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# Reading, Writing, and Rights: Who Should Own Charter School Curricula?

Allison O. Woodbury\*\*

## I. INTRODUCTION

Education has been a vital political issue since the National Commission on Excellence in Education published its report, *A Nation at Risk: The Imperative for Educational Reform* almost twenty years ago.<sup>1</sup> However, since the school voucher decision by the Supreme Court in the summer of 2002,<sup>2</sup> public attention to education has increased. Parents, educators, and legislators are all concerned with the operation of the school systems, both public and private.<sup>3</sup> In the gray area between public and private schools falls a charter school.<sup>4</sup> These latter institutions of learning have their roots in public education;<sup>5</sup> however, private management companies sometimes run them.<sup>6</sup> The hybrid nature of these schools brought hope to educational reform because it seemed to

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1. The Nat'l Comm'n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform* (1983).

2. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that the Ohio school voucher program did not violate the Establishment Clause of the United States Constitution's First Amendment).

3. See Jason Lance Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 136 (2000) ("[T]he education of our nation's children continues to be a primary concern of lawmakers throughout the country"); see also *infra* notes 185, 186, 191 for examples of debate in the public forum over charter schools.

4. See Wren, *supra* note 3, at 136-137 (arguing that charter schools are neither public nor private but "appear to be halfway between public schools and private schools").

5. See Ed Hayward, *Charters Leave Their Roots; Schools Part Ways with For-Profits*, BOSTON HERALD, June 16, 2002, at 008.

6. *Id.* at 008 (stating that "[n]ationwide, an estimated 10 percent to 20 percent of the more than 2,400 charter schools are run by management companies").

include the best of both worlds—accessibility to all through its public nature and high quality educational programs through its private nature.<sup>7</sup> The existence of this hybrid creature raises an important question concerning ownership of the curricula that education management organizations develop. In the realm of public schools, accessibility to curricula is a matter of constitutional significance.<sup>8</sup> In the realm of private business, the right to market a product is equally vital. If the schools were entirely public or private, the copyright granted for the curricula would belong to the corresponding entity.<sup>9</sup> However, in the mixed bag of charter schools, the answer to the question of curricula ownership is rather unclear.

This note will address the current status of copyright ownership in the charter schools under state and federal law. It will also address the ramifications of that ownership. The background section describes the relevant provisions of copyright law, the doctrine of fair use, and the works made for hire exception, state sovereign immunity, the structure of charter schools, and current case law on fair use and works for hire. The analysis examines the nature of charter schools, the contracts between the charter schools and public school districts, the example of higher education with regard to copyright law, the competing interests of the public school districts and the private management companies, and the public policy implications of the curricula ownership. Finally, this note concludes that although the private management companies own the curricula developed for charter schools, the public school districts in which the charter schools operate should be free to use the curricula developed through public funding.

## II. BACKGROUND

### A. INTELLECTUAL PROPERTY

In the realm of property ownership, it has always been difficult to establish the tangibility of ideas.<sup>10</sup> Intellectual property rights arose as a protection for creators of their

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7. See *supra* notes 1-6 and accompanying text.

8. See *Plyer v. Doe*, 457 U.S. 202 (1982) (held that although education is not a fundamental right, once Texas offered public school education it could not deny admittance to illegal alien children).

9. See *infra* notes 26-28 and accompanying text.

10. See *infra* note 19 and accompanying text.

works.<sup>11</sup> Intellectual property rights were established to reward inventors and creators for their labors, and to encourage people to bring creations to the public.<sup>12</sup> By granting a limited monopoly to a person, society gained the use of that person's idea, invention, or creation.<sup>13</sup> Copyright is a right of intellectual property governing the ownership, disposition, and use of an individual's creative work.<sup>14</sup> It is established in the United States Constitution which grants Congress the power "[t]o 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."<sup>15</sup> The Court in *Mazer v. Stein* explained the purpose well:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.<sup>16</sup>

## B. COPYRIGHT

The 1976 Copyright Act changed copyright protection from the common law that had previously protected works only after they were published.<sup>17</sup> The Act changed protection to the first fixation in tangible form.<sup>18</sup> It made protection available to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>19</sup> However, copyright protection does not cover "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."<sup>20</sup> The level

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11. See *infra* note 15.

12. See Robert P. Merges, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 350-352 (2d ed. 2000).

13. See *id.*

14. See *infra* note 31.

15. See U.S. CONST. art. I, §8, cl. 8.

16. 347 U.S. 201, 219 (1954).

17. See Merges, *supra* note 12, at 348.

18. See *id.*

19. 17 U.S.C. §102(a) (2002).

20. *Id.* at §102(b).

of creativity required to render a work copyrightable is low.<sup>21</sup> A work need not be “strikingly unique or novel.”<sup>22</sup> “All that is need to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than ‘merely trivial’ variation, *something* recognizably ‘his own.’”<sup>23</sup> Copyright, however, does not extend protection to pure facts.<sup>24</sup> Originality is required to the extent that there is some degree of creativity in the work itself, or in its arrangement or presentation of the facts.<sup>25</sup>

Copyright duration for works created on or after January 1, 1978, that are fixed in a tangible medium of expression, lasts for the life of the author, plus 70 years.<sup>26</sup> Furthermore, copyright ownership runs to the end of the calendar year in which it would otherwise expire.<sup>27</sup>

Curriculum is protected under federal copyright law.<sup>28</sup> Curriculum is defined as “all of the courses, collectively, offered in a school, college, etc., or in a particular subject.”<sup>29</sup> This definition may include “the scope and sequence of intended learning outcomes, course plans and syllabi, the content of instruction, standards for evaluation, the textbooks and materials, and the course of study.”<sup>30</sup> Such material falls within the general subject matter of copyright under literary

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21. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250-51 (1903) (establishing the level of creativity or originality needed to be reached by the author or creator of a work to be copyrighted). *See Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (stating that there is not a high requisite level of creativity needed to qualify for copyright protection).

22. *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951).

23. *Id.* at 102-103 (emphasis added). *See Bleistein*, 188 U.S. at 250-51.

24. *See Feist Publ'ns.* 499 U.S. at 345 (explaining that a mere compilation of facts is not itself copyrightable without some measure of creativity added to the facts).

25. *See id.*

26. 17 U.S.C. §302 (a)(b)(c) (2002).

27. *Id.* at §305.

28. *See id.* at §101 (defining literary works as works “expressed in words, numbers or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied”, which includes curriculum).

29. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 348 (2d ed. 1986).

30. Molly O'Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 150 (2000) (describing the structure of charter schools and the composition and elements of the official curriculum within a school).

works.<sup>31</sup> All the elements of curricula are fixed in a tangible medium of expression, and these elements also are within the definition of literary works.<sup>32</sup> Curriculum contains creativity in the arrangement and expression of the facts being presented, thus possessing a degree of originality.<sup>33</sup> The elements of curricula that are purely systems, procedures, or processes would not be copyrightable.<sup>34</sup> However, these elements would be minor.

### C. RIGHTS OF THE CREATOR UNDER COPYRIGHT LAW AND LIMITATIONS OF FAIR USE

Subject to limitations by other sections in the Copyright Act, the owner of a copyright has exclusive rights to do many things with the works, including reproduction, preparation of derivative works, distribution, performance, and display.<sup>35</sup>

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31. The Copyright Act reads as follows:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

literary works . . .

17 U.S.C. §102 (a) (2002).

32. Literary works are defined as follows:

“Literary works” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

*Id.* at §101.

33. *See supra* notes 21-25 and accompanying text.

34. 17 U.S.C. §102 (b) (2002).

35. *Id.* at §106. The limitations on the exclusive rights of the copyright holder are provided in sections 107 through 120 of the Copyright Act. These limitations include fair use (§107), reproduction by libraries and archives (§108), effect of transfer of particular copy or phonorecord (§109), exemption of certain performances and displays (§110), secondary transmissions (§111), ephemeral recordings (§112), scope of exclusive rights in pictorial, graphic, and sculptural work (§113), scope of exclusive rights in sound recordings (§114), scope of exclusive rights in nondramatic musical works and statutory license for making and distributing phonorecords (§115), negotiated licenses for public performances by means of coin-operated phonorecord players (§116), limitations on exclusive rights: computer programs (§117), scope of exclusive rights and use of certain works in connection with noncommercial broadcasting (§118), limitations on exclusive rights: secondary transmissions of superstations and network stations for private home viewing (§119), and scope of exclusive rights in architectural works (§120).

However, the doctrine of fair use is one of the limitations on the owner of the copyright.<sup>36</sup> Fair use is a “privilege in others than the owner of copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner.”<sup>37</sup> The fair use exception allows one to reproduce or copy a protected work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”.<sup>38</sup> Factors to be considered in determining whether the use of a work is fair include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>39</sup>

If a court finds the use as “fair”, there will be no infringement.<sup>40</sup> Additionally, the more informational the use is, the more likely it is that a court will find it to be fair.<sup>41</sup>

#### D. THE WORK MADE FOR HIRE EXCEPTION

Copyright law grants ownership to the creator of the work.<sup>42</sup> However, the “work made for hire” doctrine is an exception.<sup>43</sup> The Copyright Act defines a “work made for hire” as the following:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material

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36. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306-307 (2d Cir. 1966) (explaining the nature of the copyright privilege).

37. *Id.* at 306-307 (quoting Horace Ball, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)).

38. 17 U.S.C. §107 (2002).

39. *Id.*

40. *Id.* See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-77 (1994); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985); *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

41. See *Consumers Union of United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983) (distinguishing between informational and creative works).

42. 17 U.S.C. §201 (2002).

43. *Id.* at §201(b).

for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>44</sup>

If the work falls within one of these two categories, the copyright does not vest with the author or creator.<sup>45</sup> Instead, the copyright becomes the property of the employer.<sup>46</sup> Hence, it is the employer that retains the rights enumerated in the Copyright Act.<sup>47</sup>

Courts have held that the term “employee”, as it is used in the Copyright Act, should be understood in light of the common law of agency.<sup>48</sup> Factors used to determine whether the party producing the work is an employee are:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the 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; the provision of employee benefits; and the tax treatment of the hired party.<sup>49</sup>

Under this doctrine, a work made by an employee for an employer belongs to the employer. However, if the work is outside of the scope of employment, the employee is entitled to the copyright ownership.<sup>50</sup>

The second section of the “work made for hire doctrine” considers whether a contractual agreement between the employee and employer assigns copyright ownership to one of the parties.<sup>51</sup> The Copyright Act recognizes that the employee may waive his or her rights to the works produced.<sup>52</sup> Thus, the employee may allow the copyright to vest in the employer.<sup>53</sup> Employers commissioning works generally “require an

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44. *Id.* at §101.

45. *Id.* at §201(b).

46. *Id.*

47. *Id.*; 17 U.S.C. §106 (2002).

48. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

49. *Id.* at 751-52 (citations omitted).

50. *See* 17 U.S.C. §101 (2002).

51. *Id.* at §201.

52. *Id.*

53. *Id.*

assignment of rights before paying for or accepting a work.”<sup>54</sup>

A special exception known as the “teacher exception” has also been upheld.<sup>55</sup> In the 1909 Act, a special exception for textbooks was noted.<sup>56</sup> When the 1976 Copyright Act was passed, the exception had been left out, though it was not expressly destroyed by the “work made for hire” doctrine.<sup>57</sup> Furthermore, lack of legislative history suggests that the textbook exception was not intended to be destroyed by leaving it out.<sup>58</sup> Elimination of this exception would remove protection of professors, forcing them to assign the rights in their works to their universities.<sup>59</sup> Judge Posner described the teacher exception in *Hays v. Sony Corp. of America*.<sup>60</sup> This case involved high school teachers suing a corporation for infringement where the corporation, at the request of the school district, modified a word processor manual written by the teachers.<sup>61</sup> The case was resolved on procedural grounds, but Posner went into detail discussing the exception.<sup>62</sup> He stated that “[t]he reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were.”<sup>63</sup> Further, there is no evidence to conclude that the exception had not survived the 1976 Copyright Act.<sup>64</sup>

The teacher exception was also found in *Weinstein v. University of Illinois*.<sup>65</sup> In this case, the court held that an article is not a work made for hire where publication of the work was a requirement for obtaining tenure.<sup>66</sup> The court in *Williams v. Weisser*<sup>67</sup> found that “in the absence of evidence the teacher, rather than the university, owns the common law

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54. *Merges, supra* note 12, at 422.

55. *Id.*

56. *See* Copyright Act, 35 Stat. 1075 (1909) (current version at 17 U.S.C. §101 (2002)).

57. *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (stating there is an “absence of any indication that Congress meant to abolish” the exception).

58. *Merges, supra* note 12, at 422.

59. *Id.*

60. 847 F.2d at 416.

61. *Id.* at 412.

62. *See id.*

63. *Id.* at 416.

64. *See id.*

65. 811 F.2d 1091 (7th Cir. 1987).

66. *See id.* at 1094.

67. 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

copyright to his lectures.”<sup>68</sup> Thus, the teacher exception has been uniformly upheld.

#### E. STATE SOVEREIGN IMMUNITY

Under the Eleventh Amendment, states are granted sovereign immunity from suits by citizens of another state or by citizens of any foreign state.<sup>69</sup> The Copyright Remedy Clarification Act was passed in order to render state governments amenable to suit in federal court for violations of the Copyright Act.<sup>70</sup> The Supreme Court invalidated the act in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, when it held that Congress did not have the authority to abrogate state sovereign immunity.<sup>71</sup> State and local governments are now free to use copyrighted works under the Eleventh Amendment as long as the copyright holder is not located in the same state.

#### F. CHARTER SCHOOLS

##### 1. History

In 1991, Minnesota passed the first charter school legislation, as an alternative to traditional public education.<sup>72</sup> Forty states have enacted charter school legislation since then.<sup>73</sup> A state’s legislature authorizes charter schools to be funded by the public while being operated by an independent group. Generally speaking, the operating group enters into a contract for a fixed time period, or charter, to provide free public education independent of direct control by local school

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68. *Id.* at 545.

69. U.S. CONST. amend. XI. (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”).

70. Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) (codified at 17 U.S.C. §§501(a), 511, 901(a), 911(g) (1994)).

71. 527 U.S. 627, 647 (1999).

72. MINN. STAT. §124D.10 (2002).

73. See *History of Charter Schools*, at [http://www.uscharterschools.org/pub/uscs\\_docs/o/history.htm](http://www.uscharterschools.org/pub/uscs_docs/o/history.htm) (last visited Nov. 18, 2003). “By 1995, 19 states had signed laws allowing for the creation of charter schools, and by 2003 that number increased to 40 states, Puerto Rico, and the District of Columbia.” *Id.*

district in many aspects.<sup>74</sup> Depending on a state's authorizing legislation, the operating group may be composed of teachers, parents, existing public or private schools, non-profit agencies, or even for-profit firms.<sup>75</sup> The charter school concept was one of the fastest growing educational reform movements of the 1990's, evidenced by the fact that the majority of states have enacted charter school laws.<sup>76</sup> It has been estimated that if charter schools continue to grow at their current rate, ten percent of America's primary and secondary students would be attending charter schools in the near future.<sup>77</sup>

## 2. Structure of Charter Schools

### a. Reasons for Formation

Charter schools may be formed for a variety of reasons. Of particular interest, the Minnesota Education Code lists the following as purposes for creating a charter school:

- (1) improve pupil learning;
- (2) increase learning opportunities for pupils;
- (3) encourage the use of different and innovative teaching methods;
- (4) require the measurement of learning outcomes and create different and innovative forms of measuring outcomes;
- (5) establish new forms of accountability for schools; or
- (6) create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.<sup>78</sup>

Through curricular and teaching innovations, charter schools represent a new way of fulfilling these purposes.<sup>79</sup> Minnesota also has set up a charter school advisory council to encourage establishment of charter schools, provide leadership, support, and financial training for the schools, review charter

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74. See Karla A. Turekian, *Traversing the Minefields of Educational Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1373-74 (1997) (describing the structure and operation of charter schools under Connecticut state legislation); see also MINN. STAT. §124D.10(6) (2000) (authorization for a charter school under Minnesota state legislation must be in the form of a written contract signed by the sponsor and the board of directors of the charter school).

75. Turekian, *supra* note 75, at 1373.

76. See *id.* at 1372-1373.

77. Steven D. Sugarman & Emlei M Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 871 (2001).

78. MINN. STAT. §124D.10(1)(a) (2002).

79. See Turekian, *supra* note 75, at 1375-76.

school applications, and various other functions.<sup>80</sup>

#### b. Sponsors

In order for a Minnesota charter school to be approved, it must gain proper “sponsorship”.<sup>81</sup> Minnesota lists the potential charter school sponsors as follows: school boards, intermediate school district boards, education districts, charitable organizations, and institutions of higher education.<sup>82</sup> Once a sponsor has been established, the sponsor may authorize licensed teachers to operate the charter school.<sup>83</sup> Generally speaking, the process then progresses to a board voting on the charter school application for sponsorship.<sup>84</sup> If the board elects not to sponsor the school, the applicant may appeal the decision to the commissioner of education.<sup>85</sup> In such an instance, “[t]he commissioner may elect to sponsor the charter school or assist the applicant in finding an eligible sponsor.”<sup>86</sup> The sponsor must then file an affidavit with the commissioner stating its intent to authorize a charter school before the operators may form and operate a school.<sup>87</sup> The operators must then incorporate as a cooperative or a nonprofit organization, and must establish a board of directors of at least five members.<sup>88</sup>

#### c. Organization

Once these requirements have been met, the charter school is ready to be set up for operation. Operation of the charter school must adhere to guidelines agreed to by a contract authorized and signed by the school’s sponsor and board of directors.<sup>89</sup> The contract must be in writing and contain the following provisions:

- (1) a description of a program that carries out one or more of the purposes in subdivision 1;
- (2) specific outcomes pupils are to achieve under subdivision 10;
- (3) admissions policies and procedures;

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80. See MINN. STAT. §124D.10(2a) (2002).

81. See *id.* at §124D.10(4).

82. See *id.* at §124D.10(3).

83. *Id.* at §124D.10(4)(a).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at §124D.10(4)(b).

88. *Id.* at §124D.10(4)(c).

89. *Id.* at §124D.10(6).

- (4) management and administration of the school;
- (5) requirements and procedures for program and financial audits;
- (6) how the school will comply with subdivisions 8,13, 16, and 23;
- (7) assumption of liability by the charter school;
- (8) types and amounts of insurance coverage to be obtained by the charter school;
- (9) the term of contract, which may be up to three years; and
- (10) if the board of directors or the operators of the charter school provide special instruction and services for children with a disability . . . a description of the financial parameters within which the charter school will operate to provide the special instruction and services to children with a disability.<sup>90</sup>

Once set up, the charter school obtains a unique status from traditional public schools.<sup>91</sup> It is listed as a public school; but it is exempt from all statutes and rules applicable to a school, board, or district.<sup>92</sup> However, charter schools are generally subject to greater accountability because of this freedom.<sup>93</sup> The charters “must still hire certified teachers, teach the state-mandated standards for core subjects and administer standardized tests, but they may develop their own methods of instruction.”<sup>94</sup> The boards of trustees are in a position to hire private companies for management purposes, as training and curriculum development services, or both.<sup>95</sup>

#### d. Funding

Of particular relevance, the charter schools are eligible for public funding comparable to that of any traditional public school.<sup>96</sup> The charter school may use “total operating capital revenue for any purpose related to the school.”<sup>97</sup> Charter schools are also eligible to receive other aid.<sup>98</sup> Specifically, “[f]ederal aid received by the state must be paid to the school, if it qualifies for the aid as though it were a school district.”<sup>99</sup>

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90. *Id.*

91. *See id.* at §124D.10(7).

92. *Id.*

93. Ronnie Lynn, *Report Card Coming on Charter Schools*, SALT LAKE TRIB., Sept. 30, 2002 at D1.

94. *Id.*

95. Hayward, *supra* note 5.

96. *See* MINN. STAT. §124D.11(1)(a) (2002) (“General education revenue must be paid to a charter school as though it were a district”).

97. *Id.* at §124D.11(3).

98. *Id.* at §124D.11(6)(a).

99. *Id.* at §124D.11(6)(c).

Finally, charter schools may receive “money from any source for capital facilities needs.”<sup>100</sup> Generally, charter schools receive per-pupil funding in the same manner as public schools receive per-pupil funding.<sup>101</sup> However, “charters have to raise their own money for facilities or draw from per-pupil funding, which typically pays for operational costs such as teacher salaries and books.”<sup>102</sup>

#### e. Program Design

Charter schools are required to design programs to meet the outcomes or goals adopted by the commissioner for public school students, or in the absence of such goals, those contained in the contract with the sponsor.<sup>103</sup> In terms of student performance, the achievement levels of the outcomes contained in the contract may exceed those adopted by the commissioner for public school students.<sup>104</sup> In terms of operation, charter schools are required to have a school year at least meeting the minimum number of school days required for public schools.<sup>105</sup> However, it may exceed such school years in length.<sup>106</sup> The board of directors decides matters of employment of teachers and “matters related to the operation of the school, including budgeting, curriculum and operating procedures.”<sup>107</sup> Further, the charter schools are authorized to hire “nonlicensed community experts” to teach in the schools upon meeting certain criteria.<sup>108</sup> In terms of curriculum guidelines, Minnesota’s statute asserts that charter school curriculum should be based on the following statement: “The primary focus of a charter school must be to provide a comprehensive program of instruction for at least one grade or age group from five through 18 years of age. Instruction may be provided to people younger than five years and older than 18 years of age.”<sup>109</sup> By establishing a “comprehensive program of instruction” for a specific group, curriculum is developed with a particular focus

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100. *Id.* at §124D.11(6)(d).

101. Lynn, *supra* note 94.

102. *Id.*

103. MINN. STAT. §124D.10(10) (2002).

104. *Id.*

105. *Id.*

106. *Id.* at §124D.10(13).

107. *Id.* at §124D.10(11).

108. MINN. STAT. §122.25(1) (2002).

109. MINN. STAT. §124D.10(8)(e) (2002).

group in mind.<sup>110</sup>

#### f. Academic Standards

Charter schools also have their own academic standards. The school determines the required content standards and reports them to the commissioner along with the schedule that the school will use to implement such standards.<sup>111</sup> The charter school, by a majority vote of the licensed teachers and administrators voting jointly and with the approval of the sponsor, determines both the number of content standards that the school requires students to complete and the requirements for graduation.<sup>112</sup> If an agreement is not reached, the state-required content standards will be the default.<sup>113</sup> The schools may use their own performance assessments on students; but these assessments must have a grading system that is consistent with that of the public schools.<sup>114</sup> Charter schools may “(1) establish more than one content standard in a single course. . . ; (2) develop a system allowing students to meet a content standard through different subject areas; and (3) determine at what grade levels a content standard may be completed.”<sup>115</sup> The school must maintain records containing the following to submit to the commissioner for audit at his or her request:

- (1) examples of local assessments used to measure students’ completion of a content standard;
- (2) aggregate data on students’ completion of each high school content standard;
- (3) aggregate data on each year’s high school graduates, including the number of high school content standards completed, and the level of achievement earned on each standard;
- (4) anonymous examples of student work in each high school content standard; and
- (5) the number and identity of available content standards, the number of required content standards, and the number of content standards completed by students.<sup>116</sup>

The schools are held to a high level of accountability by the

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110. *Id.*

111. *Id.* at §120B.031(1)(a),(d).

112. *Id.* at §120B.031(1)(b)(3).

113. *Id.* at §120B.031(1)(c).

114. *See id.* at §120B.031(3).

115. *Id.* at §120B.031(7).

116. *Id.* at §120B.031(8).

public school system; and the academic standards will be subject to review by the examination and evaluation panel.<sup>117</sup> The panel consults with both national and international education experts while examining, evaluating, and sustaining the rigor of the state standards.<sup>118</sup> The panel evaluates the quality of the standards and assessments, and may make recommendations.<sup>119</sup>

#### g. Termination of Charter

A charter school contract may be terminated or not renewed on any of the following grounds: “(1) failure to meet the requirements for pupil performance contained in the contract; (2) failure to meet generally accepted standards of fiscal management; (3) violations of law; or (4) other good cause shown.”<sup>120</sup> If the charter is revoked or not renewed, the school must be dissolved.<sup>121</sup>

### E. SUMMARY

The structure of charter schools, the applicable doctrines, and the provisions of copyright law create a question as to where copyright ownership should be vested. In many ways, the charter schools have set up a situation of works made for hire with some overlap with the teacher exception. Since the curriculum is developed for use in the schools, the fair use doctrine is also an important consideration in this area. Accordingly, all of these aspects must be evaluated before a

117. The panel shall be composed of:

(1) two teachers selected by Education Minnesota, one of which shall have been a teacher of the year, and one with national board certification;

(2) deans of the colleges of education from the University of Minnesota, a Minnesota state college, and a Minnesota private college;

(3) a director of curriculum and instruction;

(4) an assessment practitioner;

(5) a school board member selected by the Minnesota school boards association; and

(6) an elementary school principal, a middle school principal, and a high school principal, each selected by the state organization representing such principals.

*Id.* at §120B.031(12).

118. *Id.*

119. *Id.*

120. *Id.* at §124D.10(23)(b).

121. *Id.*

decision can be reached as to who owns charter school curricula. Furthermore, consideration must be given to both the consequences of curricula ownership and the public policy implications of the ownership.

### III. ANALYSIS

#### A. CHARTER SCHOOL CURRICULUM AS A WORK MADE FOR HIRE

##### 1. Overview

In the event that a conflict over the ownership of curriculum arises, the local school district may try to obtain the copyright over the curriculum by claiming that it was a work made for hire.<sup>122</sup> If a court were to find that the curriculum was a work made for hire, the local school district, as the employer, would own the copyright to the work because the copyright vests in the employer in such situations.<sup>123</sup> When the employee is doing work within the scope of his or her employment, the copyright vests in the employer.<sup>124</sup> On the contrary, when there is an express agreement that the work will be a work for hire, the intellectual property rights of the employee are considered waived.<sup>125</sup>

##### 2. Education Management Organizations

Since many charter schools are contracting out for their curriculum development, the best place to start would be the work for hire and the education management organizations. The curriculum is designed with a particular focus in mind,<sup>126</sup> and must adhere to certain academic standards.<sup>127</sup> The education management organizations work with the charter schools to develop curricula designed to fit both of these needs.<sup>128</sup> In the absence of a contract vesting the copyright for

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122. *See supra* Part II.D.

123. *See supra* Part II.D.

124. *See supra* Part II.D.

125. *See supra* Part II.D.

126. *See* MINN. STAT. §124D.10 (8)(e) (2002), *supra* note 105 and accompanying text.

127. *See supra* Part II.F.2.f.

128. Charter schools using educational management organizations have these companies provide many services for them. Kent Fischer, *Public School Inc.*, ST. PETERSBURG TIMES, Sept. 15, 2002, at 1A. "The companies do everything: oversee [the] schools' budgets, pay the teachers, contract for lunch

the curricula in the education management organizations,<sup>129</sup> the question is whether or not the individual curriculum is a work made for hire. There are very specific criteria that must be met in order for a work to be considered made for hire, and for the copyright to vest in the employer.<sup>130</sup> Since the work must fall within one of the two classifications enumerated by Congress,<sup>131</sup> both classifications will be examined. The first consideration is whether or not the curriculum is “work prepared by an employee within the scope of his or her employment”.<sup>132</sup> The answer depends on whether the roles played by the education management organizations fall within the common law agency definition of employee.<sup>133</sup> In making this determination, the Court gives a number of factors to consider:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; the provision of employee benefits; and the tax treatment of the hired party.<sup>134</sup>

The education management companies must use skill in order to develop the curriculum. Depending on what sort of resources they can obtain from the school districts, education management companies may be required to independently find the tools of research for curriculum development. Furthermore, these companies would most likely work at their own company headquarters to develop the curriculum. These factors point against a finding of “employee” status. However, if the education management organizations and the schools have longstanding contracts, along with the districts having the right to assign additional projects and discretion over the deadlines for the curriculum, an “employee” status will likely

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services, write the curriculum.” *Id.*

129. In some cases there is a contract as to the intellectual property rights, yet in other cases there is not. John O’Neil, *Who Profits When For-Profits Run Schools?*, NEA TODAY, Sept. 1, 2002, at 31. “Many contracts between [education management organizations] and [school] districts stipulate that instructional models and materials are proprietary.” *Id.*

130. See *supra* Part II.D.

131. See *supra* note 45 and accompanying text.

132. 17 U.S.C. §101 (2002).

133. See *supra* note 49 and accompanying text.

134. *Cnty for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

be found. Moreover, the method of payment may affect the result, depending on whether the curriculum development is paid as a separate lump sum, or as an installment along with payments for other contractual obligations. The educational management companies would be able to control who they hire to assist with the project; and the school district would unlikely be considered a regular "employer" with respect to this field. The majority of factors seem to determine that education management organizations are not employees under agency standards. In addition, the management organization would most likely have subcontracted the work from the charter organization. This subcontract would leave the copyright interest in the hands of the education management organization unless a work for hire can be found using the second prong of the test.<sup>135</sup>

In the alternative, a work made for hire may exist if it is found to be the following:

a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>136</sup>

The nature of this sort of work fits better with the notion that the curriculum development is really subcontracted work from the charter organization. It also fits the type of work well ("instructional text" or "test" or "answer material for a test"). However, the work must be stipulated to be a work made for hire. Here, construction of the contract between the education management organization and the charter school would be of the utmost importance. If the contract does not refer to the developed curriculum in terms that construe it as a work made for hire, then the court will not likely find it to be such. Since the work made for hire doctrine does not appear to cover the contracts between the charter schools and the education management organizations, the teacher/textbook exception to the doctrine would not apply here.<sup>137</sup> Even if the work made for hire doctrine were applicable here, the teacher exception would not be applied because it is used to protect academic writers, not people writing textbooks or developing curricula. If the

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135. See *supra* note 45 and accompanying text.

136. 17 U.S.C. §101.

137. See *supra* notes 56-69 and accompanying text.

textbook exception is meant to cover all textbooks, regardless of who made them, it would make no sense that the second portion of the work for hire doctrine specifically covered “instructional texts”. There is a distinction in the textbook/teacher exception between any textbook and actual academic writings. This exception is meant to cover only the latter.

### 3. Development of Curricula by Teachers or Other Charter Members

Most charter schools, however, do not use education management organizations to develop their curricula.<sup>138</sup> Rather, charter members or the teachers develop the innovative charter curricula for their own schools. In such cases, the work for hire doctrine figures differently. If teachers are developing the curricula, then the work easily falls within the “work prepared by an employee within the scope of his or her employment” category.<sup>139</sup> The employee relationship would be established under the factors enumerated in *Community for Creative Non-Violence v. Reid*.<sup>140</sup> But since the teachers are academic professionals, the textbook/teacher exception may protect them, as it does college professors.<sup>141</sup> Whether or not charter school educators own the copyright on curriculum they developed depends on whether curriculum development is part of the teachers’ job descriptions, whether it fits in their regular duties, and whether their contracts with the schools included a reference to such work.<sup>142</sup> Because curriculum development is generally a job duty for charter school teachers, the teacher exception affords them fewer rights under copyright law than academic publishing in higher education.

Where teachers have developed the curricula, one commentator has suggested that an agreement could be reached between schools and teachers whereby copyright ownership would vest jointly.<sup>143</sup> Profits from the sale or lease

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138. See *supra* accompanying text note 3.

139. 17 U.S.C. §101.

140. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989), *supra* note 111 and accompanying text.

141. See *supra* notes 60-69 and accompanying text.

142. See *supra* notes 43-55 and accompanying text.

143. See Russ VerSteeg, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381, 410 (1990).

of the work would then be split between the parties.<sup>144</sup> However, the solution is not perfect. "As joint owners . . . the school could sell its interest in a work without the teacher's permission. For this reason, joint ownership is not necessarily an attractive solution."<sup>145</sup>

The same commentator also suggests the creation of "a 'shop right' for works created by teachers."<sup>146</sup> This right gives school districts the right to use curricula without paying royalties while giving the teacher copyright ownership. This vesting would be accomplished through a "license and accompanying grant."<sup>147</sup> In *Hobbs v. United States*,<sup>148</sup> the court explained the "shop right" in the following way: "[W]hen an employee makes and reduces to practice an invention on his employer's time, using his employer's tools and the services of other employees, the employer is the recipient of an implied, nonexclusive, royalty-free license."<sup>149</sup> Such a solution is a reasonable compromise because it rewards the teacher for the work done through copyright ownership, yet also confers upon the school district the right to use what it has paid to create.

If members of the charter developed the curricula, a fairly novel situation would arise in cases where the school's charter, an agreement between the school district and the charter board, does not cover ownership of curricula issues. In this scenario, a contractual work for hire relationship would not exist.<sup>150</sup> In addition, the requirement under the work for hire doctrine that the work was done by an employee within the scope of his or her employment may not be met either.<sup>151</sup> The question hinges on whether the charter boards are considered employees of the school district under the common law agency standard. The *Community for Creative Non-Violence v. Reid* criteria do not clarify the issue here.<sup>152</sup> Again these criteria include:

skill required, source of instrumentalities and tools, location of work,

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144. *Id.*

145. VerSteeg, *supra* note 144, at 410.

146. *Id.*

147. VerSteeg, *supra* note 144, at 410.

148. 376 F.2d 488, 494 (5th Cir. 1967).

149. *Id.*

150. *See* 17 U.S.C. §101.

151. *See id.*

152. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989) (holding that a work for hire will not be found in a case where the person is not an employee under the common law agency standard).

duration of relationship between parties, hiring party's right to assign additional projects to hired party, extent of hired party's discretion over when and how long to work, method of payment, hired party's role in hiring and paying assistants, regular business of hiring party, provision of employee benefits, and tax treatment of hired party.<sup>153</sup>

The charter boards must jump through many hoops in order to reach even the organizational stage.<sup>154</sup> At the organizational stage, the charter boards must clearly lay out what they intend to accomplish in the charter schools.<sup>155</sup> Furthermore, they are accountable for meeting those goals.<sup>156</sup> Since charter boards receive their funding from the local school district, their program designs must meet all of the academic standards promulgated by the local school districts.<sup>157</sup> The program standards must be approved by the school districts as well.<sup>158</sup> All of these factors support a finding of an employee relationship for the purposes of applying the work for hire doctrine. The school districts retain an exceptional degree of control over the entire curriculum development process. When charter boards develop the curricula, it would seem most likely that a work for hire relationship would be found.

The charter boards would be unable to apply the teacher/textbook exception just as the education management organizations were unable to do so.<sup>159</sup> The purpose of the exception is to protect academic writers, not merely people writing textbooks or developing curricula.<sup>160</sup> The curricula designed by charter boards would not fall into that narrow exception because the work is not necessarily a scholarly academic endeavor.

## B. FAIR USE AND CURRICULUM

### 1. Overview

The owner's exclusive rights to a work are limited by the fair use doctrine.<sup>161</sup> Thus, in the event of a charter school

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153. *Id.*

154. *See supra* Part II.F.2.a.,b.

155. *See supra* Part II.F.2.c.

156. *See supra* Part II.F.2.g.

157. *See supra* Part II.F.2.e, Part II.F.2.f.

158. *See supra* Part II.F.2.d.

159. *See supra* Part III.A.2.

160. *See supra* notes 138-139 and accompanying text.

161. *See* 17 U.S.C. §107 (2002).

closing, local school districts could attempt to use the curricula freely under the fair use doctrine. Under that doctrine, a party can make use of works that are copyrighted by another without the owner's permission as long as the use fits the description of fair use within the code.<sup>162</sup> The school district would be able to claim that it was using the curriculum for teaching, one of the enumerated uses in the fair use section.<sup>163</sup>

## 2. Use by the School District

If the charter school board or the education management organization owns the copyright on the curriculum, the question becomes whether the local school district can continue to use the curriculum in schools if the charter has been revoked and the charter school was closed down. Analysis of this question requires a look at the factors considered in determining whether a use is fair.<sup>164</sup> The statutory factors are:

- (1) the purpose and character of the use, including whether such a use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>165</sup>

Cases considering fair use limitations generally examine these factors one by one. Therefore, this note will do the same.

The purpose and character of the use in this context certainly fits within the intended scope of the fair use limitation. The statute emphasizes the difference between commercial use and nonprofit educational use.<sup>166</sup> Though commercial use does not preclude a finding of fair use,<sup>167</sup> in this situation the use would be purely educational. The school district would not be deriving a profit from using the curriculum in the schools because it would not be selling it to the students. The school district would merely be using what it

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162. See *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 306-07 (2d Cir. 1966) (explaining the nature of the copyright privilege and the fair use limitation).

163. See 17 U.S.C. §107.

164. See *id.*

165. *Id.*

166. See *id.*

167. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (establishing that though commercial use is a factor in considering whether a use is fair, it is not an absolute determinant).

already had, and saving itself the cost of purchasing a new curriculum. This factor would favor a finding of fair use.

The second factor, “the nature of the copyrighted work”, looks at what is being used.<sup>168</sup> When a work is more informational than creative, the scope of fair use is broadened.<sup>169</sup> In a situation such as that of the school district appropriating the curriculum of the charter school, the curriculum would most likely be informational. A court would probably need to consider the creativity in the presentation of the information. However, for the most part, curricula would be highly factual work. Further, “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”<sup>170</sup> This assembling of facts does not require a great deal of creativity. Yet, a court may find that in developing the curriculum, the copyright owner used a great deal of creativity when deciding what to include and exclude. Curriculum would seem to be a type of work that lends itself to fair use. Nevertheless, courts could vary on this point depending on the level of creativity they attribute to curriculum development.

The third factor of analysis, “amount and substantiality of the portion used in relation to the copyrighted work as a whole”,<sup>171</sup> is important to this discussion. Under a rational actor analysis, a school district using former charter school curriculum will want to use substantial portions of the material, if not the entire curriculum. Therefore, if the school district were confined to using only a limited portion of the curriculum, the district would likely pass on using any portion of the curriculum as its goals would most likely include finding a foundational curriculum, and not merely a supplement to classroom materials. In this manner, the school district would likely use a substantial quantum of material at the heart of the former charter school’s copyrighted work. Thus, the third statutory factor weighs against a finding of fair use under the presumptive characteristics of the school district’s use.<sup>172</sup>

In spite of the possible negative implications of the extent of school board use, the final factor merits special attention,

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168. 17 U.S.C. §107.

169. See *supra* note 42 and accompanying text.

170. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 563 (1985).

171. See *supra* notes 163-166 and accompanying text.

172. See *supra* notes 41-42.

concentrating on the effect of the use on the market.<sup>173</sup> Courts have seemed to consider this factor the most important in fair use analysis.<sup>174</sup> Perhaps this deference to the final factor is due to the nature of the monopoly the copyright grants.<sup>175</sup> Regardless of such apparent deference, the market effect still plays a relatively small role in the analysis at hand. Arguably, there will be a market effect on curriculum sales. The school district in which the charter school existed would be using the otherwise protected curriculum without paying for it. Additionally, the school district would not take its business elsewhere because it would have already gained what it needed. Thus, market demand would be reduced for the copyright owner or his competitors. In this particular instance, the effect is relatively small as the only outcome would be the loss of the one customer.

However, "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'"<sup>176</sup> In the situation at hand, there would be an adverse effect if the use became widespread. If all school districts were able to appropriate the curriculum of a defunct charter school, then the monetary value of that curriculum would plummet. However, this argument presupposes that all school districts would be taking the curriculum from one specific charter school, and that school curricula represent fungible products. Assuming more properly that curricula may not be readily substituted, and if acquisition was restricted to the school district in which the charter school was located, the market value of a particular curriculum external to the district would most likely only be minimally affected.

### C. POLICY IMPLICATIONS OF CURRICULUM COPYRIGHT OWNERSHIP

The greatest fear of those opposing charter schools is that

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173. See 17 U.S.C. §107.

174. See Harper & Row, 471 U.S. at 589-90 (Brennan, J. dissenting); MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981).

175. See generally Harper & Row, 471 U.S. at 546 ("It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value").

176. Harper & Rowe, 471 U.S. at 568 (alteration in original) (quoting Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 451 (1984)).

the schools will destroy public education.<sup>177</sup> In opposition to charter school legislation, it has been said that “[c]harter schools would utilize scarce public education dollars at the expense of the public school system.”<sup>178</sup> Others have noted that “public school districts invariably stand to lose money when the state or a school district grants a charter for a ‘public’ charter school.”<sup>179</sup> The charter school receives the per pupil allocation from the school district that otherwise would have gone to the regular public school.<sup>180</sup> Essentially the school district has already paid for curricula being used in the charter schools through tax dollars. This follows because charter schools use tax dollars to develop their curriculum.<sup>181</sup> It may therefore be argued that local school districts should be able to funnel that publicly funded curricula into the other non-charter public schools.

The developers of the curricula would disagree. Education management organizations contend that they are putting much-needed big money into curricula.<sup>182</sup> One education management organization “spent about \$40 million to research and develop a curriculum and school design that, it says, improves student achievement.”<sup>183</sup> The same education management organization took “back books and other supplies at many of its schools” when the final contract with the school district did not pay as much as the education management organization had expected.<sup>184</sup>

The taxpayers also claim that school districts are paying too much. When one educational consultant was hired to redesign schools, scheduling, and resources, the school district paid her \$800 per day.<sup>185</sup> Some school districts simply cut their

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177. See Velmanette Montgomery, *Charter Schools: An Alternative Education System*, N.Y. Beacon, May 27, 1998, at 10. *But see infra* note 162 and accompanying text.

178. Montgomery, *supra* note 178, at 10.

179. Kathleen Conn, *For-Profit School Management Corporations: Serving the Wrong Master*, 31 J.L. & Educ. 129, 142 (2002) (citation omitted).

180. *See id.*

181. *See* Conn, *supra* note 180, at 142.

182. *See* Queena Sook Kim, Edison Schools Sees Golden Opportunity in Philadelphia, WALL ST. J., Feb. 15, 2002, at B2.

183. *Id.*

184. Mary Lord, Philly’s Fresh Start, U.S. NEWS & WORLD REP., Oct. 7, 2002, at 52, 53.

185. *See* Tom Knapp, District Says Pricey Consultant Really a Bargain, INTELLIGENCER J., Mar. 20, 2002, at A1.

ties with the education management organizations if they feel they are paying too much or that the for-profit organizations are making their profits at the public's expense.<sup>186</sup> At least one school, the Christel House Academy, chose to part ways with its education management organization, SABIS, and proposed use of a curriculum that was modeled after SABIS' model.<sup>187</sup>

Some argue that the public should not be worried about the effect of the charter schools on public education. They argue that although funding will be lost, the "increased competition for students [will make] other schools more responsive."<sup>188</sup> However, many feel that for-profit charter schools are not creating exceptional curricula.<sup>189</sup> These individuals argue that the money being spent in hiring these educational management companies to develop curricula is wasted on something the school district will not even be allowed to keep if the contractual relationship ends.<sup>190</sup> The education management organizations often implement preexisting curricula instead of developing something specifically tailored to the school's needs.<sup>191</sup> Critics view this practice as evidence that the

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186. See Randy Ludlow, *Charter School Under Fire*, CIN. POST, Mar. 30, 2002, at 1A (a school's trustees filed suit to "dissolve the non-profit organization and close the school's doors" claiming that Sabis-owned companies were making profits at the school's expense); Editorial, *A Lesson in Education*, BOSTON GLOBE, Aug. 20, 2002, at A18 (in Boston a school ended its contract with Edison Schools Inc. once it felt it could manage the school on its own); Anand Vaishnav, *Another Charter School Cuts Its Ties*, BOSTON GLOBE, Aug. 2, 2002, at B2 (a school ended its relationship with Beacon Education Management, Inc. "citing a desire to save money by operating independently").

187. See Kim L. Hooper, *Charter Jettisons Pact with SABIS*, IND. STAR, Aug. 30, 2002, at B4.

188. Editorial, *Charter Schools Bring New Hope*, USA TODAY, Sept. 9, 1998, at 14A.

189. See generally *id.* (describing the fact that the level of accountability and academic performance of students enrolled in charter schools has come under question); see *infra* note 191.

190. See Fischer, *supra* note 129 ("Innovation is no longer the focus. The big companies offer standard curricul[a]. Critics call their schools 'McCharters.'"); O'Neil, *supra* note 130 ("[T]here is no evidence of 'revolutionary' breakthroughs by [education management organizations] with respect to curriculum, instructional strategies, or use of technologies") (quoting Henry Levin of the National Center for the Study of Privatization in Education); Dave Weber, *Pressure Mounting on School to Perform*; Board Might Yank Milestones' Charter, ORLANDO SENTINEL, July 30, 2002, at G1 ("[T]he once highly touted curriculum [of the education management organization, Milestones] is receiving mixed reviews nationwide").

191. See F. Howard Nelson & Nancy Van Meter, *What Does Private Management Offer Public Education?*, 11 STAN. L. & POL'Y REV. 271, 279 (2000) (stating that the companies sometimes use "off-the-shelf programs

companies are not fulfilling the terms of their contracts, and that companies are thereby saving money on educational resources.<sup>192</sup> “Most such companies have identified a model curriculum that they implement at each school they manage, realizing cost savings in this area over what public schools spend for diversified curricula.”<sup>193</sup> This process is known as the “cookie cutter” approach to curricula.<sup>194</sup> It is problematic when companies are not providing the promised caliber of curricula, or returning money saved by not exerting themselves to create particularized curricula. When public school districts have effectively paid for a custom product, which is ultimately not delivered, they should at least be able to keep the inferior generic product if they wish.

There are individuals who have found for-profit management organization curricula very useful. Marla Blakney, an educator that has worked with the management organization, Edison, Inc., remarked on the success she found with Edison-developed techniques. Blakney asserted that the techniques enabled her to handle her workload better, and work with students on the appropriate level.<sup>195</sup> Overall, Blakney found that the Edison system showed promise in giving students what they needed.<sup>196</sup> However, Blakney also voiced a common concern about the uncertainty associated with the permanency of this type of reform: “If Edison has to go, do we get to keep what they’ve given us? The materials, the techniques, the code of conduct?”<sup>197</sup> Blakney’s question is no minor point. Curriculum ownership and development is a vital issue in a public school system where resources are limited.

The central issue to remember in considering who should own the curricula of the charter schools is that the charter schools were created to provide an alternative to *public* education.<sup>198</sup> The charter schools were created to provide programs for at-risk students, and to provide innovative, specialized programs that cannot be offered at traditional

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already widely used in other public schools such as Success for All (SFA) or Direct Instruction (DI”).

192. Conn, *supra* note 180, at 145.

193. *Id.*

194. See Conn, *supra* note 180, at 145; see also Nelson, *supra* note 192.

195. See Rebecca Winters, *The Philadelphia Experiment*, *TIME MAG.*, Oct. 21, 2002, at 64-66.

196. *Id.*

197. Winters, *supra* note 196, at 66.

198. See *supra* notes 73-75 and accompanying text.

public schools.<sup>199</sup> It follows that charter schools were not meant to be eclipsed by private industry or created in order for education management organizations to have a market. The goal of charter schools is to provide education. In order to do so, they must have access to curricula. If the charter is revoked, or the contract with the education management company is ended, the school district that paid for the charter school's curriculum should not lose what it has purchased. Public education was supposed to thrive through charter school development, not suffer because of it.<sup>200</sup>

#### D. A SOLUTION IN CONTRACT

The most obvious solution to curriculum ownership in the charter schools involves prophylactic measures executed through contract law. If an education management organization is creating the curriculum, the school can contract for the school's right to use the curriculum following termination of the parties' relationship. School districts must become educated and active in negotiating these rights in order to keep their investment, curricula developed with public school district money. Education management organizations are unlikely to object to such a non-exclusive licensing clause. In this manner, education management organizations would retain the right to market the curriculum to other school districts, while guaranteeing the school district limited rights.

A similar contractual solution could be found between schools and educators or other individuals developing curricula. School districts want to reward innovative teachers, while maintaining the right to use curricula after a teacher has left a school. In such cases, a contract clause may provide for both the teacher's rights and the school's rights. The clause should vest the copyright in the teacher by avoiding the establishment of his or her contribution as a work for hire in the terms of the contract. If drafted accordingly, even if a teacher changes schools, he or she would be allowed to use the original material. However, the clause must also vest the school with continuing rights to use what was developed by the teacher.

As noted, these solutions are relatively easy to implement. They solve the problem of curriculum ownership by anticipating curriculum ownership issues and resolving them

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199. See *supra* notes 79-81 and accompanying text.

200. See *supra* note 187.

ex ante, through contract drafting. Resolving the issue of curriculum ownership becomes onerous if it has to be sorted retrospectively in the absence of clear contract terms. The following solutions deal with that problem.

#### E. A SOLUTION IN STATE SOVEREIGN IMMUNITY

The renegade solution to the curriculum ownership problem would be for the local school districts simply to take the curricula under the cloak of state sovereign immunity.<sup>201</sup> School districts could keep the materials and curricula and use them after the charter school had dissolved or the relationship with the curriculum provider had ended. This solution would not be a viable one. Although state governments are immune, the Supreme Court held in *Ex parte Young*<sup>202</sup> that the Eleventh Amendment<sup>203</sup> does not bar suits for injunctive relief against state officers.<sup>204</sup> The school districts could take the curriculum. However, they would likely just face the curriculum owner in court to defend against the seizure, and be prohibited from keeping the curriculum.

#### F. A SOLUTION IN RENEGOTIATED CONTRACTS

Keeping the contract with the school district is a constant concern for education management organizations. Especially in light of the fact that school districts may find that it becomes too burdensome and expensive to continue or extend their contractual relationships with the organizations. These pressures give school districts some bargaining power that may result in a more advantageous relationship through contract renegotiation. For example, when a contract with a management company comes up for renewal, school districts could employ a usage clause granting a non-exclusive right to use management company curriculum after the contractual period between the entities has ended. Thus, the schools could use the possibility of contract termination as a means of gaining curriculum rights while decreasing the loss-of-curriculum risk associated with management companies.

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201. See supra Part II.E.

202. *Ex Parte Young*, 209 U.S. 123, at 159-60 (1908) (opining that since enforcing an unconstitutional enactment is void, “the State has no power to impart to him any immunity from responsibility to the supreme authority of the United States”).

203. U.S. CONST. amend. XI.

204. See *id.*

## G. A SOLUTION IN LIMITED USE THROUGH EQUITABLE ESTOPPEL

As previously alluded to, absent a finding of a work made for hire or a fair use, the copyright for the curriculum will vest in the entity that created the curriculum.<sup>205</sup> Though the public school districts have paid for the curricula's creation, the districts will be unable to retain rights to the curricula as the law currently stands. Since there appears to be no easy remedy for this precarious situation, the best resolution would be for the school districts to be granted a limited license through equitable estoppel. This license would allow for their use of the curriculum in the school for which it was created (or if the charter school has dissolved, in the school replacing the charter school).

"[E]quitable estoppel bars a party from shirking the burdens of a voidable transaction for as long as she retains the benefits received under it."<sup>206</sup> The arrangement between the school districts and those developing the curricula is a voidable transaction. Moreover, educational management organizations do retain the benefits of the transaction if the charter is revoked because they are still paid and can still market the product. The school districts have already paid for the curricula to be developed, so it would be unfair to deny them access to that which they have purchased already. At the same time, the education management organization should not be paid to develop the curriculum and market it freely without giving something to the grantor of its funding. Part of the reason copyright is available to authors is that the limited monopoly granted by the right helps to defray the cost of research, design, and creation.<sup>207</sup> When the author has had his or her work funded by another, it is unfair to grant the monopoly to the author and grant nothing to the provider of the funding. The school districts have created a situation in which the education management companies can design a product without bearing the cost. Thus, the school districts should be able to use that product without having to pay a second time.

As an alternative to the otherwise harsh arrangement, the license of limited use through equitable estoppel could restrict the district to using the curriculum in only the school for which it is designed. Ultimately, this strategy would keep the market

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205. See *supra* Parts II.B-II.E.

206. *Oubre v. Entergy Operations*, 522 U.S. 422, 426 (1998).

207. See *supra* notes 15 & 16 and accompanying text.

free for the education management organization. At the same time, the school district, by right, would be able to keep the return of its investment in the curriculum by using it as long as it wishes in the designated school. This solution respects the boundaries and purposes of copyright law, the rights of the copyright owner, and the limited resources of public education. Granting a limited license would keep the charter school movement alive and keep it from harming the public education system. It would also allow for a better working relationship between the education management organizations and the public school districts because each would be clear about what it was getting out of the relationship.

#### IV. CONCLUSION

In the confusing existence of charter schools, it is difficult to tell where the boundary of ownership lies. In the case of the curricula, however, copyright ownership must vest in the education management organizations unless there is a provision in the contract stating otherwise. Though the education management organizations own the copyright for curricula, the public school districts pay for the development of the curricula. It is the author's view that school districts should be granted a license of limited use under equitable estoppel to implement the curricula in the schools for which the curricula have been developed in the absence of contractual provisions allowing use.