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## Public K-12 Teachers Creation of Nontraditional Educational Works: To Rely on the Teacher Exception or Explore Other Options?

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# **Public K-12 Teachers Creation of Nontraditional Educational Works:**

## **To Rely on the Teacher Exception or Explore Other Options?**

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## INTRODUCTION

Picture this. You have been in contact with a local community college regarding an idea you have for a new degree program. You have created the program materials using knowledge and skills you have acquired during your academic studies and adult life. The college becomes interested in implementing your degree program into its curriculum and offers to purchase the program materials from you. Enter the possible dilemma. You are a public school kindergarten through twelfth grade (K-12) teacher and your employer, the public school,<sup>1</sup> is determined it has copyright ownership over the degree program materials under the work made for hire doctrine of the Copyright Act of 1976 (the 1976 Act).<sup>2</sup>

Should such situation come to litigation, the outcome would hinge on a court's interpretation of the work made for hire doctrine. It is generally known that traditional materials, such as lesson plans, created by teachers specifically for use in their classrooms fall within the scope of a teacher's employment<sup>3</sup> and, thus, are owned by the institutions that employ the teachers. However, less clear are nontraditional works, such as degree program materials created by teachers to sell to other institutions. In the realm of teacher-created works, some have argued that a "teacher exception" exists that prevents employers from asserting ownership over teacher-created works based on the works made for hire doctrine. Though scholars have weighed in on the exception's existence over the years, the courts have still not provided a clear answer. In either case, exception's strength is not reliable, and teachers should turn to other options if they wish to maintain ownership over their nontraditional educational works.

This comment will begin with a discussion of the treatment of the work made for hire doctrine as it relates to teacher-created works, beginning with the doctrine's creation in the 1909 Copyright Act, its modification by the Copyright Act of 1976, and its current treatment today. Weaved throughout this history of the doctrine is a discussion about the so-called "teacher exception." This comment also discusses the views of three scholars, Russ

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1. This comment focuses on the relationship between public school K-12 teachers and their public school employers. Though the analysis and recommendations may apply to university faculty, they were developed particularly with K-12 teachers in mind. Much of this comment also applies to the private sector, but when collective bargaining is discussed, it should be noted that collective bargaining rights vary for private sector employees and employers, and thus, they deserve a different analysis not covered by this paper.

2. The works made for hire provision states, "[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 for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. § 201(b) (2012).

3. See *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177 (2d Cir. 2004).

VerSteeg, Nathaniel S. Strauss, and Ashley Packard, who have each commented on the existence of the teacher exception. Their articles were published over several years and their arguments strengthen the overarching theme of this article. That is, the teacher exception cannot be relied on, and, based on what seems to be a trend of ending or restricting collective bargaining of public employees, teachers must rely on other options to maintain copyright ownership of their works. The final section discusses some of those options.

## I. STATE OF THE LAW

The work made for hire doctrine has undergone several changes since its enactment. These changes have included not only explicit changes to the language of the doctrine in the Copyright Act, but also implicated the way courts have applied the doctrine. Despite these changes, questions still arise over who owns particular works created by employees. When such employees are teachers, the questions become even more complicated in light of the so-called “teacher exception.” To answer some of these questions, a look into the history of the work made for hire doctrine is necessary.

### A. *History of the Treatment of Intellectual Property Created by Teachers*

The work made for hire doctrine, which now asserts that an employer will assume copyright ownership over works created by an employee during the scope of his employment and over particular works that were specially commissioned,<sup>4</sup> found its birth in the Copyright Act of 1909 (the 1909 Act).<sup>5</sup> However, at that time, the 1909 Act only commented that “author” “shall include an employer in the case of works made for hire” and did not define employees or what qualified as work made for hire.<sup>6</sup> During this time, a principle eventually referred to as the “teacher exception”<sup>7</sup> developed, which carved out an exception to the general work made for hire principle for teacher-created works. It is believed the teacher exception arose out of the cases<sup>8</sup> of *Sherrill v. Grieves*<sup>9</sup> and *Williams v. Weisser*.<sup>10</sup> *Williams*, in

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4. 17 U.S.C. § 101 (2012).

5. James B. Wadley & JoLynn M. Brown, *Working Between the Lines of Reid: Teachers, Copyrights, Work-For-Hire and a New Washburn University Policy*, 38 WASHBURN L.J. 385, 390 (1999).

6. *Id.*

7. Nathaniel S. Strauss, *Anything but Academic: How Copyright's Work-For-Hire Doctrine Affects Professors, Graduate Students, and K-12 Teachers in the Information Age*, 18 RICH. J. L. & TECH. 1, 13 (2011) (“In the 1970s, commentators, most notably Professor Melville Nimmer, came to use the term ‘teacher exception’ to describe the rule established by *Sherrill* and *Williams*, arguably implying it would extend to all types of works by all teachers, including K-12 educators.”).

8. Russ VerSteeg, *Copyright and the Educational Process: The Right of Teacher Inception*,

particular, “became the established common law for all intents and purposes.”<sup>11</sup> In these two cases, the courts found Sherrill, a military instructor, and Williams, a college professor, and not their employers, owned the copyright to the lectures they created because of the teacher exception.<sup>12</sup>

Since Congress’ passage of the 1976 Act, it remains under debate whether the teacher exception lives on, particularly with reference to K-12 teachers. The 1976 Act codified the works made for hire doctrine in 17 U. S. C. § 201(b), which states, “the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”<sup>13</sup> The codification of the doctrine did not mention the teacher exception<sup>14</sup> and many commentators are very skeptical of its continued existence.

There is some case law supporting the existence of the exception. *Hays v. Sony Corp. of America*<sup>15</sup> is frequently cited as the prominent authority endorsing the continued existence of the “teacher exception.” In *Hays*, two high school business course teachers created a manual to instruct students on how to use the school’s word processors.<sup>16</sup> The school employer gave the manual to Sony and asked Sony to modify it to make it compatible with the Sony word processors the school had purchased from Sony.<sup>17</sup> Sony proceeded and created a manual almost identical to the original teacher-created manual.<sup>18</sup> The teachers, in turn, sued for copyright infringement.<sup>19</sup> While the Seventh Circuit ultimately affirmed the trial court’s decision to dismiss the teacher’s complaint for failure to state a claim, Judge Posner discussed at length the court’s support of continuing the existence of the teacher exception.<sup>20</sup> He emphasized, “[t]he reasons for a presumption against finding academic writings to be a work made for hire are as forceful today as they ever were”<sup>21</sup> and that if the court was “forced to decide the issue, [it would] conclude that

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75 IOWA L. REV. 381, 393 (1990).

9. 57 Wash. L. Rep. 286 (D.C. 1929).

10. 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

11. Strauss, *supra* note 7, at 13.

12. *Id.* at 10–13.

13. 17 U.S.C. § 201(b) (2012).

14. Strauss, *supra* note 7, at 15.

15. 847 F.2d 412 (7th Cir. 1988).

16. *Id.* at 413.

17. *Id.*

18. *Id.*

19. *Id.*

20. *See generally id.*

21. *Id.* at 416.



the exception had survived the enactment of the 1976 Act.”<sup>22</sup>

*B. Commentators Take on the Existence of the Teacher Exception*

Despite the *Hays* precedent, commentators continue to debate whether the teacher exception continues to exist. This section discusses three scholarly articles,<sup>23</sup> spanning over a period of about twenty years, which vary in opinion about the exception’s existence, and, as a result, strengthen the argument of this comment that teachers should not rely on the exception.

Some commentators, such as Russ VerSteeg, find the continued existence of the teacher exception to be an “open question.”<sup>24</sup> In his 1990 article, VerSteeg emphasizes that Judge Posner’s dicta in *Hays* is a “valuable tool for a teacher claiming ownership under the ‘teacher exception.’”<sup>25</sup> However, VerSteeg cautions “it would be unwise to interpret the *Hays* dicta to mean that the copyright in and to all educational materials created by teachers should belong to those teachers.”<sup>26</sup> In the end, VerSteeg’s main recommendation is to create a right of “teacher inception,” whereby in a teacher’s contract, a teacher and his employer would enter into a “license and accompanying grant,” which equates to a “shop right” for teacher-created works.<sup>27</sup> VerSteeg suggests this agreement could be accomplished through a collective bargaining agreement.<sup>28</sup> Though reasonable, as will be discussed in Part III, with the decline of collective bargaining since VerSteeg’s 1990 article and the unlikelihood that teachers have individual knowledge that such agreements are wise, VerSteeg’s solution may need a second glance.

Nathanial S. Strauss is one commentator<sup>29</sup> who suggests in part of his 2011 article that the exception may have survived the 1976 Act’s enactment.<sup>30</sup> To support his suggestion, he cites to federal decisions that have, arguably,

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22. *Id.* at 416–17.

23. It should be noted that these are not the only commentators who have discussed the teacher exception, but they were selected in part because of their varying opinions on the exception’s existence. Additionally, it was important to analyze the views of commentators in articles that were published over several years.

24. *See* VerSteeg, *supra* note 8, at 412.

25. *Id.* at 405.

26. *Id.*

27. *Id.* at 410.

28. *Id.*

29. *See, e.g.*, Robert A. Gorman, *Copyright Conflicts on the University Campus: The First Annual Christopher A. Meyer Memorial Lecture*, 47 J. COPYRIGHT SOC’Y U.S.A. 291 (2000); Elizabeth Townsend, *Legal and Policy Responses to the Disappearing “Teacher Exception,”* or *Copyright Ownership in the 21<sup>st</sup> Century University*, 4 MINN. INTELL. PROP. REV. 2009 (2003), for other commentators who argue that the teacher exception lives on.

30. Strauss, *supra* note 7, at 24.

accepted the teacher exception.<sup>31</sup> One such decision is *Shaul v. Cherry Valley-Springfield Central School District*.<sup>32</sup> In *Shaul*, the Second Circuit held a school employer could assert ownership over materials including “tests, quizzes, and homework problems” created by a high school teacher who had since been suspended.<sup>33</sup> The Second Circuit did not accept the teacher’s argument that he owned the materials under the “academic” exception, the alternative name for the teacher exception,<sup>34</sup> but as Strauss notes, “neither did the court reject it in its entirety.”<sup>35</sup> Instead, Strauss emphasizes the Second Circuit articulated that teaching materials prepared by high school teachers differed from published articles written by university professors in that materials not explicitly prepared for publication did not fall within “academic tradition,” a notion highly protected by court.<sup>36</sup> In doing so, Strauss argues, the Second Circuit did not dismiss the teacher exception, it only narrowed it.<sup>37</sup> Yet, Strauss’ analysis of the court’s support for the existence of the teacher exception rests on the notion that the court did not deny the exception. That lack of denial, by itself, is unfortunately not enough to justify a teacher’s reliance on the teacher exception to assert ownership over their work.

Next, Strauss cites to *Pavlica v. Behr*,<sup>38</sup> where the Southern District of New York found a high school teacher retained copyright ownership of a teacher’s manual that explained his method of teaching “independent science research to high-school students,” which was also distributed at workshops outside the school where he was employed.<sup>39</sup> Strauss argues that the “opinion is significant to the teacher exception equation because it demonstrates that, even where courts do limit the teacher exception to the university setting, as *Shaul* did, K-12 teachers would retain ownership of many of the works they create.”<sup>40</sup> Thus, his argument that the exception may have “lurched back from death in the 21<sup>st</sup> century”<sup>41</sup> only seems to apply to the university setting. Strauss argues to maintain ownership, K-12 teachers would only need to prove the works were created outside the scope of their employment, which he asserts would be not all that difficult for them to do.<sup>42</sup> Furthermore, as with

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31. See generally *id.* at 17–24.

32. 363 F.3d 177 (2d Cir. 2004).

33. *Id.* at 181.

34. *Id.* at 186.

35. Strauss, *supra* note 7, at 26.

36. *Id.*; see *Shaul*, 363 F.3d at 186.

37. Strauss, *supra* note 7, at 26.

38. 397 F.Supp.2d. 519 (S.D.N.Y. 2005).

39. *Id.* at 522–23.

40. Strauss, *supra* note 7, at 28.

41. *Id.* at 24.

42. *Id.* at 28.

Strauss' analysis of *Shaul*, Strauss rests the argument that the teacher exception may have survived the 1976 Act on the premise that the court did not deny the exception's existence. While this may be true, the court's lack of denial of the exception, as pointed out above, is not enough for teachers to strictly rely on the teacher exception.

Finally, Strauss states *Bosch v. Ball-Kell*<sup>43</sup> "slammed [the door] wide open" for the teacher exception.<sup>44</sup> There, the court held a professor, and not the university she worked for, maintained ownership over the course materials she created.<sup>45</sup> The court recognized that different considerations might apply in cases involving work made for hire situations in an academic setting.<sup>46</sup> As Strauss notes, the court recognized the *Weinstein* and *Hays* decisions, mentioned above, for their "pronouncements in support of the teacher exception."<sup>47</sup> In the end, in keeping with its support of the *Hays* recognition of the ill fit between the works made for hire doctrine and production of academic works, the court held that the university's intellectual property policy reflected intent that faculty created "course materials, such as syllabi, notes, etc., were to be included within the general category of traditional academic copyrightable works"<sup>48</sup> that are "owned by their faculty creators rather than by the university."<sup>49</sup> The *Bosch* case is noteworthy for its explicit mention of the exception in awarding a professor ownership to her works. However, the facts included a university setting and relied on a university intellectual property policy, a type of policy that most K-12 institutions are unlikely to have. And those distinguishable facts make it a decision that K-12 teachers should not rely on.

In the end, Strauss concludes his article by proposing that the "teacher exception" should be called the "academic exception" and "should apply to scholarly works by teachers, but not to course materials or administrative works."<sup>50</sup> In his explanation of his proposal, he acknowledges what this comment insinuated in evaluating his arguments above. That is, that there is little support that a teacher exception exists for K-12 teachers. In his proposal, Strauss suggests the proposed exception should not apply to K-12 teachers based on *Shaul*'s recognition that "there is no academic tradition granting control of creative works to teachers," and Strauss' opinion is that teachers do

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43. 80 U.S.P.Q.2d 1713 (C.D. Ill. 2006).

44. Strauss, *supra* note 7, at 28.

45. *Bosch*, 80 U.S.P.Q.2d at 1721.

46. *Id.* at 1720.

47. Strauss, *supra* note 7, at 29.

48. *Bosch*, 80 U.S.P.Q.2d at 1720.

49. See Strauss, *supra* note 7, at 29–30.

50. *Id.* at 47.

not need the exception.<sup>51</sup> Thus, while he argues the exception is alive, his ultimate proposal for the exception would not apply to K-12 teachers. It is Strauss's analysis of the current teacher exception and recognition that his proposed exception would not apply to K-12 teachers that supports the necessity of teachers to not rely on the teacher exception to protect their works.

Finally, some commentators doubt the existence of the teacher exception.<sup>52</sup> In her 2002 article, Ashley Packard asserts that while once accepted, the notion that the teacher exception continues to exist is dwindling.<sup>53</sup> Such evidence of this is the change in the concept of academic freedom. In addition to common law support, the notion of academic freedom, which stands for the proposition that teachers should be entitled to freedom in their research, classrooms, and speech, has been the crucial support of the existence of the teacher exception.<sup>54</sup> However, Packard notes that while the United States Supreme Court and lower courts support academic freedom, the "notions of academic freedom appear to be primarily institutional, rather than individual in nature."<sup>55</sup> This is evidenced by several cases that praise academic freedom, but come up short in applying the right to scholars over universities.<sup>56</sup> These cases are not entirely consistent with one another, says Packard, but that does not alter their adverse impact on professors' copyright ownership.<sup>57</sup> Since the United States Supreme Court appears to be signaling that academic freedom belongs to institutions rather than individuals, the concept of academic freedom cannot be "the legal hook up which to base the teacher exception,"<sup>58</sup> thereby strengthening the argument that the future of the exception's existence and reliability is bleak.

Still, twenty-five years after VerSteeg's article, there is still no clear

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51. *Id.* at 44.

52. See Todd F. Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485 (1983) (suggesting that university professors enter into written agreement with their employers to guarantee copyright ownership over their materials because they do not receive automatic ownership over their created intellectual property); see also Michael W. Klein, "The Equitable Rule": *Copyright Ownership of Distance-Education Courses*, 31 J.C. & U.L. 143, 167-70 (2005) (concluding that the teacher exception likely has not survived the 1976 Copyright Act revisions based on the current splits in judiciary opinions regarding the existence of the exception and the impact of the growth of technology, which has encouraged findings that ownership vests in colleges and universities).

53. Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL'Y 275 (2002).

54. *Id.* at 287.

55. *Id.* at 289.

56. *Id.* at 291.

57. Packard, *supra* note 53, at 293.

58. *Id.*

answer as to the existence of the teacher exception. Many scholars, including Strauss and Packard, have argued that the exception may or may not exist, but only one thing remains true since VerSteeg's article: K-12 teachers simply cannot rely on the existence of the teacher exception and must look to other alternatives, such as those discussed in Part III, to protect their copyright ownership of nontraditional works.

### *C. Interpretation of the Works Made for Hire Doctrine*

If an employer seeks to assert ownership over a teacher-created work, litigation regarding ownership of the work would involve interpretation of the work made for hire doctrine. The United States Supreme Court most notably interpreted the inner workings of the doctrine in *Community for Creative Non-Violence v. Reid*.<sup>59</sup> The court noted that Section 101 of the 1976 Act provides a work is made for hire if (1) an employee creates a work within the scope of his employment or (2) the work falls within one of nine enumerated categories and the parties expressly agree in a written instrument that the work is made for hire.<sup>60</sup>

The first circumstance, when an employee creates a work within the scope of his employment, requires two elements. First, the creator must be an employee, which can be determined by "using principals of general common law of agency."<sup>61</sup> The *Reid* court provided several non-exclusive factors that are relevant to the inquiry, but, in general, the more control the hiring party exerts over the hired party's work, the more likely the hired party is an employee.<sup>62</sup> If the creator is an employee, the second element requires that the work be created within his scope of employment. What works fall within the scope "seem to include only those of the types that the employee was hired to create that can be created within the time and space limits of the employee's job and those that are motivated by a purpose which is to specifically serve the employer's purposes."<sup>63</sup> As will be discussed in more detail in Part III, in the case of public K-12 teachers, because they are generally hired under a contract and the school and governing federal and state laws exert significant

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59. 490 U.S. 730 (1989).

60. *Id.* at 738.

61. *Id.* at 751.

62. *Id.* at 751–52 (stating relevant factors 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 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.").

63. Wadley & Brown, *supra* note 5, at 400.

control over what they teach, they are employees and ownership of their created works will be determined by the works made for hire doctrine.<sup>64</sup>

Two final considerations may impact ownership of a work created by an employee within the scope of employment. First, Section 201(b) provides that an employee and his employer can contract around the work made for hire doctrine if “expressly agreed otherwise in a written instrument.”<sup>65</sup> This Section allows for a few alternatives discussed below in Part III. Second, though this comment argues that teachers should not rely on the teacher exception, nonetheless, it is important to note that, if applied, the teacher exception would serve as an exception to ownership by the employer over works created by a teacher within the scope of his employment.

The second circumstance involves special commissioned works, which will be made for hire if the work falls within one of the nine enumerated categories and the parties have a written agreement that the work is made for hire.<sup>66</sup> This situation occurs when a creator is an independent contractor, as opposed to an employee.<sup>67</sup> However, if the work created does not fall within one of the nine categories or if the work falls within one of the categories but the parties do not have a written agreement that the work is made for hire, the work will not be made for hire and ownership will vest in the creator.<sup>68</sup> For teachers, this situation would be extremely rare, but could occur if an outside employer asked a K-12 teacher who is not employed by the employer, but would instead be an independent contractor, to create one of the nine enumerated categories of work, as specified by a written agreement between the two parties. If this were the case, the work would be one strictly made for hire, to which the teacher exception could not apply, making the issues discussed in this article related to the exception’s existence irrelevant. However, as mentioned above, most teachers will create works as employees, thereby almost eliminating the need to analyze whether a work was specially commissioned under the second circumstance.

## II. HOW SHOULD TEACHERS AND THEIR EMPLOYERS PROCEED

With the current state of law in mind, a balance must be struck between

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64. *Id.* at 412.

65. 17 U.S.C. § 201(b).

66. 17 U.S.C. § 101(2) (2012) (providing “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”).

67. *See Reid*, 490 U.S. at 753.

68. *See id.* at 738.

teachers protecting their created works and employers retaining ownership over works they should rightfully own. This is difficult because, as noted above, the teacher exception has not achieved concrete acceptance for even very traditional academic created works. Therefore, how can it be known whether the exception will be applied to nontraditional works, such as degree programs created by teachers to sell to other institutions? The answer, as suggested above, is that teachers should not rely on the exception and instead focus on other alternatives.

#### *A. Contracts and the Works Made for Hire Doctrine*

As discussed above, employers of teachers may assert ownership claims over works created by teachers who are employed by them under the works made for hire doctrine. Because it is not clear whether nontraditional works, such as degree program materials created to sell to other institutions, fall within a teacher's scope of employment, it is wise for teachers to enter into written agreements with their employers regarding copyright ownership. The solution may sound simple, but it is likely not the case, especially in light of the current state of teacher and school negotiation techniques and the uneven sophistication of the two parties.

##### 1. Collective Bargaining

If permitted by the state in which a school is located, public teachers and their employers can enter into written agreements regarding copyright ownership through collective bargaining. Collective bargaining units are beneficial to individual teachers because the units are more likely to have the sophistication and knowledge about various rights, such as a right of teacher inception or copyright licensing. While all public school teachers have a constitutional right to join a union because citizens have a constitutional right to organize, their right to engage in collective bargaining is determined by individual state's laws, as there is not a "constitutional right to bargain collectively."<sup>69</sup>

Collective bargaining involves teachers selecting "representatives to bargain with their employer about 'wages, hours, and other terms and conditions of employment.'"<sup>70</sup> Additionally, states that allow collective bargaining often have varying requirements about what school boards and teachers' representatives can and must negotiate about in terms of "wages,

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69. Louis Fischer et al., *TEACHERS AND THE LAW* 46–47 (Arnis E. Burvikovs et al. eds., 6th ed. 2003).

70. *Id.* at 46.

hours, and other terms and conditions of employment.”<sup>71</sup> These subjects often include insurance, fringe benefits, salaries, sick leave, and seniority.

Intellectual property rights are not always included in public K-12 teacher employment contracts. Thus, in states where collective bargaining is still allowed, the unions that represent teachers need to be aware of teachers’ intellectual property rights and include them in their bargaining process, especially as technology continues to increase. The National Education Association (NEA), the nation’s largest professional union,<sup>72</sup> has recognized in its *NEA Policy Statement on Digital Learning* that the changing times call for educators to ensure that “[a]ll students—pre-k through graduate students” are exposed to and learn about new technology.<sup>73</sup> The policy further recognizes that in this landscape, “teachers, faculty, and staff are becoming curriculum designers who orchestrate the delivery of content using multiple instructional methods and technologies both within and beyond the traditional instructional day.”<sup>74</sup> To ensure that students receive this important education, the NEA asserts that “education employees should own the copyright to materials that they create in the course of their employment” and that this “should be resolved through collective bargaining or other bilateral decision-making between the employer and the affiliate.”<sup>75</sup> The increase in technology and its impact on intellectual property rights can provide both teachers and employers with “bargaining chips” to be used in contract negotiations. Therefore, not only is it an advantage for teacher unions to bring intellectual property rights into their negotiations, the employers can also use those rights to negotiate with prospective teachers and their union representatives.

Bargaining over copyright ownership, specifically for a right of teacher inception, is an option emphasized by VerSteeg in his 1990 article mentioned above.<sup>76</sup> However, more recently, it appears there is a more concentrated effort to either do away with or reduce collective bargaining rights for public employees. Currently, five states outlaw collective bargaining for public

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71. *Id.* at 46–47, 53.

72. NAT’L EDUC. ASS’N, <http://www.nea.org/home/2580.htm> (last visited March 23, 2014) [hereinafter NEA].

73. *NEA Policy Statement on Digital Learning*, NEA, <http://www.nea.org/home/55434.htm> (last visited March 23, 2014).

74. *Id.*

75. *Id.*

76. VerSteeg, *supra* note 8, at 410–11. A right of teacher inception “amount[s] to a ‘shop right’ for works created by teachers.” Through collective bargaining, employers and the teacher’s union could negotiate a license and accompanying grant to include the right in teachers’ contracts. The right of teacher inception would give the school “. . . a nonexclusive, nontransferable, royalty-free license to use the copyrightable [educational] works for nonprofit educational purposes. The teachers would then hold all other copyrights.”



sector teachers.<sup>77</sup> Other states, such as Idaho, Tennessee, and Wisconsin, have implemented legislation that dramatically limits the scope of collective bargaining.<sup>78</sup> Thirteen other states apply “right to work” laws to public employees, which also have the effect of making collective bargaining more difficult.<sup>79</sup> While VerSteeg’s suggestion is a reasonable option if a collective bargaining unit is representing a group of teachers, the option may not be very realistic for teachers who must individually negotiate for their contracts. Those teachers may not have the same knowledge and ability of the bargaining unit to enter into such agreements individually with their employers, making VerSteeg’s suggestion less realistic.

While including the subject of copyright ownership rights during collective bargaining can be a good option for both teachers and their employers, it is no secret that collective bargaining is often an unpopular solution. Collective bargaining rights, though not eliminated or minimized in a majority of states, seem to be under attack across the United States and when allowed, many teachers and employers are likely not bargaining over intellectual property rights. Therefore, teachers increasingly have to take a proactive approach in order to protect their copyright ownership over works they wish to create.

## 2. Individual Employee Negotiations

Teachers have two options to engage in a contract negotiations regarding copyright ownership under the works made for hire doctrine:<sup>80</sup>

First, ‘the contract could specify that certain types of activities, [such as employee created programs or degrees intended for sale to other institutions], will not be considered within the scope of employment.’ Second, ‘the contract could give the teacher rights other than ownership of the copyright . . . [such as], the employer, which still owns the copyright, could give the teacher the right to reproduce or distribute curriculum materials.’<sup>81</sup>

This process may sound simple, but several hurdles may make these options unrealistic. First, it is reasonable to assume that copyright ownership

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77. Milla Sanes & John Schmitt, CENTER FOR ECONOMIC AND POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES (March 2014), <http://www.cepr.net/documents/state-public-cb-2014-03.pdf>.

78. *Id.* at 6.

79. *Id.* at 10.

80. Louis Fischer et al., *supra* note 69, at 110.

81. *Id.*

and other intellectual property rights are not on the forefront of a teacher's mind when entering into an individual contract with an employer. Additionally, a school employer may not be forthcoming with their employed teachers about the importance of negotiating for those rights.

School districts likely can and will enlist the help of an attorney in contract negotiations, but it is unlikely that many teachers will do the same. Of course, it is not the school district's or the state's job to provide legal advice to teachers who will enter into employment contracts. However, the state could incorporate more training into the education curriculum of those studying to be future teachers, such as requiring that prospective teachers have completed coursework regarding employment contracts. Why would a state want to do this? By educating employees on their contractual rights, teachers and employers may be able to enter into better-formed contracts regarding not just intellectual property rights, but all working conditions, and ultimately, avoid situations that may lead to disputes or litigation.

Another potential hurdle for teachers are standard form contracts. Many school districts may use standard form contracts for each of their employees that may not include intellectual property clauses. Without unions advocating that intellectual property and other rights are included in contracts, teachers may face negotiating with their employers to make additions to the standard form contract or a completely new contract. This process may go smoothly or it may create conflict between the employer and the teacher from the beginning of their relationship and perhaps, preclude the relationship from forming at all.

Not only can a school district work out an agreement to maintain certain rights pertaining to intellectual property created by its employees, but it can also avoid unnecessary conflicts or litigation with its employees. Furthermore, including opportunities for future employees to negotiate their rights may also help contribute to the positive reputation a school district employer may receive. In competing for the best educators to employ, a school district would be wise to promote it has flexibility in its contract formation, specifically in regards to intellectual property rights that are becoming increasingly important in the age of rising technology.

Even after beginning employment, a teacher may face another hurdle if and when he decides to create a nontraditional work, such as degree program materials to sell to another institution. To avoid potential future disputes, the teacher could attempt to enter into a written agreement with his employer that the teacher will have copyright ownership of the materials. Some school employers may happily agree, but others may not, causing an issue for the teacher before he even begins to work on his degree program. Overall, this hurdle may stunt the innovations of the teachers who are depended upon to

educate others.

In a perfect world, states and school district employers would include a discussion about intellectual property rights during contract negotiations, even when using standard contracts, and as suggested, it would not be an unwise move for those entities to do so. In the absence of state and school district led discussions, it is up to teachers to advocate for copyright ownership and other intellectual property rights. As mentioned, teachers may not know those discussions are important. In the absence of those discussions, disputes may arise and will be analyzed under the works made for hire doctrine.

### *B. Teacher's Scope of Employment*

When teachers and their employers have not entered into a copyright ownership agreement, the works made for hire doctrine will determine ownership over a teacher-created work. Because teachers should not rely on the teacher exception to the works made for hire doctrine, teachers will have to fall back on their next best option by arguing that a nontraditional work, such as degree program materials, do not fall within the scope of their employment.

As discussed above, the first circumstance under Section 101 is the most likely circumstance to arise when ownership of teacher-created works is disputed. This requires that an employee has created a work within the scope of his employment. It is almost certain that in every case, a public K-12 teacher will be considered an employee, because they are generally hired under a contract and the school and governing federal and state laws exert significant control over what they teach.<sup>82</sup>

The second prong, whether the work was created within the teacher's scope of employment must also be met. It is easy to imagine that "lesson plans, exams, quizzes, explanatory handouts, outlines, lecture notes, interoffice communications, e-mail messages, calendar notations, letters of recommendation for students, peer evaluations, public service presentations, correspondence with other professionals, reviews" and the like, are tasks a teacher would likely complete in the course of his employment and could be copyrighted if the work satisfied the requisite requirements of copyright ownership.<sup>83</sup> It is not a far stretch to conclude that these works are part of a teacher's general responsibility and the teacher's employer may want and may successfully retain copyright ownership under the work made for hire doctrine, particularly in relation to materials directly used during the course of

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82. See generally *Hays*, 847 F.2d 412 (7th Cir. 1988).

83. Wadley & Brown, *supra* note 5, at 403.

a teacher's instruction.<sup>84</sup> Less clear are nontraditional works, like those created by teachers to be sold to other institutions. Thus, it is under this second prong that teachers have the best opportunity to argue that a nontraditional work, such as degree program materials, does not fall within the scope of their employment and as a result, should not be owned by their employers.

Strauss, in his article, suggests this argument should not be too challenging for K-12 teachers because their "duties to their schools are usually clearer than professors' duties to their universities."<sup>85</sup> While this may be true for some works, teachers will want to be prepared with evidence that supports that they did not have a duty to create the disputed work, especially in light that little precedent exists related to nontraditional teacher-created works.

Using the example of the degree program materials, before creating this work, a teacher should consult his position description to determine whether it includes creating any materials that may be remotely close to a degree program. When a work does not fall within a position description, the teacher can argue that the work does not fall within the teacher's scope of employment either. Next, a teacher, during the creation of the material should not accept payment from his employer for any part of the work or solicit any advice about the work from his employer. If the teacher would do so, the employer may be able to successfully argue that it directed and exercised significant control over the work. He also should not solicit advice from other teachers or they may argue for joint authorship ownership rights. Additionally, teachers should not work on the materials during work time, at their place of employment, or using their employer's resources. All and all, if a teacher's work invites a disagreement with his employer or litigation, the more evidence the teacher has that he did not have the duty to create the work, the more likely he will be able to successfully argue the work does not fall within the scope of his employment, and thus, he has sole copyright ownership over the work.

#### CONCLUSION

Due to the uncertainty surrounding the acceptance and application of the so-called "teacher exception," teachers should not rely on the exception. Instead, it would be best for teachers to enter into a written agreement with their employer about copyright ownership rights. Employers would also be served by entering into contracts with their employees before conflicts arise,

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84. *See id.*

85. Strauss, *supra* note 7, at 28.

especially regarding nontraditional teacher-created works that may not easily fall under the works made for hire doctrine. Teachers who are not aware of the advantage of entering into written agreements to protect their copyright ownership would be best served by collective bargaining. However, due to what seems to be an effort to either reduce or eliminate collective bargaining rights for their public employees, teachers may have to proactively contract with their employers individually to protect their copyright ownership rights.

Though entering into written agreements regarding ownership over copyrightable materials may be the best option to appease both parties, it is more likely that many teachers are not aware of this option. Without an agreement, any disputes between a teacher and his employer over copyright ownership will fall under the work made for hire doctrine. In that case, the teacher should not rely on the teacher exception, and instead focus on arguing that his nontraditional created work, such as degree program materials, do not fall within the scope of his employment, making the work made for hire doctrine inapplicable and, ultimately, securing copyright ownership of his work.

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