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**OWNERSHIP RIGHTS DON'T STOP AT THE
SCHOOLHOUSE GATE: A CALL FOR PROTECTION OF
UNDERGRADUATE STUDENTS' RIGHTS TO
COPYRIGHTABLE WORK**

*Jaclyn Sayegh**

Intellectual property law is a fundamental doctrine founded in the U.S. Constitution. One manifestation of that doctrine is the Copyright Act, which seeks to promote creation and knowledge while protecting the rights of intellectual property owners. The Act fails to sufficiently promote these goals, however, by offering inadequate protection to the copyright ownership rights of undergraduate students from misappropriation by their universities. Undergraduate students create copyrightable works at greater frequencies than they create either patentable or trademarkable works, yet these students represent a class that the law seems to have overlooked.

To justify the involuntary transfer of copyright ownership from the student to the school, universities may rely on the Copyright Act's work-for-hire doctrine or attempt to enforce their intellectual property policies against the students as binding contracts.

This Note argues that universities lack the authority to usurp student intellectual property rights under either of these justifications. It provides that the work-for-hire doctrine is inapplicable because students are not employees and explains how contract law's doctrines of consideration and unconscionability preclude the enforceability of such policies. This Note describes the significance of protecting student works

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at the undergraduate level and calls for an amendment to the Copyright Act to expressly prohibit universities from misappropriating the copyright ownership rights of students at the undergraduate level.

INTRODUCTION

When undergraduate student Diana Rubio found out that Barnes & Noble chose her backpack design drawing to represent the Fashion Institute of Technology (“FIT”) in the retailer’s newest collection, she likely did not predict that the very drawing would one day land her in federal court, fighting both the bookseller and her alma mater to regain what she believes is rightfully hers: the intellectual property rights to her design.¹ Diana’s professor had told her that she and her Accessory Design classmates would earn thirty percent of their course grade by submitting drawings to a contest² that Barnes & Noble sponsored in collaboration with FIT as part of its “Back to Campus Design by Students for Students collection.”³ What the instructor did not share with Diana, however, was that Barnes and Noble would produce and sell her “Everything Backpack” design in its stores around the world and that the school—not Diana—would profit from the royalties.⁴ This was especially surprising because Diana refused to sign “the rights and consent” form that the Chairman of the FIT Accessories Design Department presented to her, which would formally transfer all of her ownership rights to the school.⁵ With little more to show for her work than a miniscule credit on a sales tag,⁶ Diana filed a lawsuit against Barnes & Noble and FIT for copyright infringement and is asking the Southern District of New York to

¹ Dareh Gregorian, *Former Student Sues over Backpack She Designed for FIT and Was Sold at Barnes & Noble*, N.Y. DAILY NEWS (Aug. 18, 2014, 9:29 PM), <http://www.nydailynews.com/new-york/fit-design-left-profits-lawsuit-article-1.1908121>.

² Complaint and Demand for Jury Trial at para. 9, *Rubio v. Barnes & Noble, Inc.*, No. 14-CV-06561 (S.D.N.Y. Aug. 15, 2014), 2014 WL 4063768.

³ Gregorian, *supra* note 1.

⁴ *Id.*

⁵ Complaint and Demand for Jury Trial, *supra* note 2, paras. 19–20.

⁶ *Id.* paras. 24–26.

either compel royalty payments from both parties or enjoin indefinitely the production and sale of the “Everything Backpack.”⁷

Undergraduate students, like Diana, will continue to suffer the repercussions of university usurpation of their intellectual property rights until Congress amends existing copyright law to protect student-generated copyrightable works created within the scope of the academic environment. The realms of copyright law reach far and wide to protect the works of faculty and graduate students in the university setting but stop short at the undergraduate level.⁸ In a world where students may have more advanced skills than their adult counterparts,⁹ and where some of the most successful companies are spawns of undergraduate student creation,¹⁰ the need for protection of intellectual property rights at this level is paramount. Nevertheless, the existing law leaves a gaping hole

⁷ *Id.* para. I. In October 2014, the District Court granted defendants’ motion to dismiss Rubio’s claims under the Copyright Act, reasoning that the backpack design was not copyrightable due to its “intrinsic utilitarian function.” Anthony V. Lupo & Anthony D. Peluso, *Barnes & Noble Schools Former FIT Student in IP Suit, as Federal Court Finds Backpack Design Not Copyrightable*, FASHION COUNSEL (Dec. 15, 2014), <http://fashioncounsel.com/articles/barnes-noble-schools-former-fit-student-ip-suit-federal-court-finds-backpack-design-not>.

⁸ See K.J. Nordheden & M.H. Hoefflich, *Undergraduate Research & Intellectual Property Rights*, 6 KAN. J.L. & PUB. POL’Y 34, 35 (1997) (“While much attention has been given to the rights of faculty and graduate students, little, if any, thought has been given to the rights of undergraduate students.”).

⁹ TYANNA K. HERRINGTON, INTELLECTUAL PROPERTY ON CAMPUS: STUDENTS’ RIGHTS AND RESPONSIBILITIES 4 (2010).

¹⁰ See, e.g., Nicholas Carlson, *At Last – The Full Story of How Facebook Was Founded*, BUSINESS INSIDER (Mar. 5, 2010, 4:10 AM), <http://www.businessinsider.com/how-facebook-was-founded-2010-3#we-can-talk-about-that-after-i-get-all-the-basic-functionality-up-tomorrow-night-1> (discussing how Mark Zuckerberg created Facebook while an undergraduate at Harvard University); Jonathan Byrnes, *How Microsoft Became MICROSOFT*, BUSINESS INSIDER (Sept. 21, 2010, 1:40 PM), <http://www.businessinsider.com/how-did-microsoft-become-microsoft-2010-9> (describing how Bill Gates created Microsoft as an undergraduate student at Harvard University); Dean Foust, *Online Extra: Fred Smith on the Birth of FedEx*, BLOOMBERG BUSINESS (Sept. 19, 2004), <http://www.bloomberg.com/bw/stories/2004-09-19/online-extra-fred-smith-on-the-birth-of-fedex> (explaining how Fred Smith developed the idea for FedEx while an undergraduate at Yale).

through which the bundle of rights that lawfully belong to the student falls directly into the hands of the university.¹¹ Whether this imbalance is due to a false general assumption that undergraduate students do not create copyrightable work,¹² or to university intellectual property policies that lack both legal and equitable force,¹³ the need for a solution remains the same.

Legislators should protect student works in order to preserve the very purpose and foundation of intellectual property law, which seeks to encourage rather than hinder creation.¹⁴ By failing to recognize students' rights and thus allowing universities to reap the benefits of student work to the exclusion and detriment of the students, the law has the effect of "limit[ing] the generation and dissemination of knowledge, and inhibit[ing] creativity and inventive activity."¹⁵ Congress should legislate to prevent intellectual property law from contradicting its own objectives; the legislative action should protect undergraduate student works and prevent universities from claiming ownership of such work through inappropriate application of copyright and contract law.

This Note calls for legislative action to protect undergraduate students' intellectual property rights from misappropriation by their universities. It examines existing legal doctrines that universities may use to defend their claims of rights to student-generated works. It explains that universities lack authorization for such ownership claims under both statutory and common law. This Note argues instead that students are the sole owners of intellectual property rights to the intellectual products they create within the scope of their role as students. Any transfer of ownership should be at the election of the students with proper consideration, rather than at the will of the universities at which they study.

¹¹ Carmenelisa Perez-Kudzma, *Fiduciary Duties in Academia: An Uphill Battle*, 48 INTELL. PROP. L. REV. 491, 519 (2008).

¹² Nordheden & Hoeflich, *supra* note 8, at 35.

¹³ See Sandip H. Patel, *Graduate Students' Ownership and Attribution Rights in Intellectual Property*, 71 IND. L.J. 481, 482 (1996).

¹⁴ See *id.* at 507 ("The current system of ownership rights in student-generated inventions is inconsistent with the underlying theme of promoting the progress of science and useful arts.").

¹⁵ *Id.*

Part I will provide a brief overview of copyright law and will explain why undergraduate students produce works that warrant protection of copyright more so than any other doctrine of intellectual property law. Part II will explain how students may be deemed employees of the university under the Copyright Act or under common law, as explained in the context of unpaid internships, and will demonstrate how neither statutory nor common law justifies the general transfer of rights from the student to the school. Part III begins with an evaluation of university intellectual property policies and describes how universities might attempt to enforce these intellectual property agreements as binding contracts to support their claim of ownership rights to student work. Section III.A will introduce consideration, a fundamental requirement of contract law, and explain how university policies are unenforceable for lack of valid consideration. Section III.B will provide an overview of contract law's doctrine of unconscionability and explain how this doctrine prevents the enforcement of unfair intellectual property policies. Section III.C will contend that university intellectual property policies run against public policy. Part IV will discuss why arguments that oppose allowing students to maintain ownership rights are unfounded. Finally, Part V will suggest the implementation of federal legislation to protect students' rights in order to remain consistent with the foundations and purpose of intellectual property law.

I. OVERVIEW OF COPYRIGHT LAW

The intellectual property clause of the U.S. Constitution states that "The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." ¹⁶ The fundamental goal of copyright law is to promote creation and expand knowledge. ¹⁷ Further, the Supreme Court has consistently held that the primary

¹⁶ U.S. CONST. art. I, § 8, cls. 1, 8.

¹⁷ See Patel, *supra* note 13, at 507; HERRINGTON, *supra* note 9, at 13.

purpose of copyright law is for the benefit of the public.¹⁸ Unlike other forms of intellectual property, copyright protection attaches to the protectable work at the time of its creation and grants a number of exclusive rights in “original works of authorship fixed in any tangible medium of expression.”¹⁹ These exclusive rights include the right to reproduce, prepare derivative works, distribute, and publicly perform and display the copyrighted work.²⁰

Critical to the understanding and application of copyright law is the definition of “author.” Section 201(a) of the Copyright Act provides that copyright ownership “vests initially in the author or authors of the work[.]”²¹ but fails to define the term “author.”²² The Supreme Court has defined “author” as “he to whom anything owes its origin”²³ As a general rule, the Court explains that an author is “the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”²⁴

Along with authorship, a second major prerequisite for copyright protection is originality.²⁵ An author may claim ownership over a wide variety of subject matter, including literary

¹⁸ See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973) (quoting H.R.Rep. No. 2222, 60th Cong., 2d Sess., p. 7) (“[C]opyright was ‘not primarily for the benefit of the author, but primarily for the benefit of the public.’”), *aff’d*, 420 U.S. 376 (1975); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that the primary purpose of copyright is “to motivate the creative activity of authors and inventors by the provision of special reward, and to allow the public access to their genius”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (acknowledging the primary benefit is to the public by holding “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors”).

¹⁹ 17 U.S.C. § 102(a) (2014).

²⁰ *Id.* § 106.

²¹ *Id.* § 201(a).

²² See *id.* (The statute does not expressly provide a definition for the term “author.”).

²³ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

²⁴ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). However, the law provides a crucial exception to this general rule with the work-for-hire doctrine in 17 U.S.C. § 201(b). See *infra* Part II.A (this crucial exception).

²⁵ 17 U.S.C. § 102(a).

works, choreographies, pictorial and graphic works, photographs, sound recordings, and architectural works,²⁶ yet need only contribute a minimal amount of creativity to the work in order to fulfill the originality requirement of Section 102(a).²⁷ Where this requirement is met, protection continues for the duration of the life of the author plus an additional seventy years.²⁸

To put these rules into context, Diana Rubio would generally be deemed the author of the drawing design for the “Everything Backpack” since she created the idea for the original design and translated the idea onto paper²⁹—a fixed, tangible expression. The design is original since it is a product of Diana’s own creation and not simply a depiction of a backpack already in existence. Further determination of the copyrightability of Diana Rubio’s drawing design is beyond the scope of this Note.³⁰ It will suffice to say that

²⁶ *Id.* Ideas, on the other hand, are categorically excluded from protection along with procedures, processes, systems, methods of operation, concepts, principles, or discoveries. *Id.* § 102(b). *See also* Baker v. Selden, 101 U.S. 99 (1879) (holding that an author of a book that communicates a system or method does not get the exclusive right to use of such knowledge but rather may only protect the way she expresses that knowledge through her language and organization of the book.).

²⁷ 17 U.S.C. §102(a); Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (holding that the originality requirement “is not particularly stringent” and that “[o]riginality requires only . . . some minimal level of creativity.”). In his widely cited treatise on copyright law, Melville Nimmer explains the necessary quantum of originality to support a copyright: “[a]ny ‘distinguishable variation’ of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author’s independent efforts, and is more than merely trivial.” Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 2.01[B] (2004). He continues, “a work is original and may command copyright protection even if it is completely identical with a prior work, provided it was not copied from such prior work but is rather a product of the independent efforts of its author.” *Id.* § 2.01[A].

²⁸ 17 U.S.C. § 302(a).

²⁹ *See generally* Complaint and Demand for Jury Trial, *supra* note 2 (describing “the Drawing” as Exhibit A).

³⁰ Defendants Barnes & Noble and FIT filed a motion to dismiss Diana Rubio’s unauthorized derivative work copyright claim on grounds that the Everything Backpack “has an intrinsic utilitarian function, the design of which is not copyrightable” while citing to Section 101 of the Copyright Act, which excludes from protection any “useful article,” which is “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the

outside the university context of this particular case, Diana would be considered the author of the work and thus entitled to the full bundle of exclusive rights explained above, including the right to create derivative works,³¹ insofar as the work is deemed copyrightable.³²

Unlike copyright law, the other areas of intellectual property law involve demanding requirements that make it difficult for undergraduate students to create works that qualify for such protection.³³ The immediacy with which copyright protection is granted³⁴ and the ease with which students may satisfy the authorship and originality requirements make it quite easy for students to create copyrightable work.³⁵ For these reasons, “more than any other kind of legal protection, students will encounter

article or to convey information.” Defendants’ Memorandum of Law in Support of Their Motion to Dismiss the Complaint at 6, *Rubio v. Barnes & Noble, Inc.*, No. 14-CV-06561 (S.D.N.Y. Oct. 1, 2014), 2014 WL 5449179 (citing 17 U.S.C. § 101 (2010)). Diana Rubio responded by arguing that the defendants’ argument was misguided since an original work need not be copyrightable in order for a derivative work to constitute unauthorized infringement under the Copyright Act. *See* Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Complaint at 12–13, *Rubio v. Barnes & Noble, Inc.*, No. 14-CV-06561 (S.D.N.Y. Oct. 10, 2014). Rubio’s argument seems to be on strong ground as courts have repeatedly upheld contentions like hers. *See, e.g.*, *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 722 (9th Cir. 1984) (“Further, we have held in a copyright infringement action that it makes no difference that the derivation may not satisfy certain requirements for statutory copyright registration itself.”) (internal quotation marks and citations omitted).

³¹ For a discussion of student creation of derivative works, see HERRINGTON, *supra* note 9, at 30.

³² Note that under the work-for-hire doctrine of Section 201 of the Copyright Act, FIT—not Diana—would be the author of the work. The university may attempt to defend Diana’s infringement claim by claiming she was an “employee” for sake of the doctrine, but this Note will explain the weaknesses of such an argument in Part II.A.

³³ *See* Nordheden & Hoeflich, *supra* note 8, at 37.

³⁴ *See supra* note 19 and accompanying text (providing that copyright protection attaches from the moment of creation).

³⁵ *See* Patel, *supra* note 13, at 492.

circumstances in which their intellectual products . . . are affected by copyright.”³⁶

Patent and trademark law, on the other hand, are far less relevant at the undergraduate level.³⁷ Patent law grants protection only to “useful”³⁸ inventions that are “novel.”³⁹ This means that in order to apply for a patent, the student would have to create an entirely new invention that is not known or in use by any others in the United States.⁴⁰ Further, patent rights attach to a work only after the creator successfully completes the expensive and complicated application process with the United States Patent and Trademark Office.⁴¹ The high threshold of innovation and the complex application process often present too large a hurdle for undergraduate students to overcome.⁴²

Trademark law does not include stringent novelty and application requirements like patent law,⁴³ but instead involves other difficulties that prevent this area of law from frequently applying to student-generated intellectual products. The federal trademark statute—the Lanham Act—grants trademark protection to “any word, name, symbol, or device . . . used . . . in commerce . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods.”⁴⁴ The purpose of trademark law is to protect the goodwill of the mark owner and prevent consumer confusion as to

³⁶ HERRINGTON, *supra* note 9, at 30.

³⁷ *See id.* at 37.

³⁸ 35 U.S.C. § 101 (2014).

³⁹ *Id.* § 102(a).

⁴⁰ Patel, *supra* note 13, at 489.

⁴¹ HERRINGTON, *supra* note 9, at 23.

⁴² *See id.* (“It would be the rare student who is able to patent an intellectual product without a partnership with a wealthy entity or individual.”).

⁴³ *See generally* 15 U.S.C. § 1127 (2014). The statute defines “trademark” as “any word, name, symbol, or device” that is used in the market to identify the source. *Id.* Under this definition, the mark need not be new to warrant protection; for example, the word “apple” was already in existence at the time when Steve Jobs attached it to his computers. Further, the Act protects unregistered marks from unfair competition under 15 U.S.C. § 1125(c) and thus registration is helpful, but not necessary as it is with patent law.

⁴⁴ *Id.* § 1127.

product source.⁴⁵ To receive protection, a mark must “be a unique and distinctive identifier” of the source.⁴⁶ As such, the scope of protection is based on consumers and the likelihood of confusion that may result in the marketplace from unauthorized use of a mark.⁴⁷ Though students are capable of creating trademarkable works,⁴⁸ the law applies less often to undergraduate students since they do not usually participate in commerce as manufacturers, sellers, or brand owners.

The elements required for copyright protection are both realistic for and attainable by undergraduate students. Copyright law does not present the hurdles of novelty⁴⁹ and commerciality⁵⁰ as do patent and trademark law. Undergraduate students like Diana Rubio may become authors of original, protectable works with minimal effort and in the normal course of their academic careers. Despite the fact that copyright law applies to student work more frequently and easily than any other doctrine of intellectual property law, the Copyright Act still fails to provide adequate legal protection for student copyrightable works against misappropriation by schools.⁵¹

II. NEITHER STATUTORY NOR COMMON LAW AUTHORIZES UNIVERSITIES TO USURP STUDENTS’ INTELLECTUAL PROPERTY RIGHTS

This section will introduce doctrines of both statutory and common law that a university might use to categorize students as employees and thus invoke the work-for-hire doctrine to support their claim of ownership rights. First, it will examine the Copyright Act’s work-for-hire doctrine and provide an example of the proper

⁴⁵ Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach To Trademark Law*, 84 IOWA L. REV. 611, 630 (1999).

⁴⁶ See HERRINGTON, *supra* note 9, at 20 (“The value in trademark is tied to the reputation and goodwill of what or whom it represents, and for the trademark to characterize its subject, it must be a unique and distinctive identifier.”).

⁴⁷ See Dinwoodie, *supra* note 45, at 630.

⁴⁸ HERRINGTON, *supra* note 9, at 20.

⁴⁹ 35 U.S.C. § 102(a) (2014).

⁵⁰ 15 U.S.C. § 1127 (2014).

⁵¹ Perez-Kudzma, *supra* note 11, at 494.

context in which it may support university ownership. It will then distinguish that case from the majority of student-university relationships, including that of Diana Rubio and argue that, as a general rule, the work-for-hire doctrine does not support the transfer of ownership rights from the student to the school. Second, it will further demonstrate how the work-for-hire doctrine is inapplicable in the current context by examining the Department of Labor's criteria for when a student may not qualify as an employee in the related context of unpaid internships. It will conclude that students are generally not employees insofar as they proceed in their roles as students and that the work-for-hire doctrine is therefore inapplicable in the present context.

*A. The Work-for-Hire Doctrine Does Not Apply—
Students Are Not Employees*

One of the main mechanisms by which schools may claim ownership of intellectual property rights to student-generated work is the work-for-hire doctrine of the Copyright Act.⁵² The doctrine allocates ownership rights to employers, rather than the employees, even in circumstances in which the employee generates the work.⁵³ Section 201(b) provides:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.⁵⁴

The language of the provision provides a mechanism through which a university may claim ownership of student work by deeming itself the “author” for copyright purposes even though the

⁵² See, e.g., *Fleurimond v. N.Y. Univ.*, 876 F. Supp. 2d 190, 191 (E.D.N.Y. 2012).

⁵³ Carmen J. McCutcheon, *Fairplay or Greed: Mandating University Responsibility Toward Student Inventors*, DUKE L. & TECH. REV., Oct. 2003, at 3 (“Graduate students are often classified as staff by the university because of their teaching roles.”).

⁵⁴ 17 U.S.C. § 201(b) (2014).

student actually produces the work.⁵⁵ The work-for-hire doctrine will apply when two requirements are met: (1) the originator of the work is deemed an “employee” of the institution or university; and (2) the work was created within the regular “scope of employment.”⁵⁶

In defining whether an individual qualifies as an “employee” in the work-for-hire context, the Supreme Court looked at Section 220 of the Restatement (Second) of Agency in *Community for Creative Non-Violence v. Reid*.⁵⁷ The Court provided a list of factors to consider in the analysis, which included the manner and means of control over the work, the location of the work, the degree of skill required, the source of the resources, the method of payment, the extent of employee benefits, and the tax treatment of the hired party.⁵⁸ The Second Circuit examined these factors and expanded the analysis further in *Aymes v. Bonelli*, concluding that while no single factor is determinative, the factors regarding employee benefits and tax treatment were the most influential in determining whether “employee” status was appropriate.⁵⁹ It is important to note that the highly dispositive factors—benefit plans and payroll taxes—are just two of the “employee” status signals that are missing from most student-university relationships.

A recent university-related intellectual property dispute provides an example of the very specific circumstances under which a university may properly invoke the work-for-hire doctrine—and thus categorize the student as an employee—in order to claim ownership rights over work that the student creates. In *Fleurimond v. New York University*, the Eastern District of New York held that a New York University (“NYU”) student, Ariel Fleurimond, whom the school hired as a graphic designer through the Federal Work Study program,⁶⁰ was an “employee” of the

⁵⁵ HERRINGTON, *supra* note 9, at 37.

⁵⁶ 17 U.S.C. § 101.

⁵⁷ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

⁵⁸ *Id.* at 751.

⁵⁹ *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

⁶⁰ The Program provides funds for part-time employment to help needy students to finance the costs of postsecondary education. *Federal Work-Study (FWS) Program*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/fws/index.html> (last modified Apr. 17, 2014).

school and that NYU was therefore the “author” and legal owner of the full bundle of intellectual property rights that accompanied Fleurimond’s protectable work.⁶¹

The NYU Athletics Department hired Fleurimond as an equipment room aide but her employment changed after the NYU Retail and Sales Department approached her to complete graphic design work for the Athletic Department.⁶² In her move from the towel room to the design lab, the terms and scope of Fleurimond’s employment changed; she earned a higher salary and was asked to complete an entirely different set of tasks.⁶³ The subject matter that spawned litigation was a cat character named “Orion,” which Fleurimond created and designed as part of an assigned project as a graphic designer.⁶⁴ NYU was very pleased with Fleurimond’s work and began using Orion on athletic team uniforms, apparel, promotional items, and the NYU website.⁶⁵ Fleurimond then brought suit against NYU for copyright infringement after the school refused to pay her royalties for use of the Orion mascot.⁶⁶

In this case, the District Court correctly determined that NYU was the proper “author” of Orion because Fleurimond met the threshold requirements to satisfy the “employee” status under the work-for-hire doctrine.⁶⁷ The court based its determination on the fact that Fleurimond received hourly monetary compensation and was hired for the specific purpose of creating design materials.⁶⁸ Further, the court reasoned that the relationship between Fleurimond, in her capacity as a graphic designer, and NYU, was

⁶¹ Fleurimond enrolled in New York University’s baccalaureate studies program in 2005 and then entered into the Federal Work Study Program in 2007. *Fleurimond v. New York Univ.*, 876 F. Supp. 2d 190 (E.D.N.Y. 2012). The school hired Fleurimond as an athletic equipment room assistant in January of that year and then as a graphic designer in March. *Id.* at 191.

⁶² *Id.*

⁶³ *Id.* at 192. The graphic design position increased Fleurimond’s salary from \$8.00 per hour to \$16.00 per hour “in recognition of the different nature and scope of her employment.” *Id.*

⁶⁴ *Id.* at 191.

⁶⁵ *Id.* at 195.

⁶⁶ *Id.* at 196.

⁶⁷ *Id.* at 200 (“[T]here is no dispute that the Plaintiff was employed as a graphic designer . . .”).

⁶⁸ *Id.* at 199.

for the primary benefit of the school;⁶⁹ and that the school maintained substantial control over the work product she created within the scope of her employment.⁷⁰ Though these factors were highly dispositive in the context of *Fleurimond v. NYU*, they are absent from the majority of student-university relationships.⁷¹ The holding therefore is limited to the very specific facts of the case, where the student creates protectable work after having been hired for the very task of creating such work; it cannot extend beyond these facts into the majority of situations involving student protectable works.⁷²

The *Fleurimond* analysis is helpful in illustrating the stark contrasts between students and employees in the educational setting. Thus, *Fleurimond* supports the proposition that the work-for-hire doctrine does not provide an adequate justification upon which the university may claim ownership of student intellectual property rights in most circumstances. The *Fleurimond* decision instructs that the relevant factors to consider in distinguishing students from employees include compensation, primary benefit, and substantial control over the work produced.⁷³ Students are not compensated for attending school.⁷⁴ Nor is the goal of student

⁶⁹ *Id.* at 210.

⁷⁰ *Id.* at 202. The court conducted a thorough analysis as to whether the work was, in fact, completed within the scope of her employment and concluded in the affirmative. *Id.*

⁷¹ Kathleen M. Capano et al., Comment, *In re Cronyn: Can Student Theses Bar Patent Applications?*, 18 J.C. & U.L. 105, 115 (1991) (“For most educational purposes . . . the student simply will be a student; the autonomy of the university will be preserved.”).

⁷² See Patel, *supra* note 13, at 502 (“Courts generally hold that when the student creates material entitled to protection under federal intellectual property laws while engaged in educational or training activities . . . the student is not afforded the status of employee.”) (internal citations and quotation marks removed); see also Capano, *supra* note 71, at 115 (“Even when a court classifies a student as an employee, this classification may be limited in scope.”).

⁷³ See generally *Fleurimond v. N.Y. Univ.*, 876 F. Supp. 2d 190, 199–209 (E.D.N.Y. 2012) (using such factors as the student’s monetary compensation, specific purpose in being hired to create a new mascot for the primary benefit of the school, and the university’s substantial control over the work to determine that the student was an “employee” for purposes of the work-for-hire doctrine).

⁷⁴ HERRINGTON, *supra* note 9, at 38; see also Nordheden & Hoeflich, *supra* note 8, at 37; LisaMarie A. Collins, *Copyrightable Works in the Undergraduate*

participation in the undergraduate setting for the primary benefit of the university; it is rather for the enhancement of the student's learning.⁷⁵ Despite the fact that the university may maintain significant control over the methods and means by which students earn grades,⁷⁶ such control does not itself give rise to employee status of the students.⁷⁷ The frequency with which these factors apply to almost all student-university relationships leads to the conclusion that, by and large, "the student simply will be the student"⁷⁸ and students will not qualify as "employees" insofar as they continue to act primarily in their capacity as students.⁷⁹

B. Students are Not Employees under Common Law's Interpretation of Unpaid Internships

Student participation in unpaid internships can provide a separate, yet related context that further demonstrates that students are not employees in the eyes of the law. Throughout the last three decades, the rate at which college students participate in internships in the United States has consistently been on the rise.⁸⁰

Student Context: An Examination of the Issues, 17 MARQ. INTELL. PROP. L. REV. 285, 296 (2013).

⁷⁵ HERRINGTON, *supra* note 9, at 38.

⁷⁶ Such substantial control is executed through the enforcement of course requirements and individual class rules, grading criteria, the enforcement of assignment deadlines, graduation requirements, curriculum requirements, etc.

⁷⁷ In *Fleurimond*, NYU's substantial control, evidenced by its instructions for Fleurimond to revise her drawings several times at the Athletic Department's request, was not conclusive in the court's determination that Fleurimond was an employee. *Fleurimond*, 876 F. Supp. 2d at 201. The court instead included other factors in its analysis, such as compensation and the benefit of the relationship. *Id.*

⁷⁸ Capano, *supra* note 71, at 115.

⁷⁹ HERRINGTON, *supra* note 9, at 38.

⁸⁰ Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTING L.J. 1531, 1535 (2010). See also Kevin Carey, *Giving Credit, but Is It Due?*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2013/02/03/education/edlife/internships-for-credit-merited-or-not.html> (noting that interning has "become the norm" and that a National Association of Colleges and Employers survey of the graduating class of 2012 determined that a majority of students graduated with an internship).

Between the years of 1981 and 1991, the number of college graduates with internships jumped from one in thirty-six to one in three; in 2004, eighty percent of college seniors had an internship and the number climbed to eighty-three percent by 2008.⁸¹ The goal of an unpaid internship is to offer students critical introductory experience in their profession of choice, to boost their resume credentials, and to allow them to make valuable connections with professionals.⁸² Most internships do not offer monetary compensation⁸³ but rather academic credit in lieu of payment.⁸⁴ The “unpaid” status of most internships has sparked major controversy in recent years, where courts are penalizing employers who fail to pay interns who fit the legal description of “employees” under the Fair Labor Standards Act (“FLSA”).⁸⁵

An article in the Notre Dame Journal of Legal Ethics and Public Policy discusses the issues that arise in the context of unpaid internships. Author David Gregory describes such internships as “inherently exploitative”; they benefit employers by providing a free workforce of individuals whose youth and inexperience make them vulnerable to completing “grunt work” and allowing the employer to gain “fresh perspectives and a means

⁸¹ Curiale, *supra* note 80, at 1535.

⁸² *Id.* (“[I]nternships allow students to gain insight into different companies and perhaps make better career choices as a result.”); David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 240 (1998) (explaining how student interns accept unpaid internships “in the hope of bolstering skills and credentialed experience sufficiently eventually to obtain, full-time compensated employment”); Sarah Braun, *The Obama “Crackdown:” Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281, 299 (2012) (“When students participate in well-developed internship programs, they have the opportunity to develop important professional skills such as confidence, poise, adaptability, and the ability to work collaboratively, all of which provide crucial knowledge that is not necessarily taught in classroom environments.”).

⁸³ Curiale, *supra* note 80, at 1533.

⁸⁴ Gregory, *supra* note 82, at 241.

⁸⁵ See Susan Adams, *Employers Should Pay Their Interns. Here’s Why*, FORBES (June 9, 2014), <http://www.forbes.com/sites/susanadams/2014/06/09/employers-should-pay-their-interns-heres-why/> (explaining that 35 suits have been filed against employers by unpaid interns).

to screen potential employees.”⁸⁶ The FLSA requires payment of minimum wage and overtime to all individuals who qualify as “employees” under the statute.⁸⁷

The Wage and Hour Division of the United States Department of Labor provides six specific criteria that employers must meet in order to avoid the “employee” status of interns and thus legally withhold monetary payment: (1) the internship must provide training similar to what would be given in an educational environment; (2) the experience must primarily benefit the intern; (3) the intern must not displace regular employees; (4) the employer must not directly benefit from the intern’s participation in the program; (5) the intern must not be entitled to formal employment at the termination of the internship; and (6) the intern must not expect monetary compensation.⁸⁸ This set of criteria seeks to ensure that the environment of the unpaid internship is as close to the classroom setting as possible. It logically follows that the law itself would not view students as employees where they receive educational instruction for their own benefit and do not expect payment, as is the case in most classroom settings.

Therefore, a student like Diana Rubio would not be considered an employee of her school where she (1) created work in the traditional educational environment of the classroom, (2) for the purpose of receiving an education and earning a degree, (3) did not displace any employees,⁸⁹ (4) did not directly benefit her university

⁸⁶ Gregory, *supra* note 82, at 241; *see also* 2010 Internship Salary Report, INTERN BRIDGE 8 (2010), *available at* <http://utsa.edu/careercenter/pdfs/2010%20salary%20report.pdf> (“The main purpose for-profit companies have historically hosted internship programs is to gain access to highly qualified talent at low cost . . . [Thus,] the main assumption is that for-profit companies have a profit motive in the hiring of interns.”).

⁸⁷ 29 U.S.C. § 203(s) (2014).

⁸⁸ U.S. DEP’T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT, *available at* <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> (last updated Apr. 2010).

⁸⁹ It is difficult to even consider a category of employment that would logically follow if such an expectation were reasonable: would students expect to be hired as students? That is not a typical occupation for purposes of receiving compensation. Any other type of employment usually associated with

by participating in the assignment, (5) was not entitled to employment at the end of the term, and (6) did not expect payment from such work as it was used in the academic setting.⁹⁰ Rubio created the design at the instruction of her professor and within the scope of the course curriculum. The circumstances during which Diana Rubio created her design represent the usual setting for creation at the university level: a student completing course work in a traditional, academic setting. Thus, the conclusion that Rubio was not an employee at the time she created the work would apply to the majority of student-university contexts, thus supporting the notion that, in general, students are not legal employees of the schools they attend as they proceed in their roles as students.⁹¹ An exception would exist, however, where other circumstances are at play; where the student is employed through the Federal Work Study Program. In the *Fleurimond* case, Arielle Fleurimond was employed through Federal Work Study.⁹²

universities would likely require additional education, such as a teacher, school psychologist, principal, etc.

⁹⁰ One might argue that Diana Rubio did expect compensation as evidenced by her suit seeking royalty payments for use of her “Everything Backpack” design. This argument is misguided, however, because the use in this case was commercial, which is not typical in the undergraduate setting. Had FIT displayed Diana Rubio’s drawing in a school exhibit or used it as an example for future students, it is not likely that Ms. Rubio would expect payment. However, since the drawing was used for profit, an expectation of compensation is reasonable. No matter how a court would determine this issue, the facts of the Rubio case do not apply to standard undergraduate settings that do not involve third-party commercialization of student work. Where no such circumstances exist, students do not typically expect compensation for the work they create as part of their course curricula and fit the other criteria set out by the Wage and Hour Division of the Department of Labor to prohibit their determination as “employees.”

⁹¹ An exception would exist where other circumstances are at play; for example, where the student is employed through the Federal Work Study Program. In the *Fleurimond* case, Arielle Fleurimond was employed through Federal Work Study. See *Fleurimond v. N.Y. Univ.*, 876 F. Supp. 2d 190 (E.D.N.Y. 2012).

⁹² See *Fleurimond*, 876 F. Supp. 2d 190.

III. SCHOOL POLICIES ARE UNENFORCEABLE AS CONTRACTS

University intellectual property policies are unenforceable as binding contracts. Universities may turn to their existing intellectual property policies to suggest a contractual agreement between the student and the school as the bases for their right to claim ownership of students' work.⁹³ In understanding this argument, it is important to first understand the context and content of university intellectual property policies. The World Intellectual Property Organization ("WIPO")⁹⁴ published a set of guidelines geared specifically toward universities, which instructs them on how to formulate intellectual property policies.⁹⁵ The guidelines encourage policy creators to explicitly address issues such as the basic goals and objectives of the policy,⁹⁶ coverage of persons and works, ownership and disclosures, and income distribution.⁹⁷ WIPO's goal in providing the guidelines was to "safeguard" university interests regarding "particularly sensitive" issues, including those where a relationship between the school and a third party results in the commercialization of student-created work.⁹⁸

⁹³ Collins, *supra* note 74, at 295.

⁹⁴ WIPO is a specialized agency of the United Nations whose goal is to "lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all." *Inside WIPO*, WORLD INTELL. PROP. ORG. (Feb. 11, 2015), <http://www.wipo.int/about-wipo/en/index.html>. WIPO was created in 1967 and currently has 188 member states. *Id.*

⁹⁵ See World Intell. Prop. Org., Guidelines on Developing Intellectual Property Policy for Universities and R&D Organization (advance copy) [hereinafter WIPO Guidelines], available at http://www.wipo.int/export/sites/www/uipc/en/guidelines/pdf/ip_policy.pdf (last visited Feb. 27, 2015).

⁹⁶ *Id.* at 4 ("The basic goal of an intellectual property policy should therefore be: to provide for the intellectual property generated at the institution; to promote the progress of science and technology; to ensure that discoveries, inventions and creations generated by staff and students are utilized in ways most likely to benefit the public.").

⁹⁷ *Id.* at 5.

⁹⁸ *Id.* at ii. The preface of the guidelines provides that most universities are "amateur" in their approach to sponsorship and commercialized activities for lack of any intellectual property policy at all. *Id.* Although WIPO is correct to state that failing to have a policy is inadequate, this Note argues that those few existing university intellectual property policies are also "amateur" in how they

In accordance with the WIPO guidelines, most school policies address this situation in how they define different elements of the policy. These definitions address the specific subject matter that triggers application of the intellectual property policy; how the policy applies differently to faculty, staff, and students; how ownership rights will be distributed; and the manner in which the school will allocate income in the event that a student produces commercial work.⁹⁹ One author who has focused on university intellectual property policies notes that an underlying sentiment of tension is woven through such provisions as the university attempts to balance the educational interests of students with the financial interests of the school.¹⁰⁰ Nevertheless, universities often take an extensive approach to defining the materials and subject matter to which their intellectual property policies may extend.¹⁰¹ Critical analysis of these policies is especially pertinent in situations involving undergraduate students and copyrightable works because these situations usually receive less attention than

address such issues as ownership. Diana Rubio's case provides a prime example of how an existing intellectual property policy may be just as ineffective as no policy at all. This is because the policy—which specifically named the student as the owner of his or her work—nevertheless allowed the university to claim ownership of Rubio's drawing and excluded her from the distribution of royalties. See *Copyright Policy* at Section 5(a), FASHION INSTITUTE OF TECHNOLOGY, <http://www.fitnyc.edu/12428.asp> (last updated Nov. 17, 2011) (“Subject to the other relevant terms of this Policy, students shall retain intellectual property ownership of works created in the course of their academic activities at FIT, including class work, research materials, works of art or design, music and theses.”).

⁹⁹ Anthony J. Luppino, *Fixing A Hole: Eliminating Ownership Uncertainties to Facilitate University-Generated Innovation*, 78 UMKC L. REV. 367, 371 (2010). See also, e.g., *Copyright Policy*, FASHION INSTITUTE OF TECHNOLOGY, <http://www.fitnyc.edu/12428.asp> (last updated Nov. 17, 2011); *Intellectual Property Rights*, THE NEW SCHOOL, <http://www.newschool.edu/leadership/provost/policies/property-rights/> (last visited Feb. 27, 2015); *University Policies*, NEW YORK UNIVERSITY (July 1, 2012), <http://www.nyu.edu/content/dam/nyu/compliance/documents/IPPolicyFINAL.pdf>.

¹⁰⁰ Luppino, *supra* note 99, at 373 (comparing the “self-conscious tension” to the discomfort that doctors and lawyers feel while marrying their business interests with the interests of the individuals they are set out to help).

¹⁰¹ *Id.* at 374.

the traditional intellectual property disputes that universities face. The more frequent disputes occur at the graduate level because it traditionally incorporates sponsored research. Sponsored research raises ownership issues directly between the graduate students who create the work and the universities that fund the work because these relationships between the student and school more closely mirror the employer/employee relationship that would trigger the work-for-hire doctrine.¹⁰²

Many universities' intellectual property policies state, as a general rule, that undergraduate students will own any intellectual product that they "make, discover, or create in the course of their research."¹⁰³ However, these same policies often carve out a number of exceptions that would warrant university ownership of student work, including when the work was sponsored or funded, and when the student acted as an employee, as in the *Fleurimond* case.¹⁰⁴ It is not enough to rely on the basic language of such policies, however. That FIT misappropriated Diana Rubio's rights

¹⁰² See *id.* at 375.

¹⁰³ See, e.g., WIPO Guidelines, *supra* note 95, at 13.

¹⁰⁴ WIPO's *Guidelines* suggest exceptions in situations where (1) students receive compensation from the school in the form of wages, salary, or stipend; (2) the student makes significant use of the university's resources; (3) the research was funded by a sponsor under a grant or sponsored research agreement; (4) the work involves theses or dissertations. *Id.* at 13. Several schools follow this policy. See, e.g., FASHION INSTITUTE OF TECHNOLOGY, *supra* note 99, at 10 (stating that FIT will retain ownership of works created making substantial use of college resources, created as a research project sponsored by a governmental, corporate or other sponsor, created at the direction of or commissioned by FIT, closely associated with a patent owned by FIT, or created within the scope of an employment relationship with FIT). Parson's New School includes similar exceptions. See THE NEW SCHOOL, *supra* note 99, at 1–2 (describing three exceptions to the general rule: (1) outside sponsored research/activities, (2) university commissioned or sponsored activities (3) student or faculty initiated agreements). New York University also includes similar exceptions. See NEW YORK UNIVERSITY, *supra* note 99 (describing how the general rule will not apply where a work is created in the course of (a) sponsored research (b) any research or other activity involving Substantial Use of University Resources (c) participation as a team member on a University project involving other members of the University Community (d) employment or other compensated duties).

despite an FIT policy that did not provide for such action,¹⁰⁵ demonstrates the potential for the inconsistent and inappropriate application of university intellectual policies. Furthermore, the schools lack legal authorization to enforce these policies as binding contracts.¹⁰⁶ University policies do not carry with them the binding “force of law” and “cannot, in themselves, be used as valid legal claims on students’ intellectual products.”¹⁰⁷

A. University Intellectual Property Policies Lack Adequate Consideration

The unenforceability of university intellectual property policies turns first on their lack of consideration. One of the most fundamental aspects of contract law is that there must be sufficient consideration in order for a contract to be enforceable.¹⁰⁸ The Restatement of Contracts defines consideration as one of four things: (1) an act; (2) a forbearance; (3) the creation or modification of a legal relation; or (4) a return promise.¹⁰⁹ In essence, consideration is a bargained-for exchange.¹¹⁰ Schools fail to meet this requirement in the transfer of rights from a student to the university because the school does not offer the student consideration.

The first exchange between the student and the university occurs at the very beginning stages when the student pays tuition to attend the school. There is valid consideration between the parties in this situation, where one act is exchanged for another: the student pays the school in exchange for an education accomplished through the university’s acts of instruction and guidance. If the school wants to claim ownership of a student’s intellectual

¹⁰⁵ See FASHION INSTITUTE OF TECHNOLOGY, *supra* note 99, at 10. See also *supra* note 98 for a discussion of the problem of this policy.

¹⁰⁶ Patel, *supra* note 13, at 505.

¹⁰⁷ HERRINGTON, *supra* note 9, at 32.

¹⁰⁸ ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 5.4 (Matthew Bender & Co. Inc., eds., 2014) (“An informal promise without consideration that stands utterly alone creates no legal duty and is not enforceable. To be enforceable, there must be a bargained-for exchange . . .”).

¹⁰⁹ RESTATEMENT (FIRST) OF CONTRACTS § 75 (1932).

¹¹⁰ CORBIN ON CONTRACTS, *supra* note 108 § 5.4.

property rights to work the student creates through that instruction, it must offer the student additional consideration.¹¹¹ The school would be correct in arguing that there is valid consideration where the contractual agreement is between the university and a graduate student or faculty member.¹¹² In those situations, the faculty member or graduate student bargains for compensation as an employee in exchange for awarding the school ownership rights over his protectable work product.¹¹³ Because undergraduate students are not paid such compensation, this argument would fail in the undergraduate context.

This argument is based on a well-founded rule of contract law called the pre-existing duty rule. Professor Arthur Corbin, a leading scholar of contract law and author of the legal treatise *Corbin on Contracts*, states the well-founded rule quite simply: “Neither the performance of duty nor the promise to render a performance already required by duty is a sufficient consideration for a return promise.”¹¹⁴ A duty arises under a number of general theories of obligation under contract law, including the legal doctrines of reliance, unjust enrichment, and tort.¹¹⁵ The university already bargained, through the initial tuition-education exchange, for the obligation to provide the student with an education before the student created any copyrightable work. Thus, tuition payments cannot serve as adequate consideration for the student’s copyrightable work after the initial exchange because the school had a pre-existing duty to provide that education after it accepted

¹¹¹ Patel, *supra* note 13, at 505 (“Allocating the ownership rights in a student-generated invention absent additional consideration does not appear justifiable.”). The school would be correct in arguing that there is valid consideration where the contractual agreement is between the university and a graduate student or faculty member. Nordheden & Hoeflich, *supra* note 8, at 38. In those situations, the faculty member or graduate student bargains for compensation as an employee in exchange for awarding the school ownership rights over protectable work product. *Id.* Since no such compensation is paid to undergraduate students, this argument would fail in the undergraduate context.

¹¹² Nordheden & Hoeflich, *supra* note 8, at 38.

¹¹³ *Id.*

¹¹⁴ ROBERT S. SUMMERS & ROBERT H. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 87 (6th ed. 2011).

¹¹⁵ *Id.* at 36.

payment.¹¹⁶ To comply with contract law, the university must therefore provide the student with additional consideration if it chooses to rely on its intellectual property policies as contractual obligations. Without such additional consideration, these policies are unenforceable as contracts under the pre-existing duty doctrine. Absent an enforceable contract whereby the student agrees to transfer his rights, the student will not owe the university an obligation to do so.

An article published by the *Kansas Journal of Law and Policy* explains the two ways in which a university may offer the student such additional consideration in order to satisfy the consideration requirement.¹¹⁷ The first method is to offer the student monetary compensation,¹¹⁸ and the second is to require students to assign their rights to the school before allowing them to participate in any work that may result in the creation of copyrightable work.¹¹⁹ Authors Nordheden and Hoeflich explain that the school may be opposed to offering payment for basic financial reasons or due to a separate university policy that prevents a student from receiving both academic credit and monetary compensation for simultaneous work.¹²⁰ The second option would also prove futile because the act of conditioning a student's participation in the learning process on his willingness to forego intellectual property rights would discourage his learning.¹²¹ According to the article, this option

¹¹⁶ *Id.* at 87.

¹¹⁷ See generally Nordheden & Hoeflich, *supra* note 8, at 34.

¹¹⁸ It is important to note that the compensation offered must be fair in light of the circumstances of the particular situation. The Second Restatement of Contracts provides that "a false recital of consideration" or consideration that is "merely nominal" will not suffice. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt.b (1979).

¹¹⁹ Nordheden & Hoeflich, *supra* note 8, at 38. In this situation, the school would offer the student permission to participate in the educational setting that would induce production of protectable works in exchange for the student's agreement to transfer ownership rights to the school. Permission is granted in exchange for agreement and consideration is satisfied.

¹²⁰ *Id.* at 38–39.

¹²¹ See, e.g., *id.* at 38–39; Patel, *supra* note 13, at 504 ("If . . . the student and her determination to maximize her creative potential become inhibited, society would miss out on the prompt disclosure of the student's idea.").

would be “antithetical to the educational mission of the university and highly exploitative of undergraduate labor.”¹²²

Aside from monetary compensation or preconditioned agreements, a university may argue that course credit may serve as adequate compensation for purposes of satisfying the requirements of contract law and enforcing its intellectual property policies. The major flaw of this argument is that it falls directly within the realms of the aforementioned pre-existing duty doctrine. The analysis of this issue turns to the context of unpaid internships discussed in Part III.B of this Note. In the Notre Dame article, Gregory discusses the ineffectiveness of a university’s use of academic credit as currency.¹²³ Gregory explains that academic credit cannot constitute compensation in the unpaid internship setting since students are the ones paying the school for that academic credit.¹²⁴ Once again, the university would be attempting to “double-dip” into the pot of student-generated funds in order to enforce its intellectual property policies without additional consideration. The pre-existing duty doctrine bars this action and thus prevents academic credit from serving as sufficient compensation under contract law.¹²⁵

¹²² Nordheden & Hoeflich, *supra* note 8, at 39. Nordheden and Hoeflich also explain that regardless of such a policy argument, the law on adhesion contracts (those that favor one party over the other on a “take it or leave it” basis) would likely deem this agreement unenforceable. *Id.* See *infra* Part.III, for a thorough analysis as to how this option would lay contradictory to the underlying purposes of Copyright law.

¹²³ Gregory, *supra* note 82, at 227.

¹²⁴ *Id.* at 260 (“[T]he school gets paid, not to teach, but simply to put credits on transcripts.”). Gregory argues that, in essence, all the school is doing in exchange for the thousands of dollars students pay per credit is providing a letter on paper, since the employer is actually the entity providing the instruction and occupational education to the student. *Id.*

¹²⁵ The pre-existing duty rule is one “corollary” of the doctrine of consideration that judges apply to contract issues with a “frequency unmatched” by any other (others include illusory promises and mutual obligation). Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 713, 730 (1996). Stated simply, the rule provides that “[p]romising to perform, or performing, an act that one is already under a legal duty to perform, is not consideration for a return promise.” *Id.* at 730.

Even where the pre-existing duty doctrine does not apply,¹²⁶ the argument that academic credit may serve as a form of payment to students remains flawed. Federal regulators deem school credit an illegitimate tool in satisfying compensation requirements, “especially when the internship . . . mainly benefits the employer.”¹²⁷ Since academic credit is an insufficient replacement for monetary compensation where students participate in unpaid internships that serve the needs of the employer, it logically follows that regulators would similarly deem credit inadequate where students complete coursework for the financial benefit of only the school.

Regardless of which argument a university may raise in defense of its existing intellectual property policies, the policies will continue to lack the requisite additional consideration to claim ownership of student intellectual property rights as long as the university fails to provide the student with monetary compensation.

B. University Intellectual Property Policies are Unconscionable

An intellectual property policy that fails to offer students compensation before transferring rights to the school is also unenforceable under contract law’s policing doctrine of unconscionability. Courts use the principle of unconscionability to strike down extremely unfair or oppressive contracts.¹²⁸

¹²⁶ For purposes of argument and clarity, this Note will proceed under the false assumption that the pre-existing duty doctrine does not, in fact, apply to the circumstance.

¹²⁷ Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 2, 2010, <http://www.nytimes.com/2010/04/03/business/03intern.html> (“[F]ederal regulators say that receiving college credit does not necessarily free companies from paying interns.”). Greenhouse includes as regulators officials in Oregon, California, and other states who are investigating employers who facilitate unpaid internships, as well as the U.S. Department of Labor. *Id.*

¹²⁸ See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining unconscionability as “[t]he principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp. terms that

Traditionally, courts were only able to invalidate inequitable contracts by employing other policies of contract law, such as insufficient consideration or duress.¹²⁹ However, when the Uniform Commercial Code (UCC) codified the unconscionability doctrine in 1952, modern courts gained access to a statutory foundation upon which to rely when dealing with unfair agreements.¹³⁰ Although the UCC applies exclusively to sale of goods contracts, Section 208 of the Restatement (Second) of Contracts adopted the concept of unconscionability in 1981 and has since carried the doctrine across the boundaries of sale of goods cases and into general contract law.¹³¹

Issues of unconscionability arise where an agreement involves “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”¹³² Courts generally recognize two forms of unconscionability and require that both be present before striking down a contract as unenforceable.¹³³ Procedural unconscionability relates to the problems that occur during the contract-making process and produce coercive or “unfairly surprising” agreements.¹³⁴ Substantive unconscionability, on the other hand, pertains to defects in the resulting agreements.¹³⁵

are unreasonably favorable to one party while precluding meaningful choice for the other party.”); Restatement (Second) of Contracts § 208 (1979).

¹²⁹ CORBIN ON CONTRACTS § 29.2 (2011).

¹³⁰ See U.C.C. § 2-302 (1952).

¹³¹ RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

¹³² *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

¹³³ See, e.g., Arthur Allen Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967). But see, Melissa T. Lonegrass, *Finding Room for Fairness in Formalism – The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 6–7 (2012). Lonegrass describes a trend among state supreme courts to replace the hard and fast rule, which requires both procedural and substantive unconscionability with a sliding scale approach, which allows for courts to strike down a contract for unconscionability where expansive evidence of one category compensates for limited evidence of the other. *Id.* Five courts have taken the sliding scale one step further in finding unconscionability where only one category is present. *Id.*

¹³⁴ Leff, *supra* note 133, at 498.

¹³⁵ *Id.*

1. Procedural Unconscionability—Students are Unfairly Surprised and Lack Choice

Procedural unconscionability occurs where either the terms of an agreement unfairly surprise a party or where a party lacks meaningful choice in its decision to enter into the agreement.¹³⁶ The policy behind procedural unconscionability proceeds on the ground that a party must fully understand the terms he is agreeing to, in terms of both comprehension and acknowledgement,¹³⁷ and must also be in a position to negotiate those terms in his own best interest. The student-university context provides a fine example of procedural unconscionability: students fail to understand the terms of the agreements they enter into because (1) they are unaware of the existence of intellectual property policies in the first place; (2) they lack the capacity to fully understand the terms of the policies when they are aware; and (3) they lack the standing and bargaining position to negotiate those terms in their own best interests.

The first element of procedural unconscionability, unfair surprise, is present either where a contracting party lacks sophistication or where a contract's terms are inconspicuous.¹³⁸ Though students do not represent the class of individuals that courts generally recognize as unsophisticated,¹³⁹ intellectual property policies nevertheless unfairly surprise undergraduate students because the terms are inconspicuous. Schools generally do not call the students' attention toward their intellectual property policies¹⁴⁰ but instead bury them deep within the university's

¹³⁶ Kendall K. Johnson, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete*, 19 SPORTS L. J. 1, 16 (2012).

¹³⁷ *Id.* One must both realize that he is agreeing to adhere to some term and also comprehend the meaning and effect of that term. *Id.*

¹³⁸ *Id.* at 16–17.

¹³⁹ *See, e.g.,* Ryan v. Weiner, 610 A.2d 1377, 1385 (Del. 1992) (holding that the court should consider the vulnerability and unsophistication of the 69 year-old plaintiff with a ninth grade education in determining whether the contract at hand was procedurally unconscionable).

¹⁴⁰ *See* Patel, *supra* note 13, at 503–04.

general set of policies.¹⁴¹ While deciding whether to accept enrollment into a university, students are often most focused on the school's degree programs, course offerings, and various elements of campus life.¹⁴² Close to the bottom of that list, if at all, would be the school's policy on intellectual property rights.¹⁴³ Often, students do not seek out these policies until long after enrollment and only after the student has already created protectable work,¹⁴⁴ as was the case with Diana Rubio. Under the current state of the law, it is too late for the student to raise concerns or object to the policy's terms at that point since she already (inadvertently) signed away her rights by enrolling in the school.

University intellectual property policies are procedurally unconscionable not simply because the students fail to read them, but rather because the students do not recognize them as binding contracts. While courts generally hold that parties are bound by a contract whether they have read it or not, they recognize an exception where the writing does not appear to be a contract and

¹⁴¹ For example, while trying to locate the intellectual property policy of New York University, I had to first visit the school's general website and then click onto its designated policy page. From there, I had to search among several categorical tabs such as "Financial Affairs", "Governance & Legal", "Information Technology", "Operations & Safety", "Research", and "Student Affairs" and the dozens of policies listed under each tab, and I had to search through each tab, using only my own logical reasoning as a guide, to understand each before finally coming across the school's "Statement of Policy on Intellectual Property." It is difficult to imagine how likely a prospective NYU student would be to conduct such a search and locate the document successfully where it took an individual who was specifically seeking out such information more time and effort than a simple point and click. *University Policies and Guidelines*, NEW YORK UNIVERSITY, <http://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/academic-affairs-faculty-policies.html> (last visited Feb. 27, 2015).

¹⁴² See Patel, *supra* note 13, at 503 ("Students choosing universities . . . base their decisions upon the congruence between personal interests and the substance of the . . . program.").

¹⁴³ See *id.* at 503-04; Perez-Kudzma, *supra* note 11, at 499 ("Even though intellectual property policies are prominent in academia, some universities fail to notify students of their policies. Therefore, students may engage in research activities at universities without knowing the extent of their intellectual property rights.").

¹⁴⁴ See Patel, *supra* note 13, at 504.

the party that created it does not call the agreeing party's special attention to the contract terms.¹⁴⁵ The present situation provides an appropriate context for invoking this exception since students are not likely to understand that a school policy is an enforceable legal contract, or that choosing to enroll in the school serves as assent to all of the provisions of such policies. The policies do not have signature lines, are not presented as formal documents with counsel present, and do not expressly call themselves "contracts" or even "agreements."¹⁴⁶ It is unlikely that a student, likely fresh out of high school, would recognize a school policy as an enforceable contract to which he is legally bound. Further, as explained above, universities generally do not make the effort to call their intellectual property policies to their students' special attention so that students may acknowledge them.¹⁴⁷ Such lack of notice and understanding demonstrates how unfairly surprising, and thus procedurally unconscionable, these intellectual property policies are to students.

The second element that demonstrates procedural unconscionability is lack of meaningful choice. In the event that a university does call special attention to its intellectual property policy, a policy that would allow for the transfer of students' rights to the school absent adequate consideration would nonetheless be invalid since undergraduate students lack meaningful choice while agreeing to the school's intellectual property policy. A party lacks meaningful choice where "an inequality of bargaining power results in 'no real negotiation' and the weaker party is virtually coerced into accepting the other party's terms."¹⁴⁸ Courts will hold

¹⁴⁵ See, e.g., *Specht v. Netscape Commc'n Corp.*, 306 F.3d 17, 29–30 (2d Cir. 2002) (holding that "a consumer's clicking on a 'download' button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the button would signify assent to the terms"). The *Specht* court held that under California common law, a contract is unenforceable where the agreement does not appear to be a contract and the terms are not called to the recipient's attention. *Id.*

¹⁴⁶ See *supra* notes 98 and 104 (discussing the policies of certain universities). The policies discussed in those footnotes provide lucid examples of the deficiencies of existing university policies.

¹⁴⁷ *Perez-Kudzma*, *supra* note 11, at 499.

¹⁴⁸ *Johnson*, *supra* note 136, at 17 (quoting *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (Ct. App. 1997)).

a contract unenforceable where the weaker position of one party impedes his ability to negotiate and effectively coerces him into agreeing to a contract.¹⁴⁹ Universities do not participate in negotiations with individual students regarding their policies but rather offer the policies on a “take-it-or-leave-it” basis.¹⁵⁰ Under contract law, such agreements are known as contracts of “adhesion.”¹⁵¹ Adhesion contracts lend themselves to unconscionability by definition, since they usually involve the reluctant agreement of one party despite his dissatisfaction with the terms.¹⁵²

Adhesion contracts are particularly troublesome where they position inexperienced and eager students against established institutions. A student who seeks to attend a school like Harvard due to its prestige, the Massachusetts Institute of Technology for its excellence in applied sciences and mathematics, or FIT to learn from fashion industry professionals, will almost always choose the “take it” option, despite unfavorable terms.¹⁵³ It is difficult to imagine how egregious policy terms would have to be in order to provoke a student like Diana Rubio, who dreams of a career in fashion design, to turn down an admissions offer from FIT, the “premier institution for fashion and related professions.”¹⁵⁴

Not only do students lack meaningful choice based on their inability to negotiate, they also lack the ability to assent due to their inferior bargaining power. A young, inexperienced student has little power to negotiate with an educational institution like a

¹⁴⁹ Leff, *supra* note 133, at 498.

¹⁵⁰ See HERRINGTON, *supra* note 9, at 46–47; Nordheden & Hoeflich, *supra* note 8, at 35.

¹⁵¹ HERRINGTON, *supra* note 9, at 46–47.

¹⁵² Black’s defines adhesion contracts as “standard-form contract[s] prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.” BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁵³ See Patel, *supra* note 13, at 503 (explaining how a student may consider a school’s concentration in “chemical kinetics” over another’s in “thermodynamics” while making an enrollment decision).

¹⁵⁴ *Fashion Institute of Technology*, U.S. NEWS EDUCATION, <http://colleges.usnews.rankingsandreviews.com/best-colleges/fit-2866> (last visited Feb. 27, 2015).

university.¹⁵⁵ While the student represents but one applicant among a sea of thousands from which the university may choose in making offers of admission,¹⁵⁶ the student usually has a smaller pool of schools from which to choose, based first on admissions offers and then on the student's primary concerns such as his educational and financial needs.¹⁵⁷ The difference in size between the pool of college applicants and the pool of schools offering admission helps demonstrate the magnitude of the difference in bargaining power that weighs heavily in favor of the university.

The university's undoubtedly superior sophistication and level of familiarity with the terms and consequences of its policies further contribute to its heightened bargaining power.¹⁵⁸ Undergraduate students are not in the business of maintaining educational institutions, nor are they likely to be familiar with intellectual property law. Students lack familiarity with a university's policies,¹⁵⁹ as well as the foresight and financial means to seek legal counsel before agreeing to them.¹⁶⁰ The obvious disparity in size between the institution and the student also demonstrates the inequality in bargaining power. Universities typically do not take certain actions that would mitigate the effects of the size difference,¹⁶¹ such as taking the initiative to explain to the student the key provisions or drawing attention toward them with conspicuous type.¹⁶² Differences in size therefore play a much

¹⁵⁵ See Patel, *supra* note 13, at 504 ("To say that the university enjoys a superior bargaining position would be an understatement.").

¹⁵⁶ See Delece Smith-Barrow, *10 Universities That Receive the Most Applications*, U.S. NEWS (Jul. 15, 2014, 9:00 AM), <http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2014/07/15/10-universities-that-receive-the-most-applications>. According to U.S. News, the ten universities that received the most applications in the country received anywhere from 47,000 to 72,000 applications from first-time students in the fall semester of 2012 alone. *Id.*

¹⁵⁷ See *Identify Important Factors in Choosing a College*, THE ACT, <http://www.actstudent.org/college/factors.html> (last visited Feb. 27, 2015).

¹⁵⁸ See Johnson, *supra* note 136, at 20.

¹⁵⁹ As explained above, this lack of familiarity may be a lack of awareness entirely.

¹⁶⁰ See Luppino, *supra* note 99, at 417.

¹⁶¹ Patel, *supra* note 13, at 503–04.

¹⁶² See Johnson, *supra* note 136, at 20.

larger role in the unconscionability analysis. When coupled with the other issues of unfair surprise and lack of meaningful choice, the case for procedural unconscionability falls in favor of the student.

2. Substantive Unconscionability—The Policies are One-sided and Unfair

Substantive unconscionability turns on the fairness of the final contract. The analysis is not based on the parties involved or the context under which the terms were agreed upon. Instead, it focuses on determining whether the single agreement at issue¹⁶³ contains terms that are one-sided and extremely unfair.¹⁶⁴ A court will strike down a contract as substantively unconscionable where the agreement is both unreasonable and so “‘harsh’ or ‘oppressive’ in nature, or the terms so one-sided as to ‘shock the conscience.’”¹⁶⁵ FIT’s intellectual property policy presents an example of an agreement that is so one-sided that it “shocks the conscience.” On one side of the agreement is FIT, a state-funded institution that educates 10,000 students per academic year.¹⁶⁶ With the support of its intellectual property policy, FIT may claim ownership of undergraduate students’ intellectual property rights—as in the case of Diana Rubio—which then allows the school to collect royalties from sales of the Everything Backpack.¹⁶⁷ Diana Rubio, the aspiring young designer,¹⁶⁸ sits on the opposite side of the contract from FIT, where she is excluded from sharing in the profits from for her work.¹⁶⁹ A policy like FIT’s, which allows a university to reap the fruits of its student’s labor while excluding that student from the financial benefit “shocks the conscience” and provides cause for a finding of substantive unconscionability.

¹⁶³ Leff, *supra* note 133, at 498.

¹⁶⁴ Lonegrass, *supra* note 133, at 11.

¹⁶⁵ *Id.* (quoting 1 Linda J. Rusch, Hawklund UCC Series § 2:302:5 (2010)).

¹⁶⁶ *Our History*, FASHION INSTITUTE OF TECHNOLOGY, <http://www.fitnyc.edu/1807.asp> (last visited Feb. 27, 2015).

¹⁶⁷ Complaint and Demand for Jury Trial, *supra* note 2, para. 28.

¹⁶⁸ *Id.* para. 64.

¹⁶⁹ *Id.* para. 26.

Where a university relies on its intellectual property policies as binding contracts to usurp ownership rights of student-generated work, it violates basic principles of contract law that call for equality and fairness. The agreements are procedurally unconscionable because students lack notice, understanding, and bargaining power; and substantively unconscionable because their terms are shockingly one-sided and unfair to students. As such, even if courts deem these policies enforceable despite a lack of consideration, they would likely strike them down under the doctrine of unconscionability.

C. The Enforcement of These Intellectual Property Policies Runs Against Public Policy

Intellectual property policies that allow universities to claim ownership of students' protectable works not only violate contract law, but also run fiercely against long-standing principles of public policy. Courts generally define public policy as "the present concept of public welfare or general good"¹⁷⁰ Public policy serves as a policing doctrine through which courts protect public interests from agreements that may be offensive or in conflict with such interests.¹⁷¹ Agreements that run against policy will likely see the same fate as those that are unconscionable—courts will strike them down as unenforceable.¹⁷²

Like the unconscionability doctrine, the concept of public policy involves both procedural and substantive components.¹⁷³ However, the first step in the public policy analysis is not to decide whether the agreement in question is procedurally or substantively

¹⁷⁰ Grace McLane Giesel, CORBIN ON CONTRACTS 14 (Joseph M. Perillo ed., Vol. 15 2003) (citing *Lazenby v. Universal Underwriters Insurance Co.*, 214 Tenn. 639, 383 S.W.2d at 5).

¹⁷¹ *Id.* at 2.

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 6–7. A contract that is procedurally contrary to public policy is one that conflicts solely due to the fact that the contract is consummated on a day of the week where a law prohibits contracting on that specific day. *Id.* A contract that is substantively contrary to public policy is one that involves a performance that in itself would conflict with public policy, such as contracting for illegal activity. *Id.*

in conflict with public policy.¹⁷⁴ Instead, it is to first determine whether a public policy exists regarding the format or substance of the agreement in the first place.¹⁷⁵ Constitutions, statutes, and common law all contribute to what constitutes “public policy,” though courts have failed to provide a clear definition of the concept.¹⁷⁶ Suffice it to say that public policy is a term that envelops the interests, values, and morals of the general public that are of such importance as to warrant legislative and judicial protection.¹⁷⁷

The very language and purpose of the Intellectual Property Clause in the U.S. Constitution serves as strong evidence that the promotion of learning and creation stands at the forefront of public policy. As explained in Part I of this Note, the Clause was meant to promote the progress of science and the useful arts in order to expand knowledge for the ultimate benefit of the public.¹⁷⁸ Intellectual property policies that allocate student ownership rights to the school have the opposite effect, however.¹⁷⁹ These policies hinder creativity because students are less likely to create protectable work when they are faced with the threat of losing their rights.¹⁸⁰ Carmenelisa Perez-Kudzma, a professor of law who has focused on intellectual property law, writes, “[s]tudents will not feel confident in exploring their intellectual potential if they fear losing their intellectual property to those they trust.”¹⁸¹ Through the use of such policies, the university “fails in its mission to

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *Id.* at 14.

¹⁷⁷ Black’s Law Dictionary defines “public policy” as: “principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.” BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁷⁸ *See* U.S. CONST. art. I, § 8, cls. 1, 8.

¹⁷⁹ *See* Patel, *supra* note 13, at 507.

¹⁸⁰ *See, e.g.,* Collins, *supra* note 74, at 302 (“[I]nforming students that they may not maintain ownership in their own works may hamper their enthusiasm for developing works that reach their full creative potential.”).

¹⁸¹ Perez-Kudzma, *supra* note 11, at 518.

encourage the generation and dissemination of knowledge for the benefit of the university community and society as a whole.”¹⁸²

The continued enforcement of intellectual property policies that allow for this transfer of student rights would have further consequences that harm society. Where a university expressly gives students notice of its policy to seize ownership rights to protectable work, a student will likely proceed in either of two ways. The first would be the outright decision to seek an education elsewhere. This resolution is detrimental to the student because it impedes his ability to choose a school based on more important factors such as degree programs and campus life.¹⁸³ Furthermore, it is unlikely that the student would even be able to locate a school that has a more protective policy, and the student will have wasted time, money, and effort in the unsuccessful search.¹⁸⁴ The second potential consequence of enforcing these intellectual property policies is that the student will simply choose to abstain from any coursework that has the potential to yield protectable works.¹⁸⁵ This turns back to the issue of hindering creation as described above, which negatively affects both society, by prohibiting the student’s idea from ever entering the public purview, and the student, by stunting his learning, and forcing him to decide between relinquishing his rights or harming his course grade by refusing to complete the work.¹⁸⁶

Intellectual property policies that facilitate the transfer of ownership rights from the undergraduate student to the school absent compensation have both immediate and lasting effects that disturb public policy. These policies run against the constitutional foundations of intellectual property law by diminishing a student’s incentive to create and preventing the expansion of knowledge.

¹⁸² Patel, *supra* note 13, at 504.

¹⁸³ See *Identify Important Factors in Choosing a College*, THE ACT, <http://www.actstudent.org/college/factors.html> (last visited Feb. 27, 2015).

¹⁸⁴ Patel, *supra* note 13, at 504.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.*

IV. THE BENEFITS OF ALLOCATING RIGHTS TO THE STUDENT OUTWEIGH CONTRARY CONCERNS

The benefits of student ownership of intellectual property rights far outweigh any concerns. One issue turns on whether or not the students are qualified to take on the responsibility that comes with the ownership of these rights.¹⁸⁷ That existing law does not enforce an age requirement for authors of protectable works weakens this contention dramatically. If the writers of the Constitution did not find it worrisome that intellectual property rights may develop with young authors, and since Congress has yet to amend the law to prohibit such authors from receiving protection, it is hard to find reason for such worry in the present context.

Another argument against student retention of copyright ownership is that it would place a target on the backs of student creators and make them vulnerable to manipulation by intellectual property firms.¹⁸⁸ This argument ignores the fact that these students are just as defenseless against professional brokers as they are against the universities they attend. Diana Rubio was exploited not by an overzealous copyright scout who sold her a wild dream, but rather by the university she trusted. Instead of attempting to protect students from mistreatment by outside parties, universities should first examine their own intellectual property policies to make sure they do not promote such exploitation.

V. SOLUTION: A CALL FOR FEDERAL LEGISLATION TO PROTECT STUDENTS' RIGHTS

Congress should legislate to protect the intellectual property rights of undergraduate students from misappropriation by their universities. Despite ample support from the Constitution, contract law, and public policy, the system of copyright law as it exists

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 510 (“Universities may take a paternalistic view that students will render themselves vulnerable to unscrupulous brokers who will take advantage of the students.”). This suggests that intellectual property brokers might attempt to capitalize on the youth and naïvety of undergraduate students by making unfavorable offers for the transfer of their rights.

today fails to adequately protect undergraduate students. Arguments against invoking such protection are without merit and fail to overcome the abundant and compelling reasons that support student ownership. Though Diana Rubio's case presents but one example of this problem, the risk of similar issues occurring is far from trivial.¹⁸⁹

Undergraduate students will continue to create copyrightable works for as long as the Copyright Act awards their works protection since creation of protectable works occurs regularly throughout the education process.¹⁹⁰ And as long as courts continue to enforce policies like that of FIT, the potential for misappropriation of student rights will continue to burden the educational system. University policies, without good reason, fail to provide an equitable approach to the distribution of intellectual property rights.¹⁹¹ As such, Congress should be proactive in initiating uniform and fair standards by which all students and universities must adhere.

An amendment to the Copyright Act that would expressly prevent a university from claiming ownership of intellectual property rights to protectable student-generated work would successfully achieve that goal. A relatively minor amendment to Section 201 of the Copyright Act would provide the necessary protection to undergraduate students. As referenced earlier in this Note, Section 201 describes the different forms of copyright ownership, such as initial ownership and works made for hire.¹⁹² It explains that copyright ownership may be transferred and describes how the law will "not give effect" to any transfer that is "involuntary."¹⁹³ Section 201(e) provides:

When an individual author's ownership of a copyright, or of any of the exclusive rights under a

¹⁸⁹ Nordheden & Hoeflich, *supra* note 8, at 37 ("[T]he risk of undergraduate researchers making claims to rights in the fruits of their labors is not negligible, particularly in computer science and other types of research where even young researchers may well be able to do significant work.").

¹⁹⁰ See Part I *infra* for a discussion on the qualities of copyright law that make it more feasible for undergraduate students to create copyrightable works.

¹⁹¹ Luppino, *supra* note 99, at 425.

¹⁹² 17 U.S.C. § 201 (2014).

¹⁹³ *Id.* § 201(e).

copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.¹⁹⁴

Congress should amend the language of Section 201(e) to expressly include universities so as to prevent the involuntary transfer of rights from the students to their respective schools. An effective amendment might read as follows:

When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization, *including a university*, purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.¹⁹⁵

Proper exceptions will, of course, apply in situations where the work-for-hire doctrine is appropriate, as in the *Fleurimond* case, or where the university offers the student adequate compensation. The amount of payment should be fair in light of the circumstances; as one author puts it: "Nominal payments will not do."¹⁹⁶

The unambiguous inclusion of universities in the "Involuntary Transfer" provision of the Copyright Act would eliminate the potential for universities to create loophole justifications for the transfer based on unenforceable contracts or a faulty application of the work-for-hire doctrine. Unlike the terms of university

¹⁹⁴ *Id.* Title 11 of the United States Code is entitled "Bankruptcy." 11 U.S.C. (2000).

¹⁹⁵ *Id.*

¹⁹⁶ Nordheden & Hoeflich, *supra* note 8, at 38.

intellectual property policies, which may be inconspicuous to students,¹⁹⁷ the suggested amendment to the Copyright Act is a clear and obvious recognition of the fact that a university may not seize intellectual property ownership rights. In the event that a situation like that of Diana Rubio were to occur under such legislation, the student would be able to rely not only on the strong arguments regarding copyright and contract law discussed earlier in this Note, but would also be able to point directly to the Constitution in order to support her position and protect her rights. That FIT is able to claim ownership of Diana Rubio's ownership rights demonstrates the need for more clear-cut protection of undergraduate students' rights. Where the Constitution expressly includes a university amongst those institutions that may not seize "an individual's ownership of a copyright", a university like FIT would have little, if any, defense for such action.

The amendment above would provide students with a comforting blanket of protection that would encourage their creativity and foster learning in an environment where such activities are of paramount importance. It would create a safety net upon which undergraduate students may rely in addition to the more basic principles of copyright and contract law, which provide further, though less express, protections. Such legislation would help realize the true missions of intellectual property law by protecting authors and incentivizing creation.

CONCLUSION

The Constitution addresses some of the most fundamental concepts upon which this nation was established. The intellectual property clause expresses one of these concepts through its dedication to the promotion of knowledge and creation. A concept that is so deeply rooted in American history deserves the utmost respect and attention, especially as it pertains to society's growing class of academics. Undergraduate students represent one of the

¹⁹⁷ See Part III.B of this Note for a discussion of unconscionability and inconspicuous contract terms as they relate to university intellectual property policies.

few classes that may challenge the university for ownership rights: where the work-for-hire doctrine precludes both graduate students who participate in sponsored research and professors who qualify as employees from contesting the transfer of rights, undergraduate students may rely on contract law to bolster their claims.¹⁹⁸ Despite this support, undergraduate students' rights are among the least protected in the university context.¹⁹⁹

The need for protection is even more significant in light of the fact that universities lack legal and equitable standing to claim ownership of student protectable works. The work-for-hire doctrine of the Copyright Act is inapplicable in circumstances where students act solely in their capacity as students. The intellectual property policies that might facilitate the transfer of ownership to such works are unenforceable contracts because they do not satisfy contract law's fundamental requirement of consideration and violate its policing doctrines of unconscionability and public policy.

Legislators should change existing law, which enables the exploitation of students like Diana Rubio. By passing a legislative act that expressly prevents the transfer of intellectual property rights from the student to the university absent appropriate compensation, Congress would both provide students with much-deserved protection and uphold the constitutional goal of promoting the expansion of knowledge.

¹⁹⁸ Nordheden & Hoeflich, *supra* note 8, at 37.

¹⁹⁹ See Perez-Kudzma, *supra* note 11, at 519.