COPY-RIGHT OR COPY-FIGHT? THE DISTANCE EDUCATION DILEMMA

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Abstract
This article examines the inadequacies of current copyright laws as they apply to distance education, a domain that has grown exponentially in importance, especially highlighted by the Covid-19 pandemic. Distance education, defined as “mediated instruction,” presents unique intellectual property challenges that are not sufficiently addressed by existing legal frameworks. This paper explores the evolution of copyright in distance education through the lens of legal foundations, judicial perspectives, and institutional policies. While the Copyright Act of 1976, the Digital Millennium Copyright Act, and the Technology, Education, and Copyright

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Harmonization Act have contributed to shaping the landscape, they fall short in clarifying the ownership rights over educational materials created for distance learning, often leaving educators and institutions in a legal limbo.

The paper scrutinizes various judicial rulings and policy approaches adopted by academic institutions, which have often resulted in a tug-of-war over intellectual property rights. Through an analysis of landmark cases and the policies of leading universities, this study highlights the pressing need for explicit agreements that define the rights and responsibilities of educators and institutions. The conclusion advocates for a balanced and transparent policy framework that respects the intellectual contributions of educators, safeguards the interests of institutions, and supports the growth of distance learning—a critical educational resource for the digital era.

**Keywords**

Distance Education, Copyright Law, Intellectual Property Rights, Academic Freedom, Online Learning, Work for Hire, Teacher's Exception, Fair Use Doctrine
I. INTRODUCTION

Imagine an academic landscape where the boundaries of classrooms are extended beyond physical spaces, enabling education to traverse time and space, reaching learners wherever they are. This is the realm of distance education—a pedagogical revolution propelled by the burgeoning capabilities of the internet, becoming a mainstay for non-traditional learners and a crucial pivot during the Covid-19 pandemic. Defined as “mediated instruction” by the U.S. Copyright Office, distance education is characterized by a purposeful, teacher-led pace and content, distinguishing it from unstructured self-learning.¹

In the wake of the internet revolution, distance education has transcended traditional learning, becoming indispensable for students across the globe. This surge in virtual classrooms, especially amplified by the Covid-19 pandemic,² has brought to the fore a pressing legal conundrum: who holds the copyright to the educational materials created for these courses, educators or institutions?

This article posits that the current copyright laws are ill-equipped to address the unique challenges posed by distance education, leading to a legal and academic impasse that hinders the development of a clear framework for intellectual property rights in this field.

To unravel this complexity, the paper is structured as follows: the first section lays down the legal foundations for copyright in distance education, examining the relevant acts and their interpretations. Subsequent sections delve into the judicial perspectives that have shaped current understandings, the varied institutional policies that reflect the struggle over ownership, and the emerging trends that seek to reconcile these interests. The conclusion synthesizes these insights, advocating for a coherent policy that

¹ See Copyright and Digital Distance Education: Hearing Before the Sen. Comm. on the Judiciary, 106th Cong. 1 (1999) [hereinafter Statement of Marybeth Peters] (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (utilizing the term “mediated instruction” to refer to the delivery of educational content to students through some form of intermediary or mediator, typically using digital technology).

² See Sébastien Goudeau et al., Why Lockdown and Distance Learning During the COVID-19 Pandemic are Likely to Increase the Social Class Achievement Gap, 5 NATURE HUM. BEHAVIOUR 1273 (2021) (indicating that the COVID-19 pandemic had two main effects on virtual learning: accelerated digitalization of education and amplified role of parental involvement).
balances the rights of educators and institutions, fostering an environment conducive to innovation and accessibility in distance learning.

II. Distance Education Evolution and Copyright Challenges

Distance education represents a transformative approach to learning, where students and instructors are no longer confined to the same time or space.³ This mode of education, as defined by the U.S. Copyright Office, relies on mediated instruction, where a teacher actively shapes the pace and content of the course—distinct from self-paced, resource-based learning.⁴ The advent of the internet, particularly during the 1990s, catalyzed the expansion of distance learning, making it a pivotal resource for non-traditional students and a key response during global events like the Covid-19 pandemic.⁵

The historical journey of distance education began in the 19th century with correspondence courses via mail and evolved through the mid-20th century with the introduction of broadcast and teleconferencing technologies.⁶ Today, it is predominantly facilitated through the internet, allowing for an interactive and versatile online

³ See Statement of Marybeth Peters, supra note 1 (defining “distance education” as “a form of education in which students are separated from their instructors by time and/or space.”).
⁴ See id. (using the term “mediated instruction” to denote the delivery of educational content to students through an intermediary or mediator, often with the aid of digital technology).
⁵ See Michele Le Moal-Gray, Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education, 16 TOURO L. REV. 981, 983 (2016) (providing a snapshot of the growth and development of distance learning in the wake of the advent of the internet in the 1990s to the 2000s).
   It was reported in 1995 that one third of all institutions engaged in some form of distance education and that another quarter had plans to do so. As an example of the rapid growth of distance education offerings, in March of 1999 Jones International University became the first completely virtual institution to be accredited, and “by 2002, four out of five colleges are expected” to have distance learning courses.
Id. at 983–84.
⁶ See Gregory Kent Laughlin, Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine’s Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses, 41 B.C. L. REV. 549, 552 (2000) (providing a chronological overview of the evolution of distance education).
learning experience. The 1990s, especially, witnessed an explosion of distance education, with a significant portion of academic institutions embracing this format. Studies during that era indicated a robust inclination towards offering or expanding distance education offerings.

The turn of the century marked a milestone with the accreditation of Jones International University, the first entirely virtual institution, setting a precedent for a variety of virtual universities. By the 2000-2001 academic year, over half of U.S. colleges and universities provided distance education courses, a trend particularly pronounced in public institutions.

In response to the digital era, university professors began integrating the internet and other digital technologies into their curricula, developing online resources to enhance educational delivery. These efforts aimed to accommodate the growing demographic of non-traditional students—adult learners who may be part-time students, employed, or with families, and who often do not reside on campus.

This shift towards distance education was not only an academic evolution but also an economic one, recognized by the government through legislative support like the Higher Education Amendments.

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7 See id. at 554–55 (explaining the high percentage of higher education institutions that offer distance learning through the use of the internet as well as the different possibilities that this alternative learning style offers to both educators and students).

8 See id. at 554 (providing that a 1995 study by the Department of Education revealed that more than 70% of higher education institutions planned to incorporate computer-based learning in the near future).

9 See Le Moal-Gray, supra note 5, at 984 (noting the arrival of Jones International University in 1999 as the first completely virtual institution to be accredited).

10 See Michael W. Klein, The Equitable Rule: Copyright Ownership of Distance-Education Courses, 31 J. COLL. & UNIV. L. 143, 146 (2004) (detailing the growth of educational institutions that offered distance-education courses). “In the 2000-01 academic year, 56% of the two-year and four-year degree granting institutions in the U.S.—2,320 institutions—offered distance-education courses, up from 44% three years earlier.” Id.

11 See Laughlin, supra note 6, at 554 (outlining how educational institutions began improving their offerings via the internet). “Some colleges and universities mandated at least some on-line material for all courses.” Id. “Many other colleges and universities . . . took steps to encourage faculty to incorporate [websites] and other digital technologies into their courses.” Id.

12 See id. (explaining the positive impact that technology had in increased enrollment).
Act of 1998, which extended financial aid to distance learners.\(^\text{13}\) Furthermore, the internet presented new opportunities for professors to disseminate their research, underscoring the relevance of copyright law in the realm of education.\(^\text{14}\)

Copyright law protects original works fixed in a tangible form, which within academia, can encompass a diverse range of materials from software and websites to textbooks and multimedia online courses.\(^\text{15}\) This paper will navigate the contentious debate over copyright ownership in distance education—whether the rights belong to the academic institutions or the individual professors who create the content. It will examine the legislative framework, judicial rulings, and institutional policies that have sought to address this pressing question.

\section*{III. \quad Legal Foundations for Copyright in Distance Education}

The U.S. legal system has enacted various copyright laws pertinent to distance education. Notably, the 1976 Copyright Act, the Digital Millennium Copyright Act (DMCA), and the Technology, Education, and Copyright Harmonization Act (TEACH Act) have directly addressed the challenges distance education presents to university professors’ intellectual property rights.

\subsection*{A. The Copyright Act of the United States}

The original federal Copyright Act was passed in 1909, and it codified the meaning of a “work-for-hire,” defining an “author” to include “an employer in the case of a work-for-hire.”\(^\text{16}\) Before this law was passed, courts applied the work-for-hire doctrine in an

\(^{13}\) See id. at 555 (noting the passage of The Higher Education Amendments Act, and outlining its purpose). “The Higher Education Amendments Act of 1998 provides for ‘financial aid for distance education students, [and] authorizes funding for the development of distance education programs . . . .’” Id.

\(^{14}\) See id. at 554 (highlighting the importance of professors being able to self-publish their research electronically).

\(^{15}\) See 17 U.S.C. § 102(a) (listing the categories of authorship protected by U.S. copyright laws).

\(^{16}\) See Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075 (1909) (defining author in a way that includes “an employer in the case of works made for hire.”). See also Laughlin, supra note 6, at 565 (asserting that the 1909 Act codified the work-for-hire doctrine).
inconsistent and non-standardized manner. The 1909 Act thus served as a codification of existing case law. Legal commentators have theorized that the drafters of the law were unaware that the provisions concerning work-for-hire were creating a broad exception, asserting that they were concerned with materials for encyclopedias or other composite works created by a number of employees for a large publication by a publisher that functioned as an employer. The act itself contained no definition of “work-for-hire” and did not specify how the law’s ownership result should be varied in different cases, thus giving the courts little guidance as to how to interpret the statute. Instead, courts typically looked at whether a work made for hire was produced by an employee for their employer in the “scope” or “course” of their employment, based on the facts and the circumstances of the employment relationship and the creation of the work.

The Copyright Act of 1976 constituted a significant reform of the nation’s laws related to copyrights, abolishing state common law copyright and defining copyright protection as extending to “original

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17 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, 224–25 (1992) (providing that the legislative history of the 1909 Act appears to be the result of an amalgamation of sometimes inconsistent case law).

18 See id. at 226 (explaining that courts were not given sufficient guidance as to the meaning of the term “works made for hire” under the 1909 Act).

19 See Laughlin, supra note 6, at 565 (pointing to a study conducted by the Copyright Office). The drafters “did not realize the breadth of the exception they were creating.” Id. at 566.

20 See Lape, supra note 17, at 226 (explaining how the Copyright Act of 1909 did not address the ownership result produced by the statute).

21 See id. at 227 (outlining facts considered by courts in determining what is a work made for hire). Considerations include:

(1) whether the work was produced on the purported employer’s time; (2) whether the purported employer paid for materials, equipment, and other labor used in creating the work; (3) whether the work was produced in the purported employer’s place of business; (4) whether the purported employee received a salary; (5) whether the purported employer had the right to supervise the manner in which work was performed; (6) whether the purported employer did exercise such right to supervise; (7) whether the contract referred to the purported employee as an “employee”; and (8) whether the purported employer instigated creation of the work.

Id.
works of authorship fixed in any tangible medium of expression.”

Under this law, copyright ownership “vests initially in the author or authors of the work,” and the author is considered to be the person who actually translates an idea into a tangible creation entitled to copyright protection under the law. An author does not need to actually register a copyright or a copyright notice in order to secure legal copyright protections. Neither an employer nor an employee may execute an agreement determining whether a work is a work made for hire as defined by the statute.

The Copyright Act of 1976 gives owners exclusive rights to their works, including reproducing it in copies or phonorecords, preparing derivative works, distributing copies to the public by sale, and performing or displaying the copyrighted work publicly. There are eight main categories of copyrighted works: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and

22 See 17 U.S.C. § 102(a) (providing examples of works of authorship). Works of authorship include:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

Id. See also Georgia Holmes & Daniel A. Levin, Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age, 2000 B.Y.U. EDUC. & L.J. 165, 166 (2000) (explaining how the Copyright Act of 1976 made substantial revisions to the Copyright Act of 1909); Klein, supra note 10, at 152 (demonstrating that the Copyright Act of 1976 grants authors exclusive property rights to their work).

23 See Holmes & Levin, supra note 22, at 166–67 (defining copyright ownership under the Copyright Act of 1976).

24 See id. at 167 (explaining that an author is “the party who actually creates the work—the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”).

25 See Klein, supra note 10, at 152–53 (stating that an author does not need to register a copyright or display a copyright notice for the work to secure copyright protection).

26 See Lape, supra note 17, at 239 (explaining that under the 1976 Copyright Act an employee and employer cannot make an agreement determining whether a work is a work made for hire within the terms of the statute).

27 See Klein, supra note 10, at 153 (listing the “bundle of rights” enjoyed by authors under the Copyright Act of 1976).
other audiovisual works; sound recordings; and architectural works. This list is not all-inclusive, and university lectures for distance education fall under the category of written works, as most professors write their lectures down instead of improvising them extemporaneously, and they are also able to record them through audio or visual means.

For copyright protection, a work requires original creativity and fixation in a tangible form. Copyrightable materials in distance education encompass lecture notes, course websites, exam questions, syllabi, and both draft and final scholarly articles, dissertations, theses, and monographs. Copyright rights attach to a work from the moment of its fixation, when it is expressed in a tangible medium of some kind. This is a crucial determination, complicated by the wide variety of media sources used to convey and transmit information in a tangible form.

The Copyright Act impacts materials for distance education because copyright ownership “is distinct from ownership of any material object in which the work is embodied.” This has the potential to complicate the question of ownership of the work, because scholarly articles authored by a professor may appear on university-

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29 See Seeley, supra note 28, at 170 (emphasizing that while lectures are not automatically copyright protected, they qualify once they are transcribed by the author).
30 See Elizabeth Townsend, Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University, 4 MINN. INTELL. PROP. REV. 209, 222 (2003) (explaining that an audio or video recording can also subject a lecture to copyright protections).
31 See id. at 221 (defining what is required for a work to be copyrightable).
32 See id. (listing examples of copyrightable works for teachers and scholars).
33 See Le Moal-Gray, supra note 5, at 987–88 (defining the point that copyright protection attaches to work product).
34 See id. at 987-89 (highlighting that the moment of fixation is a critical determination to the assertion of intellectual property rights in a variety of media types).
35 See Todd Borow, Copyright Ownership Of Scholarly Works Created By University Faculty And Posted On School-Provided Web Pages, 7 U. MIAMI BUS. L. REV. 149, 150 (1998) (explaining how the 1976 Act ensures that copyright law differentiates ownership between the copyrighted work and the material object where that work is found).
owned web pages, which have separate ownership from the article.\textsuperscript{36}

The main question related to distance education materials is who has control over the copyright, the university itself or the individual professors,\textsuperscript{37} as some argue that the Copyright Act allows for universities to claim copyright ownership of the faculty’s materials for distance education.\textsuperscript{38} This has the potential to impact the education profession by forcing professors moving between universities to abandon their work at their previous workplace.\textsuperscript{39}

The Copyright Act includes several sections on distance education, but it leaves unresolved whether such material qualifies as a “work for hire” under the Act, and if a professor counts as a university “employee” when creating this work. Consequently, Congress considered addressing this in future legislation.

\section*{B. Digital Millennium Copyright Act}

In 1998, Congress passed the Digital Millennium Copyright Act, regulating internet copyright.\textsuperscript{40} The act protects internet and online service providers from liability for subscriber copyright violations, while also safeguarding educational institutions’ use of online materials.\textsuperscript{41} Section 512 specifies four liability limitations for service providers in infringement cases, including digital network

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\item \textsuperscript{36} See id. at 150-51 (providing an example of transmitted information where ownership of the form of transmission is distinct from ownership of the copyrighted work).
\item \textsuperscript{37} See Townsend, supra note 30, at 223–24 (citing discourse concerning the ownership of teaching materials in relation to copyright law).
\item \textsuperscript{38} See Borow, supra note 35, at 151 (arguing that the Copyright Act of 1976 precludes faculty copyright claims and allows universities to claim copyright of faculty work product).
\item \textsuperscript{39} See Townsend, supra note 30, at 223–24 (posing the question of ownership over faculty materials especially when moving “nomadically from university to university”).
\item \textsuperscript{40} See Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998) (enacting the DMCA to implement the World Intellectual Property Organization Copyright Treaty). See also Holmes & Levin, supra note 22, at 184–86 (referencing Congress having enacted the DMCA in October of 1998).
\item \textsuperscript{41} See Holmes & Levin, supra note 22, at 184–86 (explaining that Title II of the DMCA provides protections for internet service providers and online service providers, including against copyright infringement by subscribers).
\end{itemize}
communications, system caching, information storage, and information location tools.\footnote{See 17 U.S.C. § 512 (2010) (establishing four liability limitations provided to service providers in infringement cases). See also Holmes & Levin, supra note 22, at 184–85 (listing four categories of liability limitation for copyright infringement by service providers under Section 512).}

Protection under the DMCA requires automatic, third-party initiated transmissions without provider intervention.\footnote{See 17 U.S.C. § 512(a)(2) (2010) (explaining that automatic liability protection is afforded when “the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider”). See also Holmes & Levin, supra note 22, at 185 (outlining the necessary qualifications for Section 512’s safe harbor provision).} Providers must not store material longer than necessary or alter it during transmission.\footnote{See 17 U.S.C. § 512(a)(4) (2010) (discussing security provisions related to the storage of materials). See also Holmes & Levin, supra note 22, at 185 (stating one of the necessary qualifications for the Section 512 safe harbor provision as ensuring transmitted material is unchanged).} Educational institutions, classified as service providers, grant faculty and students access as subscribers, conditional on respecting intellectual property rights.\footnote{See Holmes & Levin, supra note 22, at 185 (outlining repercussions for faculty and student subscribers that violate intellectual property rights).}

The DMCA directed the Copyright Office, alongside content providers, educational institutions, and libraries, to determine essential exemptions for copyright owners, fostering distance education and equitable rights.\footnote{See S. REP. NO. 105-90, at 3 (1998) (explaining that the Conference on Fair Use was established to explore the issue of copyright law in the digital environment, including that of distance education). See also Le Moal-Gray, supra note 5, at 1005-06, 1009–11 (highlighting the directive by the DMCA to create exemptions to copyright owners’ rights to enable distance education).} The resulting report proposed broadening exemptions to cover various work types, including dramatic, literary, musical, and audiovisual, and adjusting rights to align with technology advances, ensuring digital compliance with copyright.\footnote{See Statement of Marybeth Peters, supra note 1 (recommending updated statutory language to include digital transmission in existing statutory exemptions). See also Le Moal-Gray, supra note 5, at 1011 (listing the exemptions recommended by the report as including “dramatic, literary, musical, and audiovisual works.”).} It also emphasized universities’ role in actively combating copyright
infringement, advocating for material exemptions when vital for educational purposes.48

The DMCA mandates that internet service providers (ISPs) address copyright holders’ “takedown” notices by removing content they allege infringes on copyrights.49 These notifications hinge on the copyright holder’s “good faith belief” in the infringement.50 Yet, enforcement of the good faith belief requirement has been lax, as copyright holders need not extensively prove actual infringement.51 This leniency has sparked arguments about copyright holders exploiting the judicial system to suppress disagreeable speech.52 Even with these drawbacks, the DMCA has been an effective piece of legislation for promoting distance education, a goal that the legislators who drafted the bill explicitly had in mind.53

48 See Statement of Marybeth Peters, supra note 1 (highlighting that higher education institutions promote adherence to copyright policies by providing training to faculty and staff as well as educating students about copyright laws). See also Le Moal-Gray, supra note 5, at 1011 (proposing that educational institutions take a proactive approach to prevent copyright infringement and to ensure that faculty and students only utilize lawfully acquired copyrighted material).

49 See 17 U.S.C. § 512(c) (2010) (mandating the process by which service providers must respond to copyright infringement claims including removal or disabling access to the material in question). See also Copyright Law-Digital Millennium Copy Right Act–Ninth Circuit Requires Analysis of Fair Use before Issuing of Takedown Notices Recent Cases, 129 HARV. L. REV. 2289, 2289 (2016) [hereinafter Ninth Circuit Requires Fair Use Analysis] (explaining that the DMCA requires internet service providers to remove content that infringes on copyrights in response to takedown notifications).

50 See 17 U.S.C. § 512(c)(3)(A)(v) (requiring that a copyright infringement claim be a written communication including attestation that the complainant has a “good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”). See also Ninth Circuit Requires Fair Use Analysis, supra note 49, at 2289 (stating that “[t]he notification must state that the copyright holder has a ‘good faith belief’ that use of the material in question is not permissible.”).

51 See Ninth Circuit Requires Fair Use Analysis, supra note 49, at 2289 (highlighting that the threshold to show infringement is low and that copyright owners do not need to show proof of the infringement).

52 See id. (recognizing that due to the low standard, commentators argue that there is abuse of the takedown notice mechanism resulting in censorship of content).

53 See Holmes & Levin, supra note 22, at 186 (noting Congress’ interest in promoting distance education through the DMCA).
C. The Technology, Education, and Copyright Harmonization Act

In 2002, Congress passed another important law related to copyright ownership, the Technology, Education, and Copyright Harmonization Act. The law, following a Congressional report, modifies how copyrighted material is used online, especially in distance education. It broadens exemptions to include digital activities and introduces measures against copyright abuse. The Act restricts content sharing to specific groups and requires educational institutions to enforce and communicate copyright policies. It also mandates technological controls to prevent unauthorized use and distribution.

However, these measures pose practical and financial challenges, particularly in restricting professors’ use of multimedia in online classes without owner consent. Monitoring internet use, especially during for-profit events, raises concerns about inadvertent violations. The Act also implies university liability for student or

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56 See id. (explaining “the purpose of the TEACH Act . . . is to allow the deployment of advanced digital transmission of technologies for the improvement of student education, while introducing safeguards to limit the risks to copyright owners . . . .”).

57 See id. (providing an explanation of the TEACH Act safeguards and policy communication requirements).

58 See 17 U.S.C. § 110(2)(D) (establishing standards addressing technological measures for the purpose of protecting copyrighted material). See also Colbert & Griffin, supra note 55, at 502 (articulating the technological measures required by the TEACH Act in order to prevent unauthorized use and distribution of copyrighted work).

59 See Colbert & Griffin, supra note 55, at 507, 514 (discussing the challenges higher education institutions face financially and practically in complying with the TEACH Act).

60 See id. at 512 (articulating concerns about inadvertent TEACH Act violations at for-profit events held by universities).
While aimed at protecting copyright in distance learning, the TEACH Act’s limitations underscore its shortcomings as a comprehensive solution.  

IV. Shaping Copyright in Distance Learning  

Colleges and universities, driven by various factors, have developed policies for distance education. These policies serve their students, professors, and market demands, often focusing on the ownership of faculty papers. Stakeholders, including parents, government officials, teachers, students, and administrators, are invested in establishing effective distance education policies. Consequently, both external and internal stakeholders are concerned with shaping university policies on copyright ownership in this domain.  

A. Ownership and Policy in Academic Copyright  

The Copyright Act of 1976 left policymakers uncertain about the legality of a teacher exception for copyrighted works, leading universities and colleges to develop individual copyright policies. Such policies tend to either claim ownership of faculty works, which is used by about one-third of colleges and universities, or they tend to disclaim ownership of faculty works altogether, an approach used by two-thirds of colleges and universities. Both approaches often contain exceptions allowing institutions to claim or disclaim ownership of faculty works. In addition, ownership of “traditional  

61 See id. (indicating possible contributory infringement issues faced by universities and colleges).  
62 See id. at 519 (concluding that “the Act’s inherent complexity and safeguards . . . has undermined its effectiveness and . . . may in this instance be excessive.”).  
63 See Lisa Roundy & Shelley Watts, Stakeholders in Education, STUDY.COM (Nov. 21, 2023), archived at https://perma.cc/2MJB-M9NX (maintaining that all members of a community are impacted by the success or failure of an education system).  
65 See id. at 1478–79 (recognizing the primary approaches that universities use with issues of faculty copyright ownership).  
66 See id. at 1478–79 (listing exceptions that allow universities to disclaim ownership of faculty’s works).
scholarly works” such as textbooks, non-fiction, novels, poems, works of art, and dramatic art are often explicitly disclaimed, with some policies including a statement explaining the university’s reasons for disclaiming them.67

The motivations for including such policies include academic tradition, the need to preserve the academic freedom of the professors, and the desire of the university to encourage the propagation of scholarly research through the Internet.68 The interest of academic freedom is a primary reason for universities giving educators copyright ownership of their own academic work.69 However, the universities themselves may have an interest in the work as well, because professors use their resources in writing or drafting the work, and they do so as part of their employment obligation.70 Universities expect that professors publish in their fields, and publishing academic works is therefore part of their employment responsibilities, so a university or college could arguably claim copyright ownership over an academic work as it was created at the employer’s insistence.71 In addition, the university or college makes decisions regarding tenure, dismissal, and salary, and can in this way exert indirect control over the style and content of the academic research through the process of evaluation.72

Colleges and universities craft various policies for distance education, funding course design, delivery, faculty training, and student support.73 Investments in technology empowers professors to set goals, organize materials, and design assignments.74 Institutions

67 See id. at 1479 (explaining that most university policies explicitly disclaim copyright ownership of “traditional scholarly works”).
68 See id. (providing common reasons why universities disclaim traditional scholarly works).
69 See Townsend, supra note 30, at 212 (articulating that educators’ copyright ownership of their individual work is primarily derived from the interest of academic freedom).
70 See id. at 236 (asserting that universities have an interest in their faculty’s publishable works due to the employee-employer relationship).
71 See Lape, supra note 17, at 232–33 (proposing that university or colleges could claim copyright ownership over an academic work created by faculty).
72 See id. at 233 (highlighting the indirect control universities exert over their faculty in copyright disputes).
73 See Klein, supra note 10, at 162 (listing post-secondary education goals and policies to support long distance education).
74 See id. (emphasizing how the integration of technology assists in course design, organizing information, and researching). “Course delivery and support includes investment in the technological infrastructure, the course-delivery software that
adjust policies to encourage online course development and offer students library access, financial aid, and career counseling.  

However, in many cases, the need to develop coherent university policies regarding distance education and copyright ownership has led to difficult negotiations, including threats of a lawsuit.

B. Stakeholder Interests in University Copyright Policy

Internal and external stakeholders, including businesses, educators, and administrators, have shaped copyright policy in American distance education. Businesses see profit opportunities in this sector, leading to conflicts over unauthorized commercial notetaking. The fading of the “teacher exception” in the work-for-hire doctrine has spurred interest in monetizing faculty-created works, creating uncertainty about ownership—either by the university or the professor. This ambiguity discourages third-parties from licensing works that might otherwise be marketable to academic or for-profit institutions.

In order to sort out the potential for confusion, several schools have created copyright guidelines for distance education and TEACH makes the course content accessible to students and instructors, and technical support for users.”

See id. (providing a sample policy to demonstrate the types of support universities offer online students). “For example, for online students at the University of Wisconsin at Madison, the institution provides advising, admissions, registration, bookstore services, and technical assistance via the Internet, e-mail, fax, and telephone.”

See Laughlin, supra note 6, at 560 (evaluating the difficulties in developing policies regarding distance education and copyright ownership). “For example, faculty at Athabasca University, when confronted with a university policy change, threatened litigation.”

See Townsend, supra note 30, at 217 (describing these profit opportunities and the “commercial potential for distance learning” as motivating both universities and for-profit companies).

See id. (evaluating the way “universities [use] the law to protect themselves and their monopoly on note taking through state legislation, desist letters, and litigation.”).

See id. at 274 (highlighting the problematic nature of the work-for-hire doctrine). “Complete chaos results from the federal statute’s failure to specify who owns the work, leaving ownership to individual university policies.”

See id. (furthering the notion that the ownership ambiguity within the work-for-hire doctrine is troublesome, which might deter third-parties from entering licensing agreements for academic intellectual property). “Without certainty now, a great deal of chaos will emerge in the future.”
Act-required software, paving the way for universal standards. Well-drafted guidelines can benefit stakeholders within a university by clarifying what is required of all parties to comply with the policy, which can also facilitate the sharing of copyrighted materials with third-parties. This adaptation enhances the profitability potential amidst the expansion of distance education.

V. Judicial Perspectives on Copyright Ownership in Distance Learning

The judicial system in the United States has examined issues related to copyright ownership in distance education, focusing on three main concepts: the work-for-hire doctrine, the teacher’s exception, and the fair use doctrine. A “work made for hire” is:

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

Courts have found a “teacher exception” within this doctrine wherein the professor owns the copyright to lectures or other materials prepared by him or her.

In addition, there is the fair use doctrine, which permits using copyrighted works without consent in certain cases, primarily when public interest in idea dissemination supersedes the copyright owner’s control rights. Traditionally, fair use favored photocopies over

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81 See Colbert & Griffin, supra note 55, at 517 (stating that existing guidelines may “serve as a starting point for developing a set of universally acceptable guidelines.”).
82 See id. at 518 (acknowledging that specific terminology and definitions provide clarity and simplify the process for distributing copyrighted materials).
83 See id. at 519 (arguing that “[t]he TEACH Act with a set of guidelines . . . should provide the greatest opportunity to take advantage of digital transmission.”).
84 See 17 U.S.C. § 101 (defining a “work made for hire”).
85 See Gertz, supra note 64, at 1472 (assessing the continued validity of the teacher exception under the Copyright Act of 1976).
86 See 17 U.S.C. § 107 (explaining that fair use extends to such purposes as “criticism, comment, news reporting, teaching . . ., scholarship, or research.”). See also Le Moal-Gray, supra note 5, at 1006 (explaining the concept of fair use).
developed materials. However, its applicability to distance education is uncertain, as rules for paper materials may not extend to electronic formats. Legal ambiguity persists, especially regarding faculty ownership of academic works for distance education, leaving several unresolved issues.

A. Academic Copyright Battles in Distance Learning

Since the passage of the Copyright Act in 1976, Courts have looked at the so-called “teacher exception” to the work-for-hire doctrine that exempts teachers from having their works subjected to the copyright ownership of their employers. In Weinstein v. University of Illinois, the dispute centered on copyright ownership of an article after a co-author, the plaintiff, sued the university for altering the authors’ order prior to publication. Initially third on the list, the plaintiff claimed this reordering reduced the recognition of his contributions, impacting his reputation and career prospects. He contended that being listed last violated his Fourteenth Amendment due process rights by effectively depriving him of property without legal justification. The district court determined the university, not the professor, owns the article’s copyright, classifying it as a work for hire. Consequently, the university was in control of its dissemination, leading to the dismissal of the professor’s complaint.

87 See Le Moal-Gray, supra note 5, at 1006–07 (highlighting that the historical application of fair use favored photocopies over other materials).
88 See id. at 1007 (highlighting the legal uncertainty surrounding the fair use doctrine in distance learning).
89 See id. (maintaining that unresolved legal issues exist for copyright in distance education).
90 See Weinstein v. Univ. of Ill., 811 F.2d 1091, 1092 (7th Cir. 1987) (explaining that Weinstein argued that his name should have been the first author listed on the pharmacological paper jointly written by the three authors).
91 See id. at 1092–93 (asserting that “Weinstein believes that it should have been published as M.M. Weinstein, D.J. Belsheim & R.A. Hutchinson, Etc.”).
92 See id. at 1093 (describing Weinstein’s contention that the order of the authors’ names violated his due process rights).
93 See Weinstein v. Univ. of Ill., 828 F. Supp. 862, 865 (N.D. Ill. 1986) (holding that no due process rights attach because the plaintiff possesses no ownership interest in the data analysis or report that was produced in the course of his employment upon expense and direction of the university itself).
94 See id. at 865, 867 (dismissing Weinstein’s claim because he possessed no ownership interest in the works produced).
university ownership of the work, despite university policy providing that authors generally retain ownership of copyrightable works they produce.95 Pursuant to an exception in the policy, because the work was created as a requirement of his employment and funded by the university, it owned the work.96

Although the Court of Appeals did not squarely decide the issue, it intimated that the article was likely not a work-for-hire, consistent with the norm that faculty typically retain copyright of their academic works.97 Among other instances, the Dean instructing Weinstein to publish or risk his career did not imply the university claimed copyright because the work was a job requirement.98 The university acknowledged that a mathematics professor who discovers a new theorem during employment retains the article’s copyright, upholding a long-standing academic tradition.99 The Court ruled that if the university held the article’s copyright, the co-authors required its consent for publication, which they lacked.100 Thus, if faculty held copyrights for their scholarly articles, they would share ownership with the university, creating a joint work under the Copyright Act.

95 See id. at 865 (outlining the generally permissive language contained in the university’s copyright ownership policy). See also Michael J. Luzum & Daniel S. Pupel Jr., Weinstein v. University of Illinois: The Work-for-Hire Doctrine and Procedural Due Process for Nontenured Faculty, 15 J. COLL. & UNIV. L. 369, 370 (1988) (reporting the district court’s holding that “because the University funded the clerkship program and required Weinstein to write about it, the University owned the article.”).

96 See id. (finding that the work fell within an exception to the university copyright policy, such that the university retained ownership of it). See also Luzum & Pupel Jr., supra note 95, at 370 (explaining the circumstances that led to the university owning the professor’s works).

97 See Weinstein, 811 F.2d at 1095 (affirming the decision that no due process violation occurred).

98 See id. at 1094 (maintaining that the “publish or perish” requirement of the job did not automatically entail the university copyright ownership of Weinstein’s works).

99 See id. (exampleing how publishers in academia often retain the copyright to their findings per traditions). See also Holmes & Levin, supra note 22, at 179 (reasserting the academic tradition that publishers of novel theorems or ideas retain a copyright interest in them).

100 See Weinstein, 811 F.2d at 1094–95 (reasoning that if the university had retained copyright control it would have required the co-authors to first seek permission from the school before publishing). See also Holmes & Levin, supra note 22, at 180 (observing that universities that own a work do not require consent from co-authors prior to publication).
This scenario would reduce the dispute to a contract claim under state law.\textsuperscript{101}

In *Weinstein*, the court implied that the professor and his co-authors held the article’s copyright based on the university’s copyright policy, stating that staff keep copyright in their own works unless the work is a “specific requirement of employment or as an assigned University duty.”\textsuperscript{102} The Court asserted that absent these policies, the Copyright Act could be “general enough to make every academic article a ‘work for hire’ and therefore vest exclusive control in universities rather than in scholars.”\textsuperscript{103} The case forced universities into a dilemma: either classify academic articles as “work-for-hire,” limiting professors’ rights, or uphold “academic tradition” to maintain copyright agreements.\textsuperscript{104} However, *Weinstein* would not be the last case addressing the work-for-hire doctrine or the teacher exception.

In *Hays v. Sony Corporation of America*, the courts examined copyright ownership of a word-processing manual produced by high school teachers.\textsuperscript{105} Two high school teachers sued Sony Corporation alleging that the company infringed their copyright to instructional

\textsuperscript{101} See Le Moal-Gray, *supra* note 5, at 994 (explaining that for universities with standard employment contracts, faculty members typically lack explicit clauses safeguarding their ownership rights to any copyrightable work they create, potentially resulting in their statutory classification as employees and subsequent forfeiture of copyright ownership to materials produced).

\textsuperscript{102} See *Weinstein*, 811 F.2d at 1094 (explaining that professors can claim copyright unless the work falls into one of three exceptions). The first exception pertains to a third party “requir[ing] the University to hold or transfer ownership,” the second revolves around a written express commission of the work by the University, and the third being a “specific requirement of employment or as an assigned University duty.” *Id.* See also Klein, *supra* note 10, at 169 (stating that the university’s copyright claim to the article did not fall under the exception).

\textsuperscript{103} See *Weinstein*, 811 F.2d at 1094 (suggesting that this general approach would disincentivize professors from producing quality publications because they wouldn’t have exclusive ownership over their works). See also Klein, *supra* note 10, at 169 (articulating that this “academic exception may be a victim of old age and new technology.”).

\textsuperscript{104} See Klein, *supra* note 10, at 169 (explaining how the court’s apparent inconsistency leaves both professors and universities in uncertain positions).

\textsuperscript{105} See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 413 (7th Cir. 1988) (deciding issues related to copyright ownership of a word-processing manual produced by high school teachers).
materials. Sony had produced instructional manuals that were almost identical to the manuals drafted by the plaintiffs.

The Plaintiffs sued for common-law copyright, abolished by the 1976 Copyright Act, leading to the case being dismissed and sanctions against their attorney. On appeal, the Circuit Court upheld the sanctions, asserting that the central question of possible copyright infringement hinged on whether the teachers or the school district held the copyright under the “work-for-hire” doctrine.

In dicta, Judge Posner argued that the work would fall under a teacher exception to the work for hire doctrine, but stated that “it is widely believed that the 1976 Act abolished the teacher exception . . . .” However, the court recognized two policy justifications for a different interpretation of the Copyright Act of 1976: it would disrupt established academic practices, and the work-for-hire doctrine poorly aligns with the realities of academic production.

The court went on to state that a “college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise.” Despite not deciding the issue, one commentator noted that “Judge Posner’s dicta

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106 See id. at 412 (summarizing the plaintiffs’ cause of action). See also Holmes & Levin, supra note 22, at 180 (describing how “two high school teachers sued Sony Corporation alleging infringement of their copyright to instructional materials.”).
107 See Hays, 847 F.2d at 413 (pointing out the similarities between the plaintiffs’ manual and Sony’s manual). See also Holmes & Levin, supra note 22, at 180 (explaining that “Sony produced a manual very similar to, and in some places a verbatim copy of, plaintiffs’ manual.”).
108 See Hays, 847 F.2d at 413 (dismissing the case and sanctioning the plaintiff’s attorney). See also Gertz, supra note 64, at 1474 (explaining that the Copyright Law of 1976 negated the original cause of action and thus resulted in a dismissal and sanctions).
109 See Hays, 847 F.2d at 419 (reaffirming the sanctions against plaintiff’s attorney). See also Gertz, supra note 64, at 1474 (discussing the court’s reasoning for upholding sanctions on appeal).
110 See Hays, 847 F.2d at 416 (explaining that the teacher exception was likely abolished by the Copyright Act of 1976).
111 See Hays, 847 F.2d at 416–17 (considering the reality that faculty may produce work outside of their employment description). See also Holmes & Levin, supra note 22, at 183 (identifying two public policy reasons for a contrary reading of the 1976 Act).
112 See Hays, 847 F.2d at 416 (providing an explanation for the assumption that faculty own the copyright to academic writings prepared under the scope of their employment). See also Klein, supra note 10, at 168 (highlighting that faculty writings are generally unsupervised by administration and that colleges and universities likely do not have the capacity to exploit copyright).
... illustrates the judiciary’s reticence to accept the work-for-hire doctrine at face value in an educational context.”

The United States Supreme Court later addressed this issue in *Community for Creative Non-Violence v. Reid*.

Reid concerned copyright ownership of a statue created for a non-profit group focused on homelessness. This group commissioned the plaintiff to design the statue for Washington D.C.’s Pageant of Peace without a written contract or discussion on copyright. Post-completion, both parties filed for copyright, sparking the dispute. The Supreme Court decided that under the 1976 Copyright Act, a “work for hire” depends on whether an employee or independent contractor created the work, as analyzed under the common law of agency. It is a work for hire if an employee made it within their scope of employment. If an independent contractor made the work, it is only a work for hire if a signed agreement designates it as such. Under Reid, works for hire

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113 See Klein, *supra* note 10, at 168 (referencing Judge Posner’s comments as part of a larger reluctance to apply work-for-hire in educational institutions).


115 See *id.* at 733 (detailing the factual context for the controversy).

116 See *id.* at 734 (describing the lack of a signed written agreement by the parties for ownership of the commission).

117 See *id.* at 735 (explaining the nature of the dispute as competing copyright claims).

118 See *id.* at 740 (applying the common law principle). See also Holmes & Levin, *supra* note 22, at 187 (explaining that the Supreme Court determined that a work for hire is contingent on whether the work was completed by an employee or an independent contractor).

119 See *Reid*, 490 U.S. at 742 (postulating the various means of identifying work for hire rights).

The structure of §101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.

*Id.* See also Holmes & Levin, *supra* note 22, at 187 (explaining that defining a work for hire hinges on whether the work was made by an employee within the scope of their employment).

120 See *Reid*, 490 U.S. at 737 (indicating that “[i]f the work is for hire, ‘the employer or other person for whom the work was prepared is considered the author’ and owns the copyright, unless there is a written agreement to the contrary.”). See also Holmes & Levin, *supra* note 22, at 187 (stating that if “the work was prepared by an independent contractor . . . then it is a work for hire only if the parties have expressly so agreed in a signed writing.”).
include “those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods . . . of carrying out the objectives of the employment.” 121 Reid establishes agency law as the benchmark for analyzing a “work for hire” in distance education and other sectors. 122 This analysis applies to non-tenured faculty, graduate students, and adjuncts in higher education, impacting copyright ownership in distance education. 123 One commentator observed that Reid may categorize full-time, tenure-track professors as employees, while adjuncts and graduate students are seen as independent contractors for copyright ownership purposes. 124

Another instance of a court addressing the issue of copyright ownership in distance education and the teacher exception is Molinelli-Freytes v. University of Puerto Rico. 125 In Molinelli-Freytes, University of Puerto Rico professors sued the university for copyright infringement over their proposal for a new graduate program, alleging unauthorized use during implementation. 126 They argued for a teacher exception to the work-for-hire doctrine, which the court rejected due to its absence in case law following the Copyright Act of 1976. 127

In addition, courts have examined whether the fair use doctrine applies to copyright ownership in distance education. Generally, the Copyright Act of 1976 allows use of copyrighted materials by non-original creators if reasonable and without consent from the owner. 128 Fair use hinges on four criteria: the use’s purpose and character,

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121 See Le Moal-Gray, supra note 5, at 1000 (providing a definition for the scope of employment under the Copyright Act of 1976); Restatement (Second) of Agency §§ 228–229 (1958) (defining the scope of employment under general principles of agency law).
122 See Reid, 490 U.S. at 740 (requiring a traditional agency law analysis to decipher “works for hire”). See also Holmes & Levin, supra note 22, at 187 (summarizing the court’s conclusion that the common law of agency was the proper analysis to determine if a work falls within scope of employment).
123 See Townsend, supra note 30, at 240–241 (listing roles to which the court's decision would apply to in an educational institution setting).
124 See Townsend, supra note 30, at 240–241 (comparing the potential classification of various academic positions under Reid).
125 See Molinelli-Freytes v. Univ. of P.R., 792 F. Supp. 2d 150, 164 (2010) (applying the work for hire doctrine in an educational context).
126 See id. at 165 (providing the factual background for the claims).
127 See id. at 168–69 (explaining a lack of reported opinions on the teacher exception after the enactment of the Copyright Act of 1976).
128 See Ninth Circuit Requires Fair Use Analysis, supra note 49, at 2289 n.9 (explaining permitted use of copyrighted material under the fair use doctrine).
including commercial or educational intent; the nature of the copyrighted work; the extent of use relative to the whole work; and the impact on the work’s market value. Each case is uniquely evaluated for fair use, requiring fairness and good faith. Fair use is permissible in teaching and research, provided the usage aims to create a distinct product from the original work. In Basic Books, Inc. v. Kinko’s Graphics Corporation, the court addressed the fair use doctrine’s relevance in commercial course pack creation and usage. Kinko’s reproduced portions of copyrighted books by Basic Books into course packs for sale to students, bypassing author consent and compensation. The Court concluded that Kinko’s actions did not constitute fair use. However, it clarified that this judgment excludes student, library, or on-campus copy-shop copying, regardless of profit intent. Related judicial decisions on copyright in academia suggest educators retain some rights over their works, extending to distance education materials.

B. Evolution of Copyright Doctrine in Higher Education

The United States court system has examined copyright ownership in the context of colleges and universities, and has come to different conclusions. Generally, courts took a different approach before and after the Copyright Act of 1976. For example, in Sherrill v. Grieves, the Supreme Court ruled that a military instructor retained copyright for a book he authored on topics he taught, establishing the

129 See Ninth Circuit Requires Fair Use Analysis, supra note 49, at 2289 n.8 (listing the four metrics used to analyze whether the use of copyrighted material was fair use).
130 See Seeley, supra note 28, at 180 (emphasizing that the purpose test analyzes differences between the copyrighted work and the work in question).
132 See id. at 1526 (explaining the conduct that formed the basis of the claims).
133 See id. at 1547 (finding that the copied excerpts were not a fair use of plaintiff’s copyrights).
134 See id. at 1536, n.13 (clarifying that “the decision of this court does not consider copying performed by students, libraries, nor on campus copyshops, whether conducted for-profit or not.”).
“teacher exception” rule. This instructor created a textbook about military sketching, map reading, and surveying for Army officers.

In another case, Williams v. Weisser, a California appeals court addressed whether a student’s sale of lecture notes constituted copyright infringement against the professor or university. The defendant operated a note-selling business, employing auditors to document and sell lecture content. The Court determined that since lectures lacked a fixed format like text or recordings, they were not covered by the Copyright Act. However, a common law copyright, recognized under California law, applied exclusively to the professor. Notably, Williams did not address the issue of federal copyright law, as later cases would.

Before the 1976 Copyright Act, courts, including the U.S. Supreme Court in Sweezy v. New Hampshire, addressed copyright infringement issues in universities. The Court affirmed that a professor’s lectures fell under First Amendment protection, and recognized the refusal to disclose their contents as constitutionally safeguarded. In Manasa v. University of Miami, the court held that the plaintiff, having prepared a written proposal for an academic program within their scope of employment for the university’s benefit, lacked grounds for an infringement claim against the university.


136 See id. at 686 (seeing that there were no other comparable textbooks in the curriculum, the professor drafted a new textbook on his own initiative).

137 See Williams v. Weisser, 273 Cal. App. 2d 726, 729 (Ct. App. 1969) (appealing a lower court judgment enjoining a student from copying, publishing, and selling lecture notes and awarding the professor compensatory and exemplary damages).

138 See id. (noting that the defendant paid students to attend class and take notes, before placing a copyright notice on the notes and selling them for profit).

139 See id. at 734 (warning there may be consequences to considering the lectures copyrighted work of the university).

140 See id. at 733 (finding “that in the absence of evidence the teacher, rather than the university, owns the common law copyright to his lectures.”).

141 See Gertz, supra note 64, at 1471 (noting that in Williams, the only copyright in the lecture subject to the dispute was a common law copyright under California state law).

142 See Sweezy v. New Hampshire, 354 U.S. 234, 244 (1957) (agreeing that the petitioner’s First Amendment rights had been infringed).

143 See Manasa v. Univ. of Miami, 320 So.2d 467, 468 (Fla. Dist. Ct. App. 1975) (stating that, “[i]n order to qualify as a limited publication for purposes of a common
Similarly, in *Public Affairs Assocs. v. Rickover*, the court held that a renowned Navy Admiral was entitled to copyright speeches about his official actions, even though writing a book or giving the speech was not among his formal responsibilities.\(^{144}\) Finally, in the case of *Shipman v. R.K.O. Radio Pictures, Inc.*, the court ruled that a play with similar content to another did not constitute copyright infringement due to the fact that the works had enough differences to satisfy the defense against copyright infringement.\(^{145}\)

After 1976, courts shifted focus from state claims to federal law for copyright decisions, driven by the 1976 Copyright Act. In *Rahn v. Board of Trustees*, the court ruled that a university can retain notes from a former professor, as she did not sue personally, leaving the plaintiffs without standing for a copyright claim.\(^{146}\) In *Shaul v. Cherry Valley-Springfield Central School District*, the court held that class materials prepared by a teacher terminated by the school district were considered “works for hire” because they were prepared by the teacher in the scope of his employment and were not intended for publication, and were thus the property of the school district.\(^{147}\) The *Shaul* court noted that the scope of employment extends to conduct if “(1) [i]t is of the kind of work he is employed to perform; (2) [i]t occurs substantially within authorized work hours; [and] (3) it is actuated, at least in part, by a purpose to serve the employer.”\(^{148}\) The court further went on to state that:

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\(^{144}\) See *Pub. Affs. Assocs.’s v. Rickover*, 177 F.Supp. 601, 607 (1959) (finding that the defendant has a literary property right in the speeches and addresses he produced).

\(^{145}\) See *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 538 (2d Cir. 1938) (holding that the works were “so different as to locale, character, devices, motives, and emotions expressed, that no literary piracy can be charged.”).

\(^{146}\) See *Rahn v. Bd. of Trs.*, 803 F.3d 285, 295 (7th Cir. 2015) (holding that the district court properly rejected the copyright claim because the plaintiffs did not identify the relevant copyright law or the aspects of the law that the defendants violated).

\(^{147}\) See *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004) (holding that the teaching materials were property of the school district under the work-for-hire doctrine).

\(^{148}\) See *id.* (articulating the test for defining the scope of employment); *Restatement (Second) of Agency §§ 228–229* (1958) (defining the scope of employment under general principles of agency law).
It is clear that preparing materials for class was the kind of work that he was employed to perform as a teacher (satisfying the first prong) and that Shaul was motivated to spend the time to prepare materials for class in order to fulfill his duties as a teacher (satisfying the third prong), regardless of his purported desire to publish the materials. With respect to the second prong, . . . the very nature of a teacher’s duties involves a substantial amount of time outside of class devoted to preparing lessons, problem sets, and quizzes and tests — which is clearly within the scope of his employment.149

Similarly, in Avtec Systems v. Peiffer and U.S. Auto Parts Network, Inc. v. Parts Geek, LLC, two courts determined that the defendants’ computer programs and software, created for their employers, were “works for hire” and therefore belonged to the employers, as there was no contrary agreement.150 The U.S. Auto Parts case involved copyright ownership of computer software used in the sale of car parts.151 In addition, in Palmer v. Braun, the court found that infringing works produced outside of the United States and brought into the country were subject to the Copyright Act.152 and in the case of Pittsburg State University v. Kansas Board of Regents that “neither state nor federal law preempts the subject of ownership of intellectual property from being included within the scope of a memorandum of understanding.”153

Since 1976, courts have focused on the Copyright Act’s federal statutory language to resolve intellectual property rights issues, particularly the work-for-hire doctrine and teacher exception. Earlier

149 See Shaul, 363 F.3d at 186 (finding that Shaul erroneously argued that his preparation of teaching materials fell outside the scope of his employment).
150 See Avtec Sys. v. Peiffer, 21 F.3d 568, 575 (4th Cir. 1994) (stating that absent a written agreement any use license held by Avtec would be implied); U.S. Auto Parts Network, Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1015 (9th Cir. 2012) (agreeing with the reasoning in Avtec, the work product of respondent fell under the work-for-hire doctrine).
151 See U.S. Auto Parts Network, Inc., 692 F.3d at 1012–15 (describing the work product at issue is software used in the sale of car parts).
152 See Palmer v. Braun, 376 F.3d 1254, 1258 (11th Cir. 2004) (clarifying that an infringing act that occurs in the United States is subject to the Copyright Act).
courts prioritized copyright law’s common law origins, sometimes referencing the 1909 Copyright Act. U.S. courts now interpret intellectual property rights under the current legal framework.

C. Faculty Copyright Dilemmas in Distance Learning

Presently, there is a great deal of ambiguity regarding whether a professor is considered an “employee” of a university for the purposes of copyright ownership and whether there is a “faculty exception” currently operative in United States law. Without a teacher exception, the main question related to copyright ownership of distance education is whether the materials were created within the scope of the professor’s employment.\(^\text{154}\) Thus, these materials would be considered a “work-for-hire” for the university.\(^\text{155}\) However, some have argued that academic scholarship should not be considered the type of work that faculty members are employed to perform due to the fact that colleges and universities do not assign faculty members to write articles about specific topics.\(^\text{156}\) In addition, many colleges and universities permit faculty members to have flexible working hours and locations, meaning that time and space are not determinative of whether works are performed within the scope of employment.\(^\text{157}\) In practice, many colleges and universities have continued to honor the teacher exception, so while the uncertainty exists under the law, many institutions have decided to honor the intellectual property rights of individual faculty members.\(^\text{158}\)

There has been an increased awareness on the part of universities and colleges to have coherent and clear policies regarding copyright ownership regarding distance educational materials, with an increasing number of universities adopting institutional policies

\(^{154}\) See Gertz, supra note 64, at 1486–87 (discussing that newer material created for distance learning cannot appropriately fit within a copyright category created prior to distance learning initiatives).

\(^{155}\) See id. at 1487 (suggesting that it would be easy for universities and faculty members to create a writing that would alter the ownership of works-for-hire).

\(^{156}\) See id. at 1482 (proposing that scholarly works are not the kind of work faculty members are employed for by universities).

\(^{157}\) See id. at 1483 (stating “[w]hen universities permit their faculty members to have flexible working hours and locations, the time and space element alone cannot be used to categorize works as within or outside the scope of employment.”).

\(^{158}\) See Le Moal-Gray, supra note 5, at 995 (explaining that “patent policies and procedures governing intellectual property and technology transfer have existed at most research universities for many years.”).
related to copyright ownership. Many such policies disclaim any ownership by the university in the expectation that ownership will revert to the faculty member, however, this disclaimer is not considered an express writing signed by both parties required by the Copyright Act. In addition, many of these policies are vague and broadly written, so that the works involved are not specifically defined and the faculty members do not sign them. One 1996 survey of 437 institutions showed that most “treated online courses as works made for hire, reflecting the institution’s ownership based on contractual obligations or the use of substantial [institutional] resources.” Rather than just a vague copyright policy, an specific agreement to transfer copyright ownership seems necessary.

Other problems with copyright ownership of distance education materials include the fact that the duration of a copyright depends upon a: work’s status as a work for hire and whether licenses are subject to termination; ambiguous university policies; the fact that copyright ownership of a scholarly work may be governed by multiple university policies; and the fact that such policies require a great deal of paperwork to be enforceable. There is a need to update the policies of many colleges and universities to reflect the realities of academic work in the context of providing proper copyright ownership for course materials.

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159 See Gertz, supra note 64, at 1478 (addressing that uncertainty has caused universities to address the issue themselves with internal policies).
160 See id. at 1483 (stating “[i]f the work in question is a work-for-hire, however, this disclaimer does not satisfy the Copyright Act’s requirement for an express writing signed by both parties.”).
161 See id. at 1493 (summarizing that “[t]he current approach, based on vague and potentially unenforceable university policies, provides a formalistic affirmation of faculty ownership of scholarly works, but paradoxically creates a risk that faculty members will have no rights in their scholarly works.”).
162 See Klein, supra note 10, at 178 (summarizing Oklahoma State University’s Institute for Telecommunications 1996 survey). “A survey of 437 institutions by the Oklahoma State University’s Institute for Telecommunications in 1996 showed that most institutions treated online courses as works made for hire, reflecting the institution’s ownership based on contractual obligations or the use of substantial resources.” Id.
163 See Gertz, supra note 64, at 1483 (arguing that “[r]eliance on a copyright policy alone . . . will not settle copyright ownership issues satisfactorily.”).
164 See id. at 1482–88 (detailing the complexities of the legal uncertainties created by the current copyright model).
VI. Diverse University Approaches to Distance Education Copyright

In colleges and universities throughout the United States, administrators have experimented with different policies designed to protect the intellectual property rights of faculty members creating distance education materials. These policies have had a varying degree of success and effectiveness, and are setting a blueprint for how to resolve the issue of copyright ownership in distance education. As an example of a favored policy solution, the American Association of University Professors (AAUP) has issued an informational guide for intellectual property issues stating that:

work made by a faculty member belongs to and is copyrightable by solely that faculty member, not the institution he or she works for. This belief stems from academic tradition — which has historically recognized professors’ rights to their own work — as well as from notions of academic freedom. It is the best and fairest way for copyright law to function in relation to faculty work.165

Various colleges and universities have attempted to find the best way to resolve copyright ownership disputes related to distance education, with varying degrees of success.

A. Purdue University’s Policy Turn: Asserting Ownership of Online Courses

Purdue University in Indiana has taken the approach to create policies and guidelines contained in individual employment contracts, creating a sample “Agreement for the Production of Distance Education Course Materials” in 2000.166 This document was intended to serve as a model for other institutions, although some critics noted

165 See Intellectual Property Issues for Faculty and Faculty Unions, AM. ASS’N UNIV. PROFESSORS (Apr. 15, 2020), archived at https://perma.cc/B7M3-EHEL (articulating the position of the AAUP regarding intellectual property issues faced by faculty and faculty unions).
166 See Laughlin, supra note 6, at 583 (noting the creation of the sample copyright ownership agreement).
that it was unclear whether a faculty member could use the material developed for a traditional course at another university or college.\footnote{167}{See id. at 557 (discussing the debate over professors taking their work product with them when they leave their university to use at another institution).}

Purdue University recently updated its copyright policy in October 2019, classifying courseware and online modules as its intellectual property.\footnote{168}{See Courseware and Online Modules (S-19), PURDUE UNIV. (Mar. 26, 2024), archived at https://perma.cc/2XDD-RGZ8 (exhibiting the new policy put in place by Purdue University that allows the university to retain courseware as “Commissioned Copyrightable Works”).} This policy, which considers courseware as distance learning curriculum, advises professors to sign ownership contracts with the university.\footnote{169}{See id. (recommending professors sign ownership agreements and providing a sample Online Course Development Agreement).} However, the policy’s development and implementation bypassed the Faculty Senate, sparking controversy. Many faculty members have since pressed Purdue to acknowledge their ownership rights over lectures and coursework transitioned online due to Covid-19. The Purdue chapter of the AAUP expressed such concerns in a November 2019 statement, arguing that the policy did not meet the needs of the faculty by granting the university copyright ownership of online coursework without any consultation by faculty members themselves.\footnote{170}{See Colleen Flaherty, Who Owns All That Course Content You’re Putting Online?, INSIDE HIGHER ED (May 18, 2020), archived at https://perma.cc/7JNK-GSMA (noting that the Faculty Senate was not consulted on the intellectual property policies for faculty work related to distance education).} Eventually, Purdue University decided to refrain from reusing or commercializing material developed by a faculty member for remote delivery without the prior written consent of that faculty member, which was in response to the increase in distance learning caused by the Covid-19 pandemic. Purdue University’s S-19 policy is an example of an educational institute propagating intellectual property rights policies favoring itself over individual faculty members.

B. Seizing Ownership: The University of Louisiana System’s IP Strategy

\footnote{171}{See id. (indicating that faculty members must advocate for their ownership rights of their coursework and lectures).}

\footnote{172}{See Alice Pawley, AAUP Expresses Concern and Course of Action Regarding S-19., AAUP PURDUE (Nov. 6, 2019), archived at https://perma.cc/4CJ9-QJWD (disagreeing with Purdue University’s faculty ownership policies).}
Another example of an intellectual property policy drafted by universities is the policy drafted by the University of Louisiana. This policy, which was adopted in 2012, states that “[i]nstitutions may assert their ownership in Intellectual Property related to the Creator’s academic or professional field, regardless of the medium of expression.” However, the University of Louisiana’s policy gives creators ownership over “traditional academic copyrightable works,” subject to the university’s right to recover the value of “significant institutional resource contributions” to these works.

The University of Louisiana system is an example of an institution of higher learning seizing control of the copyright ownership of traditional academic scholarship, including in the context of distance education materials. This policy is an example of what the AAUP has been warning against, namely, the restriction of academic freedom and the lack of protection for the unrestricted pursuit of knowledge.

C. Syllabi Copyright Litigation: Insights from the University of Missouri Case

Another example is found in the system of the University of Missouri, which has involved judicial litigation to resolve disputes concerning copyright issues. In 2014, the Missouri Court of Appeals ruled that the University of Missouri did not have to release course syllabi because they were protected by copyright laws. The National Council on Teacher Quality (NCTQ) had sued the University of Missouri after it refused to release syllabi to it for an evaluation

174 See id. (defining the relationship between a creator’s ownership and the University’s rights to recover value).
175 See Intellectual Property Issues for Faculty and Faculty Unions, supra note 165 (warning academic faculty about the restrictions of academic freedom and lack of protection for their work).
176 See Nat’l Council for Tchrs. Quality, Inc. v. Curators of Univ. of Mo., 446 S.W.3d 723, 730 (Mo. Ct. App. 2014) (holding that the University of Missouri could object to the public release of their course syllabi due to copyright protections). See also Hank Reichman, Who Owns Your Syllabus?, ACADEME BLOG (Sept. 3, 2014), archived at https://perma.cc/K5JZ-7RZF (explaining that the University of Missouri is not required “to release course syllabi because they are protected by copyright laws.”).
project undertaken with the U.S. News and World Report.\textsuperscript{177} The system’s spokesman hailed the ruling, stating that “we felt it was important to respect the rights of the faculty members who created the syllabi.”\textsuperscript{178}

The University of Missouri’s actions in this case are an example of colleges and universities giving their instructors copyright ownership to their own materials prepared for their classes, which is encouraging for those who believe that copyright ownership should rest with the individual instructors rather than the university itself.

\textbf{D. Respecting Faculty Copyright Rights: The University of California System}

The University of California has been at the forefront of giving copyright rights to the individual professors responsible for academic works. In 1998, it established a task force on copyright that recommended “the University should reaffirm the policy that a faculty member owns his or her scholarly and aesthetic works,” and recommends a case-by-case policy dealing with the ownership of course materials, including those produced for distance education.\textsuperscript{179} In addition, the task force recommended that copyright contracts may be used between the university and a professor in order to clarify ownership issues concerning course materials.\textsuperscript{180}

Furthermore, in 2019, the University of California proposed a revised policy to reduce areas of ambiguity as well as update the language of the policy, which was adopted in 1992.\textsuperscript{181} The policy revisions had the effects of expanding the pool of those eligible to own

\textsuperscript{177} See Nat’l Council for Tchrs. Quality, Inc., 446 S.W.3d at 724 (describing how the case arose). See also Reichman, supra note 176 (explaining that faculty syllabi were protected against the NCTQ’s suit which was compelling the syllabi of faculty at University of Missouri).

\textsuperscript{178} See Reichman, supra note 176 (reiterating the support of faculty intellectual property rights).

\textsuperscript{179} See Townsend, supra note 30, at 266 (recounting the task force recommendation that faculty members should have intellectual property rights over their own scholarly work and recommending a case-by-case evaluation process of ownership in course materials).

\textsuperscript{180} See id. at 265 (recognizing a change in policy recommendation to clarify ownership issues between the professors and the universities).

\textsuperscript{181} See Katie Fortney, New version of UC Copyright Ownership Policy open for review, OFF. SCHOLARLY COMM’C’N (Nov. 20, 2019), archived at https://perma.cc/N342-7ZKZ (expanding on the updated policy provisions).
copyright, expanding and clarifying the pool of works eligible for copyright ownership, creating a definition for “Significant University Resources” as a limitation on the University’s ownership of creative works, and providing clarity for graduate student copyright ownership.\textsuperscript{182}

In addition, the University of California task force report on copyright ownership noted two different university policies as possible approaches for colleges and universities: that of Stanford University and the University of Kansas.\textsuperscript{183} The University of Kansas draft policy asserts ownership over “mediated courseware” due to the significant university resources required for future utilization of the programs.\textsuperscript{184} The University of Kansas provides extra pay to faculty when their courseware is utilized by peers, granting them the right to develop derivative works and “retain[ing] the right to transfer institutional rights to third parties.”\textsuperscript{185} Finally, the University of Kansas’ present intellectual property policy distinguishes between “mediated courseware” and other courseware, and reserves an ownership interest in “mediated courseware,” while giving the individual professors ownership over all other courseware developed for educational purposes.\textsuperscript{186}

Stanford University’s policy goes in the other direction, claiming ownership of all course materials published under the university’s name.\textsuperscript{187} Stanford requires professors having an existing intellectual property agreement with an employer to sign a Patent and Copyright Agreement, and it developed policies for distance education materials that allow for educators to distribute written course materials to peers at other academic institutions for non-commercial use and for

\textsuperscript{182}See id. (listing the specific areas where ambiguity was resolved and streamlined for the revised policy).
\textsuperscript{183}See Townsend, supra note 30, at 268 (addressing the two primary approaches to ownership as related to continued creativity and scholarly works).
\textsuperscript{184}See id. (describing the University of Kansas “mediated courseware” approach).
\textsuperscript{185}See id. (contrasting the rights that the faculty are afforded and those that the university retains).
\textsuperscript{186}See The University of Kansas, Intellectual Property Policy, All University, POL’Y LIBR. (Feb. 29, 2024), archived at https://perma.cc/9MEU-YCM8 (describing university policy regarding “mediated courseware” and the university’s ownership/control rights in intellectual property created by faculty).
\textsuperscript{187}See Townsend, supra note 30, at 268 (describing the “more extreme” approach taken by Stanford University).
faculty members to continue using course materials created while at Stanford at another academic institution.\textsuperscript{188}

U.S. colleges and universities adopt diverse copyright policies for course materials, either granting full ownership to professors or to the institution. Universities often exempt materials created independently from the institution. These institutions strive to balance the ownership rights of faculty and the university.

\textbf{VII. Navigating Distance Learning Copyright Challenges}

Many different organizations and ideas have been proposed regarding distance education resources and copyright ownership, with many new ideas emphasizing the importance of fair compensation for the faculty members and greater clarity in copyright ownership policies in particular. For example, the AAUP has proposed a compromise where both the university and the individual professor would share copyright ownership of certain works, including those used for distance education.\textsuperscript{189} Solutions such as licenses and individual contracts are proposed solutions, and it is increasingly looking likely that such new solutions may be necessary to finally discover and maintain a proper balance between the competing intellectual property interests of universities and faculty members.

\textit{A. Solving Distance Education Copyright Dilemmas}

There are many proposed solutions to the issue of copyright ownership in distance educational materials. For example, the AAUP has noted that the Copyright Act requires a writing signed by the author to create a legally binding transfer of copyright, so employment contracts acknowledging the copyright ownership of the faculty member would be helpful in resolving the ambiguity surrounding the

\textsuperscript{188} See Stanford University, \textit{Patent and Copyright Agreement (SU-18A) for those having existing intellectual property agreement with an Employer, OFF. TECH. LICENSING} (Feb. 29, 2024), \textit{archived at} https://perma.cc/NX9X-U59X (providing that as a condition of employment, “faculty, staff, graduate students and postdoctoral scholars are required to sign a Stanford Patent and Copyright Agreement”). \textit{See also} Memorandum from Stan. Univ. to Dep’t Chairs and Program Dirs. (Feb. 19, 2013) (on file with author) (clarifying Stanford University policy regarding distribution of course materials in regard to other academic institutions).

\textsuperscript{189} See Townsend, \textit{supra} note 30, at 258–65 (reflecting the AAUP’s interest in treating faculty members as the copyright owners of their own independently created works).
In addition, the AAUP has advocated for joint ownership of works in cases where both the university and the individual professor are involved in creating the work, thus placing the burden on the university to prove that it has contributed to the authorship of the course materials in question to be included as a joint author.

In assessing copyright ownership, especially for distance educational materials, the Consortium for Educational Technology for University Systems (CETUS) advocates the “three C approach”: creative initiative, content control, and creator compensation. This involves identifying the idea’s originator, the overseer of creation and production, and the payment method for the creator. Additionally, the May 1999 U.S. Copyright Office report, mandated by the DMCA, instructs higher education institutions to expand technological rights coverage, allow “mediated instruction” performances and displays, broaden the types of permissible materials, lift restrictions on transmission locations, protect copyright owners, enable storing materials on a server accessible only to enrolled students during the course, and extend fair use beyond the distance education exemption.

In addition, some universities have made their distance educational materials only available under the terms and conditions of non-negotiable “click wrap” licenses that require the user to click an online button to accept the terms and conditions, or similar licenses.

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190 See Laughlin, supra note 6, at 561 (describing the efforts by the AAUP in advocating that “faculty members should be the owners of ‘courseware’ they develop for distance education programs.”).
191 See Townsend, supra note 30, at 264 (stating “[t]he question of joint authorship qualifications under the copyright law, however, requires that each author contribute creatively.”).
192 See Janis Bruwelheide, Intellectual Property and Copyright: Protecting Educational Interests and Managing Changing Environments (1999), archived at https://perma.cc/DD3V-2H8F (describing the approach as more beneficial compared to the traditional approach “beginning with the economic issues and may apply more broadly to faculty engaged in producing materials but not necessarily receiving compensation for those materials.”).
193 See id. (defining the originator as the person “who created the work and fixed it in a tangible medium”).
194 See Statement of Marybeth Peters, supra note 1 (listing the recommendations produced by the DMCA-mandated report). See also Bruwelheide, supra note 192 (describing the results of the report called for in the Digital Millennium Copyright Act).
195 See Le Moal-Gray, supra note 5, at 1007 (explaining what a click wrap license is and purpose they serve in distance learning materials).
Other universities have paid royalties to faculty members for distance education materials developed by them, and have “early disclosure” clauses in employment contracts that require the professor to inform the university in advance if he or she is developing online material intended for sale.\textsuperscript{196} Another solution is for the university to only retain the copyright ownership of the materials for a limited period of time.\textsuperscript{197}

There has also been the suggestion that colleges and universities model their policies on copyright ownership of distance educational materials on university patent policies, because patent policies allow both the university and professors to share profits from the materials and allow for joint ownership to ensure that both parties share credit.\textsuperscript{198} To that end, it has been proposed that universities draft contracts requiring professors to reimburse the university for publishing costs,\textsuperscript{199} as well as for universities or the individual professors to obtain copyright ownership through a written assignment.\textsuperscript{200} All of these solutions would help clarify who owns the copyright to distance education materials in universities and colleges, and have been adopted by various colleges and universities.

\textbf{B. Trends in Copyright Licensing for Distance Education}

Ultimately, it seems likely that a trend towards licensing of copyright regarding distance educational materials for the professors will continue. The United Kingdom’s system provides a picture of such a system working. There, the Joint Information Systems Committee (JISC) has drafted a model licensing agreement for distance educational materials, which grants users permission to do certain things with the work and states that people have taken certain actions to ensure that any third-party materials included have been

\textsuperscript{196} See Klein, supra note 10, at 187 (stating that “[i]ntellectual property policies should have an early-disclosure provision that requires faculty members to inform their deans or the chair of their department that they are developing online material.”).
\textsuperscript{197} See id. (suggesting an alternate possibility for copywriting university faculty work product).
\textsuperscript{198} See Le Moal-Gray, supra note 5, at 1024 (comparing outcomes under different types of intellectual property law).
\textsuperscript{199} See id. at 1034 (proposing that universities could draft employment contracts to reimburse professors for the cost associated with producing their work product).
\textsuperscript{200} See Klein, supra note 10, at 190 (suggesting institutions or faculty members can obtain copyright ownership through a written assignment of rights).
previously cleared for use. In the context of distance education materials, they include agreements on behalf of third parties to allow users to access them.

In addition, U.S. colleges and universities have introduced “Massive Open Online Courses” (MOOCs), distance learning programs available indefinitely. These MOOCs raise intellectual property ownership issues due to proprietary claims by providers on course materials, terms of use, and user-generated content. Yet, the significant contributions of universities in terms of infrastructure and investment further complicate ownership rights. MOOCs, accessible to all and not limited to enrolled students, increase the university’s stake in the content’s value. A pressing concern in copyright ownership revolves around whether coursework submitted by students becomes university property and if professors retain rights to their materials upon leaving the institution. This dilemma is poised to become a crucial focus in the future.

Another important development in the process of discerning a proper balance of copyright ownership interests in distance education is the Open Syllabus Project (OSP), supported by Columbia University, and marking a significant advancement in establishing a balance in copyright ownership for distance education. This

201 See Azadeh Mehrpouyan & Ghassem Khadem Razavi, Legal Issues of Intellectual Property Rights and Licensing for E-Learning Content in the United Kingdom, 11 E-LEARNING AND DIGIT. MEDIA 272 (2014) (providing that the Joint Information Systems Committee has developed two types of agreements that “cover the transfer of copyright from one owner to another.”).

202 See id. (stating the reasons why a third-party license is permitted for the use of intellectual property).

203 See Copyright Challenges in a MOOC Environment, EDUCAUSE (Feb. 29, 2024), archived at https://perma.cc/HE3M-E3QB (introducing MOOCs as a method for developing technology that assists with distance learning).

204 See id. (explaining the concerns MOOC publishers have regarding fair use laws and the distribution of material).

205 See id. (evaluating the ownership equation when the institution provides significant resources and infrastructure for a MOOC, compared to an on-campus course).

206 See id. (stating that MOOCs draw on and engage the strengths of campus stakeholders).

207 See id. (considering an institution’s ability to continue to offer a faculty-developed MOOC course after the faculty member leaves the institution).

208 See Ollie Dreon, The Open Syllabus Project: Friend or Foe?, THE 8 BLOG (Jan. 26, 2016), archived at https://perma.cc/3YJJ-SND3 (reporting that since the project began, more than one million course outlines have been gathered and studied, and now, part of this data is accessible on its OSP Explorer website).
The initiative has amassed over a million syllabi, enabling educators to assess and compare the texts used across various courses.\textsuperscript{209} The OSP offers a platform for instructors to benchmark their course materials against peers, revealing the most prevalent resources.\textsuperscript{210} However, this openness risks infringing on instructors’ intellectual property rights by making their work publicly accessible without an opt-out provision.\textsuperscript{211} A publicly accessible database of educational materials could either fortify or weaken educators’ control over their intellectual property.\textsuperscript{212} The outcome of this debate remains undecided.\textsuperscript{213}

\textbf{VIII. Conclusion}

In addressing the conundrum of copyright ownership in distance education, this paper set out to unravel the legislative ambiguities and institutional inconsistencies that currently impede the creation of a coherent framework for intellectual property rights. The thesis, which asserts that existing copyright laws inadequately cater to the novel context of distance learning, has been substantiated through a systematic exploration of legal statutes, judicial interpretations, and institutional policies.

In synthesis, the imperative is clear: a balanced policy that reconciles the intellectual contributions of educators with the proprietary interests of academic institutions is paramount. Such a policy should be enshrined in explicit agreements, ensuring that the rights and duties of all parties are unequivocally defined. This clarity is not only essential for the protection of academic freedom but also for the advancement of distance education as a vital resource for learners worldwide. Through this focused lens, the article concludes, advocating for a shift towards concordant and transparent governance in the copyright domain of distance education, a shift that is essential

\textsuperscript{209} See id. (stating that “[o]ver a million syllabi have been collected and analyzed since the project’s inception and some of the data is now available on its OSP Explorer site.”).
\textsuperscript{210} See id. (explaining that the OSP allows instructors to see what instructors at other universities are teaching and ranks universities).
\textsuperscript{211} See id. (discussing the risk the OSP poses for intellectual property right infringement without an opt-out provision).
\textsuperscript{212} See id. (acknowledging the potential positives and negatives of publicly available databases of educational materials).
\textsuperscript{213} See id. (concluding that “time will tell whether [OSP] is a friend or foe.”).
for fostering an environment where education transcends traditional boundaries and meets the needs of our digital age.