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DISTANCE EDUCATION AND INTELLECTUAL PROPERTY: THE REALITIES OF COPYRIGHT LAW AND THE CULTURE OF HIGHER EDUCATION

INTRODUCTION

With the creation of advanced instructional technologies,¹ institutions of higher education are now able to offer distance learning courses and even entire degree programs through a completely new pedagogical environment. The enormous advances in technology and the manner in which knowledge is created and disseminated are bringing new challenges to higher education and the application of copyright laws.

Across the country, colleges and universities are creating innovative delivery mechanisms through distance learning programs and “remote site” educational opportunities.² Distance learners can enroll in courses transmitted via satellite while staying at home, or register via the Internet and then travel to a local site where they can view a lecture that is sent electronically to a television or computer monitor.³ Remote site methods of instruction have begun to replace traditional classroom education, in some cases, because they are generally less expensive, can be made widely available even to students in distant locations, are offered in a flexible fashion to meet students’ schedules, and may generate increased tuition revenues.⁴

¹ Distance Education Clearinghouse (visited Sept. 25, 1998) <http://www.uwex.edu/disted/definition.html>. Examples of such analog and digital technologies include telecourses, audio and video teleconferences, closed broadcast and cable television systems, microwave and ITFS, compressed and full-motion video, fiber optic networks, audiographic systems, interactive videodisc, and satellite-based and computer networks. *Id.*

² Peter Applebome, “*Education.com*,” N.Y. Times, April 4, 1999, at 4A26. See also Ted Marchese, “*Not So Distant Competitors: How New Providers Are Remaking the Postsecondary Marketplace*,” AAHE Bulletin, May 1998 at 3.

³ See generally DONALD E. HANNA AND ASSOCIATES, HIGHER EDUCATION IN AN ERA OF DIGITAL COMPETITION: CHOICES AND CHALLENGES (2000).

⁴ Ted Marchese, “*Not So Distant Competitors: How New Providers Are Remaking the Postsecondary Marketplace*,” AAHE Bulletin, May 1998 at 3.

Without the encumbrance of campus boundaries, some faculty are teaching distance learning courses through web-based instruction, compressed video, CD ROM, and the Internet.⁵ As a result, the work of the faculty who are teaching these courses can extend beyond the traditional classroom where previously there were enrollment limitations resulting from classroom size. This expanded access to faculty lectures has generated a plethora of legal questions by faculty, faculty unions, higher education administrators, and higher education attorneys.⁶ Since classes and lectures can be permanently recorded and offered to expanded audiences with seemingly unlimited possibilities for electronic or video reproduction, numerous issues are emerging regarding the ownership of materials that are presented in class. Faculty, for example, can present a seminar to an empty room that is then transmitted electronically around the world and then saved and used by an institution for subsequent semesters.⁷ While the subject matter may limit the actual length of time that unedited material can be used, particularly in rapidly changing scientific disciplines, a course on Shakespeare could, ostensibly, be repeated electronically for many years if an institution chose to do so.

The purpose of this paper is to examine legal issues pertaining to the ownership of materials created for college and university distance learning courses taught through new technological media. The first part of the paper will include information about distance learning, its development, and its contemporary status at colleges and universities in the United States. In the next section, selected issues of copyright law and the relationship of that law to higher education will be addressed. The third portion of the article will focus on the application of copyright law in higher education. Finally, the paper will conclude with a discussion of the issues that influence the nature of the policies that are developed to govern distance learning in higher education.

⁵ See e.g., ANNE B. KEATING AND JOSEPH HARGITAI, *THE WIRED PROFESSOR: A GUIDE TO INCORPORATING THE WORLD WIDE WEB IN COLLEGE INSTRUCTION* (1999). See also KEN W. WHITE AND BOB H. WEIGHT, *THE ONLINE TEACHING GUIDE* (1999).

⁶ Sarah Carr, "Chapman U. Administrator Studies Distance Learning's Effect on Faculty Pay," *The Chronicle of Higher Education*: Daily news: 02/11/2000-01@ <http://chronicle.com/free/2000/02/2000021101u.html>.

⁷ *Id.*

DISTANCE LEARNING

Distance learning, also referred to as distance education, is the use of electronic formats and multimedia to provide instruction to students at physically remote locations from where the instruction originates.⁸ Utilizing the latest technologies in telecommunications, distance education involves teaching students through the transmission and receipt of course materials outside the traditional classroom environment.⁹ "Distance learning is instructional delivery that does not constrain the student to be physically present in the same location as the instructor. Historically, distance education meant correspondence study. Today, audio, video, and computer technologies are more common delivery modes."¹⁰ Course or program requirements are completed through remote communications with the instructor and include one-way or two-way written, electronic or other media forms. Most often, the instruction is delivered via interactive software, satellite transmission, videoconferencing, or the Internet to students who have registered for a particular course.

Many universities have begun to offer degree programs through distance learning curricula, including at least one institution that offers an on-line law degree.¹¹ It was reported in 1995 that one third of all institutions engaged in some form of distance education

⁸ Distance Education Clearinghouse (visited Sept. 25, 1998) <http://www.uwex.edu/disted/definition.html>.

⁹ *Id.* See *supra* text accompanying note 1.

¹⁰ Virginia Steiner, The Distance Learning Resource Network (DLRN), reprinted by *Distance Education Clearinghouse* (visited Sept. 25, 1998) <http://www.uwex.edu/disted/definition.html>.

¹¹ See generally Peter Applebome, "Education.com," N.Y. Times, April 4, 1999, at 4A26; Ted Marchese, "Not So Distant Competitors: How New Providers Are Remaking the Postsecondary Marketplace," AAHE Bulletin, May 1998 at 3. See also Karen W. Arenson, *More Colleges Plunging Into Uncharted Waters of On-Line Courses*, N.Y. Times, November 2, 1998, at A16; See also Pamela Mendels, *Coming to a PC Near You: Virtual Law School*, Int'l Herald Trib., October 5, 1998, at 13 (commenting on establishment of degree granting program at Concord University School of Law, established by Kaplan Educational Centers, a subsidiary of the Washington Post company).

and that another quarter had plans to do so.¹² As an example of the rapid growth of distance education offerings, in March of 1999 Jones International University became the first completely virtual institution to be accredited,¹³ and "by 2002, four out of five colleges are expected" to have distance learning courses.¹⁴

As distance education programs have proven successful, they have been responsible for generating a new class of all-electronic institution, "the virtual university."¹⁵ There is great variety in the structures of these institutions. Some of these virtual sites direct students to courses offered by traditional colleges and universities. Other sites represent individual institutions, such as Phoenix University,¹⁶ that have degree-granting authority and have been developed with the express purpose of offering degrees based on distance learning curricula. Another common model is for institutions to pool their resources to provide disparate courses that can be integrated into degree programs by students.¹⁷

Most of the new on-line institutions have developed as a result of geography or state politics. Some state higher education systems and universities have joined with their neighboring institutions to form virtual university consortia. Regional and national consortia include Western Governors University,¹⁸ the Southern Regional

¹² Ted Marchese, "Not So Distant Competitors: How New Providers Are Remaking the Postsecondary Marketplace," AAHE Bulletin, May 1998 at 3.

¹³ See "Information Technology," The Chronicle of Higher Education, March 25, 1999; see also Kelly McCollum, "Accreditation of On Line University Draws Fire," The Chronicle of Higher Education, April 12, 1999, at A33 (noting that the American Association of University Professors publicly criticized the granting of accreditation in this case).

¹⁴ Jacques Steinberg with Edward Wyatt, "Boola, Boola: E-Commerce Comes to the Quad," N.Y. Times, Feb. 13, 2000, at sect. 4, p.1.

¹⁵ Ted Marchese, "Not So Distant Competitors: How New Providers Are Remaking the Postsecondary Marketplace," AAHE Bulletin, May 1998 at 3.

¹⁶ Marchese at 4 (noting that the University of Phoenix, a for-profit, well capitalized, and national in scope "branch office"- based degree granting institution, has 48,000 degree credit students in 12 states. *Id.*

¹⁷ See *infra* notes 18-29.

¹⁸ The members are Alaska, Arizona, Colorado, Guam, Hawaii, Idaho, Indiana, Montana, North Dakota, Nebraska, New Mexico, Nevada, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming, at <http://www.wgu.edu>.

Electronic Campus,¹⁹ the Community College Distance Learning Network,²⁰ and the Common Market of Courses and Institutes.²¹

Some state university systems have created virtual campuses to combine the electronic resources of their various branches. System wide efforts include those of the Connecticut State University System²² and the University of Texas System.²³ Statewide efforts include those of California,²⁴ Florida,²⁵ Indiana,²⁶ Massachusetts,²⁷ New York,²⁸ and Pennsylvania.²⁹ In Iowa, university administrators have proposed a virtual "fourth state university," which would coordinate technology resources and distance

¹⁹ Created by the Southern Regional Education Board, whose members are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia, at <http://www.srec.sreb.org>.

²⁰ The Network includes Cuyahoga Community College, Dallas Community Colleges, Foothill-De Anza Colleges, Kern Community College District, Kirkwood Community College District, Miami-Dade Community College District, Rio Salado College, and Sinclair Community College, at <http://ccdln.rio.maricopa.edu/>.

²¹ Created by the Committee on Institutional Cooperation, comprising the University of Chicago and the institutions of the Big Ten athletics conference: Indiana, Michigan State, Northwestern, Iowa, Purdue, Pennsylvania State, and Ohio State Universities, and the Universities of Illinois at Urbana-Champaign, Michigan at Ann Arbor, Minnesota-Twin Cities, and Wisconsin at Madison, at http://www.cic.uiuc.edu/CMCI/cmci_homepage.htm.

²² OnlineCSU, at <http://www.csu.ctstateu.edu/onlinecsu/>.

²³ The University of Texas TeleCampus, at <http://www.uol.com/telecampus>.

²⁴ California Virtual University (courses and programs from public and private colleges and universities), at <http://www.california.edu/>.

²⁵ Florida's Campus (courses and programs from public colleges and universities), at <http://www.flcampus.org>.

²⁶ The Indiana College Network offers courses from Ball State, Indiana, Indiana State, Purdue, and Vincennes Universities; the University of Southern Indiana; Ivy Tech State College; and the Independent Colleges of Indiana, at <http://www.icn.org>.

²⁷ Distance Learning Honors Courses is a pilot project created by public universities and colleges in Massachusetts to offer four distance learning honors courses for a limited number of students, at http://www.umass.edu/pubaffs/dislearn/fac_part.html.

²⁸ State University of New York: SUNY Learning Network, at <http://sln1.suny.edu/sln>.

²⁹ Pennsylvania Virtual University (a distance-learning alliance of West Chester, Millersville, and Shippensburg Universities of Pennsylvania), at <http://business.ship.edu/vu/>.

education efforts at Iowa State University and the Universities of Iowa and Northern Iowa.

In the past, distance education courses were provided more frequently as supplemental or continuing education offerings than as traditional credit bearing courses. Currently, however, distance education has begun to replace traditional classroom education for some students; such courses are less expensive and widely available, especially to students in remote areas, and are more accommodating of the busy schedules of an increasingly heterogeneous college and graduate student population.

As distance learning methodologies evolve and colleges and universities across the country rapidly expand their distance learning offerings, numerous questions regarding the use of course materials, and the ownership and authorship rights of faculty and higher education institutions are emerging. The controlling legislation and case law to address these issues are found in the law of copyright.

THE LAW OF COPYRIGHT

Intellectual Property

Intellectual property is a term that encompasses many different forms of creative work. It includes the primary fields of copyright, patent, and trademark law, as well as incorporating trade secrets, unfair competition, and other subspecialties of the law. Generally, intellectual property covers the principle rights governing the ownership and disposition of an individual's creativity and is used as a "short hand term to denote legal rights in products of the mind."³⁰ The genesis of the federal creation and protection of intellectual property is found in the United States Constitution, which gives Congress authority "[t]o promote the Progress of Science and the useful Arts by securing for Limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."³¹ As a result of statutes adopted pursuant to that authority, authors have been given federally

³⁰ Robert A. Gorman, "Intellectual Property: The Rights of Faculty as Creators and Users," AAUP Homepage (visited March 6, 1999) www.aaup.org.

³¹ United States Constitution, Art. I, section 8, clause 8.

created property rights, in the nature of a limited monopoly, in their original works of authorship.³²

Copyright Law: General Provisions

Prior to 1976, states and the courts defined rights and remedies for the infringement of literary and artistic works through the doctrine of common law copyright.³³ Common law copyright existed from the moment of the work's creation until the work was published with the authority of the copyright owner.³⁴ If the statutorily required copyright notice appeared on all publicly distributed copies of the work, it then came under federal copyright protection; without the required copyright notice, the work entered the public domain.³⁵ In either case, at the time of publication, common law protection ceased.³⁶

The 1976 Copyright Act made federal copyright protection attach not from the moment of a work's publication, but from the moment of first fixation in tangible form.³⁷ However, because the 1976 Act extends federal protection only to works that are fixed in a "tangible medium of expression," the 1976 Act leaves protection

³² See generally the Copyright Revision Act of 1976, PL 94-553, 94th Cong., 90 Stat. 2541 October 1976 codified as amended at 17 U.S.C. §§ 101-1101(1995). See also various state statutes.

³³ Paul Goldstein, Copyright, Patent, Trademark and Related State Doctrines 173 (4th ed.1997).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 17 U.S.C. § 301 effectively abolishes common law copyright for most purposes, stating:

On and after January 1, 1976, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specific by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by the 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.

of unfixed works to state common law and does not entirely eliminate common law copyright.³⁸

Copyright law generally places ownership of intellectual property in the hands of the author or creator of the work. Under the Copyright Revision Act of 1976, "original works of authorship fixed in a tangible medium of expression that can be perceived, reproduced, or communicated, whether directly or with the aid of a machine or device" are copyrightable.³⁹ Compilations and derivative works are also covered by this Act.⁴⁰ However, the Copyright Act specifically provides that its protection does not extend to any "idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form"⁴¹

The requirement of "fixation" is satisfied when the work is "embodied in a medium" that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."⁴² This means that copyright attaches to a work, and protection under the 1976 Act begins, immediately when the work is "fixed in a tangible medium."⁴³ A work will not be fixed under the Act unless it was embodied in a copy or phonorecord "by or under the authority of the author."⁴⁴ Consequently, states can protect works that are only "projected briefly on a screen shown electronically on

³⁸ H.R. Rep. No.94-1476, 94th Cong., Sess. 131 (1976). The House Report on the 1976 Act identifies examples of "unfixed" works that remain subject to state protection: choreography that has never been filmed or notated, extemporaneous speech, live broadcasts, and improvised dramatic skits or musical composition not recorded. *Id.* See PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 173 (4th ed. 1997) (stating that Congress attempted to address distinctions in the concept of "publication" between state and federal law because Congress' concern was that states' definitions of "publication" and extension of common law copyright past a reasonable point where the author began to receive economic rewards, would seriously affront the constitutional injunction of protection only for "limited times").

³⁹ 17 U.S.C. § 102 (a).

⁴⁰ *Id.* §§ 101, 103.

⁴¹ *Id.* § 102 (b).

⁴² 17 U.S.C. § 101. See also *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983).

⁴³ 17 U.S.C. § 101.

⁴⁴ *Id.*

a television or other cathode ray tube, or captured momentarily in the memory of a computer.”⁴⁵ As applied in the area of distance learning, the considerations regarding the manner and moment of fixation become important due to the variety and complexity of the media used to “fix” information in a tangible form that allows for its transmission.

The Supreme Court has declared that pure facts are not copyrightable and that originality is a constitutional requirement for protection.⁴⁶ The concept of originality does not require that the work be novel or unique but only that it originates with the particular author,⁴⁷ as an independent creation by the author (as opposed to being copied from other works) and that it possesses at least some minimal degree of creativity.”⁴⁸ It is possible, therefore, that a copyrightable work may be based on something already in the public domain or on someone else’s idea. Conversely, if a copyright is properly obtained, it will protect the author against the unauthorized copying of the author’s work not

⁴⁵ H. R. Rep. No. 1476, 94th Cong., 2d Sess. 131 (1976). State law, could, for example, protect a musical performance against recording by an audience member without the performer’s permission.

⁴⁶ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). A telephone utility brought a copyright infringement action against a publisher of an area-wide telephone directory for a publisher’s use of listings in the utility’s local white pages. The Court held that as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. *Id.* at 363.

⁴⁷ *Id.* at 345. Justice O’Connor writing for the Court stated: “The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. See also P. GOLDSTEIN, COPYRIGHT § 2.2.1 (1996) stating

Courts apply the originality standard differently to different types of subject matter Some courts have resolved the problem of originality in cases involving fact works, functional works, and works of visual arts by engrafting one or more of three requirements onto the basic originality standard—a novelty threshold, a quantitative threshold, and an expenditure of labor threshold.

Id.

⁴⁸ *Feist Publications* at 345 (1991).

only in its original form, but in any other fixed tangible medium the author created as well.⁴⁹

The primary objectives behind the copyright laws are the need to encourage and reward creativity and the desire to promote the dissemination of information that is deemed useful to the public. From both legal and practical perspectives, sound copyright laws are imperative to foster a societal ethos of creativity. Giving authors or creators the exclusive right to exploit the fruits of their labor encourages creativity; limiting the authors' exclusive rights in both duration and scope supports the public's "right to know."⁵⁰

The available protections for a copyrighted work include the exclusive right to reproduce the work, to prepare derivative works based on it, and to sell, rent, lease, or lend it.⁵¹ The Act also provides for the exclusive right to perform or display the work publicly if it is a "literary, musical, dramatic, choreographic, pantomime, motion picture, or other visual work, as well as the exclusive right to display pictorial, graphic, or sculptural works publicly."⁵²

Transfer Rights

Because a copyright is considered property under the law, like other types of property it may be transferred by the owner, in whole or in part, to other parties.⁵³ In other words, any of the ownership rights in the copyright may be sold, licensed,⁵⁴ or given

⁴⁹ *Rogers v. Okin*, 634 F.2d 650 (1980), *vacated and remanded on other grounds*, *Mills v. Rogers*, 457 U.S. 291 (1982).

⁵⁰ James B. Wadley, *An Introduction to Copyright Protection of Computer Programs and the Semi-Conductor Chip Protection Act of 1984*. J. Kansas Bar Assoc. July 1986, at 8, *reprinted in* INTELLECTUAL PROPERTY IN ACADEME: A LEGAL COMPENDIUM, EDWARD O. ANSELL ED., National Association of College and University Attorneys (1991).

⁵¹ 17 U.S.C. § 106 (1),(2),(3).

⁵² *Id.* at § 106 (4), (5). *See also* §§ 113-118 for limitations on the scope of exclusive rights.

⁵³ 17 U.S.C. § 201 (providing ownership of a copyright "may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession").

⁵⁴ A license is defined as a revocable permission to commit some act that would otherwise be unlawful. An exclusive license gives the licensee the

away. As with other property, these rights enable a copyright owner to “both do the things identified in the rights as well as exclude others from doing them.”⁵⁵ As such, a copyright not only provides a primary means to protect the author’s investment, but it may have considerable intrinsic economic value. Copyright ownership transfer rights, therefore, have significant implications for both individual faculty members and universities and render the nature of the authorship and ownership of courses taught in a distance learning mode economically important.⁵⁶

*Works Made for Hire*⁵⁷

Copyright law generally places ownership, and therefore copyright, of intellectual property in the author or creator of the work,⁵⁸ that is, “the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”⁵⁹ If an individual creates the work, that individual is then the author of the work and the copyright owner. The Copyright Act’s “work made for hire” doctrine, however, provides a major exception to the fundamental principle that copyright ownership vests initially in the individual who creates the work.⁶⁰ If an individual is an

exclusive right to perform the licensed act and prohibits the licensor from granting that right to anyone else. BLACK’S LAW DICTIONARY (6th ed.1990).

⁵⁵ PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 618 (4th ed. 1997).

⁵⁶ See 17 U.S.C. § 202. This section states in pertinent part:

Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object . . . does not . . . convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright . . . convey property rights in any material object. *Id.*

See also *supra* text accompanying note 53 and *infra* text accompanying notes 136-138.

⁵⁷ 17 U.S.C. § 101. See *infra* text accompanying note 62.

⁵⁸ 17 U.S.C. § 201(a) (providing that copyright “vests initially in the author or authors of the work”).

⁵⁹ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 735 (1985).

⁶⁰ *Id.* § 201 (b). Ownership of copyright by the employer rather than the employee was first implicitly recognized in *Bleistein v. Donaldson*

employee of a company or university working within the scope of employment, or is a “commissioned” author, then the work may be considered to be a “work for hire,” and the company or university could be the owner of the copyright.⁶¹

The Copyright Act’s “work made for hire” definition⁶² is two-pronged and provides that a work will be “for hire” if it falls within one of the following two provisions: (a) whenever an employee, in the normal course of employment, creates something which may be copyrighted,⁶³ or, (b) if an independent contractor and an employer “expressly agree in a written instrument” that the work to

Lithographing Co., 188 U.S. 239 (1903) (holding that advertisements produced by several employees belonged to the employer).

⁶¹ 17 U.S.C. § 201(b).

⁶² *Id.* § 101. This section provides in pertinent part:

A ‘work made for hire’ is--(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. For the purpose of the foregoing sentence, 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 forwards, afterwards, 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.

⁶³ *Id.* § 101 (1). The Act does not define the terms “employee” or “scope of employment.” In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1985), the court determined that “in light of the Act’s express objective of creating a national uniform copyright law by broadly pre-empting state statutory and common-law copyright regulations . . . the term ‘employee’ should be understood in light of the general common law of agency.” *Id.* at 740-41. The *Reid* court also determined that the language of the Act “does not support” a definition of employee to mean only “a formal, salaried employee” but that the non-exhaustive list of factors found in the Restatement of Agency § 220 (2) should be applied. *Id.* at 743, n. 8 and n.31.

be created “shall be considered a work made for hire” and if the work was “specially ordered or commissioned for use” within one of nine categories enumerated in the Copyright Act.⁶⁴ There is a dearth of case law identifying the appropriate analysis to apply in drawing a statutory line between works written to special order or on commission that should be considered as “works made for hire” and those that should not.⁶⁵

Under the “work made for hire” doctrine, the employer is considered both the author and copyright owner of the work so that copyright ownership for a work made by an employee belongs to the employer. On the other hand, if the creation of the work falls outside the scope of employment, then the employee, not the employer, is entitled to copyright ownership of the work.⁶⁶ While the “work made for hire” doctrine generally applies to employees, a work may be for hire even though the creator is not a paid employee in the real sense of the word, for example, when the creator is a volunteer.⁶⁷

⁶⁴ *Id.* § 101 (2). These categories are: contribution to a collective work, translation, supplementary work, compilation, instructional text, test, answer material for a test, atlas, or part of a motion picture or audiovisual work. This is the traditional standard which developed under the Copyright Act of 1909 (Copyright Act of 1909, 35 Stat. 1075, ch. 320, §§ 1-65 (amended entirely)) which Congress chose to retain as the standard in the Copyright Act of 1976.

⁶⁵ *But see* Copyright Law Revision, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 120-121 (1976) (identifying and discussing

specific categories of commissioned works that can be considered ‘works made for hire’ under certain circumstances Of these, one of the most important categories is that of instructional texts.’ . . . 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 for 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.).

⁶⁶ *Id.* § 101 (1). *See also* Reid, 490 U.S. at 751 (stating that “[t]o determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101.”).

⁶⁷ *Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983) (where town owned copyright to manual written by volunteer).

The effect of a contract is to create the employee-employer or master-servant relationship foreseen by the Copyright Act of 1976. Under current law, the employer owns the copyright in a work made within the scope of employment and is free to use it at will, without obtaining the permission of, or paying any royalties to, the employee. Even in the situation where the employee would normally retain original authorship, an employment contract between the author and employer can serve to shift ownership from the author to the employer, unless the contract stipulates that the creation of copyrightable material is not within the scope of employment or that the employer waives his or her rights to all or specific types of materials created by the employee. In many colleges and universities, faculty members are bound by collectively negotiated contracts, while in other institutions the employment contracts are simple and do not give any unique rights to faculty members.⁶⁸ In the majority of universities where employment contracts are common, faculty members are not protected by a specific clause in the contract requiring that they retain ownership rights in any copyrightable material they produce. 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.

Application of "Work Made For Hire" to University Faculty

Prior to the enactment of the Copyright Act of 1976, United States law specifically recognized a "text book exception" to the "work made for hire" rule.⁶⁹ This exception placed ownership of an instructor's intellectual property in the instructor. As such, lecture notes, syllabi, and textbooks, for example, prepared by an instructor, even within the scope of his or her regular employment,

⁶⁸ See generally Todd F. Simon, *Faculty Writings: Are They "Works Made for Hire" under the 1976 Copyright Act?* 9 J. COLL. & UNIV. LAW 485 (1982).

⁶⁹ See Copyright Act of 1909, 35 Stat. 1075; MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 5.03 [B][1][b][i] (1997). Although there are no American cases directly on point, Nimmer based his conclusion on dicta in a number of cases.

were the property of the instructor and not the institution. When Congress passed the current copyright law, however, it omitted the text book exception.⁷⁰ This is not to say that Congress expressly repealed the provision. Rather, the provision simply was not included.

Instructional text is defined in the 1976 statute as “a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.”⁷¹ According to Goldstein, the intent of the law is to include a category of “text book material,” regardless of whether its format is in “book form or prepared in the form of text matter.”⁷² Nevertheless, the vast majority of colleges and universities in the United States continue to honor the text book exception—a fact reflected in the actions of faculty members regarding their publications.⁷³

Unlike copyright policies, many universities have long-standing institutional patent regulations governing the arrangements between faculty and the institution to define the ownership and financial relationships associated with the products of research. Indeed, patent policies and procedures governing intellectual property and technology transfer have existed at most research universities for many years. Such guidelines provide a legal framework to ensure institutional oversight and ownership of scientific discoveries that may generate substantial income for the university while providing some portion of the royalties to faculty

⁷⁰ See *Hays v. Sony Corp of America*, 847 F.2d 412, 416 (noting in dicta that although the “teacher exception” no longer appears in the text of the Copyright Act, there also is no legislative record of an affirmative Congressional action to abolish the “teacher exception”).

⁷¹ 17 U.S.C. § 101. See *supra* text accompanying notes 62, 63.

⁷² PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 618 (4th ed. 1997).

⁷³ See e.g., Brown University Patent and Invention Policy <http://facgov.brown.edu/facgov/facrulesfolder/part5/sect11/Sect11.html>; Massachusetts Institute of Technology, Research Policies and Public and Private Support, <http://web.mit.edu/afs/athena.mit.edu/org/p/policies/14.0.html>; Stanford University, Research Policies Handbook, <http://www-leland.stanford.edu/dept/DoR/RPH.html>; University of Iowa, Sponsored Research Regulations and Procedures, <http://www.uiowa.edu/~vpr/research/rtrap.html>; University of Minnesota, Policy on Patents and Technology Transfer <http://www1.umn.edu/regents/policies/academic/PatentsandTechnologyTransfer.pdf>. See also sample policies on the Internet and others on file with the author.

members and/or their academic department and research center. That patent policies have received significant attention in higher education is not surprising—the results of campus-based research can be enormously lucrative.

In the context of intellectual property that can generate profits, the work of faculty has been generally defined as the labor of “work for hire employees,” even though faculty members and their departments tend to benefit directly from the agreement. These arrangements are not unlike the agreements that faculty and universities have forged when a faculty member is awarded a grant from an outside agency and the institution receives a portion of that funding for operating and overhead costs. When the results of the grant-funded research are significant, patent policies are then employed to insure that the institution is a direct beneficiary of the work and intellectual property of the faculty member.

Until now, copyright ownership in university settings has not been thoroughly investigated or codified because there has not been an easily identifiable financial benefit to the institution in asserting its ownership rights. Perhaps that is why the custom of faculty ownership of written work has been so strong and has gone unchallenged--the institution could gain very little from doing so. For example, given the exorbitant costs of publishing, even the most widely sold textbook brings minimal income to the author. With the growth of the Internet, and the development of new media to share intellectual property, however, colleges and universities have begun to assert their presumed ownership rights to copyrightable material in addition to the patents and trademarks developed under institutional auspices.

In the area of distance learning, the proliferation in the number of electronically based courses over the last decade has led colleges and universities to reexamine the ownership issue from multiple perspectives. On the one hand, institutions believe that they have proprietary rights because the use of instructional resources in the development of such courses has contributed to the institutional perspective that it is a partner in the course.⁷⁴ On the other hand, faculty argue that they are the sole owners of their instructional materials and should not be expected to enter into

⁷⁴ Kenneth D. Salomon, *Electronic Course Ownership and Use Policies*, Virtual University News, 1998.

contractual agreements with their employers regarding the ownership of their course materials.⁷⁵ Additionally, with the advances in technology, universities now have the capability to use course materials for multiple semesters, without additional compensation, negotiations, or involvement of the parties (faculty and staff) who originally “perform” or “produce” the materials or the course. This development, coupled with the potential financial windfalls associated with distance learning, has resulted in both faculties and university administrators reconsidering the ownership of course materials.⁷⁶

As copyright owner, the employer is free to create new editions, revisions, and derivative works, although universities have not, in the main, exercised their right to do so. In the context of the university setting, the strict imposition of the work for hire approach would seriously undermine the relationship of faculty to their universities and would probably lead to much more strongly articulated and complicated provisions in faculty collective bargaining agreements and employment contracts.

Colleges and the Courts

Given the litigious nature of United States society, it is unique that the concept of works made for hire has not been applied to the scholarly writings of college and university professors who are employed specifically to conduct research and to publish, as well as to teach. The question of who owns the copyright to scholarly writings has only been presented in federal court as peripheral to

⁷⁵ See generally COMMITTEE R ON GOVERNMENT RELATIONS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT ON DISTANCE LEARNING (November 1997).

⁷⁶ *Id.* Given the ability to record lectures in a fixed medium for repeated use, faculty are also questioning the length of contractual agreements and how long institutions will be able to enroll students in distance learning courses that were originally prepared for a single class. Under the 1976 Act, the duration of copyright protection was the life of the author plus 50 years, except in cases of “works for hire,” where the duration was 75 years from year of first publication or 100 years from year of creation, whichever expires first. 17 U.S.C. § 302. Title I of Public Law No. 105-298, the Sonny Bono Copyright Term Extension Act (signed into law on October 27, 1998) effectively extended the term of all subsisting and future copyrights by twenty years so that the term of the copyright is currently the life of the author plus 70 years.

claims of unjust employment termination,⁷⁷ although it has been treated in state courts under the doctrine of common law copyright.

In *Williams v. Weisser*,⁷⁸ decided on the basis of state common law copyright before the enactment of the 1976 Copyright Act, Williams, an assistant professor of anthropology at UCLA, successfully enjoined the commercial publication of notes taken by a student at Williams' lectures. The California court, applying California law, rejected the claim of the infringing student that copyright in the lecture notes was held by the University rather than by Williams. The court emphasized academic custom and noted the anomaly that would result from a contrary approach barring a professor from delivering lectures at one school that were prepared while employed at another institution. Addressing the distinction between writings and lectures, the court noted that the "oral delivery of classroom lectures by a university professor did not constitute a publication divesting his common law copyright to his lectures."⁷⁹

More recently, in *Weinstein v. Illinois*, an assistant professor at the University of Illinois brought an action against the university for his wrongful dismissal.⁸⁰ One of the causes of action Weinstein brought against the university pertained to the institution's permitting the publication of an article that he co-authored listing his name third in the sequence of authors, rather

⁷⁷ See *Vanderhurst v. Colorado Mountain College Dist.*, 16 F. Supp. 2d 1297, 1308 (D. Colo.1998) (holding that professor's creation of an outline, even though prepared on his own time, connected directly with the work which he was employed to do and was fairly and reasonably incidental to his employment). But see *Weinstein v. Illinois*, 811 F.2d 1091, 1094 (7th Cir. 1987) (holding that the academic tradition since copyright law began is to vest ownership of the copyright in the faculty member).

⁷⁸ *Williams v. Weisser*, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969) (decided on the basis of state common law copyright before the enactment of the present Copyright Act).

⁷⁹ *Id.* at 727. The court found that "no divesting publication occurs unless there is distribution of tangible copies of the work . . . and where nothing tangible was delivered to the students . . . the giving of a lecture did not constitute a general publication." *Id.*

⁸⁰ *Weinstein v. Illinois*, 811 F.2d 1091 (7th Cir. 1987). The underlying action in the case was that a dismissed probationary faculty member at a state university brought a civil rights action against the university and its trustees and employees for violation of several property rights. *Id.* at 1092.

than first. The Circuit Court sided with the professor, but only on the question of whether a federal copyright was owned by the faculty co-authors or by the university.⁸¹ At issue were the institutional policies of the University of Illinois, enumerated in the faculty employment contract, which permit professors to retain copyright except in three specified circumstances.⁸² The court decided to construe these limitations narrowly, rather than reach a result at odds with the strong “academic tradition” of faculty ownership of faculty-authored works. While not purporting to construe the “work for hire” provision of the Copyright Act, the court did suggest that the statutory language was sufficiently broad to “make every academic article a work for hire” and therefore vest exclusive control in universities rather than scholars.⁸³

The custom that professors retain copyright to their work⁸⁴ is probably the major reason few cases have been brought before the courts. “Academic authors have traditionally asserted the right to publish freely their scholarly creations, and otherwise to derive the professional fruits of their dissemination.”⁸⁵ For example, both the *Williams* and *Weinstein* courts granted the professors copyright ownership while noting that the relationship between professors

⁸¹ *Id.* at 1095 (holding, *inter alia*, that although faculty members’ article was not “work for hire” that was property of the university, the complainant’s colleague who had jointly authored the article was its co-owner and could publish it in revised form with his name listed first, and neither the colleague nor the university had deprived the faculty member of property in violation of due process).

⁸² *Id.* at 1094. The University of Illinois had adopted a policy defining “works for hire” which allows professors to retain the copyright unless the work falls into one of three categories: (1) a third party agreement with the University requires the University “to hold or transfer ownership in the copyrightable work;” (2) works “expressly” commissioned by the University; (3) “works created as a specific requirement of employment or as an assigned University duty” where the duty may be contained in a job description or employment agreement. *Id.*

⁸³ *Id.* at 1093-1094 (noting that copyright law at 17 U.S.C. § 201(b) gives an employer the full rights in an employee’s “work for hire” unless a contract provides otherwise).

⁸⁴ See *Salomon supra* note 73.

⁸⁵ Robert A. Gorman, *Copyright and the Professoriate: A Primer and Some Recent Developments*, *Academe* 32 (September 1987) reprinted in *INTELLECTUAL PROPERTY IN ACADEME: A LEGAL COMPENDIUM*, EDWARD O. ANSELL ED., National Association of College and University Attorneys (1991).

and their institutional employers is different from that of employees in other settings. As a result of law and custom, faculty members and universities alike have traditionally assumed that faculty members owned the copyrights to their scholarly work.

The Scope of Employment

Under most strict interpretations of the laws (labor laws, social security provisions, copyright law, etc.), the professor is an "employee" of the institution. The more debatable issue is whether the typical scholarly product is prepared "within the scope of his or her employment" as intended under the Copyright Act, since the Act does not define these terms. In *Community for Creative Non-Violence v. Reid*, the Court applied agency law to the Copyright Act.⁸⁶ The scope of employment under the Act has been defined as: "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods . . . of carrying out the objectives of the employment."⁸⁷ Other factors cited by the court include whether: "(1) it is the kind of work the person is employed to perform; (2) the work occurs substantially within the work hours; (3) the work is actuated, at least in part, by a purpose to serve the employer."⁸⁸ While most academicians would argue that the norms of academic culture presuppose a professional, non-employee status, "the 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."⁸⁹

⁸⁶ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1985) (construing agency principles as applicable in determining employment status and whether the disputed work is within scope of employment). *See also supra* text accompanying notes 63-66.

⁸⁷ *Vanderhurst* at 1307 (citing RESTATEMENT (SECOND) AGENCY, §§ 228-229; *see also* *United States v. Smith*, 810 F.2d 996 (10th Cir. 1987).

⁸⁸ *Id.* at 1307 (citing RESTATEMENT (SECOND) AGENCY, § 228; and NIMMER, 1 NIMMER ON COPYRIGHT 5-33 (1997)).

⁸⁹ NIMMER, 1 NIMMER ON COPYRIGHT 5.03[B] (1997); *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967) (noting that "an essential element of the employer-employee relationship, the right of the employer 'to direct and supervise the manner in which the writer performs his work'" was lacking. "This lack of control . . . over performance," as well as other factors identified by the court, "indicated that [writer] was not an

The explicit and implicit agreements in the typical faculty employment agreement support the idea that scholarly writing is within the scope of employment as anticipated by the statute.⁹⁰ Compensation packages for faculty members generally assume some scholarly enterprise. Faculty members are expected to produce teaching materials, books, and other academic materials “fixed in a tangible medium of expression” as a precondition of tenure in most institutions. The work that faculty members produce will normally fall “within the scope” of the courses they teach and the field of study they have been hired to pursue. Many faculty agreements identify other aspects of faculty employment, such as availability of secretarial and computer resources, and library support, that are to be provided by the university to facilitate scholarly productivity. By all the usual standards of the commercial world, the scholarly activities of faculty could be said to lie directly within the scope of their employment.⁹¹ It appears that “scholarly production” of articles, books, and other creations are works “prepared by an employee within the scope of his or her employment”⁹² and that the courts would reject the contention that these works are not prepared “within the scope” of employment.⁹³

‘employee’ in the substantial sense required by the Copyright Act”); *Clarkstown v. Reeder*, 566 F. Supp. 137, 141 (S.D.N.Y. 1983) (holding that a volunteer worker may be considered an employee for purposes of the copyright laws and that the crucial factor to be considered is whether the alleged employer has the right to direct and supervise the work of a volunteer).

⁹⁰ Often in materials used to nominate faculty members for promotion or in annual evaluation materials, there are forms included which require that faculty members list their activities that support the institutional missions. For example, in addition to time spent in “instruction for credit,” faculty may be asked to indicate the time spent in continuing education; research, creative and professional activities; and professional community/public service. The clear inference is that a faculty member’s scope of employment may entail these activities.

⁹¹ See generally Gorman, *supra* note 84; also see Simon, *supra* note 68; also see duBoff, *An Academic’s Copyright: Publish and Perish*, 32 J. OF THE COPYRIGHT SOC. 17 (1984). But see COMMITTEE R ON GOVERNMENT RELATIONS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT ON DISTANCE LEARNING (November 1997).

⁹² Simon *supra* note 68 at 486.

⁹³ See *Hays v. Sony Corp of America*, 847 F.2d 412, 416 (comparing the “work made for hire” concept with the “teacher exception” presumed to exist under the 1909 Act).

Still, arguments against treating faculty members' scholarly products as "works for hire" are compelling. While some writings are mandated--tests, written reports of committees, general correspondence--more often, faculty members' agendas are personally formulated, without external direction, to write and conduct research on subjects of their own choosing. Faculty members assume the editorial and publication responsibilities for their creations, assign "their" copyright to the professional journals which publish their works,⁹⁴ and receive whatever royalties are paid.⁹⁵ If these products were considered to be the property of the universities, professors "publishing" teaching materials while at one college would not be able to use them at another without the express permission of the former institution. The copyright owner, the employer, "could control whether and where a work was published, how and if that work would be revised in later editions," and the nature of any derivative works to be developed.⁹⁶

At research universities, where the mission is to create new knowledge, protocols have been developed for sharing the benefits and remuneration that have been generated from faculty inventions. Indeed, the basic research for such items as the facsimile machine and the development of ceramic tiles used on space shuttles have been conducted on university campuses in the United States. If the flexibility that has developed in the application of statutory protections for patents is assumed to flow to the application of copyright law to university faculty members' work, it is much easier to project the university's right to the copyright.

Indeed, notwithstanding the few cases that have been heard, the Copyright Act is less than supportive of the proposition of faculty copyright ownership. The section of the Copyright Act of 1909 omitted from the Copyright Act of 1976 serves to undermine the arguments that placed scholarly writing outside the definition of

⁹⁴ See specifically *Weinstein supra* note 79 at 1095. Generally, scholarly journals require assignments of copyrights by the faculty member or named author rather than requiring assignment by the university or its representative, but see *infra* n. 176 and accompanying text.

⁹⁵ Contrast this treatment of royalty payments with the treatment of royalty payments for patented works.

⁹⁶ *Gorman supra* note 84 at 31.

“works made for hire.”⁹⁷ The revisions to the Act strengthen 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.⁹⁸ A faculty member’s ability to rebut the presumption of university ownership will depend, therefore, upon how explicit the language of the employment contract or agreement is and whether both parties sign it. Few professors take specific legal action to retain the right to the copyright in their scholarly writings.⁹⁹ Instead, many faculty members rely on the historical laissez-faire approach of universities to enforcement of their copyrights or to the actual acquiescence of many universities in allowing what has been an economically insignificant right to be retained by the faculty member. Additionally, federal copyright law preempts state common law copyright for most purposes,¹⁰⁰ undermining the precedential value of the few common law cases on point¹⁰¹ and leaving the apparent conflict between Vanderhurst and Weinstein to be settled by the federal courts.¹⁰²

⁹⁷ 17 U.S.C. § 201.

⁹⁸ *Id.* at § 201(b) (stating specifically that “in the case of a work made for hire, the employer . . . is considered the author . . . unless the parties have expressly agreed otherwise in a written instrument signed by them . . .”).

⁹⁹ Simon *supra* n. 68 at 506. See also Robert A. Gorman, *Intellectual Property: The Rights of Faculty as Creators and Users*, AAUP Homepage (visited March 6, 1999) www.aaup.org.

¹⁰⁰ 17 U.S.C. § 301. This section prescribes three conditions, all of which must be met, for a state law to be preempted. First the state right in question must be “equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106,” second, the right must be in a work of authorship that is fixed in a tangible medium of expression. Third, the work of authorship must come within “the subject matter of copyright as specified by sections 102 and 103.”

¹⁰¹ Before 1976, United States’ copyright law was divided between federal and state protection. Published works were protected by the federal copyright law, while unpublished works were generally protected by state common law. The common law strictly prohibited the fair use of unpublished works under the theory that the author should decide when and in what form his work should first reach the public.

¹⁰² *Vanderhurst* at 1308 (holding that professor’s creation of an outline, even though prepared on his own time, connected directly with the work for which he was employed to do and was fairly and reasonably incidental to his employment) and *Weinstein supra* n. 44 at 1094 (holding that the academic

DISTANCE LEARNING, COPYRIGHT, AND TECHNOLOGICAL CHANGE

As distance education programs have evolved, non-traditional arrangements for course delivery have emerged. For example, Western Governors University (WGU) was founded in 1996 by a group including the governors of 17 states and a number of corporate partners, including Cisco, IBM, AT&T, and KPMG.¹⁰³ The academic plan for WGU does not include the employment of a full-time teaching faculty nor does it provide for the internal creation of its own courses.¹⁰⁴ Instead, WGU's "on line academic content will come from a range of qualifying providers (colleges or universities, or businesses, here or abroad) and all degrees will be competency based."¹⁰⁵ In this academic and business partnership, therefore, the distance learning concept has shifted focus from the educator to the content provider, where the educator becomes a facilitator while the distance learning organization dictates and provides course content developed by other experts in a particular field.¹⁰⁶ As additional configurations and partnerships are developed, with neither a common practice for who delivers course content nor for how it is delivered, the application of copyright, because it is fact specific, will require more negotiation, arbitration, and litigation. Of special importance in the matter of faculty ownership of intellectual property, particularly in the arena

tradition since copyright law began is to vest ownership of the copyright in the faculty member).

¹⁰³ Ted Marchese, "Not So Distant Competitors: How New Providers Are Remaking the Postsecondary Marketplace," AAHE Bulletin, May 1998 at 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* WGU's aim is to be the broker of choice within an academic common market that it helps create--its business plan envisions 95,000 students just after the year 2000. *Id.*

¹⁰⁶ Anne C. Keays and Andrew J. Warren, *Is Distance Learning Bill Balanced?* The National Law Journal, Monday, October 26, 1998 at B5. For example, one approach is that the educator/facilitator, "instead of using a traditional textbook, directs the students in practical applications and exercises via workbooks or interactive software. Therefore, rather than purchase a copy of a textbook, the distance learner may license the right to use or access the training product." *Id.*

of distance learning, is the notion of academic freedom and the nature of creative and independent inquiry in the academy.

Exemptions

Under the Copyright Act, a limited exemption from infringement of copyright is provided for performance by other than the owner of copyrighted material in a limited distance learning situation.¹⁰⁷ The exemption is restricted to classrooms, individuals prevented from attending class in person, and government employees as part of their official duties.¹⁰⁸ In an effort to provide additional guidelines to the educational community, and to broaden the existing copyright exemption to include distance learning transmissions generally, Congress passed several amendments to the Copyright Act.¹⁰⁹ These revisions expand the existing exemption for transmitted works and permit performance, display,

¹⁰⁷ 17 U.S.C. § 110 (2) allows for the performance of nondramatic literary or musical works by transmission without constituting infringement. To qualify for the exemption, the performance must be part of systematic instructional activities by a government body or non-profit educational institution, and the performance must be directly related and of material assistance to the teaching content of the transmission. Section 202 (a) of Title II of Public Law No. 105-298, the 'Fairness in Music Licensing Act of 1998,' adds a new set of exemptions to section 110 (5)'s exemption from the public performance and display rights. New sub-paragraph (B) will exempt an establishment's communication of a transmission or retransmission embodying a performance or display of a nondramatic musical work under criteria that vary with the establishment's status as a 'food service or drinking establishment.' In the case of an establishment that is a 'food service or drinking establishment,' sub-paragraph (B) (ii) categorically exempts performance in spaces of less than 3,750 square feet, and also exempts performances in establishments of 3,750 square feet or more so long as a prescribed number of loudspeakers (in the case of audio performances) or a prescribed number of audiovisual devices (in the case of audiovisual performances) is not exceeded. Sub-paragraph B (I) prescribes the same formula for all other (non-food or drinking) establishments, but employs 2,000 square feet as the tipping point for application of the audio and audiovisual device ceiling. As a further condition to both categories, no direct charge can be made to see or hear the transmission, the transmission cannot be further transmitted beyond the establishment, and the original transmission had to have been licensed by the copyright owner.

¹⁰⁸ 17 U.S.C. § 110 (2).

¹⁰⁹ The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

or distribution of any copyrighted works by analog or digital transmission for distance learning.¹¹⁰ The amendments also add the exemption to transmissions to students enrolled in distance learning courses and to government employees receiving distance learning within their employment, thereby eliminating the existing requirement for reception in classrooms.¹¹¹ Since the exemption is limited to only certain types of copyrighted material, however, it may not cover the multimedia distance learning products available today. The exemption, for example, does not appear to apply to courses that are delivered directly to a student's home via the Internet.¹¹²

Fair Use

The judicial doctrine of fair use, which has been loosely codified under the Copyright Act, section 107, is a means of permitting, under certain conditions, the limited use of copyrighted materials without the owner's consent. The impact of the fair use doctrine is to justify some uses that would otherwise be copyright infringements.¹¹³ As an equitable rule, it has been applied with a considerable degree of flexibility. Although the statute does not define fair use, it identifies a variety of factors that are relevant in determining whether the doctrine applies in a particular case.¹¹⁴ The purpose of the doctrine is to balance the public's interest in the free flow of ideas and information against the copyright owner's right to the exclusive use and control of the work.

The "fair use" exemption that educators enjoy permits a limited amount of copying and distribution of copyrighted printed material for educational purposes.¹¹⁵ Most educational institutions have widely disseminated policies articulating their application of the fair use exemption. These fair use policies generally refer to

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 13.05 (1997).

¹¹⁴ 17 U.S.C. § 107. These factors include: 1) the purpose and character of the use, 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. *Id.*

¹¹⁵ *Id.*

photocopying of copyrighted materials and do not reference the development of copyrightable materials. Distance learning educators, however, find it difficult to apply even these limited regulations to content delivered in electronic form, most likely because policies applicable to paper copies are not easily transferable to electronic copies.

Licensing

Some universities make their distance learning courses available under the terms and conditions of non-negotiable click wrap licenses¹¹⁶ or other similar types of licenses.¹¹⁷ Currently, distance learning providers offer access and use rights under several different licensing options, including site, user, seat, library, or enterprises licenses. Distance learning licensing concepts were most easily adapted from the software industry because the products combine educational content, video, entertainment components, software, and other multimedia technology.¹¹⁸ It appears, however, that universities have adapted licensing agreements from the software industry practice of providing access to, and use of, electronic information to educational institutions and corporations and have assumed the ownership of the licenses without significant consideration given to the faculty member's potential property rights.

Similar to licenses for computer software, the licenses of distance-learning products provide the student or recipient with a limited right to access and use of the course information. Such licenses do not necessarily accommodate a clear definition of the applicability of the doctrine of fair use from the perspective of the traditional classroom educator. In general, distance learning service providers and product developers have not yet created a licensing protocol to balance the student's need for receiving content with the rights of the product's copyright owner.

¹¹⁶ Click wrap licenses are so named because the licensee is generally required to "click" the computer's mouse to acknowledge having read the license and having accepted the terms and conditions of the license agreement.

¹¹⁷ See Keays *supra* note 106 at B10.

¹¹⁸ *Id.*

Particularly important is the anomaly created by proposed changes to Section 301(a) of the Copyright Act, one of which would preempt enforcement of non-negotiable licenses.¹¹⁹ Specifically, a work distributed to the public under a non-negotiable (i.e., clickwrap) license, would not be protected under state common law or statutory provisions to the same extent as non-publicly distributed works.¹²⁰ Therefore, if the clickwrap license contained provisions that "limited the reproduction, adaptation, distribution, performance or display, by means of transmission, or otherwise, of copyrighted works," the license would not be enforceable.¹²¹ As a result, the licensee would obtain much broader rights than those granted by the license. The net result is that the interpretation and applicability of the license terms depends on the manner in which the product is distributed. Given the rapid rate of change in the information distribution system, this legislation, if enacted, may quickly become obsolete.¹²²

Current Legislation

When advances in the development of motion picture technology affected the application of the Copyright Act of 1909 to the development of aural and visual recordings, Congress faced challenges similar to those of distance education, even though those challenges were brought about by different technological changes.¹²³ To address these technological advances, a comprehensive project to review and revise the copyright law was authorized by Congress in 1955.¹²⁴ During the revision process, a National Commission of New Technological Uses of Copyrighted Works (CONTU) was established to study changes in technology

¹¹⁹ *Id.*

¹²⁰ 17 U.S.C. § 101 (defining publication as "the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies . . . to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.").

¹²¹ See Keays *supra* n. 106 at B10.

¹²² *Id.*

¹²³ See NIMMER, 1 NIMMER ON COPYRIGHT, §§ 2.03 [D]; 13.03 [A] [1] (1997).

¹²⁴ See Wadley *supra* note 50 at 10.

and to recommend to Congress specific provisions to address those developments.¹²⁵

As originally adopted, the 1976 Act did not expressly list computer programs as works of authorship. The CONTU Final Report, however, recommended amendments to the 1976 Act and provided for the inclusion of computer programs in the statute.¹²⁶ In the 1980 revisions of the Act, Section 101 was rewritten to include a definition of "computer program" and Section 117 was revised to specify the limitations on exclusive rights in the case of computer programs.¹²⁷ The ability to copyright computer programs has, subsequently, been upheld by the courts.¹²⁸ The problem remains, however, that ideas are not protected.¹²⁹ Therefore, except to the extent that a computer program has an identity separate and apart from the idea(s) which it implements, protection will be denied.¹³⁰

In the Digital Millennium Copyright Act of 1998,¹³¹ Congress directed the federal Copyright Office¹³² to consult with content

¹²⁵ Pub. L. 93-573, 88 Stat. 1873, 1873-75 (1974) established CONTU.

¹²⁶ United States, *National Commission on New Technological Uses of Copyrightable Works, Final Report*, Washington, D.C.: Library of Congress, 1979.

¹²⁷ 17 U.S.C. § 101 defines computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." In addition, § 117 specifies the limitations on exclusive rights in the case of computer programs. *Id.*

¹²⁸ *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033 (1984) (holding that a computer program, so long as it is original and sufficiently expressive, will be copyrightable whether it is expressed in words, in a flow chart, in source code or object code, and whether it is embodied in paper, magnetic disk, tape or semiconductor chip).

¹²⁹ 17 U.S.C. § 102 (b). *See supra* text accompanying note 41.

¹³⁰ *See* NIMMER, 1 NIMMER ON COPYRIGHT, §§ 2.03 [D]; 13.03 [A] [1] (1997) and cases cited therein.

¹³¹ The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 202(a), 112 Stat. 2860, 2877-83 (1998) ("DMCA"). Enactment of the DMCA was the result of a multi-year effort to clarify the responsibilities of Internet service providers (ISPs) for the copyright infringing activities of their subscribers. Educational institutions that provide Internet and on-line access to their students, faculty, and staff are classified as ISPs, along with other commercial service providers. The DMCA also implements the 1996 World Intellectual Property Organization (WIPO) Copyright and Performances and Phonograms Treaties through provisions securing technological protection

providers, eleemosynary educational institutions, and non-profit libraries and make recommendations to Congress within six months of the exemptions to the exclusive rights of copyright owners that are needed to promote distance education, while maintaining an appropriate balance between all parties in the industry.¹³³ The Register of Copyrights was directed to consider a number of factors in this report: (1) the need for an exemption for distance education through digital networks; (2) categories of works to be included; (3) whether there should be quantitative limitations on how much of a work can be used; (4) whether only nonprofit educational institutions or all distance education providers should benefit from the exemption; (5) whether reception of the transmission of distance education materials under the exemption should be restricted to students enrolled in the course; (6) whether technological measures are available to prevent unauthorized access; (7) the extent to which the availability of licenses should be considered in assessing eligibility for any exemption; and (8) any other factors.¹³⁴

measures and electronic rights management; creates safe harbors for online service providers; exempts temporary copies of computer programs made in the course of computer maintenance; amends digital performance rights; and creates a new form of industrial design protection for boat hulls. Title II of the DMCA creates new § 512 of the Copyright Act which provides a limited immunity for ISPs if certain conditions are met. Additionally, § 512(e) incorporates a special rule limiting the liability for non-profit educational institutions for the activities of faculty members and graduate student employees who are “performing a teaching or research function.” The conditions attached to this special protection are that (1) the faculty member or graduate student employee’s infringing activities do not involve providing on-line access to instructional materials required or recommended for a course taught at the institution by the employee within the preceding three years (i.e., the work must be fresh); (2) the institution, within the preceding three years, received no more than two notifications of claimed infringement by the employee; and, 3) the institution provides all users with information describing and promoting compliance with copyright. *Id.*

¹³² *Id.* at Title II.

¹³³ S. REP. NO. 105-190, at 1 (1998). The Committee Report describes the purpose of Title IV of the Act as intended to initiate updates to the nation’s copyright laws with respect to library, archive, and educational uses of copyrighted works in the digital age.

¹³⁴ The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 202(a), 112 Stat. 2860, 2877-83 (1998).

The resulting *Report on Copyright and Digital Distance Education*¹³⁵ contains numerous recommendations that, if translated into legislation, will influence college and university policies pertaining to distance learning. The report recommended that the categories of works included in the exemption be expanded to include dramatic, literary, musical, and audiovisual works. At the same time, it suggests that the restriction on the place of instruction be removed but that the current language limiting the exemption to nonprofit educational institutions and government bodies be retained. It proposes expanding the coverage of rights to meet technological necessities so that digital copies made incidental to a transmission are not viewed as infringing copies. Of particular interest is the recommendation that when the performance of the work is integral to the instruction, or when the instructor is illustrating a point, the performance may be exempted from copyright infringement. The report also proposes that educational institutions become responsible to “apply measures to protect against unauthorized access; provide protection against unauthorized dissemination after access has been acquired; use only lawfully acquired copies of copyrighted works that are performed or displayed; and educate the campus community about copyright.”¹³⁶

The Evolution of Copyright Ownership in the University

Writing on the topic of patent law in higher education, Kaplin and Lee, prominent higher education legal commentators, stated:

[t]he question of who owns a particular discovery, invention, or design is especially complicated in higher education institutions because of the faculty’s academic freedom interests; the institution’s interest in obtaining a return on its investments in researchers, facilities, and equipment; and the

¹³⁵ U.S. Copyright Office, *Report on Copyright and Digital Distance Education*, May 1999. It can be accessed at http://lcweb.loc.gov/copyright/cpypub/de_rprrt.pdf.

¹³⁶ *Id.*

funding source's potential interest in the commercial application of the fruits of its investment.¹³⁷

As colleges and universities move more fully into the commercial approach of content delivery via distance learning technology, the complicated question of ownership raised in the context of inventions and discoveries becomes equally significant to the issues of copyright ownership.¹³⁸

As noted earlier, the case law involving challenges to copyright ownership in a college or university setting is sparse. User rights in higher education have been clarified instead through unilateral institutional policy statements, private agreements, and negotiated settlements. Such approaches, however, do not create law, and they are binding only on the immediate parties. These individual actions and their overall course of dealings form what some education attorneys have called a "campus common law."¹³⁹

Relationship to Distance Learning

Additionally, the institution may obtain copyright ownership by virtue of a written assignment in the same way that most universities acquire patent ownership.¹⁴⁰ Such an assignment must explicitly cover copyrighted works and must be signed by the author.¹⁴¹ In such cases, the individual assignor--not the institution-- is deemed the author so that the term of the copyright is the life of the author plus 70 years.¹⁴² If the university chooses to

¹³⁷ WILLIAM A. KAPLIN AND BARBARA LEE, *THE LAW OF HIGHER EDUCATION*, 3D ED., Jossey-Bass Publishers, 1995 at 355.

¹³⁸ The patent analogy may be the most appropriate because copyright and patent have a common constitutional source in Art. I, § 8, cl. 8.

¹³⁹ KAPLIN AND LEE, *supra* note 137 at 17.

¹⁴⁰ 17 U.S.C. § 201 (d) stating in pertinent part: "(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or operation of law . . . (2) [a]ny of the exclusive rights comprised in a copyright . . . may be transferred as provided in clause (1) and owned separately.

¹⁴¹ *Id.* at § 204 (a) stating in pertinent part: "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.

¹⁴² Title I of Public Law No. 105-298, the Sonny Bono Copyright Term Extension Act (signed into law on October 27, 1998), effectively extended the term of all subsisting and future copyrights by twenty years.

use the formality of an assignment process as a requisite for employment of the faculty member, other issues may emerge regarding the freedom with which the assignment of the faculty member's putative property rights is given.¹⁴³

Just as software produced in an academic setting usually involves several participants with differing roles, so does the development of distance learning courses. A faculty member may conceive the outline for the course products while staff members with audiovisual and production experience may create the "fixed" medium materials from the lectures. To ascertain whether the institution owns the course, one must determine who could be considered as author(s) and then which, if any, individual is working within the scope of employment.¹⁴⁴ But, just as an individual who contributes nothing original to a software product cannot be an author, when a faculty member implements the specific instructions of a supervisor to produce a distance learning course, it can be inferred that the copyright vests in the university rather than in the faculty member.¹⁴⁵

Authors are not obliged by law to place a copyright notice on their work in order to retain the copyright.¹⁴⁶ A notice is therefore not necessary when, for example, teaching materials authored by a professor are distributed to students for classroom use, or a

¹⁴³ For example, if the faculty member claims that the assignment of property rights to the university was forced upon him, does the possibility of acquisition of those rights by duress affect the ownership of the copyright?

¹⁴⁴ See *supra* notes 55-73 and accompanying text discussing work for hire and scope of employment.

¹⁴⁵ *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (holding that a work is prepared by an employee whenever the hiring party retains the right to control the product); see *Clarkstown v. Reeder*, 566 F. Supp 137, 142 (S.D.N.Y. 1983) (comparing the "efforts of the scribe" to the "genesis of the ideas" and holding that a work is prepared by an employee under § 101 (1) when the hiring party has actually wielded control with respect to the creation of a particular work).

¹⁴⁶ 17 U.S.C. at § 401 states in pertinent part:

Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

Id.

manuscript or an article is submitted to one or a number of journals for consideration.¹⁴⁷ Copyright owners still have good reason to affix copyright notice to copies of their works, because there are statutory requirements requiring notice¹⁴⁸ and registration¹⁴⁹ of the copyright in order to bring a suit for infringement¹⁵⁰ and be eligible for an award of damages.¹⁵¹ If the university asserts or attempts

¹⁴⁷ Most professional journals require the faculty member to attest that the submission is the original work of the faculty member and to release the copyright ownership to the journal. Until recently there have been no requirements imposed by universities that they be identified as the copyright holder, joint author, or possessor of any other property interest in the faculty work. *See e.g., infra* accompanying text at notes 184-187.

¹⁴⁸ 17 U.S.C. at § 401 (d) and 402 (d) provide as a general rule that if notice appears on the published copy to which the infringer had access, a court shall give no weight to a defense that innocent infringement mitigates actual or statutory damages.

¹⁴⁹ *See* 17 U.S.C. at § 405. Registration is not a condition of copyright protection and a copyright owner may obtain registration for his work at any time during the copyright term. The incentive to prompt registration is § 405 (a)(2) that allows registration to cure errors or omissions in copyright notice only if "registration for the work has been made before or is made within five years after the publication without notice." *Id.*

¹⁵⁰ *Id.* at § 405 (a). This section provides that the omission of notice from copies of a protected work may be excused or cured under certain circumstances, in which case the copyright is valid from the moment the work was created, just as if no omission had occurred. *Id.* The House Report accompanying the act stated with respect to § 405(a) that

under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely . . . [U]nder the proposed law a work that is published without any copyright notice will still be subject to statutory protection for at least five years, whether the omission was partial or total, unintentional or deliberate.

H. Rep. No. 1476, 94th Cong., 2d Sess. 147.

¹⁵¹ 17 U.S.C. at § 411 requires copyright owners of works originating in the U.S. to obtain registration in order to file a copyright infringement action and § 412 provides that no award of statutory damages or attorney's fees can be made for

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its

to assert an ownership interest in the work of its faculty members under the “work for hire” doctrine, then an additional, complex question relating to distance learning may arise in the context of derivative works.¹⁵²

In *Weismann v. Freeman*,¹⁵³ Dr. Leonard Freeman, a medical school professor, was sued by Dr. Heidi Weismann, his former research assistant, who was also a physician.¹⁵⁴ Freeman and Weismann were prolific authors who, in addition to their individual articles, had co-authored numerous previous works in the field of nuclear medicine.¹⁵⁵ One of the papers they co-authored in 1980 was a review of techniques in an area of “radionuclide imaging.”¹⁵⁶ They cooperated in a series of revisions to that article over the next five years, but then Weismann published under her own name an article derived from the previous works they had written jointly.¹⁵⁷ Two years later Freeman gave a lecture and, in developing supporting materials for the lecture, prepared to disseminate Weismann’s article by removing her name, substituting his own, and modifying the title by three words.¹⁵⁸ Weismann complained and, although Freeman never

registration, unless such registration is made within three months after the first publication of the work.

Id.

¹⁵² 17 U.S.C. at § 101 defines a derivative work as

[a] work based upon one or more pre-existing works such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other 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.

¹⁵³ 868 F.2d 1313 (2d Cir. 1989).

¹⁵⁴ *Id.* at 1315.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1315-16.

¹⁵⁷ *Id.* at 1316. Portions of Freeman’s paper were taken verbatim from the previously co-authored documents, with substantial new elements added solely by Weismann. *Id.*

¹⁵⁸ *Id.*

distributed the revised version, Weismann brought a copyright infringement action.

Freeman contended that he was entitled to recognition as co-author of the work in question because the material was based on other materials they had co-authored. The lower court held that, under the copyright act, the doctors were joint authors of the new work because there was insufficient new material for the document to be protected as a derivative work.¹⁵⁹ Weismann, however, argued that the document in question contained significant new material that she had developed and authored, and therefore that the work was solely hers for copyright purposes.¹⁶⁰

Joint Authorship

The Second Circuit Court ruled that joint authorship in prior existing materials with Weismann did not make Freeman a joint author in a derivative work,¹⁶¹ holding that "when the work has been prepared in different versions, each version constitutes a separate work."¹⁶² The court interpreted Section 103 (b) as giving copyright protection to new portions of the derivative work but not to preexisting portions.¹⁶³ In this case, the parties collaborated in the preparation and publication of previous documents from which the work in question was derived. The court, however, found no evidence that they intended to create a joint derivative product.¹⁶⁴

¹⁵⁹ The protection of derivative rights extends beyond mere protection against unauthorized copying to include the right to make other versions of, perform, or exhibit the work.

¹⁶⁰ *Weismann*, 868 F.2d at 1316.

¹⁶¹ *Id.* at 1319. The court held that "[E]ven though one co-author has the right to revise a joint work in order to create an individual derivative work, the other co-author acquires no property rights in the newly created work prepared without his involvement" (citing *Dynamic Solutions, Inc. v. Planning and Control, Inc.*, 646 F. Supp. 1329, 1338-39 (S.D.N.Y. 1986) for the proposition that even sole author/owner of pre-existing material contained in derivative work has no property right in new matter created for the derivative work added without his participation).

¹⁶² *Weismann*, 868 F.2d at 1317.

¹⁶³ *Id.* at 1319.

¹⁶⁴ *Id.* The court cited *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir.1944) (L. Hand, J.) (observing that a finding of joint authorship requires that each author intend his or her contribution, at the time

Instead, the court focused on the requirement that joint authors must intend to make their joint product “forever indivisible” and that Weismann and Freeman were scientists in a “quest of new discoveries.”¹⁶⁵ The court was clear that absent a specifically identified exception, “joint ownership of the underlying work does not confer any property right in the new work” except those rights “retained in the material used as part of the compilation of the derivative work.”¹⁶⁶ The court enunciated the originality requirement for a revised version to qualify for protection as a derivative work as a “minimal” or “modest” one.¹⁶⁷

Fair Use

The lower court had also found that even if the project were a protected derivative work,¹⁶⁸ Weismann’s use of the materials would have constituted fair use under Section 107.¹⁶⁹ The court conducted an extensive review of the fair use doctrine, beginning with a review of the underlying equities,¹⁷⁰ and noted specifically

that it is created, to become part of a unitary work to which another will make or already has made a contribution). *See also* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., (“Melancholy Baby”), 161 F.2d 406, 409 (2d Cir. 1946).

¹⁶⁵ *Weismann*, 868 F.2d at 1319.

¹⁶⁶ *Id.*

¹⁶⁷ 868 F.2d at 1321. The court applied the standard enunciated in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102, 103 (2d Cir. 1951) (holding that “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own’”). *See, e.g.*, *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 35 (2d Cir. 1982); *Puddu v. Buonamici Statuary, Inc.*, 450 F.2d 401, 402 (2d Cir. 1971); *Millworth Converting Corp. v. Slifka*, 276 F.2d 443, 445 (2d Cir. 1960).

¹⁶⁸ *See* 17 U.S.C. § 101, *supra* note 144 and accompanying text. To constitute infringement, a “derivative work” must be “based on the copyrighted work” and must incorporate a portion of the copyrighted work in some form. *Id.*

¹⁶⁹ 17 U.S.C. § 107 codifies the “fair use” doctrine by creating a privilege for people to use copyrighted material in a reasonable manner despite lacking the owner’s consent.

¹⁷⁰ *Weismann*, 868 F.2d at 1323 (citing *Financial Information, Inc. v. Moody’s Investors Service, Inc.*, 751 F.2d 501, 508 (2d Cir. 1984) (“fair use requires ‘sensitive balancing of interests,’ and the statutory factors are not hurdles over which an infringer may leap safely from liability”). *See also* Sony Corporation

that Freeman “not only neglected to credit [Weismann] for her authorship . . . but actually attempted to pass off the work as his own, substituting his name as author in place of hers.”¹⁷¹ The court noted that Section 107 codifies the so-called “fair use” doctrine and “creates a privilege for others to use copyrighted material in a reasonable manner despite the lack of the owner’s consent.”¹⁷² The four statutory factors considered in making a fair use determination are:

[t]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.¹⁷³

These nonexclusive factors exist to serve as a guide in the consideration of fair use.¹⁷⁴ Each case must be individually examined to determine the applicability of the fair use doctrine.¹⁷⁵ To find that an author used another’s copyrighted material in a fair

of America v. Universal City Studios, 464 U.S. 417, 448 (1984), where the Supreme Court noted that the doctrine requires an “equitable rule of reason” analysis to assess the extent of protection from liability an alleged infringer may be able to show. *Id.*

¹⁷¹ *Weismann* at 1323.

¹⁷² *Id.* See 17 U.S.C. § 107.

¹⁷³ *Weismann* at 1323.

¹⁷⁴ See also The Conference on Fair Use (CONFU) Draft on Fair Use Guidelines, 53 PAT. TRADEMARK & COPYRIGHT J. (BNA) 125, 130 (December 19, 1996).

¹⁷⁵ See *Campbell v. Acuff-Rose Music, Inc.* 114 S. Ct. 1164, 1177 (1994); *Harper & Row, Pub., Inc. v. Nation Enterprise*, 471 U.S. 539, 561 (1985). Fair use is an affirmative defense and as such is relevant only after a copyright owner has made out a prima facie case of infringement, consisting of ownership of the right asserted and unauthorized appropriation by the defendant of a material amount of expression. The copying of facts or of a de minimis amount of expression will not support a prima facie case of infringement. Fair use thus excuses the copying of a material amount of expression, with the test of materiality involving both quantitative and qualitative inquiries. *Id.*

manner requires a finding that the user acted fairly and in good faith.¹⁷⁶

In explicating each of the “fair use” factors, the court found that “in an academic setting, profit is ill-measured in dollars” and that recognition is valuable because of the role it plays in tenure decisions and promotions.¹⁷⁷ In addition, since Freeman’s intended use was substantially the same as Weismann’s, the equity balanced in Weismann’s favor for the first prong. Further, the fact that Freeman substantially copied Weismann’s work and “whatever the use, generally it may not constitute a fair use if the entire work is reproduced,”¹⁷⁸ lends itself to the conclusion that Freeman’s use was not fair. The court also found under the “effect on the market” factor that there was substantial impairment of Weismann’s ability to use her publication to enhance her standing in the research community. Due to the requirements in academia that a researcher be productive, the court found that it was a significant error to find “fairness” in Freeman’s use.

In *Weismann*, the university did not intervene to assert any copyright privilege. The court proceeded on the assumption that the issue of copyright was solely between Weismann and Freeman and that future derivative works would only be of interest to these two parties. However, in situations where the university claims ownership of the copyright to distance learning materials created under its aegis, questions will arise as to the rights of faculty creators in subsequent “fair use” of the materials which they originally delivered via distance learning media. The faculty member must first show that the copyright is at least jointly owned with the university, and then must show that the faculty member’s use is not an inappropriate infringement but is “fair use.” This showing is especially complex in the context of distance learning.

Recent court cases involving new technology may have some general applicability to higher education. In *Sony Corp. v. Universal City Studios*, fair use doctrine was extended to home

¹⁷⁶ *Weismann* at 1323-24. See *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir.1983); see also *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1146 (S.D.N.Y.1980) (good faith and fair dealing required).

¹⁷⁷ *Weismann* at 1324.

¹⁷⁸ *Id.* at 1325 (quoting 3 NIMMER § 13.05 [A] at 13-80).

recordings of television broadcasts for later use.¹⁷⁹ While the narrow holding in *Sony* may serve individual research needs, it did not overturn a lower court's previous ruling in *Encyclopaedia Britannica Educational Corp. v. Crooks* that schools cannot record broadcasts for long-term retention or for showings to classrooms.¹⁸⁰ An extension of the *Crooks* ruling would appear to favor universities in maintaining their copyrights in distance learning courses that are developed through institutionally provided technological resources and offered to those who are enrolled at some site other than the campus. In addition, the Supreme Court's decision in *Reno v. American Civil Liberties Union* may very well signal a more enlightened view by the courts in analyzing the rights of all persons as they use new technology for traditional business purposes.¹⁸¹ The key to the *Reno* decision, and to its future significance, seems to rest in the Court's recognition of the Internet as a "new marketplace of ideas" and a "vast democratic forum."¹⁸² The Internet may open an opportunity for universities to develop an "academic marketplace of ideas" with new approaches to the use and availability of educational resources without the risk of significant government interference. As the *Reno* Court stated,

[F]rom the publishers' point of view, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish'

¹⁷⁹ *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454-455 (1984). In *Sony*, owners of copyrights on television programs brought copyright infringement action against manufacturers of home videotape recorders. The court held that "the public interest in making television broadcasting more available . . . is not unlimited." The court supported an interpretation of the concept of "fair use" that "requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law." *Id.*

¹⁸⁰ *Encyclopaedia Britannica Educational Corp. v. Crooks*, 558 F. Supp. 1247, 1250-51, 54, 55 (W.D.N.Y. 1983).

¹⁸¹ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). At issue was the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. *Id.*

¹⁸² *Id.* at 885.

information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.¹⁸³

By identifying the right of publishers to limit access to materials through payment of a fee for use, the Court indirectly opened the door to an increased use of licensing and license fees for materials made available through new technological media. In addition, by acknowledging educational institutions as publishers on the Internet, the Court, also indirectly, contributed to the discussion of the ownership of copyright in materials disseminated through distance learning modes.

In Fall 1998, the provost at the California Institute of Technology (CalTech) took the issue public by proposing that CalTech and its professors would retain the copyrights to articles that resulted from campus-based research, would not sign those rights over to publishers, and would only allow journals to publish manuscripts by CalTech researchers if the faculty and the university retained copyrights to the material.¹⁸⁴ Asserting that the institution and its faculty members should jointly own and retain¹⁸⁵ rights to journal articles and license those copyrights to publishers on a limited basis,¹⁸⁶ the provost argued that rather than bending to the demands of publishers, CalTech faculty could publish directly on-line while maintaining the copyright to their articles.¹⁸⁷ Thus far, however, the provost has not gone so far as to attempt to retain for the University exclusively, without consideration of the faculty, the

¹⁸³ *Id.* at 853.

¹⁸⁴ Laura Guernsey, "A Provost Challenges His Faculty to Keep Copyright on Journal Articles," *The Chronicle of Higher Education* (Sept. 18, 1998) as reported at <http://chronicle.com/free/v45/i04/04a02901.htm>, (visited Sept. 14, 1998).

¹⁸⁵ 17 U.S.C. § 101 defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

copyright to faculty members' articles.¹⁸⁸ While CalTech may be unique in its approach, various institutions have published copyright policies which attempt to restrict copyright ownership solely to the university or to the university and the faculty member jointly.¹⁸⁹

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., University of Texas, Office of General Counsel, "Crash Course In Copyright," accessible at http://www:utsystem.edu/OGC/Intellectual_Property?cprindx.html. This is the website for the University of Texas higher education system. A segment of the published "Policy and Guidelines for Management and Marketing of Copyrighted Works" states:

[i]f component institutions invest in copyright works that the authors will own under the U.T. System Intellectual Property Policy, they must protect their investments and, with the authors, manage such author-owned copyrights to facilitate institutional access to the works and preserve rights to make nonprofit educational uses of them. The U.T. Board of Regents (Board) finds that works protected by copyright created at the component institutions are valuable assets that promote and further the creation and dissemination of knowledge through research, teaching and publication. Careful management of these assets will benefit the authors, the citizens of Texas, state government, the component institutions, and the U.T. System For projects that may involve significant resource contributions by the institution, component institutions and professionals, faculty, non-faculty researchers and students will agree to allocate rights to use the resulting works, allocate costs and share benefits from commercialization, as appropriate in each case. . . . [For] Works authored by employees other than professionals, faculty, non-faculty researchers and students and therefor owned by the Board or jointly owned by the Board and other authors, [there are] some occasions when a component institution hires a professional, faculty member, non-faculty researcher or student specifically to create a work that the author would otherwise own under *Subsection 2.3 of the Intellectual Property Policy*, it may be unclear that this is a work for hire. If this is ever the case, the author should execute an *acknowledgment* that the work is within the scope of employment and that the Board will own copyright in the work to avoid later confusion over ownership.

Id.

In a joint work, the authors hold individual, undivided interests in a work, despite differences in each author's contribution.¹⁹⁰ As co-owner, each author may rightfully license the use of the work, subject to an accounting to the other co-owner(s) for any profits.¹⁹¹ Under this approach, a person whose contribution is relatively minor enjoys a significant benefit if granted joint authorship status.¹⁹²

CONSIDERATIONS FOR INSTITUTIONAL POLICY

Legal Bases of Ownership

When a faculty member creates course materials, copyright attaches when the material is recorded on paper or tape, or otherwise "fixed in a tangible medium."¹⁹³ Under a constructionist application of copyright law, colleges and universities have the right to declare ownership of those courses and materials developed under their auspices and preserved in a tangible fixed medium. While the question of who owns the copyright has been defined by different institutions in different ways,¹⁹⁴ if the faculty member created the course material using university resources or

¹⁹⁰ *Childress v. Taylor*, 945 F.2d 500, 505-06 (2nd Cir. 1991) (holding that for a joint authorship to exist there must be an intent of both participants to regard themselves as authors). See also PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 635 (4th ed.1997) (stating that "[e]ven though the 1976 act's objective, factual standard for joint authorship may inadvertently give an economic interest in a work to contributors . . . the work's contributors can remedy this at the outset by . . . allocat[ing] all of the incidents of ownership to the intended recipient").

¹⁹¹ *Erickson v. Trinity Theater, Inc.*, 13 F.3d 1061 (7th Cir. 1994).

¹⁹² See *supra* text accompanying note 185. See also *Erickson v. Trinity Theater, Inc.*, 13 F.3d 1061 (7th Cir. 1994) (applying a "copyrightable" standard to the determination of the contribution of the joint author).

¹⁹³ See *supra* notes 37,38 and accompanying text.

¹⁹⁴ Some institutional copyright policies are published and accessible on line. See e.g., Carnegie Mellon University Copyright policy, http://policy.andrew.emu.edu/univ_policy/documents/Copyright.html; North Carolina State University Patent and Copyright Procedures <http://fis.ncsu.edu.ncsulegal/patent.htm>; University of California, Policy on Copyright Ownership <http://www.ucop.edu/ott/patentpolicy/first.html>.

as part of the faculty member's assigned responsibilities, the argument can be made that the material was developed under the "work made for hire" doctrine¹⁹⁵ and the copyright for that work belongs to the university.

In general, universities define the employer-employee relationship through individual employment contracts or as codified in a faculty handbook, which is then incorporated by reference into employment contracts. Wherever the employer-employee relationship is defined, an institutional policy should note that certain intellectual property is owned by the institution (as the employer) as works developed by employees within the scope of employment.

In some instances, current faculty contracts include statements which parallel intellectual property law, with the appropriate adaptations to higher education. Some institutions may opt to have faculty sign a waiver when teaching distance learning courses to insure that faculty understand that the course becomes the property of the institution, irrespective of the university's intended use of the material. Those institutions where tenured, full time faculty (employees) teach courses through distance learning technology should consider developing copyright agreements that model their patent policies, similar to the technology transfer agreements that have been developed at colleges and universities across the country.¹⁹⁶

Colleges and universities need to consider licensing protocols that will address how intellectual property rights are retained and/or moved when faculty move to another institution to offer the same course in a different distance learning setting. Institutions must also respond proactively to the real possibility that two institutions may become owners of similar virtual lectures. If the original employer university retained authorship and copyright, that original owner could negotiate a right or license to use the material with the subsequent university employer.

Additionally, in the event that the course is created as a collaborative effort, any agreement should define the works as

¹⁹⁵ See *supra* notes 57-76 and accompanying text.

¹⁹⁶ For examples of intellectual property and technology transfer policies from other research universities visit the AUTM website at <http://www.crpc.rice.edu/autm/>.

either a collective work, a joint work, or a work made for hire and the agreement should state clearly the rights that each contributor holds individually or assigns to the institution. While each contributor to a joint work is presumed to be an equal co-owner with full authority to dispose of the copyright (or any one or more of the bundle of rights associated with ownership), subject only to an accounting to the other authors for the proceeds, the university can obviate this problem by defining its pre-eminent right to all materials developed under its aegis.

Many universities already contract with federal agencies to conduct research or to provide training programs. Some federal agencies permit the author to own certain copyrights, others place ownership with the university, some do not allow assertion of copyright, and some contracts require assignment of the copyright to the federal agency. Additionally, public institutions may find that state laws control the ownership of any copyrightable materials developed under their auspices. In any of these situations, the university must have the right to control ownership of the copyrightable material in order meet its obligations with the external parties.

At a minimum, the copyright issues that should be addressed in an institution's copyright policy pertaining to distance learning courses or materials include definitions of the property incorporated in the policy, the issue of copyright ownership, the division of any profits associated with the dissemination of the copyrighted work, and statements of who retains the rights to modify the materials. In addition, the policy should: incorporate a statement of future use of the materials, such as whether the faculty member can utilize the materials to teach a course at, or through, a different institution; identify who may create derivative works; note whether licensing of the materials is permitted; and, include the conditions for fair use, incorporating specified time limits on future use of the materials.

Concerns of University Faculty Unions

With the proliferation of distance learning offerings, faculty unions have begun to express concerns about the role of technology in the delivery of courses and the threat to their

members¹⁹⁷ on issues pertaining to intellectual property rights and institutional support for new projects.¹⁹⁸ For example, the American Federation of Teachers (AFT) has published a position paper on the role of technology in education which opposes the use of technology, especially in distance education.¹⁹⁹ While they are not opposed specifically to the use of technology in education, the AFT is concerned about the unplanned utilization of pedagogical techniques that would serve to reduce the role of faculty and limit the interaction of faculty in the education of students.

The AFT has indicated that "all of our experience as educators tells us that teaching and learning in the shared human spaces of a campus are essential to the undergraduate experience and cannot be compromised too greatly without rendering the education unacceptable."²⁰⁰ Unless the classes meet the standards of quality set by faculty, the AFT opposes courses taught on the Internet, through videoconferencing and with other technologies. In addition, the position paper stresses the importance of granting course credit for only those classes that are taught in university facilities by faculty who are appointed and evaluated according to standard institutional practices.²⁰¹ The AFT also urges its members to seek restrictions on the number of distance education credits granted to students as part of a degree program and to oppose curricula that are taught entirely through technological media.²⁰² Furthermore, the AFT advises its local affiliates to bargain for contracts that will protect the jobs of professors who choose not to use new technologies to support their instruction.²⁰³

The National Education Association (NEA), another professional organization of teachers that also serves as a bargaining representative for college faculty members, has issued a statement

¹⁹⁷ Peter Monaghan, "Technology and the Unions," The Chronicle of Higher Education, (Feb.10, 1995) at A17 (reporting on a 1995 meeting on the role of technology on college campuses attended by 200 American Federation of Teachers (AFT) union members in Seattle).

¹⁹⁸ *Id.*

¹⁹⁹ Goldie Blumenstyk, "Faculty Group Calls for Caution and Curbs on Distance Education," The Chronicle of Higher Education (Jan. 26,1996) at A20.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* See generally the AFT website at www.AFT.org.

regarding intellectual property rights.²⁰⁴ The NEA, in advising its unions to bargain for intellectual property rights, asserts “[t]he issue is important to unions that want to protect faculty property rights and to colleges that might claim ownership.”²⁰⁵ The national policy of the NEA is that faculty must maintain control of their own work and that it is the faculty members’ prerogative to determine how to disseminate their work.

Further, the faculty members of the NEA are concerned with keeping distance education materials current and do not want outdated institutional materials to become available. Therefore, the NEA policy states that it is unacceptable for administrators to require assignment of intellectual property rights as a condition of employment and that issues of ownership of websites, lecture notes on websites, and other technical concerns should be determined by the faculty member and not imposed by the university.²⁰⁶ The NEA claims that “administrators and faculty members commonly, but *incorrectly*, assume that the institution, as the employer, owns the invention and that policies presuming institutional ownership are routine and enforceable.”²⁰⁷ However, the NEA statement also notes another dilemma:

If the course is broadcast or taped as part of the faculty member’s regular duties, the university may claim ownership as the employer. On the other hand, as the owner of the underlying notes and materials, the faculty member may claim ownership on the basis that the broadcast or videotape is a derivative work.²⁰⁸

²⁰⁴ STATEMENT OF THE NEA: INTELLECTUAL PROPERTY RIGHTS, NATIONAL EDUCATION ASSOCIATION, <http://www.nea.org/cet/BRIEFS/brief8.html>, visited 10/27/98.

²⁰⁵ *Id.* The NEA Higher Education Contract Analysis System (HECAS) contains more than 500 higher education contracts for faculty and staff bargaining units, many of which contain intellectual property sections, generally in the following areas: a) definition of the property, and the conditions under which the institution may assert all or partial ownership; b) use of the property, including fair use and exclusive license arrangements; c) distribution of any monies earned, including royalties or tuition payments; d) dispute resolution procedures, including binding arbitration.

²⁰⁶ *Id.*

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ *Id.*

The NEA, however, has not yet addressed the convergence of traditional copyright practices and the evolving issues pertaining to the use of new instructional media. For example, the NEA does not state that any of the work produced by a faculty member is solely the property of that faculty member and that institutional policies should not derogate that right. Until the NEA promulgates a more definitive organizational standard for ownership of intellectual property, it will continue to be difficult for local NEA leaders to negotiate agreements that are acceptable, and favorable, to their faculty members.

Similar to the AFT and the NEA, the American Association of University Professors (AAUP)²⁰⁹ considers issues of academic freedom related to teaching, research, and creation of materials and control over their distribution and use, to be fundamental to the academic profession in general. The AAUP established a subcommittee (Committee R) that reported to the Association on the topic of distance learning.²¹⁰

In 1969, the AAUP adopted its *Statement on Instructional Television*²¹¹ and asserted: “[t]he use of television in teaching should be for the purpose of advancing the basic functions of colleges and universities to preserve, augment, criticize, and transmit knowledge and to foster the student’s ability to learn.”²¹²

²⁰⁹ The American Association of University Professors (AAUP) is another professional organization of teachers that also serves as a collective bargaining representative for college and university faculty members. The best known public statement of the AAUP is its 1940 Statement of Principles on Academic Freedom and Tenure, written “to promote public understanding and support of academic freedom.” AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), accessible at www.AAUP.org/1940stat.htm.

²¹⁰ COMMITTEE R ON GOVERNMENT RELATIONS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT ON DISTANCE LEARNING (November 1997), accessible at www.AAUP.org.

²¹¹ AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT ON INSTRUCTIONAL TELEVISION (1969).

²¹² *Id.* It further stated:

A faculty member engaged in instructional television is entitled to academic freedom as a teacher, researcher, and citizen in accordance with the provisions of the 1940 Statement of Principles on Academic Freedom and Tenure Because television production is a form of publication, a faculty member has the same freedom to enter into an agreement with

In applying the principles of the 1940 *AAUP Statement of Principles on Academic Freedom and Tenure*²¹³ to the “new medium” of instructional television, the 1969 Statement went on to assert that the faculty member has the “full responsibility for selection of materials and point of view” and that “the teacher has the final responsibility for the content and objectives of the program.”²¹⁴

The 1997 Committee R *Report on Distance Learning* identifies additional issues inherent in the expansion of distance learning that “need clarification.”²¹⁵ These include “the rights of a college or university to mandate distance learning, assign faculty to teach distance courses, use or reuse previously created faculty work, and distribute and possibly misuse materials on computer networks such as the Internet and the World Wide Web.”²¹⁶ Recommending the revision of the 1969 Statement on Instructional Television to reflect current technological developments, Committee R reaffirmed “the fundamental importance of academic freedom in a classroom setting, regardless of the technological medium used to transmit the course material to the student.”²¹⁷ Furthermore, Committee R noted its support for the *Statement on Instructional Television* by indicating that “no recording of a teacher’s presentation in the traditional classroom setting, whether for reuse on instructional television or for any other purpose, should be made without his prior knowledge and consent.”²¹⁸

While the AAUP has not published a formal policy statement governing intellectual property rights, Committee R did identify

an educational or commercial agency to produce, or otherwise participate in, a television program as he has in arranging for the publication of his own writings with a commercial, university, or other nonprofit press or with a scholarly or professional journal.

Id.

²¹³ See *supra* note 209 and accompanying text.

²¹⁴ See *supra* note 211.

²¹⁵ COMMITTEE R ON GOVERNMENT RELATIONS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT ON DISTANCE LEARNING (November 1997), accessible at www.AAUP.org.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

two fundamental intellectual property questions regarding distance learning: (1) Who owns, and controls, the intellectual property in a course produced for distance learning? and, (2) How do the different modes of transmission affect the use of materials in a distance learning context?²¹⁹ Committee R also recommended that the AAUP develop a policy that presumes that the ownership of all academic work resides with the faculty member(s) who creates that work.²²⁰ Specifically, Committee R urged that any future policy apply

regardless of either the mode of transmission used to communicate that work to its audience, or of whether that audience consists of students sitting in a lecture hall, readers individually reading a book or article, small groups watching a video transmission of a lecture or demonstration, or individuals taking a course over a computer network.²²¹

Finally, Committee R recommended that the AAUP adopt a model agreement to carry out such a policy.²²²

Academic Mission and Policy Development

Intellectual property policies will vary for colleges and universities depending on an institution's mission, past practices, and goals. The continuum of possible copyright and distance learning policy models is broad. The model that an institution adopts will depend on its primary purpose for offering distance learning courses.

For example, schools that have commercial development and profit as their primary motive for offering distance learning courses will most likely seek greater institutional control of intellectual property. Such an institutional model will incorporate the university's right to retain and develop copyrightable material for the financial benefit of the institution.

²¹⁹ *Id.*

²²⁰ COMMITTEE R ON GOVERNMENT RELATIONS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT ON DISTANCE LEARNING (November 1997), accessible at www.AAUP.org.

²²¹ *Id.*

²²² *Id.*

Other institutions may be more interested in expanding the dissemination of knowledge without emphasizing financial return. Such institutions' missions will place less emphasis on university intellectual property protection and dissemination of faculty research into the public domain. The institutional model of intellectual property ownership chosen by these universities therefore is likely to place greater emphasis on faculty ownership of the intellectual property rights to educational materials, including lectures developed for distance learning courses.

A model which incorporates both perspectives is most likely to follow an approach similar to that used by many research universities in patent development for research faculty, including an institutional preference for exclusive ownership and licensing, flexible licensing arrangements with other institutions, and flexible royalty sharing with faculty to induce disclosure.

Academic Culture and Economic Considerations

The powerful influence of academic culture cannot be ignored when developing institutional copyright policy. Since the founding of Harvard College in 1636,²²³ tenured faculty have been viewed more as managers than as "work for hire" employees²²⁴ at colleges and universities. Indeed, the powerful influence of academic culture cannot be ignored when developing college and university copyright policy, given that faculty ownership of their own scholarship and lecture materials has been a long-standing practice. Both because of and despite existing copyright law,²²⁵ a radical shift to institutional claims of ownership of course materials could yield chaos in the academy.

²²³ Frederick Rudolph, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 4 (1962).

²²⁴ See, e.g., *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980). The Court found that full time faculty members who develop and enforce employer policy are managerial employees within the meaning of the National Labor Relations Act ("N.L.R.A."). However, the National Labor Relations Board has repeatedly found that professors at private universities may organize and are neither managerial nor supervisory employees excluded from the protection of the N.L.R.A. See various N.L.R.B. rulings.

²²⁵ See *supra* notes 68 et seq. and accompanying text.

With the enormous competition for students in higher education, the economic influence of distance learning cannot be underestimated. Distance learning has expanded institutional markets. It is imperative, therefore, that, careful development of faculty relationships with the university, especially regarding the ownership of courses “fixed in a tangible medium,” occur.

For example, even though faculty publications and lecture notes are prepared within the scope of employment, the universal assumption and practice has been that, absent an explicit agreement otherwise, the authority to copyright faculty works belongs to the faculty member rather than to the university. Similarly, when developing course materials for distance learning, most faculty believe that their teaching that is recorded in a fixed and tangible medium is their own intellectual property.

The majority of current college and university copyright policies were generally updated around 1990, subsequent to the 1986 changes in the copyright law pertaining to “Fair Use,”²²⁶ and do not include specific identification of distance learning issues or policies. Notwithstanding other arguments raised in this article, institutions interested in supporting the traditional academic culture may want to consider allowing faculty members to retain rights to their instructional material. Such institutions could develop long term agreements or licenses with faculty members for the use of such material. 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 course were offered.

While historically the claims of university faculty have been to retain rights in their creative works for the intellectual or academic value of those rights, issues in distance learning have focused faculty concerns on questions of workload and appropriate

²²⁶ See *supra* note 113 and accompanying text.

compensation.²²⁷ Faculty members believe that they should be compensated for, and retain control over, their property. Generally the current method of faculty workload measurement is “hours per week of formal class meetings,” with some institutions incorporating other factors, such as preparation time and office hours.²²⁸ The AAUP has recommended the following:

Faculty who have substantial additional student enrollment in a course section due to distance learning should be compensated by additional credit in load assignment. Those students enrolled as distant learning students should be considered to be an additional class section, relative to the size of the original class, for the purpose of load. [In addition], faculty who teach in distance learning programs should be additionally compensated for the extra time required to prepare for distance learning courses, particularly those transmitted by interactive television. This compensation should be financial or, preferably, in order to promote quality, in the form of credit toward load assignment.²²⁹

With the likelihood that the university can benefit directly from distance learning course materials, a university’s concerns regarding copyright ownership now can be couched primarily in financial terms. Those universities that consider distance learning courses as primarily useful in generating tuition revenues will argue that any economic benefit from the development of scholarly

²²⁷ See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT ON FACULTY WORKLOAD (1970). The Association’s 1970 Statement on Faculty Workload was promulgated prior to the expansion of distance learning in the United States. The standards articulated in the policy statement reference the traditionally defined classroom. Nevertheless, this statement serves as the basis of the AAUP standards for maximum faculty workload, which it defines as follows: “[for] undergraduate instruction, a teaching load of twelve hours per week, with no more than six separate course preparations during the academic year. For instruction partly or entirely at the graduate level, a teaching load of nine hours per week.” *Id.*

²²⁸ *Id.*

²²⁹ COMMITTEE R ON GOVERNMENT RELATIONS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT ON DISTANCE LEARNING (November 1997), accessible at www.AAUP.org.

materials in the form of distance education course materials should accrue to the university. However, if universities develop models for copyright ownership of distance learning materials that follow the most commonly utilized patent policies, the result will be shared financial benefits and joint copyright ownership between the faculty and the university.²³⁰

For example, universities could draft employment contracts that require professors to use the profits they earn to reimburse the university for costs associated with producing their scholarship or the university could create an arrangement allocating royalties in proportion to the university's support of the project.²³¹ The university could agree to assume the costs of defending and enforcing the copyright in return for rights to use the materials, or any number of other arrangements. If faculty are to receive any financial benefits from the implementation of distance learning courses, detailed contracts will need to be developed to govern property rights, ownership issues, and future accessibility.

CONCLUSION

The implications of the growth of distance learning for higher education and its multiple constituencies are significant. Students will have increased opportunities to access curricula through innovative approaches, faculty will be challenged to teach through entirely new methodologies, and colleges and universities will be able to expand their influence well beyond the boundaries of their physical locations. To insure the effective implementation of new distance learning programs, colleges and universities must analyze their educational offerings and the modes of delivery for those offerings, and consider appropriate revisions to the regulations they have in place for governing their institutions.²³² Inherent in

²³⁰ See, e.g., University of Maryland Policy on Patents [gopher://umdacc.umd.edu](http://umdacc.umd.edu); Yale University Patent Policy <http://www.cis.yale.edu/grants/patent.html>; and others.

²³¹ These costs might include computer support, library, secretarial, and research expenses, materials, and other administrative overhead.

²³² *But cf.* Kenneth C. Green and Steven W. Gilbert, "Great Expectations: Content, Communications, Productivity, and the Role of Information Technology in Higher Education," *Change* (Mar./Apr. 1995) at 15. Those who

this process is a requirement that institutions update intellectual property, specifically copyright, policies to address the new relationships brought about by faculty use of technology in teaching.

As colleges and universities revise their copyright policies to incorporate distance learning agreements, they must maintain the integrity of their academic mission, anticipate the potential economic benefits of “virtual classrooms,” and, where possible, adapt their policies to the norms of academic culture. Institutional leaders will need to develop procedures that balance effectively the institution’s teaching functions with the changing technology while providing faculty with a teaching environment that complies not only with academic customs, but with statutory requirements. The policy must reflect the mission of the institution, guidelines for implementation of distance learning programs, and be legally appropriate, ethically sound, and in keeping with the academic culture of the institution.

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are less concerned with retaining the status quo on campus suggest that “[T]he emerging uses of the Internet by faculty and students may provide ways to change the structure of the fundamental ‘business’ of education.” *Id.*

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