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Nathaniel S. Strauss

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**ANYTHING BUT ACADEMIC: HOW COPYRIGHT'S WORK-FOR-HIRE DOCTRINE AFFECTS PROFESSORS, GRADUATE STUDENTS, AND K-12 TEACHERS IN THE INFORMATION AGE**

By Nathaniel S. Strauss\*

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**I. INTRODUCTION**

[1] In 1938, the original designers of the Superman comic book figure assigned their ownership rights to DC Comics for \$130.<sup>1</sup> On January 1, 2013, their heirs plan to reclaim those rights in court.<sup>2</sup> The impending

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\* Attorney, Karr Tuttle Campbell; J.D., University of Washington School of Law; B.A., Biochemistry, Columbia University. The author would like to extend special thanks to Clark C. Shores, Gail Dykstra, and Prof. Robert Gomulkiewicz for their inspiration and invaluable feedback.

<sup>1</sup> See Scott M. Hervey, *Superman and a Super Copyright Battle*, WEINTRAUB GENSHLEA CHEDIAK L. CORP. (Apr. 2, 2008), [http://weintraub.com/Publications/Superman\\_and\\_a\\_Super\\_Copyright\\_Battle](http://weintraub.com/Publications/Superman_and_a_Super_Copyright_Battle).

<sup>2</sup> See Nikki Finke, *Why Is DC/WB Vendetta Against Superman Copyright Lawyer Relying on Stolen Files?*, DEADLINE HOLLYWOOD (June 14, 2011, 4:08 PM), <http://www.deadline.com/2011/06/attorney-marc-toberoffs-appeal-denied-as-part-of-dc-comics-warner-bros-suit/>.

Superman litigation will herald a wave of a new type of action, known as copyright termination. The Copyright Act of 1976 (“Copyright Act”)<sup>3</sup> granted the original authors of creative works the right to recover rights assigned to publishers, media companies, and other parties, after a period of thirty-five years.<sup>4</sup> Since the Copyright Act became effective on January 1, 1978,<sup>5</sup> the original authors may first assert their termination rights on January 1, 2013.

[2] Consider in conjunction a seemingly unrelated issue that has simmered for many decades: when a university professor creates a copyrightable work such as an article, a book, or a computer program, absent any kind of contractual arrangement, does the work belong to the professor or to the university? Despite the widespread belief that the work belongs to the professor who creates it,<sup>6</sup> the law is far from clear in this area. Copyright law’s “work-for-hire” doctrine states that works made during the scope of the creator’s employment belong to his or her employer.<sup>7</sup> Case law is notoriously unclear on whether works created by a professor fall into a “teacher exception” to that doctrine.<sup>8</sup>

[3] Ownership of faculty-created works remains unclear largely due to a dearth of litigation in the area. Published court opinions on the subject

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<sup>3</sup> 17 U.S.C. §§ 101-810 (2006).

<sup>4</sup> *See id.* § 203.

<sup>5</sup> *See id.* § 301.

<sup>6</sup> *See infra* p. 6.

<sup>7</sup> *See* 17 U.S.C. § 101.

<sup>8</sup> *See infra* Parts I-III.

are few and far between for two reasons.<sup>9</sup> First, universities tend to be averse to litigation, especially against their own faculty members.<sup>10</sup> They are loath to disturb institutional traditions and spark uprisings on their campuses and in their communities. Second, most, if not all, educational institutions preempt potential disputes over copyright ownership through their faculty policies and employment contracts.<sup>11</sup> A modern university's standard practice often includes a copyright section in its intellectual property policy that addresses the division of ownership for works created by its professors.<sup>12</sup>

[4] What does the impending Superman litigation have to do with a largely academic debate over the ownership rights of universities and their employees? Notably, the Copyright Act does not extend termination rights to works made for hire.<sup>13</sup> Thus, the Superman action will likely encourage a burst in litigation over the boundaries of the work-for-hire doctrine.<sup>14</sup> In fact, lawsuits seeking declaratory judgments concerning

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<sup>9</sup> See *infra* Parts I-III and accompanying notes. The cases cited in this article represent an exhaustive list of all known published court opinions on the academic work-for-hire issue.

<sup>10</sup> See WENDY S. WHITE, WHAT TO DO WHEN YOU GET A SUBPOENA OR A LEGAL NOTICE OR COMPLAINT? 7 (2010).

<sup>11</sup> See Jed Scully, *The Virtual Professorship: Intellectual Property Ownership of Academic Work in a Digital Era*, 35 MCGEORGE L. REV. 227, 257 (2004).

<sup>12</sup> See Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL'Y 275, 294-99 (2002) (citing Laura G. Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223 (1992)).

<sup>13</sup> See 17 U.S.C. § 304(c) (2006).

<sup>14</sup> See Eric C. Osterberg, *Copyright Termination – Watch out for Work for Hire*, IP LEGAL WATCH (Feb. 8, 2010, 11:57 AM), <http://iplawwatch.foxrothschild.com/2010/02/articles/copyrights/copyright-termination-watch-out-for-work-for-hire/>; Larry Rohter, *A Village Person Tests the Copyright Law*, N.Y. TIMES (Aug. 16, 2011),

artists' termination rights are already impacting the doctrine.<sup>15</sup> This litigation is drawing the attention of the software industry and concerning some companies that their long-time engineers will attempt to assert control over company programming codes.<sup>16</sup> In addition, the litigation will likely have a major impact on whether teachers will own the copyrights to the works they create.

[5] The faculty work-for-hire issue will most likely encourage a significant but more gradual increase in litigation in coming years for reasons unrelated to termination rights. In the past, universities have refrained from disputing the ownership of faculty-created works in part because they rarely expected those works – mostly scholarly articles and books – to become commercially marketable.<sup>17</sup> However, many universities facing budget shortfalls are turning to their technology transfer divisions in order to transform intellectual property into a

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<http://www.nytimes.com/2011/08/17/arts/music/village-people-singer-claims-rights-to-ymca.html?pagewanted=all> (discussing the legal battle between Victor Willis and several record companies over Willis' termination rights to songs he helped create while a member of the Village People); Larry Rohter, *Record Industry Braces for Artists Battles over Song Rights*, N.Y. TIMES (Aug. 15, 2011), <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html> (describing imminent lawsuits involving musicians' termination rights and the work-for-hire doctrine).

<sup>15</sup> See, e.g., *Marvel Worldwide, Inc. v. Kirby*, No. 10 Civ. 141(CM)(KNF), 2011 U.S. Dist. LEXIS 82868 (S.D.N.Y. July 28, 2011) (holding that comic book characters such as "The Fantastic Four" and "The X-Men" were works made for hire by Marvel Comics).

<sup>16</sup> Cf. Justin Hughes, *Market Regulation and Innovation: Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 579-580 (2005) ("In the software industry, it is widely accepted that programmers reuse sections of code from prior programs.").

<sup>17</sup> See Scully, *supra* note 11, at 239.

significant source of revenue.<sup>18</sup> While most universities have focused their efforts on patents, some technology transfer offices look to copyrights as well.<sup>19</sup> In the words of one commentator, “[t]he ownership of academic work, non-patentable work, is now on the table as a negotiation item between faculties and their employing universities.”<sup>20</sup>

[6] Moreover, professors are creating more copyrightable works of substantial commercial value.<sup>21</sup> Science and engineering departments have created much of the computer software powering the Internet economy.<sup>22</sup> Digital media, such as online content and databases, may carry huge commercial value.<sup>23</sup> Universities and colleges take particular

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<sup>18</sup> See Alexander Poltorak, *Thar’s Gold in Them Thar Patents: Why It Pays to Protect Patent Portfolios*, UNIV. BUS. (Oct. 2009), <http://www.universitybusiness.com/viewarticle.aspx?articleid=1408&p=2>.

<sup>19</sup> See Arti K. Rai et al., *University Software Ownership and Litigation: A First Examination*, 87 N.C. L. REV. 1519, 1525 (2009) (“[I]n contrast with biotechnology, where copyright is not available, universities can use software copyright to achieve revenue generation goals.”); Scully, *supra* note 11, at 229, 231, 259.

<sup>20</sup> Scully, *supra* note 11, at 260.

<sup>21</sup> See *id.* at 239 (explaining how this was not the case “before the arrival of digital distribution by the Internet ten years ago”).

<sup>22</sup> See *id.* at 257 (chronicling the development of the “information economy,” in which “[w]ealth could now be more easily created from the acquisition, manipulation, and dissemination of information through computers and the Internet than from the manufacture and distribution of tangible goods like razors and race cars”).

<sup>23</sup> See Gregor Pryor, Sachin Premnath & Joseph Rosenbaum, *Commercial Risks and Rewards of the Social Media Phenomenon*, INT’L L. OFFICE (Feb. 18, 2010), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=28190a25-de10-4635-94a1-2b54f99b06fb>.

interest in digital course materials such as online lectures.<sup>24</sup> Modern distance education, a rapidly growing industry, depends on such materials and attracts both educational non-profit and for-profit entities.<sup>25</sup> Many universities have turned to online education to increase their tuition costs and revenue relatively cheaply.<sup>26</sup> Meanwhile, other institutions have begun to distribute digital course materials online at little or no cost.<sup>27</sup> The Massachusetts Institute of Technology, for example, now publishes all of its course lectures online for free to the general public.<sup>28</sup> Apple Computer, Inc. has created iTunes U, a free online service that allows users to consume educational content on their handheld audio and video devices.<sup>29</sup> These free services likely will cause friction in the distance education industry.

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<sup>24</sup> See Glenda Morgan, *Faculty Ownership and Control of Digital Course Materials*, 5 TEACHING WITH TECH. TODAY, no. 4 (Univ. of Wis./ Office of Learning and Info. Tech., Madison, Wis.), Jan. 25, 2000, available at <http://www.wisconsin.edu/tt/facown.htm>.

<sup>25</sup> See U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 20-23 (1999) [hereinafter REPORT ON COPYRIGHT]; Michael W. Klein, “*The Equitable Rule*”: *Copyright Ownership of Distance-Education Courses*, 31 J.C. & U.L. 143, 146-47 (2004).

<sup>26</sup> See REPORT ON COPYRIGHT, *supra* note 25, at 22-24 (“One major benefit of [distance education] is that educational institutions have the costs of expensive distance education technologies defrayed by their corporate partners . . . and often gain access to the latest research of leading academics as reflected in their curriculum.”); Klein, *supra* note 25, at 148-49 (providing examples of several universities who are offering distance education courses in conjunction with for-profit ventures); Scully, *supra* note 11, at 231.

<sup>27</sup> See Klein, *supra* note 25, at 149; John Markoff, *Virtual and Artificial, but 58,000 Want Course*, N.Y. TIMES (Aug. 15, 2011), <http://www.nytimes.com/2011/08/16/science/16stanford.html?pagewanted=print>.

<sup>28</sup> See Klein, *supra* note 25, at 149.

<sup>29</sup> See Jeffrey Selingo, *Is iTunes U for You?*, WASH. POST, Nov. 4, 2007, at W22.

[7] In fact, disputes over digital course materials have already arisen on traditional college campuses. In 1998, Concord Law School, an online-only institution, contracted prominent Harvard Law School professor Arthur Miller to produce a lecture series on Civil Procedure.<sup>30</sup> Harvard objected, based on university policy that prohibited faculty from teaching at other educational institutions without permission from the administration.<sup>31</sup> The parties resolved the dispute out of court, but the action demonstrated the rising stakes surrounding distance education.<sup>32</sup> Regarding the dispute, Alan Dershowitz, another Harvard Law School professor, said, “[w]hat distinguishes the Internet from [other forms of distance learning] is the number of zeroes. The money is so overwhelming that it can skew people’s judgment.”<sup>33</sup>

[8] Perhaps the most remarkable aspect of the faculty work-for-hire issue is the near-universal assumption by the relevant parties – professors, university administrators, and publishers – that professors own the works they create.<sup>34</sup> For example, during the Harvard-Miller dispute, Harvard professor Henry Louis Gates, Jr. said, “I’ve been teaching the same course

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<sup>30</sup> Amy Dockser Marcus, *Seeing Crimson: Why Harvard Law Wants to Rein in One of Its Star Professors*, WALL ST. J., Nov. 22, 1999, at A1.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.* (illustrating how Arthur Miller’s punishment will amount to no more than sanctions issued by the university); *see also* Klein, *supra* note 25, at 192 (discussing the friction caused by the University’s policy requiring permission from the dean prior to serving as a teacher or consultant at an Internet-based institution).

<sup>33</sup> Marcus, *supra* note 30.

<sup>34</sup> *Cf.* Pub. Affairs Assocs., Inc. v. Rickover, 177 F. Supp. 601, 605 (D.D.C. 1959), *rev’d on other grounds*, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962) (“Many scientific articles published in technical journals are written by scientists employed by private concerns and their employers generally encourage such activities. No one would contend that the copyright on such articles would belong to the employer.”).



. . . for 23 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."<sup>35</sup> In fact, the case law is far from clear on the subject, and in the past twenty years, many commentators have declared the "teacher exception" to the work-for-hire doctrine to be dead.<sup>36</sup>

[9] This article aims to advance discussion about faculty work-for-hire in light of a new set of decisions by the courts on the issue over the past decade. Part II chronicles the rise of the teacher exception in the common law and its subsequent fall with the Copyright Act of 1976, as well as the U.S. Supreme Court's decision of *Community for Creative Non-Violence v. Reid*<sup>37</sup> ("CCNV"). Part III analyzes how commentators have reacted against the disappearance of the exception and the political and sociological underpinnings of those reactions. Part IV describes how some courts have revived, at least in part, the teacher exception in recent years. Part V proposes a scope for the exception consistent with some of these recent decisions and balances the binding force of the Copyright Act and *CCNV* against the compelling policies under which courts originally established the exception. The proposal introduces a two-part test: (1) a work, to be considered authored by its academic creator, must be scholarly in nature; and (2) the creator must have an occupation such that he or she has a traditional expectation of ownership. Under this test, the teacher exception would apply: to university faculty, but not to high school teachers; to scholarly works, but not course or administrative materials; and not only to teaching faculty, but to non-teaching faculty, graduate students, and many other academics.

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<sup>35</sup> Marcus, *supra* note 30.

<sup>36</sup> See *infra* pp. 13-14 and notes 85-86.

<sup>37</sup> *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

## II. THE DEVELOPMENT AND NEAR ABANDONMENT OF THE TEACHER EXCEPTION

[10] Historically, the trajectory of the teacher exception has not followed a straight line. The exception emerged in the common law in 1929 and flourished throughout the middle portion of the Twentieth Century.<sup>38</sup> However, the codification by the Copyright Act of 1976 of the work-for-hire doctrine<sup>39</sup> jeopardized the fate of the teacher exception. The 1989 Supreme Court decision of *Community for Creative Non-Violence v. Reid* defined what the Copyright Act meant by the term “work made for hire.”<sup>40</sup> Its definition seemed to represent the final nail in the coffin of the teacher exception and faculty authorship of creative works.

### A. The Rise of the Exception

[11] As a general rule, ownership of creative works belongs to those who create them.<sup>41</sup> Typically, copyright law designates these people as authors.<sup>42</sup> However, a work “made for hire” is considered authored by the creator’s employer, not the creator.<sup>43</sup> Prior to 1976, the common law well

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<sup>38</sup> See generally *Sherrill v. Grieves*, 57 Wash. L. Rep. 286 (D.C. 1929) (establishing the teacher exception).

<sup>39</sup> See 17 U.S.C. § 201(b) (2006) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

<sup>40</sup> See generally *Reid*, 490 U.S. at 737-39, 742-43, 750-51.

<sup>41</sup> See 17 U.S.C. § 201(a).

<sup>42</sup> See *id.* (“Copyright in a work protected under this title vests initially in the author or authors of the work.”).

<sup>43</sup> *Id.* § 201(b).

established this “work-for-hire” doctrine, both in state and federal courts.<sup>44</sup> The rule acknowledges that employers often invest substantial resources to support the creative work of their employees.<sup>45</sup> Often an employer would not invest such resources, commission the work, or even hire the creative employee if the employer did not receive ownership of the work.<sup>46</sup>

[12] In 1929, a District of Columbia court considered a case that challenged the work-for-hire doctrine in the educational context.<sup>47</sup> Professor Sherrill, an Army officer and military instructor, had written a textbook about military sketching and map reading.<sup>48</sup> Prior to publication,

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<sup>44</sup> See, e.g., *Solomons v. United States*, 137 U.S. 342, 346 (1890) (“If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer.”); *Zahler v. Columbia Pictures Corp.*, 4 Cal. Rptr. 612, 617 (Cal. Ct. App. 1960) (“Where an employe[sic] creates something as part of his duties under his employment, the thing created is the property of his employer . . . .”); *Wallace v. Helm*, 161 U.S.P.Q. (BNA) 121, 123 (Cal. App. Dep’t Super. Ct. 1969) (“Plaintiff as hirer of defendant M And S, is the owner of exclusive property rights . . . of the detailed working drawings prepared by said defendant . . . during the course of his employment.”); *Phillips v. W.G.N., Inc.*, 307 Ill. App. 1, 10-11 (Ill. App. Ct. 1940) (“We think the great weight of the evidence is that plaintiff was employed by defendants to do particular work; was paid for it and in such a situation under the law the ownership in the result of what was done belonged to defendants.”).

<sup>45</sup> See *Madey v. Duke Univ.*, 307 F.3d 1351, 1362 (Fed. Cir. 2002) (explaining that such “creative work” increases the status of the institution and lures “lucrative research, grants, students and faculty”).

<sup>46</sup> See Sandip H. Patel, *Graduate Students’ Ownership and Attribution Rights in Intellectual Property*, 71 IND. L.J. 481, 496 (1996) (“In addition to their teaching and administrative duties, most professors are hired to conduct research within a specified discipline that draws on the inputs of other professors, students, and other university resources.”).

<sup>47</sup> See *Sherrill v. Grieves*, 57 Wash. L. Rep 286 (D.C. 1929).

<sup>48</sup> *Id.* at 286.

he printed a pamphlet incorporating a segment of his book.<sup>49</sup> The defendant, another writer, copied sections of the pamphlet.<sup>50</sup> When Professor Sherrill sued for copyright infringement, the defendant argued that Professor Sherrill did not own the pamphlet's contents.<sup>51</sup>

[13] Based on pure policy grounds, with no precedent to support it, the *Sherrill* court held that a professor, not his employer, owns the lectures he writes.<sup>52</sup> The court focused in part on the difficulty it saw in distinguishing spoken lectures from written ones, saying that there was no "authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him."<sup>53</sup> The court focused equally on pragmatic considerations, observing that "officers do write such books which are copyrighted and used in Government schools with the approval of the military establishment and such books are found in the libraries of those establishments."<sup>54</sup> In essence, the *Sherrill* court reasoned that institutional tradition and regular practice supported the professor's ownership of his lectures.<sup>55</sup>

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<sup>49</sup> *Id.* at 290.

<sup>50</sup> *Id.* at 286, 289-90.

<sup>51</sup> *See id.* at 290 ("The defendants, while claiming that no use was made by [defendant] of any part of the Leavenworth Pamphlet, contend . . . [the] pamphlet is a 'publication of the United States Government.'").

<sup>52</sup> *See Sherrill*, 57 Wash. L. Rep. at 290.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Cf. id.* The logical corollary is that holding otherwise would have had widespread and severe downstream effects on third parties such as military libraries and their readers.

[14] It took forty years for another published opinion on faculty work-for-hire to arise.<sup>56</sup> In *Williams v. Weisser*, the California Court of Appeals encountered a college note-taking company that hired students at the University of California Los Angeles to attend classes and take lecture notes, which the company then published.<sup>57</sup> The plaintiff, an anthropology professor, sued the company for copyright infringement.<sup>58</sup> As in *Sherrill*, the defendant argued the professor did not own his lectures.<sup>59</sup> Citing *Sherrill*, the court held that a professor owns the common law copyright to his own lectures.<sup>60</sup>

[15] The *Williams* court drew from some of the same policies as *Sherrill*, reasoning that a university should not “prescribe [a professor’s] way of expressing the ideas he puts before his students.”<sup>61</sup> More notably, however, the court invoked the concepts of academic freedom and movement, stating, “[p]rofessors are a peripatetic lot, moving from campus to campus. The courses they teach begin to take shape at one institution and are developed and embellished at another.”<sup>62</sup> The court explicitly established what subsequently became known as the teacher

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<sup>56</sup> See *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

<sup>57</sup> See *id.* at 543.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* (“On appeal defendant [argued] . . . [t]he common law copyright in plaintiff’s lectures presumptively belonged to UCLA.”).

<sup>60</sup> See *id.* at 549 (“There is therefore no real difference between *Sherrill* and plaintiff. Neither was under a duty to make notes, neither was under a duty to prepare for his lectures during any fixed hours, but the notes that each made did directly relate to the subjects taught.”).

<sup>61</sup> *Williams*, 78 Cal. Rptr. at 546.

<sup>62</sup> *Id.*

exception: “University lectures are *sui generis*. Absent compulsion by statute or precedent, they should not be blindly thrown into the same legal hopper with valve designs” or other creative works that had previously been held to fall under the work-for-hire doctrine.<sup>63</sup>

[16] In light of the sparse case law in the area of faculty work-for-hire, the California Court of Appeals’ decision became the established common law for all intents and purposes.<sup>64</sup> No court prior to the passage of the Copyright Act of 1976 ever extended the work-for-hire doctrine to professors or other academics.<sup>65</sup> In the 1970s, commentators, most notably Professor Melville Nimmer, came to use the term “teacher exception” to describe the rule established by *Sherrill* and *Williams*, arguably implying that it would extend to all types of works by all teachers, including K-12 educators.<sup>66</sup> Few considered that the policy bases on which *Sherrill* and *Williams* rested might not apply to some types of works, or apply in the K-12 classroom.<sup>67</sup>

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<sup>63</sup> *Id.* at 547 (providing a list of various other works that were held as “works-for-hire” by courts across the country).

<sup>64</sup> See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1][b][i] & n.94 (David Nimmer ed., Matthew Bender & Co. 2011), available at LexisNexis Nimmer (tracing the history of court rulings on the teacher exception leading up to the 1976 Act).

<sup>65</sup> See *id.*; see also *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987) (“This has been the academic tradition since copyright law began . . .”).

<sup>66</sup> See NIMMER & NIMMER, *supra* note 64, § 5.03[B][1][b][i] (using “teacher exception” for the first time in Nimmer’s 1978 edition); Pamela A. Kilby, *The Discouragement of Learning: Scholarship Made for Hire*, 21 J.C. & U.L. 455, 458-59 (1995); Elizabeth Townsend, *Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University*, 4 MINN. INTELL. PROP. REV. 209, 211 (2003).

<sup>67</sup> But see Russ VerSteeg, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 Iowa L. Rev. 381, 396 (1990) (“Should the Williams conclusion be equally applicable to the not so peripatetic high school and grade school teachers?”).

## B. The Copyright Act of 1976, CCNV, and the Apparent Collapse of the Exception

[17] Ironically, *Williams*' qualification of the teacher exception "absent compulsion by statute or precedent"<sup>68</sup> foreshadowed the events of the next twenty-five years. In 1976, Congress passed its landmark re-write of the copyright rules, effectively harmonizing them around the country by removing the last vestiges of common law.<sup>69</sup> One of the 1976 Act's many changes was to codify the work-for-hire doctrine.<sup>70</sup> The new law states in part: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise . . . owns all of the rights comprised in the copyright."<sup>71</sup> The Act defines a "work made for hire" as one "prepared by an employee within the scope of his or her employment."<sup>72</sup> The Act does not define the terms "employee" or "scope of one's employment."<sup>73</sup> The legislative history also provides no clue as to how Congress intended the provision to apply to teachers and other academics.<sup>74</sup>

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<sup>68</sup> *Williams*, 78 Cal. Rptr. at 547.

<sup>69</sup> See generally Copyright Act, 17 U.S.C. §§ 101-810 (2006) (originally enacted as of Oct. 19, 1976, 90 Stat. 2541).

<sup>70</sup> *Id.* § 201(b).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* § 101.

<sup>73</sup> See *id.* (leaving the terms "employment" and "scope of employment" out of the definitions section).

<sup>74</sup> See H.R. REP. NO. 94-1476, at 121 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5736-37 (discussing the laborious task of adequately defining

[18] Because *Williams* had so clearly created a special exception for teachers, or at least for professors, and because the Copyright Act codified the work-for-hire doctrine without reference to any exception for teachers, “the conclusion that the Act abolished the exception may seem inescapable.”<sup>75</sup> Still, at least one avenue remained for faculty ownership: academic works might fall outside of the scope of a professor’s employment and might thereby escape the work-for-hire doctrine altogether.

[19] The Supreme Court defined the term “employee” under the Copyright Act in 1989 with the landmark case of *Community for Creative Non-Violence v. Reid*.<sup>76</sup> In that case, the creator was not a teacher, but an artist.<sup>77</sup> A non-profit organization contracted with James Reid, a sculptor, to produce a statue “dramatiz[ing] the plight of the homeless.”<sup>78</sup> After Mr. Reid finished his work, communication faltered, and CCNV eventually filed an infringement action for ownership of the statue.<sup>79</sup> The Supreme Court decided Mr. Reid was not an employee of the non-profit organization; therefore, CCNV was not entitled to the statue under the

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“works made for hire” in the Act); *see also* *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (“Until 1976, the statutory term ‘work made for hire’ was not defined”); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859, 888-890 (1987) (arguing the 1976 Act’s “pre-legislative dialogue” indicates the term “employee” was meant to apply only to a “statutory worker in a long-term position”).

<sup>75</sup> *Hays*, 847 F.2d at 416.

<sup>76</sup> *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 732 (1989).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 733.

<sup>79</sup> *See id.* at 735.



work-for-hire doctrine.<sup>80</sup> More importantly for future cases, the Court held that in determining whether a work is a work made for hire under the Copyright Act, courts should apply the principles of the common law of agency.<sup>81</sup> It reasoned that:

In 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. . . . Nothing in the text of the work for hire provisions indicates that Congress used the words ‘employee’ and ‘employment’ to describe anything other than [that relationship].<sup>82</sup>

[20] Since the Court held that Reid was not an employee of the organization,<sup>83</sup> it did not examine the “scope of employment” issue. It nevertheless recognized that “scope of employment” was a “widely used term of art in agency law,”<sup>84</sup> and lower courts have universally interpreted *CCNV* to require the superimposition of the common law of agency on “scope of employment” analyses.<sup>85</sup> Section 228 of the Restatement (Second) of Agency, representing the common law of the time regarding whether some work is within the scope of employment, indicated courts could consider whether “(a) [the work] is of the kind [the employee] is

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<sup>80</sup> *See id.* at 752-53.

<sup>81</sup> *See Reid*, 490 U.S. at 739-40.

<sup>82</sup> *Id.* (citations omitted).

<sup>83</sup> *See id.* at 752.

<sup>84</sup> *Id.* at 740.

<sup>85</sup> *See, e.g., Price v. Fox Entm’t Grp., Inc.*, 473 F. Supp. 2d 446, 456 (S.D.N.Y. 2007).

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 . . . .”<sup>86</sup> Lower courts have continued to apply this test, despite the fact that since 1989 both the common law and the Restatement have shifted significantly toward finding more activity to fall within the scope of employment.<sup>87</sup> While neither *CCNV* nor its lower-court progeny addressed the teacher exception, the message was clear: the courts intended to settle the meanings of the Copyright Act’s references to “employee” and “scope of employment” in its work-for-hire provision. The rules established in those cases applied to traditional master-servant relationships and to non-traditional, unsupervised contractual relationships alike. It seemed that there was no exception for teachers or others on the university campus.

### III. REACTIONS TO THE APPARENT DEATH OF THE TEACHER EXCEPTION

[21] Since the late 1980s, commentators have declared the teacher exception to be effectively dead, relegated to the dustbin of jurisprudential history by the Copyright Act and *CCNV*.<sup>88</sup> Courts and commentators alike have lamented its disappearance, and some have called for its revival.<sup>89</sup> This section examines some of the reactions of those courts and commentators and summarizes their main arguments. Part IV will

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<sup>86</sup> RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

<sup>87</sup> See RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006). The impact of this common-law shift on the work-for-hire doctrine is unclear, and has not been discussed by any courts or commentators. It is beyond the scope of this article.

<sup>88</sup> See, e.g., Klein, *supra* note 25, at 168-69; Packard, *supra* note 12, at 314; Townsend, *supra* note 66, at 243, 245.

<sup>89</sup> See, e.g., Hays v. Sony Corp. of Am., 847 F.2d 412, 416-17 (7th Cir. 1988); Packard, *supra* note 12, at 314; Townsend, *supra* note 66, at 282-83.

demonstrate how later courts invoked these arguments to resuscitate the teacher exception, at least partially. Part V will evaluate some of these arguments in order to design a practicable test to design a reasonable scope for the revived exception.

#### A. *Weinstein* and *Hays*: The Exception on Life Support

[22] The Seventh Circuit decided two landmark teacher work-for-hire cases in the late 1980s,<sup>90</sup> shortly before *CCNV*. Those cases, *Weinstein v. University of Illinois* and *Hays v. Sony Corporation of America*, recognized the threat that the Copyright Act posed to the teacher exception, yet both managed to avert direct confrontation, each in its own way.<sup>91</sup> Remarkably, these cases represent two very different approaches to the post-1976 (and post-*CCNV*) teacher exception dilemma.

[23] The first case, *Weinstein*, involved a “private war”<sup>92</sup> among university faculty members at the University of Illinois over the order of authorship on a scholarly article published by the American Journal of Pharmaceutical Education.<sup>93</sup> Professor Weinstein sued the university and the other faculty members, claiming that they had deprived him of his due process rights.<sup>94</sup> The defendants responded in part by arguing that Weinstein lacked a property interest in the article.<sup>95</sup> The university had a

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<sup>90</sup> See *Hays*, 847 F.2d at 417; *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987).

<sup>91</sup> *Hays*, 847 F.2d 412; *Weinstein*, 811 F.2d 1091.

<sup>92</sup> *Weinstein*, 811 F.2d at 1092.

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* at 1095.

written policy incorporated into Weinstein's employment contract that defined "work for hire" for purposes of its employees; yet it was not clear under that policy who actually owned the article, the professor or the university.<sup>96</sup>

[24] In an opinion penned by Judge Easterbrook and joined by Judge Posner, the Seventh Circuit held that the policy granted ownership of the article to Professor Weinstein.<sup>97</sup> In doing so, it first acknowledged that the Copyright Act "is general enough to make every academic article a 'work for hire' and therefore vest exclusive control in universities rather than scholars."<sup>98</sup> It then examined the university's policy only cursorily, and concluded that the policy "reads more naturally when applied to administrative duties," despite no reference to administrative duties in the policy.<sup>99</sup> The court relied almost exclusively on its recognition of an "academic tradition" that existed "since copyright law began."<sup>100</sup> It noted a concession by the university that "a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof,"<sup>101</sup> and claimed, "[w]e

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<sup>96</sup> *See id.* at 1094.

<sup>97</sup> *See Weinstein*, 811 F.2d at 1094-95. The *Weinstein* court decided the *ownership* of the article under the university's faculty employment contract, but not the article's *authorship*. *Id.* Assuming that the professor assigned the article to the American Journal of Pharmaceutical Education, the decision does not bear directly on who would be able to assert termination rights to the article 35 years after its creation in 1985. *See id.* at 1092. Thus, if the article was in fact a work made for hire, then ownership might revert to the university in 2020 rather than to Professor Weinstein.

<sup>98</sup> *Id.* at 1094.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (citing NIMMER & NIMMER, *supra* note 64, § 5.03[B][1][b]).

<sup>101</sup> *Id.*

would be surprised if any member of the faculty of the College of Pharmacy treats his academic work as the property of the University.”<sup>102</sup> Thus, *Weinstein* represents two arguments central to the faculty work-for-hire debate: first, that an “academic tradition” weighs heavily in favor of recognizing the teacher exception; and second, that the teacher exception did not work so much as a legal rule in the absence of contract, but as a canon for interpreting employment contracts and university policies.

[25] *Hays*, the second of the Seventh Circuit’s cases on faculty work-for-hire, did not involve an employment contract including a copyright provision upon which the court could fall back.<sup>103</sup> Remarkably, Judge Posner wrote the *Hays* opinion and was joined by Judge Easterbrook.<sup>104</sup> Two high school teachers had prepared an instructional manual on how to operate the school’s Sony word processors, and had distributed the manual to students and colleagues.<sup>105</sup> Their employment contracts made no mention of copyrightable works.<sup>106</sup> Two years later, the teachers discovered that Sony had published a manual very similar to theirs, “in many places a verbatim copy,” and sued for copyright infringement.<sup>107</sup> Sony defended in part by arguing that the teachers did not own the manual they wrote.<sup>108</sup> The trial court dismissed the complaint, calling its claims

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<sup>102</sup> *Weinstein*, 811 F.2d at 1094.

<sup>103</sup> See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 417 (7th Cir. 1988) (“The plaintiffs’ employment contracts with the school district contain no reference to copyright . . .”).

<sup>104</sup> *Id.* at 413.

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* at 417.

<sup>107</sup> *Id.* at 413.

<sup>108</sup> See *Hays*, 847 F.2d. at 415.

and requests for relief frivolous, and awarded Rule 11 sanctions to Sony.<sup>109</sup>

[26] The Seventh Circuit did not rule on dismissal itself, since the plaintiffs had failed to perfect their appeal on that issue.<sup>110</sup> However, Judge Posner, a university professor himself, seemed to go out of his way to declare his support of the teacher exception. In doing so, he relied on pure policy grounds, arguing that “the universal assumption and practice [prior to 1976] was that . . . the right to copyright such writing belonged to the teacher rather than to the college or university,”<sup>111</sup> and that “[t]he reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were.”<sup>112</sup> Judge Posner went well beyond the reasoning of *Weinstein*, observing that “[a] college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings . . . .”<sup>113</sup> He continued:

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

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<sup>109</sup> *See id.* at 413.

<sup>110</sup> *See id.* at 417.

<sup>111</sup> *Id.* at 416.

<sup>112</sup> *Id.*

<sup>113</sup> *Hays*, 847 F.2d at 416.

that the exception had survived the enactment of the 1976 Act.<sup>114</sup>

[27] *Hays* stands for three principles in support of the teacher exception. First, as noted in *Weinstein*, there is a widespread assumption among professors and universities alike, based on academic tradition, that professors own the scholarly works they create.<sup>115</sup> Second, disturbance of that academic tradition would “wreak havoc” on settled practices.<sup>116</sup> Finally, the absence of a teacher exception would be incongruent with “the conditions of academic production,” which foster scholarship in the university context.<sup>117</sup> In effect, Judge Posner defended what he saw as an attack on the principle of academic freedom.

[28] Perhaps most remarkably, *Hays* concerns high school teachers,<sup>118</sup> not university professors, so these principles had little relevance to the facts of the case. Judge Posner seemed to acknowledge this by reasoning that, even if the teacher exception no longer existed, the word processor manual may have escaped the work-for-hire doctrine because, “[u]nlike college and university teachers, high-school teachers normally are not expected to do writing as part of their employment duties.”<sup>119</sup> However, the court did not address the possibility that the teacher exception did not, or should not, extend from the college campus to the high school classroom.

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<sup>114</sup> *Id.* at 416-17.

<sup>115</sup> *See id.* at 416.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *Hays*, 847 F.2d at 413.

<sup>119</sup> *Id.* at 417.

## B. Commentators' Reactions

[29] In *Hays*, Judge Posner noted, “it is widely believed that the 1976 Act abolished the teacher exception.”<sup>120</sup> Indeed, observers during the 1978-1989 period declared the exception either dead or knocking on death’s door.<sup>121</sup> If the Copyright Act provided the teacher exception’s coffin, then *CCNV* provided the nails. By holding that the common law of agency should manage the contours of the work-for-hire doctrine, regardless of whether a traditional employee or an artist (or, presumably, a professor or a high school teacher) created the copyrighted work, the Supreme Court seemed to leave little room for an exception based on a seldom-cited common-law copyright theory. Since 1989, some commentators have declared the teacher exception gone for good.<sup>122</sup> Others have argued it survives, not as a formal exception to the work-for-hire doctrine, but as a *Weinstein*-like canon for the interpretation of employment contracts or agency law.<sup>123</sup> Still others have argued that the exception lives on in true form, yet with little support from the courts

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<sup>120</sup> *Id.* at 416.

<sup>121</sup> See, e.g., Leonard D. Duboff, *An Academic’s Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC’Y U.S.A. 17, 24-25 (1984) (“This 1976 Copyright Act fails to support this traditional relationship between the academician and the institution in which he works.”); Todd F. Simon, *Faculty Writings: Are They “Works Made for Hire” Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485, 486 (1982) (“[S]tate common law copyright is pre-empted by federal copyright for most purposes [under § 301], undermining the precedential value of the handful of common law cases on point which might be utilized to excuse faculty from the work ‘made for hire’ provision of the 1976 Act.”).

<sup>122</sup> See, e.g., Klein, *supra* note 25, at 144; Packard, *supra* note 12, at 314.

<sup>123</sup> See, e.g., Kilby, *supra* note 66, at 459; James B. Wadley & JoLynn M. Brown, *Working Between the Lines of Reid: Teachers, Copyrights, Work-for-Hire and a New Washburn University Policy*, 38 WASHBURN L.J. 385, 427-28 (1999).



beyond *Hays*' dicta to support them.<sup>124</sup> As explained in Part III, however, the teacher exception *has* survived, and multiple court opinions have cited the exception approvingly.

#### IV. THE TEACHER EXCEPTION'S SURVIVAL INTO THE TWENTY-FIRST CENTURY

[30] After a period of near-silence by the courts on academic work-for-hire problems during the 1990s, the teacher exception has apparently lurched back from death in the 21st Century. No court has ever explicitly rejected it. Moreover, recent published federal decisions have accepted its continuing existence.<sup>125</sup> One such court, *Bosch v. Ball-Kell*, cites the exception explicitly to award authorship of copyrighted works to a university professor.<sup>126</sup> Considering the historical dearth of published court opinions on academic work-for-hire issues, one could say that the teacher exception is alive and kicking. This Part examines the case law that has revived the exception, and looks at courts' attempts to delineate its scope.

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<sup>124</sup> See, e.g., Robert A. Gorman, *Copyright Conflicts on the University Campus: The First Annual Christopher A. Meyer Memorial Lecture*, 47 J. COPYRIGHT SOC'Y U.S.A. 291, 304 (2000); Townsend, *supra* note 66, at 245-46.

<sup>125</sup> See, e.g., *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004); *Bosch v. Ball-Kell*, 80 U.S.P.Q.2d (BNA) 1713, 1719-20 (C.D. Ill. 2006).

<sup>126</sup> See *Bosch*, 80 U.S.P.Q.2d (BNA) at 1716-1722. The decision in *Bosch* only denied Defendant's Motion for Summary Judgment on the issue of whether *Bosch* owned the teaching materials in question. See *id.* at 1721. However, in the subsequent jury trial, the jury determined *Bosch* to be the owner of two of three sets of teaching materials. *Bosch v. Ball-Kell*, No. 03-1408, 2007 U.S. Dist. LEXIS 63785, at \*1-2 (C.D. Ill. Aug. 29, 2007). The defendant's Rule 50 Motion to Direct Entry of Judgment as a Matter of Law was subsequently denied. *Id.* at \*1, \*3.

### A. Recognition of the Exception by Some Courts

[31] The Second Circuit was the first court to recognize the continuing viability of the teacher exception, albeit implicitly.<sup>127</sup> In *Shaul v. Cherry Valley-Springfield Central School District*, decided in 2004, a public school district suspended William Shaul, a high school mathematics teacher, in connection with allegations that he had harassed and engaged in improper relations with several female students.<sup>128</sup> Following his suspension, school officials took teaching materials from his office, at one point drilling out the lock of one of his filing cabinets.<sup>129</sup> The materials included “tests, quizzes, and homework problems.”<sup>130</sup> No school policy addressed the ownership of such works.<sup>131</sup> Shaul then sued the school district under 42 U.S.C. § 1983, claiming that he had a property interest in the materials and that their seizure violated the Fourth Amendment.<sup>132</sup>

[32] Adhering to *CCNV* and common-law agency principles, the Second Circuit held that the high school owned the teaching materials that Shaul had created.<sup>133</sup> However, the court made the following response to Shaul’s argument that he owned the materials under the teacher exception:

The plaintiff . . . seeks to invoke an “academic” exception to the work-for-hire doctrine. *See Weinstein v. University*

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<sup>127</sup> *See generally Shaul*, 363 F.3d 177.

<sup>128</sup> *See id.* at 180.

<sup>129</sup> *See id.* at 181.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.* at 186.

<sup>132</sup> *See Shaul*, 363 F.3d at 181.

<sup>133</sup> *See id.* at 185-86.

of Illinois, 811 F.2d 101 (7th Cir. 1987). However, unlike the university employer in *Weinstein*, the School District in the instant case does not have a formal and written policy concerning work produced by teachers. Furthermore, the “academic tradition” granting authors ownership of their own scholarly work is not pertinent to teaching materials that were never explicitly prepared for publication by Shaul, as opposed to published articles by university professors.<sup>134</sup>

Thus, while the court did not endorse the teacher exception, neither did the court reject it in its entirety. Most interestingly, by distinguishing teaching materials created by high school teachers from published articles created by university professors,<sup>135</sup> it implicitly proposed a narrowing of the exception’s scope, if it existed at all. It rested its distinction on the contours of academic tradition, the principle on which *Weinstein* and *Hays* were based.<sup>136</sup>

[33] A year later, in *Pavlica v. Behr*, the Southern District of New York encountered another dispute in which a high school teacher claimed ownership of a work he created.<sup>137</sup> In that case, Robert Pavlica, a science teacher, wrote a manual explaining a method of teaching independent

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<sup>134</sup> *Id.* at 186 (citation omitted).

<sup>135</sup> *See id.*

<sup>136</sup> *See id.* (“However, unlike the university employer in *Weinstein*, the School District in the instant case does not have a formal and written policy concerning work produced by teachers.”) Ironically, however, by declining to extend the exception to the high school context or to unpublished teaching materials, the Second Circuit contradicted two of the most often-cited teacher exception precedents, *Hays* (high school teachers) and *Weisser* (unpublished teaching materials). *See Hays v. Sony Corp. of Am.*, 847 F.2d 412 (7th Cir. 1988); *Weinstein v. Univ. of Ill.*, 811 F.2d 1091 (7th Cir. 1987).

<sup>137</sup> *See Pavlica v. Behr*, 397 F. Supp. 2d 519 (2005).

science research to high school students.<sup>138</sup> He created the manual at his home, on his own time and without any involvement or direction by the school.<sup>139</sup> He then worked with two colleagues, under a grant from the National Science Foundation (“NSF”), to distribute the manual in a series of workshops outside of school.<sup>140</sup> He later sued those colleagues, alleging that they had copied and distributed the manual without his permission.<sup>141</sup> As in many other work-for-hire disputes, the defendants moved for summary judgment on the basis that Pavlica did not own the copyright to the manual.<sup>142</sup>

[34] The court denied the defendants’ motion finding sufficient evidence to show that Pavlica, and not his school, owned the copyright to the manual that he wrote.<sup>143</sup> While it did not rest its conclusion on the teacher exception, similar to *Hays*, Pavlica “‘prepared the manual on [his] own initiative without direction or supervision by [his] superiors.’”<sup>144</sup> The court distinguished the situation from *Shaul*, concluding that a reasonable jury could find that “Pavlica designed an entirely new course without assistance of or direction by his employer.”<sup>145</sup>

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<sup>138</sup> *See id.* at 522.

<sup>139</sup> *Id.*

<sup>140</sup> *See id.* at 523.

<sup>141</sup> *See id.* at 523-24.

<sup>142</sup> *See Pavlica*, 397 F. Supp. 2d at 524.

<sup>143</sup> *See id.* at 525-26. Finding that defendants’ motion for summary judgment should not be granted because a genuine issue of material fact existed on the question of ownership, the court noted that “[i]ndeed, even Byram Hills maintains that Pavlica owns the copyright to the manual and pays him the standard fee for use of the manual in its science research program.” *Id.* at 525.

<sup>144</sup> *Id.* at 526 (quoting *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 417 (7th Cir. 1988)).

<sup>145</sup> *Id.* at 525.

[35] The *Pavlica* opinion is significant to the teacher exception equation because it demonstrates that, even were courts do limit the teacher exception to the university setting, as *Shaul* did, K-12 teachers would retain ownership of many of the works they create. To do so they would simply have to prove that they created those works outside of the scope of their employment. Because K-12 teachers' duties to their schools are usually clearer than professors' duties to their universities, it is easier for them to demonstrate they had no duty to create the work in question. Therefore, the court easily found the drafting of the manual fell outside of the scope of Pavlica's employment. However, if a university professor had accepted the same NSF grant to write and distribute the very same manual, then the scope-of-employment analysis may have proven more difficult, and the court very well might have gone the opposite way.

[36] While *Shaul* and *Pavlica* cracked the door for the teacher exception, *Bosch v. Ball-Kell* slammed it wide open.<sup>146</sup> *Bosch*, decided by Judge Mihm of the Central District of Illinois in 2006, involved a dispute in the pathology department at the University of Illinois College of Medicine in Peoria ("UICOM").<sup>147</sup> The plaintiff, professor and course director Barbara Bosch, resigned from her position following a particularly vicious feud with two other members of the faculty, Susan Ball-Kell and Donald Rager.<sup>148</sup> Five days after Bosch's resignation as course director, Ball-Kell entered Bosch's office and took copies of her course materials, including lectures, exam questions, and laboratory protocols.<sup>149</sup> When Ball-Kell copied and used those materials to teach her

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<sup>146</sup> See generally *Bosch v. Ball-Kell*, 80 U.S.P.Q.2d (BNA) 1713 (C.D. Ill. 2006).

<sup>147</sup> *Id.* at 1715.

<sup>148</sup> See *id.* at 1715–16.

<sup>149</sup> *Id.*

own classes, Bosch sued for copyright infringement.<sup>150</sup> The defendants argued that the materials were “works made for hire” owned by UICOM.<sup>151</sup>

[37] The court held that it was Professor Bosch, rather than UICOM, who owned the course materials.<sup>152</sup> It explicitly rested its conclusion largely on the “logic” of the *Weinstein* and *Hays* pronouncements in support of the teacher exception.<sup>153</sup> It elaborated on what *Hays* called “the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production . . . .”<sup>154</sup> The court continued:

In the typical work for hire scenario, the employer assigns and directs the topic, content, and purpose of the work. In the academic setting, an employee may be assigned to teach a particular course, but then is generally left to use his or her discretion to determine the focus of the topic, the way the topic is going to be approached, the direction of the inquiry, and the way the material will ultimately be presented.<sup>155</sup>

[38] Interestingly, the defendants argued not that *Weinstein* and *Hays* were unpersuasive, or that the Supreme Court’s subsequent *CCNV*

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<sup>150</sup> *See id.* at 1716–17.

<sup>151</sup> *Bosch*, 80 U.S.P.Q.2d (BNA) at 1718 (quoting 17 U.S.C. § 201(b) (2006)).

<sup>152</sup> *See id.*

<sup>153</sup> *See id.* at 1719-21; *see also supra* note 126 (providing background information on the subsequent jury trial in this case).

<sup>154</sup> *Bosch*, 80 U.S.P.Q.2d (BNA) at 1719-20 (quoting *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988)).

<sup>155</sup> *Id.* at 1720.

decision overruled them, but that they applied solely to “faculty publications for scholarly review or self-promotion,” and not to course materials.<sup>156</sup> However, the court countered by pointing to the university’s intellectual property policy.<sup>157</sup> Within the category of “traditional academic copyrightable works,” the policy itself listed only “class notes [and] educational software”;<sup>158</sup> yet, citing *Weinstein*, the court considered evidence offered by Bosch of deliberations in the faculty senate regarding UICOM’s intellectual property policy.<sup>159</sup> That evidence demonstrated a “legislative intent, so to speak,” that the policy considered “course materials, such as syllabi, notes, etc.” to be “traditional academic copyrightable works,” owned by their faculty creators rather than by the university.<sup>160</sup> The court also pointed to further deliberations by a faculty senate committee that demonstrated “the general practice and understanding, by both faculty and apparently also by University counsel, that teaching materials fell within the [university policy’s] general rule of traditional academic works for which ownership would be vested in the author of the materials.”<sup>161</sup>

[39] What is perhaps most ironic about this line of reasoning is the court had no explanation of why the deliberative history of the university’s policy, as opposed to the policy’s text, should have had any bearing on the court’s decision. Under the Copyright Act, the employer owns a work made for hire “unless the parties have expressly agreed otherwise in a

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<sup>156</sup> *Id.* at 1720.

<sup>157</sup> *See id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See Bosch*, 80 U.S.P.Q.2d (BNA) at 1720.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1721.

written instrument signed by them.”<sup>162</sup> The *Weinstein* court examined the text of the University of Illinois’s intellectual property policy because Professor Weinstein’s employment contract incorporated it explicitly;<sup>163</sup> the *Bosch* court made no similar connection between Professor Bosch’s contract and the UICOM policy.<sup>164</sup> Moreover, the court made no indication that she was present during any of the committee meeting deliberations cited by the court.<sup>165</sup> In fact, one of the deliberations the court cited took place *after* Ball-Kell had taken the materials from Bosch’s office.<sup>166</sup> In summary, it is unlikely that Bosch had any privity with respect to the senate deliberations; therefore, they should have bound neither her nor UICOM.<sup>167</sup>

[40] *Bosch* is also notable because it highlights the potential for universities and their administrators to copy or distribute works even when those works fall under the teacher exception and are owned by their faculty members. After the court found sufficient evidence that Professor Bosch owned the copyright to her teaching materials to survive summary judgment, it then proceeded to analyze whether the university could be

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<sup>162</sup> 17 U.S.C. § 201(b) (2006).

<sup>163</sup> See *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987).

<sup>164</sup> See *Bosch*, 80 U.S.P.Q.2d (BNA) at 1720 (noting that Bosch sought confirmation of the policy from the University Intellectual Property Office).

<sup>165</sup> See *id.* at 1720. The court considered evidence presented by Bosch of a University senate committee deliberation as shown in meeting minutes, and formal findings stated in a committee report to the University president regarding her complaint. See *id.*

<sup>166</sup> *Id.* at 1716, 1720 (illustrating how Ball-Kell took the teaching materials on August 7, 2002, and the faculty senate committee report was dated April 12, 2003).

<sup>167</sup> See *Wadley & Brown, supra* note 123, at 423 (“It is unlikely that [many university IP] policies can satisfy the requirements of the writing envisioned by section 201(b) because they are typically not signed by the parties and do not expressly reverse the presumption of the [work-for-hire] doctrine.”).



shielded from liability by the fair use doctrine.<sup>168</sup> Therefore, the court refused to grant the university's motion for summary judgment on that basis.<sup>169</sup> A jury later found that UICOM's reproduction of two works owned by Bosch was considered fair use and "did not infringe on Bosch's copyrights."<sup>170</sup> Fair use may well protect universities and university administrators in many other contexts in which they would otherwise be infringing. It is important to note, however, that other defendants in faculty work-for-hire disputes, such as between faculty author and publishers arguing professors, do not have standing to assert termination rights, and would not be able to use this defense.

### **B. Omission (but Not Rejection) of the Exception by Other Courts**

[41] While the preceding cases show judicial recognition of faculty ownership, either outright or via the teacher exception, other courts in recent years granted ownership of faculty-created works to the employer without any reference to the exception.<sup>171</sup>

[42] *University of Colorado Foundation v. American Cyanamid* was a faculty work-for-hire dispute between a private vitamin manufacturer and

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<sup>168</sup> See *Bosch*, 80 U.S.P.Q.2d (BNA) at 1721-23.

<sup>169</sup> *Id.* at 1723.

<sup>170</sup> See *Bosch v. Ball-Kell*, No. 03-1408, 2007 U.S. Dist. LEXIS 63785, \*2-3 (C.D. Ill. Aug. 29, 2007) (discussing the reasons why the jury found the University's use of the teaching materials constituted fair use); see also Jeff Galin, *Bosch v. Ball-Kell: Faculty May Have Lost Control over Their Teaching Materials*, NAT'L COUNCIL OF TCHRS. OF ENG. (Sept. 17, 2008), <http://www.ncte.org/cccc/committees/ip/2007developments/boschvballkell>.

<sup>171</sup> See e.g., *Vanderhurst v. Colo. Mountain Coll. Dist.*, 16 F. Supp. 2d 1297 (D. Colo. 1998); *Univ. of Colo. Found. v. Am. Cyanamid*, 880 F. Supp. 1387 (D. Colo. 1995), *rev'd on other grounds*, 902 F. Supp. 221 (D. Colo. 1995); *Rouse v. Walter & Assocs.*, 513 F. Supp. 2d 1041 (S.D. Iowa 2007).

a university.<sup>172</sup> The manufacturer paid university faculty members to devise and study a reformulated prenatal vitamin.<sup>173</sup> The faculty submitted the research results for publication in professional journals and supplied the manufacturer with a courtesy copy of the submission.<sup>174</sup> Using the contents of that article and the university's research, the manufacturer procured a patent for the reformulated vitamin, prompting the university to file suit.<sup>175</sup> The defense argued that actual ownership of the research product and article was unclear, but offered no evidence to support this position.<sup>176</sup> The court concluded that the university owned the work, with no need to address in detail agency principles or the teacher exception.<sup>177</sup>

[43] *Vanderhurst v. Colorado Mountain College District* was an employment termination dispute in which the plaintiff, a veterinary professor and clinician, brought a copyright infringement claim against his

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<sup>172</sup> See *Cyanamid*, 880 F. Supp. at 1389.

<sup>173</sup> See *id.* at 1390.

<sup>174</sup> *Id.* at 1391 (noting the New England Journal of Medicine's rejection to publish the study in 1981, which was later accepted and published in the March 1983 volume of "Obstetrics and Gynecology").

<sup>175</sup> See *id.* at 1392. Notably, this case did not involve an authorship dispute between the university and its faculty, as patent ownership in faculty research was contractually assigned to the university pursuant to its policies. See *id.* at 1391. The faculty members did however join the university as plaintiffs in the litigation, which collectively alleged: conversion, fraud, wrongful naming of patent inventor, copyright and patent infringement, breach of confidentiality, and unjust enrichment. *Id.* at 1389.

<sup>176</sup> See *id.* at 1400 ("Cyanamid offers no evidence which places in issue the original authorship of the Article by [the faculty members], nor the [university's] entitlement to ownership of the copyright as their employer.").

<sup>177</sup> See *Cyanamid*, 880 F. Supp. at 1400-03 (assessing each element of the plaintiffs' copyright infringement claim).

former employer for allegedly infringing use of a “Veterinary Technology Outline” that he developed “in the course of teaching . . . .”<sup>178</sup> The court followed *CCNV* and agency principles and relied heavily upon the employer’s stated policy, which defined a faculty member’s duties to include “professional service activities [including], but not limited to, course, program and curriculum development [and] course preparations.”<sup>179</sup> The court made no mention of the teacher exception and granted summary judgment to the employer as “there [was] no genuine dispute that Vanderhurst’s creation of the Outline was connected directly with the work for which [he] was employed . . . and was fairly and reasonably incidental to his employment.”<sup>180</sup>

[44] In *Rouse v. Walter & Associates*, agricultural research professors at Iowa State University (“ISU”) sued an external consultant for alleged infringement of cattle-imaging software the faculty members had created together.<sup>181</sup> The consultant argued that ISU owned the copyright to software code used to develop new technology and the code was created during the course of research as a work for hire, therefore, the plaintiffs did not own the software.<sup>182</sup> Adhering closely to *CCNV* and its non-academic progeny, the court overlooked any possible teacher exception in its thorough analysis of agency principles, holding that ISU owned the copyright to the software code.<sup>183</sup> In particular, the court emphasized the

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<sup>178</sup> See *Vanderhurst v. Colo. Mountain Coll. Dist.*, 16 F. Supp. 2d 1297, 1298, 1307 (D. Colo. 1998).

<sup>179</sup> *Id.* at 1307 (internal quotation marks omitted).

<sup>180</sup> *Id.*

<sup>181</sup> See *Rouse v. Walker & Assocs.*, 513 F. Supp. 2d 1041, 1045-50 (S.D. Iowa 2007).

<sup>182</sup> See *id.* at 1053 (quoting 17 U.S.C. § 501(b) (2006)) (“Only [t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).

<sup>183</sup> See *id.* at 1055-61.

fact that the professors “were employed as faculty members of ISU” and dedicated their careers to developing the type of technology at issue.<sup>184</sup> The court also brushed aside evidence that the professors did “the ‘vast’ majority of programming”<sup>185</sup> at home on a personal computer, instead emphasizing the software was tested using university equipment.<sup>186</sup> The court also made no mention of the teacher exception.

[45] These decisions, particularly *Rouse*, demonstrate the uphill battle that university faculty members face in attempts to defend individual ownership absent a teacher exception. Whether by contract, university policy, or the seemingly inescapable precedent of *CCNV*, the scope of a professor’s employment includes the production of scholarly articles and teaching materials with unfortunate frequency.<sup>187</sup> In other words, the job description of many a professor is to “publish or perish,” that is, to create copyrightable works.<sup>188</sup> Under agency principles every work the professor creates and publishes is automatically a work made for hire, owned by the university.<sup>189</sup> What makes the university-professor relationship different from the traditional master-servant relationship envisioned by agency law is the fact that the university so rarely dictates the content, the approach, or even the subject of potential works.

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<sup>184</sup> *Id.* at 1061.

<sup>185</sup> *Id.* at 1058.

<sup>186</sup> *See Rouse*, 513 F. Supp. 2d at 1059-60.

<sup>187</sup> *See* U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 1 (2010-11 ed.), available at <http://www.bls.gov/oco/ocos066.htm> (describing professors’ general duties “to do their own research” and to “publish their findings in scholarly journals, books, and electronic media”).

<sup>188</sup> Klein, *supra* note 25, at 166.

<sup>189</sup> *See* Packard, *supra* note 12, at 289.

Moreover, the professor expects to control his or her scholarly work as a matter of academic freedom, a principle that implicates both intellectual progress and freedom of expression.<sup>190</sup>

#### V. A PROPOSED TWO-PRONGED TEST TO DELINEATE THE SCOPE OF THE TEACHER EXCEPTION

[46] As litigation over the work-for-hire doctrine in academic settings increases in the coming years, courts that accept the continuing viability of the teacher exception will inevitably have to grapple with the exception's scope. While some courts may accept the exception wholeheartedly, as the *Bosch* court did,<sup>191</sup> few would be so brazen as to suggest an across-the-board exemption for teachers from the work-for-hire doctrine, no matter what type of works they create. Moreover, if courts award to teachers a limited exemption from the general rule, then disputants will surely argue over who is a "teacher" and who is not. Also, non-teachers will surely argue they are just as entitled to an exemption.

[47] From a methodological standpoint, the dilemma faced by future courts is a classic one, that of a tension between statutory text and binding higher court precedent on the one hand, and countervailing policy considerations on the other. In similar situations in other areas of law, the way a lower court decides depends largely on its philosophy regarding deference to prior legislative and judicial decision-making on the one hand, and the subjective weight the court assigns to the countervailing policies on the other.<sup>192</sup> In this case, many particularly strong policy-based arguments in favor of recognizing the teacher exception exist, as

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<sup>190</sup> See *id.* at 289-93 (discussing the connection between academic freedom and freedom of expression).

<sup>191</sup> See *Bosch v. Ball-Kell*, 80 U.S.P.Q.2d (BNA) 1713, 1719-21 (C.D. Ill. 2006).

<sup>192</sup> See, e.g., *id.* (looking to prior legislative and judicial decision-making evidence in deciding whether the teacher exception applies).

articulated by prior courts and commentators. What is more, the peculiar history of the work-for-hire doctrine and the teacher exception clouds the equation considerably. The teacher exception does not represent a standard policy-based carve-out to a statutory rule since in this case the “carve-out” was established in the law before the statute ever existed.<sup>193</sup> There is simply no evidence whether Congress or the Supreme Court intended to override this particular aspect of the pre-existing common law.

[48] This Part proposes a balanced and judicially manageable scope for the teacher exception. Before continuing further, however, it is necessary to make two important notes. First, this proposal assumes that the teacher exception *does* continue to exist in one form or another in the post-*CCNV* work-for-hire doctrine. *Bosch*, and to a lesser extent *Pavlica*, prove that courts continue to recognize the teacher exception.<sup>194</sup> This article aims to aid future courts that accept this reality but struggle to determine the scope of the exception. It is not intended to weigh in over whether courts should recognize the teacher exception in the first place. This author believes he has little new to offer in that well-worn debate.

[49] Second, the proposed scope of the teacher exception is meant as a judicial solution, not as a legislative solution. It seeks to balance policy considerations against deference to prior decisions made by Congress and the Supreme Court;<sup>195</sup> Congress owes no such deference. It is based in part on a desire to avoid wanton judicial policymaking and to respect the

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<sup>193</sup> See *supra* Part I.

<sup>194</sup> See *Bosch*, 80 U.S.P.Q.2d (BNA) at 1720; *Pavlica v. Behr*, 397 F. Supp. 2d 519, 524-25 (S.D.N.Y. 2005). *Contra* *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 185-86 (2d Cir. 2004) (holding that the work-for-hire doctrine precluded the teacher’s ownership in tests and quizzes).

<sup>195</sup> See, e.g., *Bosch*, 80 U.S.P.Q.2d (BNA) at 1718-21 (looking to both policy considerations and prior case law to make a determination on the applicability of the teacher exception).

constitutional division between the judicial and legislative branches of government. Thus, ideal judicial and legislative solutions to the faculty work-for-hire problem *do* and *should* diverge. However, this author believes that a legislative solution to the problem is unlikely to come about in the foreseeable future without either a judicial decision that has a near-cataclysmic impact on professors or universities, or a complete overhaul of this country's copyright regime. In all likelihood, none of the lobbying groups representing the interests of professors, universities, K-12 teachers, or school administrators have both the political clout on Capitol Hill and the desire to disturb the peace between universities and their faculties in order to push through any legislation to deal with the issue.

#### A. Prong One: the Type of the Work

[50] Academic copyrightable works fall into three broad categories: (1) scholarly works; (2) course materials; and (3) administrative works.<sup>196</sup> *Scholarly works* are those works that the academic creates without direct supervision from his or her employer, during unscheduled time, for a primary purpose other than the teaching of specific courses offered to students by the university.<sup>197</sup> Publication of a copyrightable work provides evidence that the work is scholarly in purpose, but is neither necessary nor sufficient to prove scholarly character. Thus, research articles and opinion pieces are generally scholarly works, whether published or unpublished. *Course materials* are works created primarily for the purpose of teaching specific courses offered to students by the

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<sup>196</sup> This article presents this categorization scheme purely as a heuristic tool in support of the analysis that follows. It makes no claim that such a scheme is the only or the best way to categorize academic copyrightable works for other purposes.

<sup>197</sup> *Cf. Bosch*, 80 U.S.P.Q.2d (BNA) at 1717 (defining “traditional academic copyrightable works” as all materials “created independently and at the creator’s initiative . . . not created as an institutional initiative”).

employer, such as most lectures, teaching notes and exams.<sup>198</sup> *Administrative works* comprise the catch-all category of all works that are neither scholarly works nor course materials: they include all of the academic's works created under direct supervision or during employer-scheduled time, but exclude all works created for the primary purpose of teaching specific courses offered by the university.<sup>199</sup> Most works falling into this category would deal with university or departmental business.

[51] Borderline cases under this system of categorization are important, but usually cases fall fairly neatly into one category or another. Textbooks prepared for publication usually classify as scholarly works, since while their creators often test them in their own courses, their primary use is at other educational institutions. Prepared lectures for a hypothetical course that a professor's university does not offer to its students would also classify as scholarly works, while lectures prepared by one professor for a course taught by a colleague at the same university would classify as teaching materials. Works related to teaching in general, but not to any specific course, such as materials for the development of curricula or grading schemes, would classify as administrative works. Notably, from the perspective of copyright law, software code would not fit into one category or another as a whole. The character of a piece of software would depend on the circumstances and purposes of its creation, just as with any other type of copyrightable work.

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<sup>198</sup> See, e.g., *Shaul*, 363 F.3d at 186 (holding that tests, quizzes and homework problems created by the teacher were owned by the school – and not the teacher – under the work-for-hire doctrine because the materials were for an already established class, and thus under his scope of employment as a teacher).

<sup>199</sup> See, e.g., *Weinstein v. University of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987) (“Perhaps the University forms a committee to study the appropriate use of small computers and conscripts professors as members. The committee may publish a report, in which the University will claim copyright.”). Accordingly, because these works are “prepared by an employee within the scope of his or her employment,” they fall under the work-for-hire exception. 17 U.S.C. § 101 (2006).



[52] The teacher exception should apply to scholarly works, but not to course materials or administrative works. The reason for this is straightforward: the truly compelling justifications for the teacher exception apply most strongly to scholarly works, and less strongly to other categories. Judge Posner articulated the reasoning most succinctly: a declaration of ownership of scholarly works in universities, rather than in professors, would be fundamentally at odds with the "conditions of academic production" and would "wreak [havoc] in the settled practices of academic institutions. . . ." <sup>200</sup> Intellectual workers in the academic world often need the creative freedom and control associated with ownership in order to do their work. Lack of freedom and control not only would potentially stifle professors' creativity, but would discourage them from joining the academy in the first place. The campus culture, the cradle of modern innovation in the sciences and the arts, would be fundamentally threatened. Moreover, professors' assignments of their copyrights to third parties would in many cases be invalidated, causing massive disruptions in the industries that depend heavily on those assignments, such as publishing and computer software. For example, if copyright assignees in those industries made their agreements with the professors rather than with their universities, a declaration of university authorship might seriously jeopardize the rights of a publisher that made a book deal with an Economics professor, or of a dot-com that purchased software code from a Computer Science professor. The downstream economic effects of such a widespread loss of the perceived property and contractual rights could be catastrophic.

[53] In contrast, university control over course materials and administrative works would not have nearly such widespread or negative effects. Professors prepare lectures, syllabi, and exam materials for purposes internal to their universities, not external. The property and contractual rights affected by the ownership of the works are those of the professor and the university, and rarely have significant downstream

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<sup>200</sup> Hays v. Sony Corp. of Am., 847 F.2d 412, 416 (7th Cir. 1988).

effects.<sup>201</sup> Moreover, the justifications for the work-for-hire doctrine apply in stronger force to course materials and administrative works than to scholarly works. While universities have a legitimate business interest in enhancing their reputations through the scholarly work of their faculties,<sup>202</sup> they have an even stronger interest, buttressed by both reputation and contractual duty, in maintaining their business operations, controlling their curricula, and ensuring that each student receives a quality education.

[54] The *Williams* court supported its application of the teacher exception to lecture notes by arguing, in part, that “[p]rofessors are a peripatetic lot, moving from campus to campus,” and that they need to keep ownership of their course materials in order to develop them for future courses at other institutions.<sup>203</sup> Even if tenured professors do move around more than the typical non-academic creative employee – a bold assumption in today’s mobile job marketplace – the need of professors to keep control of their course materials does not seem so compelling as to justify a departure from statutory work-for-hire doctrine. Universities have as much of a right to control the evolution of teaching materials as professors, if not more so. The value of a professorial candidate to a university lies in her credentials, reputation, teaching ability, and ability to attract research funding; it should not be the intellectual property that she carries with her.

[55] If course materials belong to universities, rather than to professors, then what recourse do the professors have to develop their lectures freely

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<sup>201</sup> Under the Copyright Act, works within the academic setting are either owned by the professor, or by the university. 17 U.S.C. § 201(a) § 201(b).

<sup>202</sup> See *Madey v. Duke Univ.*, 307 F.3d 1351, 1362 (Fed. Cir. 2002) (noting that university funding and sanctioning of research projects serves “to increase the status of the institution and lure lucrative research grants, students and faculty”).

<sup>203</sup> *Williams v. Weisser*, 78 Cal. Rptr. 542, 546 (Cal. Ct. App. 1969).

and independently from university control? In fact, professors have several tools at their disposal to retain use rights to their teaching materials. Under the categories of academic works described earlier, textbooks, lectures, and other teaching materials not created primarily for specific university courses would be considered scholarly in nature and would therefore fall under the teacher exception.<sup>204</sup> Courts might also hold, similarly to *Bosch*, that professors may use course materials they create on behalf of their universities under the fair use doctrine.<sup>205</sup> Additionally, professors may gain the right to use course materials or to create derivative works from them under the theory of implied license.<sup>206</sup>

[56] Of course, professors may also gain full ownership by contract or by university policy. Nevertheless, contracts and policies cannot vest *authorship* in the professor, rather than in the university, for the purpose of termination rights.<sup>207</sup> Yet termination rights are largely irrelevant for course materials, since course materials are rarely assigned to third parties and are generally of little value thirty-five years after their creation.

### **B. Prong Two: The Position of the Creator**

[57] The second issue when determining the scope of the teacher exception is to whom it should apply. At first blush, it might seem obvious that a "teacher" exception should apply to all teachers, and only to teachers. However, commentators, rather than courts, apparently coined

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<sup>204</sup> See *supra* notes 196-98 and accompanying text.

<sup>205</sup> See, e.g., *Bosch v. Ball-Kell*, 80 U.S.P.Q.2d (BNA) 1713, 1722 (C.D. Ill. 2006).

<sup>206</sup> See Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 275 (2009) (proposing an expansion of the implied license doctrine "to impose norms based on public policy considerations in order to bring reasonableness into the law of copyright . . .").

<sup>207</sup> See Wadley & Brown, *supra* note 123, at 424-25.

the term "teacher exception" as a simple nametag to describe an underdeveloped rule of law. *Williams*, the case that explicitly established the "teacher exception," made no reference to that term, referring only to "university lectures."<sup>208</sup> Because so few published opinions exist in the faculty work-for-hire arena, determining to whom the exception should apply necessarily falls back on who needs it the most.

[58] The teacher exception should apply to all academic creators whose positions grant them a traditional expectation of ownership in the scholarly works they create. While this test might seem vague or unwieldy, its application is surprisingly straightforward in the vast majority of real-world cases. As discussed throughout the case law and commentary, professors and the colleges and universities that employ them have traditionally and near-universally assumed that the professors own the scholarly works they create.<sup>209</sup> Thus, professors have a traditional expectation of ownership. There is no evidence of a comparable tradition for K-12 teachers and their schools, so the teacher exception would not apply to K-12 teachers. Other categories of academic employees fall neatly into this dichotomy. There are few borderline cases.

### 1. K-12 Teachers

[59] The most obvious effect of a "traditional expectation of ownership" test excludes K-12 teachers. Unlike their higher-education counterparts, the work-for-hire doctrine should include primary and secondary school faculty for two broad reasons. First, the arguments

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<sup>208</sup> See *Williams*, 78 Cal. Rptr. at 546.

<sup>209</sup> See, e.g., *Weinstein v. University of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987); *Bosch*, 80 U.S.P.Q.2d (BNA) at 1719-20; Russ VerSteeg, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381-395 (1990) ("The *Williams* court appears to have recognized [the] academic tradition, which . . . assumed that professors owned the copyrights to their works . . .").

supporting the teacher exception simply apply with little force, if any, in the K-12 arena. As the Second Circuit noted in *Shaul*, there is no academic tradition granting control of creative works to K-12 teachers.<sup>210</sup> Lower-education schools usually assign to their teachers the task of developing course materials based on curricula dictated by school districts. K-12 teachers rarely bear any duty to create scholarly works outside of the classroom context. As with the type-of-work analysis, courts should not depart from unambiguous statutory language and Supreme Court decree except in the most compelling of cases. The K-12 setting is not one of those cases.

[60] Second, the teacher exception should exclude K-12 teachers as they generally do not need it in the first place. K-12 teachers' interests in the scholarly works they create are usually adequately protected by agency law's "scope of employment" rules.<sup>211</sup> This principle is borne out by *Pavlica*, where the court aligned with *Hays* in acknowledging that the plaintiff, a high school teacher, could have ownership of a teaching manual he wrote without any involvement from his school.<sup>212</sup> While a survey of primary and secondary school teachers might indicate a widespread belief that they own the materials they write for their schools, there is no apparent reason why they would hold that belief more strongly than members of non-teaching professions. More importantly, K-12 teachers have not traditionally relied on an assumption of ownership to create a vast network of property and contractual rights, as have their counterparts on the university campus.

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<sup>210</sup> See *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004).

<sup>211</sup> See *id.* at 186; *Pavlica v. Behr*, 397 F. Supp. 2d 519, 524-25 (S.D.N.Y. 2005).

<sup>212</sup> See *Pavlica*, 397 F. Supp. 2d at 526.

## 2. Non-teaching University Faculty, Students, and Other Academics

[61] Under the proposed “traditional expectation” test, the “teacher” exception would expand to include many types of employees on the university campus aside from teachers. Many universities employ non-teaching faculty and postdoctoral fellows. Some universities allow their professors to “buy out” their teaching responsibilities if they bring in sufficient research funding from external sources.<sup>213</sup> Many research professors and postdoctoral fellows have as their sole duty the responsibility to “publish or perish,” that is, to conduct research and create written works for publication.<sup>214</sup> Universities also employ students, both at the graduate and undergraduate level; those students often contribute to scholarly articles written by their faculty advisors. Some of them even write articles of their own within the scope of their employment duties. To exclude non-teaching faculty, postdoctoral fellows, students, and other such academics from the teacher exception would defy common sense and the policies upon which the teacher exception is based. There is no less of an academic tradition granting ownership of creative works to these types of positions than to teaching faculty. Moreover, academic freedom does not stop at the classroom door; *all* academic researchers and commentators need the same leeway to publish and to communicate free from university control. A professor who buys out her teaching duties should not unwittingly lose her right to control the articles or textbooks she writes.

[62] The extension of the teacher exception to non-teaching faculty would have flipped the ownership of the cattle-imaging software in *Rouse*

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<sup>213</sup> See, e.g., BOSTON COLLEGE, PSYCHOLOGY DEPARTMENT FACULTY HANDBOOK 19-21 (2011), available at [http://www.bc.edu/content/dam/files/schools/cas\\_sites/psych/pdf/faculty\\_handbook.pdf](http://www.bc.edu/content/dam/files/schools/cas_sites/psych/pdf/faculty_handbook.pdf); WAKE FOREST UNIVERSITY, WAKE FOREST UNIVERSITY GUIDELINES FOR INTERNAL AND EXTERNAL SUPPORT OF ACADEMIC YEAR RESEARCH SALARY 1 (2011), available at <http://www.wfu.edu/rsp/pdf/acadyrsalary1-31-11.pdf>.

<sup>214</sup> See Klein, *supra* note 25, at 166.

to the professors.<sup>215</sup> That would have been the proper result in that case because it may have enabled the plaintiffs to keep some control of the software and prevented the software's use by one of the defendants, a private consultant, without the plaintiffs' consent. There is no principled reason why the research professors' control over their software should have turned on whether they had held any teaching responsibilities on the side. Indeed, in light of this, the "teacher exception" should properly be renamed the "academic exception," as it is already called in a handful of court decisions and commentaries.<sup>216</sup>

## VI. CONCLUSION

[63] This article has aimed to advance discussion about academic work-for-hire issues in light of a new generation of court decisions in the new millennium. These decisions have debunked the previous conventional wisdom that the teacher exception to the work-for-hire doctrine was effectively dead. The advent of termination rights and changes in technology, distance education, and university economics will lead to increasing litigation on the issue, and courts must consider not only whether the teacher exception should continue to exist, but in what form and scope. This article's proposal for a two-part test for the exception aims to balance the binding force of statutory law and Supreme Court precedent against the compelling policies under which courts originally

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<sup>215</sup> See *Rouse v. Walter & Assocs.*, 513 F. Supp. 2d 1041, 1065 (S.D. Iowa 2007) (holding, instead, that the University owned the cattle-imagery software under the work-for-hire doctrine).

<sup>216</sup> See *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004); *Pittsburgh St. Univ. / Kan. Nat'l Educ. Ass'n v. Kan. Bd. of Regents / Pittsburgh St. Univ.*, 280 Kan. 408, 423 (2005) (using "academic exception" and "teacher exception" interchangeably); Klein, *supra* note 25, at 167-69 ("For several reasons, it appears more likely that the academic exception has not survived the revisions of the Copyright Act."); Corynne McSherry, WHO OWNS ACADEMIC WORK?: BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 107 (2001); Wadley & Brown, *supra* note 123, at 430-31.

established the exception. It recognizes that, based on those compelling policies, the so-called “teacher” exception should properly be called an academic exception and should apply to scholarly works, but not to course materials or administrative works. Furthermore, it should apply to teachers, as well as to non-teaching academics, including university researchers and graduate students. This realignment of the exception could open up a whole new world of possibilities for people in these positions and advance the interests of academic freedom and scholarly innovation.