

MEMORANDUM

To: Marti Ellermann and Joyce Villa
From: Wendy L. Kowalczyk
Date: December 3, 2001
Re: The Academic Exception to the Work-for-Hire Doctrine

In preparation for our meeting regarding copyright issues, I thought that some additional background on the academic exception to the work-for-hire doctrine might be helpful.

Under the Copyright Act, the individual who creates a particular work generally is deemed to own the copyright to such work. Where the work is made for hire, however, the statute provides that the employer of the individual who created the work owns the copyright to such work. Thus, the author's employer owns the work when it is created by the employee within the scope of her employment or, under certain statutory circumstances, when there is a written agreement commissioning the work which is signed by the author before the work begins.

With respect to works made within the scope of employment, agency principles are used to determine whether a work is one made for hire. Where an employer withholds taxes for the employee, provides or pays for the employee's benefits, sets work schedules, provides necessary equipment or materials and assigns projects to the employee, an individual is more likely to be deemed an employee for purposes of the work-for-hire doctrine. See Burk, D., *Ownership of Electronic Course Materials in Higher Education*, CAUSE/EFFECT, Vol. 20, No. 3, pp. 13 – 18 (fall 1997).

Conversely, where the employee exercises considerable discretion over her own schedule, has a short term relationship with the employer, pays for her own benefits and income tax and supplies some or all of her own equipment, the individual is more likely to be considered an independent contractor. An independent contractor will be deemed to be the author of works she creates unless the work was specially commissioned and expressly designated as a work made for hire. The copyright statute sets forth nine such specially commissioned

works, including contribution to a collective work, audiovisual works, a compilation, an instructional test, a test and answer material for a test.

Under the foregoing analysis, university faculty members would appear to satisfy the criteria for regular employees. They generally have long-term relationships with the institution, which has the right to assign them to particular projects and which, to some extent, can dictate their work schedule. Most educators are subject to income tax withholding and receive benefit packages from, or through, their employer. Moreover, most of the course materials and scholarship produced in higher education is generated with resources provided by the institution. See Burk, *supra*.

This being the case, it may seem odd then that most faculty members are nonetheless afforded ownership rights to works created in the scope of their employment. The roots to this anomalous result lie in the principle of academic freedom – *i.e.*, that universities should not control the expression of ideas in scholarly writings. Several older cases seized on this philosophy and created a body of law holding that university academicians are not employees for purposes of the work-for-hire doctrine.

Most of the cases affirming the academic exception were decided under the 1909 Copyright Act. It is now widely believed, however, that when the 1976 Act superseded the 1909 Act, the academic exception was abolished as well. See *e.g.* Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. Chic. L. Rev. 590, 598-98 (1987); *Hays v. Sony Corp. of America*, 847 F.2d 412 (7th Cir. 1988); *Weinstein v. University of Illinois*, 811 F.2d 1091, 1093-94 (7th Cir. 1987). This conclusion is based on the fact that since the 1976 Act suggests that courts should limit their inquiry to the existence of an employment relationship, the dispositive issue will be whether production of scholarly material is “within the scope of employment.” Therefore, since scholarship clearly is a factor in decisions regarding tenure, promotion, salary increases, sabbatical leaves, and reduced teaching loads, scholarly works properly belong to universities, rather than to the faculty members who created them. Dreyfus, 54 U. Chi. L. Rev. at 599.

Despite this reasoned analysis, public policy concerns appear to be mandating a contrary result – at least in some courts. The Seventh Circuit may have put it best when, considering whether the academic exception to the work-for-hire doctrine had been abolished, it stated:

[C]onsidering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the

exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act. *Hays v. Sony, supra.*

In conclusion, there are some very real questions as to the continued viability of the academic exception to the work-for-hire doctrine. While some institutions have asserted ownership under the work-for-hire doctrine, others have continued to allow faculty to assert copyright ownership over their own scholarly materials. Yet others attempt to allocate authorship by contract. Whichever direction ultimately is charted, it is important to remember, however, that absent a signed agreement commissioning one of nine types of specified works set forth under the Act, authorship cannot be determined by private agreement. The Copyright Statute, not private agreement, governs authorship of copyrightable materials.