

“THE EQUITABLE RULE”:  
COPYRIGHT OWNERSHIP OF DISTANCE-  
EDUCATION COURSES

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“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.”

—*Regents of the University of Michigan v. Ewing*<sup>1</sup>

“I have . . . come to believe that we need to be very careful to ensure that information technology serves the university, and not the other way around.”

—Professor Stanley N. Katz, Princeton University<sup>2</sup>

“I’m not obsessively into technology. Mainly, I just scream for my wife.”

—Professor Marvin Druger, Syracuse University<sup>3</sup>

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1. 474 U.S. 214, 226 n.12 (1985) (internal citations omitted).

2. Stanley N. Katz, *In Information Technology, Don’t Mistake a Tool for a Goal*, CHRON. HIGHER EDUC., June 15, 2001, at B7.

3. Michael Arnone, *Many Students’ Favorite Professors Shun Distance Education: They Use Technology in the Classroom, But Refuse to Give Up Face-to-Face Interaction*, CHRON. HIGHER EDUC., May 10, 2002, at A39 (quoting Professor Druger).

“I’m fully confident that copyright, for instance, will no longer exist in 10 years, and authorship and intellectual property is in for such a bashing.”

—David Bowie<sup>4</sup>

“Let us understand that the equitable rule is, that no one should take more than his share, let him be ever so rich.”

—Ralph Waldo Emerson<sup>5</sup>

## I. INTRODUCTION

The proliferation of college courses offered over the Internet<sup>6</sup> presents several legal challenges to colleges and universities. Chief among these issues is ownership of the courses themselves. Do they belong to the faculty member who develops them, or to the college or university that provides the resources that support the professor’s work? A strong case can be made that under the Copyright Act,<sup>7</sup> the college or university owns the work under the doctrine of “work made for hire.”<sup>8</sup>

Despite having the law on their side, colleges and universities should neither boldly assert copyright ownership over online courses developed by their faculty, nor use these courses without permission. Monetarily, it is not worth the fight; the courses tend not to be the money-makers they are often anticipated to be.<sup>9</sup> Institutions can better serve their rights and interests—and uphold long-standing policies of academe and foster stronger relationships with their faculty—by entering agreements that share the ownership of online courses.<sup>10</sup> This paper will outline and explore the important elements of college and university copyright-ownership policies, in the context of the current state of copyright law.

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4. Steve Lohr, *In the Age of the Internet, Whatever Will Be Will Be Free*, N.Y. TIMES, Sept. 14, 2003, §4, at 1.

5. Ralph Waldo Emerson, Lecture Before the Mechanics’ Apprentices’ Library Association, Boston, Mass. (Jan. 25, 1841), in RALPH WALDO EMERSON, NATURE, ADDRESSES, AND LECTURES 190 (1849).

6. See *infra* text accompanying notes 17–24.

7. 17 U.S.C.A. §§ 101–3201 (1996 & West Supp. 2004).

8. 17 U.S.C. §§ 101, 201(b) (2000). See discussion *infra* Part III.D.1.b-2.a (arguing that distance-education courses are works made for hire under the typical faculty contract).

9. See *infra* text accompanying notes 256–268.

10. See discussion *infra* part V (Campus Copyright Policy Agreements). The scope of this paper will not encompass patents. While ownership of patents offers some useful analogies to copyright ownership, patent law is a sufficiently distinct legal area that exploration of patent-ownership policies is best left to other commentators to explore.

## II. THE RISE OF ONLINE DISTANCE EDUCATION

## A. What Is Distance Education?

It is helpful to have a definition of “distance-education courses” before discussing the prolific rise of such courses in higher education. The U.S. Copyright Office defines distance education as “a form of education in which students are separated from their instructors by time and/or space.”<sup>11</sup> The National Center for Education Statistics provides a similar, but more detailed, definition for distance education: “[E]ducation or training courses delivered to remote (off-campus) sites via audio, video (live or prerecorded), or computer technologies, including both synchronous (i.e., simultaneous) and asynchronous (i.e., not simultaneous) instruction.”<sup>12</sup>

Synonymous terms for distance education include “distance learning,” “distributed learning,” and “distributed education.”<sup>13</sup> Despite so many interchangeable terms, “distance education” usually focuses on “the delivery of instruction with a teacher active in determining pace and content, as opposed to unstructured learning from resource materials.”<sup>14</sup> The most extensive use of distance education as a substitute for the classroom experience is in higher education.<sup>15</sup>

There is no typical digital distance-education course. Instructors sometimes develop courses from scratch, and they sometimes customize templates from commercial software. They may combine several technologies including e-mail, threaded discussions, chat rooms, whiteboard programs, shared applications, streaming video or audio, video or audio files, course management infrastructure, links to websites, and interactive CD-ROMs and DVD-ROMs.<sup>16</sup>

For purposes of this paper, “distance-education course,” “online course,” and “web-based courses” will be used interchangeably. The copyrightable portions of these courses that are the focus of this paper are the materials prepared by the faculty member before the course begins, as compared to the material created during the teaching of the course, such as threaded e-mail dialogues with students, and postings to the course’s website.

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11. U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 10 (1999) [hereinafter “U.S. COPYRIGHT OFFICE REPORT”], available at [http://www.copyright.gov/reports/de\\_rprt.pdf](http://www.copyright.gov/reports/de_rprt.pdf).

12. NATIONAL CENTER FOR EDUCATION STATISTICS, DISTANCE EDUCATION AT DEGREE-GRANTING POSTSECONDARY EDUCATION INSTITUTIONS: 2000–2001, at 1 (July 2003) [hereinafter “NCES DISTANCE-EDUCATION REPORT”], available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2003017>.

13. U.S. COPYRIGHT OFFICE REPORT, *supra* note 11, at 10.

14. *Id.*

15. *Id.* at 11.

16. *Id.* at 53–56. For examples of twelve different online courses and degree programs, see Amy Harmon, *Cyberclasses in Session: From Nursing to Music, Online Courses and Degree Programs Are Vast and Varied. A Guide to How Fast-Evolving Virtual Classrooms are Shaping Up*, N.Y. TIMES, Nov. 11, 2001, § 4A, at 30.

### B. More Nontraditional Classes for More Nontraditional Students

In the 2000–01 academic year, 56% of the two-year and four-year degree-granting institutions in the U.S.—2,320 institutions—offered distance-education courses, up from 44% three years earlier.<sup>17</sup> The percentage was highest among public institutions: 90% of public two-year and 89% of public four-year institutions offered distance education courses, compared with 16% of private two-year and 40% of private four-year institutions.<sup>18</sup>

The number of students taking distance-education courses has been equally explosive. In 1997–98, approximately 1.66 million students were enrolled in distance-education courses.<sup>19</sup> Approximately 1.34 million of those students were enrolled in college-level, credit-granting courses.<sup>20</sup> By 2000–01, there were an estimated 3.077 million enrollments in all distance education courses offered by two-year and four-year institutions.<sup>21</sup> There were an estimated 2.876 million enrollments in college-level, credit-granting distance education courses, with 82% of these at the undergraduate level.<sup>22</sup> The number of students enrolled in online MBA programs increased from five thousand in 2000 to one hundred thousand in 2003.<sup>23</sup> By 2006, the number of students taking online courses is projected to grow to five million.<sup>24</sup>

The market for distance education has expanded as the face of the average college student has changed. The traditional college student who attends full time and lives on campus composes less than 20% of the current student population.<sup>25</sup> Adults over twenty-five years old now represent nearly half of the students in colleges and universities.<sup>26</sup> The majority of college students are older, attend part-time, hold jobs, have families, and live off campus.<sup>27</sup> The convenience and flexibility of online courses is integral to their educational needs.

The working-adult market of students represents the “sweet spot” to Andrew S. Rosen, president of Kaplan Inc., which operates Kaplan College and Kaplan

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17. NCES DISTANCE-EDUCATION REPORT, *supra* note 12, at 3; Vincent Kiernan, *A Survey Documents Growth in Distance Education in Late 1990s*, CHRON. HIGHER EDUC., Aug. 8, 2003, at A28.

18. NCES DISTANCE-EDUCATION REPORT, *supra* note 12, at 3.

19. NATIONAL CENTER FOR EDUCATION STATISTICS, DISTANCE EDUCATION AT POSTSECONDARY EDUCATION INSTITUTIONS: 1997–98, at 15 (Dec. 1999), available at <http://nces.ed.gov/pubs2000/2000013.pdf>.

20. *Id.* at 50.

21. NCES DISTANCE-EDUCATION REPORT, *supra* note 12, at 6. “Enrollments” include duplicated counts of students enrolled in multiple online courses. *Id.* at 5.

22. *Id.* at 6.

23. Janna Braun, *Do Your Homework: It's Easy to Find Online M.B.A. Programs These Days. It's Harder to Find the One That Is Right for You*, WALL ST. J., Oct. 20, 2003, at R7.

24. William C. Symonds, *Giving It the Old Online Try: More People Are Clicking Their Way to Degrees, Creating Huge Opportunities for the Education Industry*, BUS. WK., Dec. 3, 2001, at 76.

25. ARTHUR LEVINE & JEFFREY C. SUN, BARRIERS TO DISTANCE EDUCATION 4 (2002).

26. Symonds, *supra* note 24, at 76.

27. Levine & Sun, *supra* note 25, at 4.

College Online.<sup>28</sup> He said that traditional courses on campus “still require people to set aside a specific set of hours to get across town, find a babysitter, and those things tend to be disqualifying for a lot of people.”<sup>29</sup> Online courses present greater flexibility and options.

But convenience is only one reason why students choose distance-education courses. Evidence shows that, “when students are actively involved in a self-driven learning project, they learn more and remember it longer than when they are passively sitting and listening.”<sup>30</sup>

### C. Examples From Campuses

Several institutions encourage their students to take online courses. In September 2001, Fairleigh Dickinson University (“FDU”) began requiring all undergraduates to take at least one distance-learning course each year.<sup>31</sup> In an article about the program, FDU’s president and associate provost for interdisciplinary, distributed, and global learning wrote: “No new credit requirements were added—just the method of delivery and the pedagogical design.”<sup>32</sup> With this requirement, most students at the university will take about ten percent of their courses online.<sup>33</sup>

Many institutions are experimenting with “hybrid” or “blended” courses and degree programs that use online sessions to replace some in-class meetings. For example, the University of Central Florida offers about one hundred hybrid courses that meet half the time in classrooms and half online; the University of Wisconsin system has a “hybrid course project,” under which seventeen faculty members on five campuses are developing hybrid courses; and Ohio State University’s introductory statistics course is developing a hybrid course that offers a choice of classroom or virtual activities.<sup>34</sup>

Chemistry 1A at the University of California at Berkeley is the university’s largest course each year, with 2,100 students, and it formerly required more than one hundred teaching and support staff to teach and manage the course.<sup>35</sup> To make

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28. Dan Carnevale & Florence Olsen, *How to Succeed in Distance Education: By Going After the Right Audience, Online Programs Build a Viable Industry*, CHRON. HIGHER EDUC., June 13, 2003, at A31.

29. *Id.*

30. Frank Newman & Jamie Scurry, *When Teaching Clicks: Online Technology Pushes Pedagogy to the Forefront*, CHRON. HIGHER EDUC., July 13, 2001, at B7. *But see* Dan Carnevale, *As Distance Education Evolves, Choices Reflect Institutional Cultures*, CHRON. HIGHER EDUC., May 4, 2001, at A37 (citing certain studies that suggest students are more likely to drop out of an online course than a traditional course, in part, perhaps, because online courses demand more self-motivation).

31. J. Michael Adams & Michael B. Sperling, *Ubiquitous Distributed Learning and Global Citizenship*, THE PRESIDENCY, Winter 2003, at 31, 32.

32. *Id.* at 32.

33. Jeffrey R. Young, *‘Hybrid’ Teaching Seeks to End the Divide Between Traditional and Online Instruction: By Blending Approaches, Colleges Hope to Save Money and Meet Students’ Needs*, CHRON. HIGHER EDUC., March 22, 2002, at A33.

34. *Id.*

35. BUSINESS-HIGHER EDUCATION FORUM, *BUILDING A NATION OF LEARNERS: THE NEED FOR CHANGES IN TEACHING AND LEARNING TO MEET GLOBAL CHALLENGES*, at 22 (2003),

the course more dynamic and engaging for students and faculty, the university added several technological changes, including online quizzes with automatic grading and immediate feedback; enhanced lectures with graphics and animation; and an online lab manual combined with animated, interactive exercises for future lab experiments.<sup>36</sup>

Institutions are also trying to establish partnerships across state lines, overseas, and with branches of the military. In 2002, West Virginia and Kentucky entered an agreement allowing students in West Virginia to take online courses from community colleges in Kentucky.<sup>37</sup> In January 2003, the New School University and Britain's Open University entered a partnership to develop distance-education programs, including a joint course program in management development that will consist of five online courses.<sup>38</sup> The U.S. Army, because of increased demand for online education from soldiers stationed at home and around the world, has greatly expanded the number of colleges participating in its distance-education program. The program, called eArmyU, offers more than one hundred degree programs and enrolls more than 30,500 soldiers. By 2005, the Army expects to enroll about 80,000 soldiers.<sup>39</sup>

Colleges and universities are also offering courses online through for-profit ventures. In 2000, Cornell University launched eCornell, its for-profit distance-education company, which focuses on noncredit professional-certification courses, such as human-resources management.<sup>40</sup> AllLearn, a distance-education company supported by Oxford University, Stanford University, and Yale University, began selling online courses to the public in August 2002. Professors from the three institutions created the approximately fifty available courses, which cost \$250 in tuition, plus an additional \$25 to \$50 in materials.<sup>41</sup>

In 2003, Augsburg College in Minneapolis and Capella University—a for-profit institution based in Minneapolis that offers courses online—entered a three-year agreement under which Capella will pay Augsburg to hire new professors to develop and teach courses for Capella.<sup>42</sup> Capella will own the courses, including the online components, but Augsburg faculty will have unlimited use for their own

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available at [http://www.acenet.edu/bookstore/pdf/2003\\_build\\_nation.pdf](http://www.acenet.edu/bookstore/pdf/2003_build_nation.pdf).

36. *Id.*

37. Dan Carnevale, *W.Va. Students Get New Option on Online Courses*, CHRON. HIGHER EDUC., July 5, 2002, at A33. Kentucky's community colleges offer more online courses than West Virginia's, which is why the agreement did not provide for Kentucky students to take online courses from West Virginia colleges. *Id.*

38. Dan Carnevale, *New School and Open U. to Collaborate*, CHRON. HIGHER EDUC., Feb. 7, 2003, at A28.

39. Dan Carnevale, *Army Adds 12 Colleges to Distance-Education Program*, CHRON. HIGHER EDUC., Feb. 7, 2003, at A28.

40. Michael Arnone, *Cornell's Distance-Education Arm Readies New Program, and Hopes for Profits*, CHRON. HIGHER EDUC., Nov. 2, 2001, at A48.

41. Scott Carlson, *Alliance Backed by Oxford, Stanford, and Yale Offers Courses to the Public*, CHRON. HIGHER EDUC., Sept. 6, 2002, at A47. For a discussion of failed online commercial ventures, see *infra* text accompanying notes 260–266.

42. Scott Carlson, *A Leap From Modesty to Cyberspace: A Small Lutheran College Sees Big Benefits from Teaming Up with a For-Profit University to Offer Courses Online, but Some Professors Are Skeptical*, CHRON. HIGHER EDUC., Dec. 5, 2003, at A21.

classes.<sup>43</sup> Although details of the contract were not made public, William V. Frame, president of Augsburg, said, “It should earn us between \$500,000 and \$1 million net in the third year, when we’re up and fully running.”<sup>44</sup>

The New York Institute of Technology (“NYIT”) and UNext, a for-profit education company, entered an agreement in October 2003 to create Ellis College, which will offer undergraduate degrees in business-oriented fields to working adults.<sup>45</sup> Professors at NYIT will devise the curriculum and teach the courses, and NYIT will grant the degrees.<sup>46</sup> UNext designed the software on which the courses will run and will help market the college.<sup>47</sup> NYIT and UNext did not disclose financial details of the new college, indicating only that a revenue-sharing agreement had been arranged.<sup>48</sup>

One online project has no profit motive. The Massachusetts Institute of Technology (“MIT”), through its OpenCourseWare project, aims to publish online the outlines, lecture notes, assignments, and reading lists for all two thousand courses offered at MIT by September 2007.<sup>49</sup> The project’s purpose is to expand access to educational materials by making them free and without restriction for noncommercial use. Many MIT faculty expressed enthusiasm for the project, and their involvement is voluntary.<sup>50</sup>

When faculty may not be so enthused about participating in an online project, institutions are providing incentives for the development of distance-education courses and online materials. George Mason University recently completed Innovation Hall, a \$20 million, one hundred thousand square-foot facility with classrooms that feature sound systems, video players, digital projectors, wireless microphones, tables with Internet jacks and power outlets for laptops, and touch-screen computers in podiums.<sup>51</sup> Rather than assign the building to a particular department, the university will select professors from all disciplines to teach in Innovation Hall, provided the faculty members expand the use of technology in their courses.<sup>52</sup> At the University of North Carolina at Chapel Hill, which started requiring all freshmen to have a laptop computer in the fall of 2000, the office of the vice chancellor for information technology financed two faculty proposals to develop interactive-media books—one on basic cell and molecular biology, the

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43. *Id.*

44. *Id.*

45. Scott Carlson, *UNext and N.Y. Institution Create an Online College That Caters to Working Adults*, CHRON. HIGHER EDUC., Oct. 10, 2003, at A21.

46. *Id.*

47. *Id.*

48. *Id.*

49. Florence Olsen, *MIT’s Open Window: Putting Course Materials Online, the University Faces High Expectation*, CHRON. HIGHER EDUC., Dec. 6, 2002, at A31. See Charles M. Vest, *Why MIT Decided To Give Away All Its Course Materials via the Internet*, CHRON. HIGHER EDUC., Jan. 30, 2004, at B20; MIT OpenCourseWare website at <http://ocw.mit.edu/index.html>.

50. Olsen, *supra* note 49, at A31.

51. Scott Carlson, *A \$20 Million Carrot: A University Wants Faculty Members to Compete to Get into a New High-Tech Building*, CHRON. HIGHER EDUC., April 18, 2003, at A39.

52. *Id.*

other on three nineteenth-century artists—for laptops.<sup>53</sup> Media books contain hypertext links, audio and video clips, computer simulations, and the ability to graph data that is entered by the student.<sup>54</sup>

#### D. Competing Ownership Interests

The race to develop online courses naturally raises the question: who owns them? The courses and their materials do not fit neatly into existing institutional policies on intellectual property. They are part textbook, to which universities rarely claim ownership rights, and they are part invention, to which universities usually own the patent rights and share in licensing income.<sup>55</sup> As a result, faculty and their institutions are asserting competing reasons to claim ownership over online courses.

Faculty members cite practical and policy reasons for ownership. First, they often envision making a profit off these courses.<sup>56</sup> They are equally concerned that if they give up ownership of the course and its online materials, they will lose control over course content and dissemination of the work—including the manner of distribution, revisions, and derivative works—which in turn would threaten academic freedom.<sup>57</sup> The first tenet of academic freedom, as expressed in the *1940 Statement of Principles on Academic Freedom and Tenure by the American Association of University Professors*, is: “Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties.”<sup>58</sup> One author described professors’ desire to retain copyrights this way: “[F]aculty copyrights are being constructed as badges of autonomy, independence, and control.”<sup>59</sup>

The labor-intensive nature of developing and teaching an online course also leads professors to seek ownership. Besides developing the course, they usually maintain chat rooms and respond to e-mail from students around the clock, which in turn raise concerns over staffing, course loads, advising, faculty support, and teaching-assistant roles.<sup>60</sup>

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53. Florence Olsen, *Chapel Hill Seeks Best Role for Students’ Laptops: Requirement Yields Savings, But Educational Gains are Evolving and Hard to Measure*, CHRON. HIGHER EDUC., Sept. 21, 2001, at A31, A32.

54. *Id.* at A32.

55. Lisa Guernsey & Jeffrey R. Young, *Who Owns On-Line Courses? Professors and Universities Anticipate Disputes Over the Earnings From Distance Learning*, CHRON. HIGHER EDUC., June 5, 1998, at A21.

56. Laura G. Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223, 265 (1992).

57. *See id.*; Guernsey & Young, *supra* note 55, at A22.

58. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, available at <http://www.aaup.org/statements/Redbook/1940stat.htm> [hereinafter AAUP STATEMENT ON ACADEMIC FREEDOM] (last modified April 2003).

59. CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 102 (2001).

60. LEVINE & SUN, *supra* note 25, at 6.



Universities, like their faculty, have a pecuniary interest in owning online courses.<sup>61</sup> This interest is especially true when the institution incurred the cost of creating the materials in the first place.<sup>62</sup> Ohio State University made this argument when it began requiring its graduate students to submit their doctoral dissertations electronically for posting online.<sup>63</sup> In the sciences, Ohio State has historically held some intellectual-property rights to dissertations and student work because university grants and equipment help make the research possible.<sup>64</sup> In the humanities, Ohio State's associate dean of the Graduate School indicated that the university had a similar ownership right because those graduate students produce their work as an academic requirement, often while employed as teaching assistants or receiving scholarships.<sup>65</sup>

Colleges and universities may also see ownership as a way of preventing their faculty from developing courses for rival institutions. As President Graham B. Spanier of Pennsylvania State University ("Penn State"), explained: "Universities may see some of their faculty developing software for other educational institutions, who in turn sell it, perhaps in competition with the home institution's programs."<sup>66</sup>

To try to sort through these competing interests, institutions and their faculty now often include copyright ownership provisions in their contracts. The Massachusetts Society of Professors, which represents the faculty at the University of Massachusetts, began negotiations with the university in October 2002 to delineate rights and responsibilities over distance-education courses.<sup>67</sup> While some of the union's demands, like capping enrollment in online courses at fifteen students, required more extensive talks, the issue of ownership did not.<sup>68</sup> The administration was willing to allow faculty members to retain ownership and control of courses.<sup>69</sup> In New Jersey, ownership of intellectual property was a central issue in contract negotiations between the state colleges and universities and the faculty union in 2003.<sup>70</sup>

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61. See Lape, *supra* note 56, at 264–65 ("The interest taken by universities in faculty copyrights is primarily monetary, as demonstrated by the universities' interest in holding copyright in technologically complex work . . .").

62. Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549, 561 (2000).

63. Scott Carlson, *Students Oppose Ohio State's Plan to Put Dissertations Online*, CHRON. HIGHER EDUC., May 30, 2003, at A33.

64. *Id.*

65. *Id.* Ohio State's policy caused some faculty members to be concerned about the intellectual-property rights of their students. One English professor said, "Our concern is whether this [policy] is going to take control of the copyright out of the hands of the student and into the hands of the university." *Id.*

66. Guernsey & Young, *supra* note 55, at A23 (internal quotations omitted).

67. Dan Carnevale, *Union Seeks Agreement with U. of Mass. on Distance Education*, CHRON. HIGHER EDUC., Sept. 27, 2002, at A50.

68. *Id.*

69. *Id.*

70. To view the faculty union's initial demands regarding intellectual property and online courses, see [http://www.cnjscl.org/BARGAINDEMANDSnoneconomic\\_2.pdf](http://www.cnjscl.org/BARGAINDEMANDSnoneconomic_2.pdf) at 39–43 (March

## III. COPYRIGHT LAW

## A. History

The concept of ownership of intellectual property dates back to thirteenth-century craft guilds in Europe.<sup>71</sup> Copyright itself was developed as a response to the printing press by providing a monopoly to printers, who were required to register a work for the right to make copies of it.<sup>72</sup> Modern copyright dates to the Statute of Anne of 1710 in England, which granted copyright to authors in their registered works for fourteen to twenty-five years.<sup>73</sup>

As a matter of policy, copyright law assumes that authors need and deserve monetary profit, and it fosters a market economy in intellectual commodities by “defining and defending the respective economic interests of property owners.”<sup>74</sup> Copyright law also has a public purpose, namely “to promote the dissemination of information that is useful to the public.”<sup>75</sup>

## B. “Promoting the Progress of Science and the Useful Arts”: The Constitution and the Copyright Act

In the United States, the concepts of protecting the property interests of authors, and providing useful information to the public, are embedded in the Constitution. The Constitution granted Congress 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.”<sup>76</sup>

The Copyright Act provides that copyright ownership “vests initially in the author or authors of the work.”<sup>77</sup> The Copyright Act protects a work from the time it is created. The Act states: “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.”<sup>78</sup> Stated more simply, “[A] work is protected at the very

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21, 2003). The final agreement may be viewed at <http://www.cnjscl.org/Library/AFT%2003-07%20FT%20Contract.pdf> (last visited Oct. 12, 2004).

71. MCSHERRY, *supra* note 59, at 38.

72. See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2–6 (1967). For a history of the concept of intellectual property from thirteenth-century European craft guilds to the seventeenth-century monopoly granted to the British Stationers’ Company, see MCSHERRY, *supra* note 59, at 38–42, 46.

73. MCSHERRY, *supra* note 59, at 111; Statute of Anne, 8 Anne., ch. 19 (1710). For a copy of the Statute of Anne, see <http://www.copyrighthistory.com/anne.html> (last visited Oct. 12, 2004).

74. MCSHERRY, *supra* note 59, at 75.

75. Michele J. Le Moal-Gray, Note, *Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education*, 16 *TOURO L. REV.* 981, 990 (2000).

76. U.S. CONST. art. I, § 8, cl. 8.

77. 17 U.S.C. § 201(a) (2000).

78. *Id.* § 102(a).

instant that, for example, a word is written on a page or encoded onto a computer disk.”<sup>79</sup> An author is not required to register a copyright, or even affix a copyright notice to the work to secure copyright protections.<sup>80</sup>

The Act defines eight categories of works of authorship. They are literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.<sup>81</sup>

Copyright owners enjoy exclusive rights to their works under the Copyright Act. This bundle of rights includes: reproducing the work in copies or phonorecords;<sup>82</sup> preparing derivative works; distributing copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, performing the copyrighted work publicly; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, displaying the copyrighted work publicly; and in the case of sound recordings, performing the copyrighted work publicly by means of a digital audio transmission.<sup>83</sup>

In addition to the above-enumerated bundle of rights, copyright owners enjoy several statutory remedies against infringers. Infringers are liable for actual damages and their profits,<sup>84</sup> or statutory damages per each infringed work between \$750 and \$30,000, or up to \$150,000 when the infringer acts willfully.<sup>85</sup> Damages

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79. Russ VerSteege, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381, 384 (1990).

80. 17 U.S.C. § 408(a) (2000).

81. *Id.* § 102(a)(1)–(8).

82. Under the Copyright Act, phonorecords are defined as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.” *Id.* § 101.

83. 17 U.S.C.A. § 106 (1996 & West Supp. 2004). Authors of works of visual arts have additional rights under 17 U.S.C. § 106A (2000). The owner of a copyright also has the right to transfer the copyright. *Id.* § 201(d). Despite the transfer, the author of the work always retains the ability to exercise certain rights, such as terminating transfers and licenses of the work under certain conditions. 17 U.S.C.A. §§ 203(a), 304(a) (1996 & West Supp. 2004). This includes the exercise of moral rights. 17 U.S.C. § 106A (2000).

84. 17 U.S.C. § 504(a)(1) (2000). Damages from copyright infringement are often measured by the decrease in market value of the copyrighted works. *See* DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW ch. 4, at 247 (1993).

85. 17 U.S.C. § 504(c) (2000). Courts have the discretion to decrease the statutory damage award to as low as \$200 per infringement in cases where infringers were not aware, and had no reason to believe that, their acts constituted copyright infringement. *Id.* at § 504(c)(2). Although copyright owners have the discretion to pursue statutory damages and may elect to do so at any point during a lawsuit before final judgment, defendants have a constitutional right to a jury trial on the question of statutory damages. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340

may also include court costs and attorney fees.<sup>86</sup> Other remedies include injunctive relief<sup>87</sup> and the impounding, and eventual destruction, of the infringing copies.<sup>88</sup> Infringers face criminal liability, including imprisonment, for willful copyright infringement for purposes of commercial advantage or private financial gain.<sup>89</sup>

Copyright owners do not have unlimited rights to their works. The Copyright Act contains several significant limitations, most notably the “fair use” privilege.<sup>90</sup> Section 107 of the Copyright Act states that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”<sup>91</sup>

These examples in § 107 are not a complete list of fair uses under the law. The U.S. Supreme Court has held that the recording of broadcast television for later viewing, also called “time shifting,” is also a fair use.<sup>92</sup>

The fair-use provision of the Copyright Act sets out four factors to be considered to determine “whether the use made of a work in any particular case is a fair use . . . .”<sup>93</sup> These four factors are:

- (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>94</sup>

One commentator cautions: “The factors, each of which has elasticity, are not an exhaustive enumeration and do not present bright-line rules.”<sup>95</sup> Courts will apply these factors on a case-by-case basis.

The current on-campus controversies over peer-to-peer (“P2P”) file sharing—specifically, the downloading of music over the Internet—has brought new attention to the fair-use doctrine. This issue is beyond the scope of this paper, but for a broader examination of the fair-use doctrine, please see, for example, *A&M Records, Inc. v. Napster, Inc.* (file sharing damages the market for copyrighted

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(1998).

86. 17 U.S.C. § 505 (2000).

87. *Id.* § 502.

88. *Id.* § 503.

89. *Id.* § 506.

90. *Id.* § 107.

91. *Id.*

92. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).

93. 17 U.S.C. § 107 (2000).

94. *Id.*

95. Michael J. Remington, Background Discussion of Copyright Law and Potential Liability for Students Engaged in P2P File Sharing on University Networks (August 7, 2003), at <http://www.acenet.edu/washington/legalupdate/2003/P2P.pdf> (paper prepared for the Education Task Force of the Joint Committee of the Higher Education and Entertainment Communities).

works),<sup>96</sup> and *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.* (transferring a copyrighted work from one medium to another, so-called “space shifting,” is fair use).<sup>97</sup>

### C. Works Made for Hire

Generally, as noted above, the author is the creator of the work, i.e., the person who expresses an idea in a fixed, tangible medium. The law allows for joint authors, and therefore, co-owners of the work’s copyright, when two or more authors prepare their work “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>98</sup>

The law allows an exception to the general rule that the author is the creator of the work. Under the concept of “work[s] made for hire,”<sup>99</sup> the author—and therefore, the owner of the copyright—is often an employer or the person for whom the work was prepared.<sup>100</sup>

Determining whether a work is a work made for hire has many significant implications. In addition to ownership, the ramifications include copyright duration,<sup>101</sup> renewal rights,<sup>102</sup> termination rights,<sup>103</sup> and even the right to import certain goods bearing the copyright.<sup>104</sup> With these significant rights at stake, it is clearly important to determine what constitutes a work made for hire.

#### 1. Congress’s Two-Part Definition

The Copyright Act establishes two situations under which a work is a “work made for hire”:

- (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 a 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>105</sup>

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96. 239 F.3d 1004 (9th Cir. 2001).

97. 180 F.3d 1072, 1079 (9th Cir. 1999).

98. 17 U.S.C. § 101 (2000).

99. *Id.*

100. *See id.* § 201(b). The creator may still own the copyright if there is a written agreement. *Id.* The U.S. Supreme Court first recognized the ownership of copyright by the employer, rather than the employee, in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 242 (1903), which held that advertisements produced by several employees belonged to the employer.

101. Copyright ownership lasts for the life of the author plus seventy years, 17 U.S.C. § 302(a) (2000), or in the case of a work made for hire, ninety-five years from the first publication of the work or 120 years from its creation, whichever comes first. *Id.* § 302(c).

102. 17 U.S.C.A. § 304(a) (1996 & West Supp. 2004).

103. 17 U.S.C. § 203(a) (2000).

104. *Id.* § 601(b)(1).

105. *Id.* § 101.

The Act provides some definitions for its terms, two of which—supplementary work and instructional text—are particularly significant for institutions of higher education and their faculty.<sup>106</sup>

[A] “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.”<sup>107</sup>

Significantly missing from the Act, however, are definitions for “employee” and “within the scope of his or her employment.” Given this ambiguous statutory language, the key to determining whether a work is made for hire is the relationship between the parties. Without guidance from Congress, the courts have supplied interpretations of “employee” and “within the scope of his or her employment.”

## 2. Defining “Employee”

The U.S. Supreme Court provided the framework to determine an employee in a work-for-hire relationship in *Community for Creative Non-Violence v. Reid*.<sup>108</sup> In *Reid*, the Community for Creative Non-Violence (“CCNV”), a Washington, D.C.-based organization dedicated to eradicating homelessness in the United States, hired James Earl Reid, a sculptor, to produce a statue to dramatize the plight of the homeless for the 1985 Christmastime Pageant of Peace in Washington, D.C.<sup>109</sup> The parties agreed that the project would cost no more than \$15,000, not including Reid’s services, which he offered for free.<sup>110</sup> The parties did not enter a written agreement, and neither party mentioned copyright ownership.<sup>111</sup> Reid worked on the statue—called Third World America—in his studio in Baltimore, and CCNV members visited him several times to check on his progress and to coordinate CCNV’s construction of the sculpture’s base, in accordance with the parties’

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106. Roberta Rosenthal Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 13 (2001) (“One of the pertinent statutory categories is ‘an instructional text,’ and thus there is the possibility that on-line courses in their entirety could be considered works made for hire under this specific provision [provided the parties enter an express written agreement].”).

107. 17 U.S.C. § 101 (2000). See also H.R. REP. NO. 94-1476 Cong., 2d Sess., at 121 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5737:

The concept is intended to include what might be loosely called ‘textbook material,’ whether or not in book form or prepared in the form of text matter. The basic characteristic of ‘instructional texts’ is the purpose of their preparation for ‘use in systematic instructional activities,’ and they are to be distinguished from works prepared for use by a general readership.

108. 490 U.S. 730 (1989).

109. *Id.* at 733.

110. *Id.* at 734.

111. *Id.*

agreement.<sup>112</sup> Reid accepted most of CCNV's suggestions and directions.<sup>113</sup> After the completed work was delivered to Washington, CCNV paid Reid the final installment of the agreed-upon price, joined the sculpture to its base, and displayed it.<sup>114</sup> The parties, who had never discussed copyright in the sculpture, then filed competing copyright registration certificates.<sup>115</sup> CCNV sued Reid in federal court for return of Third World America and a determination of copyright ownership.<sup>116</sup>

The Court's starting point for resolving the ownership of copyright was to ask whether Third World America was "a work prepared by an employee within the scope of his or her employment" under 17 U.S.C. § 101(1).<sup>117</sup> Because the Copyright Act does not define "employee" or "scope of employment," the Court used the common law of agency.<sup>118</sup> To determine whether a hired party is an employee under the general common law of agency, the Court considered thirteen factors:

[T]he hiring party's right to control the manner and means by which the product is accomplished; . . . 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>119</sup>

The Court, however, cautioned: "No one of these factors is determinative."<sup>120</sup>

The Court found that Reid "was not an employee of CCNV but an independent contractor,"<sup>121</sup> and because CCNV could not satisfy the requirements for a commissioned work under § 101(2) of the Copyright Act, CCNV was not the

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112. *Id.*

113. *Id.*

114. *Id.* at 735.

115. *Id.*

116. *Id.*

117. *Id.* at 738.

118. *Id.* at 741, 751.

119. *Id.* at 751–52 (internal citations omitted). *See also* RESTATEMENT (SECOND) OF AGENCY §§ 220(1), 220(2) (1958).

120. *Reid*, 490 U.S. at 752. *But see* *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) (stating that some factors often have little significance in determining whether a party is an employee, while other factors—such as the right to control the manner and means of creation, the skill required, the provision of employee benefits, the tax treatment of the hired party, and the right to assign additional projects—will almost always be relevant and should be given more weight "because they will usually be highly probative of the true nature of the employment relationship."). *See also* MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03[B] (2004) ("[T]he major factor in determining whether a work is for hire is whether the employer had the right, whether or not exercised, to supervise and control the putative employee.").

121. 490 U.S. at 752.

author of *Third World America*.<sup>122</sup> The Court upheld the Circuit Court's decision to remand the case back to district court to determine whether CCNV and Reid were joint authors—and therefore co-owners of the copyright—because they prepared the statue “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole” under § 101 of the Copyright Act.<sup>123</sup>

### 3. Defining “Scope of Employment”

While *Reid* explored the first half of the first statutory definition of work made for hire—“work prepared by an employee”—the Court did not examine the second half of the definition—“within the scope of their employment.”<sup>124</sup> Some federal district court cases provide direction.<sup>125</sup> Courts have developed a three-part test, based on the common law of agency, to determine whether employees acted within the scope of their employment when creating a copyrightable work.<sup>126</sup> The three factors are: (1) whether the work is of the type that the employee is employed to perform; (2) whether the work occurs substantially within authorized work hours and space; and (3) whether the work's purpose, at least in part, is to serve the employer.<sup>127</sup>

One case is particularly instructive regarding copyright ownership. In *Marshall v. Miles Laboratories, Inc.*, the district court held that an article written by an employee of a laboratory was prepared within the scope of his employment and, therefore, the copyright belonged to the employer.<sup>128</sup> The employee argued that he had written the article at home, he had not received instructions to write the article, and he received no additional compensation.<sup>129</sup> The employer responded that the employee researched the article while at work, the employee discussed the article with one of the laboratory's scientists while at work, this scientist became a coauthor of the article, and the employer reimbursed the employee for expenses from presenting the article at a symposium.<sup>130</sup> The court concluded that the employer owned the copyright, noting that the employee's job description included the development, summarization, and reporting of “information about advances in technology to” the employer.<sup>131</sup>

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122. *Id.* at 753.

123. *Id.* On remand, the district court held that: (1) Reid is the sole author of the sculpture and that he has sole ownership rights under 17 U.S.C. § 106 regarding all three-dimensional reproductions; (2) CCNV is the sole owner of the original copy of the sculpture; and (3) both parties are co-owners of all § 106 rights regarding two-dimensional reproductions.) *Comm. for Creative Non-Violence v. Reid*, Civ.A. 86-1507, 1991 WL 415523 (D.D.C. Jan. 7, 1991).

124. 17 U.S.C. § 101 (2000).

125. *See Newark v. Beasley*, 883 F. Supp. 3 (D.N.J. 1995); *Roeslin v. Dist. of Columbia*, 921 F. Supp. 793 (D.D.C. 1995).

126. RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

127. *Beasley*, 883 F. Supp. at 7; *Roeslin*, 921 F. Supp. at 797–98.

128. 647 F. Supp. 1326, 1331 (N.D. Ind. 1986).

129. *Id.* at 1330.

130. *Id.*

131. *Id.* at 1331.



## D. Distance-Education Courses as Works Made for Hire

## 1. Faculty Members: “Employees” Under the Work-Made-For-Hire Doctrine?

*a. Maybe Not . . .*

Several arguments can be made to support the notion that faculty members should not be considered “employees” under the work-made-for-hire doctrine. Most of these arguments focus on aspects related to the first factor listed in *Reid*—controlling the manner and means of production.<sup>132</sup> Professors select their own “research goals, procure their own funding, determine their research strategy, and choose the format through which their findings are expressed.”<sup>133</sup> The American Association of University Professors (“AAUP”), in its *Statement on Copyright* adopted in 1999, agreed with this assessment: “In the case of traditional academic works . . . the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions. This is the very essence of academic freedom.”<sup>134</sup> The AAUP recognizes, however, that the employer college or university may fairly claim ownership of faculty-created work that falls into three categories: “special works created in circumstances that may properly be regarded as ‘made for hire,’<sup>135</sup> negotiated contractual transfers, and ‘joint works’ as described in the Copyright Act.”<sup>136</sup>

Some scholars conclude that professors are not work-for-hire employees because the institution is not the motivating force behind the work.<sup>137</sup> As one commentator stated, “[S]ince professors do not create scholarly works for the universities that hire them, but rather to advance their own interests (future employment, enhancement of reputation), their scholarship does not fit the intended meaning of a work made for hire.”<sup>138</sup> Two commentators ascribe professors’ motivation to produce scholarly writings not to a requirement to create copyrightable works for their employer, but to a desire for “proof[s] of excellence” to assure their advancement or retention.<sup>139</sup>

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132. *Reid*, 490 U.S. at 751.

133. Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 603 (1987).

134. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT ON COPYRIGHT (1999), at <https://www.aaup.org/statements/Redbook/Spccopyr.htm> [hereinafter AAUP STATEMENT ON COPYRIGHT].

135. *Id.* Included in this category are works created as a specific requirement of employment or as an assigned institutional duty, such as reports prepared by a dean, or by the chair or members of a faculty committee. *Id.*

136. *Id.*

137. Dreyfuss, *supra* note 133, at 597.

138. Pamela A. Kilby, *The Discouragement of Learning: Scholarship Made for Hire*, 21 J.C. & U.L. 455, 468 (1994).

139. James B. Wadley & 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, 416 n.102 (1999).

Akin to the means-and-manner-of-production analysis, Professor Robert A. Gorman of the University of Pennsylvania Law School concludes that professors are not employees under the work-made-for-hire doctrine because the doctrine builds its foundation on “the accountability of a subordinate to a superior,” which “cannot be transplanted to academic writings.”<sup>140</sup> He lists several reasons why: professors select the subjects of their work; professors select the views about the subjects that they present to the reader; professors decide the opinions and their expression in their work; and informed readers do not identify professors’ views with those of their university employer.<sup>141</sup>

Proceeding with the list of factors in *Reid*, the location of the work could indicate that faculty members should not be considered employees. If they are creating an online course, they could have the necessary software to work at home; they could also incorporate material developed either while working at other institutions, while working as a consultant, or through other outside activities.<sup>142</sup>

Professor Roberta R. Kwall of DePaul University’s College of Law finds that two other factors in *Reid*—hiring of assistants, and determining work hours—help the faculty’s argument.<sup>143</sup> She writes, “Most faculty members probably enjoy total discretion in the selection of research assistants, and in deciding when and how long to work.”<sup>144</sup>

The right to assign additional projects also militates against finding that faculty are employees under work-for-hire doctrine. Universities do not generally assign scholarly articles to professors, “and it is doubtful whether they could do so without also invading a professor’s academic freedom.”<sup>145</sup>

Finally, colleges and universities—because of their not-for-profit status—might not be a “business” under the *Reid* analysis. In *Reid*, the Court specifically stated that the Community for Creative Nonviolence—a nonprofit unincorporated association—was “not a business at all.”<sup>146</sup>

The AAUP would agree that institutions of higher education are not typical businesses. In its *Statement of Principles on Academic Freedom and Tenure*, the AAUP stated: “Institutions of higher education are conducted for the common good and not to further the interests of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.”<sup>147</sup>

Beyond the boundaries of *Reid* and agency law, some scholars stand on policy and constitutional grounds to reach the conclusion that the professor-university relationship does not fit the work-made-for-hire doctrine. For example, Professor

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140. Robert A. Gorman, *Copyright Conflicts on the University Campus: The First Annual Christopher A. Meyer Memorial Lecture*, 47 J. COPYRIGHT SOC’Y OF THE U.S.A. 297, 302 (2000).

141. *Id.* at 302–03.

142. Kwall, *supra* note 106, at 18.

143. *Id.* at 17.

144. *Id.*

145. Kilby, *supra* note 138, at 466.

146. *Cnty. for Creative Nonviolence v. Reid*, 490 U.S. 730, 753 (1989).

147. AAUP STATEMENT ON ACADEMIC FREEDOM, *supra* note 58.

Kwall agrees with the AAUP's view that universities are not a traditional "business" by applying the policy behind copyright law. She writes, "All educational institutions have the dissemination of information and the advancement of knowledge as their primary goals."<sup>148</sup>

Several scholars look to the traditional role of faculty members, and the long-standing policies of academe, to conclude that professors should not be defined as employees under work-for-hire principles. By policy and precedent, "traditional scholarly works" produced by "independent academic effort" usually are not considered works for hire, and the majority of professors own the work they produce in the course of their employment.<sup>149</sup> The longstanding assumption that professors own the copyright to their works is evidence that the professors and their employer institutions do not consider the creation of copyrightable works to be within the scope of employment.<sup>150</sup> One scholar asserts: "To equate a general duty to write with a duty to produce specific work for a university distorts the nature of academic employment and downgrades the professorial rank to that of an ordinary staff member."<sup>151</sup>

One commentator, attorney Pamela A. Kilby, goes so far as to conclude that it would be unconstitutional to find faculty members' works to be works made for hire. She writes, "It is outside the scope of Congress' power under the Copyright Clause to vest rights of authorship in a party who is not the motivating factor that brought the work to light. To do so would inhibit, rather than promote, the progress of science."<sup>152</sup> "The university employer generally is neither the motivating factor nor the creative spark behind the creation of professors' works."<sup>153</sup> She further concludes that applying the work-for-hire doctrine to academic work would also violate the First Amendment "because it imposes an undue burden on academic speech—a burden that is not justified by the government interests that the law is meant to advance."<sup>154</sup> She also writes, "The prospect of a university using the copyright law to stifle unorthodox or politically incorrect speech strikes at the very heart of First Amendment values."<sup>155</sup>

*b. . . . But They Probably Are*

Some commentators, applying the thirteen factors in *Reid*, conclude that faculty members should be considered employees under the work-made-for-hire doctrine

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148. Kwall, *supra* note 106, at 20. See also Wadley & Brown, *supra* note 139, at 419: "[I]n academia . . . the creation of economically valuable copyrightable works is clearly subordinated to the goal of encouraging the dissemination of information."

149. MCSHERRY, *supra* note 59, at 107.

150. Kilby, *supra* note 138, at 467. See also Wadley & Brown, *supra* note 139, at 403, 404 (noting that the parties' presumed intent and expectations are to have work such as lesson plans, exams, lecture notes, and letters of recommendation fall outside the work-for-hire doctrine).

151. J.H. Reichman, *Computer Programs as Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research*, 42 VAND. L. REV. 639, 674 (1989).

152. Kilby, *supra* note 138, at 457–58. For further analysis of this point, see *id.* at 469–74.

153. *Id.* at 473.

154. *Id.* at 458, 483–85.

155. *Id.* at 475.

within the Copyright Act.<sup>156</sup> Because of the large expense behind the development of online courses, it is helpful to examine simultaneously two of the *Reid* factors: the right to control the manner and means of production, and the source of instrumentalities and tools. Relating these factors to an online course, a faculty member could be seen as an employee creating a work made for hire.

The costs borne by universities to develop distance-education programs encompass four categories: course design, course delivery, faculty development, and student support.<sup>157</sup> Course design includes defining the learning objectives, organizing the material to be covered, assembling resources such as texts and research sources, and designing interactive, graphically rich student assignments.<sup>158</sup> Course delivery and support includes investment in the technological infrastructure, the course-delivery software that makes the course content accessible to students and instructors, and technical support for users.<sup>159</sup> Faculty development encompasses direct costs, such as the use of new technological tools to redesign courses for the Internet; and indirect costs, such as release time and potential adjustments to promotion, salary, and tenure policies.<sup>160</sup> Student support includes access to library materials, plus advising, registration, financial aid, and career counseling.<sup>161</sup> For example, for online students at the University of Wisconsin at Madison, the institution provides advising, admissions, registration, bookstore services, and technical assistance via the Internet, e-mail, fax, and telephone.<sup>162</sup>

One community college in Minnesota specifically designates a portion of its

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156. MCSHERRY, *supra* note 59, at 107 (“Professors could be considered employees under work-for-hire doctrine because they are treated as employees for tax purposes, receive benefits, use materials and equipment provided by the employer, and cede substantial control in the hiring and remuneration of their assistants to their employer, the university.”) See Todd F. Simon, *Faculty Writings: Are They “Works Made For Hire” Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485 (1982–83); Laughlin, *supra* note 62, at 569–72; Wadley & Brown, *supra* note 139, at 426.

157. Jane Sjogren & James Fay, *Cost Issues in Online Learning: Using “Co-opetition” to Advantage*, 34 CHANGE 52, 53–54 (May/June 2002), at [http://www.findarticles.com/p/articles/mi\\_m1254/is\\_3\\_34/ai\\_85465154](http://www.findarticles.com/p/articles/mi_m1254/is_3_34/ai_85465154).

158. *Id.* at 54. See also MCSHERRY, *supra* note 59, at 108 (arguing that if the university staff is greatly involved in designing a website for a course, the university can copyright the site because of its legitimate claim to substantially controlling the production of the work). The university would strengthen its position if it sold the Web site to a distance-education company, and the professor who taught the course could not rework the material. *Id.*

159. See Scott Carlson, *A Patent Claim That Could Cost Millions*, CHRON. HIGHER EDUC., Nov. 7, 2003, at A35. Acacia Research Corporation, which owns the patents covering the concept behind streaming—storing and transmitting digital sound and video on the Internet—is threatening infringement actions against colleges and universities with which it does not have a license agreement. *Id.* Acacia’s usual license fee is two percent of the revenue from courses that use its technology. *Id.*

160. Sjogren & Fay, *supra* note 157, at 54. See also Simon, *supra* note 156, at 504 (noting that universities will often vary a professor’s teaching load to provide more time for research and writing). A one-semester or one-year sabbatical with pay is another example of control of means and manner of production. *Id.* “The university would not offer such free time unless publication or research is expected.” *Id.*

161. Sjogren & Fay, *supra* note 157, at 54–55.

162. Glenn C. Altschuler, *The E-Learning Curve*, N.Y. TIMES, Aug. 5, 2001, § 4A, at 13.

tuition for online courses toward the services needed to support the online program. Tuition at Lake Superior College is \$98.25 per credit in 2003–04, with \$7 dedicated toward online-course support such as instructional software, online-tutoring programs, and salaries for students who operate a technology help desk, mentor other students, and assist the campus’s instructional technologist.<sup>163</sup>

It is reasonable to conclude that colleges and universities are the source of instrumentalities and tools under the *Reid* test. First, there are the usual tools needed for scholarly work: office equipment and supplies, photocopying, research aides, travel expenses, and registration fees for conferences.<sup>164</sup> For distance-education courses, high-tech materials and support are needed. Most faculty members who post their work on the Internet use their institution’s online services to conduct research, the university’s computers to create the work, the university’s server to store their work, the university’s Internet connection to make the work available, and the university’s technology staff for assistance.<sup>165</sup> The “electronic-classroom” M.B.A. program at the University of Arizona, which connects its Tucson-based classes to a classroom in Santa Clara, California, features a system of two videoconferencing rooms leased by the university for \$17,000 a month.<sup>166</sup>

The support—and expense—of technical staff is the key to creating and maintaining online courses. Support staff members include computer programmers, video crew, support staff, script writers, graphic artists, and photographers.<sup>167</sup> Two professors at Cornell estimate that an institution with approximately twenty thousand students will need a staff of twenty to thirty technicians to support the institution’s communications infrastructure.<sup>168</sup>

A study by two researchers at the University of Nebraska at Lincoln revealed one unsung duty performed by technical staff: cleaning up “link rot.” The study showed that online courses experience a relatively high rate of “link rot,” a term used to describe hyperlinks to webpages that have moved or cease to exist.<sup>169</sup> Because of link rot, an online course’s links must be periodically checked to remove or update links that have expired. Academic departments often do not

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163. Andrea L. Foster, *How One Community College Copes When Online Enrollment Soars*, CHRON. HIGHER EDUC., Dec. 19, 2003, at A31. Tuition for on-campus courses is \$91.25 per credit. *Id.* at A32.

164. Simon, *supra* note 144, at 504. See also Wadley & Brown, *supra* note 139, at 426: (noting that “teachers create copyrightable works . . . using the instrumentalities of the employer such as paper, pens, computers, printers and other resources . . .”).

165. Laughlin, *supra* note 62, at 571.

166. Florence Olsen, *Videoconferencing With Some Life to It: The U. of Arizona Finds that Pricey Technology Attracts Distance-Education Students*, CHRON. HIGHER EDUC., July 4, 2003, at A24.

167. See UNIV. OF TEX. SYS., U.T. SYSTEM INTELLECTUAL PROPERTY POLICY IN PLAIN ENGLISH, in COPYRIGHT CRASH COURSE, “Who Will Contribute Copyrightable Expression?” at <http://www.utsystem.edu/ogc/intellectualproperty/course.htm> (last visited Oct. 12, 2004).

168. Diane Lynch, Glenn C. Altschuler & Polley McClure, *Professors Should Embrace Technology in Courses . . . and Colleges Must Create Technology Plans*, CHRON. HIGHER EDUC., Jan. 18, 2002, at B16.

169. *Online*, CHRON. HIGHER EDUC., May 3, 2002, at A33 (estimating a half-life for science-education hyperlinks of approximately fifty-five months).

budget for such maintenance costs.<sup>170</sup>

Penn State's distance-education division, World Campus, provides an instructive example of the vital role played by campus technical staff to convert classroom courses into online courses. World Campus starts by pairing faculty members with instructional designers.<sup>171</sup> Instructional designers put courses online with a team of computer experts that includes an instructional technologist, who helps with computer programming; a graphics designer, who adds images and artwork to webpages; a technical typist, who finalizes the copy; and a production specialist, whose duties include securing copyright approval.<sup>172</sup>

The overall cost of implementing online courses and programs points to the significant resources that must be invested, strengthening the argument that the college or university controls the manner and means, and instrumentalities and tools, of production. AllLearn, a distance-education company supported by Oxford University, Stanford University, and Yale University, spent between \$10,000 and \$150,000 to produce each of its approximately fifty courses.<sup>173</sup> At Fairleigh Dickinson University, the five-year implementation cost of the university's requirement that all students take at least one distance-education course each year will be approximately \$12 million; the expenses include costs for distance education, technology infrastructure upgrades, and related staffing.<sup>174</sup> At MIT, early estimates for the cost of its seven-year OpenCourseWare project to make its courses available for free over the Internet totaled nearly \$100 million, although the final costs might be lower.<sup>175</sup>

The other factors of *Reid* provide more support for considering faculty to be employees in the context of online distance-education courses. Under *Reid*'s skill-required factor, faculty could be seen as employees because they may not have the skills necessary to publish their materials electronically. While some faculty have developed the required computer skills to produce online courses, many faculty depend on their institution's information-technology personnel or librarians to convert their work into "Internet-published works."<sup>176</sup>

The *Reid* factor regarding location of the work also helps support the conclusion that faculty are employees under the work-for-hire doctrine. Faculty members typically perform much, if not most, of the work to create the material for an online course at their college or university, and the material is most often stored and made available on the college or university's server.<sup>177</sup> Moreover, the

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170. *Id.* See also John Markwell, *Broken Links: Just How Rapidly Do Science Education Hyperlinks Go Extinct?*, at [http://www-class.unl.edu/biochem/url/broken\\_links.html](http://www-class.unl.edu/biochem/url/broken_links.html) (last visited Oct. 12, 2004); John Markwell & David W. Brooks, *Broken Links: The Ephemeral Nature of Educational WWW Hyperlinks*, 11 J. SCI. EDUC. & TECH. 105 (2002).

171. Dan Carnevale, *Turning Traditional Courses into Distance Education: Instructional Designers Translate Professors' Teaching Styles into Electronic Content*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A37.

172. *Id.*

173. Carlson, *supra* note 41, at A47.

174. Adams & Sperling, *supra* note 32, at 35.

175. Olsen, *supra* note 49.

176. Laughlin, *supra* note 62, at 570.

177. *Id.* at 571.

professor might need the assistance of college or university staff, including video producers, computer programmers, and website designers.<sup>178</sup>

Because of the peculiarities of producing an online course, *Reid's* factor regarding assignment of additional projects could make a professor appear to be an employee under work-made-for-hire doctrine. Universities usually do not assign specific research topics, but they may assign the courses that the faculty must teach, and they could require the creation of web-based material for the course.<sup>179</sup>

The duration-of-relationship factor under *Reid* also points to faculty members being employees. Employer institutions and their faculty members—except for visiting professors and those on a fellowship—usually anticipate an on-going relationship that is not limited to the completion of a particular copyrightable work.<sup>180</sup>

The *Reid* factors regarding method of payment, assistants, benefits, and taxes all support the conclusion that faculty members are employees under work-for-hire principles. Most full-time faculty members receive a salary.<sup>181</sup> “The method of payment can be especially suggestive of an online course being considered a work for hire in those instances where a university awards a faculty member a particular amount of money to create an online course.”<sup>182</sup> Moreover, universities generally hire and pay research assistants.<sup>183</sup> With regard to benefits, most universities provide health-care insurance, pension, and tuition waivers or reductions for faculty and their dependents.<sup>184</sup> With regard to taxes, universities typically withhold federal and state income taxes and FICA taxes.<sup>185</sup>

Finally, under the *Reid* factor that asks whether the work is part of the regular business of the hiring party, it can be argued that colleges and universities are in the business of educating students, which includes the creation of courses and materials for those courses.<sup>186</sup> Colleges and universities are also in the business of producing and publishing scholarly research. Professors “create many of these works to enhance their own productivity or quality of work, much the same way as any employee working in commercial, labor or service jobs.”<sup>187</sup> In its report on intellectual property, the American Association of University’s Intellectual Property Task Force wrote that while the central mission of a research university “is to create, preserve, and disseminate knowledge through teaching and research,” the creation and dissemination of knowledge “is a collective enterprise at the university. . . . Individual faculty members as well as the School itself are part of a

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178. Kwall, *supra* note 106, at 18.

179. Laughlin, *supra* note 62, at 570.

180. *Id.* at 572.

181. *Id.* See also Wadley & Brown, *supra* note 139, at 426 (noting that “teachers create copyrightable works while being paid by the employer. . .”).

182. Kwall, *supra* note 106, at 17.

183. Laughlin, *supra* note 62, at 572; MCSHERRY, *supra* note 50, at 107.

184. Laughlin, *supra* note 62, at 570.

185. *Id.*; Kwall, *supra* note 106, at 17.

186. Laughlin, *supra* note 62, at 572. Professor Kwall explores whether the “regular business of the hiring party” should be determined according to the mission of the institution, i.e., whether it is a research or a teaching institution. See Kwall, *supra* note 106, at 18–19.

187. Wadley & Brown, *supra* note 139, at 426.

larger enterprise, and this must be recognized along financial as well as other dimensions.”<sup>188</sup>

2. Developing Online Courses: Within the “Scope of Employment”?

a. *Yes, Under Typical Faculty Contracts*

If an employee’s job description is the key to determining scope of employment, as indicated in *Marshall v. Miles Laboratories, Inc.*,<sup>189</sup> then a court could reasonably find that a typical faculty contract or work agreement encompasses the development of online courses, making such courses within the scope of employment.<sup>190</sup> In most colleges and universities, faculty members are expected to publish books or articles within their area of expertise, and the publications “are expected to meet standards both of quality and quantity, and occasionally, frequency.”<sup>191</sup> Professor Todd F. Simon of Kansas State University concludes: “The explicit and implicit agreements in the typical faculty employment agreement today support the idea that scholarly writing is within the course of employment as anticipated by the [Copyright Act].”<sup>192</sup>

The explicit factors identified by Professor Simon include a typical professor’s contract, which often calls for teaching a certain number of subjects or courses, and may expressly require that the faculty member research and write.<sup>193</sup> Other typical provisions within faculty contracts that point toward scholarly writing being within the scope of employment include compensation packages that assume some scholarly enterprise; promotion and evaluation materials that require faculty to indicate time spent in research, creative and professional activities; and the provision of secretarial support, computer availability, and library resources to facilitate scholarly productivity.<sup>194</sup>

Untenured faculty members face important implicit agreements to produce scholarly work. “Publishing the results of scholarly efforts is peculiarly important to junior faculty members, because, usually, a professor must publish to gain tenure as well. Whether the tenure publication requirement is express or not, every new faculty member knows he must ‘publish or perish.’”<sup>195</sup>

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188. AMERICAN ASSOCIATION OF UNIVERSITIES INTELLECTUAL PROPERTY TASK FORCE, INTELLECTUAL PROPERTY AND NEW MEDIA TECHNOLOGIES: A FRAMEWORK FOR POLICY DEVELOPMENT AT AAU INSTITUTIONS (1999), at <http://www.aau.edu/reports/IPReport.html> [hereinafter AAUFRAMEWORK].

189. See *supra* notes 129–132 and accompanying text.

190. Le Moal-Gray, *supra* note 75, at 994 (“Without an explicated right to the copyright of materials prepared or developed under the auspices of the employer, arguably the faculty member statutorily is an employee working within the scope of employment and waives any right to retain copyright ownership of any materials developed.”).

191. Simon, *supra* note 156, at 502.

192. *Id.* at 486.

193. *Id.* at 503.

194. Le Moal-Gray, *supra* note 75, at 1001.

195. Simon, *supra* note 156, at 503.



Other commentators find that online courses fall within a faculty member's scope of employment because of the history and philosophy of the work-made-for-hire doctrine. They note that:

'[S]cope' is defined to include only those works of a sufficient degree of importance to both parties to make the ownership of the copyright a likely object of dispute. In most cases . . . the works that should emerge from such an inquiry will be those in which the employer has a strong economic interest.<sup>196</sup>

Even with the interpretation under the Copyright Act that faculty are employees, their online courses are created within the scope of employment, and therefore faculty-created online courses are works made for hire, colleges and universities are well advised not to assert ownership over these works, as explained below in Part V.

*b. No, Under the Academic Exception . . . But Is the Exception Still Good Law?*

Some copyright scholars would strongly believe that the analysis in the section above is unneeded to determine whether faculty work is a work made for hire, because a time-honored tradition—the academic exception—has allowed teachers and faculty to retain copyright ownership of the work they produce. The academic exception developed under the Copyright Act of 1909, so it is not clear whether it survived the amendments made in 1976.<sup>197</sup> The 1909 Copyright Act provided that “the word ‘author’ shall include an employer in the case of works made for hire.”<sup>198</sup> The 1909 Act did not define “works made for hire” or “employer,” but in cases involving professors, courts defined the terms narrowly.<sup>199</sup>

In *Sherrill v. Grieves*, an instructor who taught military sketching, map reading, and surveying to U.S. Army officers wrote a textbook on these subjects.<sup>200</sup> Before the book's publication, Sherrill allowed the U.S. military to print a pamphlet incorporating the section on military sketching.<sup>201</sup> The defendants published an infringing work, arguing that Sherrill did not own the copyright because it was a work for hire.<sup>202</sup> The court held that Sherrill owned the copyright because, although he was employed to teach the subject contained in the pamphlet, he was not “obligated to reduce his lectures to writing.”<sup>203</sup>

Another important state-court case that supports the academic exception is *Williams v. Weissner*.<sup>204</sup> In *Williams*, an anthropology professor at the University of California at Los Angeles sued under California common law copyright to prevent

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196. Wadley & Brown, *supra* note 139, at 407.

197. See MCSHERRY, *supra* note 59, at 107.

198. Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075, 1087–88 (1909).

199. See, e.g., *Sherrill v. Grieves*, 57 WASH. L. REP. 286, 20 COPYRIGHT OFF. BULL. 675 (D.C. 1929).

200. *Id.*

201. *Id.* at 686.

202. *Id.* at 686–87.

203. *Id.* at 687.

204. 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

a commercial publisher of class notes from transcribing and publishing oral lectures delivered in class.<sup>205</sup> The publisher's defense was that the professor's lectures were the property of the university under the work-for-hire doctrine.<sup>206</sup> The court held that Williams owned the common law copyright to his lectures.<sup>207</sup>

Some commentators assert there is nothing in the 1976 Act or its legislative history to suggest that the Act eradicated the common law exception for professors from the common law definition of work made for hire.<sup>208</sup> They often cite dicta in a decision in the Seventh Circuit to support this contention. In *Hays v. Sony Corp. of America*, two public high school teachers who taught business classes wrote a manual to operate the school's word processors.<sup>209</sup> The school district later bought new word processors from Sony and asked Sony to modify the teachers' manual to be compatible with the new equipment.<sup>210</sup> Sony created a manual that directly incorporated sections of the teachers' manual.<sup>211</sup> The teachers sued Sony for copyright infringement.<sup>212</sup> The district court held that the manual was a work for hire and owned by the school district.<sup>213</sup> The circuit court dismissed the case on procedural grounds (want of timely appeal), but in dicta, the court—while acknowledging that under the 1976 Copyright Act the manual was a work for hire<sup>214</sup>—indicated that the “reasons for a presumption against finding academic writings to be work make for hire are as forceful today as they ever were.”<sup>215</sup> The court noted that 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.”<sup>216</sup>

The *Hays* decision provides the springboard that propels some commentators to conclude that the academic exception survives. As Professor Russ VerSteeg writes: “Judge Posner's dicta in *Hays* . . . illustrates the judiciary's reticence to accept the work-for-hire doctrine at face value in an educational context.”<sup>217</sup> Another commentator finds several policy reasons to support the survival of the academic exception and the presumption that faculty members, not their institutions, own their scholarly works. These policies include academic freedom, faculty expectation of enhancing their salaries with royalties, and faculty expectation of freedom to move to other institutions and recreate their courses.<sup>218</sup>

For several reasons, it appears more likely that the academic exception has not

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205. *Id.* at 543. Prior to the 1976 Act, common law copyright protected unfixed and/or unpublished works. See Lape, *supra* note 56, at 235 n.42.

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

207. *Id.* at 542, 546.

208. See, e.g., Lape, *supra* note 56, at 238.

209. 847 F.2d 412, 413 (7th Cir. 1988).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 416.

214. *Id.*

215. *Id.*

216. *Id.*

217. VerSteeg, *supra* note 79, at 406.

218. Laughlin, *supra* note 62, at 578–79.

survived the revisions to the Copyright Act. At the very least, *Williams* is no longer good precedent because the Copyright Act, under § 301, preempts state common-law copyright.<sup>219</sup> Section 301 of the Act “washes away the *Williams* rule.”<sup>220</sup> More broadly, the revisions to the Act between 1909 and 1976 strengthened the common law presumption that employers own the copyright to the work of employees by requiring a signed writing to rebut the presumption of ownership in the employer.<sup>221</sup>

An important case, again from the Seventh Circuit, proves this point.<sup>222</sup> In *Weinstein v. University of Illinois*, a pharmacy administration professor at the University of Illinois at Chicago sued over the publication of a scholarly article about a clinical program for practicing pharmacists.<sup>223</sup> The plaintiff sued his co-authors, university administrators, the university, and its trustees, claiming that the publication of the article with revisions, and with his name listed third in a series of three coauthors, deprived him of property without due process.<sup>224</sup> Based on its interpretation of the university’s copyright policy, the court held that Weinstein, along with his coauthors, owned the copyright to the article.<sup>225</sup> The copyright policy stated, in part, that university staff retained copyright in works they produced as authors, except in situations where the work was created as a “specific requirement of employment or as an assigned University duty.”<sup>226</sup> Without this policy, the court stated that the Copyright Act’s work-made-for-hire provisions were “general enough to make every academic article a ‘work for hire’ and therefore vest exclusive control in universities rather than in scholars.”<sup>227</sup>

The academic exception may be a victim of old age and new technology. The high cost of producing academic work—particularly online courses—may have swung the equities back toward the colleges and universities’ side, or at least back to the center of the scale, since the judicial interpretation of the Copyright Act of 1909. Commentators from Washburn University make this point by writing:

Although undoubtedly warranted at the time, [the academic] . . . exception may be so broad that it would likely exclude all the works produced by the faculty and staff employed within an educational context from the work-for-hire doctrine and, as a result, may unfairly discount any legitimate claims to authorship the academic employer

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219. 17 U.S.C. § 301(a) (2000). The statute provides:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

*Id.*

220. Simon, *supra* note 156, at 507.

221. Le Moal-Gray, *supra* note 75, at 1002–1003. See 17 U.S.C. §§ 201(b), 204(a) (2000).

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

223. *Id.*

224. *Id.* at 1092–93. The plaintiff sued under 42 U.S.C. § 1983 which subjects to liability every person who deprives another of constitutional rights while acting under color of law. *Id.*

225. *Weinstein*, 811 F.2d at 1094–95.

226. *Id.* at 1094.

227. *Id.*

may have.<sup>228</sup>

Two federal decisions in Colorado indicate that the courts might be abandoning the academic exception.<sup>229</sup> In *Vanderhurst v. Colorado Mountain College District*, a veterinary professor prepared course materials “on his own time with his own materials,” but the court held that the course materials were works for hire because their creation was “fairly and reasonably incidental to his employment.”<sup>230</sup> In a case in the Tenth Circuit, the plaintiffs, defendants, and court all agreed that the faculty’s work—in this case a journal article—was work made for hire.<sup>231</sup> In *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, two professors from the University of Colorado Health Sciences Center agreed to perform studies on patients’ absorption of iron from a multivitamin manufactured by American Cyanamid.<sup>232</sup> The professors published an article about the studies in a medical journal.<sup>233</sup> The plaintiffs in the case—the University of Colorado Foundation, the University of Colorado, the Board of Regents of the University of Colorado, and the two professors—maintained that the regents “are quite obviously the owner, because the Article is a ‘work made for hire’ by the co-authors done within the scope of their employment.”<sup>234</sup> The court agreed that there was no evidence to rebut such ownership.<sup>235</sup>

Given the judiciary’s current state of flux over the academic exception—including the split in the Seventh Circuit between *Hays* and *Weinstein*—and given the growing legal complexity of ownership issues over course materials, “What is clear is that without an explicit statutory foundation the exception can no longer simply be assumed.”<sup>236</sup> No clear definition for traditional scholarly work exists. Moreover, the line between “independent academic effort” and “collaboration” between faculty members and their institutions is blurred, especially when the faculty member needs extensive university resources—such as staff, computers, and software—to develop and use new media for teaching.<sup>237</sup> In short, the “mixed holdings of these cases indicate that [college or university] policy probably is the best way to resolve the ambiguity.”<sup>238</sup>

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228. Wadley & Brown, *supra* note 139, at 431.

229. See *Vanderhurst v. Colo. Mountain Coll. Dist.*, 16 F. Supp. 2d 1297, 1307 (D. Colo. 1998), *aff’d*, 208 F.3d 908 (10th Cir. 2000); *Univ. of Colo. Found., Inc. v. American Cyanamid Co.*, 880 F. Supp. 1387, 1400 (D. Colo. 1995), *aff’d in part and vacated in part*, 196 F.3d 1366 (Fed. Cir. 1999).

230. *Vanderhurst*, 16 F. Supp. 2d at 1307.

231. *Univ. of Colo. Found., Inc.*, 880 F. Supp. at 1400.

232. *Id.* at 1390.

233. *Id.* at 1391.

234. *Id.* at 1400 (quoting from Plaintiffs’ Reply Brief Supporting a Motion for Partial Summary Judgment at 29 n.55).

235. *Id.*

236. MCSHERRY, *supra* note 59, at 107.

237. *Id.*

238. Georgia Harper, *Developing a Comprehensive Copyright Policy to Facilitate Online Learning*, 27 J.C. & U.L. 5, 10 (2000).

### E. Conclusion

Under the Copyright Act's definition for work made for hire, the thirteen-point test in the Supreme Court's decision in *CCNV v. Reid* interpreting the definition, and the federal courts' definition of "scope of employment," it is reasonable to conclude that the copyright in faculty work most often will belong to the college or university.<sup>239</sup> Still, if officials use only the law as their guide, they will sometimes have to flip a coin to decide whether the copyright of a scholarly work belongs to the faculty member who produced it, or to the institution where it was created.<sup>240</sup>

The reality is that some works may involve a level of university involvement from which one might infer an intent to treat it as made-for-hire, whereas other works may not warrant such a determination. In the former case, the work should be included within the scope of the doctrine and in the latter case, it would not be included.<sup>241</sup>

To solve the ambiguity, college and university policies and collective bargaining agreements are drawing brighter boundaries of ownership, particularly around online distance-education courses and materials. The strongest agreements boil down the key issue—the manner and means of production—to faculty members' use of institutional resources to create their work. "University policy statements and collective bargaining agreements are reposing in the institution ownership of faculty-authored works for which the university provides an extraordinary measure of equipment, facilities, staff assistance or compensation."<sup>242</sup> Part V.B. below will provide specific provisions from current copyright policies and negotiated contracts to demonstrate how institutions of higher education are addressing these issues.

## IV. MODERN INTERPRETATIONS OF COPYRIGHT POLICY

### A. Intellectual Land Grab: Cultural Commons vs. Micropayments

Beyond academe, ownership of copyright has become a much-debated issue over the past few years. Recent cases include attempts to force the Girl Scouts to pay royalties for singing songs around campfires;<sup>243</sup> the Recording Industry Association of America's 261 copyright-infringement lawsuits against Internet users who downloaded music;<sup>244</sup> and the fight by independent film producers

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239. See *supra* text accompanying Part III.D.1.b-2.a.

240. Sherri L. Burr, *A Critical Assessment of Reid's Work for Hire Framework and Its Potential Impact on the Marketplace for Scholarly Works*, 24 J. MARSHALL L. REV. 119, 120 (1990) (arguing that "while four of the thirteen factors weigh in favor of the faculty member and four of the factors weigh in favor of the university, the remaining five factors have equities on both sides.").

241. Wadley & Brown, *supra* note 139, at 413.

242. Gorman, *supra* note 140, at 307. See *infra* text accompanying notes 298–319 for examples.

243. Robert S. Boynton, *The Tyranny of Copyright?* N.Y. TIMES MAG., Jan. 25, 2004, at 40, 42.

244. Lohr, *supra* note 4, at 1.

against the ban imposed in 2004 by the Motion Picture Association of America on sending DVDs to voters for annual film awards.<sup>245</sup> As one author summed it up, “In less than a decade, the much-ballyhooed liberating potential of the Internet seems to have given way to something of an intellectual land grab, presided over by legislators and lawyers for the media industries.”<sup>246</sup>

A group of copyright-law reformers argues that recent efforts to increase copyright protections, aimed at fighting piracy, will ultimately erode society’s ability to create and share ideas. The “free-culture movement,” as dubbed by Professor Lawrence Lessig at Stanford University, invokes the spirit of Thomas Jefferson and supports giving individual creators only a limited time to profit exclusively from their intellectual property.<sup>247</sup> The members of the movement “stress that borrowing and collaboration are essential components of all creation and caution against being seduced by the romantic myth of ‘the author’: the lone garret-dwelling poet, creating masterpieces out of thin air.”<sup>248</sup> Once a copyright has lapsed, the work would go into the public domain, a kind of cultural commons.

At the opposite end of the spectrum is the so-called “permission culture,” under which consumers would purchase leases to have restricted access to, and use of, copyrighted works such as books and songs.<sup>249</sup> Under this scenario, Apple’s online music store, iTunes—through which songs can be downloaded for \$0.99 each—represents the tip of the permission-culture iceberg. Through the emerging industry of digital-rights management, corporate owners of copyrights are drafting licenses that will result in so-called micropayments: “play a song on your computer for one price; transfer it to your MP3 player for a slightly higher fee.”<sup>250</sup>

Some legal scholars find greater policy justification for the permission culture’s micropayments than for the free-culture movement’s cultural commons. Columbia professor Jane C. Ginsburg asserts:

Copyright cannot be understood merely as a grudgingly tolerated way station on the road to the public domain. . . . Much of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work. Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert.<sup>251</sup>

Stanford Professor Paul Goldstein indicates the lengths to which an author’s rights could go: “The logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works. . . . [C]opyright should extend into every corner of economic value where

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245. Sarah McBride, *Academy Votes to Expel Member for Sharing Movies*, WALL ST. J., Feb. 5, 2004, at A8.

246. Boynton, *supra* note 245, at 42.

247. *Id.* at 42, 43.

248. *Id.* at 42.

249. *Id.* at 42–43.

250. *Id.* at 45.

251. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1068 (2003).

the cost of negotiating a license is not insurmountably high.”<sup>252</sup>

The free-culture movement, also called the Copy Left, is trying to find a more quantifiable compromise between the rights of creators and the interests of consumers. William Fisher, director of the Berkman Center for Internet and Society at Harvard Law School, is modeling a new compensation system on the current arrangement used to ensure that composers are paid when their works are performed or recorded.<sup>253</sup> Under Fisher’s proposal, called compulsory licensing, a central office would register all works capable of being transmitted online, like music and movies.<sup>254</sup> This central office would monitor the number of times a work is used, and then compensate the creators based on the frequency of usage, with the money coming from a 15% tax collected from devices used for storing and copying music and movies, such as blank CDs, MP3 players, and CD burners.<sup>255</sup> Fisher estimates that this proposal would raise \$2.4 billion, but critics contend that amount is insufficient when compared to the estimated \$11 billion in revenue made by the music industry in the United States alone.<sup>256</sup>

#### B. Reason to Compromise: “Show Me the Money”

Faculty members and their institutions often compete over ownership of online distance-education courses because each side believes the courses will be profitable on the open market.<sup>257</sup> “What distinguishes the Internet from everything else is the number of zeroes,” Professor Alan M. Dershowitz of Harvard University Law School has said.<sup>258</sup> “The money is so overwhelming that it can skew people’s judgment.”<sup>259</sup> According to Professor Lessig of Stanford University, however, only about two percent of all works protected by copyright produce continuing revenue for their owners.<sup>260</sup> Universities and their faculty need to be dispelled of the notion of instant Internet riches so they can move toward a compromise somewhere between a cultural commons and micropayments for the use of online courses.

Several institution-led online ventures have failed to generate profits for their

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252. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 178–79 (1994).

253. Boynton, *supra* note 245, at 45; Ethan Smith, *Can Copyright Be Saved?*, WALL ST. J., Oct. 20, 2003, at R1.

254. *Id.*

255. Boynton, *supra* note 245, at 45; Lohr, *supra* note 4, at 5.

256. Smith, *supra* note 254, at R3. Another type of licensing arrangement, developed by Professor Lessig’s Creative Commons project, would allow authors to reserve certain rights while waiving others under four basic agreements that can be mixed and matched: (1) securing attribution when their work is used by someone else; (2) denying use of their work for profit without permission; (3) preventing alterations to their work; and (4) permitting use of their work only if the new work is offered to the public under the same terms. *Id.*

257. *See supra* text accompanying notes 56–57, 61–66.

258. Amy Dockser Marcus, *Seeing Crimson: Why Harvard Law Wants to Reign In One Of Its Star Professors*, WALL ST. J., Nov. 22, 1999, at A1.

259. *Id.*

260. Amy Harmon, *Debate to Intensify on Copyright Extension Law*, N.Y. TIMES, Oct. 7, 2002, at C1.

partners. MIT decided to make the primary materials from its courses available for free online, through its OpenCourseWare project, after a study by consulting company Booz Allen Hamilton concluded that no market existed for selling MIT courses online.<sup>261</sup> Such advice came too late for Columbia University and New York University (“NYU”). In January 2003, Columbia announced that it would close Fathom, its for-profit distance-learning venture that aimed to sell web-based courses and seminars to the public.<sup>262</sup> With twelve partners—including the London School of Economics and Political Science, the University of Chicago, and the Woods Hole Oceanographic Institution—Columbia invested \$14.9 million in Fathom in 2001.<sup>263</sup> New York University closed down NYUOnline in November 2001, three years after becoming the first large nonprofit university to create a for-profit venture to market courses over the Internet.<sup>264</sup> The bust of the Internet industry ended NYU’s plans to tap the Internet investment market to finance development and marketing of its for-profit online courses.<sup>265</sup>

The State University of New York at Buffalo’s School of Management ended its eighteen-month-old web-based MBA program after only thirty-five students signed up for the two pilot courses in the fall of 2001.<sup>266</sup> “Each course has to have an instructor, a graduate assistant, technical people to be there in case the connection breaks down, as well as someone to design the course,” according to Howard G. Foster, associate dean for academic programs at the business school.<sup>267</sup> To recover its costs, the business school would have had to charge about \$23,000 for the two-year program, more than double the in-state tuition rate for the school’s traditional MBA program.<sup>268</sup> Similar closures of other major distributed-learning initiatives include Virtual Temple and United States Open University, underscoring “the immaturity of the e-learning market and the risks that await the commercial online ventures of traditional institutions.”<sup>269</sup>

Despite these many examples, some studies support the notion that online courses generate profits, or at least break even. The Pew Grant Program in Course Redesign has funded thirty technology-based projects that aim to maintain or increase quality while reducing costs.<sup>270</sup> The program’s early results suggest that institutions can yield an average savings of 41%—with a high of 86%—through the careful design and restructure of resources for high-quality learning

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261. Olsen, *supra* note 49, at A31.

262. Scott Carlson, *After Losing Millions, Columbia U. Will Close Online-Learning Venture*, CHRON. HIGHER EDUC., Jan. 17, 2003, at A30.

263. *Id.* The venture earned \$700,000 in fees from other institutions and from sales revenue. *Id.*

264. *NYU Shuts Down an Internet Venture*, N.Y. TIMES, Nov. 30, 2001, at D7.

265. *Id.*

266. *Online*, CHRON. HIGHER EDUC., March 8, 2002, at A31.

267. *Id.*

268. *Id.* Concord Law School, however, conducts all its courses over the Internet and charges \$7,000 per year for a four-year program, which is up to two or three times less than the annual tuition at traditional law schools. Martha Neil, *Virtual Lawyers: Online Law School Produces Its First Graduating Class*, 88 A.B.A.J. 27 (Dec. 2002).

269. JOHN C. HITT & JOEL L. HARTMAN, *DISTRIBUTED LEARNING: NEW CHALLENGES AND OPPORTUNITIES FOR INSTITUTIONAL LEADERSHIP* 5 (2002).

270. *Id.* at 7.



environments.<sup>271</sup> Studies commissioned by the Alfred P. Sloan Foundation on the financial cost and potential profitability of distance learning at six universities—Drexel University, Pace University, Penn State University, Rochester Institute of Technology, University of Illinois at Urbana-Champaign, and the University of Maryland University College—concluded that most of the institutions are close to the break-even point.<sup>272</sup>

## V. CAMPUS COPYRIGHT POLICY AGREEMENTS

### A. List of Shared Rights, In Writing

Free from delusions of riches pouring in from the Internet through online courses, and reaching a middle ground between the public domain and micropayments, faculty and their institutions should collaborate on drafting copyright agreements that respect both sides' rights. The first step, while it may be obvious, is to put the policy in writing.

Both the American Association of University Professors ("AAUP") and the American Association of Universities ("AAU") agree on the importance of reducing such policies to writing. The AAUP, in its *Statement of Copyright*, indicates: "It is . . . useful for the respective rights of individual faculty members and the institution—concerning ownership, control, use, and compensation—to be negotiated in advance, and reduced to a written agreement."<sup>273</sup> The AAU's Intellectual Property Task Force had a similar statement in its recommendation for policy development for intellectual property and new media: "The university should have a formal written policy (one that is easily available for review by members of the community) that describes clearly the bases of distribution of revenues derived from the new media content."<sup>274</sup>

The written document should be a comprehensive one that delineates not just ownership, but the rights and methods for using a work as well. Georgia Harper, senior counsel at the University of Texas System and a national expert on copyright, advocates this approach. She writes that copyright policies should address "the use of others' copyrights *and* the creation, ownership, and management of institutional copyrights."<sup>275</sup> The policy should address who owns the works and who has the rights to use and exploit them.<sup>276</sup> Harper concludes, "[A] policy that recognizes and focuses upon the parties' interests in a work, rather

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271. *Id.* See also Carol A. Twigg, *Improving Learning & Reducing Costs: Redesigning Large-Enrollment Courses*, The Pew Learning and Technology Program, 1999, available at <http://www.center.rpi.edu/PewSym/mono1.pdf> at 4–5 (arguing that colleges and universities can use technology to reduce the costs of instruction).

272. Sarah Carr, *Is Anyone Making Money on Distance Education? Colleges Struggle to Figure Out How Much They are Spending on Online Programs*, CHRON. HIGHER EDUC., Feb. 16, 2001, at A41.

273. AAUP STATEMENT ON COPYRIGHT, *supra* note 134.

274. AAU FRAMEWORK, *supra* note 188.

275. Harper, *supra* note 238, at 6.

276. *Id.* at 7.

than just on who owns a work, will better serve everyone's needs."<sup>277</sup>

Beryl Abrams, associate general counsel of Columbia University, also believes in bifurcating ownership and control. As he explained during a roundtable discussion:

[T]here is a legitimate basis for separating copyright ownership from control, and use and distribution of any revenues that arise from commercialization of a work. If those different issues are each addressed, I'm not sure you have to really come down firmly and say that any new media works are necessarily works for hire.<sup>278</sup>

Two commentators from Washburn University agree that copyright policies need not adhere to the strict structure of the Copyright Act, but can instead meet the reasonable expectations of faculty and institution, not to mention fulfilling the purpose of copyright laws. They write, "Avoiding any blanket application of the work-for-hire doctrine would reinforce the parties['] normal and legitimate expectations regarding the ownership of particular works as well as promoting the larger policies of copyright law and of academic freedom which favor information dissemination."<sup>279</sup>

Overall, an institution's copyright policy regarding the copyright of distance-education online courses should address the following items:

- definitions of the property incorporated in the policy;
- the issue of copyright ownership, particularly clarifying what is considered a work for hire by reasonably specifying which works are within or outside the faculty's scope of employment;
- rights to distribute the work, and the division of any resulting profits;
- rights to modify the work;
- rights to future use;
- rights to derivative works;
- licensing rights;
- rights of fair use, including specific time limits on future use;
- rights of distribution; and
- the recommendation, or requirement, that the parties enter contracts to clarify ownership, control, and the rights to revise, commercialize, and create derivative works.<sup>280</sup>

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277. *Id.* at 9.

278. *Coping with Copyright in the Digital Age*, TRUSTEESHIP, Sept./Oct. 2000 at 28, 32. See also AAU FRAMEWORK, *supra* note 185. Ownership of intellectual property and the sharing in economic returns from the licensing or sale of that property are two distinct matters.

279. Wadley & Brown, *supra* note 139, at 420. See also LeMoal-Gray, *supra* note 75, at 1032. LeMoal-Gray states:

While still recognizing the legal bases of ownership, colleges and universities that wish to maintain a traditional academic culture will, most likely, provide for faculty members to retain ownership of their instructional materials. Through the use of well-crafted, collaboratively developed, contracts or license agreements, faculty would own their work, while still providing the institution with flexibility in the manner in which the courses were offered.

*Id.*

280. See Le Moal-Gray, *supra* note 75, at 1025; Lape, *supra* note 56, at 265–66; Harper,

While drafting such a comprehensive document may seem unnecessary, especially if the institution has a well-recognized patent policy, an incident at Princeton University indicates that it is better to draft something new than to follow the institution's existing patent policy. A committee on intellectual property at Princeton suggested in the spring of 1998 that electronic courses were like computer programs and should fall within the university's patent policy, under which the university has the option to claim ownership over intellectual property created with its resources.<sup>281</sup> Professors in the computer science department objected to this suggestion, arguing that it would give the university control over extensive online materials used in their courses.<sup>282</sup> An open letter signed by fourteen faculty members stated that "the proposed policy has potentially far-reaching effects that will inhibit, rather than encourage, the production and dissemination of knowledge."<sup>283</sup> In response, the intellectual property committee suggested setting a new policy for online courses apart from copyright and patent policies.<sup>284</sup>

With the resolve to craft a strong and useful copyright policy, institutions should first focus on the issue of ownership, which will lead them to lay to rest the ambiguous question left by the Copyright Act: what is a work made for hire in the world of academe?

#### B. Work Made for Hire Redux: Statutory Language and Substantial Control

As discussed in Part III.C.1, Congress devised a two-part test to determine if an author's work was a work made for hire.<sup>285</sup> Taking the second part first, a college or university's copyright policy can, with little controversy, declare a faculty member's work to be a work made for hire when the work is "specially ordered or commissioned for use" in one of nine specific categories, which include the following that are most relevant to higher education: a contribution to a collective work, a supplementary work, a compilation, and an instructional text.<sup>286</sup> An equally important requirement of this provision is that the parties must "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."<sup>287</sup>

Absent these circumstances, copyright ownership rests on the interpretation of the language in the first part of the work-made-for-hire provision of the Copyright Act: "a work prepared by an employee within the scope of his or her employment."<sup>288</sup> When interpreting this phrase while drafting their campus copyright policies, colleges and universities may want to provide their faculty with a presumption of ownership in their work. This advice is based on policy, not law.

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*supra* note 238, at 8.

281. Guernsey & Young, *supra* note 55, at A22.

282. *Id.*

283. *Id.*

284. *Id.* at A23.

285. *See supra* Part III.C.1; 17 U.S.C. § 101 (2000).

286. 17 U.S.C. § 101.

287. *Id.*

288. *Id.*

The law provides a reasonable case for colleges and universities to own the copyright of their faculty's work, particularly online distance-education courses.<sup>289</sup> Nevertheless, colleges and universities should judiciously seek ownership or any other right within the bundle of copyright privileges. "What is essential is that the university allocate to itself only those aspects of the copyright in which it truly has an interest."<sup>290</sup>

The AAUP, in its *Statement on Copyright*, advocates for a presumption of faculty ownership. It states:

[I]t has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes. Examples include 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." This practice has been followed for the most part, regardless of the physical medium in which these "traditional academic works" appear, that is, whether on paper or in audiovisual or electronic form. . . . [T]his practice should therefore ordinarily apply to the development of courseware for use in programs of distance education.<sup>291</sup>

From management's perspective, the AAU's Intellectual Property Task Force's *Framework for Policy Development at AAU Institutions* recommends that "the university should own the intellectual property that is created at the university by faculty, research staff, and scientists and with substantial aid of its facilities or its financial support."<sup>292</sup> The task force defined substantial aid to include "intellectual, financial, and reputational capital."<sup>293</sup>

Many college and university copyright policies give a nod toward the AAUP's statement but adopt the AAU's approach.<sup>294</sup> A survey of 437 institutions by the Oklahoma State University's Institute for Telecommunications in 1996 showed that most institutions treated online courses as works made for hire, reflecting the institution's ownership based on contractual obligations or the use of substantial resources.<sup>295</sup> One author's 1990–91 survey of copyright policies at seventy

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289. See *supra* Part III.D.1.b-2.a.

290. Lape, *supra* note 56, at 268.

291. AAUP STATEMENT ON COPYRIGHT, *supra* note 134. The AAUP recognizes, however, that the employer college or university may fairly claim ownership of faculty-created work that falls into three categories: special works created in circumstances that may properly be regarded as "made for hire," negotiated contractual transfers, and "joint works" as described in the Copyright Act. *Id.*

292. AAU FRAMEWORK, *supra* note 188, § II.

293. *Id.* at n.5.

294. See Gorman, *supra* note 140, at 307 ("University policy statements and collective bargaining agreements are reposing in the institution ownership of faculty-authored works for which the university provides an extraordinary measure of equipment, facilities, staff assistance or compensation.").

295. OKLA. STATE UNIV. INST. FOR TELECOMMUNICATIONS, HIGHER EDUC. TECH. STUDY (1996), available at [http://www.osu-institute.org/HiEd\\_Study.html](http://www.osu-institute.org/HiEd_Study.html).

research universities showed that in forty-two of the policies, universities claimed ownership of faculty work when there was use—or, more specifically, “significant or substantial use”—of university resources.<sup>296</sup> Of those forty-two policies, sixteen of them excluded the use of some common resources from consideration, including libraries, offices, salaries, classrooms, laboratories, and secretaries.<sup>297</sup>

Some specific campus examples provide helpful illustrations. The University of Texas System’s *Policy and Guidelines for Management and Marketing of Copyrighted Works* describes ownership in accordance with the Copyright Act, clarifying that educational materials are not normally considered works made for hire, i.e., not within the scope of employment.<sup>298</sup> Therefore, the ownership of most educational course materials belongs to faculty members. The university asserts an ownership interest, however, “[i]f component institutions invest in copyright works that the authors will own under the U.T. System Intellectual Property Policy,” in which case the institution and the author will “manage such author-owned copyrights to facilitate institutional access to the works and preserve rights to make nonprofit educational uses of them.”<sup>299</sup> For projects that involve “significant resource contributions by the institution,” the institution enters agreements with its faculty and staff to “allocate rights to use the resulting works, allocate costs and share benefits from commercialization.”<sup>300</sup> There is no definition of “significant contribution.” In these cases, “[i]nstitutions should determine what constitutes significant kinds or amounts of resource contribution.”<sup>301</sup>

At the University of North Carolina at Chapel Hill, the copyright policy provides: “Traditional Works or Non-Directed Works Involving Exceptional Use of University Resources shall be owned by the University.”<sup>302</sup> The policy defines “exceptional use of university resources” as occurring:

[W]here the University has provided support for the creation of the work with resources of a degree or nature not routinely made available to faculty . . . Exceptional use of University resources may include:

- (i) Waiver of fees normally required to use specialized facilities such as equipment, production facilities, service laboratories, specialized computing resources, and studios;
- (ii) Institutional funding or gifts in support of the work’s creation; and
- (iii) Reduction in levels of teaching, service or other typical university

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296. Lape, *supra* note 56, at 252, 257.

297. *Id.* at 257.

298. Harper, *supra* note 238, at 10. See also UNIV. OF TEX. SYS. POLICY AND GUIDELINES FOR MGMT. AND MARKETING OF COPYRIGHTED WORKS (2001), available at <http://www.utsystem.edu/ogc/IntellectualProperty/copymgt.htm> [hereinafter “UT SYSTEM COPYRIGHT POLICY”].

299. UT SYSTEM COPYRIGHT POLICY, *supra* note 298.

300. *Id.*

301. *Id.*

302. COPYRIGHT POLICY OF THE UNIV. OF N.C. AT CHAPEL HILL, § V.A.(2)(b) (2001), available at <http://www.unc.edu/policies/copyrightpolicy2001.pdf> [hereinafter UNC POLICY]. “Traditional Works or Non-Directed Works” are “pedagogical, scholarly, literary, or aesthetic works resulting from non-directed effort.” *Id.* §V.A.(1)(a).

activities (*e.g.*, course load, student advising responsibilities, division/department meetings, office hours, administrative responsibilities) specifically to facilitate creation of the work.

Ordinary or limited use of computers, laboratory space, libraries, office space or equipment, routine secretarial services at routine levels, telephones, and other informational resources shall not be considered exceptional use of University resources.<sup>303</sup>

At Columbia University, the university asserts copyright ownership in any authored work that is:

(i) created with substantial use of University resources, financial support or non-faculty University personnel beyond the level of common resources provided to faculty; (ii) created or commissioned for use by the University; or (iii) created under the terms of a sponsored project where the terms of the sponsored project require that copyright be in the name of the University.<sup>304</sup>

The policy defines “substantial use” as the opposite of ordinary use: “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.”<sup>305</sup>

The University of Michigan’s copyright policy provides separate ownership principles for faculty-owned works and university-owned works.<sup>306</sup> The principles for faculty-owned work state:

Consistent with academic freedom and tradition, all faculty (including full-time, part-time, adjunct, and emeritus faculty) own and control instructional materials and scholarly works created at their own initiative with usual University resources. “Usual University resources” are those resources commonly provided or made available to similarly situated faculty. They include, for example, ordinary use of resources such as the libraries; one’s office, computer and University computer facilities; secretarial and administrative support staff; and supplies. For any given department, unit, or individual, what constitutes a usual resource will depend upon the functions and responsibilities of that department, unit, or individual. For example, access to a chemistry laboratory may be a usual resource in chemistry, but would probably be considered an unusual resource in English literature.<sup>307</sup>

Conversely, the principles for university-owned works state that the university

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303. *Id.* § V.A.(2)(a).

304. COLUMBIA UNIV. COPYRIGHT POLICY, § I.B. (2000), *available at* <http://www.columbia.edu/cu/provost/docs/copyright.html> [hereinafter “COLUMBIA POLICY”].

305. *Id.* § I.B. para. 2.

306. OWNERSHIP OF COPYRIGHTED WORKS CREATED AT OR IN AFFILIATION WITH THE UNIV. OF MICH. § I.A.1 (2002), *available at* <http://www.copyright.umich.edu/official-policy.html> [hereinafter “MICHIGAN POLICY”].

307. *Id.*

owns works that are:

[C]reated in whole or in part by faculty members, when creation of those works is dependent upon the provision of unusual University resources as specially authorized by University administrators such as deans, department chairs, unit directors, or their designees. “Unusual University resources” are resources such as financial, technical, personnel, or other forms of support beyond the type or level of resources commonly provided to similarly situated faculty. Unusual University resources may include, for example, an extraordinary quantity or quality of media development, significant research assistance, or access to or use of other special, limited University facilities or resources.<sup>308</sup>

The University of Washington’s copyright policy begins by stating: “University faculty, staff, and students retain all rights in copyrightable materials they create,” except when special circumstances or contractual arrangements prevail.<sup>309</sup> The faculty’s right of ownership is subject to seven exceptions and conditions: (1) grant and contract limitations; (2) university-owned materials; (3) university-sponsored materials; (4) written agreements; (5) proportional ownership; (6) royalty-free privileges to the university; and (7) student writings.<sup>310</sup> Materials are “university-owned” when:

[T]he author was commissioned in writing by the University . . . to develop the materials as a part of the author’s regularly compensated duties, as for example, released time arrangements in the case of faculty members. As to a faculty member, “commissioned in writing” specifically does not refer to his or her general obligation to produce scholarly works.<sup>311</sup>

Materials are “university-sponsored” when:

[T]he author developed the materials in the course of performance of his or her normal duties and utilized University [service centers (such as the Computer Centers, the Audio-Visual Services unit, or departmental service centers)]. As to a faculty member, “normal duties” does not include his or her usual scholarly activity unless it involves extensive uncompensated use of University [service centers].<sup>312</sup>

At Washburn University, the university has only three ways to rebut its policy’s presumption that faculty members own the copyright in their work: (1) “the university can hire the employee to create a particular work”;<sup>313</sup> (2) “the university can specially commission a work,”<sup>314</sup> provided it is one of the nine enumerated

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308. *Id.* § I.C.1.b.

309. UNIV. OF WASH., PATENT, INVENTION, AND COPYRIGHT POLICY, § 2.B (2000), available at <http://www.washington.edu/faculty/facsenate/handbook/04-05-07.html> [hereinafter “UW POLICY”].

310. *Id.* § 2.B.1-7.

311. *Id.* § 2.B.2.

312. *Id.* § 2.B.3.

313. Wadley & Brown, *supra* note 139, at 435, 436, 443–45.

314. *Id.*

works in the Copyright Act, and provided a signed writing exists specifying that the work is to be considered a work made for hire; and (3) the university provided “support” for the work, meaning that the work “is substantially the result of University support or would not have come into existence but for University support.”<sup>315</sup> University support includes the use of university funds, personnel, facilities, equipment, materials, or technological information; it does not include “the normal use of offices, classrooms, equipment or facilities in the course of normal teaching[,] administration or research assignments.”<sup>316</sup>

Carnegie Mellon University may be the only institution that defines “substantial use” in an actual dollar amount, which is even adjusted for inflation. Carnegie Mellon defines “substantial use of university facilities” as:

[E]xtensive unreimbursed use of major university laboratory, studio or computational facilities, or human resources . . . . Use will be considered “extensive” and facilities will be considered “major” if similar use of similar facilities would cost the creator more than \$5000 (five thousand dollars) in constant 1984 dollars if purchased or leased in the public market.<sup>317</sup>

Many copyright policies of colleges and universities are available over the Internet. Individual institutions often post their copyright policy on their website.<sup>318</sup> Some copyright-related websites also provide links to college and university copyright policies. For example, the University of Maryland’s *Copyown: A Resource on Copyright Ownership for the Higher Education Community* lists links to policies at one hundred institutions in the United States and in Canada.<sup>319</sup>

### C. Protecting Specific Faculty Rights

When a college or university owns the copyright to an online course, the faculty member who developed the course should still retain important rights and privileges under copyright law. The AAUP’s *Statement on Copyright* indicates that for most works, faculty should minimally “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.”<sup>320</sup> In the case of distance-education courseware, the AAUP believes that faculty members should also receive rights for future use, “not only through compensation but also through the right of ‘first refusal’ in making new versions or

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315. *Id.*

316. *Id.* at 436–37, 444–45.

317. CARNEGIE MELLON UNIV., INTELLECTUAL PROP. POLICY OF CARNEGIE MELLON UNIV. § 2 (1985), available at <http://www.cmu.edu/policies/documents/IntellProp.html> [hereinafter “CARNEGIE MELLON POLICY”].

318. See, e.g., *supra* notes 298–317 and accompanying text.

319. UNIV. OF MD., COPYOWN: A RESOURCE ON COPYRIGHT OWNERSHIP FOR THE HIGHER EDUC. CMTY., available at <http://www.inform.umd.edu/copyown/policies/indes.html> (last visited Oct. 12, 2004).

320. AAUP STATEMENT ON COPYRIGHT, *supra* note 134.



at least the right to be consulted in good faith on reuse and revisions.”<sup>321</sup> Professor Gorman from the University of Pennsylvania agrees with the AAUP’s ideas.<sup>322</sup>

The University of Michigan’s copyright policy has many of the elements listed by the AAUP. Faculty retain an interest in university-owned works to use the works and receive credit for the participation in such works.<sup>323</sup> Faculty still employed by the university have the right of first refusal to make new versions of their work.<sup>324</sup>

The University of Washington’s copyright policy provides two options to preserve a professor’s right to revise a course. The policy provides that, “As long as the author . . . remains an employee of the University, the author may: (a) request reasonable revisions of the materials prior to any instance of internal use, or (b) ask that the materials be withdrawn from internal use if revisions are not feasible.”<sup>325</sup>

A copyright policy’s provision on future use should protect the rights of faculty members who move to another institution and wish to use their old courses. Licenses and royalties are two vehicles to provide that protection. Licenses are “a contract in which a copyright owner grants to another permission to exercise one or more of the rights under copyright.”<sup>326</sup> Royalties are a “payment made to an owner of a copyright for the privilege of practicing a right under the copyright.”<sup>327</sup>

Using the policies of academic publishers as a model, departing faculty members could receive a nonexclusive, royalty-free license to use their work in their classes at the new institution.<sup>328</sup> Alternatively, if the original institution insists on retaining authorship and copyright, it can negotiate a license for use with the faculty member’s new institution.<sup>329</sup> Michigan’s departing faculty “have the right to be consulted in good faith on reuse and revisions (e.g., for online

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321. *Id.*

322. Gorman, *supra* note 140, at 309. Gorman states:

[S]hould it be determined that ownership of courseware lies with the *university*, [policies or agreements] can expressly reserve to the faculty member any number of important rights, both economic and “moral”: to share future royalties, to be given due credit on the courseware, to have the right of first refusal if the lectures are to be updated in later years, and to have the right to use the material in the professor’s own courses and publications.

*Id.*

323. MICHIGAN POLICY, *supra* note 306, § I.C.2.

324. *Id.*

325. UW POLICY, *supra* note 309, § 2.D.2.a.(2). *See also* Laughlin, *supra* note 62, at 580–81 (noting that faculty members could retain the right to demand credit for creating their work, or, alternatively, to have their name removed as the creator if they disagree with college or university-made revisions).

326. UNIV. OF CAL. AT BERKELEY, POLICY ON COPYRIGHT OWNERSHIP § III.D, *available at* <http://otl.berkeley.edu/inventor/uccopyright.php> (1992) [hereinafter “BERKELEY POLICY”].

327. *Id.* § III.G.

328. AM. COUNCIL OF EDUC., DEVELOPING A DISTANCE EDUC. POLICY FOR 21ST CENTURY LEARNING Part II.B (March 2000), *available at* [http://www.acenet.edu/washington/distance\\_ed/2000/03march/distance\\_ed.html](http://www.acenet.edu/washington/distance_ed/2000/03march/distance_ed.html) [hereinafter “ACE DISTANCE-EDUCATION REPORT”].

329. Le Moal-Gray, *supra* note 75, at 1024.

instructional materials or courseware).”<sup>330</sup>

Faculty members and their institutions always have the option to enter agreements with each other on these issues. For example, at the University of Washington, the university retains the right to continue to use a faculty member’s work internally after the faculty member leaves the institution, “unless the author/producer and the University agree in writing on special conditions for subsequent internal use of the materials and the procedures for their revision.”<sup>331</sup> Faculty members will secure the maximum protection for their work if they obtain an agreement stating that their works are not considered works made for hire and are not produced in the course of employment.<sup>332</sup>

#### D. Protecting Specific College or University Rights

When a faculty member owns the copyright to an online course, the college or university that provided the resources should still retain some control over the materials. If the college or university provided an “extraordinary measure of creative or financial input,” it may justifiably negotiate for either reimbursement from, or a continuing share in, royalties; or a license to revise, update, and use the courseware within the college or university, without paying royalties.<sup>333</sup> Reimbursement might be preferable to a license to use because it reduces the possibility of prospective disagreement between the institution and the faculty member, although it would not satisfy the institution’s interest, if it had one, in generating income.<sup>334</sup>

Dividing royalties and reserving the college or university a “shop right” to the distance-education material are common practices in allocating rights to patents developed by college and university faculty.<sup>335</sup> Under the shop-right doctrine of patent law, an employer is entitled to use the patented device or process to the extent necessary for business purposes, but the employee retains the underlying patent.<sup>336</sup>

One policy reason supporting a college’s or university’s shop right to a faculty member’s online materials is the protection of student expectations over the availability of courses and course material. Under this policy, colleges and universities should have a “perpetual, non-exclusive license to use of the videotapes, computer files, or other media comprising the distance learning program.”<sup>337</sup>

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330. MICHIGAN POLICY, *supra* note 306, § I.C.2.

331. UW POLICY, *supra* note 309, § 2.E.2.a.(3).

332. Simon, *supra* note 156, at 509.

333. Lape, *supra* note 56, at 261. *See also* Laughlin, *supra* note 62, at 580 (arguing that developing ownership policies may lead to difficult negotiations between the institution and individual faculty members).

334. Lape, *supra* note 56, at 261.

335. Gorman, *supra* note 140, at 308–309.

336. Simon, *supra* note 156, at 511. Employees in the motion-picture and music industries—where copyrights remain valuable for many years—proposed including shop rights in the Copyright Act, but Congress explicitly rejected them. H.R. REP. NO. 1733, at 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5737.

337. Laughlin, *supra* note 62, at 580.

Retaining a shop right also helps protect the college's or university's interests in the event the faculty member leaves for another institution. Using academic publishers as a model for such instances, the institution could receive a nonexclusive, royalty-free license to use the work for instruction, with possible restrictions on commercializing the work.<sup>338</sup>

The AAUP agrees with providing colleges and universities with a shop right to online courses that were expensive to develop.<sup>339</sup> Whether the institution or the faculty member owns the copyright, the AAUP believes that the institution may reasonably require reimbursement for "unusual financial or technical support."<sup>340</sup> Reimbursement can be in "the form of future royalties or a nonexclusive, royalty-free license to use the work for internal educational and administrative purposes."<sup>341</sup>

The University of California at Berkeley's *Policy on Copyright Ownership* has shop-right language within its section regarding the release of university rights. The provision reads:

The University may release its ownership rights in copyrighted works to the originator(s) when, as determined by the University: (a) there are no overriding or special obligations to a sponsor or other third party and (b) the best interests of the University would be so served. Such release of ownership rights must be contingent on the agreement of the originator(s) that no further effort on, or development of, the work will be made using University resources and that the University is granted a free-of-cost, nonexclusive, worldwide license to use and reproduce the work for education and research purposes.<sup>342</sup>

Akin to advocating a shop right, one commentator suggests establishing the right of "teacher inception" for works created by faculty pursuant to their teaching duties and on their own initiative, not at the institution's direction.<sup>343</sup> Under the right of teacher inception, which could be included in collective bargaining agreements or individual contracts, the institution would have "a nonexclusive, nontransferable, royalty-free license to use the copyrightable works for nonprofit educational purposes. The teacher then would hold all other copyrights."<sup>344</sup>

One other interest colleges and universities should protect is their web server. Universities usually own their web server, and they often have policies stating that all information and files saved on the server become the property of the university.<sup>345</sup>

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338. ACE DISTANCE-EDUCATION REPORT, *supra* note 328, at 5.

339. AAUP STATEMENT ON COPYRIGHT, *supra* note 134. These costs might include computer support, library, secretarial, and research expenses, materials, and other administrative overhead. See Le Moal-Gray, *supra* note 75, at 1034 n.231.

340. AAUP STATEMENT ON COPYRIGHT, *supra* note 134.

341. *Id.*

342. BERKELEY POLICY, *supra* note 326, § VII.

343. VerSteege, *supra* note 79, at 410–11.

344. *Id.* at 411.

345. Todd D. Borow, Note, *Copyright Ownership of Scholarly Works Created by University Faculty and Posted on School-Provided Web Pages*, 7 U. MIAMI BUS. L. REV. 149, 165 (1998).

### E. Additional Contract Provisions

Ownership and the protection of key faculty and institutional interests are the central elements of a comprehensive copyright policy. A survey of campus copyright policies, and their critique by legal and labor commentators, indicates that policy drafters should consider some other significant provisions as well.

#### 1. Licenses

Colleges and universities most often grant licenses when they commercialize an online course. The University of Texas System and the University of Washington provide two examples. The intellectual property policy at UT states: "It is a basic policy of the System that intellectual property be developed primarily to serve the public interest. This objective usually will require development and commercialization by exclusive licensing, but the public interest may best be promoted by the granting of nonexclusive licenses."<sup>346</sup> Washington's policy specifies the licensing right of faculty members:

Licensing or sale of . . . materials for external use shall be preceded by a written agreement between the University and the author or producer specifying the conditions of use, and including provisions concerning the right of the author or producer to revise the materials periodically, or to withdraw them from use—subject to existing agreements—in the event revisions are not feasible.<sup>347</sup>

Licenses are playing an important part in the creation of MIT's OpenCourseWare project, which is making the primary materials of all the institution's courses available free online.<sup>348</sup> Faculty involvement is voluntary; those participating in the project sign a licensing agreement that allows MIT to distribute their course materials on the OpenCourseWare website, and the faculty member retains the copyright to the materials.<sup>349</sup>

#### 2. Royalties

As with licenses, royalties are most important when an institution sells a faculty-created course to another institution or on the open market.<sup>350</sup> The AAU's Intellectual Property Task Force recommends that the "long-standing custom" of faculty members' receiving royalties on their work, "whether distributed in print or electronically . . . should not change."<sup>351</sup>

The University of Washington splits royalties with its faculty when it sells noncommissioned materials developed by professors. The university's policy explains: "[A] sharing of royalties and income is appropriate because of the

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346. UNIV. OF TEX. SYS. REGENTS' RULES AND REGULATIONS, pt. 2, ch. XII: Intellectual Property § 2.7 (2002), available at <http://www.utsystem.edu/ogc/IntellectualProperty/2xii.htm>.

347. UW POLICY, *supra* note 309, § 2.D.2.b.

348. Olsen, *supra* note 49, at A31.

349. *Id.*

350. ACE DISTANCE EDUCATION REPORT, *supra* note 328, at 12–13.

351. AAU FRAMEWORK, *supra* note 188, § II.

author's provision of creative efforts on the one hand and the University's provision of salary, facilities, administrative support, and other resources."<sup>352</sup>

The University of California at Berkeley's policy contains a provision combining licenses and royalties. It says:

The University may assign or license its copyrights to others. Royalty or income received from such transactions may be shared with the originator(s) of such works, as determined by the appropriate Chancellor, Laboratory Director, or Vice President, taking into account the originator's contribution, the University's costs, any provisions imposed by sponsors or other funding sources, and any other applicable agreements concerning the copyright.<sup>353</sup>

Faculty members at the University of North Texas receive royalties when their online courses are taught by other North Texas professors.<sup>354</sup> The amount of the royalty depends on the amount of technical assistance provided by the university, but faculty members can receive up to 8% of the tuition paid by a student (about \$20) who takes the course when another professor teaches it.<sup>355</sup> The faculty member also receives 50% of the license fee paid by another institution to use the course.<sup>356</sup>

### 3. Early Disclosure

Intellectual property policies should have an early-disclosure provision that requires faculty members to inform their deans or the chair of their department that they are developing online material.<sup>357</sup> Such disclosure is especially important if the faculty member intends to try to sell the work, and when an outside source is paying for the development of the work.<sup>358</sup>

Carnegie Mellon's copyright policy has an early-disclosure section. The policy states:

The creator of any intellectual property that is or might be owned by the university under this policy is required to make reasonably prompt written disclosure of the work to the university's provost, and to execute any document deemed necessary to perfect legal rights in the university and enable the university to file patent applications and applications for copyright registration when appropriate. This disclosure to the provost should be made at the time when legal protection for the creation is contemplated, and it must be made before the intellectual property is

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352. UW POLICY, *supra* note 309, § 2.E.1.

353. BERKELEY POLICY, *supra* note 326, § VIII.

354. Jeffrey R. Young, *At One University, Royalties Entice Professors to Design Web Courses: At North Texas, Online Education Pays Off—Literally—for Faculty Members and Departments*, CHRON. HIGHER EDUC., March 30, 2001, at A41.

355. *Id.*

356. *Id.* The drawback of this arrangement is that the institution charges the students an extra fee to cover the professor's royalty. *Id.* at A42.

357. See AAU FRAMEWORK, *supra* note 188.

358. *Id.*

sold, used for profit, or disclosed to the public.<sup>359</sup>

#### 4. Joint Works

Under the Copyright Act, a college or university and a faculty member can be joint authors, and therefore co-owners of the work's copyright, when each party prepares the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>360</sup> The three most influential circuit courts in the area of copyright—the Second, Seventh, and Ninth Circuits—interpret the statute to require two components: "(1) independent copyrightability of each contribution; and (2) intent by all putative authors at the time of the collaboration that they be co-authors."<sup>361</sup>

In cases of joint works, the institution's copyright policy should clearly state the rights that each contributor holds individually or assigns to the institution.<sup>362</sup> One important right is the ability to manage the work.<sup>363</sup>

Journal articles are one area where joint ownership might be especially beneficial to the college or university. Without joint ownership, the institution pays twice for faculty research: once for the research itself, and again when its library buys subscriptions for expensive, for-profit journals that publish the professors' articles about their research. To combat this expense, California Institute of Technology's ("Caltech") provost has suggested that Caltech and its faculty members "jointly own and retain rights to journal articles and license those copyrights to publishers on a limited basis."<sup>364</sup>

The Caltech proposal notwithstanding, joint ownership agreements between the college or university and a professor generally "are inadvisable."<sup>365</sup> Since either co-owner can license the work, joint decisions by the college or university and the professor will be necessary for effective marketing of the work.<sup>366</sup> For example, as a joint owner, the institution could sell its interest in a work without the faculty member's permission.<sup>367</sup> Additional difficulties with joint works arise when the online course could be considered a derivative work under the law.<sup>368</sup> If neither

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359. CARNEGIE MELLON POLICY, *supra* note 317, § 4-1.

360. 17 U.S.C. § 101 (2000).

361. Kwall, *supra* note 106, at 22 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991)).

362. Le Moal-Gray, *supra* note 75, at 1024–25.

363. Harper, *supra* note 238, at 9.

364. Lisa Guernsey, *A Provost Challenges His Faculty to Keep Copyright on Journal Articles*, CHRON. HIGHER EDUC., Sept. 18, 1998, at A29.

365. Lape, *supra* note 56, at 260.

366. *Id.* at 260–61.

367. NIMMER, *supra* note 120, § 6.11, (noting that a joint owner may grant a nonexclusive license without the consent of the other joint owners).

368. Kwall, *supra* note 106, at 24. *See* 17 U.S.C. § 101 (2000). The statute provides in pertinent part:

A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other

the professor nor the institution is the author of the preexisting work, the fair-use doctrine will determine the extent to which the preexisting work may be used.<sup>369</sup> If the professor or institution is the author of the underlying work, joint authorship principles will determine whether the online course is a jointly authored work.<sup>370</sup>

### 5. Time Limits

Some institutions enter an agreement with their faculty under which the institution owns the copyright of the work for a finite period of time, which is sometimes contingent on the faculty member's employment with the institution.<sup>371</sup> After the end of the set time period, the faculty member assumes ownership of the copyright.<sup>372</sup>

### 6. Dispute Resolution

Many campus copyright policies provide for a committee within the institution to make the initial decision regarding disputes over copyright ownership.<sup>373</sup> After an attempt at an informal resolution among the parties and then with the department chair,<sup>374</sup> a final binding decision is often determined by a college or university official, such as the president or provost, or through arbitration.<sup>375</sup>

The AAU's Intellectual Property Task Force recommends the formation of a dispute resolution committee.<sup>376</sup> The committee should:

recommend policy changes that are required to respond to the rapid development of new forms of information technology and new types of relationships that develop among the university, its faculty members, and external for[-]profit companies (*i.e.*, those "partners" who are either directly or indirectly involved in the creation of new media content that will bear the university's name or claim its sponsorship).<sup>377</sup>

The dispute-resolution committee should also hear and adjudicate disputes over interpretations of college or university policy regarding intellectual property.<sup>378</sup>

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form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.

*Id.*

369. 17 U.S.C. § 107 (2000). *See supra* text accompanying notes 90–97.

370. Kwall, *supra* note 106, at 24–25.

371. ACE DISTANCE-EDUCATION REPORT, *supra* note 328, at V.

372. *Id.*

373. Lape, *supra* note 56, at 264.

374. *See, e.g.*, MICHIGAN POLICY, *supra* note 306, § IV.

375. *See id.* *See also* UNC POLICY, *supra* note 302, § VII; CARNEGIE MELLON POLICY, *supra* note 317, § 5; Lape, *supra* note 56, at 264.

376. AAU FRAMEWORK, *supra* note 188.

377. *Id.*

378. *Id.* *See also* UW POLICY, *supra* note 309, § 2.D.

## 7. Conflict of Interest

Copyright policies should include provisions to address the situation when professors prepare online courses for another institution. While the professors may own the copyright to such courses, they may have a conflict of interest with their employer institution.<sup>379</sup>

This was the case when Professor Arthur R. Miller of Harvard Law School sold a series of eleven videotaped lectures on civil procedure to Concord University School of Law, an online institution.<sup>380</sup> Harvard said that Professor Miller violated university policy by teaching at another institution during the academic year without the dean's permission.<sup>381</sup> Miller contended that he did not violate Harvard's policy because he did not teach at Concord or even interact with its students.<sup>382</sup>

After this incident, Harvard's provost reviewed the university's general conflict rule. A few months later, Harvard Law School published its revised faculty manual with a new rule stating that any faculty member who wants to serve as a teacher, researcher, or salaried consultant to an Internet-based institution must first get permission from the dean, followed by a vote by the corporation that governs the university.<sup>383</sup> The law school was the first of Harvard's schools to adopt such a policy, which caused friction among the university faculty.<sup>384</sup> To avoid such tension, a college or university's conflict-of-interest policy should apply institution-wide.

## 8. Assignment

Institutions or faculty members may obtain copyright ownership through a written assignment. Under the Copyright Act: "The ownership of a copyright may be transferred in whole or in part by any means of conveyance or operation of law. . . ."<sup>385</sup> The agreement must be signed by the author of the work.<sup>386</sup> In the case of works made for hire, both parties need to sign the agreement.<sup>387</sup>

If online courses are works made for hire owned by the college or university, and if the college or university wants to assign copyright ownership to the professor who created the course, the question is raised as to how best to satisfy the

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379. Gorman, *supra* note 140, at 309.

380. Marcus, *supra* note 258, at A1.

381. *Id.*

382. Dan Carnevale & Jeffrey R. Young, *Who Owns On-Line Courses? Colleges and Professors Start to Sort It Out*, CHRON. HIGHER EDUC., Dec. 17, 1999, at A45.

383. Marcus, *supra* note 258, at A10.

384. *Id.*

385. 17 U.S.C. § 201(d) (2000).

386. *Id.* § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance . . . is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.").

387. *Id.* § 201(b). See NIMMER, *supra* note 120, §§ 5.05[C], 9.01[A][4], 11.02[A][2]. Nimmer points out that § 201(b) permits the parties only to alter ownership of the copyright rights; the provision does not permit the parties to change the status of authorship that vests in the employer under the work-for-hire doctrine. *Id.*



Copyright Act's requirement for a written agreement signed by both parties. The requirement is probably met if the college or university expressly incorporates its copyright policy by reference into a written employment contract signed by the faculty member and the college or university.<sup>388</sup> This conclusion seems reasonable in light of court decisions holding that other college and university policies—such as tenure and dismissal policies—are binding when they are expressly incorporated by reference in a written employment contract.<sup>389</sup>

Two commentators disagree with this conclusion. They indicate that because the institution's bylaws and policies are not signed by both parties, the Copyright Act's requirement is unmet.<sup>390</sup>

#### IV. CONCLUSION

In 2002–03, colleges and universities in the United States budgeted more than \$5.2 billion for information technology, a 5% increase over 2001–02.<sup>391</sup> Institutions targeted the largest portion of the spending—\$2.75 billion—on hardware, mainly computers and campus networks.<sup>392</sup> With so much of these significant resources dedicated to distance-education courses and programs, it is imperative for colleges and universities to have a written, comprehensive policy regarding the ownership of copyright of distance-education material.

The “Arthur Miller v. Harvard” affair involving Concord University presents a microcosm of the type of campus melee that can ensue if an institution does not have a comprehensive copyright policy, including a conflict of interest provision regarding Internet-based institutions. Professor Miller thought he owned his work, seeing no difference between videotaped lectures prepared for an Internet-based course and a textbook.<sup>393</sup> Joseph Ney, the dean of Harvard's John F. Kennedy School of Government, sided with the university, saying, “The basic intellectual capital that goes into a course is provided by the university. The idea the professor can skim the cream, stick a course on the Internet, and get all the gains isn't acceptable.”<sup>394</sup> Harvard professor Henry Louis Gates, Jr. agreed a bit with both arguments: “I see both sides. The university makes the course possible, but the

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388. Kilby, *supra* note 138, at 457 n.12; Lape, *supra* note 56, at 248; Weinstein v. Univ. of Ill., 811 F.2d 1091, 1094 (7th Cir. 1987).

389. Lape, *supra* note 56, at 249. See, e.g., Sacchini v. Dickinson State Coll., 338 N.W.2d 81, 82–85 (N.D. 1983) (tenure policy); Brady v. Bd. of Trustees, 242 N.W.2d 616, 618–19 (Neb. 1976) (dismissal policy).

390. Simon, *supra* note 156, at 506; Kwall, *supra* note 106, at 13 (citing Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 560 (2d Cir. 1995)).

391. Florence Olsen, *Colleges Expect to Increase Spending on Information Technology by 5%*, CHRON. HIGHER EDUC., April 11, 2003, at A43 (citing an annual survey by Market Data Retrieval).

392. *Id.*

393. In a six-page letter to the dean of the law school, Miller wrote: “I simply do not see any distinction between preparing a few hours of thoughts about civil procedure on videotape for use at another educational institution via frontier technology and the publication, in whatever form, of casebooks, textbooks, hornbooks, student aids, audio tapes, data collections, or other educational materials.” Marcus, *supra* note 258, at A10.

394. *Id.*

professor does the course.”<sup>395</sup> By following the concepts outlined in Part V, professors and their institutions can retain the rights they each need over Internet-based course material to fulfill their respective missions and share in any profits.

Respecting each other’s rights to ownership and control over the copyright of online distance-education courses would, aside from minimizing legal disputes, provide other benefits for institutions and their faculty. One commentator identified several such benefits:

Shared ownership of distance courses would make it profitable for the institution to hire and promote gifted teachers, and to be known for doing so. Shared ownership would also make it profitable for individual faculty members to experiment with new teaching techniques.

Shared ownership and shared reputations would preserve higher education’s non-profit mission . . . . To protect each party’s reputation, both must make certain that the good generated by great teaching is preserved, as the good generated by great research should be, for the public’s benefit.<sup>396</sup>

Shared ownership is a logical compromise between the all-or-nothing battle between colleges and universities and their faculties for control over online courses that are costly to create but that generally produce little profit. For ways to reach such a compromise on copyright ownership, colleges and universities and their faculty need look no farther than their first year in school. As Robert Fulgham wrote,

All I really need to know about how to live and what to do and how to be I learned in kindergarten. . . . These are the things I learned: Share everything. Play fair. Don’t hit people. Put things back where you found them. Clean up your own mess. Don’t take things that aren’t yours. . . .<sup>397</sup>

Sharing, playing fair, and not taking things that are not theirs: sounds like good advice for colleges’ and universities’ copyright policies.

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395. *Id.*

396. Gail S. Chambers, *Toward Shared Control of Distance Education*, CHRON. HIGHER EDUC., Nov. 19, 1999 at B8.

397. ROBERT FULGHAM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS 6 (1986).