

WHO OWNS THE COPYRIGHT TO FACULTY-CREATED WEB SITES?: THE WORK-FOR-HIRE DOCTRINE'S APPLICABILITY TO INTERNET RESOURCES CREATED FOR DISTANCE LEARNING AND TRADITIONAL CLASSROOM COURSES

GREGORY KENT LAUGHLIN*

Abstract: *The Internet has spawned an increased interest in distance education and in using technology to enhance traditional classroom courses. It has also created new markets for faculty-created works. This Article explores who owns these materials. The Article addresses the competing interests of faculty and universities. Educators are concerned about academic freedom and control of their work product. Universities are concerned about competition from their own faculty and the continued right to use faculty-created material in which they have invested considerable resources. Both sides are interested in who gets paid when others seek to use these materials. The Article suggests that courts recognize a teachers' exception to the work-for-hire doctrine, vesting ownership in faculty-creators. It also offers proposals for written agreements which allocate rights between faculty and universities.*

INTRODUCTION

"We always thought our new competition was going to be 'Microsoft University' We were wrong. Our competition is our own faculty."¹ These were the words of "the president of an elite eastern university" as quoted in the lead paragraph of an article in the New York Times on the growing dispute between educators and universities over who owns the work product of faculty.² Until recently, many educators

* Assistant Professor of Law and Law Library Director, Ohio Northern University. J.D., 1986, University of Missouri-Columbia; M.S. in L.I.S., 1995, University of Illinois at Urbana-Champaign. I would like to acknowledge the contributions of my research assistant, Kyle Thompson.

¹ Jacques Steinberg & Edward Wyatt, *Boola, Boola, E-Commerce Comes to the Quad*, N.Y. TIMES, Feb. 13, 2000, § 4 Week in Review, at 1.

² See *id.*

probably had not considered this issue. Yet, as more faculty utilize the Internet and more institutions of higher education develop distance education programs, it is more important than ever that faculty and the institutions at which they work have clear ownership policies. Absent amendments to the existing Copyright Act or clear institutional guidelines, faculty and universities are left to find the answer within the current Copyright Act and the cases which interpret it. Unfortunately, these provide no clear answers. The outcome of this issue through litigation likely will turn on the specific facts before each court, thus providing limited precedential value, at least until a number of cases have wound their way through the courts.

This Article examines the use of information technology by educators and the status of copyright law as applied to faculty-created works. It explores the applicability of the work-for-hire doctrine to educators, as well as whether and when a teachers' exception should apply. The assumption of this Article is that Congress will not act in this area. If it does, then the Article's discussion of a teachers' exception could provide a framework for such action. The Article also examines some existing institutional policies that purport to deal with these issues, and suggest how such guidelines should be drafted and implemented.

I. BACKGROUND

A. *Use of Information Technology in Education*

In a broad sense, information technology always has had a place in education. Overheads, reel-to-reel movies, sound recordings, and even blackboards, books, paper and pens are all types of information technology. When first introduced, the printed book was a revolutionary change in education and culture at large.³ Today, we take such

³ See DOUGLAS C. McMURTRIE, *THE BOOK: THE STORY OF PRINTING AND BOOKMAKING* 136 (1943) ("In the cultural history of mankind there is no event even approaching in importance the invention of printing with movable types."); see also LEVI SEELEY, *HISTORY OF EDUCATION* 164-65 (1899). Seeley argued that printing "multiplied readers a hundred-fold; it stimulated authorship; it revolutionized literature. . . it was a mighty influence in bringing about universal education." SEELEY, *supra*. This argument was echoed by Ralph L. Pounds, who wrote: "If there had not been some method for the cheap dissemination of knowledge in print, it would have been quite difficult to support any argument for popular education." RALPH L. POUNDS, *THE DEVELOPMENT OF EDUCATION IN WESTERN CULTURE* 116 (1968). It has even been stated that "[t]he original copyright law upon which our system was based (England's Statute of Anne) was a reaction to the invention of the printing press." BRUCE A. LEHMAN, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION*

tools for granted, not even thinking of these items as information tools. The past two decades, however, have seen an explosion in new or improved tools for delivering information to students. Perhaps the most prevalent information technology today is the Internet, but this is only one example of a revolution in information media. While cable television has been with us for decades, its use has spread remarkably in the past two decades. The space program has brought satellite transmissions. The late 1970s and early 1980s saw the advent of the video cassette recorder.⁴ These and other advances have been adopted rapidly by a public with an unquenchable thirst for information. It is only natural that educators would explore the use of these and other advances in information technology in a profession which is, after all, about delivering and interpreting information.⁵

The term "distance education" has been defined as "a form of education in which students are separated from their instructors by time and/or space."⁶ In its *Report on Copyright and Digital Distance Education* ("the Report"), the U.S. Copyright Office limited its definition of "distance education" to "mediated instruction."⁷ Mediated instruction was defined as "the delivery of instruction with a teacher active in determining pace and content, as opposed to unstructured learning from resource materials."⁸ The Report noted: "An individual course may contain both classroom and distance education components. Some online courses require brief periods of on-campus instruction,

INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 7, n.17 (1995).

⁴ See IBRAHIM MICHAEL HEFZALLAH, *THE NEW EDUCATIONAL TECHNOLOGIES AND LEARNING: EMPOWERING TEACHERS TO TEACH AND STUDENTS TO LEARN IN THE INFORMATION AGE* 218 (1999).

⁵ The following have been identified as information technologies currently being used for distance education: audio cassettes, broadcast radio, broadcast television, compressed video, computer-aided-instruction, correspondence, interactive television, independent programmed learning (computer and paper based), multimedia (e.g., CD-ROM), satellite television, short-wave radio, telephone (often referred to as "POTS"—Plain Old Telephone Service), video cassettes, and the various Internet technologies. See JILL H. ELLSWORTH, *EDUCATION ON THE INTERNET: A HANDS-ON BOOK OF IDEAS, RESOURCES, PROJECTS, AND ADVICE* 428-29 (1994).

⁶ See U.S. COPYRIGHT OFFICE, *REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION* 10 (1999) (citing Comment 1, Indiana Commission for Higher Education ("ICHE"), at 1; Comment 8, American Association of Community Colleges ("AACC"), at 2; Comment 20, University of Texas System, at 1) [hereinafter *REPORT ON COPYRIGHT*]. This concept has been assigned other labels, including "distance learning," "distributed learning" and "distributed education." See *id.*

⁷ See *id.*

⁸ *Id.*

for example, while many classroom courses use digital technology as a tool for directed research, delivery of resource materials, or communication between teachers and students."⁹

Distance education is a concept that is more than 150 years old, originating in the correspondence courses of the nineteenth century.¹⁰ During the first half of the twentieth century, radio was the primary technology used for distance education.¹¹ Television became the favored technology for distance education in the 1950s; this medium, along with video, is still widely used.¹² Audio conferencing was introduced in the 1970s.¹³ The introduction of computer networks and multimedia technologies in the 1990s spurred the current interest in distance education.

B. Educational Use of the Internet

The decade of the 1990s saw an explosion in information technology that will have profound effects on education in the new century. While the Internet has existed since the 1960s,¹⁴ in the 1990s it

⁹ *Id.*

¹⁰ See *id.* at 9, 10. The earliest distance education arose in the nineteenth century, utilizing the cheap and reliable postal services then available. See MICHAEL G. MOORE & GREG KEARSLEY, *DISTANCE EDUCATION: A SYSTEMS VIEW* 20-24 (1996). In 1840, Isaac Pitman started a correspondence course in shorthand, relying on Great Britain's "Penny Post." See *id.* at 21. In 1856, Charles Toussaint and Gusav Langensheidt each began correspondence courses in languages. See *id.* The earliest documented such course in the United States was also in shorthand. See *id.* at 21-22. In 1883, the State of New York granted the Chautauqua Institute authority to award degrees through a correspondence program conducted through the mail. See *id.* at 20. After authorities rejected an attempt by educators at the University of Cambridge to establish a degree program by correspondence, one of its advocates, Richard Moulton, migrated to the United States, where he assisted William Rainey Harper in establishing the University of Chicago. See Moore & Kearsley, *supra* note 10, at 21-22. As president of the university, Harper established an extension program, making the University of Chicago the first university with a distance education program. See *id.*

¹¹ See REPORT ON COPYRIGHT, *supra* note 6, at 13.

¹² See *id.*

¹³ See JOHN TIFFIN & LALITA RAJASINGHAM, *IN SEARCH OF THE VIRTUAL CLASS: EDUCATION IN AN INFORMATION SOCIETY* 5 (1995).

¹⁴ The Internet is the product of a network created by the United States Department of Defense in the late 1960s called ARPAnet. ARPAnet was designed to withstand partial outages (such as might be caused by a nuclear attack) by communicating data via an Internet Protocol (IP) and addressed to a destination computer. The data itself would be divided into "packets" and these "packets" would be recombined upon reaching the destination computer, with verification schemes to assure that all the data had arrived. At first, only academic and research users had access to the network, but demand soon spread. See ED KROL, *THE WHOLE INTERNET USER'S GUIDE & CATALOG* 13 (2d ed. 1994). While electronic mail was one of the earliest uses of the Internet and probably remains its most widely used application, the advent of the World Wide Web, developed primarily at CERN,

emerged from the exclusive domain of academic and government researchers and into wide-spread use by the public. Growth in the use of the Internet has occurred exponentially.¹⁵ Even before the World Wide Web burst upon the scene around 1994, educational use of the Internet was growing.¹⁶ At first, this use was largely limited to electronic mail—still probably the greatest use of the Internet.¹⁷ With the advent of the World Wide Web, the use of the Internet became easier and more attractive to a less technologically sophisticated audience. This created a dramatic acceleration in users¹⁸—a growth which is expected to continue into the early years of the twenty-first century.¹⁹

Faculty in a wide variety of disciplines responded by setting up Web pages and threaded discussion lists or news groups to enhance

the European Particle Physics Laboratory in Geneva, Switzerland, was the application that brought the Internet to wide spread public awareness and use. *See id.* at 287.

¹⁵ *See* KROL, *supra* note 14, at 1 (stating that in the late 1980s, the Internet had only a few thousand users but that by the time of his book the number of Internet users had increased a thousand-fold.); *see also* HEFZALLAH, *supra* note 4, at 153 (noting the growth in number of Internet servers from 213 in August 1981 to 727,000 by January 1992).

¹⁶ *See* KROL, *supra* note 14, at 13. The development of the World Wide Web, begun in 1989 under the leadership of Tim Berners-Lee, used a new protocol, the hypertext transfer protocol (or http) to "link" together information resources on the Internet using various protocols (including telnet, file transfer protocol (ftp), gopher, and http itself). *See id.* CERN released the results of its research to the public domain in 1992. By 1993, a team at the National Center for Supercomputer Applications (NCSA) at the University of Illinois in Urbana-Champaign led by Marc Andreessen created a graphical web browser called Mosaic. *See* CRICKET LIU ET AL., MANAGING INTERNET INFORMATION SERVICES 279-80 (1994). Andreessen left NCSA the following year and became one of the founders of Netscape Communications, Inc., the maker of the first commercially successful Web browser. Interestingly enough, Mosaic was not the first graphical browser to become available; a law school-based project, Cornell University Law School's Legal Information Institute, developed the first Windows-based Web browser (Cello). *See* Cornell Law School, *The Legal Information Institute—A Quick Overview*, (visited March 15, 2000) <<http://www.law.cornell.edu/lii.html>>.

¹⁷ *See* HEFZALLAH, *supra* note 4, at 154 (stating that as of January 1997, 71 million people were using e-mail, as compared to 57 million users of computer that provided World Wide Web, ftp, and other interactive TCP/IP services; by January 2001, these numbers are projected to increase to 827 million e-mail users and 707 million users of other Internet services, including the World Wide Web).

¹⁸ *See Just How Wide is the Web?*, PC MAG., Feb. 9, 1999, at 10 (citing a study by the market research firm IDC showing 68.7 million web users in 1997, growing to 97.3 million in 1998); *see also* HEFZALLAH, *supra* note 4, at 153 (noting the growth in number of Internet servers from 727,000 by January 1992 to 29,670,000 in January 1998).

¹⁹ *See Just How Wide is the Web?*, *supra* note 18, at 10 (projecting 131.4 million users by 1999, 170 million in 2000, and 227.7 million by 2001, a compounded annual growth rate of 26%); *see also* HEFZALLAH, *supra* note 4, at 153 (estimating 100,000,000 million servers by January of 2000).

their courses.²⁰ Some colleges and universities mandated at least some on-line material for all courses.²¹ Many other colleges and universities, while stopping short of mandating the use of technology in every course, took steps to encourage faculty to incorporate Web sites and other digital technologies into their courses.²² At the same time, a growing interest in distance education captured the imaginations of college administrators. The new technologies offered innovative ways to meet the educational needs of non-traditional students not able to relocate to a college and, thereby, boost enrollments.²³ In addition, the Internet created a new publishing option—self-publishing electronically—for those wishing to make their research efforts available on the Internet.

In a study conducted by the Department of Education in 1995, more than 70% of higher education institutions reported that they planned to start offering, or increasing, courses using online or other computer-based technologies in the next three years.²⁴ The study reported technologies in use to include "e-mail among teachers and students, class chat rooms, links to resources on the World Wide Web, incorporation of preexisting content in the course of instruction, and the delivery of supplementary materials in electronic form."²⁵ Use of these technologies have resulted in fundamental changes in the nature of distance education. With the older technologies, communication between teacher and student was often one way, with limited interaction via telephone or mail. The new digital technologies provide more teacher-to-student and student-to-student interaction.²⁶ Further, the new technologies permit both synchronous (or immediate re-

²⁰ See, e.g., Jeffrey R. Young, *A Year of Web Pages for Every Course: UCLA Debates Their Value*, CHRON. OF HIGHER EDUC., May 15, 1998, at A29. At the time the article was written, UCLA, which offers to make Web pages for professors, assessing students a fee to pay the cost, had created more than 3000 courses during that year. See *id.*

²¹ For example, the University Technology Committee of Florida Gulf Coast University's Standards for Specific Types of Web Pages states: "Within any given semester, all scheduled courses will be represented by a standard format home page." See Florida Gulf Coast University, *Web Design Standards*, (visited March 15, 2000) <<http://www.fgcu.edu/utc/wds5.html>>.

²² See Young, *supra* note 20, at A29. Some professors, fearing that the university might claim ownership of the course material they created, have rejected UCLA's offer to help create Web pages for their courses.

²³ See REPORT ON COPYRIGHT, *supra* note 6.

²⁴ See *id.* at 14 (citing NATIONAL CENTER FOR EDUCATION STATISTICS, DISTANCE EDUCATION IN HIGHER EDUCATION INSTITUTIONS: INCIDENCE, AUDIENCES, AND PLANS TO EXPAND (Issue Brief, Feb. 1998)).

²⁵ *Id.*

²⁶ See *id.* at 15.

sponse) and asynchronous (or delayed response) elements to be a part of the same course.²⁷ For example, "e-mail, threaded discussion and self-paced testing" can be used for asynchronous education while "chat rooms and streaming audio" can provide synchronous elements.²⁸ The latter can even provide both synchronous and asynchronous elements, with the streaming audio being archived for later review.²⁹

The use of distance education is found at all educational levels. It is, however, most prevalent in higher education.³⁰ By 2002, it is estimated that 2.2 million college students—or 15% of all higher education students—will take distance courses.³¹ This will represent an increase from 710,000 or 5% of all such students in 1998.³² In 1998, 62% of all four-year colleges offered distance learning courses; by 2002, this will increase to 85%.³³ One reason for this rate of growth is that distance education is seen as an important revenue source in the academic and professional education market, which is already a \$100 billion a year industry.³⁴ In addition, the federal government has aggressively promoted distance education. The Higher Education Amendments Act of 1998 provides for "financial aid for distance education students, authorizes funding for the development of distance education programs, and established a 'Web-Based Education Commission' to assess the educational software available for students."³⁵

C. *The Potential for Dispute*

One of the appeals of the Internet, at least to some, is that it represents a kind of cyber-frontier, where the civilizing influence of the

²⁷ A communication is synchronous when the transmitter and receiver of information operate in the same time frame, such as a face-to-face conversation and a telephone call; a communication is asynchronous when the transmitter and receiver are operating in different time frames, such as a letter or an electronic mail message written by the transmitter in one time frame and read later by the receiver. See TIFFIN & RAJASINGHAM, *supra* note 13, at 104.

²⁸ See REPORT ON COPYRIGHT, *supra* note 7, at 16.

²⁹ See *id.*

³⁰ See *id.* at 11–12.

³¹ See *id.* at 19 (citing International Data Corp., *Distance Learning Takes Off, Fueled by Growth in Internet Access*, (Press Release, Feb. 2, 1999) (visited March 15, 2000) <<http://www.idc.com/Data/Consumer/content/CSB020999PR.htm>>).

³² See *id.*

³³ See REPORT ON COPYRIGHT, *supra* note 6, at 19.

³⁴ See *id.* at 22.

³⁵ Pub. L. No. 105–244, 112 Stat. 1581 (1998).

law has not yet reached.³⁶ Much of the educational use of the Internet to date proceeded without any serious consideration of the legal issues created by such use. Historically, the ownership of the materials prepared by educators for their courses has not been an issue³⁷; this remained true as educators first began to use the Internet.³⁸ Like the physical frontiers of the past, however, wherever technology leads, the law is sure to follow. In response to changing technology, many schools suddenly are rewriting their policies on how professors may use course material.³⁹ Why this sudden interest? The answer is simple: money.⁴⁰

While no reported case has addressed directly the copyright ownership of such materials, such cases are likely to emerge in the coming years.⁴¹ It is easy to imagine the scenarios in which ownership of materials would become an issue. For example, suppose a professor is placed in charge of creating a distance learning program in a particular subject. The professor creates a Web site, records video of lectures, creates a chat room and an electronic mail discussion list (the

³⁶ See TIFFIN & RAJASINGHAM, *supra* note 13, at 125.

³⁷ See Lisa Guernsey & Jeffrey R. Young, *Who Owns On-Line Courses? Professors and universities anticipate disputes over the earnings from distance learning*, CHRON. OF HIGHER EDUC., June 5, 1998, at A21.

³⁸ See Isabella Hinds, *Marketplace for Licensing in Digital Distance Education*, in REPORT ON COPYRIGHT, *supra* note 7, at app. E, p. 19. Hinds noted that in the course of her investigation into the current licensing activities that impact distance education, she reviewed the programs and agenda of more than twenty-five conferences and workshops for distance educators. *See id.* Of these, only one had any reference to copyright and licensing. *See id.* at app. E, p. 19 n.6. That workshop was designed for academic administrators to discuss faculty creation and ownership of distance courses. *See id.* She noted that the workshop was "heavily subscribed almost immediately." *See id.*

³⁹ See Steinberg & Wyatt, *supra* note 1, §4 at 1; *see also* Amy Dockser Marcus, *Any Student Can Have Him*, WALL STREET J., Nov. 22, 1999, at A1 (stating that after Professor Arthur Miller videotaped a ten-hour lecture series for Concord University School of Law, an on-line law school, Harvard began to rewrite its policies on how professors may use course materials. Other schools are doing likewise.).

⁴⁰ *See id.* (discussing Harvard Law School's interest in his lectures videotaped for Concord, Professor Arthur Miller noted: "I don't think it's undue cynicism to recognize that many of the old-format educational products—books, monographs, articles—produce no or very little revenue. They were of no concern to the university." Miller's colleague, Professor Alan Dershowitz has expressed a similar view. Referring to the controversy between Miller and Harvard, Dershowitz noted, "What distinguishes the Internet from everything else is the number of zeroes. The money is so overwhelming that it can skew people's judgment.").

⁴¹ See Guernsey & Young, *supra* note 37, at A21. At that time, Guernsey and Young stated: "At the moment, the debate is also somewhat abstract. Few electronic courses, if any, have become best sellers, or have even made much of a profit. There are even fewer examples of profit-hungry universities' [sic] stripping professors of rights to course materials." *See id.*; *see also* text accompanying notes 44–49.

communications of which are archived for future use), and even develops examinations administrable on-line. The program is developed over several years and becomes quite popular. The professor is then offered the opportunity to manage a similar program at another college. The professor, naturally, would like to take her work product with her. The university where she developed the course may want to retain the material for its use. Certainly, the university would not want to see another institution offering a course developed using its resources, particularly if not compensated. While such concerns might exist even when the materials are all paper based, the time and expense to develop a program using modern information technology creates an even greater incentive for universities to claim ownership of the materials.⁴² It also is not difficult to imagine that a well-developed package of course materials might have a market for resale to other institutions. Naturally, the faculty member who created the materials and the university for which she works both are interested in at least a share of the potential profits.⁴³ Another possibility is that an author of a treatise or casebook may want to use an article by another professor (or even herself) self-published on a university Web site. The author needs to obtain permission from the copyright owner in order to use the article but from whom should she get such permission—the author or the institution employing the author?

The above scenarios are hypothetical examples of how disputes might arise. We no longer, however, need hypothetical examples. In late 1999 and early 2000, the Wall Street Journal and the New York Times each reported on a dispute between Harvard Law School and one of its well-known faculty members, Professor Arthur Miller.⁴⁴ Miller is one of the relatively few law professors whose name and face is known to the general public. As legal editor for ABC's "Good Morning America" and host of "Miller's Court," a television program in which a panel of experts examines a wide variety of public policy issues,⁴⁵ Miller has gained a celebrity unusual for an academic. In the summer of 1999, Miller entered into a contract with Concord University School of Law, which is one of the first on-line law schools in the United States. Under his contract with Concord, Miller gave eleven

⁴² See Guernsey & Young, *supra* note 38, at A21 (estimating the cost of developing "a complete digital distance education course for delivery over the World Wide Web at \$10,000 to \$15,000 per course.").

⁴³ See *id.*

⁴⁴ Steinberg & Wyatt, *supra* note 1, §4 at 1; Marcus, *supra* note 39, at A1.

⁴⁵ See Marcus, *supra* note 39, at A1.

lectures for a civil procedure course, which were videotaped for later use by Concord's students. When Harvard Law School learned of this arrangement, it objected, citing its policies that prohibit its faculty from teaching for another educational institution during the academic year without the dean's permission.⁴⁶

Miller has denied that he violated that policy. Since he never "meets, interacts, or exchanges e-mail with any of the Concord students," Miller maintains that he is not "teaching."⁴⁷ Instead, he has compared the videotapes to "casebooks, textbooks, hornbooks, student aids, audio tapes, data collections, or other educational material."⁴⁸ As will be discussed below, many educators assume that they own the rights to such materials under a so-called teachers' exception to the Copyright Act's work-for-hire doctrine. When applicable, the work-for-hire doctrine vests copyright for a work in the employer, not the employee who created the work.⁴⁹ There has been little litigation on whether and when a teachers' exception to that doctrine applies.

Although Congress held hearings and passed legislation dealing with distance education,⁵⁰ including its impact on intellectual property rights, it ignored the issues addressed in this Article. Given that Congress appears unlikely to act, educational institutions and their faculty must develop policies that clearly set out their respective rights and obligations as related to educational materials prepared for on-

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ See 17 U.S.C. § 201 (1994). Miller's dispute with Harvard does not appear to center on ownership of the intellectual content contained in videotape but instead on Harvard's policies restricting teaching at other institutions. See Steinberg & Wyatt, *supra* note 1, § 4 at 1. Ownership of course materials, however, has been recognized as being an issue in the dispute. For example, Professor Henry Louis Gates, Jr., the head of Harvard's Department of Afro-American Studies, in commenting on the dispute for the *New York Times* article stated: "I've been teaching the same course, with modifications, for twenty-three years. I've taught at Yale, Cornell and Duke, too, and when I moved to a new university nobody said to me I couldn't take my course with me because the university owned it." *Id.* § 4 at 1.

⁵⁰ Section 403 of the Digital Millennium Copyright Act, required the Register of Copyrights to submit to Congress "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works," including recommendations as to legislation appropriate to achieve this objective. Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. § 512, 1201 to 1205, 1301 to 1332 and 28 U.S.C. § 4001 (1994)); see also *infra* note 51 and accompanying text. In addition, presently bills are pending in both the House of Representatives and the Senate directly addressing distance education at the elementary and secondary school levels. See Digital Education Act of 1999, H.R.2965, 106th Cong.; Digital Education Act of 1999, S.1029, 106th Cong.

line use, rather than leaving the resolution of these very important issues to the uncertainty and expense of litigation.

II. LEGAL ANALYSIS

A. *The Digital Millennium Copyright Act of 1998 and the Report on Copyright and Distance Education*

The growth in distance education and the use of the Internet and other information technology for traditional courses has profound implications in the area of intellectual property law, particularly copyright. While a great deal of work already has been done, both by the United States Copyright Office and Congress, most of the focus has been related to the use of pre-existing materials in such courses. For example, the Report on Copyright and Distance Education concentrates on fair use, licensing and related issues as they pertain to pre-existing materials used in distance education.⁵¹ The report cites earlier efforts in this area, including the Conference on Fair Use's ("CONFU") proposed guidelines for distance education⁵² and the Digital Millennium Copyright Act of 1998 ("DMCA")⁵³. Section 403 of the DMCA required the Register of Copyrights to submit to Congress "recommendations on how to promote distance education through digital technologies . . . while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works."⁵⁴ This mandate, however, does not extend to addressing ownership issues with respect to materials created or adapted for distance education courses. As a result, faculty who create such materials and the institutions which use them must turn to existing copyright law. These laws, however, were written before the wide-spread use of the technologies spurring the disputes—the Internet and the World Wide Web.

B. *Current Status of Copyright Issues Between Faculty and Educational Institutions*

Naturally, the issue of ownership of faculty-created digital materials has not gone unnoticed. Some faculty members, out of concern

⁵¹ See generally U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (1999).

⁵² See *id.* at 116–19.

⁵³ See *id.* at 119–25.

⁵⁴ Pub. L. No. 105–304, 112 Stat. 2860, § 403 (1998).

over this very issue, have refused to make digital material available for their courses.⁵⁵ Colleges and universities are just beginning to address the issue, at least to the extent of planning to develop policies and guidelines.⁵⁶ Harvard and other institutions are developing or revising policies related to the outside activities of its faculty as a way of addressing university concerns about faculty selling course materials to other institutions.⁵⁷ Developing such policies, however, can lead to difficult negotiations between educational institutions and their faculty.⁵⁸ For example, faculty at Athabasca University, when confronted with a university policy change, threatened litigation.⁵⁹

Both sides have legitimate concerns. Traditionally, it was presumed that educators owned the copyright to academic work they have authored or created.⁶⁰ Academic freedom is cited as a primary reason for such an arrangement.⁶¹ Educational institutions, on the other hand, claim an interest in the work and point to the faculty's

⁵⁵ See discussion in *supra* note 22.

⁵⁶ For example, Florida Gulf Coast University's Institutional Policies and Procedures identifies as one of several issues to be address in its Strategic Plan for Distance Learning, the development of "[i]ntellectual property rights and ownership policies for materials, courses, and resources developed by FGCU faculty." See Florida Gulf Coast University, *Institutional Policies and Procedures*, (visited March 15, 2000) <http://itech.fgcu.edu/distance/Institutional_Policies_Procedures.html>.

⁵⁷ See Steinberg & Wyatt, *supra* note 1, §4 at 1.

⁵⁸ See, e.g., Jeffrey R. Young, *UCLA Contract Shows Complexity of Issues Involving Ownership of On-Line Courses*, CHRON. OF HIGHER EDUC., June 5, 1998, at A23.

⁵⁹ See Guernsey & Young, *supra* note 37, at A21.

⁶⁰ See American Association of University Professors, *Draft Statement on Copyright* (visited March 15, 2000) <<http://www.aaup.org/spccopyr.html>> [hereinafter "*Draft Statement*"]. As noted earlier, the recognition of such ownership by educator is more a tradition than a rule of law. Those who seek a legal basis often point to a "teachers' exception" to the work-for-hire provisions of the 1909 and 1976 Acts, but can point to no controlling authority to support it. See *id.*; see also Steinberg & Wyatt, *supra* note 1, §4 at 1.

⁶¹ See *Draft Statement*, *supra* note 60. The AAUP *Draft Statement on Copyright* argues that academic freedom is threatened if the institution is the owner because "it would have the powers, for example, to decide where the work is to be published, to edit and otherwise revise it, to prepare derivative works based thereon (such as translations, abridgments, and literary, musical, or artistic variation), and indeed to censor and forbid dissemination of the work altogether. Such powers [are] deeply inconsistent with fundamental principles of academic freedom." *Id.*; see also *Ownership of On-Line Material*, Letters to the Editor, CHRON. OF HIGHER EDUC., July 24, 1998, at B9 ("If I contribute to a brochure, policy statement, or World-Wide Web page for my institution, that may be work for hire. I am representing the institution, not myself, and the institution should have the right to edit, translate, or rewrite any of the material But when I design a course, the choice of material, the order and method of presentation and discussion, the tools for assessment, and—most importantly—the intellectual coherence of the course are mine and reflect my education, scholarship, and point of view.").

use of their resources in its creation.⁶² Institutions also can assert that producing such work is part of the educators' employment obligation. These institutions have legitimate concerns about losing the right to use materials, created with their resources, by a "salaried employee." Even more troubling to such institutions is the prospect that the educator could sell the product to other institutions which, in turn, may use these materials to compete against them—the institution which incurred the cost to create the materials.⁶³

The American Association of University Professors ("AAUP") has prepared a Draft Statement on Copyright ("Draft Statement") which advocates that faculty members should be the owners of "courseware" they develop for distance education programs.⁶⁴ The AAUP notes that while some institutions have policies that proclaim their ownership of such materials, the Copyright Act of 1976 (hereinafter the "1976 Act") requires a writing, signed by the author, to create a legally-binding transfer of the copyright.⁶⁵ Of course, this requirement is only relevant if in fact the educator who creates the material is its owner. Current copyright law leaves in doubt the issue of who owns such works.⁶⁶ Even if current law recognizes faculty-creators as owners, colleges and universities could argue that employment contracts, which incorporate by reference such policies and which are signed by the educator, satisfy the signed written transfer requirement of the 1976 Act.⁶⁷ Further, as in Arthur Miller's dispute with Harvard, universities may seek to prevent current faculty from selling their course materials to other

⁶² See *Draft Statement*, *supra* note 60. Resources used include office space and supplies, library materials, computers, networking, university staff and student assistants.

⁶³ See Steinberg & Wyatt, *supra* note 1, §4 at 1.

⁶⁴ See *Draft Statement*, *supra* note 60.

⁶⁵ See *id.*

⁶⁶ See text accompanying notes 78–182.

⁶⁷ See 17 U.S.C. § 204(a) (1994) (providing: "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."). While no case addressing whether a contract between a faculty member and her institution which incorporate by reference a copyright policy has arisen, there is no reason to believe such incorporation by reference would not be sufficient to effect a transfer of copyrights. Whether all institutions in fact have a clause in their contracts with faculty that incorporate by reference such policies is another issue. In addition to being signed by the author, the writing purporting to transfer copyright ownership must be clear. See, e.g., *Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1158–59 (S.D.N.Y. 1996) (citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990)) ("[A] writing memorializing the assignment of copyright interests 'doesn't have to be the Magna Carta; a one-line pro forma statement will do.' However, the terms of any writing purporting to transfer copyright interests . . . must be clear.").

institutions under outside employment restrictions contained in university policies or employment contracts.⁶⁸

The Draft Statement recognizes three categories of projects in which a college or university "may fairly claim ownership of, or an interest in, copyright in works created by faculty (or staff) members."⁶⁹ Those three categories are "special works created in circumstances that may properly be regarded as 'made for hire,' negotiated contractual transfers, and 'joint works' as described in the Copyright Act."⁷⁰ As to the first of these, the Draft Statement recognizes an institution's claim of ownership where the works were "created as a specific requirement of employment or as an assigned institutional duty."⁷¹ Examples given in the Draft Statement include "reports prepared by a dean or by the chair or members of a faculty committee, or college promotional brochures prepared by a director of admissions."⁷² Course examinations were specifically identified as materials that would be the exclusive property of the faculty member.⁷³ As to the second category, contractual transfers, the Draft Statement identified as an example "a work prepared pursuant to a program of 'sponsored research' accompanied by a grant from a third party," noting that in such circumstances that "a contract signed by the faculty member providing that copyright will be owned by the institution will be enforceable."⁷⁴ The Draft Statement continues:

Similarly, the college or university may reasonably request that the faculty member—when entering into an agreement granting the copyright or publishing rights to a third party—make efforts to reserve to the institution the right to use the work in its internally administered programs of teaching, research, and public service on a perpetual, royalty-free, non-exclusive basis.⁷⁵

Finally, the Draft Statement provides: "In rare situations, . . . it may be proper to treat a work as a product of the joint authorship of the fac-

⁶⁸ See Steinberg & Wyatt, *supra* note 1, §4 at 1; Marcus, *supra* note 39, at A1.

⁶⁹ See Draft Statement, *supra* note 60.

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² *Id.*

⁷³ See *id.*

⁷⁴ See Draft Statement, *supra* note 60.

⁷⁵ *Id.*

ulty member and his or her institution, so that both have a shared interest in the copyright."⁷⁶

The Draft Statement expresses principles upon which a rational allocation of copyright could be based. Its first category proposes a logical analysis for whether a particular work created by an educator should be deemed a work-for-hire. It is not at all clear, however, that this is in fact the current state of the law.⁷⁷ As to the second category, there appears to be no legal basis for the implication that, absent special circumstances, a signed writing purporting to transfer copyright from an educator to an institution at which she worked would not be enforceable. There is no language in the 1976 Act, or in case law interpreting it, that indicates an educator lacks the capacity to transfer copyright of her work product to the institution that employed her.

C. *The Work-for-Hire Doctrine*

1. General Principals

Generally, copyright initially vests in the author of the copyrightable work.⁷⁸ Specifically, the 1976 Act grants copyright protection for "original works of authorship fixed in any tangible medium of expression."⁷⁹ Often the creator of a work and its "author" are the

⁷⁶ *See id.*

⁷⁷ *See* text accompanying notes 78–182.

⁷⁸ *See* 17 U.S.C. § 102 (1994).

⁷⁹ 17 U.S.C. § 102(a). Section 102(a) provides:

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

(1) literary works; . . ."

Id. It seems clear that such sites are copyrightable so long as they represent original works of authorship. Such files are fixed in a "tangible medium of expression," namely an Internet server's hard drive, "from which they can be perceived, reproduced, or otherwise communicated . . . with the aid of a machine or device," that is, by retrieval of a copy of the computer file or files making up a web page from the server on which the file or files making up the page are stored through the use of a web browser, such as Netscape Navigator or Internet Explorer, which, when retrieved, is displayed by the browser on the monitor of the computer through which the file or files making up the web page were requested.

That the work is fixed on a server's hard drive instead of paper, film, or some other older media would have no bearing on whether or not it is an original work of authorship. There are two factors used to determine whether or not a work is original: it must be of independent origin and represent at least a minimal amount of creativity. *See* *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663, 668 (7th Cir.

same.⁸⁰ This is not, however, always the case; section 201(b) of the 1976 Act provides that a "work for hire" is the property of the employer of the creator of the work, not of the creator.⁸¹ Put another way, the employer, not the creator, is the work's "author" for purposes of copyright. The copyright statute defines a work-for-hire as "a work prepared by an employee within the scope of his or her employment."⁸²

Copyright law is founded in article 1 of the Constitution of the United States: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁸³ Congress acted quickly in exercising this power, enacting the first copyright statute in 1790.⁸⁴ Even before any statutory or common law work-for-hire doctrine existed, employers were claiming ownership of the works of their employees. The famous 19th century photographer, Mathew B. Brady, claimed credit for any photographs created by any operator (as photographers were then known) working for him, even when the operator made the images after work hours and used his own equipment.⁸⁵ The work-for-hire doctrine first appears in the law of the late nineteenth and early twentieth centuries. The doctrine was introduced not by Congress, but by

1986) (citing *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2nd Cir.) (en banc), cert. denied, 429 U.S. 857 (1976)); *Withol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956); M. NIMMER, NIMMER ON COPYRIGHT § 2.01 (1985). The *Baltimore Orioles* court distinguished the concepts of originality, creativity and novelty, stating that "[a] work is original if it is the independent creation of its author. See 805 F.2d at 668 n.6. A work is creative if it embodies some modest amount of intellectual labor. See *id.* A work is novel if it differs from existing works in some relevant respect." See *id.* The court concluded: "For a work to be copyrightable, it must be original and creative, but need not be novel." *Id.* Faculty created web material certainly can meet these tests, though it will require evidence in each case to determine whether or not a particular work does in fact meet these tests.

⁸⁰ 17 U.S.C. § 201(a).

⁸¹ See 17 U.S.C. § 201(b).

⁸² See 17 U.S.C. § 101.

⁸³ U.S. CONST. art. 1, § 8, cl. 8.

⁸⁴ See Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

⁸⁵ See William Frassanito, *The Photographers of Antietam*, CIVIL WAR TIMES ILLUSTRATED, Aug. 1978, at 17. Alexander Gardner and James F. Gibson, two Brady operators, copyrighted their photographs of Antietam but Brady claimed credit and included the photographers' copyrights only in fine print. This practice actually led Gardner and others to leave Brady's employment following the Battle of Antietam. Brady sold the images to *Harper's Weekly* which used them for engravings displayed in their publication, and also held an exhibit in his New York studio entitled "The Dead of Antietam." See *id.*

the courts.⁸⁶ Interestingly, the first case to address this doctrine, *Colliery Engineer Co. v. United Correspondence Schools Co.*, involved the use of a compilation prepared by an educator for the use of his employer.⁸⁷ The court in *Colliery* found that his contract of employment required the educator, Ewald, "while a salaried employe [sic] of complainant, *inter alia*, to compile, prepare, and revise the instruction and question papers."⁸⁸ From these facts, the court concluded that "the literary product of such work became the property of the complainant [i.e., the employer], which it was entitled to copyright, and which, when copyrighted, [the employee] would have no more right than any stranger to copy or reproduce."⁸⁹ In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court cited the opinion in *Colliery* in finding that "designs belonged to [an employer], they [sic] having been produced by persons employed and paid by the [employer] in their establishment to make those very things."⁹⁰ This finding gave the employer standing to sue for infringement.⁹¹

Shortly after the *Bleistein* decision, Congress enacted the Copyright Act of 1909 ("1909 Act"), in which the work-for-hire doctrine was first codified.⁹² The 1909 Act defined "author" to include "an employer in the case of a work for hire."⁹³ In *An Academic's Copyright: Publish and Perish*, Leonard D. DuBoff asserts that "the congressional committee that drafted the 1909 Act was concerned primarily with materials for composite or encyclopedic works created by a number of salaried employees for a large publication by an employer publisher."⁹⁴ A study prepared by the Copyright Office, which was cited by DuBoff, states:

It seems that the committee's major concern in this situation is [sic] not its only concern—was with cases where a

⁸⁶ See Leonard D. DuBoff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT Soc'y 17, 18 (1985) (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)); *Colliery Engineering Co. v. United Correspondence Schools Co.*, 94 F. 152, 153 (S.D. N.Y. 1899).

⁸⁷ See *Colliery*, 94 F. at 153.

⁸⁸ See *id.*

⁸⁹ *Id.*

⁹⁰ 188 U.S. at 248–49 (citing *Colliery*, 94 F. at 153).

⁹¹ See DuBoff, *supra* note 86, at 18.

⁹² See Act of March 4, 1909, ch. 320, Pub. L. No. 60–320, 35 Stat. 1075 (1909).

⁹³ *Id.* at § 62.

⁹⁴ DuBoff, *supra* note 86, at 19, citing B. Ringer, Study No. 31: *Renewal of Copyright* (1960), reprinted in 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, at 105–90 (G. Grossman ed. 1976).

number of authors contributed to a single work. It is almost as if the committees were unaware that the provisions concerning works made for hire had been added the bills they were reporting.

..*.*

The committee report on this final bill indicates a likelihood that the legislators regard a "work for hire" as a species of "composite or encyclopedic work," and did not realize the breadth of the exception they were creating.⁹⁵

Be that as it may, the work-for-hire doctrine created in *Colliery* and adopted by the Supreme Court in *Bleistein* now was made a part of the Copyright Act itself. If Congress intended it to apply only to composite works, nothing in the language enacted indicated such a limitation. Based on this language, the courts crafted a rule that makes the employer the author of works created by salaried employees in the regular course of their employment.⁹⁶

In 1976, Congress passed major revisions to copyright law. The 1976 Act included more detailed definitions and provisions related to the work-for-hire doctrine. Specifically, the 1976 Act defines a work-for-hire as "a work prepared by an employee within the scope of his or her employment."⁹⁷ Additionally, section 201 provides, *inter alia*:

In the case of a work for hire, the employer or other persons for whom the work was prepared is considered the author for purposes of this title, and unless the parties have ex-

⁹⁵ *Id.* at 138.

⁹⁶ DuBoff, *supra* note 86, at 21 (citing *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909 (2d Cir. 1974)); *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697 (2d Cir. 1941); *National Cloak & Suit Co. v. Kaufmann*, 189 F. 215 (C.C. Pa. 1911).

⁹⁷ 17 U.S.C. § 101 (1994). A work can also be for hire where it is "specially ordered or commissioned" under one of nine specifically defined circumstance "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." *Id.* This appears to apply to works prepared by independent contractors, not employees. Since a writing is required to make such a work a work for hire, this Article will not address works of this type as they may relate creations of faculty members. It should be noted, however, that among the types of work covered by this provision are "contributions to a collective work, . . . instructional text, . . . a test, . . . answer material for a test." *Id.* If a faculty member preparing such works is not an employee of the institution for which they are prepared and if no written instrument exists showing an express agreement otherwise, the faculty member would appear to be entitled to the copyright in such works.

pressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.⁹⁸

The 1976 Act did not define the terms "employee" and "employer" as used in the act. This led to a split among federal circuit courts of appeal as to the meaning of those terms and, hence, the application of the work-for-hire doctrine. One line of cases (representing the views of the Second, Fourth, and Seventh Circuits) focused on the hiring party's control of the product that was the subject of the copyright dispute.⁹⁹ The Ninth Circuit utilized a multifactor formal, salaried employee test.¹⁰⁰ The Fifth Circuit applied agency law to determine whether the creator of a work was an employee as used in the 1976 Act.¹⁰¹

In 1989, the United States Supreme Court accepted certiorari in *Community for Creative Non-Violence v. Reid* in order to resolve this conflict among the Courts of Appeal.¹⁰² In *Reid*, an organization dedicated to eliminating homelessness entered into an oral agreement with a sculptor to produce a statue dramatizing the plight of the homeless for display at a Christmas pageant.¹⁰³ The sculptor provided sketches to the organization of his proposed sculpture, a modern Nativity scene depicting a homeless black family huddled on a streetside steam grate.¹⁰⁴ The parties disputed the purpose of the sketches; the sculptor asserted that they were to be used for fund raising while a member and trustee of the organization claimed that the sketches also were offered for his approval.¹⁰⁵ In any event, the sculptor did make modifications based on input from the organization.¹⁰⁶ The parties, however, did not discuss copyright ownership.¹⁰⁷ When a dispute arose between the parties as to taking the sculpture on tour, the sculptor, who had possession of the work at the time, refused to return it

⁹⁸ 17 U.S.C. § 201.

⁹⁹ See, e.g., *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Evans Newton Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir. 1986), cert. denied, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984), cert. denied, 469 U.S. 982 (1984).

¹⁰⁰ See *Dumas v. Gommerman*, 865 F.2d 1093, 1102 (9th Cir. 1989).

¹⁰¹ See *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323, 334-35 (5th Cir. 1987).

¹⁰² See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 736 (1989).

¹⁰³ See *id.* at 733.

¹⁰⁴ See *id.* at 734.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *Reid*, 490 U.S. at 733-34.

and filed a certificate of copyright registration.¹⁰⁸ A trustee of the organization filed a competing certificate of copyright registration on behalf of the organization and commenced a civil action seeking return of the sculpture and a determination of copyright ownership.¹⁰⁹ The district court declared that the sculpture was a "work made for hire" under Section 101 of the Copyright Act and found that the organization's trustee (on behalf of the organization) was the exclusive owner of the work's copyright.¹¹⁰ The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that the sculpture was not work-for-hire and that the sculptor was the copyright owner.¹¹¹

In affirming the Court of Appeals' judgment, the Supreme Court examined the legislative history of the 1976 Act as it related to the work for hire provisions¹¹² and noted that "[i]n the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."¹¹³ The Court, relying "on the general common law of agency, rather than on the law of any particular [s]tate,"¹¹⁴ offered a multi-factor test to determine whether a hired party is an employee: the hiring party's right to control the manner and means by which the product is accomplished [;] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹¹⁵

The Court noted that no one factor was determinative.¹¹⁶

Several cases have applied and elaborated on the *Reid* test. In *Ay*

¹⁰⁸ See *id.* at 735.

¹⁰⁹ See *id.* at 735.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 736.

¹¹² See *Reid*, 490 U.S. at 743-48.

¹¹³ *Id.* at 739-40.

¹¹⁴ *Id.* at 740.

¹¹⁵ *Id.* at 751-52.

¹¹⁶ *Id.* at 752.

mes v. Bonelli,¹¹⁷ the Court of Appeals for the Second Circuit reversed a finding that Aymes, the creator of a software program, was not the employee of Bonelli.¹¹⁸ In so doing, the Court of Appeals criticized the lower court for giving each of the *Reid* factors equal weight and merely adding up the factors for each side in determining that Aymes was an employee.¹¹⁹ Instead, the appellate court found that some factors of the *Reid* test would have no applicability in some cases, while others would "be significant in virtually every situation."¹²⁰ It identified these latter factors as the following: "(1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party."¹²¹ Further, the court found that these factors would not only "almost always be relevant," but concluded that they "should be given more weight in the analysis, because they will usually be highly probative of the true nature of the employment relationship."¹²² The *Aymes* court cited six other decisions which had adopted this weighted approach.¹²³ Using this weighted analysis, the appellate court concluded that Aymes was not an employee of Bonelli.¹²⁴

2. When are Faculty Members Employees?

Applying the factors outlined by the *Reid* Court, most faculty are, without serious question, employees of the institutions at which they work. Starting the analysis with the five factors identified in *Aymes* as virtually always significant and deserving the most weight, the first factor—the hiring party's right to control the manner and means of creation¹²⁵—appears to favor a finding that a faculty member is not an

¹¹⁷ See 980 F.2d 857, 865 (2nd Cir. 1992).

¹¹⁸ *Id.*

¹¹⁹ See *id.* at 861.

¹²⁰ See *id.*

¹²¹ *Aymes*, 980 F.2d at 861.

¹²² *Id.*

¹²³ See *id.* (citing *Marco v. Accent Publ'g Co.*, 969 F.2d 1547 (3rd Cir. 1992); *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769 (3rd Cir. 1991); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990); *Johannsen v. Brown*, 797 F. Supp. 835 (D. Or. 1992); *Kunycia v. Melville Realty Co.*, 755 F. Supp. 566 (S.D.N.Y. 1990); *Kelstall-Whitney v. Mahar*, No. CIV. A. 89-4684, 1990 WL 69013 (E.D.Pa. May 23, 1990)). It should be noted that the *Reid* decision does not suggest the weighted approach.

¹²⁴ See *id.* at 862-64.

¹²⁵ See *id.* at 861.

employee. Few universities seek to control the content, or even the subject matter of a faculty-created scholarly work. Likewise, universities seldom provide detailed requirements (beyond a general requirement to cover the subject matter) with respect to the content and presentation of courses. Faculty members, however, are required to teach, conduct significant research and publish findings in order to obtain tenure. In addition, this factor could favor a finding that the faculty member is an employee in circumstances where the university assigns the faculty member a specific project—such as the preparation of a distance learning course, material for such a course or, as seen in the cases of UCLA and Florida Gulf Coast University, Internet-based materials for classroom-based courses.¹²⁶

The second of these factors—the skill required¹²⁷—also seems, at least at first glance, to favor a finding that faculty are not employees, for faculty members are highly educated and accomplished scholars. This factor, however, may encompass more than the skill needed to create the content of the materials; it also may look at the skills needed to publish those materials electronically. While many faculty members have developed a great deal of skill in this area, others depend on their school's information technology personnel or librarians to convert their intellectual output into Internet-published works.

The third factor—provision of employee benefits¹²⁸—definitely favors finding faculty members to be employees. Most universities provide employee benefits in the form of health care insurance, retirement, tuition waivers or reductions and a number of other benefits. Similarly, the tax treatment of faculty¹²⁹ in most cases favors finding faculty to be employees. Universities typically perform tax managing services such as withholding federal and state income taxes and withholding the faculty member's portion and paying the employer's share of F.I.C.A. taxes.

An analysis of the final factor—the hiring party's right to assign additional projects to the hired party¹³⁰—produces mixed results when applied to faculty members. Again, the university usually does not assign specific research topics, but it may assign the courses taught and, as at UCLA and Florida Gulf Coast University, require the creation of Internet-based materials for the course, or require a pro-

¹²⁶ See *supra* notes 20 and 21 and accompanying text.

¹²⁷ See *Aymes*, 980 F.2d at 861.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

fessor to create materials for a distance learning course she is teaching.¹³¹

The *Aymes* formulation also requires determining which of the remaining *Reid* factors apply to the particular case and the evaluation of those factors.¹³² One remaining factor that may influence finding a faculty member an employee is the instrumentalities and tools used in creating the product.¹³³ Most faculty placing work on a Web site use their institution's: libraries and on-line services to conduct research in preparing the work; computers and software to conduct research and to create the work; space on a server to store the work; Internet connection to make the material available to the world; and, depending on skill level, the assistance of other institutional employees throughout the process of making the material available to its intended audience. Were a faculty member to use her own personal computer and software to research and create the material and acquire and pay for "publication" space from a commercial Internet service provider ("ISP"), then this factor would support a finding that she is not an employee.

Usually, the location of the work factor¹³⁴ also would favor a finding that the faculty member was an employee. Much, if not most, of the effort in creating the work typically is done at the university. Additionally, the work in many cases is stored and made available on the university's server. Even if a large portion of the work is done at home, this does not lead to a conclusion that the creator of the work is not an employee, as will be discussed below.¹³⁵ Applying this factor to educators, however, presents some difficulties since their "product" is created over an extended period, incorporating the totality of their experiences. For example, when, as in Arthur Miller's case, an educator uses previously prepared lecture material for an educational institution other than the one at which he is a faculty member, the evaluation will be very fact specific. If the educator has taught the same courses at several institutions over many years, it is likely that while the material was prepared in the course of employment, it probably was prepared and refined while working for different employers. Educators are not likely to leave behind the material they prepared for a course at one institution when they take a position at a different insti-

¹³¹ See *supra* notes 21 and 22 and accompanying text.

¹³² See *Aymes*, 980 F.2d at 861, 863; *Reid*, 490 U.S. at 751-52.

¹³³ See *id.*

¹³⁴ See discussion *supra* note 48.

¹³⁵ See *Miller v. CP Chemicals, Inc.*, 808 F. Supp. 1238, 1240, 1244 (D. S.C. 1992).

tution.¹³⁶ Further, an educator may incorporate concepts and expressions in her course materials which she developed as a consultant or through other outside activities. Nonetheless, in many cases, a court could find that materials were prepared in the scope of the educator's employment at the university at which he or she is a faculty member.

The duration of the relationship factor¹³⁷ also supports finding that the faculty member is an employee. Both faculty and universities, absent a visitorship or fellowship arrangement, anticipate an on-going relationship of many years, not limited by the time needed to complete any particular copyrightable work. As most full-time faculty receive a salary, the method of payment factor¹³⁸ also favors a finding that the faculty member is an employee. The hired party's role in hiring and paying assistants¹³⁹ generally favors a finding that faculty are employees, assuming that the university, not faculty, pay research assistants. Depending on the nature of the work, which will be explored more fully below, the work created may be part of the regular business of the hiring party.¹⁴⁰ Universities are in the business of educating students, which includes the creation of courses and materials used in those courses. This is true whether the course is classroom-based or part of a distance learning program. Additionally, institutions of higher education are in the business of producing and publishing scholarly research. Although the final factor—whether the hiring party is in business¹⁴¹—at first may seem to favor a finding that a faculty member is not an employee, since most educators do not think of themselves as working in a business, a non-profit entity is considered to be "in business" for purposes of determining whether or not the creator was an employee under the work-for-hire provisions of the 1976 Act.¹⁴² That faculty are employees of the institutions at which they work seems beyond reasonable dispute.¹⁴³

¹³⁶ See discussion *supra* note 48.

¹³⁷ See *Reid*, 490 U.S. at 751.

¹³⁸ See *id.*

¹³⁹ See *id.* at 751-52.

¹⁴⁰ See *id.* at 752.

¹⁴¹ See *id.*

¹⁴² See, e.g., *Reid*, 846 F.2d at 1487 (The plaintiff organization, Community for Creative Non-Violence, was a non-profit, unincorporated association.).

¹⁴³ See *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 679 (1980) (holding that full-time faculty were managerial employees under 29 U.S.C. § 152 (12) (1997)). Although the Court was applying statutory definitions and thus this case is not directly on point, it is interesting to note that none of the parties challenged a finding that full-time faculty were employees. See *id.* at 681. The only issue was what category of employees they were under the National Labor Relations Act. See *id.* at 674-75.

3. When Is a Work Created by an Educator Prepared Within the Scope of Employment?

Establishing that faculty are employees is only the first step in deciding if the work-for-hire doctrine applies.¹⁴⁴ The second step is determining whether a specific work was prepared in the scope of the educator's employment.¹⁴⁵ Courts have developed a three-part test based on the *Restatement (Second) of Agency* for determining whether or not an employee acted within the scope of her employment when preparing a copyrightable work. Those factors, all of which must be shown to establish that the employee was acting within the scope of her employment, are: (1) whether the work is of the type that the employee is employed to perform; (2) whether the work occurs substantially within authorized work hours; and (3) whether its purpose, at least in part, is to serve the employer.¹⁴⁶

In *Miller v. CP Chemicals, Inc.*, the federal district court addressed the scope of employment issue.¹⁴⁷ The case involved an employee who created computer programs which his employer continued to use after his termination. Miller was initially employed by CP Chemicals as a technician in its quality control laboratory, but was soon promoted to a senior laboratory chemist and ultimately to laboratory supervisor.¹⁴⁸ While working as a senior laboratory chemist, Miller requested that CP Chemicals purchase spreadsheet software; Miller intended to use the software to store analytical data regarding CP Chemicals' customer product specifications.¹⁴⁹ After being promoted to laboratory supervisor, Miller organized the laboratory's records to meet federal environmental and work safety regulations and completed computerization of all the laboratory's analytical data.¹⁵⁰ He also wrote a computer program to compute complex mathematical calculations previously done manually, simplifying his duties and decreasing the chance of error.¹⁵¹ Miller's supervisors then asked him to do the same for other products, which he did.¹⁵² Miller, who was an hourly employee, did most of this work at home and on his own time, receiving no addi-

¹⁴⁴ See 17 U.S.C. §101 (1994).

¹⁴⁵ See *Miller*, 808 F. Supp. at 1243.

¹⁴⁶ See *Newark v. Beasley*, 883 F. Supp. 3, 7 (D.N.J. 1995).

¹⁴⁷ See *Miller*, 808 F. Supp. at 1242-44.

¹⁴⁸ See *id.* at 1240.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *Miller*, 808 F. Supp. at 1242-44.

tional compensation.¹⁵³ Miller was terminated from his job in June 1991. Thereafter, he demanded that CP either return to him the programs he had written or pay a license fee for their continued use. CP refused both demands.¹⁵⁴

Although the district court found that Miller failed to register a copyright to the programs and thus had no valid claim for infringement, it nonetheless analyzed Miller's claim in light of the work-for-hire doctrine.¹⁵⁵ The court noted Miller's contention "that the computer programs were a result of his own initiative and that they were written and tested at his home on his personal computer."¹⁵⁶ The court turned to the comments to section 229 of the *Restatement*, which provided: "(1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."¹⁵⁷ The court further noted that the *Restatement* provided that "acts incidental to authorized acts may be within the scope of employment"¹⁵⁸ but that "[t]o be incidental, . . . [the act] must be one which is subordinate to or *pertinent* to an act which the servant is employed to perform [and] . . . must be within the ultimate objective of the principal and an act which is not unlikely that such a servant might do."¹⁵⁹ Analyzing the three factors from the *Restatement*, the court found that Miller had acted in the scope of his employment when he developed the software in question.¹⁶⁰ First, the court found that while Miller "was not hired primarily for the development of computer programs, . . . he was responsible for the organization and updating of the laboratory"¹⁶¹ and that "the development of the computer programs was at least incidental to his job responsibilities because it was 'within the ultimate objective of the principal and an act which is not unlikely that such a servant might do.'"¹⁶² Second, the court found

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 1240-41.

¹⁵⁵ See *id.* at 1242-44.

¹⁵⁶ *Id.* at 1242.

¹⁵⁷ See *Miller*, 808 F. Supp. at 1243 (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

¹⁵⁸ See *id.* (citing RESTATEMENT (SECOND) OF AGENCY § 229 cmt. b (1958)).

¹⁵⁹ *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 229 cmt. b (1958)) (emphasis added).

¹⁶⁰ See *id.* at 1243-44.

¹⁶¹ See *id.* at 1243.

¹⁶² See *Miller*, 808 F. Supp. at 1243.

that while Miller did much, if not all, of the development on his home computer, it "was performed during the time period in which he was employed by CP."¹⁶³ Finally, the court found that the development of the software "was actuated, at least in part, by a purpose to serve the master."¹⁶⁴ As a result of these findings, the court held that the development of the software was within the scope of Miller's employment.¹⁶⁵

In perhaps a more analogous case, *Marshall v. Miles Laboratories, Inc.*, the federal district court held that an article written by an employee was done within the scope of his employment and the employer owned the copyright.¹⁶⁶ The employee argued that he had written the article at home, was not specifically instructed to write the article and received no additional compensation.¹⁶⁷ The employer responded that the research for the article was done at work, while at work the employee discussed the article with one of the employer's scientists, this scientist was co-author of the article and the employee received reimbursements from his employer for the costs of presenting the article at a symposium.¹⁶⁸ The court noted further that the employee's job description included the development, summarization and reporting of "information about advances in technology to" the employer, in concluding that the employer owned the copyright.¹⁶⁹

Given the *Miller* and *Marshall* cases, it is hard to imagine that a court would find that faculty-created scholarly articles, books and teaching materials are not prepared within the scope of employment. Faculty are employed to create scholarly works and to teach courses, which of necessity requires the preparation of course materials.¹⁷⁰ Most faculty probably work on their scholarship and course preparation both at the office and at home. Even if a faculty member prepared all of the material at home, the *Miller* case still would support a finding that it was prepared in the scope of employment. Finally, since

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 1243.

¹⁶⁵ See *id.* at 1244.

¹⁶⁶ See *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326, 1331 (N.D. Ind. 1986).

¹⁶⁷ See *id.* at 1330.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 1331.

¹⁷⁰ It is typically presumed that a college professor prepares his or her own course materials, though he or she may rely upon the works of others in preparing such materials. For purposes of the analysis, it is safe to assume such preparation for if an educator had not prepared his or her own course materials, then there would be no basis for an ownership dispute between the educator and the university.

universities encourage, and even require, scholarship and teaching assignments, it unquestionably is difficult for a faculty member to assert successfully that the work was not actuated, at least in part, by a purpose to serve the university.

4. Is There a "Teachers' Exception" to the Work-for-Hire Doctrine?

Although courts likely will find faculty to be employees of educational institutions and their scholarship and course materials to be prepared in the scope of employment, some writers nonetheless proclaim that an overriding "teachers' exception" exists to the work-for-hire doctrine, vesting authorship in the teacher-employee rather than her employer.¹⁷¹ Other writers have denied that such an exception exists.¹⁷²

In *Hays v. Sony Corp. of America*, Judge Posner discussed the teacher exception.¹⁷³ In *Hays*, high school teachers brought a copyright infringement action against a corporation that modified a word processor manual, prepared by the teachers at the request of their school.¹⁷⁴ The court stated:

Until 1976, the statutory term "work made for hire" was not defined, and some courts had adopted a "teacher exception" whereby academic writing was presumed not to be work made for hire. [Citations omitted.] The authority for this conclusion was in fact scanty, . . . but it was scanty not because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings. Although college and university teachers do academic writing as part of their employment responsibilities and use their employer's paper, copier, secretarial staff, and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as

¹⁷¹ See, e.g., MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.03[B][1][b][i] & n.94, at 5-34 to 5-35 (1994); Laura G. Lape, *Ownership of Copyrightable Works of University Professor: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223, 246 (1992); see also Philip T. K. Daniel & Patrick D. Pauken, *The Impact of the Electronic Media on Instructor Creativity and Institutional Ownership within Copyright Law*, 132 EDUC. L. REP. 1 (1999).

¹⁷² See, e.g., DuBoff, *supra* note 86, at 18; Todd F. Simon, *Faculty Writings: Are They 'Works Made for Hire' Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485, 508 (1982-83).

¹⁷³ See *Hays v. Sony Corp. of America*, 847 F.2d 412, 416 (7th Cir. 1988).

¹⁷⁴ See *id.* at 413.

to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university.¹⁷⁵

The court then sets forth the reasons for such an exception, including the lack of university supervision of faculty in the preparation of scholarly writings.¹⁷⁶ Asserting these reasons for a teachers' exception "are as forceful today as they ever were,"¹⁷⁷ the court noted:

Nevertheless it is widely believed that the 1976 Act abolished the teacher exception [citations omitted] – though, if so, probably inadvertently To a literalist of statutory interpretation, the conclusion that the Act abolished the exception may seem inescapable But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception has survived.¹⁷⁸

Judge Posner's conclusions, however, are dictum and have no binding, precedential value.¹⁷⁹ Nonetheless, this opinion is often cited by advocates of the existence for a teachers' exception to the work-for-hire doctrine.

¹⁷⁵ *Id.* at 416.

¹⁷⁶ *See id.* Interestingly, the court set off "to one side cases where a school directs a teacher to prepare teaching materials and then directs its other teachers to use the materials too." *Id.* This caveat calls into the question the use of a teachers' exception with respect to distance education materials since the situations appear analogous to each other.

¹⁷⁷ *See id.*

¹⁷⁸ *Hays*, 847 F.2d at 416. The court notes the lack of discussion of this issue in the legislative history and asserts that "no political or other reasons come to mind as to why Congress might have wanted to abolish the exception." *See id.*

¹⁷⁹ *See id.* The court addressed the issue of a teachers exception in relation to Sony Corporation's claim for sanctions under Rule 11 of the Federal Rules of Civil Procedure. *See id.* at 418–19. The court held that the teachers had failed to perfect their appeal from a lower court's dismissal for failure to state a claim. *See id.* at 419. The court went as far as to note "[w]e need not try to decide the issue in the present case, for even if the [1976 Act] abolished the teachers exception this would not necessarily spell victory for Sony." *Id.* at 415.

There is nothing in the 1976 Act to support a teachers' exception.¹⁸⁰ Further, there is no controlling case authority to support such an exception. One must look, however, at the policy behind the work-for-hire doctrine and its effects if applied to educators to determine if a teachers' exception is warranted. The possible applications of the work-for-hire doctrine to the work of educators are many, but there are three primary categories of work related to the Internet likely to produce disputes: scholarly work (for example, articles, monographs and books); course materials prepared for traditional classroom teaching which are later adapted for distance learning or other on-line publication; and course materials specifically prepared for integration into a distance learning program.

Absent agreements or policies to the contrary, scholarly work generally has been presumed to be owned by the educator, not the institution at which he or she works. There are good policy reasons for this. First, the same policy that underlies tenure—academic freedom—supports faculty ownership of their intellectual work product. If universities owned the copyright to articles, monographs and books written by their faculty, they could suppress unpopular or controversial views of their faculty. Faculty writings often have instigated or propelled changes in the law and societal attitudes. Controversial scientific opinions later have been accepted in the general scientific community. Universities may be tempted to suppress views expressed by their faculty which seem out-of-step with the views of alumni, prospective students and their parents, and financial contributors. They also may feel pressure to suppress novel or controversial ideas that they expect to be rejected by the general academic community.

Second, faculty long have looked to royalties from textbooks, casebooks and monographs for additional income. In general, educators accept lower pay to remain part of the academy when opportunities in the private sector beckon. The prospect of outside sources of

¹⁸⁰ See 17 U.S.C. § 101 (1994). The 1976 Act defines a "work made for hire" as including "a work specially ordered or commissioned for use . . . as an instructional text, as a test, as answer material for a test . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." *Id.* This section could be interpreted as supporting a teachers' exception as to those type of educational materials that can be overridden by a signed writing. One arguing against a teachers' exception could point to this language and assert that any other type of educational material should be presumed to be a work made for hire if the educator is an employee and created it in the scope of her employment. This, however, takes the quoted language out of context and assigns more meaning to it than the entire definition of a "work made for hire" would seem to indicate.

income helps some educators support that decision. Since economic value for scholarly work is directly linked to the reputation of the academic in their field, depriving educators of the fruit of their labor may compel scholars to leave the academy. As a result, the next generation of scholars would not receive the benefit of learning from the most talented and respected thinkers in their field.

Since institutions of higher education never have received revenue from such work in the past, applying a teachers' exception to such materials published in electronic format does not deprive the university of income on which it now relies. Nor does allowing educators to retain copyright to these materials create potential competition for the universities at which they work. That some such materials have enhanced value due to the advent of the Internet and other high tech media does not change these facts. Thus, a teachers' exception to the work-for-hire doctrine should be applied to all such works.

Course materials are a different matter. If faculty own this material, they can sell it to their employers' competitors.¹⁸¹ There are, nonetheless, good reasons to apply a teachers' exception to course materials. Faculty develop more than expertise while working at a university; they develop lecture notes, syllabi, teaching methods, examination and other evaluation material for the courses they teach. Traditionally, when they relocate, faculty take their course materials with them.¹⁸² If the universities where they develop course materials own those materials, educators would have no more right to the material they developed than would anyone else.¹⁸³ Without university permission, they would be denied the ability to recreate their courses at other institutions. This would have the effect of providing a powerful disincentive to faculty movement. Yet this very movement is important to the dynamic nature of the educational system. In addition, faculty may use portions of their course materials when conducting presentations at seminars and conferences with colleagues in their field. This use is also important in developing effective teaching methods throughout the institution, and the academic community as a whole.

¹⁸¹ See Steinberg & Wyatt, *supra* note 1, §4 at 1; Marcus, *supra* note 39, at A1.

¹⁸² See Marcus, *supra* note 39, at A1 (Professor Henry Louis Gates, Jr. exemplifies this attitude. Commenting on Professor Arthur Miller's dispute with Harvard, he said: "I've been teaching the same course, with modifications, for 23 years . . . [W]hen I moved to a new university nobody said to me I couldn't take my course with me because the university owned it.").

¹⁸³ See *Colliery*, 94 F. at 153.

Universities could argue that it is one thing for faculty to take their course materials when they move to another institution or to use small portions in presentations, but it is quite another for them to videotape lectures and provide examination materials to a competitor—whether on-line or bricks-and-mortar—while still employed by the university at which these materials were created. This position has some merit. A rule certainly could be fashioned that made faculty owners of such works for some purposes but not for others. Such a rule, however, would be cumbersome. Each new use of these materials would create the potential for litigation. It also would result in different treatment of these materials than has actually been the practice in the past. That such material now has much greater value is no reason to change the way ownership of course material is determined. While universities may have waived any rights to course materials in the past—because they believed that it was not worth the cost, both financially and in terms of faculty relations, to assert such rights—the fact remains that until recently there has been no serious effort to prohibit faculty's outside use of course materials. The universities' legitimate concerns in this area, as in any of the examples discussed, are addressed better through written agreements that modify the rules in ways that meet the specific interests of all parties.

Materials integrated into a university's distance learning program are a substantially different matter. In such cases, the universities have expended substantial resources, including the cost of converting the educator's intellectual content into the formats required by the distance education technology. An educator's subsequent claim of ownership deprives the university not only of the benefits of its expenditures, but could disrupt the entire distance learning program. While this problem also may exist with traditional classroom courses, the time and expense involved in integrating the content into a useful format for a distance learning program increases the university's interest. Further, students who enroll in such programs expecting to take courses in a particular sequence face unnecessarily the risk that these plans could be interrupted by a single educator. This, however, does not support vesting exclusive rights to the intellectual content in the university, only that they have a perpetual, non-exclusive license to use of the videotapes, computer files or other media comprising the distance learning program. This license also should permit the institution to revise and update course materials for its distance learning programs. The educator who created the course materials should have the right to demand credit for its creation or, alternatively, that her name be removed as the creator. This would allow the creator to

receive credit for her intellectual contribution to the course while at the same time permitting her to disassociate herself from it should the material become out-of-date or be revised in a manner unacceptable to the creator. Competition which may arise from other institutions wanting to use the course materials should be resolved through written contracts between educators and the universities for whom the distance education material is prepared or adapted. If a faculty member wishes to waive or limit her right to future use of such material as part of her bargain with a university, she may do so, but the default rule need not provide such a restrictive arrangement.

III. NEED FOR WRITTEN POLICIES AND GUIDELINES

Perhaps a case will eventually settle whether a "teachers' exception" exists to the work-for-hire doctrine. While the above discussion presents a reasoned outline for a "teachers' exception," it would be risky to both educators and institutions to rely on such an exception at this time. Even if the issue ultimately is resolved in the courts, unnecessary litigation costs and delays will be incurred by all parties to the dispute. This uncertainty has and will continue to inhibit some faculty who might otherwise create innovative Internet-based materials.¹⁸⁴ Potential third-party purchasers of licenses or of the copyright itself would be prudent to steer clear of a work whose ownership is uncertain. Such third-parties would certainly factor that uncertainty into any fees paid if less than all potential copyright owners agreed to the license or transfer. Further, protracted negotiations between rival claimants to a copyrightable work could lead a potential licensee or transferee to find a comparable work elsewhere rather than wait for the rivals to resolve their dispute. There is no evidence that Congress will act to clarify the law in this area. For all these reasons, educators and universities should have policies that clearly spell out the respective rights of the parties so as to avoid litigation and lost opportunities for profit from educator-created works.

There are no one-size fits all agreements. The parties can and should be creative in structuring ownership and licensing arrangements, tailoring the agreements to meet the specific needs of the parties involved.¹⁸⁵ For example, the parties may agree to joint ownership

¹⁸⁴ See discussion in *supra* note 22.

¹⁸⁵ An author under the Copyright Act possesses a "bundle of rights." These include the right to reproduce the work, to prepare derivative works, to distribute copies of the work to the public by sale or other transfer, to publicly perform certain types of work, to

using cross-licensing arrangements. This provides incentives for both educators and universities to develop materials since each is assured of its continued use of the materials. Additionally, an educator may be willing to forgo the right to make future use of certain materials, should she leave the institution, in exchange for additional compensation. An institution may be willing to limit the time it is allowed to use the material. How the faculty and institution divide any proceeds from sales of integrated distance learning course packages also could be negotiated.

Many examples of such agreements are available.¹⁸⁶ Agreements range from one page documents, that set forth general principles for deciding ownership and licensing issues,¹⁸⁷ to lengthy, detailed policies that define a variety of types of faculty works, the circumstances under which the works were created, and provide for different ownership and licensing arrangements depending on these factors.¹⁸⁸ In order to minimize potential disputes, perhaps the latter approach is the wisest.¹⁸⁹ Ambiguity invites disputes and litigation. Policies, guidelines and other agreements naturally will vary from institution to institution and even within institutions. The important issue is not the precise terms, but that such policies and agreements are created, are

publicly display certain types of work, and to publicly perform the work by means of a digital audio transmission. See 17 U.S.C. § 106. There is no sound public policy reason why these rights must all reside in a single person. Certainly there is no reason to prevent the faculty and universities from allocating these rights between themselves, nor is there any sound reason why a default allocation of rights could not be created by statute.

¹⁸⁶ See University of Maryland, *Copyown, A resource on copyright ownership for the higher education community*, (visited March 15, 2000) <<http://www.inform.umd.edu/copyown/policies/index.html>> (containing links to the intellectual property policies of more than 100 institutions of higher education).

¹⁸⁷ For example, universities which have instituted policies of this type include: Auburn University, Case Western Reserve University, The University of Chicago, Clark University, Dartmouth University, Iowa State University, University of South Carolina, Southern Illinois University and Yale University.

¹⁸⁸ For example, universities that favor more detailed policies and guidelines include: University of Arizona, Brigham Young University, Brown University, Carnegie Mellon University, University of Georgia, Indiana University, Ohio State University, Syracuse University, Tulane University, University of Utah, and Washington University in St. Louis.

¹⁸⁹ Length, naturally, is not always an accurate measure of the quality of the policy. What is of importance is the degree to which the policy provides a clear understanding of who has what rights. An ambiguous policy or one that tries to define every conceivable scenario may create more problems than it solves, particularly if the scenario that develops falls outside any of the scenarios described. Nonetheless, as in the drafting of any other agreement, definition of terms whose meanings may be less than certain and the inclusion of provisions covering specific categories of works are preferred over those that give cursory treatment of the subject in general without recognition of the differences between types of work.

clear and deal with all foreseeable types of work. They should not be limited to existing media, but should be written in a manner preserving the agreement's application to later development. When this is not the case, they will need to be revised. An approach that relies on policies and guidelines incorporated by reference in employment contracts, while perhaps enforceable, is less desirable than one in which each faculty member signs the writing that actually contains the terms of the agreement. This is the approach taken by Indiana University's Copyright Management Center, which created a sample "Agreement for the Production of Distance Education Course Materials."¹⁹⁰ It is much more likely that faculty members will realize what rights they keep and what rights they assigns to others when they sign an agreement than when the policies are set forth in a faculty handbook or other lengthy document containing unrelated policies and guidelines.

CONCLUSION

The advent of the Internet did not create the legal issues surrounding faculty-created works, but only created greater incentives—due to the enhanced value of the work—to litigate over ownership. Perhaps the reason that people have accepted the notion of a teachers' exception to the work-for-hire doctrine is that educational institutions appear to lack sufficient incentive to challenge such an exception. This perception is likely to change as colleges and universities scramble to develop and implement distance education programs and faculty continue to develop polished Internet-based content for their traditional courses. In order to encourage the fullest possible development of on-line educational resources for the American public, Congress should amend the 1976 Act to set forth clearly the respective rights and obligations of educators and educational institutions as to educator-created material. Uncertainty can only inhibit faculty

¹⁹⁰ See Indiana University–Purdue University Indianapolis, *Distant Learning Faculty Agreement* (visited March 15, 2000) <<http://www.iupui.edu/~copyinfo/dlagreement.html>>. The agreement was drafted by the Copyright Management Office at Indiana University–Purdue University Indianapolis, directed by Professor Kenneth D. Crews of that university's college of law. The Copyright Management Office's web site contains a wealth of material related to the topic of this article. See Indiana University–Purdue University Indianapolis, *Copyright Management Center* (visited March 15, 2000) <<http://www.iupui.edu/~copyinfo/>>. The proposed agreement could serve as a model for other institutions, though this author believes that Section 2.2 is not entirely clear on whether a faculty member could use materials prepared pursuant to the agreement in a traditional classroom course taught at another school.

from developing content which they would otherwise create. Absent Congressional action, courts should recognize a teachers' exception to the work-for-hire doctrine. Recognition and development of a teachers' exception by the courts is likely to come slowly and unpredictably if at all. Educators should own their works of scholarship and course preparation, with licensing provided to institutions in circumstances where such works have been integrated into distance learning programs. If this arrangement does not meet the needs of particular faculty and universities, tailored arrangements can be reached by written agreement. Rather than relying on an uncertain outcome, educators and educational institutions should negotiate written agreements that meet the needs of all the parties with an interest in copyright and licensing of the intellectual work product.