Seventh Circuit in *Weinstein*, decided two years before *Reid*, had already transferred the “teacher exception” from a case-based judge-made law to one dictated by university policy.⁸² The university chose to claim or disclaim ownership in traditional materials produced in teaching, research, and study.⁸³ All of this is dealt with in more detail below and is part of the argument surrounding the demise of the “teacher exception.”

This section looks at the issue of the “teacher exception” from a slightly different historical perspective by placing the “teacher exception” cases of *Williams*,⁸⁴ *Weinstein*, and *Hayes*⁸⁵ alongside the legislative testimony of scholars and their concerns during the Copyright Act revisions during the 1960s and 1970s.⁸⁶ One of the main arguments for the disappearance of the “teacher exception” was its non-incorporation into the 1976 Copyright Act, suggesting that Congress had not intended the “teacher exception” to survive. This article argues, on the contrary, that the “teacher exception” was so well established that no one thought it was in danger under the 1976 Act. This idea is supported in Judge Posner’s dicta opinion in *Hayes*,⁸⁷ delivered one year after the *Weinstein* court gave universities power over the fate of the “teacher exception.” To date, no law review article has actually explored Posner’s assertion within the context of the copyright law revisions.

80. 460 U.S. at 730.

81. Numerous law review articles have pondered the implication of the Supreme Court’s “teacher exception” in *Cnty. for Creative Non-Violence v. Reid*. Some have taken the position that the Court’s definition of employment includes teachers and scholars, and therefore, subsumes the “teacher exception.” Others follow tradition and have argued that, like the 1909 Act (which defined work-for-hire with a factors test and then by case law), the definition of employment excludes teachers. *See generally supra* note 52.

82. *Weinstein v. Univ. of Ill.*, 811 F.2d 1091 (7th Cir. 1987).

83. This section will discuss *Weinstein* and related cases in detail.

84. *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. 1969).

85. *Hayes v. Sony Corp. of Am.*, 847 F.2d 412 (7th Cir. 1988).

86. *See infra* note 171.

87. *See infra* text accompanying notes 171-175.

A. THE CASE AGAINST THE DISAPPEARANCE OF THE “TEACHER EXCEPTION.”

The revision of the Copyright Act did not happen overnight. Revisions were introduced in Congress as early as 1924.⁸⁸ It would not be until 1955 that the revision process was begun seriously, heating up from 1961 to 1964.⁸⁹ Draft copyright bills were introduced in 1964, 1967, 1969, 1971, 1973, and 1974.⁹⁰ Finally, after a hearing with over a hundred witnesses in 1975 and more revisions, the 1976 Copyright Act was passed by a 97-0 Senate vote on February 19, 1976.⁹¹ The following parts of this article examine the “teacher exception” during this time.

1. The 1967 Senate Hearing on the Copyright Law Revision

In light of the proposed revisions in the 1960s, the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision was formed. It consisted of 34 associations representing educational interests from elementary through higher education, public, private, and parochial schools.⁹² On March 16, 1967, nine witnesses from this committee appeared before the U.S. Senate Subcommittee on Patents, Trademarks, and Copyrights of the Committee of the Judiciary to express their concerns about the proposed Copyright Law Revisions currently being debated.⁹³ They detailed, through written and oral statements, and question and answer sessions with the senators, the main concerns of educators.⁹⁴ The “teacher exception” regarding ownership was not mentioned. The best explanation of why it was not mentioned is that none of the testifying witnesses *believed* the exception was at issue. The support for this supposition is circumstantial, but important. Witnesses detailed a myriad of educators’ concerns regarding the revision and the fact that the “teacher exception” was not part of this list is evidence that it

88. 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT Appendix 4 (2002) (reprinting “The House Report on the Copyright Act of 1976” as corrected in 122 Cong. Rec. H 10727-8 (daily ed. Sept. 21, 1976)).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Copyright Law Revision: Hearing on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong. 141, 151 (1967) (hereinafter *Copyright Law Revision*).

93. *Id.* at 141.

94. *Id.*

was not at issue. The concerns of the day in 1967 shed some light on why the “teacher exception” might not have been at issue.

The ad hoc committee of educators, represented by the nine witnesses, had been studying the proposed copyright revisions for three years, and their concerns represented their recommendations to the Senate on the currently proposed bill.⁹⁵ Many aspects of the Senate revisions were revolutionary. Some testifying educators touched upon these revolutionary concepts in their statements. New technologies like the photocopier drove some of their concerns.⁹⁶ Substantive changes to the copyright law itself presented other issues, including the change in length of duration of copyright, and the development of the statutory category of fair use.⁹⁷

According to Dr. Wigren, chairman of the ad hoc committee, the latest bill contained marked improvements for education, but changes were still needed, and level of concern was still high.⁹⁸ Dr. Wigren outlined “six fundamental needs of education which must be protected in any revision of the copyright law.”⁹⁹ These needs reflected the educators’ response to the proposed bill, rather than all copyright needs of educators. Their concerns included:

- (1) the need for teachers to make limited copies of copyright materials for classroom use; (2) the need to have “fair use” extended to include educational broadcasting and educational uses of computers; (3) the need for reasonable certainty that a given use of copyrighted materials is permissible; (4) the need for protection in the event teachers and librarians innocently infringe the law; (5) the need to meet future instructional requirements by utilizing the new educational technology now being made available to schools; and (6) the need to have ready access to materials.¹⁰⁰

What is striking about these needs is the focus on educators as copyright users, rather than producers. None of their concerns focused on ownership of materials created by teachers. The far-reaching issues at hand included formulating a statutory fair use doctrine and extending copyright durations.

95. *Copyright Law Revision*, *supra* note 92 at 142.

96. For more on historical development of copyright law and the influence of technology, see generally PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 37 (1994) and more recently, Mark F. Smith, *Intellectual Property and the AAUP*, ACADEME, Sept.-Oct. 2002, at 39.

97. See generally, *Copyright Law Revision*, *supra* note 92, at 152-54.

98. *Id.* at 143.

99. *Id.*

100. *Id.* at 152-54.

Regarding duration: under the proposed laws, materials that had previously entered the public domain after twenty-eight years because of non-renewal would now automatically be protected for the life of the author plus seventy years.¹⁰¹ This would severely hamper educators' use of materials previously considered abandoned.¹⁰² If educators were concerned about duration and other similarly grave issues, it follows that if the "teacher exception" had been in danger, it would have been brought up as a seventh point. But it does not appear to have been an issue at that time. Furthermore, the educator's requests, according to Senator McClellan, were "a pretty big order."¹⁰³

Even so, one can see that the language of their concerns replicates the "teacher exception" in that they saw the role of educators as special and unique:

We feel we must bring these matters to your concern, because teachers do not use materials for their own private individual gain. They use materials for the benefit of your children and the benefit of the children of all of our citizens. We have a responsibility that we cannot dismiss lightly in seeing to it that children have access to communication of ideas in our society . . . We want to reemphasize again so that you can keep this uppermost in your mind that we are stressing the public interest in our statement here. This is our point, because we are in the business of serving the public."¹⁰⁴

Dr. Lois Edinger, a former classroom teacher from North Carolina, and then an associate professor of education at University of North Carolina at Greensboro, reiterated the special place of teachers in describing the function of the National Education Association (NEA): "NEA has two primary interests: the improvement of instruction in the Nation's

101. *Id.* at 147.

102. *Id.*

103. *Id.* at 163.

104. *Id.* at 149. In his prepared statement, Dr. Wigren also quoted the label under the Library of Congress' display case containing a copy of the Gutenberg Bible: "Through the invention of printing, it became possible for the accumulated knowledge of the human race to become the common property of every man who knew how to read—an immense forward step in the emancipation of the human mind." *Id.* at 151. Dr. Wigren continued:

This sums up in a succinct way the point of view and concern which our Ad Hoc Committee wishes to express to the Congress in regard to revision of the copyright law. Our committee is speaking on behalf of the public interest—the right of every man to share in the accumulated knowledge of the human race, and the rights and responsibilities of teachers to make the knowledge available in the public interest.

Id.

schools and the protection of the rights of teachers and their welfare. Both of these interests are affected by any revision of the copyright law."¹⁰⁵

Two other pieces of historical material support this: the development of the ad hoc committee itself, and its resolution three years later:

Because education has a substantial interest in the copyright law, the NEA through its division of audiovisual instructional service and its national commission on professional rights and responsibilities, in July 1963, called a national conference of representative of major education organizations to discuss both the present copyright law and the proposals which were being made for revision of the law; to canvass education's needs in a new copyright law; and to determine what steps, if any, the profession should take to deal with the situation.¹⁰⁶

A statement of their concern was adopted in July 1966 at the NEA's annual meeting in Miami Beach, Florida.¹⁰⁷ The 1967 list is said to represent these concerns. Dr. Edinger explained to the Senate: "Let me simply say as a summary of that resolution that there are two parallel sets of rights—the rights of those who create materials, and the rights of educators to use certain copyrighted materials in teaching."¹⁰⁸ Note, that there is an implication that the materials being created are those *other than* the educators'. That educators might create economically valuable copyrighted materials was not yet a concern.¹⁰⁹

2. The 1969 "Teacher Exception" Case of *Williams v. Weisser*¹¹⁰

In the midst of continuing discussions on the revisions of the copyright law, a California case concerning the unauthorized commercial sale and distribution of notes taken at a UCLA anthropology professor's lectures wrestled with the issue of ownership and the "teacher exception."¹¹¹ While the substantive matter of the case is often discussed in law review articles, the point here is that the concept of the "teacher exception" was decided in the courts while educators and

105. *Id.*

106. *Id.* at 158 (statement of Dr. Lois Edinger, representing the classroom teacher uses of copyrighted materials).

107. *Id.*

108. *Id.*

109. *See e.g.*, Alger, *supra* note 69 (examining third party sales of university lecture course notes).

110. *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

111. *Williams*, 78 Cal. Rptr. at 543.

legislators were debating the revisions. The “teacher exception” did not become a concern of educators even after the *Williams* case.¹¹² In all probability, this is because the “teacher exception” appeared to be decided case law after the *Williams* case.

The *Williams* case concerned a for-profit company that paid students to take lecture notes, which the company then sold to students taking the class.¹¹³ The court found that the professor, rather than the university, had a common law copyright in his lectures.¹¹⁴ The court explained that a professor was hired to teach a certain body of material—the Renaissance or Shakespeare—rather than to present a certain, dictated expression of that material.¹¹⁵ The court differentiated “other products of the mind which an employee is hired to create,” from the lectures conducted by a professor.¹¹⁶ “[I]n order to determine just what it is getting, the university would have to find out the precise extent to which a professor’s lectures have taken concrete shape when he first comes to work,” which the court thought undesirable and most likely impossible.¹¹⁷

To get to this view, the *Williams* court cited a number of leading English cases, among them *Abernethy v. Hutchinson*.¹¹⁸ In that case, Dr. Abernethy delivered lectures based on his own notes at St. Bartholomew’s Hospital in London.¹¹⁹ The defendant periodical, “The Lancet,” published the lectures.¹²⁰

112. See discussion *infra* Part III.A.3.

113. *Williams*, 78 Cal. Rptr. at 543.

114. *Id.* at 545. Under the 1909 Act, unpublished works had a common law copyright; only upon publication did works come under the federal copyright statute. That changed with the 1976 Copyright Act, where unpublished and published works receive the same term of protection, seventy years after the author’s death. See also Consortium for Educational Technology for University Systems, *infra* note 214 at 11.

115. *Williams*, 78 Cal. Rptr. at 546.

116. *Id.*

117. See *id.* at 546. The court declared that “rule[s] of law developed in one context should not be blindly applied in another where it violates the intention of the parties and creates undesirable consequences. University lectures are *sui generis*.” *Id.* at 546-47. The court further stressed that “[a]bsent compulsion by state or precedent, university lectures should not be blindly thrown into the same legal hopper with valve designs, motion picture background music, commercial drawings, . . . and treatises on the use of ozone or on larceny and homicide.” *Id.* (internal cites omitted).

118. *Id.* at 547 (referring to 3 L.J. (ch.) 209 (1825)).

119. *Id.*

120. *Id.*

In granting an injunction, Lord Eldon compared Dr. Abernethy's role at the hospital to that of a professor.¹²¹ The *Williams* court reasoned that since in "absence of positive evidence to the contrary the [*Abernethy* court] assumed as a matter of course that the copyright was with the lecturer and not with the hospital," the copyright would not belong to a university either.¹²² Lord Eldon had assumed that professors had a common law copyright in their lectures, due to Sir William Blackstone's copyright in his Vinerian Lectures.¹²³

Now, if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that any body could publish his lectures; nor can I conceive on what ground Sir William Blackstone had the copyright in his [Vinerian Lectures] for twenty years, if there had been such a right as that; we used to take notes at his lectures; at Sir Robert Chamber's lectures also the students used to take notes; but it never was understood that those lectures could be published;—and so with respect to any other lectures in the university, it was the duty of certain persons to give those lectures but it never was understood, that the lectures were capable of being published by any of the persons who heard them.¹²⁴

The *Williams* court also looked at *Caird v. Sime*.¹²⁵ Defendant had published pamphlets of plaintiff professor's lectures based on notes taken at the lecture.¹²⁶ "In law the case turned on the question whether Caird had lost his common law copyright because as a professor in a public university it was his obligation 'to receive into his class all comers having the requisite qualification,'" thereby making his lectures "addressed to the public."¹²⁷ The *Caird* court dismissed this argument and responded, as the *Abernethy* court had, that the lectures were held in copyright by the professor.¹²⁸

As to cases in the United States, the *Williams* court discussed *Sherrill v. Grieves*,¹²⁹ where plaintiff professor at an army officer's school wrote a book in conjunction with the course he was teaching to "fill the gap" of material he wanted

121. *Id.*

122. *Id.*

123. *Id.* at n. 7 (quoting *Abernethy*, 3 L.J. at 215).

124. *Id.*

125. 12 A. C. 326 (H.L. 1887).

126. *Williams*, 78 Cal. Rptr. at 548.

127. *Id.*

128. *Id.*

129. 57 Wash. L.R. 286, 20 C.O. Bull. 675.

the students to learn.¹³⁰ He gave permission to the school to print a portion of the book before the complete book was published.¹³¹ Defendants claimed that plaintiff professor's book was a publication of the United States, and therefore in the public domain.¹³² The *Sherrill* court found that the professor was employed to lecture, not to write a book.¹³³

The plaintiff at the time was employed to give instruction just as a professor in an institution of learning is employed. *The court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him.*¹³⁴

Just because the government used the book with permission did not automatically transfer or assign the copyright from the plaintiff professor to the institution.¹³⁵

Finally, the *Williams* court explained: "No reason has been suggested why a university would want to retain ownership in a professor's expression. Such retention would be useless except possibly . . . for making it difficult for the teacher to give the same lectures, should he change jobs."¹³⁶ It would be difficult because, if the university owned the material, they would also control it and its future uses, including prohibiting its creator, the professor, from giving the same lecture elsewhere.

3. The 1975 Congressional Hearings

Nearly ten years after the first hearings, in 1967, the House of Representatives heard further testimony on the Copyright Law revisions.¹³⁷ Again, Dr. Harold Wigren and three others appeared, including Sheldon E. Steinbach, the then current chairman of the Ad Hoc Committee of Education

130. *Williams*, 78 Cal. Rptr. at 548.

131. *Id.*

132. "No copyright may be claimed in a work written in a for-hire relationship if the employer is the United States Government," NIMMER ON COPYRIGHT, *supra* note 71, § 5.03[A] at 5-11 (citing 17 U.S.C. § 105). Nimmer notes a "broader construction of works for hire in suits against the U.S. Government." *Id.* n.7.

133. *Id.*

134. *Id.* at 549 (alteration in original) (quoting *Sherrill*, 20 C.O. Bull. 675).

135. *See Id.*

136. *Id.* at 546.

137. *Copyright Law Revision, May 15, 1975: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong. 267 (1976).*

Organizations on Copyright Law Revision.¹³⁸ The committee had now grown to thirty-nine organizations, “represent[ing] the interests of teachers, professors, school and college administrators, subject matter specialists, educational broadcasters, librarians, and indirectly, students themselves.”¹³⁹ As in the 1967 Senate hearing, educators raised their concerns, but again the “teacher exception” was never mentioned. This time, both research and teaching were emphasized: “each function is indispensable to and supportive of the other.”¹⁴⁰ However, the fair use provisions in the most recent bill were the main focus of concern.¹⁴¹

4. The relationship of the 1909 Act to the 1976 Act

The “teacher exception” was devised under the 1909 Act,¹⁴² and affirmed by the *Williams* case.¹⁴³ However, whether the “teacher exception” survived the 1976 Act was questionable. In working out the parameters of the work-for-hire doctrine, one 1984 case which has not received much attention, is useful. In *Aldon Accessories Ltd. v. Spiegel, Inc.*,¹⁴⁴ the Second Circuit stated, “[n]othing in the 1976 Act or its legislative history indicates that Congress intended to dispense with [the standards from the 1909 Act work-for-hire doctrine].”¹⁴⁵ Nimmer commented, “the Second Circuit concluded from legislative silence that no change was intended.”¹⁴⁶ However, “the Supreme Court rejected such reliance on legislative silence,” explaining “Congress’ silence is just that—silence.”¹⁴⁷ What this means when applied to the “teacher exception” is that silence can be taken for silence and need not indicate exclusion under the new work-for-hire doctrine.

138. *Id.* at 268.

139. *Id.* (testimony of Sheldon E. Steinbach, staff counsel, American Council on Education and Chairman, Ad Hoc Committee of Education Organizations on Copyright Law Revision).

140. *Id.* at 270.

141. *Id.*

142. See discussion *supra* Part III.

143. See discussion *supra* Part III.A.2.

144. *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984).

145. NIMMER ON COPYRIGHT, *supra* note 71 § 5.03[B][1][a] n.37 at 5-17 (quoting *Aldon*, 738 F.2d at 552).

146. *Id.*

147. *Id.* (quoting *Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989)).

5. The mid-1980's Seventh Circuit Pair of "Teacher Exception" cases

Over a decade after the passage of the 1976 Copyright Act, two cases from the Seventh Circuit took up the issue of the "teacher exception." One case dramatically altered it, while the other reaffirmed the exception in dicta. *Weinstein v. University of Illinois* and *Hays v. Sony Corp. of America* both discussed the question of whether the "teacher exception" remained under the new work-for-hire doctrine under the 1976 Copyright Act.¹⁴⁸ Since no "teacher exception" cases have been decided since before *Reid*, which defined the scope of the work-for-hire doctrine,¹⁴⁹ these cases are important in understanding the status of the "teacher exception" today.

The *Weinstein* case evaluated the 1976 Copyright Act work-for-hire doctrine with regard to professors and teachers.¹⁵⁰ The Seventh Circuit Court of Appeals upheld the policy behind the "teacher exception."¹⁵¹ However, the court based its reasoning on university policies (coupled with tradition) rather than case law.¹⁵² Furthermore, the court seemed to hold open the possibility that universities could change their policies with justification, and include scholars' writings under the work-for-hire doctrine.¹⁵³ The following year, the *Hays* case, in dicta, seemed to reaffirm that a "teacher exception" exists, for all the traditional reasons given under the 1909 case law.¹⁵⁴ Whether this serves as a contrast or a clarification to *Weinstein* is not clear from the opinions themselves, which are discussed in detail below.

The *Weinstein* district court found that the university owned an article because the document constituted a work-for-hire;¹⁵⁵ the appellate court disagreed.¹⁵⁶ Three professors

148. *Weinstein v. Univ. of Ill.*, 811 F.2d 1091 (7th Cir. 1987); and *Hays v. Sony Corp. of Am.*, 847 F.2d 412 (7th Cir. 1988).

149. See discussion *supra* Part II.B.

150. *Weinstein*, 811 F.2d at 1091.

151. *Id.* at 1094.

152. *Id.*

153. See *id.*

154. *Hays v. Sony Corp. of Am.*, 847 F.2d 412 (7th Cir. 1988).

155. *Weinstein v. Univ. of Ill.*, 628 F. Supp. 862 (N.D. Ill. 1986). The dispute centered around which author's name should be listed first, with *Weinstein* alleging denial of due process under the 14th Amendment. *Id.* The district court dismissed the complaint under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim, concluding that the employer owned the article as a "work-for-hire," and therefore *Weinstein* had no standing to sue.

involved in a university-funded program wrote the article about the program's results.¹⁵⁷ Judge Easterbrook wrote the opinion for the panel, which included Judges Cudahy and Posner, and explained that "[t]he copyright law gives an employer the full rights in an employee's 'work for hire' . . . unless a contract provides otherwise. The statute is general enough to make every academic article a 'work for hire' and therefore vest exclusive control in universities rather than scholars."¹⁵⁸ The court noted that many academic institutions responded to the Act "by adopting a policy defining 'work for hire' for purposes of [their] employees, including [their] professors."¹⁵⁹ For example, the University of Illinois, the institution in question, includes the following definition of a "work-for-hire" in each of its professor's employment contracts:

[A] professor retains the copyright unless the work falls into one of three categories: 1) [t]he terms of a University agreement with an external party require the University to hold or transfer ownership in the copyrightable work, or 2) [w]orks expressly commissioned in writing by the University, or 3) [w]orks created as a specific requirement of employment or as an assigned University duty.¹⁶⁰

According to the appeals court, the district court found the article to fall under the third category because the University funded the program, and "because, as a clinical professor, Weinstein was required to conduct and write about clinical programs."¹⁶¹ Easterbrook found this interpretation to "collide[] with the role of the three categories as exceptions to a rule that faculty members own the copyrights in their academic work."¹⁶² Easterbrook explained that universities require all of their scholars to write as part of the tenure process.¹⁶³ "When Dean Manasse told Weinstein to publish or perish, he was not simultaneously claiming for the University a copyright on the ground that the work had become a 'requirement of duty' within the meaning of [the third work-for-hire definition]."¹⁶⁴ Easterbrook exalted the practice that academics have held the

Id. at 865.

156. *Weinstein v. Univ. of Ill.*, 811 F.2d 1091 (7th Cir. 1987).

157. *Id.* at 1092-93.

158. *Id.* at 1093-94.

159. *Id.* at 1094.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

copyright to their scholarly works, averring “[w]hen Saul Bellow, a professor at University of Chicago, writes a novel, he may keep the royalties.”¹⁶⁵ Easterbrook further notes that this practice is “a tradition the University’s policy purports to retain. The tradition covers scholarly articles and other intellectual property.”¹⁶⁶ As further evidence, Easterbrook notes that the University never acted as if it owned the copyright. Weinstein did not need permission from the University to publish the article, a requirement if the University had indeed been the copyright holder.¹⁶⁷ Easterbrook’s last point is very interesting: a university’s claim of ownership comes with additional responsibilities, responsibilities most universities have yet to accommodate with structural and financial support. It also speaks to the control issue,¹⁶⁸ suggesting that, in the coming years, groups like the American Association of University Professors should remain vocal in getting out the message that with ownership comes control of determining content, dissemination, and publication.

Easterbrook explained that the University’s claim on copyright focused more on administrative duties, such as a university committee report.¹⁶⁹ What is interesting is that Easterbrook leaves the door open to changing tradition: “We do not say that a broader reading is impossible, but such a reading should be established by evidence about the deliberations underlying the policy and the course of practice.”¹⁷⁰

165. *Id.*

166. *Id.* Easterbrook also cites Nimmer : “This has been the academic tradition since copyright law began, see M. Nimmer, *Copyright* § 5.03[B][1][b] (1978 ed.), a tradition the University’s policy purports to retain.” *Id.*

167. *Id.* at 1095.

168. *See supra* text accompanying note 70.

169. Weinstein, 811 F.2d at 1094.

170. *Id.* at 1094. Todd Borow points out that the *Weinstein* court relied on the Ninth Circuit case *May v. Morganelli-Heumann & Assoc.*, 618 F.2d 1363 (9th Cir. 1980). Todd A. Borow, *Copyright Ownership of Scholarly Works Created by University Faculty and Posted on School-Provided Web Pages*, 7 U. MIAMI BUS. L. REV. 149, 156 (1998). The court used *May*’s holding of “incorporat[ing] professional custom into . . . disputed contract[s], by bringing academic tradition into the copyright agreement.” *Id.* “In the case of *May v. Morganelli-Heumann & Associates*, the Ninth Circuit stated that if a practice is known to the parties or widely held, ‘the custom is an implied in fact term of the contract’ between the parties.” *Id.* at 156. Borow further notes:

The Weinstein court appears to have stretched the *May* holding, because while *May* relied on custom in usage in the absence of any specific mention of an agreement to that custom, *Weinstein* looked to

The *Hays* case, decided a year after *Weinstein*, continued the discussion. Two high school teachers sued Sony Corp. for copying (in some places verbatim) the word processor operating manual they as teachers wrote for their students.¹⁷¹ The teachers' employer had given the manual to Sony.¹⁷² Sony, after copying and modifying the manual to suit their word processor, delivered it to the school district.¹⁷³ The court discussed the "work-for-hire" doctrine in dicta in the opinion.¹⁷⁴ The decision was written by Judge Posner, with Flaum and Easterbrook on the panel.¹⁷⁵ In some ways, then, this case can be seen as continuing the discussion begun the year before in *Weinstein*.

Judge Posner explained that "[u]ntil 1976, the statutory term 'work made for hire' was not defined, and some courts had adopted a 'teacher exception' whereby academic writing was presumed not to be work made for hire."¹⁷⁶ Posner explained that the "authority for this conclusion was in fact scanty . . . *not because the merit of the exception was doubted*, but because, on the contrary, *virtually no one questioned that the academic author was entitled to copyright his writings*."¹⁷⁷ He reiterated the traditional reasons, that although academics use their "employer's paper, copier, secretarial staff, and (often) computer facilities" as part of their employment, "[a] college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise."¹⁷⁸ He noted that he did not include in this category material that a school directly requested a teacher to prepare, and then directed other teachers to use.¹⁷⁹

What is interesting about his analysis is the fact that only

academic tradition in spite of a specific provision dealing with the vesting of copyrights that contradicted the academic tradition.

Id. at 156-57 (citing Michael J. Luzman and Daniel S. Pupel, Jr., *Weinstein v. University of Illinois: The "Work-for-Hire" Doctrine and Procedural Due Process for Nontenured Faculty*, 15 J.C. & U.L. 369, 375 (1989)).

171. *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 413 (7th Cir. 1988).

172. *Id.*

173. *Id.*

174. *Id.* at 416-17.

175. *Id.* at 413. Note: Easterbrook wrote the *Weinstein* opinion, with Posner on the panel.

176. 847 F.2d at 416.

177. *Id.* (emphasis added).

178. *Id.*

179. *See id.*

thirteen years after Posner's assumptions that a college or university is "poorly equipped to exploit their writings", much has changed, or is about to change. The rise of technology transfer and trademark licensing offices within universities has greatly changed this equation, yet to date they have not focused on copyrighted works. Also note that in this exception, two elements are required: the school must directly request the teacher to prepare the material *and* the school must then direct other teachers to use the materials.

Posner then directly addressed whether the 1976 act abolished the "teacher exception," as many had believed. He did not believe it had, "for there is no discussion of the issue in the legislative history, and no political or other reasons come to mind as to why Congress might have wanted to abolish the exception."¹⁸⁰ He continued:

[t]o a literalist of statutory interpretation, the conclusion that the Act abolished the exception may seem inescapable. The argument would be that academic writing, being within the scope of academic employment, is work made for hire, per se; so, in the absence of an express written and signed waiver of the academic employer's rights, the copyright in such writing must belong to the employer.¹⁸¹

Posner explains this literalist reading would wreak havoc "in the settled practices of academic institutions."¹⁸² He thinks, if forced to decide (which he is not, since this discussion is dicta), that a reading of the statute in support of a "teacher exception" could be found in the fact that a work-for-hire has to be "prepared for the employer."¹⁸³ With regard to the *Hays* case itself, Posner explains that high school teachers are not required to publish as part of their job requirement and therefore this work falls outside the scope of their employment, "especially since, so far as appears, they prepared the manual on their own initiative without direction or supervision by their superiors."¹⁸⁴

Easterbrook's decision in *Weinstein* appears to stand as the only voice on this topic, meaning that university policies control whether a "teacher exception" exists. Since the *Weinstein* decision, the focus has been on the employment contract and intellectual property policy at the particular university.¹⁸⁵ It

180. *Id.*

181. *Id.*

182. *See id.*

183. *See id.* at 417.

184. *See id.*

185. For a particularly good discussion of this see James B. Wadley &

seems that only tradition and custom, remembered by the university, keeps the teacher exception in place.

B. A RETURN TO OWNERSHIP OPTIONS

In 1989, *CCNV v. Reid* further delineated the definition of “employee” in the case of work made for hire.¹⁸⁶ Some people have interpreted *Reid* as stating that, in most cases, teacher’s creative works fall under scope of employment, and therefore many believe that the “teacher exception” no longer exists.¹⁸⁷ What is interesting is that there are some instances where professors’ and/or graduate students’ work would not fit into the scope of employment, and would, as in the *Reid* case, be the property of the professor/student creator. Elements to consider in evaluating whether a person is an “employee” include benefits, the amount of control over the “manner and means of creation,” the skills required, the right to assign additional projects, and tax treatment of the individual.¹⁸⁸ Many of the court’s reasons why the sculptor in *Reid* did not meet the work-for-hire requirements would apply to non-tenured faculty, graduate students, and adjuncts as well:

Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision

JoLynn M. Brown, *Working Between the Lines of Reid: Teachers, Copyrights, Work-For-Hire and a New Washburn University Policy*, 38 WASHBURN L.J. 385 (Spring, 1999).

186. 490 U.S. 730 (1989). To determine whether someone is an employee for the purposes of determining ownership of the copyright, the Court developed a three-step test. See Wadley & Brown, *supra* note 185, at 396. First, does an employment relationship exist, with the critical element, from cases following *Reid*, hinging on whether “the hiring party failed to extend benefits or pay social security taxes,” two of the factors on a non-exhaustive list developed by the *Reid* court. *Id.* These factors include skills required, source of the instrumentalities and tools, location of the work, duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, extent of the hired party’s discretion over when and how long to work, method of payment, 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, provision of employee benefits, and tax treatment of hired party. *Reid*, 490 U.S. at 751-52. Then, one must determine whether the works were produced within the scope of the employee’s employment, and if not, whether the work could fall under and meet the requirements for the specially commissioned category of works for hire. See Wadley & Brown, *supra* note 185, at 396-97.

187. See, e.g., Wadley & Brown, *supra* note 185.

188. See *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992). For more on the *Aymes* five factor test and its application in a university setting, see Laughlin, *supra* note 1.

of his activities from Washington practicably impossible. Reid was retained for less than two months, a relatively short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. . . . Reid had total discretion in hiring and paying assistants. 'Creating sculptures was hardly 'regular business' for CCNV.' Indeed, CCNV is not a business at all. Finally, CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.¹⁸⁹

In many ways, adjuncts and some graduate students would fall into this category as they are employed on short-term contracts, often without benefits, using their own computers and other "tools" (often not even being given an office).¹⁹⁰ It may be that *Reid* has created a situation where full-time, tenure-track professors are treated as employees, but adjuncts and graduate students would be treated as independent contractors rather than as employees for purposes of determining ownership in copyrighted materials. However, distinguishing between the status of employees does not seem to be how the university policies distinguish ownership. Instead, policies have tended to concentrate on a different set of elements—the kind of material created and/or the amount of resources contributed by the university. Both of these elements are indicative of the potential commercial interests in copyrighted works that the university is pursuing, or would at least like the potential to pursue.

At this point, even *Nimmer on Copyright* is unsure of the ownership of course materials produced by faculty under the work-for-hire doctrine. The treatise states on one hand: "[I]f a professor elects to reduce his lectures to writing, the professor and not the institution employ ing [sic] him owns the copyright in such lectures."¹⁹¹ In a footnote, however, after reviewing the *Sherrill*, *Williams*, and *Hays* cases (but not discussing the *Weinstein* case), and then turning to *Reid*, the treatise concludes: "Given that universities typically do not dictate the manner and means for a professor to reduce his lectures to writing, . . . perhaps such works still fall outside the work-for-hire doctrine even under the 1976 Act."¹⁹² It is under the work-for-hire doctrine that many university policies (and the

189. See *Reid*, 490 U.S. at 752-53.

190. See Garon, *supra* note 35, at 151 ("Adjunct faculty generally will not be employees under the Supreme Court's test, because they are not regular salaried employees receiving benefits.").

191. See NIMMER ON COPYRIGHT, *supra* note 71, § 5.03[B][1][b][i].

192. *Id.* at n.94.

Weinstein case) rely, coupled with employment contracts.¹⁹³

A third kind of ownership is when an author is commissioned to create a particular work.¹⁹⁴ To be considered a work-for-hire, the commissioned work must fall under one of nine enumerated categories, and both parties must put in writing that the copyright has been assigned from the author to the one that has commissioned the work.¹⁹⁵ Teaching and scholarly work could fit under nearly every category, depending on the work: 1) a contribution to a collective work; 2) a part of a motion picture or other audiovisual work; 3) a translation; 4) a supplementary work; 5) a compilation; 6) an instructional text; 7) a test; 8) answer material for a test; and 9) an atlas.¹⁹⁶

A teacher/scholar can therefore assign copyright to the university/school. Under Copyright law, both the scholar and the university must sign an agreement, "which includes the appropriate transfer language."¹⁹⁷ Some question exists whether this requirement is met in cases where work-for-hire does not apply and universities are relying on assignment because the teacher/scholar is generally the only party signing the employment contract with the assignment clause; the university generally does not sign the employment contract.¹⁹⁸

Jon Garon, Professor of Law at Franklin Pierce Law Center, suggests that ownership of adjunct works might require assignment because their work would probably not meet scope-of-employment requirements for work-for-hire ownership.¹⁹⁹ Another area that would require assignment is distance learning because tasks might fall outside the traditional scope of employment.

C. THE DISAPPEARANCE OF THE TEACHER EXCEPTION

... the notion that a common law tradition survives, despite the language of the [Copyright] statute, may be undermined when the academic tradition that gave rise

193. See *infra* Part III.C.

194. See NIMMER ON COPYRIGHT, *supra* note 71, § 5.03[B][2].

195. *Id.*

196. 17 U.S.C. § 101 (2002).

197. See Garon, *supra* note 35, at 151.

198. *Id.*

199. *Id.* Garon suggests that adjuncts who teach at more than one institution license their work to the university, rather than give an all-out assignment of ownership. *Id.* Of course, adjuncts are the least powerful group of academics, and the likelihood of an adjunct having bargaining power to achieve these ends seems unlikely.

to that tradition is itself transforming through the growth of new teaching media."²⁰⁰

Jon Garon, Professor of Law, Franklin Pierce Law Center

It appears now that only custom holds the "teacher exception" in place, and even though only the 7th Circuit has gone this far, universities have taken advantage of this new space to obtain a firm hold on new commercial advantages. *Weinstein* clearly made the "teacher exception" in a "work-for-hire" context dependent on university policy.²⁰¹ *Hays*, in dicta, tried to make the "teacher exception" more stable, by claiming that the 1976 act had not abolished the "teacher exception." Posner left the door open, however, as did Easterbrook in *Weinstein*, that a day might come when that will change.²⁰²

A recent law review article by Georgia Holmes and Daniel A. Levin entitled "*Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*," concluded that the "teacher exception" continues to exist, "at least in the absence of an explicit agreement to the contrary between the institution and the faculty member."²⁰³ But many of the reasons that Holmes and Levin offer are no longer valid in a more commercialized and digital environment, as this section will discuss. Before leaving the "teacher exception" to look at how intellectual property policies have shifted the discourse to one of university ownership, consider the traditional reasons for the "teacher exception," and whether the justification for faculty ownership can withstand the pressures of technological changes. This section will use the conclusion of Holmes and Levin as a starting place, although their ideas and reasons are the traditional reasons for the "teacher exception," found in many sources, including case law.

Among the reasons Holmes and Levin believe the "teacher exception" will survive is that lecture notes and other materials have traditionally had no or limited commercial value, and therefore institutions "would typically have no reason to want copyright ownership of such lecture notes."²⁰⁴ Commercial

200. *Id.* at 152 (italics added).

201. *See Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987).

202. *See Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416-17 (7th Cir. 1988).

203. *See Holmes & Levin, supra* note 1, at 186.

204. *Id.*

advantages of distance learning and other new knowledge-based products are quickly altering that dynamic, and colleges and universities are already adopting special distance learning policies for ownership of lectures and other course materials.²⁰⁵

Holmes and Levin give a second reason for the “teacher exception.” As professors move from college to college, they need to be able to transport their knowledge.²⁰⁶ However, as the university becomes more commercialized, knowledge is commodified rather than individualized. The basis for the argument that institutions did not need ownership was that they had no reason to want the materials to be presented in a particular expression. However, with the advent of digital technologies and the sales of knowledge and expression, this may no longer be the case. This is already occurring, as in the case of the Harvard professor who decided to teach an online course for another university, and Harvard sued to prevent dilution of cultural capital (the idea of a Harvard professor).²⁰⁷ While not using copyright infringement as a justification, the example nevertheless points to the changing relationship of the professor to the more commercialized world in which universities find themselves.

Holmes and Levin’s third reason for the survival of the “teacher exception,” again a traditional reason given in case law, is that the institutions would have to *know* the content of the professor’s lectures in order to qualify under the *Reid* test.²⁰⁸ However, this is also antiquated. With fully wired classrooms all over the country, it would not be difficult for those lectures to be videotaped or digitally recorded, creating a fixed form of copyrightable expression, as well as serving as a monitoring device to satisfy university ownership.

The fourth reason Holmes and Levin give is that a professor’s lectures should be treated differently as “a unique kind of intellectual product.”²⁰⁹ As to the fifth reason, Holmes and Levin cite the Posner idea that applying “work-for-hire” to the scholar would “wreak havoc” on the system.²¹⁰ The system is already in great flux, and more havoc is expected. The

205. As would be expected, there are a myriad of people concerned with this.

206. See Holmes & Levin, *supra* note 1, at 186-87.

207. See Twigg, *infra* note 379.

208. See Holmes & Levin, *supra* note 1, at 187.

209. *Id.*

210. *Id.*

commercialization of the university is already underway, and with it, the change of standards, practices, and influences. Capitalism creates its own traditions.

Holmes and Levin's sixth reason, that "there is a lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production," may also have problems.²¹¹ Technology transfer offices, for instance, believe that profit for the individual professor and for his/her department is a great incentive for academic production. The sciences have been operating from this approach for many years; universities initially own patents professors acquire.

What is missing from their list is an important concept raised by Jon Garon, whose thoughts began this section. He writes, "[t]he reasons for providing a teacher's exception to the work-for-hire doctrine flow primarily from the desire to provide faculty sufficient autonomy from their employers."²¹² That aspect has completely disappeared, as university policies now dictate the ownership relationship between faculty and the university. If the university has a stake at potential profit and ownership, the university is more likely to take an interest in content and subject matter of projects. The scenario most feared by faculty is that eventually the university might begin dictating or censoring work, all for the sake of profit from ownership.

IV. NAVIGATING UNIVERSITY INTELLECTUAL PROPERTY POLICIES

This article has chronicled the commercial development in the university setting, particularly in the areas of patent and copyright. Then the article explained what items in the university are copyrightable, and the potential options of ownership under the 1976 Copyright Act. Next the article argued that the "teacher exception," which previously gave ownership to teachers as an exception to the work-for-hire doctrine, is now at the university's discretion, despite the fact that it had not been debated as part the copyright law revisions. The reason for the lack of debate is that the "teacher exception" was not at issue. As the *Williams* case in the midst of the revisions indicated, and Judge Posner reaffirmed in 1987, the "teacher exception" was widely accepted, despite the

211. *Id.*

212. Garon, *supra* note 35, at 152.

paucity of cases. The next section looks at how universities have implemented their power to determine ownership, looking specifically at a number of recent intellectual property policies.

This section looks at the current state of intellectual property from a number of vantage points. First, the work examines an innovative policy by the Consortium for Educational Technology for University Systems that seeks to unbundle copyright rights, claiming that ownership determination is not necessary. Then, the section turns to two more traditional policies, found at the University of Arizona and University of Iowa, based on the work-for-hire provision. Finally, it looks to Stanford University's policy whose language claims absolute ownership of faculty works. After viewing these three policies, the work then looks to two groups concerned with copyright policy in the university. One group outside the university, the American Association of University Professors; and the other, inside the university, the University of California Copyright Taskforce. The section then turns to two final university efforts to clarify copyright, one at Columbia University, and the other at the University of Texas, Austin, both of which show thoughtful consideration of the complex issues and conflicting interests.

A. THE CONSORTIUM - UNBUNDLING RIGHTS - A NEW APPROACH

The Consortium for Educational Technology for University Systems (CETUS) is one example of ways in which universities are trying to work out intellectual property policies that contend with new technology, the impact of commercialization in the university, and the place of the teacher/scholar/professor.²¹³ Comprised of three of the largest public institutions in the country, California State University System, State University System of New York, and City University of New York, CETUS put together a pamphlet/discussion series, *Ownership of New Works at the University: Unbundling of Rights and the Pursuit of Higher Education*.²¹⁴ CETUS was formed in July 1995 to pool

213. See Consortium for Education Technology for University Systems, *What is CETUS*, <http://www.cetus.org/cetusfct.html> (last visited September 2, 2002).

214. See Consortium for Educational Technology for University Systems, *OWNERSHIP OF NEW WORKS AT THE UNIVERSITY: UNBUNDLING OF RIGHTS AND THE PURSUIT OF HIGHER EDUCATION*, (1997), available at <http://www.cetus.org> (last visited Jan. 25, 2002) [hereinafter *OWNERSHIP OF NEW WORKS*]. About the CETUS's policy on ownership, The University of California's Taskforce on

resources and ideas in order to determine various intellectual property and other current technology-associated problems confronting universities and colleges today.

The Consortium wants to create a circular, rather than linear copyright relationship between the university and the author/faculty, creating interdependence and “ongoing mutual reinforcement of shared interests.”²¹⁵ The cycle has six steps:

1. the creative environment fosters work protected by copyright
2. the works are protected by copyright ownership
3. the benefits of authorship accrue to the creator/author
4. appropriate benefits of ownership also accrue to the institution
5. the institution fosters a creative/scholarly environment
6. the creative cycle can begin again²¹⁶

CETUS does not explicitly name the “teacher exception” to the work-for-hire doctrine, but CETUS does discuss the instability of the law. The pamphlet says:

Although the work-for-hire doctrine may be widely applied in the commercial environment, statutes and court rulings do not make clear whether creative or scholarly work by faculty members should be treated as work-for-hire. The law also does not make clear whether the work of research assistants, for example, would be work-for-hire.²¹⁷

The pamphlet suggests that a contract can clarify the uncertainty of law “or if the law produces an undesirable result.”²¹⁸

CETUS looks at three factors to determine not only copyright ownership, but also the allocation of rights: “1) the creative initiate for the new work; 2) the control of its contents; and 3) any extraordinary compensation or support provided by the university.”²¹⁹ The first factor, creative initiative, is to be presumed in favor of the author/faculty, with the burden placed on the university to “state the rights it wishes to exercise in the

Copyright noted that “The policies proposed and adopted on ownership are tailored to an institutional environment in which faculty are represented by collective bargaining units, but the discussion is useful and relevant to UC.” University of California, UNIVERSITYWIDE TASKFORCE ON COPYRIGHT: REPORT AND RECOMMENDATIONS (OCT. 1999), at *21, available at <http://www.ucop.edu/acadinit/copyright/reports/copyright-final.pdf> (last visited Jan. 25, 2002).

215. See OWNERSHIP OF NEW WORKS, *supra* note 214, at *7.

216. *Id.*

217. *Id.* at *9.

218. *Id.*

219. *Id.* at *17.

language of prior agreements, if any, to be proposed before the creative effort begins.”²²⁰ This is interesting. The traditional “teacher exception” applies, unless the university creates an agreement that changes the relationship from the start. Regarding the third factor, extraordinary compensation or support, the pamphlet admits that funding alone will not satisfy the work-for-hire doctrine and bring the employee’s work within the scope of employment or an independent contract. “Consequently, an ‘independent contractor’ may be paid for work, but that person is not an employee and will therefore probably be the copyright owner under the law.”²²¹ This is an important statement that admits that the substantial or extraordinary use of materials may not necessarily bring the copyrighted work under the work-for-hire doctrine. Many policies today distinguish substantial use or extraordinary use of materials as a reason for claiming ownership.

CETUS also advocates unbundling traditional copyright. Through standard licensing agreements, CETUS seeks to identify the competing rights and interests of the professors and the university to the copyrighted creative work and give both sides assurances. For instance, the faculty/author would be able to, without obtaining permission from the university-owner: reproduce the work in teaching and scholarship, use portions of the work in compilations, make derivative works, update the work, and use the work with a new employer. The standard licensing language was written in 1995. If the text were written today, it may not be so generous in its philosophy. When the work is owned by the creator, the university might want non-exclusive licenses to use the work within the university system, and the right to control whether the university’s name is placed on the work. What is strange is the recognition that under the law, the owner controls all of these determinations, and that without clear-cut ownership, none of these allocations seem possible, even by contract. The other question is why one side would want the other to have rights to something they do not own. In the case of the university-owner, it appears that this is a way to keep the teacher-exception in place (and not stir up too much animosity), while actually owning and controlling the work.

These rules go toward the traditional arenas of faculty

220. *Id.* at *18.

221. *Id.* at *19.

ownership; the pamphlet specifically makes clear that administrative work by faculty are the property of the institution, regardless of the factors test.

Nevertheless, in the spirit of ‘unbundling’ of rights we espouse here, the university may own the copyright, but the professor(s) who created it should have rights to use the content in other contexts, particularly future projects of a similar nature,²²² or to incorporate the content into scholarly studies or instruction.

Through license agreements, reproduction, use, and control, the copyrighted work is maximized for “the mutual benefit of the . . . other members of the university community.”²²³ This seems strikingly similar to the view of a technology transfer office, which handles the licensing of patents. In this scheme, copyrights would be handled in a similar matter, with the university helping to license copyrighted works. CETUS gives the example of licensing particular rights to a publisher rather than assigning all rights, as is traditionally done, thereby allowing the retention of the rights to “reproduce and distribute the work for educational and research purposes throughout at least the home campus,” as well as the professor’s right to develop derivative works.²²⁴

As an example, CETUS acknowledges that while departments may be asking faculty to create web sites, the actual content is left up to the individual instructor: “The extent to which an individual faculty member contributes to the course materials will weigh in favor of the faculty member’s ownership of copyright.”²²⁵ CETUS also acknowledges that while course syllabi are developed to be consistent with course catalogue descriptions, the actual scope and content of a particular course is usually left up to the faculty member.²²⁶ Generally, if the materials are circulated only to the students or university officials, the faculty member has retained “complete control over creation, modification, and even access to the materials. This level of control helps strengthen the professor’s rights.”²²⁷ However, if a professor distributes the materials at a conference or puts the work on the Internet, then the professor has far less control over the materials, because he has “increased the opportunities for others to build upon those

222. *Id.* at *17.

223. *Id.* at *20.

224. *Id.*

225. *Id.* at *24.

226. *Id.*

227. *Id.* at *25.

creative works.”²²⁸ The control factor under this plan seems to miss the point: publishing the materials on the Internet should not change the outcome of the control factor test. If the professor owns the copyright on her syllabus when she passes it out to the class on the first day, she owns all of the bundle of rights associated with copyright, including the right to distribute, perform publicly, reproduce, and make derivative works. Placing the work in a particular medium should not alter or lessen a copyright owner’s rights; in fact, the objective of copyright is to give incentive for “authors” to create and distribute works for the public’s benefit and education, as stated in the copyright clause in the U.S. Constitution.²²⁹ But like the University of Arizona policy that distinguishes works by the form they take, the CETUS policy distinguishes works based on what right from the copyright has been used – namely distribution – to change the nature of the ownership in the work itself.

Finally, with regard to traditional areas of scholarly work—in this case journal articles—CETUS suggests that the university does have “a strong interest in how the faculty member chooses to manage the ownership of that copyright.”²³⁰ There is an almost paternalistic tone, where CETUS explains that professors assign copyright to publishers “leaving that professor unable even to use his own work in future research and teaching without permission from the publisher.”²³¹ To combat that, the university “may assert a ‘shop right’ that would require the professor to retain rights to use the article for teaching and research by that professor and by all colleagues at that university.”²³²

CETUS is only one example of the innovations in intellectual property (IP) policies that are being thought of around the country, as universities, now in the driver’s seat, navigate traditional notions of faculty ownership of their works, which are increasingly collaborative works in digital and electronic spaces, and the economic incentives that might be derived from the creativity at the university.

228. *Id.*

229. U.S. CONST. art. I, § 8, cl. 8: “Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.”

230. See OWNERSHIP OF NEW WORKS, *supra* note 214, at *29.

231. *Id.*

232. *Id.*

The National Education Association (NEA), for example, seems to support doling out rights to both universities and faculty, particularly in relation to distance learning. Faculty own their originally produced materials and are able to take all materials they create with them, should they move to another college, even if the materials are used in a courseware product.²³³ The college owns the courseware product itself, and is free to use the materials. The faculty member has right of first refusal to teach the course, and faculty share in the revenue. The NEA sees this resolution as an example of successful collective bargaining.

B. THE UNIVERSITY OF ARIZONA

University of Arizona exemplifies a trend toward universities encroaching on ownership rights in the electronic arena, but so far maintaining a teacher exception on traditional works in non-electronic form. The IP policy produced at the Regents level provides a good example of a number of policies across the country. Like many universities around the country, University of Arizona, Arizona State University, and Northern Arizona University are governed by one state Board of Regents.²³⁴ In 1999, the Arizona Board of Regents adopted a new Intellectual Property Policy that blends traditional “teacher exception” values with the *Weinstein* ideas that collaboration falls under the ownership of the university. In the new policy, an uncertain space of copyright ownership is saved for new technology and economic gains of works created in electronic spheres.

The new policy has been embroiled in controversy, in part because of how the new policy was created. According to Distinguished Professor and Chair of the Faculty Jerrold E. Hogle, the new policy was created without input from the Faculty Senate or any other faculty-centered group.²³⁵ Instead, business and university attorneys created a policy that was

233. Cynthia Chmielewski, *News: Rights Watch—Protecting Your Intellectual Property Rights Online*, NEA TodayOnline, available at <http://www.nea.org/neatoday/0010/rights.html> (last visited Sept. 14, 2002). Chmielewski works at the Office of General Counsel for the National Education Association.

234. The official intellectual property policy of University of Arizona is governed by 6-908 of Arizona Board of Regents Policy Manual (last revised Sept. 1999).

235. Personal interview with Jerrold E. Hogle, Chair of the Faculty, University of Arizona, (Apr. 19, 2001).

adopted by the Board of Regents. The rationale Professor Hogle gave for this was that going through the regular channels of faculty committees would have taken too long, and might have jeopardized business relations with the university.²³⁶ Professor Hogle commented that the Faculty Senate should have been able to review the policy and make recommendations, even if those recommendations were ignored, as that is part of the Faculty Senate's duties and responsibilities.²³⁷ The policy itself does not appear radical. If anything, the policy remains vague regarding technology-based faculty creations.

The policy boldly declares: "Federal and state law provide for Board ownership of intellectual property created by university employees . . . [t]his policy covers all forms of legally recognized 'Intellectual Property'. . . ."²³⁸ The Board, overseeing the university, owns all university employee-created intellectual property.²³⁹ In the case of copyright, the policy defines the scope of university ownership to include, but not be limited to:

- a) scholarly works (e.g. textbooks, class notes, research monographs and articles, publications, instructional materials, and research materials);
- b) creative/artistic works (e.g. music, art, dance, architecture, sculpture, poetry, fiction, and film);
- c) copyrightable software (commercial as well as academic or research);
- d) other developing areas, including but not limited to multimedia works, and various other forms of electronic communications, including media used for distance learning; and
- e) mask works.²⁴⁰

Also included as part of the Board's domain of intellectual property are various forms of data: "All data are considered to

236. *Id.*

237. *Id.*

238. ARIZONA BOARD OF REGENTS INTELLECTUAL PROPERTY POLICY MANUAL, 6-908(B) [hereinafter ABOR].

239. *See id.* The purpose statement continues: "Each university may patent, register, market, and license intellectual property using its own resources or through one or more intellectual property management organizations." *Id.* The policy then discusses how net income will be divided. "This policy provides universities the discretion to retain ownership in intellectual property, or to enter into agreements with industry sponsors to grant exclusive or non-exclusive licenses, or, when appropriate, to assign title to intellectual property." *Id.*

240. *Id.* at 6-908B(2).

be subject to this policy, as intellectual property is often present in data that are generated during research at the university. Data shall include but not be limited to: a) lab notes, results of analyses, etc.; b) research notes, research data reports and research notebooks, etc.”²⁴¹ At first, this looks as if the Regents have claimed ownership over all intellectual property, including spaces traditionally occupied by the “teacher exception,” including textbook, research notes, and creative/artistic works. However, the policy exempts university ownership of these works.

What the Regents do claim ownership to are sponsor-supported projects, university-assigned projects, and university-assisted projects.²⁴² Sponsor-supported include funds from non-university entities, generally for the science side of the campus.²⁴³ University-assigned projects are defined as intellectual property “developed as a result of employee work performed in the course and scope of employment,” which the Board owns.²⁴⁴ The policy defines “course and scope of employment” to include “any activity that is listed or described in the employee’s job description or is within the employee’s field of employment, including research, instruction, or other activities assigned to the employee that involve the creation of Intellectual Property.”²⁴⁵ The policy explicitly states that “[c]opyrightable works . . . are considered to be works made for hire under U.S. Copyright Law, with ownership vested in the Board.”²⁴⁶ This seems to indicate the “teacher exception” has disappeared, since it explicitly names research and teaching activities.

The third category is university-assisted projects.²⁴⁷ These projects are developed by university employees and “make significant use of university resources.”²⁴⁸ The policy notes that “the Board does not construe the use of office space, library resources, personal workstations, or personal computers as constituting significant use of university resources.”²⁴⁹ In this

241. *Id.* at 6-908B(5).

242. *Id.* at 6-908C.

243. *Id.*

244. *Id.* at 6-908C(2).

245. *Id.*

246. *Id.*

247. *Id.* at 6-908C(3).

248. *Id.*

249. *Id.* Interestingly, in the interview with Professor Hogle, he did believe that using these sorts of university materials constituted university-assisted

way, the policy is following the traditional distinctions set out in case law, and in particular, in the Seventh Circuit cases. The policy goes on to describe more fully “significant use” as:

use of research funding, use of funding allocated by asynchronous or distance learning programs, use of university-paid time within employment period; assistance of support staff; use of telecommunication services; use of university central computing resources; use of instructional design or media production services; access to and use of research equipment and facilities, or production facilities.²⁵⁰

In this way, the policy resembles the Consortium’s policy, in that using additional resources or creating a collaborated work awards ownership of the work to the university. The difference is that the university claims ownership from the outset, and now groups ownership into categories.

The fourth category is employee-*excluded* works.

[T]he Board *releases* to the creator all ownership of Intellectual Property in the following categories of work, subject to contractual rights of Sponsors:

- a) *traditional publications* in academia, including scholarly works, textbooks, and course notes
- b) artistic works (music, dance, film, etc.)
- c) academic software (not for commercial application)
- d) student works (the student owns his/her works, unless the student is a university employee and the work is part of his/her employment, or the student makes significant use of university resources, or the student’s work is part of a Sponsor-supported project. Student works are not subject to revenue sharing described above.)
- e) *electronic publications*, including on-line courses will be reviewed on a case-by-case basis.²⁵¹

A number of things are interesting about this policy. First, the Board has gone out of its way to assert its legal right to ownership of *all* intellectual property. Second, the Board has not used the “individual” versus “collaborative” distinction for its policy. Instead, the Board asserts its rights on everything, in all categories, and then provides exceptions.

As to the exceptions themselves, the wording in the first exception is interesting: “traditional publications in academia.” Does this mean it excludes non-traditional publication arenas, such as internet or other new forms of publication? What they

projects, particularly when additional resources such as travel grants and research assistants were included. Hogle interview *supra* note 235.

250. ABOR, *supra* note 238 at 6-908C(3).

251. *Id.* at 6-908C(4) (emphasis added).

are releasing are traditional categories where the courts have found professors to hold the copyright, that is, lecture notes, (*Williams, Abernethy, Caird*) articles (*Weinstein*) and scholarly works and textbooks (*Sherril, Hayes*). The second exception of artistic works recalls the *Weinstein* opinion, in which Judge Easterbrook wrote, “[w]hen Saul Bellows, a professor at University of Chicago, writes a novel, he may keep the royalties.”²⁵²

The fifth exception, regarding electronic publications, is *not* an exception, but a wait-and-see space. Unlike the Consortium that gave ownership of web sites created on faculty’s own initiative without additional compensation to faculty, the Arizona Board of Regents policy leaves the ownership question unanswered. While projects using university office equipment and the library are not to be construed as university-assisted, the universities have also claimed ownership to all intellectual property. This implies that until a decision is made in favor of the faculty, the university owns electronic publications, merely because it is not within the traditional forms of academic communication. The Board is maneuvering for the future, waiting to see what happens, unwilling to give up ownership on potentially lucrative electronic publications. Recall that the policy reserves the rights of “on-line courses” for case-by-case determination.²⁵³

Nick Goodman of the University of Arizona Attorney’s Office, said the University has been working on a policy that would set clear standards.²⁵⁴ In general, he said the policy would address electronic publications, software, and other digital creations (including websites). Currently, the line between faculty and university ownership depends on the resources used, consistent with the current ABOR IP policy. He asserted that if there is any *significant* use of resources (the multimedia lab, for instance) for the creation of work *beyond*

252. *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987) (*citing* M. Nimmer, NIMMER ON COPYRIGHT, § 5.03[B][1][b] (1978 ed.)).

253. ABOR, *supra* note 238 at 6-908C(4).

254. Personal interview with Nick Goodman, Intellectual Property Attorney, University Attorney’s Office, University of Arizona, (Apr. 25, 2001). I sat down and talked about the policy with Nick Goodman, who is from the University Attorney’s office and one of the principal drafters of the policies. He talked about the history of the drafting of the policy, and the meaning of the IP policy in practical terms. He discussed the process of the drafting, which included input from IP committees from each of the three universities, and input from local businesses, particularly on the sponsor-patent type projects. He said that the whole process took close to three years.

the desktop computer and standard office staff, the university will take an interest and claim ownership. However, as the current Arizona Board of Regents IP policy indicates, even then the claim of ownership has exceptions, including academic software. Goodman explained that categories like these give the university and faculty room to define software as academic (therefore the university does not have an interest in it), and is particularly useful when there is no commercial or economic advantage to university ownership.

Another interesting aspect of the policy is that creators “must disclose any intellectual property . . . in which the Board or Sponsor may have an interest.”²⁵⁵ An attorney in the Technology Transfer Office said his office follows a “don’t ask, don’t tell policy.” The university does not have the staff to police copyright ownership at the university. Moreover, there is still little economic incentive for such policing. At the University of Arizona, however, a number of committees are exploring distance learning and online class policies.²⁵⁶ Universities have traditionally claimed ownership in materials, but have not enforced their ownership rights.²⁵⁷

C. THE UNIVERSITY OF IOWA

The University of Iowa summarizes the two approaches presented above, recognizing these as the two major strands of ownership theory.²⁵⁸ The policy begins by quoting the University of Iowa Operations Manual laying out the ownership parameters:

[e]xcept as provided in V-31-3, textbooks and other products of teaching, research, scholarship, and artistic endeavors *belong to the faculty* or staff member when the product is not the result of a specific assignment or commission and where there is no substantial University contribution or support beyond the salary, developmental assignment, services, and facilities (including libraries and laboratories) customarily provided to faculty in the respective discipline and University unit.²⁵⁹

255. ABOR, *supra* note 238 at 6-908D(1).

256. Hogle interview *supra* note 235; Interview with Andrew Silverman, Joseph M. Livermore Professor of Law, University of Arizona, James E. Rogers College of Law (Apr. 20, 2001).

257. Robert Gorman, *Intellectual Property: The Rights of Faculty as Creators and Users*, ACADEME, May/June 1998, at 15.

258. University of Iowa, *Faculty or University Ownership of Course Materials*, at <http://twist.lib.uiowa.edu/resources/fairuse/ownership.html> (last visited Jan. 16, 2003).

259. *Id.* (emphasis added).

If this statement does not make it clear that the University of Iowa is not claiming ownership in course materials, the next sentence makes it explicit: “[h]owever, other universities have made claims of ownership of course-related materials developed by faculty.”²⁶⁰ The University of Iowa also notes that CETUS “suggests that university ownership of intellectual property does not have to be an ‘all-or-nothing proposition’ and that the ‘unbundling’ of intellectual property rights may best serve the university community.”²⁶¹ University of Iowa, therefore, is currently giving ownership to faculty in traditional materials and in their course materials, but recognizing the possibilities of what others are doing.

D. STANFORD UNIVERSITY

Stanford’s policy contains problems similar to those in policies like the Arizona Regent’s policy. Their policy states: “[i]n accord with academic tradition, except to the extent set forth in this policy, Stanford does not claim ownership to pedagogical, scholarly, or artistic works, regardless of their form of expression.”²⁶² Ownership of lecture and other teaching materials is not addressed. “The University claims no ownership of popular nonfiction, novels, textbooks, poems, musical compositions, unpatentable software, or other works of artistic imagination which are not institutional works and did not make significant use of University resources or the services of University non-faculty employees working within the scope of their employment.”²⁶³ Nor do lecture and course materials appear under the category of institutional works. The only possible mention could be under the category of “Videotaping and Related Classroom Technology,” the first line of which reads: “[c]ourses taught and courseware developed for teaching at Stanford belong to Stanford.”²⁶⁴ Scholars are also required to sign a “Patent and Copyright Agreement for Stanford Personnel,” which reads in part:

Stanford policy states that all rights in copyright shall remain with the creator unless the work: (a) is a work-for-hire (and copyright therefore vests in the University under copyright law), (b) is

260. *Id.*

261. *Id.* (quotes in original).

262. Stanford University, *Copyright Policy (RPH 5.2)*, at <http://www.stanford.edu/dept/DoR/rph/5-2.html>. (last visited Jan. 16, 2003).

263. *Id.* Why the adjective “popular” is added to nonfiction is unclear, especially since most scholarship does not become “popular.”

264. *Id.*

supported by a direct allocation of funds through the University for the pursuit of a specific project, (c) is commissioned by the University, or (d) is otherwise subject to contractual obligations.²⁶⁵

Why lecture materials, but not works of scholarship or other nonfiction works would fall under the work-for-hire exemption, is unclear.

E. THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

The American Association of University Professors' (AAUP) position on copyright came out of a Special Committee on Distance Education established in June 1998.²⁶⁶ A year later, they released statements on distance learning and copyright protection.²⁶⁷ This was the first intellectual property policy the AAUP produced since their 1915 foundation.²⁶⁸ The AAUP policy reflects the current debate and includes views of different constituencies within the AAUP.²⁶⁹

The AAUP began their Statement on Copyright with the United States Constitution copyright clause's objective "to promote the progress of science and useful arts."²⁷⁰ Institutions of higher learning should interpret the clause and subsequent copyright laws to "encourage the discovery of new knowledge and its dissemination to students, to the profession and to the public."²⁷¹ While not naming the "teacher exception" as such, the Copyright Statement explains that "it has been the prevailing academic practice to treat faculty members as the copyright owner [sic] of works that are created independently

265. Stanford University, *Patent and Copyright Agreement for Stanford Personnel*, at <http://www.stanford.edu/dept/DoR/rph/su18.html> (last visited Jan. 16, 2003).

266. AAUP, *Committee R on Government Relationship; Report on Distance Learning*, at <http://www.aaup.org/Issues/DistanceEd/Archives/dlreport.htm>. (last visited Sept. 1, 2002). See also, AAUP, *Statement on Distance Education*, at <http://www.aaup.org/statements/Redbook/StDistEd.HTM> (last visited Jan. 16, 2003); AAUP, *Statement on Copyright*, at <http://www.aaup.org/statements/Redbook/Spccopyr.htm> (last visited Jan. 16, 2003).

267. *Id.*

268. Mark F. Smith, *Intellectual Property and the AAUP*, 88 ACADEME, Sept.–Oct. 2002, at 39.

269. *Id.* at 41. Included are the views of the "standing committees on accreditation, government relations, and academic freedom, and the teaching committee's subcommittee on the use of technology in college and university instruction . . . [and] the staff director of a collective bargaining chapter." *Id.*

270. AAUP, *Statement on Copyright*, *supra* note 266.

271. *Id.* The Statement on Copyright cites the AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* as reflecting this mission.

and at the faculty member's own initiative for traditional academic purposes."²⁷² This includes "class notes and syllabi, books and articles, works of fiction and nonfiction, poems and dramatic works, musical and choreographic works, pictorial, graphic, and sculptural works, and educational software, commonly known as 'courseware.'"²⁷³ This statement merged the property discussed in cases (class notes, articles, and fiction) with the non-exclusive list of materials found in the Copyright Act itself.²⁷⁴ The Copyright Statement notes that faculty ownership has traditionally disregarded the *form* of the work; that is, whether the form is traditional, audiovisual, or electronic, faculty members have historically been treated as the owners of those copyrights.²⁷⁵

The Copyright Statement explores three scenarios of ownership in the university context. Some institutions have handbooks that *assign* copyright from the faculty to the university. This is distinct from policies in which the university initially owns the copyright. The AAUP statement notes the initial faculty owner must assign over her rights *in writing* to the university for the assignment to be legal.²⁷⁶ The writing requirement of a valid transfer is satisfied by a faculty "condition of employment, [to] sign a faculty handbook which purports to vest in the institution the ownership of all works created by the faculty member for an indefinite future."²⁷⁷ The assignment scenario could be initiated either because the university fears the teacher is the original owner, or believes the work may fall under the independent contractor's commissioned works categories of the Copyright Act.

One lawyer advocating the assignment approach (described above in the AAUP's Statement of Copyright) is Clark Shore, Assistant General Attorney for the State of Washington, who made a presentation at the Association of Research Library's Copyright and Leadership Workshop in the mid-1990s.²⁷⁸ Clark

272. *Id.*

273. *Id.*

274. 17 U.S.C. § 102(a) (2000) protects "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."

275. AAUP, *Statement on Copyright*, *supra* note 266.

276. *Id.* See also 17 U.S.C. § 201(d) (2000).

277. AAUP, *Statement on Copyright*, *supra* note 266.

278. Clark Shore, "Ownership of Faculty Works and University Copyright

Shore's article, "Ownership of Faculty Works and University Copyright Policies," published in ALR, reflects the power universities have through their policies to determine ownership.²⁷⁹ According to Shore, the work-for-hire doctrine would not be well-received by faculty if the university suddenly claimed ownership to all traditional and non-traditional forms of writings. Instead, Shore advocated an employment contract requiring assignment of copyright to the university "when the determination has been made that the university has an interest in the work."²⁸⁰ The determination would be made and policies implemented by a new administrative office: the University Copyright Office. A threshold would be established beyond which faculty would be required to report "any copyrightable work of potential commercial value."²⁸¹ If the university became interested, the faculty and university would enter into an agreement (if written assignment of copyright was necessary), or the university would claim its rights under the work-for-hire doctrine (if the work fell within that framework). "In cases where the parties agree the work is not a work for hire, a simple assignment of copyright interests will

Policy," 189 ALR: A BIMONTHLY NEWSLETTER OF RESEARCH LIBRARY ISSUES AND ACTIONS 2 (Dec. 1996) available at

<http://www.alr.org/newsltr/189/owner.html> (last visited Jan. 29, 2003). Shore presented a more extended version of this paper at the ALR Copyright and Leadership Workshop in Seattle, Washington. He argued that:

[a] university policy concerning copyright interests in faculty works should address at least the following issues: (1) whether the university will assert an ownership interest in some faculty works, and, if so, which ones; (2) the means by which the university will obtain an ownership interest in those faculty works not considered works for hire; and (3) the process by which determinations of institutional interest will be made.

Id. Shore noted that the class approach reduces the burden on the administration making individual determinations. *See id.* Shore explained that the general factors approach, used at many universities, involves five factors:

(1) the extent to which institutional resources were used in preparing the work; (2) the commercial character of the work; (3) the utilitarian (as opposed to purely scholarly or aesthetic) character of the work; (4) the connection between the work and the faculty member's job responsibilities; (5) the concern to avoid disputes within the university community.

Id. Shore noted that these considerations parallel the statutory balancing test of the fair use doctrine. *See id.*

279. *Id.*

280. AAUP, *Statement on Copyright*, *supra* note 266.

281. *Id.*

suffice.”²⁸² Three things come to mind. First, there is no indication that the university is *doing* anything to receive this assignment, even registering the copyright. Second, this policy would encourage faculty *not* to pursue commercial projects so as to have no interference from the university. Third, by assigning rights to the university, the faculty member no longer controls the elements of copyright she might deem important: making derivative works, controlling publication, etc.—all of the rights connected to a copyrighted work that the AAUP are concerned in protecting.

Returning to the AAUP’s ownership categories, the “work-for-hire” scenario makes the institution the initial owner. The Copyright Statement focuses on defining the concept of “scope of employment”—a key component in determining whether the work is the legal property of the employer.²⁸³ The Copyright Statement first reiterates the traditional elements of the scope of employment, as described in *Reid*,²⁸⁴ including the content of the work being under the direction, control, design and supervision of the employer.²⁸⁵ The committee contrasted this with academic work explaining, “[i]n the case of traditional academic works, however, the faculty member, rather than the institution determines the subject matter, the intellectual approach and the direction, and the conclusions, . . . the very essence of academic freedom.”²⁸⁶ The committee also explained the danger in an institution owning the materials because:

[The institution] would have the powers, for example, to decide where the work is to be published, to edit and otherwise revise it, to prepare derivative works based thereon (such as translations, abridgements, and literary, musical, or artistic variations), and indeed to censor and forbid dissemination of the work altogether. Such powers, so deeply inconsistent with fundamental principles of academic freedom, cannot rest with the institution.²⁸⁷

These are now familiar arguments. Corynne McSherry, in her recently published work, *Who Owns Academic Work*,²⁸⁸ seems to have missed this point entirely, though she quotes the same material. McSherry appears to not understand why a policy that determined electronic ownership on a case-by-case

282. *Id.*

283. *Id.*

284. *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

285. AAUP, *Statement on Copyright*, *supra* note 266.

286. *Id.*

287. *Id.*

288. McSherry, *supra* note 1, at 102.

basis would be objectionable to faculty. McSherry begins by relating the experience of a draft report on copyright prepared by the “University of the West”²⁸⁹ being circulated in September 1998—only four months after the AAUP’s statement. McSherry writes that the report contained “a set of fairly noncontroversial recommendations,” which were objectionable “from faculty associations, technology transfer managers, and research administrators,” with the criticism “going so far as to suggest that the committee was too responsive to the administration and insufficiently committed to scholarship, creativity, and academic freedom.”²⁹⁰ According to McSherry, the committee failed to define ownership of copyright materials as a stable category a failure also present in the Regents of Arizona policy. Under the Regents of Arizona’s policy, ownership (on a work-for-hire basis) on electronic forms of academic work would be decided on a case-by-case basis. At the University of the West, according to McSherry, “class materials and lectures might not always fall into the category of ‘works of scholarship,’”—the category of faculty-owned material.²⁹¹

While McSherry admits that these sites of conflict are increasing, with “faculty copyrights . . . being construed as badges of autonomy, independence, and control,” she quickly explains that “University administrators across the country . . . are observing the institutional investment and profit potential in Internet-based education tools and software developed by faculty and students under university auspices, and are themselves moving to assert copyright ownership of some teaching materials.”²⁹² Profit drives the policy, riding the argument that *libraries* need money for increased journal prices. McSherry admits that faculty are suspicious of the new relationships between universities and for-profit “learning corporations,”²⁹³ and takes the argument to the realm of commodification: “activists warn faculty that they must carefully guard their copyrights if they wish to stave off commodification of education and the proletarianization of the

289. *Id.* (giving *no citation* to the draft and disguises the University of California with a fictional name, University of the West).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 103.

professoriate.”²⁹⁴ Still no mention for the concerns the AAUP noted – that by placing ownership in the hands of the university, academic freedom and the nature of the profession is at risk. Instead, McSherry believes that faculty want to be seen as “arbiters of true and valuable knowledge . . . [a position that] depends on the location of academia outside the realm of commodity production and circulation,” and she sees a conflict in faculty owning their own works, because they are part of the commodified system. She does *not* acknowledge that *someone* owns the material, and with ownership comes *control* to create and disseminate ideas.

McSherry does not explain why faculty should be treated as knowledge owners rather than as knowledge workers, believing that faculty are only interested in ownership to keep their “monopoly of competence” in “cognitive property” in order to “control a market for their expertise,” and fear that their positions would be “downgrade[d] to that of an ordinary staff member.”²⁹⁵ Finally, in response to the AAUP’s concerns over a “work-for-hire” doctrine being applied to faculty work, and their fear that “such powers [are] deeply inconsistent with the fundamental principles of academic freedom”²⁹⁶ McSherry responds: “[b]ut if there is something offensive about an institution controlling the dissemination of a work (including, by implication, its commercialization), it is not clear that there is anything inherently less offensive about an individual professor being able to do so.”²⁹⁷ She bases this opinion on her belief that “professors are supposed to be producing gifts, not commodities, and scholarship is supposed to be ‘disinterested.’”²⁹⁸ However, professors live in a market economy, where their works are commodities, and as the last thirty years of cultural and literary theory have shown, scholarship can never come from a *disinterested* space.

The AAUP’s Statement on Copyright continues, explaining there are some instances, as in the Arizona Regents policy, where the university does have a legitimate claim in ownership. These are works where the university “provides the specific authorization or supervision of the preparation of the work,” with examples like “reports prepared by a dean or by the

294. *Id.*

295. *Id.* at 108-9.

296. *Id.* at 110 (quoting AAUP, *Statement on Copyright*).

297. *Id.*

298. *Id.*

chair or members of a faculty committee, or college promotional brochures prepared by a director of admissions.”²⁹⁹

The AAUP also sees a fourth type of ownership, situations where joint authorship between the university and the faculty member may be appropriate, where both share the copyright. “New instructional technologies” is a particular place this might apply, with content from faculty and technology from the university.³⁰⁰ The question of joint authorship qualifications under the copyright law, however, requires that each author contribute creatively.³⁰¹ In some scenarios the university’s involvement will not rise to “authorship.”³⁰² The statement explains:

On the one hand, the institution may simply supply “delivery mechanisms,” such as videotaping, editing, and marketing services; in such a situation, it is very unlikely that the institution will be regarded as having contributed the kind of “authorship” that is necessary for a “joint work” that automatically entitles it to a share in the copyright ownership. On the other hand, the institution may, through its administrators and staff, effectively determine or contribute to such detailed matters as substantive coverage, creative graphic elements, and the like; in such a situation, the institution has a stronger claim to co-ownership rights.³⁰³

This is a very different approach. At some universities, the dividing point is the amount of additional resources the faculty member uses for the project. The faculty member loses his ownership rights because he has used additional university resources; thereby, under a work-for-hire scenario, the university reclaims ownership. This is problematic as the university, in disclaiming ownership, must make that assignment in writing. Instead, the AAUP turns the burden back to the university, to show that the university has

299. *Id.* Another situation is a work specifically commissioned in writing and falling outside “the normal scope of [a] person’s employment duties.” *Id.* Thus the nine enumerated categories of commissioned works, an area often overlooked in the discussion of faculty/university ownership. *See id.* The third situation is described as contractual transfers, where, like in the Arizona Regent’s IP policy, the work is connected to an outside sponsor and licensing arrangements have been made. *See id.* The statement adds, “Similarly, the college or university may reasonably request that the faculty member—when entering into an agreement granting the copyright or publishing rights to a third party—make efforts to reserve to the institution the right to use the work in its internally administered programs of teaching, research, and public service on a perpetual, royalty-free, nonexclusive basis.” *Id.*

300. *Id.*

301. *Id.* *See also* 17 U.S.C. § 101.

302. AAUP, *Statement on Copyright*, *supra* note 266.

303. *Id.*

contributed *enough authorship* to be included as a *joint author*. At no time does the faculty member lose the ownership of his syllabi, lecture notes, or other materials because they have been put into a new form requiring additional resources from the university. Alternatively, a university might be “compensated with royalties commensurate with its investment” or be given “some sort of implied royalty-free ‘license to use’ the copyrighted work.”³⁰⁴

The statement ends with a list of items a faculty member may do, in the event that the university *does* claim ownership, either in a traditional or more technological setting:

Conversely, where the institution holds all or part of the copyright, the faculty member should, at a minimum, retain the right to take credit for creative contributions, to reproduce the work for his or her instructional purposes, and to incorporate the work in future scholarly works authored by that faculty member. In the context of distance-education courseware, the faculty member should also be given rights in connection with its future uses, not only through compensation but also through the right of “first refusal” in making the new version or at least the right to be consulted in good faith on reuse and revisions.³⁰⁵

F. UNIVERSITY OF CALIFORNIA COPYRIGHT TASKFORCE

In the last several decades, universities have become increasingly linked to commercial, governmental, and civil organizations and authorities. As a result, universities are directly affected by the growing commercialization of copyrighted and copyrightable works. At the same time digital technologies are making possible the creation of new genres of works never before imagined. . .

Introduction, in UC, Universitywide Taskforce on Copyright³⁰⁶

While the UC copyright policy has not changed since 1992, a Copyright Task Force was developed for the UC system, with the committee meeting from November 1997 to April 1998, “working in parallel with the Library Planning and Action Initiative Task Force.”³⁰⁷ In the introduction to *Universitywide*

304. *Id.*

305. *Id.*

306. UC Taskforce on Copyright, *supra* note 29.

307. *Id.* at “Copyright Task Force.” The copyright task force included Michael Tanner, Chair; Peter Berck; John Canny; Mary Corey (by phone); Suzanne Henry; Richard Lucier; Mark Rose; Pamela Samuelson; Kevin Smith;

Task Force on Copyright: Report and Recommendations, the executive summary asserts, "The University should reaffirm the policy that a faculty member owns his or her scholarly and aesthetic works."³⁰⁸ The report advocates that the University of California "clarify its commitment to this tradition and reassure those who fear that it may lay claim to individual faculty works of authorship."³⁰⁹ In "Ownership, Partnership, and Management," the Report explains that "[t]he University and its faculty are partners in the academic mission of creating and disseminating knowledge."³¹⁰ The report continues: "However, the Task Force urges a wide ranging discussion of the opportunities that might occasionally make voluntary departures from this norm desirable."³¹¹ The report gives one factual scenario and two hypotheticals. The factual scenario concerns the digital recording of faculty lectures, and the unauthorized selling of the recording to third parties. The question arises whether the faculty or the university owns the lecture, creating a further responsibility to sue for infringement. The second scenario concerns the fear that administrators are claiming ownership to syllabi and course materials in order to create and sell courseware packages in a commercial setting, "without the permission or participation of the faculty member who created the course."³¹² The third scenario reverses the second, with the administrators fearing that faculty members will package and sell their own syllabi and course material.³¹³ The Task Force believes all three scenarios are unacceptable and, like the AAUP, that partnerships and alternatives must be formed.³¹⁴ They do not

Corynne McSherry (graduate student researcher); Martha Winnacker, Jeffrey Cole; Stuart Lynn; and Irwin Sherman. *Draft University of California Task Force on Copyright Meeting*, January 26, 1998, Minutes, <http://www.ucop.edu/acadinit/copyright/minutes/min012698.html> (last visited Sept. 1, 2002).

308. UC Taskforce on Copyright, *supra* note 29 at "Executive Summary."

309. *Id.* at 5.

310. *Id.* at 11.

311. *Id.*

312. *Id.* at 12. See also David F. Noble, *Digital Diploma Mills: The Automation of Higher Education*, Oct. 1997, at <http://www.uwo.ca/uwofa/articles/noble.html> (last visited Sept. 1, 2002), where he examines the current secret deals created at UCLA extension.

313. UC Taskforce on Copyright, *supra* note 29, at 14. This is similar to the Arthur Miller example at Harvard University, where Harvard protested Miller filming lectures for an online law school.

314. *Id.*

recommend a blanket policy, but suggest “short term case-by-case contracts to experiment with the consequences of differing allocation of rights. Contracts could, for example, make available instructional development or media resources in exchange for vesting all or part of copyright rights in the institution.”³¹⁵ This statement seems to suggest that additional resources might prompt a copyright contract with an institution, with the faculty-author then negotiating, perhaps for the right to make derivative rights, or the right to continue using the material after moving to a different university. It also implies that the university would not claim the work under a work-for-hire doctrine, but would negotiate a joint authorship or assignment of copyright from the faculty-author. The report reiterates that while it will take time to experiment, “UC should relieve anxiety by asserting that it will protect both institutional and individual interests related to classroom lectures and recorded collaborative works by faculty and students.”³¹⁶

The executive summary also recommends that “UC should provide copyright education and services on every campus,” and would include both education on how to comply with copyright laws when using others’ materials, as well as “how to exercise the rights of copyright owners in ways that promote the dissemination of knowledge.”³¹⁷ The executive summary continues: “Such information should include case studies and model contracts that demonstrate how collaborative works and assignment of copyrights to third parties may be managed to protect the integrity of works and ensure that they are freely accessible for teaching and research.”³¹⁸

The Introduction immediately addresses the concern that ownership is linked to continued creative and scholarly works, but also notes that without clear ownership, commercial ventures also cannot go forward.³¹⁹ The report also notes that previously the UC system had a central Copyright, Patent and Trademark office, but today “there is no systematic support for management of or education about such copyrightable works as

315. *Id.* at 14.

316. *Id.* The report also points to the 1995 Workgroup on the Commercialization of Lecture Materials for notes regarding the allocation of rights for lectures.

317. *Id.* at “Executive Summary,” No. 5.

318. *Id.*

319. *Id.* at “Introduction.”

scholarly writing, creative works of art and music, and multimedia course materials," which the report hopes the university rectifies.³²⁰

The report notes two different approaches. A University of Kansas draft policy has taken a different approach, claiming ownership on "mediated courseware," arguing that they are created and offered with substantial investment of university resources and that the university must be able to use them again. Additional compensation is given to faculty if the courseware is used by a different faculty member, and the author/faculty member is given the right to create derivative works, and "retains the right to transfer institutional rights to third parties."³²¹ Stanford has a more extreme response, claiming ownership "of all Stanford course materials."³²² In contrast, the report suggests that a myriad of ownership scenarios may exist in a multimedia setting where there are multiple authors and collaboration, including "joint authorship, assignment of rights to a single owner, and University ownership."³²³ With regard to when the university should own a work, the report suggests first that "the University should develop a mechanism for evaluating when an investment of University resources will encourage the creation of works that will enhance the academic mission."³²⁴

G. COLUMBIA UNIVERSITY

Columbia University's copyright policy may serve as a model for thoroughness. Columbia University makes the same allowances as the University of Arizona of granting ownership in traditional materials, but Columbia also clearly states that the *form* of the traditional materials will not alter ownership allocation: "By longstanding custom, faculty members hold copyright for books, monographs, articles, and similar works as delineated in the policy statement, whether distributed in print or electronically. This pattern will not change. This copyright

320. *Id.* at 4.

321. *Id.* at n. 12. See also the University of Kansas policy at <http://www.ukans.edu/~kbor/ipdraft.html>.

322. UC Taskforce on Copyright, *supra* note 29, at n 12. See also Stanford's Copyright Policy at <http://www.stanford.edu/dept/DoR/rph/5-2.html> (last updated Dec. 22, 1998); see also, Patent and Copyright Agreement for Stanford Personnel, at <http://www.stanford.edu/dept/DoR/rph/su18.html>, (last visited Sept. 14, 2002).

323. UC Taskforce on Copyright, *supra* note 29, at 11.

324. *Id.* at 15.

policy retains and reasserts those rights.”³²⁵ As noted above, this was not the case with the University of Arizona, where electronic forms were to be decided on a case-by-case basis. Similar to the University of Arizona,

Columbia will hold rights in copyright to works of authorship that are created at the University by faculty, research staff, and others and that are supported by a direct allocation of University funds, are commissioned by the University, make substantial use of financial or logistical support from the University beyond the level of common resources provided to faculty, or are otherwise subject to contractual obligations.³²⁶

The Columbia policy also acknowledges that faculty may distribute their copyrighted works without permission as long as the work is not courseware or course content, action the Consortium seems to discourage. Courseware and course content may be distributed for non-commercial use “to recipients who agree that they will not make commercial use of the material.”³²⁷ In each instance, the University does not want its name attached, except to identify the faculty member as an instructor at the University. The copyright policy devotes a special section to course content and courseware.³²⁸ Using the

325. Columbia University, *Preamble to the Columbia University Copyright Policy*, <http://columbia.edu/cu/provost/docs/copyright.html> (last visited Sept. 1, 2002) [hereinafter *Preamble to the Columbia University Copyright Policy*]. See also, Columbia University, *Columbia University Copyright Policy*, Section 1. Copyright Ownership; Assertion of Rights, A. Traditional Faculty Authorship Rights, at <http://www.columbia.edu/cu/provost/docs/copyright.html> (last visited Sept 1, 2002) [hereinafter *Columbia University Copyright Policy*]. Columbia uses the language “disseminated” rather than “created in print or electronically.” See *id.* In contrast to other policies, this is where the focus belongs, as in copyright the form of the creation does not create a new or additional copyright, but the creative elements in the tangible form do.

326. *Preamble to the Columbia University Copyright Policy*, *supra* note 325. See also, *Columbia University Copyright Policy*, *supra* note 325, at Section 1. Copyright Ownership; Assertion of Rights, B. Assertion of Rights by the University. Categories in the Columbia policy correspond to those of University of Arizona and other universities – additional funds above the normal usage, sponsored projects, administrative works, or created or commissioned specifically by the University. The policy explicitly notes that “ordinary use of resources such as the libraries, one’s office, desktop computer and University computer infrastructure, secretarial staff and supplies, is not considered to be substantial use of such resources for purposes of vesting the University with copyright ownership in a work.” *Id.*

327. *Columbia University Copyright Policy*, *supra* note 325, at Section 1. Copyright Ownership; Assertion of Rights, D. Non-commercial Distribution of Creator-owned Works.

328. *Columbia University Copyright Policy*, *supra* note 325, at Section 1. Copyright Ownership; Assertion of Rights, E. Categories of Works, No. 2. Course Content and Courseware. Courseware is defined as “the set of tools

principle distinction of faculty versus university ownership, the section aggressively asserts that the University will claim its rights to copyright in course content and may “limit the faculty member’s ability unilaterally to commercialize non-institutional course content and courseware.”³²⁹ The university will also claim ownership in videotapes of lectures (the object themselves) but not the underlying copyrighted work, which would be governed by the faculty/university ownership distinction above.³³⁰ The policy does create another category, “institutional courses” that the university would own, but the policy does not define them further. Faculty may participate in course creation outside of the university, as long as these endeavors do not include “commercialization of any course content.” In fact, any commercialized project must be approved “by the appropriate dean and the Provost” in advance. This last point is sticky, because if a faculty member owns the copyright to their lectures, and other materials produced without additional substantial resources from the university, that faculty member retains the right to make derivative works, distribute and publicly perform. Does this mean that the faculty is being assigned only part of the rights of copyright? How does this work in a legal context?

H. UNIVERSITY OF TEXAS

Georgia Harper, a copyright attorney at the University of Texas at Austin has developed a great deal of material on university intellectual property policies and has become a leader in educating universities and scholars on IP issues. Given that the courts are split on whether the “teacher exception” exists, she believes it would be unwise to depend upon that for ownership rights.³³¹ She suggests that teachers/educators do fall under the employee/employer relationship, but that one must look to the particular

and technologies used to present course content, and is independent of the content itself.” *Id.* Course content is defined as “the intellectual content of the course, as taught at or through the University.” *Id.*

329. *Id.*

330. *Id.*

331. See Georgia Harper, *Copyright Law in Cyberspace*, Office of General Counsel, University of Texas System, at <http://www.utsystem.edu/OGC/IntellectualProperty/distance.htm>, (last visited Sept. 1, 2002). Look in particular at section entitled, “Ownership in Detail: The Employer is the Owner When,” where in reference to the “teacher exception” she writes, “reliance is not recommended.”

university's intellectual property for further guidance.³³² She noted that when determining ownership of joint authors at different universities it would be necessary to determine the intellectual properties for each author to make that determination.³³³

Harper has created what she calls a comprehensive copyright policy that addresses both using copyrighted works and the creation of copyrighted works.³³⁴ She notes that in the past, with regard to managing and licensing new creations, institutions "haven't taken them or their value very seriously."³³⁵ She states that it "is up to us as institutions and as an educational community. These are our works, made by us for us."³³⁶

For the UT system, faculty own "scholarly, artistic, literary, musical and educational materials within the author's field of expertise."³³⁷ One wonders why the addition of "author's field of expertise," how a "field of expertise" is defined, and what happens if a scholar writes outside of the field s/he has been hired to teach. Then, a more curious statement is made, "[i]f the University wants to use such a work, to recover expenses of its creation and/or share in royalties if the work is commercialized, it should establish standard University rights that apply to such works or negotiate its rights in a contract with the faculty author."³³⁸ What expenses are they talking about—salary and regular expenses? Extra expenses? And in what context will the contract be negotiated?

The policy also exemplifies how traditional spaces transformed into electronic forms sometimes create new ownership rights, stating "[s]cholarly works owned by faculty members can be implemented in software, which is usually identified as an invention and owned by the Board."³³⁹ The

332. *See id.*

333. *See id.*

334. *The U. T. System Comprehensive Copyright Policy*, at <http://www.utsystem.edu/ogc/intellectualproperty/cprtpol.htm> (last visited Sept. 15, 2002).

335. *See id.*

336. *Id.*

337. University of Texas, *Who Owns What*, at <http://www.utsystem.edu/ogc/intellectualproperty/whowns.htm> (last visited Sept. 15, 2002).

338. *Id.*

339. *Id.* The page gives three additional policies to look at: the Intellectual Property Policy Section 2.32, Administrative Software Policy, and the

taping of lectures is dealt with in the *Administrative Policy - Regarding Creation, Use and Distribution of Telecourse Materials*.³⁴⁰ Here, “[f]aculty members . . . hold copyright in Telecourse materials they create on their own initiative in the course of the performance of their teaching responsibilities.”³⁴¹ Thus, Telecourses created by non-faculty and within the scope of their employment are owned by the Board.

Telecourses created by faculty members as a condition of their employment fall into the category of works for hire or works created by an employee within the scope of employment; thus, copyright in such works is owned by the Board. Telecourses created jointly by faculty authors and others whose contributions would be works for hire will be jointly owned by the faculty author and the Board. Any owner of copyright in a Telecourse may secure copyright registration; joint owners may, but do not have to, agree to bear responsibility for enforcement of the copyright.³⁴²

This is one of the first policies to discuss registration.³⁴³ Faculty “should” retain revision rights in the materials they create, by specific terms in a contract.³⁴⁴ The policy explains:

Regardless of who owns copyright in Telecourse materials, faculty who participate will undoubtedly wish to retain some control over the later use of the materials. Faculty will be reluctant to memorialize lectures and other educational materials if they are unable to update, revise or eliminate entirely parts of the work that are no longer

Administrative Distance Learning Policy. Here is the substance of the IP policy:

2.3 The Board shall assert its interest in scholarly or educational materials, art works, musical compositions and dramatic and nondramatic literary works related to the author's academic or professional field, regardless of the medium of expression, as follows:

2.31 Students, professionals, faculty and researcher authors.—The Board shall not assert ownership of works covered by this Subsection authored by students, professionals, faculty, and nonfaculty researchers. The Board encourages these authors to carefully manage their copyrights. The Board retains certain rights in these works as set forth in the Policy and Guidelines for Management and Marketing of Copyrighted Works.

2.32 Software.—The Board normally shall assert ownership in software as an invention; however, original software which is content covered by Subdivision 2.31, or that is integral to the presentation of such content, shall be owned in accordance with Subdivision 2.31.

Id.

340. See University of Texas, *Administrative Policy, Regarding Creation, Use and Distribution of Telecourse Materials*, at <http://www.utssystem.edu/ogc/intellectualproperty/telecrs.htm> (last visited September 15, 2002).

341. See *id.*

342. *Id.*

343. See *id.*

344. See *id.*

relevant, correct, or are merely no longer timely. Since the Copyright Law would not vest the right to revise, edit or even destroy a work belonging to another, these rights must be granted in contracts between any component and its faculty members who will be exercising the rights. Further, since the application of the work for hire provisions of Copyright Law does not always bring about the allocation of ownership of copyright that the parties may have intended, it is important to have a contract to properly address ownership issues as well. The contract should include a statement that the work is a work for hire, an assignment of copyright to be sure that the intended result is realized, and special provisions allowing the faculty member to retain a right to edit or modify the original at specified times, thus creating a derivative work. A sample contract is attached as Attachment B. If this form of agreement is utilized without substantive alteration,³⁴⁵ it should not require review by the Office of General Counsel.

With regard to royalties, the owner takes all—whether it is a faculty member creating on their own initiative or the Board as part of a faculty's duties.³⁴⁶ The University will also require the faculty to share royalties in traditional scholarly material when the faculty has used substantial resources at the university, where otherwise all royalties on traditional materials, regardless of form, belong to the faculty.³⁴⁷

The UT site is a great resource. One page, in particular, helps navigate through determining ownership rights connected with the creation of courseware.³⁴⁸ The page lets the user click the answers to three categories: "Who provided the initial impetus to create the Work?," "Who will contribute copyrightable expression?," and whether the faculty will elect to have the work fall under the scope of employment.³⁴⁹ The last question, it is explained, is that

some faculty authors may not wish to own their works, because they consider themselves to be employees working within the scope of their employment. In such a case, the faculty member need only sign an acknowledgement of this unusual circumstance. This election shifts ownership of the affected contribution to the University and causes the standard rules for liability for infringement to control.³⁵⁰

The site also provides sample courseware contracts for

345. *Id.*

346. *See id.*

347. *See id.*

348. *See* University of Texas, *Courseware Contracts - Starting with the Right Contract*, at <http://www.utsystem.edu/ogc/intellectualproperty/course.htm> (last visited September 15, 2002).

349. *See id.*

350. *Id.*

“Faculty Sole Owners,” “Joint Owners,” “Work-For-Hire,” “TeleCampus Funded Faculty Owned Contribution to a Collective Work,” and “TeleCampus Funded Joint Creation and Ownership Agreement.”³⁵¹

V. SOME PRACTICAL THOUGHTS

Some universities may appear to see copyright as mere economics, in that they do not want to give away their potential pots of gold. But more is at stake, both for the university and the creators. Universities have greater obligations beyond economics, including the dissemination of information to the public. Many of the steps now being taken are influenced not only by the cultural impact of the Bayh-Dole Act, which allowed federally-funded research to be patented by universities, but also by increased amounts of commercial profit from trademarks and economic potential in copyrighted works.

A. LEGAL QUESTIONS SURROUNDING UNCERTAIN COPYRIGHT OWNERSHIP

Those creating copyright works must fully understand the implications of the policies, so as not to live in fear, confusion or misplaced concern. For those interested in copyright and the use of these creations, it is obvious that serious issues remain. The following portion of this article will identify four of them.

1. Ownership as Duration of Copyright. The length of copyright is dependent, in part, on whether the work is a work-for-hire or created by an individual. If the work is a work-for-hire, the duration of copyright is 120 years from creation or 95 years from publication, whichever is shorter.³⁵² If the work is created by an individual, the current term is life of the author plus 70 years.³⁵³ Complete chaos results from the federal statute's failure to specify who owns the work, leaving ownership to individual university policies. What happens when scholars want to use these works in twenty, fifty, or a hundred years? Who will they turn to for permission, or to determine whether the work is in the public domain? Few people are concerned about this, since they see most of the work as relevant for only a semester or a few years. In fact, many professors use lectures throughout a career, and far from

351. *See id.*

352. 17 U.S.C. § 302 (c).

353. 17 U.S.C. § 302 (a).

being disposable, these lectures form part of their lifetime body of work. Uncertain ownership is very troubling, as ownership gives the owner certain rights for a certain period of time. Without certainty now, a great deal of chaos will emerge in the future.

2. Registration. *Are these works being registered? How are these works being registered at the Copyright Office? Again, the copyright holder must be identified. Is this based on university policy? Tradition? If a university claims ownership to the material, are they then responsible for registering it as well? As we saw in Part II of this article, with registration comes statutory damages and potential attorney's fees in a successful infringement suit. Moreover, if infringement occurs, is the university willing to sue if a creator brings this to their attention? Does university ownership give the creator more support to protect their works from others? The University of Texas is one of the few universities addressing this question.*³⁵⁴

3. Original versus Derivative work. The copyright owner authorizes derivative works. If ownership is unclear, who does the authorizing? Can a professor, after creating a website for a class, write an article using the same materials? Must professors gain permission from the university to make derivative works because they were produced in a form in which the university has claimed an ownership interest? Some policies address this concern, but many do not.

4. The University's Responsibilities. With ownership comes responsibility. As mentioned before, registration becomes a question, as does dissemination, promotion, and prosecuting unlawful infringers. Will the university create Copyright Offices like they have created Technology Transfer offices for patents and Licensing Offices for trademarks, in order to help facilitate creators getting their products into commercially-advantageous situations? David Perry, in the Technology Transfer Office at University of Arizona, noted that the university disclaims ownership of patents when the technology transfer office determines the invention does not have economic potential.³⁵⁵ Instead of spending \$10,000 or more on the patent application process, the university releases

354. See University of Texas, *Copyright Registration for Faculty Authored Works*, <http://www.utsystem.edu/ogc/intellectualproperty/faccprt.htm> (last visited September 15, 2002).

355. Interview with David Perry, Office of Technology Transfer, University of Arizona, (April 2001).

the invention of the item to the inventor.³⁵⁶ In case of later success, the university has a built-in contractual mechanism that allows the university to share the profits.³⁵⁷ Could the university put in place the same sort of policy with textbooks, articles, and other traditional materials with copyright? With patents, the university spends money as part of their ownership responsibilities. With copyright, the university need not spend, because copyright affixes at the moment of creation.³⁵⁸ At most, the university might pay a \$30 registration fee, but the university typically does not do even this. The University of California recognizes this need, with the task force recommending the creation of a University Copyright Office.³⁵⁹

B. SURVIVING UNCERTAIN TIMES - THOUGHTS FOR THE SCHOLARS

This article has looked at the increasing commercialization of the university, the change in the copyright law, and how that has impacted the view of the “teacher exception” and ownership of materials within education.³⁶⁰ The article has also looked at specific intellectual property policies in the university as examples of what is currently happening. While there are no definitive answers, the trend seems to indicate that more intellectual property policies in education dictate ownership, rather than case law or statute carving out a special “teacher exception.” Teachers, scholars, and researchers must look to their institutions to determine who owns the materials being created and under what circumstances. The following offers some practical points to take away from this paper on how to determine ownership of newly created materials.

1. Easterbrook versus Posner. Easterbrook’s 7th circuit decision in *Weinstein* has, so far, brought the “teacher exception” into the realm of university policies.³⁶¹ Until courts decide otherwise, Posner’s dicta in *Hayes* that a teacher

356. *See id.*

357. *See id.*

358. 17 U.S.C. § 302 (a).

359. *See supra* note 31 and accompanying text.

360. For another overview, *see also* Dan L. Burk, *Ownership of Electronic Materials in Higher Education*, CAUSE/EFFECT, Vol. 20, no. 3, Fall, 1997, 13-18, at <http://www.educause.edu/ir/library/html/cem9734.html> (last visited Sept 1, 2002).

361. *See Weinstein v. Univ. of Ill.*, 811 F.2d 1091 (7th Cir. 1987).

exception survives outside of university policy, as a judge-made doctrine, seems outdated.³⁶² However, the point has yet to be decided by any court after the *Reid* case and remains uncertain.³⁶³

2. Read All IP policies carefully. As this paper has demonstrated, there are many subtle differences in the IP policies at colleges and universities. Read these policies carefully, and consider consulting with the university attorney for clarification (remaining mindful of the attorney's professional obligation to the client university). Some policies claim ownership in all works, but disclaim ownership on more traditional works. Many claim ownership when a significant amount of recourses are used. Some require copyright assignment if the project has commercial potential. Others make the university a joint author. Some give certain rights to faculty members, and keep other parts of the copyright for themselves. Also, make sure to read not merely the IP policy, but any additional policies connected to the IP policy, such as those on distance learning.

3. Claiming ownership in traditional materials before creating derivative works. Because many universities still disclaim ownership or allow faculty ownership of traditional materials (textbooks, lectures, and other non-digital, non-electronic forms of scholarly materials), register copyrighted work at the Copyright Office,³⁶⁴ then make a derivative work for digital, distance learning, or multimedia projects.³⁶⁵ If problems arise later, registration establishes prima facie evidence of the ownership of the original.³⁶⁶ The scholar will then own the underlying original work, regardless of whether

362. See *Hays v. Sony Corp. of Am.*, 847 F.2d 412 (7th Cir. 1988).

363. See *Cnty. For Creative Non-Violence v. Reid* 109 S. Ct. 2166 (1989).

364. See Kenneth Crews, *COPYRIGHT LAW AND GRADUATE RESEARCH: NEW MEDIA, NEW RIGHTS, AND YOUR DISSERTATION*, (Proquest Information and Learning, 2000), at <http://www.umi.com/hp/Support/DEplorer/copyrght/> (last visited September 15, 2002) (manual providing a roadmap for copyright compliance).

365. See Copyright Office Website, at <http://www.copyright.gov> (last visited February 12, 2003).

366. It also guarantees statutory damages (without having to prove actual damages) and perhaps attorney's fees, if infringement on the original is found. See 17 U.S.C. § 412; § 505. To do this, a scholar should go to the Copyright Office's web site at <http://www.copyright.gov>. Make sure to use the proper form. The Copyright Office has information on the web site on which form applies and how to fill the form in. The process is not difficult, but make sure to follow directions.

the university claims ownership in subsequent works. Both published and unpublished works may be registered with the Copyright Office.³⁶⁷ The university, in that case, will only own materials “added” to the original work, and not the original work itself. This means that the scholar can revise the original work, create new derivative works, and do all of the other things a copyright owner is allowed to do.

a. Copyright Registration. An individual can easily register a copyright with the Copyright Office.³⁶⁸ This may be done with each individual creation (\$30 each) or as a collection (\$30 for the collection).³⁶⁹ However, if an infringement occurs, statutory damages only apply to the materials in the collection, and not the individual pieces; that is, if it is registered in a collection, statutory damages may be awarded only once for the collection, rather than on each piece. That aside, once the original work is copyrighted (and registered), the owner may create derivative works. For example, the copyright holder/scholar could use additional university resources to create a new project, with the original project as the core content of the work. The university might claim ownership on the new product, for example, the CD-ROM or the website, but the scholar would still own the original work within the new medium. The new university-owned work would be a derivative of the original work. The same applies to lecture materials. If an author valued ownership, s/he could record lectures, provide copies of course materials and anything else created, and again register them with the Copyright Office.³⁷⁰ Then, if the university wanted the course to be in an online version, s/he would license the right to create an online version

367. See Copyright Office Website, at <http://www.copyright.gov> (last visited February 12, 2003).

368. Directions are given on the Copyright Office's website: <http://www.copyright.gov>. Registration includes filing out the proper form (downloadable from the site), and sending two copies of the work, along with \$30 per registration. See *id.*

369. Copyright Office, Fees, at <http://www.copyright.gov/docs/fees.html> (last visited April 20, 2001).

370. Penne Restad, a lecturer at University of Texas, did just that [recorded her own lectures], according to reporter Sharon Jayson in *Online Notes Debate; College Lecturers spilt over propriety of free*, AMERICAN-AUSTIN STATESMAN, March 26, 2000 at Metro/State B1, in order to combat a professional, commercial notetaker hidden amongst her 400 students. Georgia Harper also recommends this at University of Texas. See University of Texas, *Ownership of Lectures*, at www.utsystem.edu/ogc/intellectualproperty/lectures.htm. (last visited September 15, 2002).

to the university. Alternatively, s/he could assign a derivative right to make an online version. However, s/he would retain ownership of the underlying materials.³⁷¹

b. Specific student concerns. If ownership is important to a student, the student might think about how s/he is “paid” for particular work. If a student is getting academic credit for a creation, the student will own the creation, unless the work is collaborative. When the student does research for *credit* for a professor, there is an implied right for the professor to use the materials, but the student has kept the copyright in the notes and writings. If, however, the student is paid for these same activities, the situation is more complicated. This may be considered an employee/employer relationship, depending on school policy. However, it may not fit within the categories of the *Reid* test. Just because a work is labeled as a work-for-hire does not mean it is a work-for-hire. It must satisfy the factors of the *Reid* test. Then the university, and not the professor for whom the research was done, owns the notes and materials.³⁷²

4. A Special note regarding web sites. This is an area in flux. At some schools, web sites are not part of required job tasks, and if created by the professor, will be the property of the professor. If the web site is created using the labor and more than usual amounts of resources at the university, the university may claim ownership. At the University of Arizona, the IP policy states that it will decide ownership on a case-by-case basis on all electronic materials, which means in practical

371. See NIMMER ON COPYRIGHT, *supra* note 71, § 5.03[B][1][b][i] n.92 (citing *Siegel v. Nat'l Periodical Pubs., Inc.*, 508 F.2d 909 (2d Cir. 1974) (earlier version of Superman created prior to commencement of employment relationship held not owned by employer) and *Scerr v. Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (interpreting the *Siegel* case as holding that “[t]he first expression of the Superman character was the underlying work, and the later development of the character was a derivative work. Because only the derivative work was produced in a for-hire relationship, the underlying work remains the property of the creators, absent an assignment thereof.”)).

372. Indiana University has research assistants sign a copyright agreement, which includes, *inter alia*,

that any copyrightable works that I may create within the scope of my service as a research assistant shall be regarded as “works made for hire” under the U.S. Copyright Act. Should any such works not qualify as works made for hire, I hereby assign or transfer any copyright interest that I may have in and to such works to Indiana University or to my instructor as may be appropriate of reach work.

Sample Agreement, Research Assistant Copyright Agreement, Indiana University, at <http://iupui.edu/~copyinfo/raagreem.html> (last visited September 15, 2002).

terms that they may claim ownership if an electronic medium becomes economically profitable. For those fearful of the university gaining control of a web site a number of law review articles suggest that faculty not put their materials directly onto university servers, but put their work on a separate web site, which would then link to their university address.³⁷³ That way, once the link is removed, the instructor's work is still within their possession, and the university will have no copy of the work. This might be particularly advantageous to adjuncts and graduate students, who are not permanent faculty members.

5. The Technology Transfer Office is not all bad. Ownership is not the only game in town. A technology transfer office may provide the resources to make the copyrighted work turn a profit. In many cases, they distribute royalties both to the instructor as well as the department. If the instructor is thinking about a collaborative project that would involve the university, it may turn out to be a very happy experience, and the instructor may become, the hero of the department with the royalties streaming in. In this way, it goes to the CETUS's idea of unbundling the rights to serve all of the interests involved.

6. Reorienting One's World View. The days of scholars locked away from the commercial/business/corporate world are quickly fading. Scholars must think about the materials they create, as well as those they use within a more commercialized environment. Otherwise instructors may find themselves colonized and enslaved, providing the raw cultural resources for both the university and multi-national corporations. Practical steps are needed, and faculties' voices must ring out as copyright policies – nationally and in the universities – reorient the game to heightened commercialization of creations. Scholars must be aware of the discourses of the laws, customs,

373. See e.g., Holmes and Levin, *supra* note 1 at 188-9. After writing a law review article in which they argue that the "teacher exception" still applies today, the authors advocate in their conclusion that

[f]aculty wishing to preserve ownership rights in copyrightable materials they develop would seem to have a stronger argument in favor of ownership if they require "passwords" or other limiting devices to screen access to the materials. *Faculty might also want to consider posting the materials with private service providers rather than with school or university providers so as to protect their copyright under the 1976 Copyright Act and the DMCA.*

Id. (emphasis added). Note that the authors do not give any reason for this at all, and give no footnotes or citations as to why they believe this. See *id.* This is how they end their article that is pro-"teacher exception."

and concerns of the commercial world. Much negotiation, discussion and molding of policy, vision, and values can be accomplished. Scholars must take the discourse theories of their academic work and apply them to their academic world. Commercialization of the university is not necessarily an evil. But scholars should actively engage in the conversation, articulating their own views and thoughts, rather than allowing the corporate world to dictate the hegemony of the new century.

7. Policy versus Practice. Scholars should be aware of the policies and the laws governing their works, but also recognize that within the university some policies are followed, while others are not fully enforced. Some universities may follow a “don’t ask, don’t tell” policy. If they do not know about a project, they do not actively seek to find out; yet, if they find out, they must pursue ownership issues. A good rule of thumb appears to be that if the work has actual or potential economic worth, the university will be interested in claiming ownership. Even with patents, if the university does not see it as economically advantageous, they will give the ownership back to the inventor. One should be aware of what the practices are, and not merely consider the policies.

8. The Role of Contracts. A number of scholars, like Todd Borow and Ashley Packard, place emphasis on the employment contract or specific contracts between the faculty member and the university, rather than case-law or even university policies alone.³⁷⁴ Both Packard and Borow suggest scholars secure copyright through contract, which expressly reserves rights scholars feel are of concern.³⁷⁵ This would require scholars to have the power and clout to be able to do this. However, Borow, Packard, and others suggest that they do not believe the written requirement for assignment under the copyright act is satisfied by a university copyright policy.³⁷⁶ Borow explains that “handbooks are unlikely to be considered signed writings by courts,” and that both parties, not merely the faculty member, must sign the express writing.³⁷⁷ This is an area to watch in the coming years. Packard agrees, writing, “[l]egally,

374. See Borow, *supra* note 170; Packard, *supra* note 49.

375. Borow, *supra* note 170, at 166-67; Packard, *supra* note 49, at 313-314.

376. Borow, *supra* note 170, at 166-67; Packard, *supra* note 49, at 313-314.

377. Borow, *supra* note 170, at 168 (citing Rochelle Cooper Dreyfuss, *The Creative Employee and The Copyright Act of 1976*, 54 U. CHI. L. REV. 600 (1987)).

there is some question as to whether a written university policy 'satisfies the section 204(a) requirement of a writing signed by the professor, or the section 201(b) requirement of a writing signed by the professor and the university.'³⁷⁸

9. Demand help. Finally, scholars and educators need not figure all of these issues out on their own. If the university will assert ownership over materials, scholars need to ask in return for help navigating through the minefields. At the same time, scholars need to make sure it is not a one-way administrative dialogue.

In conclusion, this Article suggests that all is not lost with the "teacher exception." University policies are still recognizing this tradition. Moreover, educators, like those that gathered at the Pew Learning and Technology Program in 2000, seem to be continuing to advocate for a teacher exception with a modified commercial-caveat. Carol Twigg in *Who Owns Online Courses and Course Materials? Intellectual Property Policies for a New Learning Environment*, summarized the activities and findings of this conference of fourteen higher education leaders, including Kenneth Crews and Georgia Harper, held in February 2000.³⁷⁹ The article presents

378. Packard, *supra* note 49, at 313-314.

379. Carol A. Twigg, The Pew Learning and Technology Program, *Who Owns Online Courses and Course Materials? Intellectual Property Policies for a New Learning Environment*, (2000), at <http://www.center.rpi.edu/PewSym/mono2.html> (last visited February 12, 2003). The full list included: Barbara McFadden Allen, Director Committee on Institutional Cooperation; Dan L. Burk, Professor of Law, University of Minnesota Law School; Bruce Chaloux, Director, Southern Regional Electronic Campus, Southern Regional Education Board; George Connick, President, Distance Education Publications; Kenneth D. Crews, Director, Copyright Management Center, and Associate Professor of Law, Indiana University-Purdue University Indianapolis; Russ Edgerton, Director, Pew Forum on Undergraduate Learning, The Education Trust; William H. Graves, Chairman and Founder Eduprise; Georgia K. Harper, Attorney/Section Manager—Intellectual Property, University of Texas System; Isabella Hinds, Director of Publisher Alliances, WebCT; Terence P. McElwee, Director, Technology Transfer and Corporate Research, Marquette University; Gary Miller, Associate Vice President, Continuing and Distance Education, Penn State University; James Neal, Dean of University Libraries, The Johns Hopkins University; Rodney J. Petersen, Director, OIT Policy and Planning, University of Maryland; and Carol A. Twigg, Executive Director, Center for Academic Transformation. Virtual participants included: Robert K. Gemin, Vice President and Publisher, Archipelago Productions, Robert C. Heterick, Jr., Former President, Educom; Sylvia Manning, Interim Chancellor, The University of Illinois at Chicago; Christopher J. Rogers, Director of New Business Development, and John Wiley and Sons, Inc.. Reporters included Patricia Bartscherer, Program Manager, Center for Academic Transformation

scenarios and policy concerns for institutions facing these problems, including the possible creation of “academic” pop stars through online courses, or competing commercial interests in intellectual products created at the university, but recognizes that most situations would not become so commodified.³⁸⁰ In the end, her summation reiterates that the “law” is not settled, and that universities should think through what they want and how they want to achieve their goals.³⁸¹

Twigg’s article suggests the following:

We recommend that the default policy position for all institutions should be that the faculty member owns the course materials he or she has created. Rather than trying to anticipate all the possible exceptions and include them in a policy, institutions may want to incorporate “trigger mechanisms” in the primary policy; these would define specific situations or conditions that would trigger the application of a second policy. As an example, if the course materials are commercialized by someone other than the college or university and actually make money, the institution could reserve the right to get a certain percentage of royalties to recover any investment it may have made. That percentage should be small, perhaps 5 percent.³⁸²

In a way, these high-profile educators endorse the notion of the continuation of the “teacher exception,” with the caveat that the university would benefit economically (a percentage scheme) from materials created that came to have a commercial value. This is similar to universities whose policies transfer ownership of patentable material to faculty when the university does not have interest in pursuing the patent, with the caveat that if the patented work becomes profitable, the university will still have stake (a percentage) in those profits. How it will all turn out in the end, only time will tell.

and Susan Oaks, Assistant Professor and Area Coordinator, Communications, Arts, and Humanities, SUNY Empire State College.

380. *See id.*

381. *See id.*

382. *Id.*