NOTES

APPLICATION OF THE TEACHER EXCEPTION DOCTRINE TO ON-LINE COURSES

*Laura Leslie**

I. INTRODUCTION

The issues surrounding copyright law continually change with advances in technology. Today, many universities are exploring the use of computers to offer on-line courses. With the increasing popularity of distance education, issues surrounding copyright ownership are on the rise. Historically, there has been a custom of faculty ownership to works created by professors while employed at universities.[1] Some argue that universities have allowed professors to retain ownership because of the lack of profit associated with many academic publications.[2] While it is true that not all academic works produce substantial profits, it is also true that universities have other interests aside from profit in allowing faculty to retain copyright ownership. However, on-line courses do present unique problems. Universities can offer the same on-line course semester after semester without continually paying the professor who originally created the course.[3] This does present universities with a huge profit incentive. Consequently, many universities have begun to review their position on copyright ownership relating to faculty works.

Because the use of on-line courses is relatively new, these problems have not yet been litigated in the courts. Agreements between faculty and administration currently vary across universities. Most universities treat the faculty as the original owner, but require an assignment of rights.[4] The American Association of University Professors takes the position that the

* Candidate for Juris Doctor, Notre Dame Law School, 2003; Bachelor of Arts, University of California, Berkeley, 1999. This Note is dedicated to my Mom and Dad and to my grandparents James and Dorothy Heron for their continued encouragement, love, and support.

1. Roberta Rosenthal Kwall, *Copyright Issues In Online Courses Ownership, Authorship And Conflict*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2001).

2. *Id.*

3. *Id.* at 2.

4. *Id.* at 4.

faculty members should own the "courseware" they create.[5] This seems to me to be both the better and more workable position. If universities insist on retaining the copyright to on-line courses, faculty members could potentially face numerous problems.

The main focus of this paper will be on the issues surrounding copyright ownership in the academia context. Part II of this paper will explore the history of copyright law, and specifically the work for hire doctrine. Particular focus will be given to the rise of the work for hire doctrine in the 1909 Copyright Act and the changes that the doctrine has undergone since then. Part III of this paper will look at the relevant case law that has dealt with the work for hire doctrine in relation to academics. Part IV will focus on the unique issues presented by on-line courses, and explain why copyright ownership should vest with the creating professor. In the conclusion, I will attempt to offer some comments explaining my position as to why courts should continue to find a teacher exception to the work for hire doctrine.

II. A HISTORICAL EXAMINATION

Copyright law in the United States continues to be a constantly changing doctrine. The law first appeared in America in the continental state statutes. It then progressed to the national level in the Constitutional provision, and continued to be codified through the legislative acts passed by Congress. The theories of American copyright law can be traced to theories that existed in early English law. The influence of English law can easily be seen in some of the continental state copyright statutes.[6] When enacting the first copyright laws, a few of the continental states mirrored their statutes after the language used in the English Statute of Anne. Authors as well as publishers were given rights under these statutes.[7] The majority of the states however, chose to vest copyright protection solely in the authors of the works.[8] This decision reflected the theory that the creator of the work should bear the fruits of his labor. In addition to the natural rights theory prevalent in these state statutes, the encouragement of learning also was considered important. The statutes limited the author's rights to printing, publishing, and selling thus leaving the public with various uses of the work as long as the author's profits were secured.[9] For a time, the state statutes served their

5. *Id.* at 5.
6. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 183 (1968).
7. *Id.* at 188.
8. *Id.*
9. *Id.* at 190.

purposes well, but as the national government formed many realized that copyright law would need to be consistent across the states.

When the Constitutional Convention met, the following four copyright theories were popular: learning, protection of authors, monopoly concerns, and statutory privilege.[10] The statutory privilege theory focused on the idea that the right to copyright was an existing right that Congress could ensure by granting it to authors through the passing of a statute.[11] The word "securing" in the Constitution was interpreted to mean that the "statutory copyright was to affirm and protect an existing right, not create one."[12] The founders managed to include all theories in the Constitutional provision. The Legislature was given the power to pass laws giving authors protections limited both in time and scope. Such protections were instituted to promote learning. The primary focus on learning and protecting the rights of authors is apparent in the following language of the Constitution, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[13] When Congress enacted the first copyright act in 1790, this focus quickly changed.

The Copyright Act of 1790 was similar to the Constitutional provision in the sense that the same four prevalent theories of copyright were recognized in the Act. Some have argued that instead of focusing on the elements of learning and author's rights, the Act emphasized the importance of monopoly concerns and statutory provisions.[14] While it is true that the Act put in provisions for these concerns, I disagree with the assertion that the natural rights theory disappeared from the statute. The statute limited the protection of privileges to the author or authors of maps, charts, and books, for a term of fourteen years. Also required was a registration of title with the clerk's office. Because the Act still afforded these protections to authors who took the steps to protect their work, I believe that the Act continued to protect the fruits of the author's labor.

For almost one hundred and twenty years, the first copyright act remained virtually unchanged. As authors began expanding the types of works created, Congress realized that more protections needed to be granted.[15] In 1909, Congress passed the second Copyright Act. Among the many changes

10. *Id.* at 193-94.
11. *Id.* at 194.
12. *Id.*
13. U.S. CONST. art. I, § 8, cl. 8.
14. PATTERSON, *supra* note 6, at 198.
15. Patricia L. Bellia, Class Notes, Copyright and the Constitution course (Notre Dame, IN., Spring 2002) (copy on file with author).

was the expansion of the scope of works that were given protection. Instead of just protecting maps, charts, and books, all the writings of an author were given protection.[16] Under the new act authors were also allowed to assign their copyrights to others.[17] It was also under the 1909 Act that the work for hire doctrine first appeared. Under § 26 of the Act, Congress stated that the term "author" could apply to an employer if the works were made for hire.[18]

The work for hire doctrine has extensively been modified over the years. The 1909 Act did not provide any definitions for the terms "employee" and "work for hire." Thus, the courts were left to provide meaning to the statute. The courts concluded that work for hire status should apply to works made by employees in the "regular course of their employment."[19] Many courts required the parties to show who had supervision and control over the work.[20] This caused a presumption of ownership to lay with employers because of their general supervisory power.

The Copyright Act of 1976 filled in many of the gaps inherent in the 1909 Act. It took years and numerous negotiations and drafts to finally come up with the exact provisions of the 1976 Act.[21] Congress realized that the 1909 Act needed to be revised as early as 1955. It was a slow process, but by 1961 the Copyright Office issued a proposal to distinguish between employee works and works made by independent contractors.[22] Once this distinction was in place, the Copyright Office in 1963 issued a preliminary bill to limit the work for hire doctrine to only those works prepared by employees while working within the scope of their employment. The Office decided to not include special orders or commissioned works.[23] Book publishers protested this limitation. In 1965, a compromise was reached and embodied what ultimately became the "work for hire" definition in § 101 of the 1976 Act.[24] Congress allowed for the commissioned works category, but limited it to four enumerated cases. Later, the House Committee on the Judiciary expanded the enumerated cases, and today there are nine total.

16. *See*, Copyright Act, § 3, 35 Stat. 1075 (1909) (repealed 1976).
17. *Id.* at § 28.
18. *Id.* at § 26.
19. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 744 (1989).
20. Patricia L. Bellia, Class Notes, Copyright and the Constitution course (Notre Dame, IN., Spring 2002) (copy on file with author).
21. *Reid*, 490 U.S. at 743.
22. *Id.* at 744.
23. *Id.* at 745.
24. *Id.* at 746.

Section 101 of the Copyright Act of 1976 defines a "work made for hire" as:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work [or for certain other purposes] . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[25]

Out of the nine enumerated categories for commissioned works, the category of "instructional texts" could be the most relevant to courts in the context of on-line courses. Section 101 lists "instructional texts" as one of the nine enumerated categories and defines it as "[a] literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities."[26]

Section 26 of the 1909 Act referring to authors was retained in the new act but expanded and became § 201(b) of the 1976 Act. Section 201(b) states that, "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 in a written instrument signed by them, owns all of the rights comprised in the copyright."[27]

It is important to detail the above history of copyright law for two primary reasons. First, the history shows that a work could attain work for hire status in two primary ways.[28] It could be a work made by an employee within the course of employment, or it could be a work made by an independent contractor. In the case of an independent contractor, if the work fell under one of the enumerated categories, and the parties expressly agreed in writing, the work would be considered a work made for hire. Second, the history demonstrates that because Congress and the House Committee on the Judiciary enumerated express categories, statutory interpretation would warrant that only those categories be given work for hire status.[29] These conclusions from legislative history have aided the courts in their determinations of works made for hire.

The 1976 Act is the applicable statutory provision for copyright law today. However, given the turbulent changes that copyright law has undergone, it is not surprising that courts continue to interpret the statute differ-

25. 17 U.S.C. § 101 (2000).
26. *Id.*
27. Hays v. Sony Corp. of America, 847 F.2d 412, 416 (7th Cir. 1988) (quoting 17 U.S.C. § 201(b)).
28. *Reid*, 490 U.S. at 747.
29. *Id.* at 748.

ently. The Seventh Circuit has continued to find a teacher exception to the work for hire doctrine, while others have argued that the 1976 Act abolished any such exception.[30] The Supreme Court has not decided the issue, and thus it remains a hot topic.

For the more straightforward cases the Court has attempted to provide some guidelines for determining if works are made for hire. In the case of *Community for Creative Non-Violence v. Reid*, the Court stated that it first determines if an employee or an independent contractor prepares the work by using common law agency principles.[31] If the work falls under one of these categories, the Court then applies the appropriate provision under § 101. Although the scope of this paper prevents a more substantive analysis of copyright history, the above summary hopefully sheds some light on where copyright law and particularly the work for hire doctrine stand today.

III. CASE LAW

Two cases, both decided by the Seventh Circuit, have found a teacher exception to the work for hire doctrine. The teacher exception basically holds that faculty members retain the copyright privileges to their works produced while employed at an academic institution. The reasoning behind allowing such an exception is varied. While some universities tend to undervalue faculty publications because they do not produce large profits, the faculty members themselves accord high value to their publications. This value in large part stems from the concept of "publish or perish." Academic institutions require faculty members to publish works. Thus, faculty members do not just value their works for the profit aspect, but also for the security that they provide to their positions. The progress of technology towards on-line courses has increased the competition among academic institutions.[32] This has caused many institutions to closely reexamine their positions relating to copyright ownership.[33]

The Seventh Circuit first identified a teacher exception to the 1976 Act in the case of *Weinstein v. University of Illinois*.[34] Weinstein was an Assistant Professor at the University of Illinois. He created an internship program for pharmacy students and the University funded the program. When the program was first proposed to the school, Weinstein asked another professor and the director of the pharmacy to help in the proposal.

30. *See, e.g.*, Rochelle Cooper Dreyfuss, *The Creative Employee And The Copyright Act Of 1976*, 54 U. CHI. L. REV. 590, 598-600 (1987).

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

32. Kwall, *supra* note 1, at 2.

33. *Id.*

Weinstein maintained that he was responsible for the majority of the ideas, but admitted that the writing of the results was a joint effort. Eventually a paper was written about the program and Weinstein brought suit when his name was not the first listed author. The district court dismissed Weinstein's due process challenge and held that the University owned the copyright to the article and could thus do whatever it wanted with it.[35] The district court reasoned that the University owned the article because it was a "work for hire."[36]

The University's policy allowed professors to retain copyright ownership to their works unless the work fell into one of the following three categories: (1) the University had an agreement with an external party that required them to hold or transfer copyright ownership; (2) works expressly commissioned in writing by the University; or (3) works created out of a requirement of employment or an assigned University duty.[37] The University argued that Weinstein's article fell under the third category because he was required to create internship programs as part of his position.

On appeal, the Seventh Circuit rejected the University's argument. Writing for the court, Judge Easterbrook stated that the "demands of departments deciding whether to award tenure—will be" one of the primary factors behind many academic works.[38] He pointed to the fact that the University had conceded that a professor who developed a mathematic theorem would be able to retain copyright ownership to his article that published the theorem.[39] Referring to the source of *Nimmer on Copyright,*[40] Judge Easterbrook explained that from the beginning of copyright law, the longstanding tradition has been to allow professors to maintain copyright ownership in their works.[41] He concluded that Weinstein did have a property interest in the article, and further held that the tradition applied to all scholarly articles and "other intellectual property."[42]

Just one year later, the Seventh Circuit again discussed a teacher exception to the work for hire doctrine in the case of *Hays v. Sony Corp. of America.*[43] In *Hays*, two high school business teachers developed a manual for using word processors. A few years later, the high school purchased new

34. Weinstein v. Univ. of Illinois, 811 F.2d 1091 (7th Cir. 1987).
35. *Id.* at 1093.
36. *Id.*
37. *Id.* at 1094.
38. *Id.*
39. *Id.*
40. MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1][b] (1978 ed.).
41. *Weinstein*, 811 F.2d at 1094.
42. *Id.*
43. Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988).

word processors from Sony. The school provided Sony with the manual so that they could revise it and make it applicable to the new machines. The teachers who had created the original manual sued Sony for copyright infringement. The district court held that the manual was a work for hire and dismissed the case.[44] In writing the opinion for the Seventh Circuit, Judge Posner went into an in-depth discussion regarding the teacher exception to the work for hire doctrine.[45]

Judge Posner began his discussion by referring to the text of the statute. Under § 101 of the 1976 Act, Judge Posner agreed that it might appear that the manual was a work for hire.[46] The teachers were employees of the high school and had created the manual under the scope of their employment. There was also no signed contract that entitled the teachers to retain the copyright to the work. Despite these facts, Judge Posner explained that until the 1976 Act was enacted, works made for hire were left undefined.[47] Some courts had found that academic writings did not fall under works for hire, and thus created the teacher exception. Conceding that the authority surrounding the teacher exception was scanty, Judge Posner claimed that the basis was "not scanty because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings."[48] Judge Posner emphasized that despite Congress's knowledge in 1976 of the court-created teacher exception doctrine, there is no mention of it in either the legislative history or the 1976 Act itself.[49] Judge Posner interprets this intentional omission of reference to the teacher exception doctrine as Congress's intent to not abolish it.

Many good reasons exist today for allowing a teacher exception to the work for hire rule even though many professors do academic writing as part of their duties of employment.[50] One of the reasons cited by Judge Posner in the *Hays* case was the lack of supervision exerted over professors by the universities.[51] For the most part, professors are able to write their articles on their own accord, free from university input and requirements. Aside from the situation where a university directs a professor to create teaching materials for use by other professors in the future, universities do not supervise faculty and do not exploit their works.[52] Although universities provide

44. *Id.* at 413.
45. *Id.* at 416-18.
46. *Id.* at 416.
47. *Id.*
48. *Id.* at 416.
49. *Hays*, 847 F.2d at 416.
50. *Id.*
51. *Id.*
52. *Id.*

computers, library resources, and other facilities to professors, this does not prove that the university is the "motivating force behind the work."[53]

In the *Reid* case, the district court held that Reid was an employee under § 101(1) of the statute, because Community for Creative Non-Violence was the motivating force behind the statue created by Reid.[54] The Supreme Court ultimately found Reid to be an independent contractor, but one of the factors it used in determining if a person was an independent contractor was the amount of control that the hiring partner exerted over the manner and means of the work.[55] It is possible that courts could view academic articles as specially created works done outside of the general scope and control of the professor's regular employment.

Because the teacher exception was a judicially created protection that arose from courts interpreting the work for hire provision of the 1909 Act, many scholars have argued that the exception was abolished by the enactment of the 1976 Act.[56] It is a given that faculty members are employees of universities. All that is left to decide is whether or not academic writings fall within the scope of the faculty members' employment.[57] Academic writings do have an impact on salary, teaching loads, tenure, and other employment related decisions.[58] Thus, it is argued that the universities should own the copyright to all academic works, according to a strict interpretation of the 1976 Act.

This does not necessarily have to be the case. There is no indication that when enacting the 1976 Act, Congress intended to abolish the exception.[59] Congress knew that some courts were applying the exception and yet they did not expressly forbid it in the statute. Another possible loophole for the exception rests with the text of § 201(b).[60] This section not only requires the work to be a work for hire, but also requires that the work be prepared for the employer. It could be argued that academic writings are prepared for the individual benefit of the author and for the promotion of the general public's knowledge.

Some scholars have proposed the idea that if copyright to academic writings vests automatically in the universities, then academics could chal-

---

53. Dreyfuss, *supra* note 30, at 597.
54. *Reid*, 490 U.S. at 735.
55. *Id.* at 750.
56. Dreyfuss, *supra* note 30, at 598.
57. *Id.* at 599 (citing Todd F. Simon, *Faculty Writings: Are They Works Made for Hire Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485 (1982-83); Leonard D. Duboff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC. 17 (1984)).
58. *Id.*
59. *Hays*, 847 F.2d at 416.
60. *Id.* at 417.

lenge the constitutionality of the 1976 Act under both the First Amendment and the Copyright Clause.[61] Under the First Amendment, professors could argue that if the Act vests the copyright with the university automatically, then the university would own all of the writings of the professor for the entire time the professor is employed.[62] This could cause a problem with the distribution of the professor's ideas. The university could decide to not distribute the work because of a lack of economic benefit. Such "forced silence, condoned by the federal act," could pose a First Amendment problem.[63]

This argument could carry weight with the courts. One of the purposes behind the Copyright Clause is to promote learning and the expression of ideas. If universities prevent this expression because of a lack of economic incentive, then they are in effect suppressing speech. It should not matter that the author may be able to contract around this obstacle. A constitutional violation is a constitutional violation. Universities should not be able to violate the Constitution and then claim that their conduct is protected because of the contractual rights that authors possess. In her article, *The Creative Employee and the Copyright Act of 1976,* Professor Dreyfuss argues that a First Amendment challenge will likely "be poorly received by the courts."[64] She claims that such arguments do not succeed because courts "defer" to Congress on the proper weight to be given to the flow of information and the "need to promote investment in creativity."[65] While I agree that courts generally will defer to Congress on this matter, I believe that if it is shown that universities are causing a widespread problem of "forced silence" by not distributing works, courts will examine such conduct under the First Amendment.

Another related reason for allowing a teacher exception to the rule, relates to the protection that the statute gives against public access to the copyrighted work. If courts allowed copyright ownership to always vest with the university, professors would not be able to disseminate their research across various college campuses.[66] Such limitations would only prohibit the promotion of learning that copyright law is supposed to advance.

The Copyright Clause poses a different problem with the statute. Professor Dreyfuss asserts that professors could argue that Congress exceeded its authority by allowing employers to retain copyright ownership in

61. *See, e.g.*, Dreyfuss, *supra* note 30, at 600.
62. *Id.* at 601.
63. *Id.*
64. *Id.* at 600.
65. *Id.* at 601.
66. Dreyfuss, *supra* note 30, at 597.

works, when the employers have not "fulfilled the constitutional purpose of enlarging the pool of knowledge."[67] Professor Dreyfuss analogizes this argument to one made by Judge Friendly in the case of *Scherr v. Universal Match Company*.[68] In *Scherr*, Judge Friendly dissented from the majority's holding that a statue created by a serviceman at an army base was a work for hire. The Copyright Clause only allows Congress the power to secure to "authors" the rights to their works.[69] Judge Friendly conceded that if the employer exercises significant control over the production of the work, then allowing the employer to be considered the author would be consistent with the clause.[70] However, if the "locus of the activity" remains within the exclusive control of the author, Congress cannot grant the title of "author" to the employer without exceeding its authority.[71] Applying this reasoning to academic context would mean that if a university does not exercise significant control over the production of an article, then the copyright to the article would remain with the faculty member.

As Professor Dreyfuss points out, Melville Nimmer has identified some weaknesses inherent in this particular argument.[72] One obvious weakness is that the 1976 Act allows for employees to contract with universities for copyright ownership. Therefore, Congress does not exceed its authority when it assumes that the parties have negotiated ownership rights.[73] Furthermore, Nimmer explains that the transfer of ownership merely affects the rules dealing with the length of the copyright and the "right to terminate the grant."[74] Nimmer concludes that Congress has the power to treat works for hire differently because some of the benefits that the Act gives should be "altered" if the work is created under an employment relationship.[75]

These weaknesses do not necessarily negate the Copyright Clause argument. In contrast, Professor Dreyfuss argues that Nimmer only focuses on financial considerations.[76] The aims of the Copyright Clause go far beyond just the economic theory of copyright ownership. Nimmer ignores the "concerns that flow from an intellectual commitment"[77] to copyright. These concerns should carry weight in a constitutional challenge to the 1976 Act.

---

67. *Id.* at 602.
68. *Id.* (citing Scherr v. Universal Match Co., 417 F.2d 497 (2d Cir. 1969) (Friendly, J., dissenting)).
69. Dreyfuss, *supra* note 30, at 602.
70. *Id.*
71. *Id.*
72. *Id.* at 603, (citing MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 1.06 [c] (1984)).
73. *Id.*
74. *Id.* at 604.
75. Dreyfuss, *supra* note 30, at 604.
76. *Id.*
77. *Id.*

IV. COPYRIGHT OWNERSHIP ISSUES RELATING TO ON-LINE COURSES

The cases discussed above recognized the custom of granting copyright ownership to professors for their academic writings. This is the best rule from both an economic and intellectual theory of copyright. Granting copyright ownership to professors not only prevents the suppression of speech problem, but it also is the fairest policy because it allows professors to reap the economic rewards for their hard work. Advocates of an economic theory of copyright argue that authors should enjoy the profits that result from their labor.[78] Advocates of an intellectual theory argue that academic works stem from the sole creative intellectual expression of professors, and therefore professors should own the copyright to their creative expressions. As Judge Posner recognized, for the most part professors create their writings completely on their own accord, without the supervision or control of the university. In many work for hire cases, the courts look to the amount of control exercised over the employee or independent contractor by the employer.[79] This exercise of control is absent in the context of most academic writings.

I realize that in some cases a university may request a professor to create an internship program or course for use by other professors in the future. However, if the university does not exercise any control beyond its initial request, then copyright ownership in most cases should still vest with the professor. This should be the rule because the final product is the creative work of the professor. I would concede that if the professor is paid solely to create this program, and the work is solely done on university time, then the professor's claim to copyright ownership likely would fail under the work for hire doctrine. But, if the professor is not paid specifically to create the program and devotes much of his own time to the creation of the program, then the professor should keep the copyright to his work under the teacher exception doctrine.

Today, with the creation of distance education, universities are realizing that the stakes involved with copyright ownership are higher than ever. On-line courses create a "potential financial windfall"[80] for the owner of the copyright. They allow universities the ability to offer the same course repeatedly without having to pay a professor to teach the course. Once the course is developed and fixed into a program, the need for a professor is significantly reduced. Such programs pose unique copyright law issues.

---

78. *See*, Patterson, *supra* note 6, at 186.
79. *See, e.g., Reid*, 490 U.S. at 742.
80. Kwall, *supra* note 1, at 2.

On-line courses are not all identical. The different variations in the programs definitely affect the legal issues involved.[81] If a professor creates an on-line course without any direction or order from the university, then the professor should own the copyright to his work. This is fair both from an economic and intellectual standpoint. The course comes from the fruit of the professor's labor and is his sole intellectual creation. Vesting copyright in the university would be analogous to allowing the university to force a professor to stay and teach a specific course forever. When a professor leaves a university, the class content and insights provided by that professor leave too. The on-line course is replacing the class course ordinarily taught by the professor. Copyright ownership to such a course should be vested with the creator.

In contrast, if a professor is paid by the university for creating the course, or is directed to create a course, the university could have some strong copyright ownership arguments.[82] If the university is paying the professor and giving the professor a format for what should be offered, then the university would have economic and intellectual interests in the work. If the professor were receiving money specifically for creating the on-line course, one possible position the courts could take would be to view the professor as an independent contractor. If the work falls under § 101's enumerated category of "instructional texts," and the professor did not contract with the university to retain his copyright, then the court could arguably award ownership to the university. As mentioned in Part I, courts could interpret the enumerated category of "instructional texts" to include on-line courses. The courses could be viewed as "graphic works." However, to get around the statute, professors could argue that the works are not created for the "purpose of use in systematic instructional activities." If courts are unwilling to recognize a teacher exception to the work-for-hire doctrine, then Congress should pass a statute imposing a default rule that vests copyright ownership with professors unless they contract to assign ownership to the university. I will more fully explain why this is the better result in the following pages.

Universities that currently use on-line courses have dealt with the copyright ownership issue in different ways. The University of North Texas allows royalties to be paid to the faculty members when their courses are repeatedly offered, and the University allows the professors to keep some of the tuition money that is gained from the on-line courses.[83] Unfortunately, this is not the common practice. Some institutions actually create corporate

81. *Id.* at 5.
82. *Id.*
83. *Id.* at 4.

entities that hire professors to create courses so that there will be no debate that the work was produced within the scope of employment.[84] Out of concern for such practices, the American Association of University Professors advocates that professors should own the "courseware" they develop.[85]

Courts have yet to decide the issue of academic ownership in the context of on-line courses. However, ownership claims to course materials in other contexts have been argued. In the case of *Williams v. Weisser*,[86] a California appeals court decided that a professor owned the copyright to his lectures that were copied down by a student and subsequently sold in note format by the defendant. The case was decided under the Copyright Act of 1909. Under the Act, unpublished works were protected by state common law.[87] The defendant argued that the university owned the copyright to the professor's lectures. The court rejected the defendant's argument and held that the professor owned the copyright unless he had assigned it to the university. Concerned with contrary opinions, the court went on to outline the downsides that could result if copyright were awarded to the university.[88]

One of the cited downsides concerns the mobility of professors.[89] If copyright to professors' on-line courses or lectures vests in the university then this inhibits professors from accepting positions at other institutions. If a university owns the copyright to the on-line course created by a professor, then it follows that the university would be able to prohibit professors from using and teaching from their posted syllabus at any other institution. Another example of how this rule could apply is in the case of a law professor who develops a series of slides to explain a complicated Supreme Court case. If the university owns the copyright to the professor's works, it follows that the professor would not be able to use these slides for teaching at another university. Such a rule not only could impact professors who permanently leave a university, but also professors who take visiting professorships for limited terms.

Another problem the court points to relates to the difficulty a university will have in determining how much of a professor's expression in teaching, that is later fixed in a work, stems from knowledge a professor already has gained before working for the university.[90] If the professor has clerked for the Supreme Court, and then comes to teach constitutional law at the uni-

84. *Id.*
85. *Id.* at 5.
86. 78 Cal. Rptr. 542 (Cal. Ct. App. 1969), *cited in* Kwall, *supra* note 1, at 11.
87. Kwall, *supra* note 1, at 11.
88. Weisser, 78 Cal. Rptr. at 546.
89. *Id.*
90. *Id.*

versity, the knowledge that the professor already has relating to the subject he is hired to teach is substantial. If the professor already has developed a syllabus conveying the content of the course before coming to the university, then the university does not have any claim to ownership. This expression of knowledge was not developed as a result of working for the university.

When applying the 1976 Act to the *Williams* case, I do not believe a change in the result is required. As previously mentioned, the 1976 Act provided two categories for works to be deemed "for hire." First, an employee can create the work within the scope of employment, or second, the work can be specially ordered or commissioned for certain uses and the parties can agree that the work will be one made for hire.[91] As Professor Kwall points out, one of the enumerated categories under the commissioned works category includes "instructional texts."[92] Professor Kwall argues that this category provides the possibility that on-line courses "in their entirety" could be works for hire.[93] I disagree. An on-line course varies significantly from a textbook. Students do not just read what is posted on-line. They have to submit assignments and in some cases can post questions and receive answers. In addition, most on-line courses require textbooks. I think that a strong argument exists that the value and knowledge conveyed in an on-line course varies significantly from an instructional text.

Professors also can argue that they did not create the on-line course for the "purpose of use in systematic instructional activities,"[94] as required under the "instructional texts" definition to § 101. If a professor creates an on-line course and grades the work done by students who take the course, the professor could persuasively argue that the course was created for a specific semester, and like any other classroom course, changes from year to year. Thus, the course lacks the "systematic use" purpose.

Courts should continue to recognize that academic works do not fit neatly into the "works made for hire" category. Courts' previous recognition of this problem resulted in the creation of the teacher exception doctrine. The Seventh Circuit has continued to apply this exception consistently to academic writings. With the rise of new issues like on-line courses, it remains to be seen what courts will do with academic works. To prevent courts from interpreting academic works as falling under "works made for hire," Congress should either amend the statute, or pass a new statute instituting a default rule that vests copyright ownership in professors automati-

91. 17 U.S.C. § 101.
92. Kwall, *supra* note 1, at 13.
93. *Id.*
94. 17 U.S.C. § 101.

cally. This new statute would in essence codify the teacher exception doctrine in law.

V. CONCLUSION

When evaluating who should own the copyright to on-line courses, both economic and intellectual theories of copyright favor awarding ownership to the professor who creates the course. This result is also warranted by the downfalls that would result from a contrary decision. Even though the creation of on-line courses can vary in content and formation, copyright ownership should default to professors. This would solve the debate about which category professors should be put into under § 101 of the 1976 Act. Clearly, professors are employees of universities, but when they create on-line courses on their own accord, strong arguments can be made that they are independent contractors. By creating a default rule that vests copyright ownership in the professor, this distinction does not even need to be made. The default rule would also provide consistency across the courts because it in effect would codify the teacher exception doctrine that some courts already apply.

The default rule is fair even when professors receive money from the university to create the course. The university is receiving a benefit from the creation of the course. Before paying the professor, the university could require that the professor to assign the copyright ownership to the university. If the university makes the professor a good offer, it is likely that the professor will contract with the university for the ownership rights.

Allowing copyright ownership to vest with a university in the case of on-line courses creates too many unfair restraints on professors. Universities could not only prevent professors from teaching similar courses at other institutions, but they could also prohibit the professor from disseminating his ideas and research. Such limitations run counter to what copyright law was designed to protect. Furthermore, it is impossible for universities to determine how much knowledge the professor had before working at the institution. If the professor creates an on-line course based on his knowledge of constitutional law derived from his experience as a judge or clerk, the university cannot claim that such knowledge was gained while working at the university. Professors should be able to reap the benefits of their labor and knowledge. Allowing professors to retain ownership to their works will further the promotion of learning. The teacher exception to copyright law should be recognized, and a default rule should be installed to automatically vest copyright ownership with professors for their academic works.