Copyright Issues in Online Courses: Ownership, Authorship and Conflict

Roberta Kwall
COPYRIGHT ISSUES IN ONLINE COURSES:
OWNERSHIP, AUTHORSHIP AND CONFLICT

Roberta Rosenthal Kwall†

I. INTRODUCTION

The paucity of case law involving copyright ownership of materials prepared by university faculty reflects the reality that copyrightable works created by academics have not historically generated large amounts of money. Thus, early cases involving the work product of professors reflected the custom of faculty ownership of copyrighted materials.¹ Not surprisingly, universities were far more concerned with the ownership of more profitable patentable inventions.² As the twenty-first century dawns, however, university

† Raymond P. Niro Professor of Intellectual Property Law, DePaul College of Law; Director, DePaul College of Law Center for Intellectual Property Law & Information Technology. © 2001 by Roberta Rosenthal Kwall. This article was delivered in lecture format as the first of two talks during the author's Third Annual Intellectual Property Distinguished Lectureship at Santa Clara University School of Law in March, 2001.

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¹ See Williams v. Weisser, 78 Cal. Rptr. 542 (Cal. Ct. App. 1969). See also infra notes 46–48 and accompanying text; Sherrill v. Grieves, 57 Wash L. Rep. 286 (D.C. 1929) (holding that book authored by an army employee was not excluded from copyright protection because the book was not considered a publication of the United States government; the court relied on reasoning that the judiciary has not endorsed the notion that faculty works belong to their universities).

² See Rochelle Cooper Dreyfuss, Collaborative Research: Conflicts on Authorship, Ownership, and Accountability, 53 Vand. L. Rev. 1161, 1184–85 (2000) [hereinafter Collaborative Research] (noting that with respect to patents, “universities now require faculty (as a condition of employment) and students (as a condition to enrollment) to assign all rights to inventions made with substantial university resources,” in exchange for which the schools take
interest in copyright ownership of works created by academics is intensifying, largely as a result of the potential financial windfalls associated with distance education.\(^3\) Both faculty and university administrators are reconsidering copyright ownership as technological advances provide universities with the capability of using on-line course materials for multiple semesters without providing additional compensation to the faculty who actually produced the subject matter of the course materials.\(^4\) Indeed, the escalating competitive environment in higher education fosters the growing economic influence of distance learning.\(^5\)

Distance education is proliferating, although legal education has been comparatively slow to adapt to this trend. In 1998, Concord University of Law, the first exclusive on-line law school, opened, engendering controversy from the outset.\(^6\) When renowned Harvard law professor Arthur Miller was commissioned by Concord to produce a series of videotaped lectures on civil procedure to be delivered through streaming video from Concord's web site, Harvard modified its faculty manual so that its professors would be prevented from teaching, researching or acting as salary consultants to an Internet on-line school absent special permission.\(^7\) Despite the

\(^3\) See generally Kenneth D. Crews, *Distance Education and Copyright Law: The Limits and Meaning of Copyright Policy*, 27 J.C. & U.L. 15 (2000). Distance education has been defined as "a form of education in which students are separated from their instructors by time and/or space." Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549, 551 (2000) (quoting U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 10 (1999)) [hereinafter REPORT ON COPYRIGHT]. In the REPORT ON COPYRIGHT, the definition of "distance education" is limited to "mediated instruction," defined as "the delivery of instruction with a teacher active in determining pace and content, as opposed to unstructured learning from resource materials." *Id.* The REPORT ON COPYRIGHT is available at http://www.loc.gov/copyright/docs/de_rprt.pdf.


\(^5\) See *Realities of Copyright Law*, supra note 4, at 1032.

\(^6\) Concord was introduced by Kaplan, Inc.

\(^7\) Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841, 849-50 (2000). Special permission can be obtained by getting the Dean's consent and then receiving
endorsement of high-powered academics such as Arthur Miller and others, the ultimate influence of Concord on the legal academy remains unknown at this point. One particularly formidable obstacle to the ultimate success of Concord may be the ABA’s reluctance to offer Concord accreditation in light of its refusal to consider Concord as anything more than a correspondence school. As such, Concord is barred from accreditation consideration under the ABA Accreditation Standard 304(f).

Despite the legal academy’s reluctance to embrace distance education, the number of institutions gravitating toward on-line courses mandates attention to important legal issues surrounding the use of this educational medium. The creation of on-line courses presents many novel copyright issues. For example, one especially timely issue concerns the extent to which the creators of on-line courses can avail themselves of the fair use doctrine. This Article, the approval of the corporate body governing Harvard University. Laughlin, supra note 3, at 557–58.

8 See Oliphant, supra note 7, at 851.
9 Id. at 874. Although the ABA published Temporary Distance Learning Guidelines in May 1997, these guidelines reflect a relatively conservative approach toward the substitution of distance learning technology with respect to the J.D. degree, essentially limiting students to receiving no more than three credits in a distance learning setting. See also Helen Leskovac, Distance Learning in Legal Education: Implications of Frame Relay Videoconferencing, 8 ALB. L. J. SCI. & TECH. 305, 355 (1998). Interestingly, the ABA’s position in this regard reflects the reality that the precursors of today’s on-line courses were the correspondence courses of the nineteenth century. See Laughlin, supra note 3, at 552.
10 Even elite universities such as Cornell are aggressively supporting distance education. See Oliphant, supra note 7, at 850. Distance education exists at all levels of education but it is most common in higher education. It is estimated that by 2002, 2.2 million college students (approximately 15% of all higher education students) will take distance learning courses. Laughlin, supra note 3, at 555. Also, the federal government is supporting distance education through the Higher Education Amendments Act of 1998, which provides for “financial aid for distance education students, authorizes funding for the development of distance education programs, and establishes a ‘Web-Based Education Commission’ to assess the educational software available for students.” Id. (quoting the REPORT ON COPYRIGHT, supra note 3, at 19).
11 The fair use doctrine is codified at 17 U.S.C. § 107 (1994). The statute provides that in determining whether a particular unauthorized use should be deemed a fair use, the following factors should be considered: the purpose of the use, including whether it is for commercial purposes; the nature of the copyrighted work; the amount and substantiality of the portion used by the defendant in relation to the entire plaintiff’s work; and the effect of the defendant’s use upon the potential market for the plaintiff’s work. Fair use is an extraordinarily flexible doctrine, however, and courts often invoke other factors in their fair use analyses. In essence, the fair use doctrine explicitly recognizes that some unauthorized uses of copyrighted property ought to be tolerated, and therefore it attempts to strike a balance between the optimal use by society of resources and the optimal level of creativity. See ROCHELLE COOPER DREYFUSS &
however, focuses on the ownership and authorship issues surrounding the creation of on-line courses. Varied practices exist regarding these issues. For example, at one institution, the University of North Texas, professors are paid royalties when their on-line materials are used by other instructors and are awarded some of the tuition generated from the courses they create. Still, such arrangements are rare. More typically, authorship and ownership of on-line course materials are governed by university intellectual property policies, in which copyright issues are gaining prominence.

Some institutions treat copyrighted subject matter similarly to the way in which patentable subject matter was historically treated: the faculty is considered the legal author but the university requires an assignment of rights in any work made with significant university resources. Alternatively, institutions create for-profit entities, and hire faculty and students as employees of these entities so that their works are viewed as having been produced within the course of employment for the corporate

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The REPORT ON COPYRIGHT, supra note 3, concentrates on fair use, licensing, and related issues. This report also discusses Section 403 of the Digital Millennium Copyright Act, which required the Register of Copyrights to submit to Congress "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works." Id. at 12. The Register also was instructed to provide recommendations for legislation designed to achieve this objective. See Laughlin, supra note 3, at 559. Currently, new legislation is being proposed which will facilitate the use of copyrighted material in on-line instruction by extending the existing copyright exemption for classroom use of "dramatic literary and musical works" to nonprofit distance-education courses. See Senate Passes a Bill Extending Copyright Exemption to On-line Courses, CHRON. HIGHER EDUC., June 22, 2001, at A36. However, these efforts will not address the authorship and ownership issues treated in this Article.

Jeffrey R. Young, At One University, Royalties Entice Professors to Design Web Courses, CHRON. HIGHER EDUC., Mar. 30, 2001, at A41. Before creating a distance education course, professors at the University of North Texas sign a contract stipulating ownership interests and the amount of future revenue from the course to which the professor will be entitled if the university offers the course without the faculty member's involvement. This percentage varies according to how much assistance the faculty member received from the university in conjunction with creating the course. Administrators at the University of North Texas have found that this policy not only has attracted substantial numbers of new students, but also improved the quality of course offerings. Id.

See Dreyfuss, supra note 2, at 1186. See also William R. Slomanson, Legal Scholarship Blueprint, 50 J. LEGAL. EDUC. 431, 448 (2000) ("[U]niversities are beginning to update their [intellectual property] policies to address 'shared rights' issues, and to cover faculty-generated electronic and digital works."); Patel, supra note 2, at 501 n.106.

Dreyfuss, supra note 2, at 1186 (noting also that in exchange for this arrangement, "[t]he university agrees to handle administrative matters and to share royalties with the creators.").
entity.\textsuperscript{15} Significantly, the American Association of University Professors (AAUP) has prepared a Draft Statement on Copyright advocating that faculty members should be the owners of “courseware” they develop for distance education programs.\textsuperscript{16} Still, the validity, and ultimate enforceability, of any university policy governing copyrighted material depends on the relevant copyright law.\textsuperscript{17} As this Article demonstrates, the relevant copyright law governing the ownership and authorship of on-line courses is murky and largely untested.\textsuperscript{18}

Of course, different models exist regarding faculty creation of on-line course materials, and the appropriate resolution of the authorship and ownership issues can differ depending on which model is at issue. For example, when a faculty member prepares an on-line course completely independently, and then places it on the university server, there is far less of a legitimate ownership claim by the university than if the university asks the faculty member to create the course. Additionally, some colleges will give a faculty member a particular amount of money to create the course. This scenario probably results in the university having a stronger ownership interest.

Part II of this Article explores the parameters of copyright protection generally, and specifically how copyright applies to the creation of on-line course materials. Part III explores issues surrounding the general question of how the doctrines determining the recipients of copyright’s incentives should be applied in the context

\textsuperscript{15} Id. at 1187. See also infra notes 44–60.
\textsuperscript{16} Laughlin, supra note 3, at 561.
\textsuperscript{17} See Dreyfuss, supra note 2, at 1189–90 (expressing reservations regarding the extent to which university policies can address issues of collaborative authorship). Section 204(a) of the 1976 Copyright Act requires a transfer of a copyright to be signed by the author in order to be effective. Even if faculty can be considered the original authors of their course materials under copyright law, universities might argue that employment contracts signed by faculty can result in a transfer of copyright ownership to the extent they incorporate by reference university policies providing university ownership of copyrighted materials. Laughlin, supra note 3, at 561 n.67 (noting that although no such case has yet arisen, “there is no reason to believe such incorporation by reference would not be sufficient to effect a transfer of copyrights.”). But see 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, 250 (1992) (questioning whether university copyright policies, even if incorporated by reference into employment contracts, will result in a transfer of copyright ownership).
\textsuperscript{18} See Laughlin, supra note 3, at 550 (noting that litigation in this area will undoubtedly be very fact specific and therefore provide limited precedential value until such time as several cases have established relevant precedents).
II. AUTHORSHIP OF ON-LINE COURSES SATISFIES COPYRIGHT'S GENERAL REQUIREMENTS OF ORIGINALITY AND FIXATION

The type of subject matter that is capable of copyright protection has expanded over time. For example, computer programs, though now subject to protection, clearly were never contemplated as a protected category of works by the framers of the Constitution. To qualify for copyright protection, however, the Copyright Act of 1976 ("the 1976 Act") provides that a work of authorship must be "original" and "fixed in a tangible medium of expression." As the following discussion demonstrates, authorship of on-line course materials clearly satisfies these statutory criteria, as interpreted by the courts.

Preliminarily, it is important to underscore what types of creative activity would be involved in creating an on-line course. At a minimum, such an endeavor would involve the creation of a Web site, the authorship and recordation of video lectures, a reading list, perhaps commentary on the reading materials, other course materials such as charts, outlines, and exams, and arguably the creation of a chat room and an electronic mail discussion list.

The constitutional grant of power is sufficiently broad to extend to any "writing" as long as the writing is the product of an "author." The Supreme Court had occasion to interpret the term "originality" in

19 The legislative history of the 1976 Copyright Act expressly recognizes that "[t]he first copyright statute in this country, enacted in 1790, designated only 'maps, charts and books'; additional forms of expression, such as music, drama, and visual art" were provided for subsequently. See H.R. REP. NO. 94-1476, at 51, 56-57 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664-65, 5670.

20 Roberta Rosenthal Kwall, Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century, 2001 ILL. L. REV. 151, 161 (2001) [hereinafter Constructed Personas] (arguing that "constructed personas" should be considered works of authorship subject to copyright protection so that the reputation and personality interests of celebrities can be protected under copyright law’s moral rights provision).


22 See generally Laughlin, supra note 3, at 556-57.

23 Kwall, supra note 20, at 161 ("In discussing the term ‘writing’ in this context in 1879, the Supreme Court in the Trademark Cases stated that the writings that are to be protected are the ‘fruits of intellectual labor.’") (quoting The Trade-Mark cases, 100 U.S. 82, 94 (1879)).
Feist Publications, Inc. v. Rural Telephone Service Co., 24 in which the Court held that the plaintiff's white pages telephone book listings did not contain sufficient originality to qualify for copyright protection. Feist declared that originality mandates a minimal degree of creativity. Moreover, Feist enshrined originality as a constitutional requirement, therebyforeclosing copyright protection for many works deemed socially valuable, and greatly labor intensive, but which lack this important prerequisite. Although Feist also held that the specific requirements for originality are fairly low—indepen-
dent selection and minimal creativity 27—the opinion realistically forecloses the possibility of copyright protection for many fact-based works in which the facts themselves constitute the expression sought to be protected. Thus, a reading list of course materials prepared by a professor may be protected as an original work of authorship under Feist, but only if the selection and arrangement of such materials constitute copyrightable expression. More doubtful would be copyright protection for a compilation of names for an electronic mail discussion list. In general, the more expressive the work, the more likely it is to be considered original. Any original expression authored by the professor, such as commentary or lectures, qualify as copyrightable subject matter. Even outlines should fall on the side of original expression, particularly if they contain expression as opposed to mere listings of facts.

Thus, although there may be individual components of on-line course materials, such as alphabetized listings, which may lack sufficient originality for copyright protection, the components of such course materials taken as a whole clearly would qualify for copyright protection. No serious questions should arise, therefore, regarding the application of the "original works of authorship" requirement 28.

Nor does the fixation requirement pose an obstacle to the inclusion of on-line course material as copyrightable subject matter. 29 In defining the permissible means for "fixation," the 1976 Act

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25 Id. at 345.
26 Id. at 345, 358.
27 Id. at 358.
28 See Constructed Personas, supra note 20, at 162 ("The original-authorship requirement demands only that a work be an expression of a separately cognizable idea, and that this expression originates from the author.").
29 It should be noted that "fixation" is not a constitutional requirement under the Copyright Clause. Moreover, many countries protect both fixed and unfixed works under their copyright laws. Id. at 163.
provides that any "tangible medium of expression" will suffice, including mediums "now known or later developed," and from which works of authorship "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."30 In Goldstein v. California,31 the Supreme Court interpreted the Constitution's use of the term "writings" to include any physical rendering of the fruits of creative intellectual or aesthetic labor.32 However, a physical rendering is not necessarily synonymous with a tangible rendering.

In the digital age, typing material into a computer fixes the work just as writing with a pen did in earlier years. In MAI Systems Corp. v. Peak Computer, Inc.,33 the Ninth Circuit concluded that a copy of copyrighted software created in a computer's random access memory (RAM) meets the statute's fixation requirement because it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."34 All of the components of an on-line course, to the extent they embody material entered into a computer, should meet the fixation requirement as defined in MAI Systems. Although it certainly would be possible to print out material appearing on-line, or to archive an electronic mail discussion for future use,35 such additional steps are unnecessary in order to satisfy the requirement of fixation.36

32 Id. at 561.
33 MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).
34 Id. at 518 (quoting the Copyright Act's definition of "fixed," as found in 17 U.S.C. § 101 (1994)). The court's ultimate observations regarding the "fixation" requirement still have relevance despite the reversal of the specific holding in MAI Systems by Title III of the Digital Millennium Copyright Act codified at 17 U.S.C. § 117 (1998). See also Constructed Personas, supra note 20, at 163 n.99 for a fuller discussion of this issue.
35 See Laughlin, supra note 3, at 556–57.
36 See S. REP. No. 93-982, at 103–04 (1972) (reporting that "it makes no difference what the form, manner, or medium of fixation may be."). The situation where a professor's lectures are delivered in a conventional classroom setting presents more of a difficult issue regarding fixation. Here, the problem centers on the degree to which the professor has scripted her remarks, and the extent to which the professor follows that script during the actual class lecture. See also Stephanie L. Seeley, Are Classroom Lectures Protected by Copyright Laws? The Case for Professors' Intellectual Property Rights, 51 SYRACUSE L. REV. 163, 188 (2001) (noting the recent passage of a California law prohibiting the sale or distribution of class notes for commercial purposes); Maryam Ahmad, Fixated on Fixation: Reformulating the Constitution's Copyright Clause to Protect Orally Delivered Lectures (unpublished manuscript, on file with the author).
Having established that on-line course materials satisfy copyright law’s general subject matter requirements, this Article now turns to the application of three copyright doctrines that merit substantial consideration in connection with the creation of on-line course material. The copyright doctrines that are the focus of the following section are work for hire, joint authorship, and moral rights. In brief, these doctrines govern issues involving copyright authorship and ownership, as well as the matter of protection for the integrity and attribution interests of authors.

III. DETERMINING THE RECIPIENTS OF COPYRIGHT’S INCENTIVES IN THE CONTEXT OF THE CREATION OF ON-LINE COURSES

As discussed in the foregoing section, on-line courses clearly fall within the scope of copyrightable subject matter. The far more difficult issue, however, derives from the question of who should be the recipients of copyright’s incentives regarding this type of subject matter. This issue has two facets: first, in whom should the copyright vest; and second, what will be the impact on society resulting from vesting any sort of ownership rights in this subject matter.

Indeed, the question of how society will be affected by vesting ownership rights in copyrighted materials arises in every context in which subject matter is protected by copyright law. The fundamental doctrines of copyright law reflect the underlying reality that the application of these doctrines necessitates a delicate balance between a creator/inventor centered justification for protection, and one that focuses primarily on the social benefits of protection. The most notable example of the balance struck by copyright law between the competing interests of individual creators and those of society is the fair use doctrine, which explicitly recognizes that some unauthorized uses of copyrighted property ought to be tolerated. Additionally, the 1976 Act details a series of exempted activities that do not constitute copyright infringement as well as a series of limitations upon the scope of exclusive rights enjoyed by the owners of copyrighted property. Several of these exemptions concern the rights of

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37 See supra note 11 and accompanying text.
38 These exempted activities and copyright limitations are codified in the 1976 Act at 17 U.S.C. §§ 107–120 (1994). Among the most prominent statutory provisions concerning public access are the statutory limitations involving public performance, see §110; the first sale doctrine, §109(a); the Record Rental Amendment Act and the Computer Software Rental Amendment Act, §109(b); the public display exemption, §109(c); the more limited rights in
unauthorized secondary users of copyrighted property; others focus on the interests of those who own the tangible objects in which copyrighted works are embodied. Moreover, the passage of the Visual Artists Rights Act in 1990, which codified in Section 106A of the copyright statute limited moral right protections for certain types of visual art, significantly altered the rights of creators of certain copyrightable property as well as owners of lawfully made copies of artwork covered by the statute.

Much attention currently is being given to the right versus access balance in the context of on-line courses in light of the pending legislative directives focusing on the appropriate scope of fair use for those creating distance education materials. The application of the fair use doctrine in the context of on-line course materials is a topic of vital importance, and already it has received attention by copyright scholars. This Article, however, explores the authorship and ownership questions pertaining to on-line course materials.

Copyright authorship and copyright ownership represent distinct sets of interests under the 1976 Act. As discussed more fully below, copyright law provides that the author of a work is considered the copyright owner in the first instance, absent the application of the work for hire doctrine. Copyright doctrine also affords to the owner of a copyright the ability to transfer the copyright, either partially or completely, and stipulates that the owner of any particular exclusive right protected under the copyright statute can obtain all available statutory protection and remedies. Thus, the author of a copyrighted work can assign all of her rights to the work and completely lose the

sound recordings, § 114; and the various compulsory licensing provisions, §§ 111(c), 112, 114, 115, 116, 118, and 119.

39 See id. § 109(a) (providing that the owner of a particular lawfully made copy of a copyrighted work has the right to sell or otherwise dispose of that copy without permission of the copyright owner); § 109(c) (providing for the right to display the copy publicly without the permission of the copyright owner).


41 See supra note 11 and accompanying text.

42 See Gasaway, supra note 4. See also Laura N. Gasaway, Distance Learning and Copyright: Part II, J. COPR. SOC’Y (forthcoming) (discussing proposed recommendations to amend 17 U.S.C. § 110(2) (1994) of the copyright statute, which treats exempted performances of works in the context of distance education).

43 See supra notes 53–93 and accompanying text.

44 17 U.S.C. § 201(d) (1994). Section 106 of the 1976 Act details the exclusive rights protected under the 1976 Act. These include the exclusive rights to reproduce and distribute the original work, to prepare derivative works, and to publicly perform and display certain types of copyrighted works.
ability to exercise her copyrights. Nevertheless, the author of the copyrighted work always retains the ability to exercise certain rights under the statute, despite a partial or complete transfer of the copyright.\footnote{These rights include the ability to terminate transfers and licenses of the copyrighted work under certain conditions, id. §§ 203(a) and 304(a), and the exercise of moral rights under § 106A. See infra notes 115–51 and accompanying text for a more complete discussion of moral rights.}

The following section explores the application of two copyright doctrines affecting the ownership and authorship of online course materials: the work for hire doctrine and joint authorship. In addition, by addressing the application of moral rights to the creation of online course materials, it also treats the intersection of economic rights under copyright law with more personal protections for authors.

A. Work For Hire

The issue of whether universities or faculty members own scholarship and other course materials has been the subject of litigation, although not in the context of online course materials. One such case decided in 1969 involved faculty lectures. In *Williams v. Weisser*,\footnote{Williams v. Weisser, 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).} the defendant operated a business that published and sold the lecture notes of a professor of Anthropology at the University of California at Los Angeles (UCLA). The defendant paid a UCLA student to attend the plaintiff's course, take notes, and type them up. The defendant then placed a copyright notice in these notes, subsequently reproducing and selling them.

This case was decided under the 1909 Copyright Act, under which unpublished works were protected by state common law copyright. The defendant disputed the professor's ownership of the copyright by asserting that the common law copyright in the plaintiff's lectures belonged to his university. The court rejected this argument, concluding that the common law copyright in these materials was owned by the professor, rather than the university for which he worked, absent evidence that the professor had assigned such materials to the university. The court also noted several "undesirable consequences" which would follow from a contrary holding.\footnote{Id. at 546.} For example, vesting the copyright in the university would complicate situations when a professor changes jobs and wishes to give the same lecture at his new university. Would the old university...
own the copyright to lectures given there, and would the professor's former university be able to prevent the professor's subsequent use of these materials elsewhere? If such were the case, any university hiring a professor laterally would then have to determine the extent to which the professor's lectures were subject to ownership by another entity.48

Williams v. Weisser was decided under the copyright statute in existence prior to the current statute, the 1976 Act. Under the current law, however, the question of ownership of teaching materials and faculty scholarship would be decided by applying the specific statutory provision embodying the work for hire doctrine.49 Application of the work for hire doctrine to faculty work product is highly controversial, with legal scholars advocating different views on whether and how the doctrine should be applied in this context.50 Some commentators believe that even if cases such as Williams v. Weisser supported the existence of a "teacher" exception under the 1909 Act, the 1976 Act abolished such an exception.51 Other scholars dispute this conclusion.52 As will be discussed below, a large part of the difficulty resides in the flexibility surrounding the application of the current provision of the statute.

Section 201(a) of the 1976 Act provides that the copyright in a protected work "vests initially in the author or authors of the work."53

48 Id.
51 See, e.g., DuBoff, supra note 50, at 17; Simon, supra note 50, at 485.
52 See Lape, supra note 17, at 240–46; Seeley, supra note 36, at 173–74. See also infra notes 60–68 and accompanying text for a discussion of the judicial commentary on this issue.
The statute also provides that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . unless the parties have expressly agreed otherwise in a written instrument signed by them . . . ." 54 Thus, the work for hire doctrine is an exception to the rule that copyright ownership vests initially in the work's creator, and in recognizing this doctrine, the United States probably is the only country that allows the employer of a work's creator to obtain "authorship" status.55

The statute provides that a work is made "for hire" under two alternate circumstances. First, a work can be a work made for hire if it is "prepared by an employee within the scope of his or her employment."56 Second, a work that is specially ordered or commissioned for certain types of uses can be a work for hire, but only "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."57 One of the pertinent statutory categories is "an instructional text," and thus there is the possibility that on-line courses in their entirety could be considered works made for hire under this specific provision. However, application of this part of the definition of a work made for hire requires an express written agreement by the parties involved. This specific written requirement probably would not be satisfied by the incorporation by reference into a faculty member's contract of a university intellectual property policy giving the university rights to on-line courses created by their faculty.58 Nevertheless, in those rare instances when universities and their faculty do agree in writing, the application of this provision of the work for hire doctrine treating specially ordered or commissioned works might apply. In applying this provision of the statute, however, it is reasonable to question whether untenured faculty can realistically decline to sign a document stipulating that their on-line course is a work for hire.

54 Id. § 201(b).
55 DREYFUSS & KWALL, supra note 11, at 318.
57 Id. According to subpart 2 of the statutory definition, a work will qualify as a work made for hire if it is "specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."). Id.
58 See supra note 17. See also Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 560 (2d Cir. 1995) (discussing the specificity with which courts have construed the statutory writing requirement), cert. denied, 516 U.S. 1010 (1995).
Undoubtedly, the more problematic part of the work for hire definition as applied to the creation of on-line course materials is the first subpart, which provides that work done by an employee within the scope of her employment is considered a work made for hire. Under this subpart, there is no requirement of a signed written instrument executed by both parties. The work for hire determination turns completely on whether the professor is considered an employee of the university, and whether preparing the on-line course materials comes within the scope of her employment. Little doubt exists that a professor is an employee of the university where she teaches, but for purposes of applying this provision of the statute, the real question is whether the faculty member is an employee for purposes of creating the on-line course materials.\(^{59}\)

The work for hire provision of the 1976 Act has been litigated rather sparsely in the context of academic work products. In one case, *Weinstein v. University of Illinois*,\(^{60}\) the plaintiff, a pharmacy administration professor, proposed a clinical program for practicing pharmacists, to be funded by his university. Three professors who agreed to write jointly on the results made the proposal to the university jointly. Plaintiff ultimately sued his co-authors, university administrators, the university, and its trustees under 42 U.S.C. § 1983,\(^{61}\) claiming that his co-authors mutilated his work and stole the credit, thereby denying him due process of law.\(^{62}\) The district court dismissed the complaint, concluding that the article was a "work for hire" and owned by the university. The court based its conclusion on the University's Work for Hire policy, which provided that "[w]orks created as a specific requirement of employment or as an assigned

\(^{59}\) *See* Wadley & Brown, *supra* note 50, at 400 (observing that "to the extent that the doctrine embodies the parties' expectations and presumptions, the term 'scope' would include, in the context of the copyright law, only those things in which the parties anticipate that the employer should hold the copyright and not necessarily everything that the hired party produces while working.").

\(^{60}\) *Weinstein v. Univ. of Illinois*, 811 F.2d 1091 (7th Cir. 1987).


\(^{62}\) *See* *Weinstein*, 811 F.2d at 1092–93. Weinstein and one of his co-authors apparently disagreed about the content and conclusions of the proposed article. Although Weinstein had written one draft, his co-author wrote a second draft. Subsequently, the department head, as well as the Dean of the College of Pharmacy, urged the collaborators to resolve their differences and publish the article. Weinstein's co-author submitted his version of the article to the *American Journal of Pharmaceutical Education* and it was published with Weinstein's name in third place. *Id.*
University duty” are works for hire.\textsuperscript{63} Therefore, because the University funded the clerkship program and because the plaintiff was required to conduct and write about clinical programs as part of his clinical professor duties, the article qualified as a work for hire.\textsuperscript{64}

The Seventh Circuit disagreed, however, concluding that the district court’s broad interpretation of the university’s copyright policy was not warranted by the evidence presented in the case.\textsuperscript{65} In so holding, the Seventh Circuit emphasized the tradition under which professors retain the copyrights in their scholarly articles and other intellectual property, a tradition supported by the university’s copyright policy, which provided for only three specific exceptions to this general rule.\textsuperscript{66}

The following year, the Seventh Circuit had another occasion to comment on the work for hire doctrine in the context of academic work product in \textit{Hays v. Sony Corporation of America}.\textsuperscript{67} In that case, plaintiff high school teachers sued a corporation for copyright infringement based on the defendant’s modification of an instruction manual for word processors that the plaintiffs had prepared at the request of their school. Although the court did not expressly decide whether the teacher exception had survived the enactment of the 1976

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 1094.
\item According to the [University’s copyright] policy, which is a part of each professor’s contract with the University, a professor retains the copyright unless the work falls into one of three categories:
\begin{enumerate}
\item The terms of a University agreement with an external party require the University to hold or transfer ownership in the copyrightable work, or
\item Works expressly commissioned in writing by the University, or
\item Works created as a specific requirement of employment or as an assigned University duty. Such requirements or duties may be contained in a job description or an employment agreement which designates the content of the employee’s University work. If such requirements or duties are not so specified, such works will be those for which the topic or content is determined by the author’s employment duties and/or which are prepared at the University’s instance and expense, that is, when the University is the motivating factor in the preparation of the work.
\end{enumerate}
\item \textit{Id.} The application of subpart 3 of the policy was at issue in \textit{Weinstein}.
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} The court did, however, observe that copyright law is sufficiently broad “to make every academic article a ‘work for hire’ and therefore vest exclusive control in universities rather than scholars.” \textit{Id. See also} VerSteeg, \textit{supra} note 50, at 402 (discussing how the court in \textit{Weinstein} became “the first court to acknowledge, albeit in dicta, that, absent either an agreement to the contrary or an expressly recognized ‘teacher exception,’ the work-for-hire doctrine applies to scholarly articles written by university professors.”).
\item \textsuperscript{67} \textit{Hays v. Sony Corp. of America}, 847 F.2d 412 (7th Cir. 1988).}


Act, it indicated that it would be inclined to retain the exception based on policy considerations, coupled with the absence of an express indication that Congress had intended to alter the law as previously applied.68

Subsequently, the Supreme Court attempted to give some definitive context to the “scope of employment” component of the work made for hire definition in Community for Creative Non-Violence v. Reid.69 The facts of Reid are completely divorced from the university context. In Reid, the defendant nonprofit organization commissioned Reid, the plaintiff sculptor, to create a sculpture of a homeless family. Neither party signed a written agreement defining its rights and neither party mentioned copyright.70 After the sculpture was completed, it was returned to Reid for repairs. Upon Reid’s refusal to return the sculpture, the organization brought suit, seeking a return of the sculpture and a determination of copyright ownership.71

As the work in Reid did not fit within any of the categories enumerated under subpart (2) of the work made for hire definition, and as no written agreement existed, the Supreme Court was faced exclusively with the application of the “scope of employment” provision of the statute. Noting the absence of a statutory definition for the terms “employee” and “scope of employment,” the Court determined that Congress intended these terms to be interpreted in light of the general common law of agency.72 In so holding, the Court adopted a long list of factors that are relevant to determining whether a hired party is an employee under the general common law of agency, as opposed to an independent contractor. The overall consideration, according to the Court, is “the hiring party’s right to control the manner and means by which the product is accomplished.”73 According to the Court, the other factors relevant to this determination include:

- the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work

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68 See id. at 416–17.
70 Id. at 734.
71 Id. at 735.
72 Id. at 740.
73 Id. at 751.
is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.\textsuperscript{74}

Applying these factors to the issue of on-line course creation results in factors being present on both sides of the argument. A number of factors militate in favor of on-line courses being regarded as works made for hire under copyright law. Universities clearly withhold federal and state taxes, pay its employer's share of F.I.C.A. taxes, and provide other important employee benefits. The method of payment can be especially suggestive of an on-line course being considered a work for hire in those instances where a university awards a faculty member a particular amount of money to create an on-line course. Also, universities unquestionably have the right to assign faculty members additional projects and professors undoubtedly use their institutions' computers, software, and other instrumentalities to create on-line course materials.\textsuperscript{75} On the other hand, faculty are highly skilled professionals and few university administrators are inclined to become involved in micromanaging the creation and content of an on-line course. Moreover, most faculty members probably enjoy total discretion in the selection of research assistants, and in deciding when and how long to work.

The issue of a faculty member's discretion over when and how long to work can present, however, some difficulties when applying the work made for hire doctrine, especially when this factor is considered in conjunction with the factor emphasizing the location of the work. At first blush, it seems reasonable to suppose that much of the work performed in creating an on-line course would have to be done at the university itself, and if such is the case, the faculty member may be somewhat constrained by the work schedules of other university employees upon whom she is dependent for support. Typically, designing an on-line course would require creating a Web

\textsuperscript{74} \textit{Id.} at 751–52.

\textsuperscript{75} Most faculty placing work on a Web site use their institution's libraries and on-line services to conduct research in preparing the work; computers and software to conduct research and to create the work; space on a server to store the work; Internet connection to make the material available to the world; and, depending on skill level, the assistance of other institutional employees throughout the process of making the material available to its intended audience. Were a faculty member to use her own personal computer and software to research and create the material and acquire and pay for "publication" space from a commercial Internet service provider, then this factor would support a finding that she is not an employee.

Laughlin, \textit{supra} note 3, at 571.
page for every component of the course, including a separate Web page for each lecture. Software such as a program called Microsoft FrontPage facilitates an individual's ability to design an on-line course and create such Web pages. This software can be installed into any computer, and therefore, a faculty member with this software can design an on-line course and create the Web pages from her home computer. On the other hand, professors might need to rely on their universities' services and hours of availability to create certain course components, such as a threaded discussion board. Also, on-line courses might require additional external services provided by the university, such as those of video producers, computer programmers, computer assessment specialists, and Web site designers. Another issue is how these factors should be applied in the situation where a faculty member creates the on-line course over an extended period of time, during which she worked at a number of different institutions. Moreover, a faculty member may incorporate into on-line courses materials developed while working as a consultant or through non-academic outside activities.

The factor focusing on whether the work is part of the regular business of the hiring party also can create some troublesome questions. Hypothetically speaking, should the creation of an on-line course at Concord University, the only law school in the country that is exclusively on-line, be considered a work made for hire even if the creation of courses at other law schools is not so considered? Should the creation of on-line courses at universities that do not offer conventional classroom experiences be more apt to be considered within a faculty member's scope of employment, particularly if faculties at totally on-line universities have no publication duties? For that matter, even at mainstream universities, should the university's particular mission influence the work made for hire determination when the creation of an on-line course is at issue? For example, it could be argued that at universities more focused on research and publication, a work made for hire determination regarding the creation of on-line courses is much less supportable.

76 Interview with Alex Kowalski, Webmaster, DePaul College of Law, Chicago, Ill. (May 23, 2001).
77 The skills of assessment specialists might be required in conjunction with computer examinations.
78 See Laughlin, supra note 3, at 571-72 (noting that "[e]ducators are not likely to leave behind the material they prepared for a course at one institution when they take a position at a different institution.").
79 Id. at 572.
than it would otherwise be at universities more geared toward teaching as their primary mission.\textsuperscript{80}

In my view, difficulties would abound if the work made for hire determination were dependent on consideration of such institution-specific criteria. A much more practical, and administratively viable, interpretation of the current law is to treat the creation of on-line courses in just the same way as any other academic work product. As the analysis in \textit{William v. Weisser} suggests, the presumption is that faculty members own the copyrights to their lectures.\textsuperscript{81} The same reasoning surely should apply to faculty members' scholarship and other work products, although some commentators have argued to the contrary.\textsuperscript{82} As discussed below, the creation of on-line course materials does entail somewhat different considerations from more conventional academic work products. I believe the ultimate analysis applicable to on-line course materials should be consistent with that which governs other genres of academic work products.

Vesting copyright ownership of conventional course lectures and other academic work products in faculty does not entail a significant degree of monetary loss or administrative disruption to the university. In contrast, regarding the creation of on-line course materials, an educator's claim of copyright ownership can result in depriving the university of the benefits of its monetary and time expenditures in creating the courses. Distance learning materials also generate tremendous profits for the university, and such profits will be diminished to the extent universities must negotiate subsequent uses of the materials with the faculty members who create the courses.\textsuperscript{83} Moreover, a university's inability to continue to use particular distance education materials can potentially disrupt an entire distance learning program.\textsuperscript{84}

Still, these differences do not support vesting exclusive rights to the intellectual content of on-line course materials in the university. Initially, if such courses are considered works made for hire, the

\textsuperscript{80} "[S]chools that have commercial development and profit as their primary motive for offering distance learning courses will most likely seek greater institutional control of intellectual property." \textit{Realities of Copyright Law}, supra note 4, at 1030. "[I]nstitutions interested in supporting the traditional academic culture may want to consider allowing faculty members to retain rights to their instructional material." \textit{Id.} at 1032.

\textsuperscript{81} See supra notes 46-48 and accompanying text.

\textsuperscript{82} See supra note 50.

\textsuperscript{83} This is a particular consideration where the university has provided additional resource services in facilitating the creation of the course. See supra note 77 and accompanying text.

\textsuperscript{84} See Laughlin, \textit{supra} note 3, at 580.
faculty members who create them will find themselves in the anomalous situation of being deemed copyright infringers upon using their courses at other universities, absent their ability to invoke the fair use doctrine. The successful invocation of the fair use doctrine by a faculty member in this context is remote, however, to the extent a professor makes use of an entire on-line course for commercial gain at another institution.85

Moreover, the conventions of academia support the position that even with respect to on-line course materials, copyright ownership presumptively belongs to the faculty creator. All educational institutions have the dissemination of information and the advancement of knowledge as their primary goals. These goals, in fact, are consistent with the policies underlying the Copyright Clause, namely "to promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings . . . ."86 The incentive-based rationale underlying copyright protection has, in fact, driven at least one university to pay royalties to professors whose on-line materials are used by other instructors, as well as a percentage of the tuition generated by the courses.87 Administrators at the University of North Texas are betting that such measures "will spur widespread development of on-line courses and course materials."88

One commentator has suggested that the issue of ownership of on-line courses should be resolved by affording universities a "perpetual, non-exclusive license to use of the videotapes, computer files or other media comprising the distance learning programs."89 Such a license "also should permit the institution to revise and update course materials for its distance learning programs."90 This recommendation appears to strike a positive balance, at least initially. Yet, even if the work made for hire doctrine were amended to incorporate explicitly this suggestion, the application of such a provision would raise other critical issues. As discussed in Part IIIC

85 See supra note 11 and accompanying text.
86 U.S. CONST. art. I, § 8, cl. 8. See also Wadley & Brown, supra note 50, at 419 (observing that "to the extent that educational institutions are dedicated to the dissemination of information, they support and reinforce the goals of the copyright system.").
87 See supra note 12 and accompanying text.
88 Young, supra note 12, at A41.
89 Laughlin, supra note 3, at 580. See also Lape, supra note 17, at 261 (advocating same approach to general issue of ownership of copyrightable works). Professor Lape also proposes the notion of faculty reimbursing their universities for resources used, but notes that such an alternative will not advance the university's interest in generating revenue. Id.
90 See Lape, supra note 18, at 264.
of this Article, the United States' legal system does not embrace the notion of moral rights for creators of copyrightable works other than certain categories of visual art. Therefore, even if faculty members retain copyright ownership of the course materials, no law exists to mandate that professors receive a right of attribution when their universities subsequently use their course materials, or to insure that a professor's name is removed if such is her desire. Moreover, no legal recourse exists for a professor who objects to the manner in which the university modifies or updates the original materials. As the law currently stands, such moral rights interests must be provided for by contract since United States copyright law does not insure faculty members the ability to protect these types of personal interests.

B. Joint Authorship

In Community for Creative Non-Violence v. Reid, the Supreme Court suggested that the sculptor and the non-profit organization might be considered co-owners of the copyright if, on remand, the district court determined that they met the statutory requirements for joint authorship. Indeed, often courts holding that a particular work is not made for hire must examine whether the facts at issue nonetheless justify a conclusion of joint authorship.
The 1976 Act defines a "joint work" as one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The statute does not contain any definition of the relevant terms, although the intention to merge the contribution is the key concern. The most influential federal circuit courts in the area of copyright law—the Second, Seventh, and Ninth Circuits—have interpreted this statutory provision so that joint authorship requires two components: 1) independent copyrightability of each contribution; and 2) intent by all putative authors at the time of the collaboration that they be co-authors. In these circuits, the more rigorous "intent to be joint authors" standard is substituted for the "intent to merge" standard. The difference between these standards is not insignificant. Under the "intent to merge" standard, joint authorship conceivably can result even if a party provides a less significant contribution, as long as both parties intend to merge their contributions. In contrast, the "intent to be joint authors" standard de-emphasizes the act of collaboration at the expense of mutual intent to be joint authors, thereby insuring a result favorable to the collaborator disputing joint authorship.

Of course, joint authorship will not be a major concern for professors who work independently, although many professors potentially face the possibility of a research assistant who provides some degree of assistance claiming joint authorship of the final work product. In general, such claims will not go far in those circuits invoking the "intent to be joint authors" standard. After all, few

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98 See Roberta Rosenthal Kwall, "Author-Stories": Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine, 75 S. CAL. L. REV. 1, 48-49 (2001) [hereinafter Author-Stories] (noting also that although the legislative history similarly fails to define key terms, it furnishes a conception of joint authorship that focuses on either the act of collaboration or intent to merge).

99 See, e.g., Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000) (joint authorship suit by an advisor for film); Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998) (suit by dramaturge of play Rent against the playwright's heirs); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061 (7th Cir. 1994) (affirming injunction against theater company from performing plays to which plaintiff playwright owned the copyrights); Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991) (copyright infringement suit by playwright against an actress who had furnished the playwright assistance in connection with a play). But see Author-Stories, supra note 98, at 52 (observing that although some courts have not embraced standard for joint authorship, its acceptance by three of the most prominent federal appellate courts in copyright requires that it be given serious attention).

100 See Author-Stories, supra note 98, at 55-57 for a more complete discussion of this point.
professors intend to share joint authorship status with their research assistants, no matter how much assistance they provide. In addition, the independent copyrightability standard will also thwart joint authorship claims by research assistants whose contributions do not translate into an independently copyrightable product—specifically, a product that is an original work of authorship.\(^{101}\)

In contrast, when professors collaborate with one another, or even with graduate students performing substantial research and writing duties, problems can arise. Cases have arisen involving authorship disputes in academic settings, although not in a digital context. In *Weissman v. Freeman*,\(^ {102}\) the court was faced with a situation involving the authorship of a derivative work,\(^ {103}\) in which an established professor and his accomplished assistant collaborated on a number of prior scholarly works. Weissman, the more junior colleague, claimed sole authorship of an article that was derived from a collaborative effort. Freeman subsequently used Weissman’s article in his materials for a particular course, and he deleted Weissman’s name, replacing it with his own.\(^ {104}\) The Second Circuit reversed the district court’s determination that, as a matter of law, Freeman’s joint authorship of the prior works made him a joint author of the derivative work.\(^ {105}\) The court articulated a standard for joint authorship of derivative works: “First, each putative author must have ‘contributed’ to the work. Second, each must intend to contribute to a joint work at the time his or her alleged contribution is made.”\(^ {106}\) In this case, the evidence established that Freeman had not made any contributions to the derivative work at issue, apart from his contributions to the underlying work. Moreover, purportedly applying the standard that joint authorship does not result unless all parties intend to merge their contributions,\(^ {107}\) the court determined that no joint authorship resulted in light of Weissman’s lack of intent.

\(^{101}\) See 17 U.S.C. § 102(a) (1994); *supra* notes 23–27.

\(^{102}\) *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989).

\(^{103}\) Section 101 of the 1976 Act defines a “derivative work” as “a work based upon one or more preexisting works, such as [examples omitted] or any other form in which a work may be recast, transformed, or adapted.” Moreover, “[a] work consisting of editorial revisions, annotations, elaboration, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”

\(^{104}\) See *Weissman*, 868 F.2d at 1316.

\(^{105}\) *Id.* at 1317.

\(^{106}\) *Id.* at 1318.

\(^{107}\) Subsequent Second Circuit decisions clearly apply the more rigorous “intent to be joint authors” standard. See *supra* note 99 and accompanying text.
A close reading of the case indicates that the court was not entirely clear on whether it was applying the "intent to merge" the contributions standard, or the more rigorous "intent to be joint authors" standard. More troubling, however, is the court's suggestion that the absence of Weissman's intent precludes a finding of joint authorship, regardless of Freeman's intent. The court fails to explain why one party's intent should dominate the inquiry. Perhaps the court just assumed this analysis was appropriate in light of Freeman's failure to contribute to the derivative work at issue. Even so, the court's application of the intent standard in this regard facilitated the development by future courts of a test for joint authorship in which the dominant author's intent takes precedence even in cases where other parties also contributed to the work at issue.

As discussed, Weissman v. Freeman involved a derivative work, and the copyright law provides that copyright protection exists for derivative works independent of the protection afforded the underlying work. The creation of on-line course materials clearly can involve the use of works derived from previously existing copyrighted works. Where the professor creating the on-line course was not an author of the preexisting works used, the extent to which use of the underlying work is allowed will be determined by application of the fair use doctrine, absent the involvement of a license. On the other hand, when the professor creating the on-line course alleges that he co-authored the underlying work used in a derivative manner in the on-line course, the joint authorship principles invoked in Weissman and other courts will apply to determine whether the underlying work was the product of joint authorship. The same joint authorship principles will apply to the

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108 See Weissman, 868 F.2d at 1319. The court relies on the statutory "intent to merge" standard, but also states: "[T]he rule has evolved that an author who intends to create a joint work must clearly demonstrate his or her intent in that regard. . . . [I]n the absence of such a showing, the work is presumed to be the product of an individual author . . . ." Id.

109 See, e.g., cases cited supra note 99. See also Author-Stories, supra note 98, at 55 & n.252 (citing commentary critical of the case law requiring that all putative joint authors share a mutual intent to be joint authors); Mary LaFrance, Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors, 50 EMORY L.J. 193, 216 (2001) (noting that "Weissman's unnecessary introduction of a new intent requirement introduced an unfortunate sleight-of-hand into the joint work analysis" and that "this questionable analysis has now been applied in a series of cases . . .").

110 "The copyright in [a derivative work] is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. § 103(b) (1994).

111 See supra notes 11 and 85 and accompanying text.
issue of whether a particular on-line course is a jointly authored product, regardless of whether the course itself is a derivative effort. In those jurisdictions requiring independent copyrightability as well as intent by all putative joint authors to establish joint authorship, individuals who contribute to a joint product, but whose efforts do not constitute the dominant portion of the work, risk being denied joint authorship status. The authorship status of a given work is significant because under copyright law, joint authors have "equal" undivided interests in the whole work, meaning that they can unilaterally use and license the work, subject only to the duty to account to their fellow joint authors for profits.112

In addition, a question exists as to whether a collaborator to an on-line course who is denied joint authorship status can nonetheless make a subsequent use of those parts of the course he created independently, without obtaining the permission of the copyright owner. If the non-dominant collaborator is not able to use the materials he contributed, he will be in the anomalous position of being deemed a copyright infringer for using the parts of the on-line course he did create, unless he can justify his use under the fair use framework.113

In sum, the manner in which the joint authorship doctrine has been applied has the potential for creating significant difficulties for those who collaborate on ventures resulting in on-line course materials. Courts must be willing to confront directly these difficulties in the context of all joint ventures. Moreover, a statutory revision of the joint authorship provision would be helpful to the extent it acknowledges that the economic interests of joint authors do not have to be equal, and incorporates "meaningful collaboration" as

112 See, e.g., Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998). But see Author-Stories, supra note 98, at 57–58 for a critique of the “equal” sharing of profits standard in the joint authorship context.

113 See supra notes 53–93 and accompanying text for a similar discussion regarding the work for hire doctrine. Professor Dreyfuss has noted that a void exists regarding the legal status of collaborative works that do not fall into either the work for hire or joint works categories. She concludes that such works fall into "the Larson gap" with indeterminate legal status. She adds that "[p]erhaps they are to be considered authored solely by the dominant author; perhaps they are not fully exploitable by anyone—until courts start facing the ramifications of dispositions like [Thomson v.] Larson, there is no way to be certain." See Collaborative Research, supra note 2, at 1217.
the touchstone rather than independent copyrightability of the contributions and mutual intent.\footnote{114 See Author-Stories, supra note 98, at 64. See also Collaborative Research, supra note 2, at 1220–24 (advocating the creation of a new category of multi-authored works under copyright law in which rights and duties would be allocated proportionally).}

C. Moral Rights

Although copyright law is intended to provide economic incentives for the creation of works of value to the public,\footnote{115 Monetary rewards to the individual author or inventor are viewed as an essential incentive for spurring production of valuable types of innovation, rather than as a critical end in and of itself. On numerous occasions, the Supreme Court has observed that the promotion of the arts and sciences is the primary purpose of the monopoly granted to copyright owners, with financial rewards to creators as a secondary concern. \textit{See}, e.g., Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994); Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); Mazer v. Stein, 347 U.S. 201 (1954). \textit{See also} H.R. REP. No. 60-2222, at 7 (1909); supra note 86 and accompanying text.} the works that are subject to copyright protection reflect a bifurcated origin. On the one hand, they are subject to commodification in much the same way as any other tangible form of property. Yet, copyright law protects works "that are the product of the creator's mind, heart, and soul,"\footnote{116 Roberta Rosenthal Kwall, \textit{Copyright and the Moral Right: Is an American Marriage Possible?}, 38 \textit{VAND. L. REV.} 1, 2 (1985).} and the very act of creating such works implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way.\footnote{117 \textit{See Author-Stories}, supra note 98 (arguing that the author's perspective has been submerged in the development of copyright law).} Therefore, complete protection for copyrightable works must embody important personal interests in addition to economic safeguards.

Copyright law in the United States is concerned almost completely with protecting the pecuniary rights of copyright owners. By assuring the copyright owner the exclusive rights to reproduce and distribute the original work, to prepare derivative works, and to perform and display publicly certain types of copyrighted works, the 1976 Act focuses on the inherent economic value of a copyright.\footnote{118 \textit{See} 17 U.S.C. § 106 (1994).} In contrast, moral rights, which are well established in many European and Third World nations, enable authors to safeguard their personal, as opposed to pecuniary, rights in their works.\footnote{119 Interestingly, in recent years, there has been a renewed interest in moral rights abroad in countries such as Russia, Vietnam, and Hong Kong. As of this writing, however, a European Union Directive on moral rights still has not surfaced. \textit{See} Roberta Rosenthal Kwall, \textit{Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than the U.S. Law?}, 27 \textit{J.C & U.L.} 53, 60–61 (2000) [hereinafter Moral Rights for University}
in content among those countries that maintain moral rights provisions, some universal aspects of the doctrine do prevail.

Moral rights doctrine encompasses the following three major components: the right of disclosure, the right of attribution, and the right of integrity.\textsuperscript{120} Underlying the right of disclosure is the idea that the author, as the sole judge of when a work is ready for public dissemination, is the only one who can possess any rights in an uncompleted work. The right to determine the timing of a work’s public dissemination has particular significance for academics whose professional reputations rest largely upon the perceived quality of their scholarship.\textsuperscript{121}

The right of attribution safeguards an author’s right to compel recognition for her work and to prevent others from naming anyone else as the author. It also protects an author’s negative rights of anonymity and pseudonymity.\textsuperscript{122} The right of integrity lies at the heart of the moral rights doctrine, as it prohibits any alterations of an author’s work that will destroy the spirit and character of the creator’s work.\textsuperscript{123}

In 1988, the United States joined the Berne Convention for the Protection of Literary and Artistic Works, the oldest multilateral treaty governing copyright protection. As a result, American creators can now obtain increased copyright protection internationally. Section 6 of the Berne Convention recognizes a right of attribution and a right of integrity, but the treaty contemplates that the specific legislation of the respective Union members will govern substantive

\textit{Employees].} For a discussion of the reasons underlying the difference between the limited protection afforded creators’ moral rights in the United States, and the scope of this doctrine in many other countries, see id. at 59–62 and the sources cited therein. The disparity in protection afforded moral rights among different nations presents an increasingly difficult challenge in the digital age. Indeed, “the possibilities of borderless exploitation of works, the endless ways of using digital work and the changes in how works are created” give rise not only to greater potential for moral rights violations but also highlight the difficulties presented by varying laws and enforcement mechanisms among different nations. See \textit{Moral Rights for University Employees, supra,} at 62 (citing Thomas P. Heide, \textit{The Moral Right of Integrity and the Global Information Infrastructure: Time For a New Approach?}, 2 U.C. DAVIS J. INT’L L. & POL’Y 211, 214 (1996)).

\textsuperscript{120} Roberta Rosenthal Kwall, \textit{Copyright and the Moral Right: Is An American Marriage Possible}, 38 VAND. L. REV. 1, 2 (1985). (The Copyright Act of 1976 continues this country’s tradition of safeguarding only the pecuniary rights of a copyright owner. “By assuring the copyright owner the exclusive rights to reproduce and distribute the original work, to prepare derivative works, and to perform and display publicly certain types of copyrighted works, the Copyright Act of 1976 focuses on the inherent economic value of a copyright.”).

\textsuperscript{121} \textit{See Moral Rights for University Employees, supra} note 119, at 53.

\textsuperscript{122} Id. at 54.

\textsuperscript{123} Id.
applications of these rights within each member country. When the United States joined the Berne Convention, Congress believed that no additional moral rights protections were needed in this country given the presence of certain other federal and state doctrines. In addition, several states provided specific statutory moral rights protections for certain types of works, notably visual art. In 1990, however, Congress enacted the Visual Artists Rights Act (VARA), a measure that was intended to enhance moral rights protections in the United States. This provision is codified in § 106A of the Copyright Act, and its effective date was June 1, 1991. VARA’s scope is extremely narrow, as it applies only to visual art, and even then, only to a narrow range of visual art. On-line courses are completely outside the scope of VARA’s protection, leaving faculty who create such courses with no effective moral rights in this country.

I have argued elsewhere that the copyright law’s failure to protect authors’ personal interests is especially devastating to those who create within the university confines. The university setting provides an atmosphere with the potential to breed moral rights violations. Yet, the case law addressing moral rights, or “quasi” moral rights violations in the university context reveals that moral rights interests are not being adequately addressed, or safeguarded, in the current legal system.

A review of the cases involving universities and their personnel in the context of moral rights types of claims reveals various litigation patterns. For example, students have sued both universities as well as professors. Additionally, professors have sued students as well as their universities. Although the factual situations giving


125 Moral Rights for University Employees, supra note 119, at 54–55.

126 17 U.S.C. § 106A (1994) (limiting VARA’s protections to visual artists who create certain categories of works which include paintings, drawings, prints, sculptures, or still photographic images produced for exhibition purposes only).

127 See Moral Rights for University Employees, supra note 119.

128 Id.


130 See, e.g., Seshadri v. Kasraian, 130 F.3d 798 (7th Cir. 1997) (suit by professor against student for publishing under student’s name paper allegedly written by professor); see infra notes 137–39 and accompanying text; Weinstein v. Univ. of Illinois, 811 F.2d 1091 (7th Cir. 1987) (suit by professor against university and its trustees based on publication of an article with
rise to these lawsuits vary, the underlying themes of many of these cases involve violations of authors' rights of attribution, integrity, and disclosure. None of the reported cases deal with on-line courses, but it is easy to imagine scenarios where moral rights types of claims can be raised in conjunction with the preparation and use of on-line course materials. For example, to the extent students participate in the creation of on-line course materials, these materials could be modified by their supervising professors or their universities so as to violate the students' integrity or attribution interests. Moreover, as discussed earlier, even if faculty are able to retain copyright ownership of their on-line course materials subject to certain use privileges by their universities, the lack of moral rights protection in this country fails to insure faculty a right of attribution, or a right of non-attribution if such is a professor's wish. Additionally, a professor who objects to the manner in which the university modifies or updates the original materials may have little chance for successful redress. Even if the modifications themselves were authorized pursuant to a valid license, without additional protections for the personal and reputational interests safeguarded by moral rights, academics are insufficiently protected.

Of course, reputational interests are critical in most law suits implicating moral rights types of controversies. As a general matter, although other legal doctrines are occasionally invoked in the United States as substitutes for moral rights, the case law reveals that these substitutes do not adequately address the reputational interests at stake in moral rights disputes. Moreover, what distinguishes moral rights oriented cases in the university context is the recognition that often university faculty or students have relatively no commercial interest in their creations. Indeed, many academics do not create for the purpose of obtaining royalties, but instead desire widespread dissemination of their work for the sole purpose of building their professional reputations. Still, as discussed earlier, the creation of

\[131\] See generally Patel, supra note 2, at 505 (observing that "[t]he fact that the parties are a university and a student, as opposed to an employer and an employee, only exacerbates an already troublesome form of assigning ownership rights.").

\[132\] See supra note 92 and accompanying text.

\[133\] See Moral Rights for University Employees, supra note 119, at 63–67 for an expanded treatment of this issue.

\[134\] Id. at 63. The Internet exacerbates the reputational interests at stake by facilitating other types of moral rights violations of concern to academics apart from the on-line course issue. In September 1999, an article appeared in the Chronicle of Higher Education discussing
on-line course materials, with their high potential for financial gain, necessarily interjects financial interests into the calculus. Therefore, in the context of on-line course materials, a faculty member’s reputational and economic interests converge.

Additionally, academic environments give rise to many co-authorship arrangements, and such collaborative efforts often result in difficult disputes involving moral rights types of concerns. The case law demonstrates that no adequate cause of action exists in this country to address a moral rights violation committed by one co-author who, in the opinion of her co-authors, mutilates the work. For example, Seshadri v. Kasraian involved a joint authorship dispute between an electrical engineering professor at the University of Wisconsin and his graduate student. The court held that the work at issue was jointly authored. Additionally, the Seshadri case

the prevalence of Internet companies engaging in the practice of paying students to take class notes and then posting this material on the Web. See CHRON. HIGHER EDUC., Oct. 1, 1999, at A31. This disturbing practice is extremely troublesome for reasons extending beyond copyright law’s concern with unauthorized reproductions and distributions. Suppose, in a conventional classroom setting, a professor engages in a dialogue with her students as part of a lecture in which she attempts to sketch out a new theory or research idea. The professor’s objection to a posting of such a lecture clearly will encompass a claim that her work is not ready for dissemination in a public forum and that she is the only one with the ability to judge when her work will be ready for a public airing. Although the practice of posting such lecture notes on the Web may be actionable as a matter of copyright law, an application of the current copyright law, which is concerned exclusively with economic compensation, does not theoretically address the reputational harm caused by premature publication of her work. This scenario also can give rise to the publication of lecture notes in an altered state, with important errors and omissions. If the altered lecture notes were explicitly connected to a particular professor, she also could allege a violation of her right of attribution. Moreover, the right of attribution also allows an author to compel recognition for her particular work. Therefore, even if the lecture notes did not contain errors, but were not in any way designated as deriving from the professor’s particular class, the right of attribution is implicated. See Moral Rights for University Employees, supra note 119, at 65. Obviously, these same concerns also can arise if a university were to use and modify on-line course materials.

See supra note 3 and accompanying text.

See Moral Rights for University Employees, supra note 119, at 67.

Seshadri v. Kasraian, 130 F.3d 798 (7th Cir. 1997).

Id. The professor and student allegedly co-authored an article published in the Journal of Applied Physics. When they initially submitted the article to the journal, the student’s name was listed first. Subsequently, the professor had a substantial disagreement with the student, and the professor withdrew the manuscript from the journal prior to its acceptance. The student then resubmitted the article under his own name, signing an assignment of copyright to the publisher of the journal upon the article’s acceptance. The professor contended that upon taking this action, the student infringed his copyright because the professor was the sole author of the work. In contrast, the student argued that the article was a joint work, and as such he was entitled to license the copyright to a third party, subject only to a duty to account. The court rejected the professor’s argument, based on the evidence that the student contributed significant copyrightable material. Id.
involved the interesting issue of how joint authorship rules interface with moral rights. On this point, the court observed:

If a joint work is marred by errors reflecting unfavorably on his coauthor, with quantifiable adverse effects on the coauthor’s career, the coauthor might conceivably have some legal remedy, but it wouldn’t be under the Copyright Act. We don’t know what it would be under: possibly the law of contracts; in Europe it might be a violation of the author’s “moral right” (*droit moral*), the right to the integrity of his work. . . . But all that matters here is that a joint author does not lose his copyright by being a lousy scholar; were that the rule, rights of joint authorship would be in legal limbo.¹³⁹

The interface between joint authorship and moral rights in academia also arose in a case discussed earlier in the “work for hire” section, *Weinstein v. University of Illinois.*¹⁴⁰ In that case, Weinstein’s co-author submitted a version of their jointly authored article to the *American Journal of Pharmaceutical Education* and it was published with Weinstein’s name in third place. In his lawsuit under 42 U.S.C. § 1983, Weinstein essentially sought to redress the violation of his moral rights by arguing that his co-authors mutilated his work and stole the credit. The Seventh Circuit noted that co-authors can make changes in a work and publish the original or the revision. In a footnote, the court observed that “Weinstein tries to avoid” this result by asserting moral rights.¹⁴¹ According to the court, however, Weinstein must fail in this respect because “no jurisdiction has created the sort of moral right Weinstein invokes, let alone created any moral right through judicial decision.”¹⁴² Therefore, this federal court was “not about to foist so novel a principle on Illinois.”¹⁴³

*Weinstein* is a troublesome opinion to the extent it underscores that no remedy exists for a joint author when her fellow joint authors publish her work in an altered, or objectionable state.¹⁴⁴ To the plaintiff in *Weinstein*, the order in which his name appeared on the article was significant for several reasons having to do with his

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¹³⁹ Id. at 803–04 (citations omitted).
¹⁴⁰ *Weinstein v. Univ. of Illinois*, 811 F.2d 1091 (7th Cir. 1987). See also supra notes 60–66 and accompanying text.
¹⁴¹ Id. at 1095 n.3.
¹⁴² Id.
¹⁴³ Id.
¹⁴⁴ See Moral Rights for University Employees, supra note 119, at 70.
professional standing. Regardless of the validity of these reasons, the state of the law is such that he has no forum in which to litigate these issues, and no remedy for any such proven violations. The law's omission of a remedy for copyrighted works that are unilaterally mutilated or altered in an objectionable manner by one joint author is problematic. When joint authors collaborate with respect to on-line course materials, there is the potential for serious damage to a joint author's moral rights. Again, given the state of the law in this country, such damage can escape redress unless it is treated contractually. The problem with exclusive reliance on contractual provisions, however, is that non-dominant contributors may face significant obstacles in obtaining contractual provisions insuring these types of rights.

I have argued elsewhere that universities face particular types of challenges in dealing with their personnel with respect to moral rights issues. Specifically, universities are in a unique position because they provide a refuge from the outside world. Within the confines of the university, authors are free to indulge in the creative process, often without having to be unduly concerned with an economic bottom line. In this respect, the nurturing creative environment afforded authors by universities differs substantially from the harsher realities of the non-academic world. Thus, universities have special responsibilities to safeguard the moral rights of authors operating within their creative environments by protecting their authors' moral rights, providing more moral rights education, and encouraging their administrations and faculties to be protective of authors' moral rights.

Universities should provide assistance to their faculty, students, and employees in securing moral rights in connection with all works of authorship, including on-line course materials. Indeed, under the model suggested earlier, under which faculty members own their own on-line course materials subject to non-exclusive licenses for use by

\[145\] For example, Weinstein argued that his not being listed as the first author precluded his use of this topic for a dissertation; diminished his accomplishments among other professors; and hampered his ability to show citations under his name given the prevalent practice of listing citations only under the name of the first author. See Weinstein, 811 F.2d at 1093.

\[146\] See Moral Rights for University Employees, supra note 119, at 70.

\[147\] See generally Author-Stories, supra note 98, at 54-55 for a further discussion of this point.

\[148\] See Moral Rights for University Employees, supra note 119, at 79.

\[149\] Id. at 79-81.

\[150\] Id. at 79.
their universities, it is especially important that such licenses provide adequate moral rights protections. Otherwise, faculty members are left unprotected if the university takes inappropriate attribution measures or otherwise modifies the materials in an objectionable fashion.

IV. CONCLUSION

In many ways, professors and other educators enjoy a privileged existence. Many of us enjoy lifetime job security and high social status, based on our perceived intellectual abilities. Moreover, academics experience enormous satisfaction on a daily basis as we facilitate an awareness of, and appreciation for, our subject matter in our students. Candidly, both undergraduate and graduate university professors are able to enjoy life at a somewhat more leisurely pace than individuals in the corporate world, to the extent we are unconstrained by the demands of clients and other external forces.

In many ways, then, an academic existence truly is an idyllic one. Even so, many academics typically forego the substantial economic rewards that are available to other individuals with comparable educational backgrounds. Although professors at graduate and professional schools often chose to use their expertise by consulting for the corporate sector, this choice remains an individual one rather than an avenue required to achieve prominence in the academy. Indeed, for professors, the publication of scholarly works continues to be the hallmark of success. For the most part, professors find great intellectual stimulation in the authorship of their work products, be they scholarly articles, books, or even the compilation of new course materials.

Our society's advancement depends upon the willingness of people inclined to devote themselves to educational enterprises, even if the economic rewards of these endeavors are not as great as they would receive elsewhere. As a group, academics probably value their reputations, as well as their personal freedom and creativity,

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151 See supra notes 89–90 and accompanying text.
152 See, e.g., Lape, supra note 17, at 266 (noting that depriving professors of supplemental income derived from their copyrightable works could result in a departure of professors with otherwise marketable skills); Kulkarni, supra note 50, at 248–50 (advocating that professors possess complete rights in their intellectual property creations so that talented faculty are more likely to remain in the academy).
more than they do a substantial income. Professors take great pride in their works of authorship, crafting them with loving care. Although concern for the ownership, authorship, attribution, and integrity rights of educators with respect to their works of authorship is not new, this Article has treated these issues in the context of the relatively new medium of on-line course materials. Overall, the foregoing discussion has demonstrated that copyright law does not require a particular revision to deal specifically with these issues as they pertain to on-line course materials. Such materials should be treated much the same as any other academic work product. Even so, the existing applications of the work made for hire, joint authorship and moral rights doctrines do require some adjustments if educators are to be insured their interests will be protected adequately.

153 See VerSteeg, supra note 50, at 407 (noting that teachers “often fashion creative educational materials not so much for financial gain, but for the satisfaction of the endeavor for its own sake and the pride that flows from seeing an original idea come to fruition and achieve a specific educational objective.”).