

FROM PEDAGOGY TO PROPERTY: COPYRIGHT IN TEACHING MATERIALS

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Some university intellectual property policies claim the right to use some of the copyright-protected material that has been authored by academics. While the clauses in these policy instruments can vary in detail, the claim to use this material can extend to both traditional scholarly work, such as books and articles, together with teaching materials. This article considers whether the legal foundations for the claim are sound and whether the claim aligns with the characteristics of universities set out in the Education and Training Act 2020.

I INTRODUCTION

I had the privilege of working under Professor Tony Smith's leadership of the Victoria University of Wellington Faculty of Law for some five years. Like many of my faculty colleagues, I appreciated the paramountcy Tony accorded to academic work: scholarship, research-informed teaching, and public and institutional service.

There was a clear alignment between the priorities that emerged under Tony's deanship and the characteristics of universities set out in s 268 of the Education and Training Act 2020:

... universities have all the following characteristics ... :

- (A) they are primarily concerned with more advanced learning, the principal aim being to develop intellectual independence:
- (B) their research and teaching are closely interdependent and most of their teaching is done by people who are active in advancing knowledge:
- (C) they meet international standards of research and teaching:
- (D) they are a repository of knowledge and expertise:
- (E) they accept a role as critic and conscience of society ...

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By example and gentle admonishment, Tony conveyed to all academics in the Faculty of Law his expectation that our work, especially our scholarship and teaching, should align with those ideals and responsibilities.¹ He knew, as only a respected and experienced leading legal scholar could, that "develop[ing] intellectual independence", "meet[ing] international standards of research and teaching", and fulfilling the role of "conscience and critic of society" were demanding taskmasters. Of the wider university administration, he expected no more and no less than it should do its best to help us live up to these standards.

This brief article offers a few reflections on one development in the management of the modern university that pulls in the opposite direction:² a claim by the university that it is entitled to use teaching materials authored by academics.³ Typically, the basis of the claim is an assertion in institutional intellectual property (IP) policies that the university has a right to a non-exclusive licence to use teaching materials in various ways. At the same time, the policies acknowledge academics' ownership of the copyrights in these materials. The licence would allow universities to do various things with and to the copyright-protected material – reproduce the works, post them to websites, communicate the works, and so on – activities that would otherwise infringe an academic's copyrights. The licence attempts to clear the way to use the materials without the author's permission or even without the author's subsequent involvement.⁴

The assertion of a right to use these copyright-protected materials – described below as the universities' "copyright claim" – is not without difficulties. Explored below is an obvious problem: if the relevant copyrights otherwise vest in the employees, what is the basis for the university's assertion of a right to use the material? What makes the copyright claim different from an assertion of the right

1 The characteristics of universities set out in the Education and Training Act 2020 reflect ideas that emerged over many centuries. See generally WH Crowley and Don Williams *International and Historical Roots of American Higher Education* (Garland, New York, 1991).

2 For a recent illuminating discussion, see Peter Woelert "Administrative Burden in Higher Education Institutions: A Conceptualisation and a Research Agenda" (2023) *J Higher Ed Policy & Management* 1.

3 This article focuses on New Zealand law. It assumes *arguendo* that New Zealand's law on copyright ownership would apply to the exploitation of copyright-protected works both within New Zealand and in other jurisdictions. The legal position is not, however, entirely clear. Compare, for example, *Itar-Tass Russian News Agency v Russian Kurier, Inc* 153 F 3d 82 (2d Cir 1998) (copyright ownership issues to be determined by conflict of laws principles applying to general property) and *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167 (FCA) (copyright ownership questions to be determined by the law governing infringement). For an analysis suggesting that the law governing ownership questions should be the law governing the circumstances in which the work is produced (which, in most cases, will be the place of creation), see Graeme W Austin "Intellectual Property Politics and the Private International Law of Copyright Ownership" (2005) 30 *Brooklyn J Int'l L* 899.

4 In one notorious instance, after he had died: see Tamara Kneese "How a Dead Professor is Teaching a University Art History Class" *Slate* (online ed, United States, 27 January 2021).

to use any other items of an employee's property without consent?⁵ This article asks whether the assertion of a right to use copyright-protected material in this way is consistent with the "characteristics" that the Education and Training Act 2020 requires universities to manifest. Universities are, after all, their people, as their constituting statutes confirm,⁶ and it is the work produced by academic employees that enables universities to manifest the requisite characteristics.⁷ The key issue is this: how can academic employees manifest the requisite independence of thought (and other, related characteristics of university work) when it might not be they who decide when and how material they have authored is to be used?

II THE COPYRIGHT CLAIM

The copyright claim is usually advanced through a university's "intellectual property policy". The following wording is typical:⁸

... the University is entitled to a non-exclusive, non-assignable, royalty-free, irrevocable and perpetual licence from the copyright owner to copy, reproduce and distribute the materials or resources for use within the University for teaching and research purposes ...

By dint of such wording (and there are variations on this general theme) universities purport to extract a licence to use copyright-protected materials created by the academic. The precise scope of "the materials" that are subject to the licence varies. It can include both teaching materials and more traditional scholarly works, such as articles and books.

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- 5 This article considers only copyright questions. It does not address issues arising in the employment law context, in the light of collective employment agreements and continuing obligations of good faith. Where, for example, a collective agreement acknowledges that academics retain their copyrights, to suggest that an intellectual property policy containing a clause to the contrary is incorporated into the employment contract would be an uphill battle, to say the least. Nor does it consider the jurisdictional issues raised by the decision of the Supreme Court in *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466. Employment law questions might arise where, for example, the institutional employer threatens disciplinary action if the employee refuses to facilitate the employer's access to the material. This situation arose in *Abbott v Chief Executive, Whitireia Polytechnic* NZERA Wellington WA151/10, 27 September 2010, triggering the jurisdiction of the Employment Relations Authority. Noting that the creation of the workbooks at issue was not part of the express requirements of employment, the Authority held that the copyrights in the workbooks vested in the employee.
 - 6 See for example Victoria University of Wellington Act 1961, s 3(2), which states that the University "shall consist of" the people who comprise the university, including "the professors" and "lecturers". I am grateful to Sir Kenneth Keith for drawing my attention to this provision.
 - 7 Only the constituting legislation for the Auckland University of Technology includes general staff in the people the university "shall consist of": see Auckland University of Technology (Establishment) Order 1999, cl 3(a).
 - 8 In the interests of probity, I have not provided specific institutional sources for the clauses discussed in this article. Source information is available on request.

As for teaching materials, the motivations for the copyright claim have been well described by others.⁹ They include: removing impediments to commercialisation; facilitating collaboration with other institutions; and distribution through mass online learning products. Clauses such as these might also be invoked to ensure continuity of programme delivery where a lecturer is incapacitated and is unable (or unwilling) to grant an express permission to use the materials.¹⁰ The move, reflected in the IP policies, to see teaching materials *as property* helps facilitate these strategies. Hence the title of this article: from Pedagogy to Property.¹¹ What was once regarded as an expression of a teacher's own unique contribution to knowledge is now regarded as something that can be packaged and owned – a bundle of rights that can be divided up and redistributed to suit institutional needs.

Some policies stipulate that the university generally owns the copyright in work produced by academics in the course of their employment, but then disclaim ownership of the copyrights in certain "excluded materials". The latter may include works such as monographs, journal articles and conference papers, as well as instructional material, including "any copyright work prepared specifically for the purpose of assisting teaching and learning". Despite the exclusion, however, such materials can then be subject to the copyright claim made in the kind of clause set out above – ie, a licence to use them.

The clause set out above is one of the more anodyne versions. In some, the licence is specified to be "worldwide", and the "non-assignable" limitation is absent. Moreover, an important limitation contained in this clause – that the licence be for use "within the University" – is not uniformly adopted. One version purports to extend the licence to uses that the university might make "itself or through other academic institutions", while adding a proviso that such uses must be "confined to the delivery of courses or programmes offered by the University". What is envisaged by a use that is "confined to the delivery ... by the University" (ie, the home institution) but delivered "through other academic

9 See for example Robert Gorman "Copyright Conflicts on the University Campus" (2000) 47 J Copyright Soc'y USA 297 at 298.

10 For an example in the polytechnic context, see *Abbott v Chief Executive, Whitireia Polytechnic*, above n 5.

11 A further set of issues, which must be explored at another opportunity, concerns the extent to which emerging institutional approaches to copyright in respect of teaching materials is symptomatic of and reflects phenomena James Scott describes in the context of complex regulatory states: James C Scott *Seeing Like a State* (Yale University Press, New Haven, 1998). Scott reasons that large-scale states can recognise only the kinds of information that they can process. As a result, only standardised and quantified information is integrated within institutional frameworks. With the increasing centralisation of universities, similar phenomena may be occurring in academic settings. Information must be legible to distant parts of complex organisations, with the result that learning and teaching, or, at least, institutional understandings of what learning and teaching comprise, are increasingly standardised and modularised. A related development is the increased use of digital tools such as learning management systems, software whose design architecture facilitates this kind of standardisation: see for example Bruce Baer Arnold "Surveillance Machines in Ivory Towers? Surveillance Capitalism, Dignity and Learning Management Systems" (2022) 19 Canb LR 70. It is possible that the increasing standardisation of teaching and learning we are currently witnessing serves institutional drivers to create intellectual property out of pedagogy.

institutions" is not explained. Even so, it is relatively clear that some uses outside of the home institution are anticipated.

One IP policy excludes "all lecture notes" from the university's copyright claim, but then stipulates that this exclusion does not extend to "examination and assessment materials [and] teaching materials published by the university". In other words, published materials of this kind are within the licence that the policy claims for the university. In this policy, no definition of "published" is provided. Given the context, publication could mean publication by university publishing houses (assuming they could be characterised as the same entity as "the university"). Publication by such an entity accompanied by a voluntary assignment of the copyright (subject to a payment of royalties) would not give rise to difficulties. But publication without the permission of the author would be a straightforward breach of copyright,¹² absent some independent legal justification. An infringement cannot be negated by the university purporting to exercise a right to publish that it does not possess.

But what of self-publication of teaching material by individual academics? Is their publication on the course sites of a university learning management system (LMS) a publication by the university, such that the "publication" of teaching materials is "by the university"? Even assuming the acts of these individuals can be ascribed to the university, that result seems unlikely. The Copyright Act 1994 defines "publication" as "the issue of copies of the work to the public" and, in the case of "a literary, dramatic, musical, or artistic work, making it available to the public by means of an electronic retrieval system".¹³ It might be thought that posting teaching material to a course LMS would publish the work, and thereby bring such distribution within the clause. There is, however, a statutory response to that proposition. Section 10(3) of the Copyright Act 1994 provides that references in the Act to publication "do not include publication that is not intended to satisfy the reasonable requirements of the public". Distribution to a closed group through the LMS site of a university course that conditions access on course enrolment does not satisfy the public's reasonable requirements.¹⁴

For present purposes the specific details of what is claimed under these licence clauses is less important than that the claim is made at all. How is it that universities can say that copyrights in the excluded materials are the academics' own, while, at the same time, claiming a right to use them? A copyright is, as the Copyright Act 1994 confirms, "a property right".¹⁵ A copyright owned by an academic is the academic's own, just as an academic might own other items of property, such as a car or personal clothing. What, then, is the basis for the claim in the IP policies that the university may

12 Copyright Act 1994, s 16(1)(a), (b) and (f) (the exclusive rights of the copyright owner include the right "to copy the work" and "to issue copies of the work to the public, whether by sale or otherwise" and "communicate" the work).

13 Section 10(1).

14 Staniforth Ricketson *The Law of Intellectual Property* (Law Book Company, North Ryde, 1984) at 162–166.

15 Copyright Act 1994, s 14(1).

nevertheless *use* copyrights in works authored by academics for its own purposes? What makes this claim to exploit an academic's property different from a clause in a university policy that says: "The university acknowledges that academics' cars are their own property, but the university may nevertheless use them, when convenient, to run errands"? Or consider a policy that stipulates that the university excludes academics' clothes from the items of property that the university owns, but nonetheless reserves a right to use them, if convenient to do so. An acknowledgment that staff own their own property would be otiose; and the suggestion that the employer might nevertheless use it when convenient would be alarming, to say the least.

One possibility is that the acknowledgment that academics own their copyrights is not quite what it seems, and that the copyright claim rests on the tacit assumption that, insofar as the copyrights in works produced by academics are concerned, the university owns them. It is therefore the university's prerogative to exclude certain categories of works from university ownership. As is explained below, the relevant default rule under the Copyright Act 1994 is that the author of a work is the owner of the copyright, unless some exception applies. Here, the exception would be s 21(2) of the Copyright Act 1994, which provides that the copyrights in literary, dramatic, musical or artistic works produced in the course of employment vest in the employer. It is convenient to describe this as the "employer-owner default rule".¹⁶ Unless the university owns the copyrights there is no legal basis on which it can give those copyrights to the academics and *a fortiori* no basis – save for the possibilities discussed later¹⁷ – on which it can withhold any kind of right to use the works in ways that would otherwise breach the authors' copyrights. The most logical explanation for an assertion of a right to use property belonging an academic is that the university owns these copyrights as employer-owned copyrights under s 21(2) of the Copyright Act 1994. In other words, the exclusion of certain categories of works from university ownership transfers to the academic authors the copyrights in the excluded works that the university would otherwise own. At the same time, this transfer is subject to the copyright claim: the licence to use those works.

III IS THE CLAIM SOUND?

If this indeed be the predicate for the copyright claim, is it sound? University ownership of the copyrights in works authored by academics would appear to have two possible foundations. As indicated above, the first is statutory: the copyrights in literary, dramatic, musical and artistic works vest in the university under the employer-owner default rule.¹⁸ The second is the IP policies themselves: that is, the wording of these policies is effective to transfer the copyrights to the

16 The rule is "default" because, like all statutory rules concerning copyright ownership, it may be varied by agreement: Copyright Act 1994, s 21(4).

17 There is a brief discussion in Part V of various doctrines that supplement the default rules in the Copyright Act 1994.

18 Professor Pila notes that the same assumption informs IP policies in the United Kingdom university setting: see Justine Pila "Who Owns the Intellectual Property Rights in Academic Work?" [2010] EIPR 609.

university, subject to the carve-out of the non-exclusive licence. As we shall see, neither is entirely secure.

A "Made in the Course of his or her Employment"

The starting point for copyright ownership questions is s 21(1) of the Copyright Act 1994. It provides that the author of a work is the first owner of the copyright. That subsection is, however, subject to a number of exceptions, including, as we have seen, the stipulation in s 21(2) that the copyrights in certain categories of works made by an employee "in the course of his or her employment" vest in the author's employer.¹⁹ If the claim were indeed based on s 21(2), the question resolves to this: are the works produced by an academic "made in the course of his or her employment"? Only if that is true²⁰ can the university assert ownership in the copyrights it purports to give back to the academic, while, at the same time, reserving the licence to use some of these works.

To the extent that authority exists, it supports the view that the copyrights in lectures vest in the lecturer, not the employer. In the 1825 decision of *Abernethy v Hutchinson*,²¹ Lord Eldon LC enjoined the unauthorised publication by *The Lancet* of a distinguished surgeon's lectures that were delivered at St Bartholomew's Hospital. It appeared that a transcript of the lectures had been made by one of the students who had been present. Because the lectures had not been committed to writing, the injunction could not be based on statutory copyright law as it was at the time,²² but was instead based on "property", "trust" or "implied contract". Lord Eldon reasoned that students were permitted to take notes for their own purposes, but could not publish the transcripts independently for profit. Expanding

19 Some policies also appear to claim university ownership in works whose creation is specifically commissioned by the university. Specially commissioned works vest in the commissioning party under specified circumstances: see Copyright Act 1994, s 21(3)(a). The categories of works to which this provision applies are broader than under the employer-owner default rule, and include "films". In s 2, "film" is defined as meaning "a recording on any medium from which a moving image may by any means be produced", a definition broad enough to capture audio-visual materials made for teaching, which, from the university's perspective, are likely to be viewed as among the more valuable of teaching materials authored by academics. The difficulty here is that relatively few works authored by academics are specifically commissioned by university managers. In commercial settings, the absence of "films" from the categories of works to which the employer-owner rules apply is addressed by the Copyright Act 1994, s 5, which provides that the person who creates, and is therefore the author of, a film is "the person by whom the arrangements necessary for the making of the ... film are undertaken". In most instances, this will be the production company. It seems likely that an academic's use of the built-in camera in a desktop computer to create audio-visual material would qualify as making the arrangements necessary for the making of the film. On that basis, it would seem, the academic is the author.

20 Subject to the supplementary doctrines briefly discussed in Part V.

21 *Abernethy v Hutchinson* (1825) 3 LJ (Ch) 209. To like effect, see *Nicols v Pitman* (1884) 26 Ch D 374.

22 Unpublished works of this character were not protected until the passage of the Copyright Act 1911 (UK) 1 & 2 Geo V c 46.

on this point (in terms which, today, might usefully be heeded by operators of online student notes banks!), Lord Eldon reminisced on the time he had spent attending lectures:²³

Now, if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that any body could publish his lectures; nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that; we used to take notes at his lectures; at Sir Robert Chambers' lectures also the students used to take notes; but it never was understood that those lectures could be published; – and so with respect to any other lectures in the university, it was the duty of certain persons to give those lectures; but it never was understood, that the lectures were capable of being published by any of the persons who heard them.

The case did not concern the respective rights to the copyrights as between the surgeon and the hospital. Even so, Lord Eldon was reported to have noted that it had been asked during argument whether the surgeon, "from the peculiar situation which he filled in the hospital, was precluded from publishing his own lectures for profit".²⁴ He observed that there had been "no evidence before the Court that he had not such right".²⁵

In the middle of the 20th century, in *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans*,²⁶ Lord Evershed treated it almost as axiomatic²⁷ that copyright in lectures vests in the lecturer, and not the lecturer's employer, even if the lecturer were specifically employed to deliver lectures. Elaborating on the point, Lord Evershed referred to yet another famous series of law lectures. The heightened rhetoric in the following passage seems to evince some strength of feeling about the issue:²⁸

23 *Abermethy v Hutchinson*, above n 21, at 215.

24 At 219.

25 At 219. The Court seemed tacitly to reject any suggestion that the surgeon was not the right plaintiff. Whatever rights supported the granting of the injunction, they were vested in him.

26 *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* (1952) 69 RPC 10 (CA). As noted by the Employment Relations Authority in *Abbott v Chief Executive, Whitireia Polytechnic*, above n 5, a case involving an employment dispute in respect of patents, the New Zealand Court of Appeal in *Empress Abalone Ltd v Langdon* [2000] 2 ERNZ 53 (CA) cited *Greater Glasgow Health Board's Application* [1996] RPC 207 (Ch), which found that an employee's duty to treat patients did not extend to devising new ways of treating patients. The latter case quoted with approval *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* as an illustration of circumstances where intellectual property does not vest in the employer.

27 Hugh Laddie *The Modern Law of Copyright and Designs* (3rd ed, Butterworths, London, 2000) at 824.

28 *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans*, above n 26, at 18. See also Laddie, above n 27, at 824. Today, the copyright status would not be affected by another party's recording of an oral lecture. Section 15(1) of the Copyright Act 1994 provides that copyright does not subsist in a literary work until the work is recorded (in writing or otherwise), but it does not matter that the recording was not made by or with the consent of the author. It appears that even an unauthorised recording can cause a copyright-protected work to come into existence, but the copyright is vested in the author: see *Wright v BTC Core (A Partnership)* [2023]

Prima facie I should have thought that a man, engaged on terms which include that he is called upon to compose and deliver public lectures or lectures to some specified class of persons, would in the absence of clear terms in the contract of employment to the contrary, be entitled to the copyright in those lectures. That seems to me to be both just and common sense. The obvious case by which reference by way of illustration was made in the course of argument is the case for the academic professions. Lectures delivered, for example, by Professor Maitland to students have since become classical in the law. It is inconceivable that because Professor Maitland was in the service at the time of the University of Cambridge that anybody but himself, one would have thought, could have claimed the copyright in those lectures ... [P]rima facie a man engaged in the way I suggest would have the copyrights in the lectures he composed and delivered.

In Australia, similar questions have arisen in the patent context. In a 2009 decision, the Full Federal Court rejected a claim by the University of Western Australia (UWA) to ownership of inventions and associated patents originating with a former employee, a professor of surgery.²⁹ As Professor Justine Pila notes, the analysis of the Full Federal Court in *University of Western Australia v Gray* reinforces the distinctive character of the universities and the importance of academic freedom to questions of intellectual property ownership.³⁰ Referring to the decision of French J, the first-instance judge, and the changing nature of the modern university, the Court said:³¹

What is notable for present purposes is that there is nothing in the evidence to suggest that those commercial activities have displaced, either totally or if in part to what extent, UWA's traditional public function as an institution of higher education in favour of the pursuit of commercial purposes (if it lawfully could do so under its Act). Its function, in other words, was not limited to that of engaging academic staff for its own commercial purposes. Accordingly, we agree with French J that on the evidence Dr Gray was not required to advance a commercial purpose of UWA when selecting the research he would undertake.

While the case arose principally in the patent law context, the Full Court understood the implications of UWA's arguments for the ownership of copyrights in works authored by academics. Resisting the argument that the university's claim to own the intellectual property in the employee's inventions was supported by an implied contractual term in its favour, the Court referenced the passages quoted above from *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans*, appearing to endorse Lord Evershed's

EWCA Civ 868 at [75]. Before the extension of statutory copyright to unpublished works by the Imperial Copyright Act of 1911 (enacting in New Zealand as the Copyright Act 1913), consensual communication of a work to the public could divest authors of their common law copyright: see *Jefferys v Boosey* (1854) 4 HLC 815, 10 ER 681 (HL). In *Caird v Sime* (1887) 12 App Cas 326 (HL) at 337–338, the House of Lords held by a majority that this principle did not apply to oral delivery of classroom lectures.

29 *University of Western Australia v Gray* [2009] FCAFC 116, (2009) 259 ALR 224.

30 Justine Pila "Academic Freedom and the Courts" (2010) 126 LQR 347.

31 *University of Western Australia v Gray*, above n 29, at [184].

view that it would be "inconceivable" that the copyrights in Professor Maitland's lectures would vest in Cambridge University.³²

Disputes between employers and employees over ownership of copyright typically centres on two questions: whether the work was the kind of work the employee was engaged to do; and whether the work was in fact done in the course of the employment.³³ For the various reasons suggested in the dicta discussed above, courts are reluctant to conclude that the copyright in some academic work is owned by the university employer, even in circumstances where, at least superficially, it might be possible to answer those questions affirmatively. Some of the factors that assist in answering the second question help explain why. In addition to asking where and when the work was created, the "multifactorial analysis based on all the circumstances of the case"³⁴ explores issues such as "the level of direction provided to the author", and "whether the author can refuse to create the work/s".³⁵ The autonomy enjoyed by most academics when creating scholarly works and teaching materials suggests that employer involvement in the creation of specific copyright-protected works will inevitably be diminished, at least in comparison with other employment contexts.

Similar views have been advanced in United States decisions. In *Williams v Weisser*, an influential Californian case that squarely raised the issue of the respective rights of the lecturer and the university, the Court of Appeal sided with the lecturer.³⁶ In this case, a firm paid students for taking lecture notes, which it then offered for sale.³⁷ Sued for copyright infringement, the firm claimed that the lecturer was not the correct plaintiff, arguing that the copyrights vested in the employer, the University of California at Los Angeles (UCLA). Rejecting this argument, the Court referred to the surgeon's lectures that were the subject of *Abernethy v Hutchinson*, and observed that Lord Eldon "assumed as a matter of course that the copyright was with the lecturer and not with the hospital".³⁸ It followed "a fortiori" that the copyright in lectures "would not belong to a university".³⁹

The Court noted the inconvenience that would follow were the university to own the copyrights in lectures.⁴⁰

32 At [180], citing *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans*, above n 26, at 18.

33 *PQ Systems Europe Ltd v Aughton* [2023] EWHC 581 (Pat) at [44].

34 At [46], citing *MEI Fields Designs Ltd v Saffron Cards and Gifts Ltd* [2018] EWHC 1332 (IPEC) at [42].

35 At [46].

36 *Williams v Weisser* 273 Cal App 2d 726 (Cal 1969).

37 At 729.

38 At 736.

39 At 736.

40 At 734. This point was also recognised in *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans*, above n 26. As Monotti and Ricketson observed, this suggests that academic research is tantamount to an academic's

... the undesirable consequences which would follow from a holding that a university owns the copyright to the lectures of its professors are such as to compel a holding that it does not. Professors are a peripatetic lot, moving from campus to campus. The courses they teach begin to take shape at one institution and are developed and embellished at another.

Furthermore, were the copyright to vest in UCLA, a university that sought to appoint a new professor would need to "find out the precise extent to which a professor's lectures have taken concrete shape when he first comes to work".⁴¹ Were it otherwise, as the Court noted earlier, UCLA could, with lateral faculties hires, risk infringing other universities' copyrights.⁴² The Court explained that the defendant's contention:⁴³

... calls for some understanding of the purpose for which a university hires a professor and what rights it may reasonably expect to retain after the services have been rendered. A university's obligation to its students is to make the subject matter covered by a course available for study by various methods, including classroom presentation. It is not obligated to present the subject by means of any particular expression.

And, in a passage that captures the gist of academic freedom in the teaching context, the Court said:⁴⁴

As far as the teacher is concerned, neither the record in this case nor any custom known to us suggests that the university can prescribe his way of expressing the ideas he puts before his students.

Vesting copyright in the academic, not the employer, thus aligned with defining characteristics of academic work.

At the United States federal level, two decisions of the Seventh Circuit Court of Appeals have endorsed the views advanced in these dicta. The United States Copyright Act of 1976, still the governing federal legislation, contains a provision that is equivalent to s 21(2) of the New Zealand Copyright Act 1994.⁴⁵ The copyrights in works created in the course of employment vest in the

"tools of trade": see Ann Monotti and Sam Ricketson *Universities and Intellectual Property: Ownership and Exploitation* (Oxford University Press, Oxford, 2003) at 493. And, by analogy with cases on expertise and knowledge derived by employees in the employment context, academic insights reflected in teaching materials are not confined to a single institution: see for example *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 704–705.

41 *Williams v Weisser*, above n 36, at 735.

42 At 735: "If defendant is correct, there must be some rights of that school which were infringed at UCLA."

43 At 734.

44 At 734.

45 Copyright Act 17 USC § 201(b). United States copyright law goes further than the equivalent New Zealand provision. A "work made for hire" as defined in § 101(1) is a work "prepared by an employee within the scope

employer, not the author, under the "work-for-hire" doctrine, as the employer-owner rule is known in United States copyright law. "Work-for-hire" is an especially important principle in United States copyright industries, most notably motion pictures and television.⁴⁶ Even so, an exception had emerged, known as the "teacher exception". Where the exception applied, the copyrights remained vested in the academic author. In *Weinstein v University of Illinois*, Judge Easterbrook noted that academic ownership of copyright has been the tradition since copyright began.⁴⁷ Referencing exigencies of the United States academic tenure system, the Judge observed that when the plaintiff's dean told him to "publish or perish", he was "not simultaneously claiming for the University a copyright on the ground that the work had become a 'requirement or duty'".⁴⁸

In *Hays v Sony Corp of America*,⁴⁹ the same Court engaged more directly with the concern that the teacher exception did not survive developments in United States work-for-hire doctrines that had followed the enactment of the current United States copyright statute.⁵⁰ Judge Posner noted that the authority in United States copyright law was "scanty", but this was not because the merit of the exception was doubted. In Judge Posner's assessment, this was because virtually no one questioned that the academic author was entitled to copyright his writings. Judge Posner elaborated on the teacher exception as follows:⁵¹

Although college and university teachers do academic writing as a part of their employment responsibilities and use their employer's paper, copier, secretarial staff, and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university. There were good reasons for the assumption. A college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise; we may set to one side cases where a school directs a teacher to prepare teaching materials and then directs its other teachers to use the materials too.

of his or her employment". Under § 201(b), the employer is, absent an agreement to the contrary, considered to be the author, not, as in New Zealand, merely the first owner of the copyright.

46 The directorial contribution to most movies is typically work-for-hire, allowing the copyright in the movie itself to vest in the production company.

47 *Weinstein v University of Illinois* 811 F 2d 1091 (7th Cir 1987) at 1094.

48 At 1096.

49 *Hays v Sony Corp of America* 847 F 2d 412 (7th Cir 1988), abrogated on other grounds by *Cooter & Gell v Hartmarx Corp* 496 US 384 (1990).

50 See for example Rochelle Cooper Dreyfuss "The Creative Employee and the Copyright Act of 1976" (1987) 54 U Chi L Rev 590 at 598–600.

51 *Hays v Sony Corp of America*, above n 49, at 416.

He concluded: "The reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were."⁵²

While many legal scholars consider that the teacher exception remains in place as a matter of United States copyright doctrine,⁵³ this view is not universally endorsed. Some commentators have suggested that the Seventh Circuit's analysis is inconsistent with the United States Supreme Court's subsequent engagement⁵⁴ with the scope of copyright's work-for-hire doctrine.⁵⁵ This view has found support in the case law. In a detailed analysis of the question, the Supreme Court of Kansas rejected the proposition that the copyrights in all works created by academics vested in the authors under the "teacher exception."⁵⁶ At the same time, the Court reasoned that to suggest that the copyrights in all work created by academics vest in the university would be "too big a leap".⁵⁷ The issue called for not merely a case-by-case evaluation, "but potentially a task-by-task" evaluation.⁵⁸

Similar views have been advanced in the United Kingdom context. The authors of one of the leading treatises on United Kingdom copyright law suggest that because of the changing nature of academic work, "in many cases" some materials prepared by academics, such as written materials produced as an aid to instruction, will be produced "not merely at the inclination of the individual teacher but as an integral part of the course of instruction".⁵⁹ As the authors note, such materials may be suitable for use in similar courses and even sold to other institutions. These authors also reference materials prepared for institutions such as the United Kingdom Open University, which specifically

52 At 416.

53 See for example Mathieu Deflem "The Right to Teach in a Hyper-Digital Age: Legal Protections for (Post-) Pandemic Concerns" (2021) 58 *Society* 204 at 206; Elizabeth Townsend "Legal and Policy Responses to the Disappearing 'Teacher Exception,' or Copyright Ownership in the 21st Century University" (2003) 4 *Minn Intell Prop Rev* 209; and Laura Lape "Ownership of Copyrightable Works of University Professors: The Interplay between the Copyright Act and University Copyright Policies" (1992) 37 *Vill L Rev* 223 at 238–246 and 268–269.

54 The benchmark case on the scope of the United States work-for-hire principle is *Community for Creative Non-Violence v Reid* 490 US 730 (1989). This case post-dates the two Seventh Circuit decisions discussed above.

55 See for example Ashley Packard "Copyright or Copy Wrong: An Analysis of University claims to Faculty Work" (2002) 7 *Comm L & Pol'y* 275 at 314 (concluding that the copyrights in faculty work belong to the university). This view has also been adopted at the District Court level: *Molinelli-Freytes v University of Puerto Rico* 792 F Supp 2d 164 (DPR 2010).

56 *Pittsburg State University v Kansas Board of Regents* 122 P 3d 336 (Kan 2005).

57 At 346.

58 At 347. As Ann Monotti and Sam Ricketson observed in their monumental study of university intellectual property, the scope of the teacher exception under United States law "is not clear": Monotti and Ricketson, above n 40, at 283.

59 Laddie, above n 27, at 825.

employs lecturers to create material that is suitable for inclusion in, for example, video materials that are available for students. In such cases, the contract of employment must be scrutinised "to see exactly what it was the employee-teacher was employed to do and thus whether the work was produced in the course of his employment".⁶⁰ As in the United States, it cannot be confidently asserted that the copyrights in all works created by an employed academic vest in the university under the course of employment principle; but nor can it be claimed that academics own the copyrights in everything they author. As is explored in Part IV, the copyright position will depend on the specific context in which ownership questions arise.

B Can the Copyright Claim be Based on IP Policy Wording?

University ownership through the employer-owner default rule is only the first step in the analysis. If, in reliance on s 21(2) of the Copyright Act 1994, the university does own these copyrights, it becomes necessary to ask whether they can be transferred back to the academics through a statement in an internal policy document. An affirmative answer might make the copyright claim (ie, a right to use categories of academic-authored works) somewhat more coherent. The analysis would be as follows. Step one: the university owns the copyrights under the employer-owner default rule. Step two: the university can transfer the copyrights in some works (typically scholarly works and teaching materials) back to the academics. Step three: that transfer may be made subject to withholding some of the rights that would otherwise transfer to the academics: the ability to use the works for certain purposes, as described in the clauses claiming the non-exclusive licence for the benefit of the university. Viewed in this light, the copyright claim is different from a claim to use an employee's car whenever convenient, when, as explained earlier, the car was never the university's property. On the analysis advanced here, the exclusive licence clauses are not a bald assertion of a right to use the work, but instead are a carve-out from the transfers of copyrights "back" to the academics.⁶¹

Despite its superficial attractions, the argument does not quite work. Step two is the key problem. For the purposes of copyright law, the transfer of copyrights owned by the university to academics who authored the works would need to qualify as an assignment of copyright. With copyrights, the validity of assignments is conditioned on compliance with statutory formalities. Section 114 of the Copyright Act 1994 provides: "An assignment of copyright is not effective unless it is in writing signed on behalf of the assignor." A policy statement would falter at this hurdle. It is not a transfer

60 At 825. Under New Zealand's default employer-owner rules, audio-visual material would not be included. Section 21(2) of the Copyright Act 1994 does not apply to films. See above n 19.

61 Technically, nothing is going "back" to the academics. On the analysis advanced above, if copyright-protected works fall within the employer-owner default rule under s 21(2) of the Copyright Act 1994, the copyrights were never vested in the academic authors at all.

document; it is unlikely to identify the copyright-protected material with sufficient specificity; and it will lack a signature.⁶²

The same conclusion has been reached at the District Court level in the United States. In *Forasté v Brown University*,⁶³ a photographer who was employed by the university attempted to rely on a copyright policy providing that "as a general premise, ownership of copyrightable property which results from performance of one's University duties and activities will belong to the author or originator". The Court held that the policy statement was not legally effective to overcome the statutory default rule vesting "works for hire" in the employer; nor did it effect a valid transfer under statutory provisions, which, in terms similar to the New Zealand legislation, require transfers of copyright to be in writing and signed by the copyright owner (in this instance, the university).⁶⁴ The Court found that the university policy failed as a transfer instrument.⁶⁵ Applied to the New Zealand context, this holding suggests that even if the university did own the copyrights in works produced by

62 The same writing requirement would apply if the transfer from the university to the academic author were characterised as an "exclusive licence". An exclusive licence authorises the licensee, "to the exclusion of all other persons (including the copyright owner), to exercise a right that would otherwise be exercisable exclusively by the copyright owner": see Copyright Act 1994, s 2. Characterising the return of the copyrights to the authors as an "exclusive licence" granted by the university to the academic authors would be somewhat awkward, as the non-exclusive licence clauses in the IP policies purport to retain for its own purposes the ability to engage in activities which, following the grant of the licence, would be among the exclusive rights of the licensee. Putting this difficulty aside, the Copyright Act 1994 indicates that a statement in a policy document purporting to vest an exclusive licence in the academic employee would be just as ineffective as it would be in the case of an assignment. Like an assignment, an exclusive licence must be "in writing, signed by or on behalf of a copyright owner": see Copyright Act 1994, s 2. As between a university and an academic relying on statements in an IP policy, the policy statement could give rise to an estoppel, and preclude the university from relying on the incapacity of the IP policy to transfer ownership or grant an exclusive licence in favour of the academic. This would not, however, avail the academic in an infringement claim against another party. Copyright infringement is actionable only by the copyright owner (s 120) or the exclusive licensee (s 123(1)). Another possibility arises from the statement in s 21(4) that the rule in s 21(2) vesting copyright in the employer applies "subject to any agreement to the contrary". Such agreements do not require formalities and they may be made orally or in writing. However, at least one leading scholar has suggested that, to be enforceable, the agreement should be supported by consideration or else be under seal: see Laddie, above n 27, at 833. While rules around consideration in the copyright context can be quite permissive (see for example *Stackemann v Paton* [1906] 1 Ch 774 (Ch)), it is difficult to see what separate consideration would be provided in these circumstances.

63 *Forasté v Brown University* 290 F Supp 2d 234 (DRI 2003). The case did not involve academic work, such as scholarship or teaching notes, but concerned photographs taken by an employed photographer. Accordingly, the issues discussed in this article – whether academic work is work-for-hire – did not arise.

64 Equivalent statutory formalities have been strictly construed by the Ninth Circuit Court of Appeals: *Effects Associates Inc v Cohen* 908 F 2d 555 (9th Cir 1990) at 557.

65 *Forasté v Brown University*, above n 63, at 241. The Court noted that to infer from the policy's language a transfer of copyright ownership would contravene the legislative policy to achieve certainty in copyright ownership.

academics as employer-owned works, a policy statement purporting to exclude specific categories of "scholarly" work would be ineffective to transfer those copyrights to the academics.

IV DOES MY EMPLOYER OWN THE COPYRIGHT IN THIS ARTICLE?

To summarise the discussion above: either the university owns the copyrights in works created by academics or it does not. If it does not, and the copyrights are the academics' own, then, without more, the university lacks a basis for claiming the right to use academic-authored works. Accordingly, there must be another foundation for universities' copyright claim. For literary, dramatic, musical or artistic works,⁶⁶ the employer-owner default rule in s 21(2) of the Copyright Act 1994 is a possibility. But if this rule were to apply, the university has somehow to (re)vest the copyrights in the academics. If a statement in a policy document is not an effective transfer document, we are left with the embarrassing conclusion that, despite the policy wording, there are no excluded works at all – and, as a corollary, no basis for the carve-out of a non-exclusive licence in favour of the university.

The case law and commentary suggest that a blanket claim to the copyrights in all works produced by academics under the employer-owner default rule is unlikely to be sustainable. Instead, a context-specific, task-by-task inquiry is required. Some of the work created by academics during their workday is likely to vest in the employer as being made "in the course" of the academic's employment. Internal memoranda, course descriptions, emails to students, reports: literary works of these kinds are clearly made in the course of employment, and the copyrights would vest in the university employer.⁶⁷

Greater difficulties arise with works authored by academics that manifest independent academic judgment and other qualities that reflect the characteristics of universities set out in the Education and Training Act 2020. Works of scholarship – books and scholarly articles – are embodiments of intellectual independence and academic freedom. The same is likely to be true of many types of teaching materials. Consider a series of law lectures and accompanying material that explore the apparent contradictory holdings in two private nuisance cases. Or that tests the boundaries of privacy law. Or that tries to make sense of the kind of material parties in difficult contract interpretation cases may put before the court. Or that explores the relevance of international instruments to the interpretation of a particular domestic statute. Or that critically evaluates a proposed legislative amendment. Carefully curated and crafted teaching materials will often manifest similar qualities of intellectual insight and independence and critical evaluation as those manifest in traditional scholarly outputs such as books and journal articles. As noted in the United States case law, while the employment responsibilities of academics typically include teaching (including the teaching of

⁶⁶ See above n 19.

⁶⁷ Most of these are likely to be literary works, one of the categories of work specifically referenced in s 21(2) of the Copyright Act 1994. See Louise Longdin "Copyright Dowries in Academia" (2004) 35 IIC 22 at 22–23 (discussing the range of copyright-protected works created by academics).

specific subjects), the university may not, consistent with the "characteristics" of universities set out in the Education and Training Act 2020, prescribe the viewpoints that the teaching will advance.

At this point, it might be objected that the argument proves too much: intellectual independence is exactly what should be evinced in academic work. As such, the work advances the mission of the university employer; it is therefore quite obviously produced in the course of an academic's employment. The Education and Training Act 2020 requires universities to have a role as conscience and critic of society and to manifest qualities such as intellectual independence. If intellectual independence is manifest principally through the efforts of individuals,⁶⁸ works authored by academics that reflect this quality would seem to be aligned with the legislative vision of what makes a university a university. Accordingly, such work should be regarded as made in the course of the academic's employment.

This argument can be met by consideration of the implications of university ownership of the copyrights in material of this kind. A copyright owner owns the right to do all the exclusive acts that comprise the copyright. Specified in s 16 of the Copyright Act 1994, these include the right to copy the work, to publish it, to communicate it (through electronic means) and, as relevant, to perform and play the work in public. For the academic author to do any of these things without the permission of the university would, in the absence of a statutory defence or exception, infringe the university's copyright. Suppose the employer of the author of this article owned the copyright therein on the basis that the article was written in the course of the author's employment. It seems quite likely that the views advanced in this article do not align with those advanced by the university itself. The irony here is that in advancing a view that might be contrary to that of the university, the article's oppositional stance is a manifestation of exactly the quality of "intellectual independence" that allows its author's employer to claim that it is a university. Even so, vested with the exclusive rights to copy the article and issue copies to the public,⁶⁹ the university could suppress it. It could forbid further reproduction of the article and forbid its publication.⁷⁰ The use of passages from this article in a public address

68 See above n 6.

69 Copyright Act 1994, s 16(1)(a) and (b): "The owner of the copyright in a work has the exclusive right to ... copy the work" and "to issue copies of the work to the public, whether by sale or otherwise".

70 It could even forbid the updating of material produced by the academic: Monotti and Ricketson, above n 40, at 498.

might even infringe the university's exclusive right to public performance.⁷¹ The "independent" ideas advanced herein might never see the light of day.⁷²

At the same time, if the university were to own the copyright in all academic work authored by academics, it could exploit that work whenever it saw fit. It could copy, publish, adapt and communicate any of this material⁷³ whenever convenient to do so, even in circumstances when an academic author might object to its use. An author might change her views, sense that the debate has moved on, or believe that the substantive points could be espoused more clearly or be better explained. To be sure, New Zealand copyright law includes protections for moral rights,⁷⁴ which would allow an author to object to the derogatory treatment of a work.⁷⁵ Although these can be more limited when the economic rights are owned by the employer, authors generally retain some moral rights protections to be identified as the author and to object to treatment of their work that would be prejudicial to their honour or reputation. It is not clear, however, that a moral rights claim would offer meaningful protections in circumstances where, for instance, a university continued to exploit material that is out-of-date or that contains errors which the academic author has since noticed and would correct in subsequent iterations of the same or similar material.⁷⁶ A large gap is likely to exist between uses to

71 Copyright Act 1994, s 2(b), defining performance to include "any mode of visual or acoustic presentation of a literary, dramatic, musical, or artistic work, including presentation of the work by means of a sound recording, film, or communication work".

72 Academic authors may assign their copyrights to publishers. An agreement to promulgate the work is, however, very different from the vesting of *initial* ownership of the copyright in another party who may control whether the work is published or disseminated at all.

73 Copyright Act 1994, s 16. A recent controversy arising in India is broadly analogous. Academic authors have asked the National Council of Educational Research and Training (NCERT) of India to remove their names as advisers from its political science textbooks. In the authors' view, the original content has been manipulated in new versions of the texts beyond recognition. While there are differences between this controversy and the concerns of this article (according to the report in the *Hindustan Times*, the authors had assigned the material to the NCERT), it illustrates two more general points: (a) reputational and dignitary harms can result from authors' inability to control their copyrights; and (b) adaptations authors do not authorise can convey misleading impressions as to the original intellectual contribution. See Fareeha Iftikhar "NCERT rejects Yogendra Yadav, Suhas Palshikar request to drop names as chief advisers" *Hindustan Times* (online ed, India, 11 June 2023).

74 These rights do not, however, include a right of divulgation, which exists in some copyright systems: see Branka Marušić "Author's Right to Choose: Right of Divulgation in the Online Digital Single Market of the EU" in Tatiana-Eleni Synodinou and others (eds) *EU Internet Law in the Digital Era* (Springer, Cham, 2019) 137.

75 Copyright Act 1994, pt 4.

76 This follows from the wording of the Copyright Act 1994, s 98(1)(a), which, for the purposes of moral rights protection, appears to require alteration of the work itself. A treatment requires an "addition to, deletion from, alteration to, or adaptation of the work". In some circumstances, an academic author might consider that continued use of the work is inappropriate, even if the use does not qualify as a "treatment" for the purposes of the Copyright Act 1994, pt 4.

which, for sound academic reasons, an academic might object and uses that would give rise to sustainable moral rights claims.

Neither consequence of university ownership – the ability to suppress academic work or use it in inappropriate contexts – would be consistent with defining characteristics of universities, as set out in the Education and Training Act 2020. Vesting the university with the right to suppress academic work would be inconsistent with most of a university's characteristics: advanced learning, intellectual independence, the existence of close links between teaching and research, and, perhaps most saliently, the role of conscience and critic of society. Similar inconsistencies would be present if academics were forced to "speak" by the promulgation of their works without prior consent.⁷⁷ A corollary of intellectual independence is the ability to decide when and how one's views are to be advanced. When others – here, an employer – make that decision, intellectual independence could be compromised.

If, as others have suggested, determining whether academic work is made in the course of employment is a case-by-case or "task-by-task" inquiry, the issue is essentially an interpretive one. What does "in the course of employment" mean *in this context*? Detailed contextual analyses of the copyright implications of university ownership have been undertaken by others.⁷⁸ To these analyses might be added the suggestion that, when determining if works authored by academics are made in the course of employment, some regard should be had to the legislatively mandated characteristics of universities set out in the Education and Training Act 2020. In other words, in the university context, the consequences of employer ownership for the ability of universities to manifest those characteristics, and therefore *be* universities, should be considered in the application of s 21(2) of the Copyright Act 1994.⁷⁹ Where employer ownership would be inconsistent with independent inquiry, independence of thought, critique and criticism, that may be an indication that the employer-owner default rule should not apply.

V CONCLUSION

The law does not, however, leave university employers entirely empty-handed. With large and complex projects with multiple inputs and parameters for the project set in advance, the claim to employer ownership of the copyrights is likely to be more sustainable.⁸⁰ Where, for example, the

77 Dreyfuss, above n 50, at 595.

78 See for example Monotti and Ricketson, above n 40, at 492–510.

79 This may also be an answer to the claim, briefly explored in *University of Western Australia v Gray*, above n 29, and *Abbott v Chief Executive, Whitireia Polytechnic*, above n 5, as to whether a term in an IP policy may, going forward, be incorporated into the employment contract. These and other cases suggest that a degree of specificity would be required to achieve that outcome. Even in cases where the intellectual property position has not been negotiated in the context of a collective agreement, it could be appropriate to consider the parties' positions in the context of the characteristics of universities described in the Education and Training Act 2020.

80 For analysis in the analogous context of motion picture productions, where multiple parties might make a claim to copyright ownership in complex productions with multiple inputs, see *Aalmuhammed v Lee* 202 F

academic author is one of many contributors to the creation of the work,⁸¹ the intellectual independence of academic authors is likely to be constrained. This could be true in some teaching contexts, where materials represent a broad consensus as to the content of the syllabus by a large group. Furthermore, the employer-owner rule is only the default: in many instances, the copyright position will be determined in advance of the creation of copyright-protected materials, through specific agreements that delineate ownership rights.⁸² When academic authors are asked to collaborate, or to participate in projects that require the advance assignment of intellectual property, they are in the best position to assess the implications for intellectual independence, and it might be expected that the work undertaken in the context of such projects will reflect that assessment.

In circumstances where advance agreements have not been secured, equitable doctrines and the implication of contractual terms may be of some assistance. Various doctrines have developed to supplement the statutory rules in circumstances where, for example, an author's assertion of copyright ownership would be unconscionable. Strategies include vesting the beneficial title in a party other than the author⁸³ or the imposition of implied licences.⁸⁴ The proprietary consequences of breaches of fiduciary obligations might also be relevant in the university context.⁸⁵ A constructive trust might be imposed over the copyright for the benefit of the university where, for example, an academic uses confidential information in breach of the terms on which access to the information was provided.⁸⁶

3d 1227 (9th Cir 2000) (rejecting a joint authorship claim by a party who contributed dialogue to a movie, with the result that the production company owned any relevant copyrights). But compare *Kogan v Martin* [2019] EWCA Civ 1645, where joint authorship was established in the production of a movie screenplay.

- 81 In the patent context, see for example *Empress Abalone Ltd v Langdon*, above n 26, where the University of Canterbury was one of the parties contributing to the research project.
- 82 This is anticipated by the wording of the Copyright Act 1994, s 21, which specifies that the default ownership rules are subject to agreement to the contrary. The point is often important in the context of collaborations with third parties: see for example *Empress Abalone Ltd v Langdon*, above n 26.
- 83 See for example *Massine v de Basil* [1936–1945] Macg Cop Cas 223 (CA); and *Nichols Advanced Vehicle Systems Inc v Rees* [1979] RPC 127 (Ch).
- 84 See for example *Robin Ray v Classic FM* [1988] FSR 622 (Ch); *R Griggs Group Ltd v Evans* [2003] EWHC 2914 (Ch); *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328, [2010] Ch 503; and *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208.
- 85 See Monotti and Ricketson, above n 40, at 286–291. For the leading case on the proprietary consequences of breaches of fiduciary relations in the context of copyright-protected works, see *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL).
- 86 In a different context, see *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193 (FCA) (suggesting obiter that a constructive trust might be imposed where an author misappropriates confidential information). In the light of the very significant implications for academic freedom, a context-specific inquiry into breaches of fiduciary obligations offers an approach that may be better adapted to the intellectual property context than a more generalised approach to the fiduciary obligations of employees. Compare with *Empress Abalone Ltd v Langdon*, above n 26, at [9]–[11].

Doctrines such as these can be invoked where retention of ownership by the author would be in defiance of the expectations accompanying the creation of the work (including where significant institutional resources have been used in the creation of the work), or, broadly, where business efficacy requires that other parties, including the university, have the right to use the work.⁸⁷ These supplementary doctrines also have the advantage that they are not limited to the categories of work that are stipulated to come within the employer-owner default rule.⁸⁸ At the same time, application of these supplementary rules will not necessarily result in an untrammelled right to use the work in all circumstances.⁸⁹ Careful tailoring of the legal response can ensure that the right to use a copyright-protected work goes no further than the circumstances require.⁹⁰

Advanced planning around intellectual property ownership questions, together with (where necessary) recourse to these supplementary doctrines, might offer more productive responses to the allocation of intellectual property rights in work produced in the university context. In sum, it may be possible to devise workable approaches to allow university access to copyright-protected works without recourse to a general claim to use copyright-protected works authored by academics. As the analysis in this brief article has attempted to show, such a claim is in tension with the characteristics of universities set out in the Education and Training Act 2020. A festschrift in honour of Professor Smith is an apt occasion to underscore their importance.

87 See for example *Gold Peg International Pty Ltd v Kovan Engineering (Aust) Pty Ltd* [2005] FCA 1521, (2005) 225 ALR 57.

88 For example, the supplementary rules could apply to films created by academics, a description of work that is not included in s 21(2). For further analysis of this point, see above n 19.

89 This can, however, be the outcome: see for example *R Griggs Group Ltd v Evans*, above n 84 (where beneficial title was found to vest in the commissioning party).

90 *Robin Ray v Classic FM*, above n 84.

