No. 03-91305-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

PITTSBURG STATE UNIVERSITY/
KANSAS NATIONAL EDUCATION ASSOCIATION,
Appellees,

vs.

KANSAS BOARD OF REGENTS/
PITTSBURG STATE UNIVERSITY, and
PUBLIC EMPLOYEE RELATIONS BOARD,
Appellants

BRIEF OF *AMICUS CURIAE* BY THE AAUP

of the Court of Appeals= December 10, 2004 Decision in No. 91,305, an appeal from the District Court of Shawnee County, Kansas
The Honorable Charles E. Andrews, Jr., District Judge
District Court Case No. 00-C-498

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BRIEF OF *AMICUS CURIAE BY THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS*

STATEMENT OF INTEREST

The American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines, and is dedicated to advancing the interests of higher education. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly work. The Association's members include both faculty members and academic administrators on the campuses of public and private institutions of higher education throughout the country, including Kansas.

One of the AAUP's principal tasks is the formulation of national standards, often in conjunction with other higher education organizations, for the protection of academic freedom and other important aspects of university life. These standards serve as models for institutional policy on matters such as academic freedom, due process, research and teaching, and copyright. Numerous federal and state courts have relied on AAUP policy statements.

The seminal 1940 *Statement of Principles on Academic Freedom and Tenure* was developed by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), and has been endorsed by more than 180 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. 1940 *Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS & REPORTS 3 (9th ed. 2001) ("1940 *Statement*"). The 1940 *Statement* is the country's most widely accepted description of the basic attributes of academic freedom and tenure, and has been cited with approval by the Supreme Court. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972).

In 1999, the AAUP adopted its *Statement on Copyright*, AAUP POLICY DOCUMENTS & REPORTS 182 (9th ed. 2001). This statement makes clear that to meet the objective of the law of copyright (to "promote the progress of science and the useful arts") and of the 1940 *Statement* (to support the "free search for truth and its free exposition"), "institutions of higher learning . . . should interpret and apply the law of copyright so as to encourage the discovery of new knowledge and its dissemination to students, to the profession, and to the public." This statement goes on to discuss the tradition of academic practice regarding copyright, including issues of ownership and the use of faculty scholarly works. The *Statement on Copyright* contrasts the traditional work-for-hire situation, where employee-prepared works are under the control of the employer, with traditional scholarly works, where the faculty member's control of the subject matter, intellectual approach, and conclusions is the very essence of academic freedom. The *Statement* makes clear that faculty scholarly work cannot be work-for-hire without violating the basic tenets of academic

freedom, which is a "special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The AAUP is uniquely positioned to assist this court in developing the law in a manner that respects academic practice in higher education for the treatment of faculty intellectual property.

SUMMARY OF ARGUMENT

Faculty scholarly work is not, and has not been, considered work-for-hire under federal copyright law. To consider it as such would go against established federal appellate case law, would wreak havoc with settled academic practices, and would fundamentally conflict with academic freedom. Both the courts and AAUP policy recognize that it has been the prevailing academic practice to treat faculty members as the owners of their scholarly work. This is the case because faculty, rather than the administration, control the content and intellectual directions and conclusions of such work. Administration control of copyrights to faculty scholarly work would mean administration responsibility for the conclusions and statements made in such works and for managing the content and dissemination of faculty works; responsibilities that few administrations have the resources for or interest in taking on. Faculty independence of thought, and control of the copyright to the expression of that thought, is essential for academic freedom, and is inherently inconsistent with the work-for-hire exception to the Copyright Act.

ARGUMENT

The narrow issue in this case is "whether intellectual property rights are mandatorily negotiable under the Public Employer-Employee Relations Act (PEERA)." *Pittsburg State University/Kansas NEA v. Kansas Board of Regents, PSU and PERB*, 101 P.3d 740 (table), 2004 WL 2848767 (Kan. App. 2004). The appellate court concluded below that they are not.

In reaching this conclusion, however, the court based its reasoning on an erroneous application to faculty of the work-for-hire exception to the copyright law. The AAUP writes to address not the lower court's ultimate conclusion regarding mandatory bargaining, but rather the broader issue of why faculty work cannot be considered work-for-hire. AAUP writes, respectfully, to correct the appellate court's misapplication of the work-for-hire exception to faculty scholarship.

I. Professors Own the Copyright to Their Own Scholarly Work Under Federal Copyright Law

Federal copyright law protects original works of authorship fixed in any tangible medium. *See* 17 U.S.C. §102 (2000) ("The 1976 Copyright Act"). As the court below correctly noted, the copyright protection so granted "vests initially in the author or authors of the work." 17 U.S.C. §201 (2000). It is widely recognized, and held by the United States Supreme Court, that the 'author' of a work is the person who actually originates it, by creating it with his or her mind and reducing it to a fixed expression. *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 737 (1989). The law also provides a special exception to this provision for works "prepared by an employee within the scope of his or her employment." 17 U.S.C. §201 (2000). "In the case of [such works] made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. §201(b) (2000). Citing this provision, the court below concluded that all faculty work must be work for hire belonging to the university as the employer. However, the court's reasoning skipped a step, jumping from the fact that those works categorized as work-for-hire belong to the employer to the assumption that faculty work therefore belongs to the university. The court reached this

result without answering the necessary preliminary question: may faculty work be categorized as work-for-hire?

While faculty are generally salaried employees at academic institutions, much of the scholarship faculty produce during that employment is not considered work-for-hire. Instead, a large part of a faculty member's appointment involves the creation of independent scholarship that represents the scholarly views of the faculty member him or herself, not those of the university. *See* Paul Goldstein. *Copyright, Second Edition.* Volume I. 2005 Supplement. §4.3.2. ("Because of the traditions of independence and judgment that are commonly associated with professional activities, the fact that the individual who prepared the work is a professional, such as a. . . university professor, will weigh heavily toward a finding that he, rather than his employer, is the author of any works that he creates while in the other's employ.")[1] Indeed, the very independence of that scholarship gives it its value, and few colleges and universities attempt to exercise control over such work or are in a position to exercise the oversight and responsibility that such control would require. *Hays v. Sony*, 847 F.2d 412, 416 (7th Cir. 1988) ("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."). "This has been the academic tradition since copyright law began." *Weinstein v. University of Illinois*, 811 F.2d 1091, 1094 (7th Cir. 1987) *citing* M. Nimmer, *Copyright* §503[B]1][b] (1978 ed.). To conclude otherwise "would wreak . . havoc . . .in the settled practices of academic institutions." *Hays*,

[1] *See also* Stephanie L. Seeley, Note, *Are Classroom Lectures Protected by Copyright Laws? The Case for Professors' Intellectual Property Rights*, 51 SYRACUSE L. REV. 163, 175 (2001) ("The university hires the professor with the intent of deferring to the professor's personal style. The university does not instigate a particular work; the professor undertakes that on his own. Thus, while the professor is paid, that one factor is insufficient to find that a professor's lecture is a work made for hire and that [sic] university holds the copyright.")

847 F.2d at 416; *accord* Georgia Holmes and Daniel Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 BYU EDUC. & L.J. 165 (2000).

That is not to say that all faculty work is independent scholarly work. Some aspects of faculty work are administrative and managerial, or have been created with the administration's specific authorization or supervision. Such materials are legitimately considered work-for-hire. For example, a curriculum report prepared by the department chair, written decisions of a faculty discipline committee, faculty contributions to faculty handbooks, and similar documents are works undertaken on behalf of the university, and fit much more logically into the work-for-hire doctrine. *See, e.g.*, Robert A. Gorman, *Intellectual Property: The Rights of Faculty As Creators and Users*, 84:3 ACADEME 14 (May-June 1998). However, faculty scholarly work is much different, and is not, and cannot be, controlled by the university. Consider the hundreds of articles, books, notes, and lectures faculty members create on a daily basis; such materials cannot be, legally or practically, under administration control.

Few cases have directly addressed the issue of faculty scholarly work as work-for-hire. In the two prominent decisions in this area, however, the Seventh Circuit has persuasively concluded that faculty authors retain ownership of the copyright to their scholarly works.

The Seventh Circuit first addressed the issue in 1987 in *Weinstein v. University of Illinois,* 811 F.2d 1091, 1094 (7th Cir. 1987), a case where multiple faculty authors were competing over control of an article. The district court below had concluded that the article was the university's property because the university funded the clinical program that was the

focus of the article. The district court reasoned that because Marvin Weinstein was a clinical professor, he was required to conduct clinical programs and write about them as part of his appointment, and thus the article was a work-for-hire. The federal appellate court reversed the decision, finding that faculty scholarly work was not work-for-hire. Recognizing and affirming the longstanding tradition that higher education faculty own the copyrights to their academic work, Judge Easterbrook noted that "a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof," and that "when the Dean told [the professor] to publish or perish, he was not simultaneously claiming for the University a copyright on the ground that the work had become a 'requirement or duty.' . . . When Saul Bellow, a professor at the University of Chicago, writes a novel, he may keep the royalties." *Id.*

Similarly, in *Hays v. Sony Corp*, 847 F.2d 412 (7th Cir. 1988), Chief Judge Posner of the Seventh Circuit agreed that faculty work is not work-for-hire. Instead, he opined, an academic work exception from the work-for-hire doctrine created by the courts before the 1976 Copyright Act should be read into the Act.[2] As he noted, when the Act was passed, "virtually no one questioned that the academic author was entitled to copyright his writings . . . [and] . . . the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university." *Id.* at 416. The Chief Judge also noted both the "lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production" and that the wording of Section 201(b) of the Act should be read as

[2] 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, 237-8 (1992) ("[L]anguage of the work-made-for-hire provisions of the 1976 Act does not preclude the continued existence of an exception for professors.")

requiring that work be created *for* the employer in a way that academic work is not. *Id.* *See* 17 U.S.C. § 201(b) (2000)("In the case of a work made for hire, the employer or other person *for whom the work was prepared* is considered the author." Emphasis added).

Both of these decisions concluded that faculty scholarly work does not fit into the legal framework of work-for-hire. An earlier state court decision on the issue also reaches a similar conclusion. In *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. App. 1969), a professor sought to enjoin a publishing organization from selling notes of his lectures, and the publisher claimed that the professor did not own the copyright to his lectures, and thus did not have standing to bring suit. The California appellate court concluded, however, that it was "convinced that … the teacher, rather than the university, owns the common law copyright to his lectures." *Id.* at 545. The court observed, "[no] custom known to us suggests that the university can prescribe [the professor's] way of expressing the ideas he puts before his students," and university ownership of faculty lectures would create such "undesirable consequences . . . as to compel a holding that it does not." *Id.* at 546. Among those consequences would be, for example, that professors could not utilize their own teaching notes if they were to move, temporarily or permanently, to another academic institution. *Id.* at 546.

Faculty scholarly work is independent; it lacks the necessary elements of employer control found in the corporate world and necessary for a work-for-hire scenario.[3] As the courts have recognized, assuming that faculty scholarly work is automatically work-for-hire

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[3] Chanani Sandler, Note, *Copyright Ownership: A Fundamental of Academic Freedom*, 12 Alb. L.J. Sci. & Tech. 231, 251 (2001) ("A professor's role in an educational institution is different than an employee in a corporation. The intellectual 'insulation' between the professor and the institution is a central element in the principle of academic freedom. Thus, although educational institutions do exhibit some level of control over professor's works, the level of control is less than that is [sic] found in the typical corporate setting." (Internal citations omitted)).

because faculty members are salaried employees of the institution is unworkable and contradictory to established legal understanding. Such a conclusion also goes against academic practice and custom.

II. AAUP Policy, Academic Practice, and Preservation of Academic Freedom Require that Professors Own the Copyrights to Their Scholarly Work.

AAUP policy, long recognized as the standard of the academic profession, further elaborates upon and informs the above legal analysis. AAUP's *Statement on Copyright* recognizes that "it has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes," in large part because in traditional academic works "the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions," which is inherently inconsistent with the work-for-hire analysis. *Statement on Copyright*, AAUP POLICY DOCUMENTS & REPORTS 182-183 (9th ed. 2001).

Faculty independence of thought is essential for academic freedom, and thus there would be a fundamental conflict with academic freedom if all faculty work were to be considered work-for-hire. Academic freedom requires that faculty be free to produce work reflecting their own views and theories--not those of the university's administration or trustees. If all work belonged to the institution, then its content would also have to be controlled or at least accepted by the administration, which would vitiate any freedom of thought or inquiry. "Institutions of higher education are conducted for the common good, and . . . [t]he common good depends upon the free search for truth and its free exposition." 1940 *Statement* at 3. "Were the institution to own the copyright in [faculty scholarly work] under a work-made-for-hire theory, it would have the power [to control it] and indeed to

censor and forbid dissemination of the work altogether. Such powers, so deeply inconsistent with fundamental principles of academic freedom, cannot rest with the institution." *Statement on Copyright*, AAUP POLICY DOCUMENTS & REPORTS 182-183 (9th ed. 2001).

Not only does academic freedom necessitate control by the faculty of its scholarly work, but in fact, administrations are often relieved to distance themselves from some of the scholarly work produced by faculty. If the administration owned all the work of faculty, and controlled its release and dissemination, then it would also be legally responsible for the content. Few administrations seek to claim responsibility for every conclusion reached by a faculty member. Indeed, most administrators rely on the ability to disclaim controversial statements made by faculty as the views of the faculty member alone, and not of the university.[4] Further, if the institution owned the scholarly work of faculty, it would also be responsible for tasks such as negotiating book contracts and publishing agreements, handling revisions and updates, *etcetera*. Few institutions have the desire or the resources to take on these tasks, and as a historical matter they have not done so.

AAUP policy is thus consistent with and informs the law of the work-for-hire doctrine.[5] It reiterates and explains the longstanding tradition of faculty ownership of

[4] *See*, for example, the recent debate over the writings of Ward Churchill, a professor at the University of Colorado, whose inflammatory commentary following September 11th has come under great criticism. *College Cancels Speech by Professor Who Disparaged 9/11 Attack Victims*, N.Y. TIMES, February 2, 2005; Scott Smallwood, *Inside a Free Speech Firestorm: How a Professor's 3-Year-Old Essay Sparked a National Controversy*, THE CHRON. OF HIGHER EDUC., February 18, 2005, at A10. Yet another example involved a professor at Brandeis University who wrote a book published by Indiana University Press about the composer Rebecca Clarke. After the book's publication, the owner of unpublished papers by Clarke contacted the press, claiming that the book made unauthorized use of the papers. The press withdrew the book, but the owner of the papers also wrote to Brandeis University, asking questions about the "relationship" of the faculty member to the institution. The administration responded that the work was done by the faculty member as an "independent scholar," and that the work of such scholars belongs to the scholar, and not to the institution. Richard Byrne, *Silent Treatment: A Copyright Battle Kills an Anthology of Essays about the Composer Rebecca Clarke*, THE CHRON. OF HIGHER EDUC., July 16, 2004, at A14.

[5] Courts have also relied on AAUP policy to inform the law in other legal questions relating to academe. For example, in *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir 1969), the D.C. Circuit used AAUP

copyright, and at the same time it recognizes that some faculty work is not independent scholarly work, and *would* be considered work-for-hire. Accordingly, faculty materials created in an administrative capacity, as described above, and those that require use of *extraordinary resources* beyond those usually given to faculty members as part of their position are rightly considered work-for-hire. *Statement on Copyright*, AAUP POLICY DOCUMENTS & REPORTS 182-183 (9th ed. 2001). Thus the traditional university resources used by faculty in creating most works "such as office space, supplies, library facilities, ordinary access to computer and networks, and money," are not sufficient to make higher education faculty work into work-for-hire, but those works involving special money, materials, collaboration, control, or participation would be in a different category. *Id.* This approach is balanced, legally sound, and in keeping with academic practice and tradition. To abandon this balanced approach in favor of a blanket transfer of faculty copyright to administration control would not work legally, practically, or academically.

CONCLUSION

Administration ownership of faculty scholarly works, lecture notes, and teaching materials through application of the work-for-hire doctrine would profoundly contradict controlling principles of law and long-standing practices of the academic community academic practice.

"Standards for Notice of Nonreappointment" to inform its contractual analysis of the effects of lack of notice of non-renewal of faculty members' appointments. As it noted, "[c]ontracts are written, and are to be read, by reference to the norms of conduct and expectations founded on them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt to this non-commercial context." *Id.* at 1135. *See also Browzin v. Catholic University of America*, 527 F.2d 843, 848 n. 8 (D.C. Cir. 1975) (finding that jointly issued statements of AAUP and other higher education organizations, such as the 1940 *Statement*, "represent widely shared norms within the academic community" and, therefore, may be relied upon to interpret academic contracts); *Drans v. Providence College*, 383 A.2d 1033, 1039 (R.I. 1978) (using the 1940 *Statement* to interpret and elucidate the parameters of tenure as an employment agreement).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and 16 copies of the above and foregoing Brief of *Amici* Curiae by the American Association of University Professors, was mailed, postage prepaid, on the _____ of July, 2005 to:

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APPENDIX A **http://www.aaup.org/statements/Redbook/1940stat.htm**

APPENDIX B **http://www.aaup.org/statements/redbook/spccopyr.htm**