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ARE INTELLECTUAL PROPERTY POLICIES SUBJECT TO COLLECTIVE BARGAINING? A CASE STUDY OF NEW JERSEY AND KANSAS

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*390 I. Introduction

Although Kansas and New Jersey might be in many ways as unalike as possible, their courts have recently grappled with the same issue related to higher education: whether a public university's policy regarding the ownership of intellectual property is subject to collective bargaining. The Kansas Supreme Court redirected the issue to the state's Public Employee Relations Board in Pittsburg State University/Kansas National Education Association v. Kansas Board of Regents,[1] which ruled in favor of the faculty union.[2] In New Jersey, the issue was decided in a somewhat Solomonic way. In ***391** Rutgers Council of AAUP Chapters v. Rutgers, The State University, the Appellate Division found some provisions of Rutgers' patent policy to be managerial prerogatives not subject to bargaining,[3] but found other provisions to involve terms and conditions of employment that must be negotiated.[4]

Because of the potential revenue it can generate, ownership of intellectual property created at colleges and universities is becoming increasingly important, particularly as public support for higher education has shrunk at public institutions. State governments are spending smaller portions of their budgets on higher education. The percentage of state and local revenue allocated to higher education decreased 5.6% nationally between 1997 and 2007.[5] In 2010, total state funding for higher education was approximately $1.4 billion less than what states provided in 2008.[6]

As a result of this decrease in public resources, colleges and universities are turning increasingly toward "academic capitalism," defined as "the pursuit of market and market-like activities to generate external revenues," which includes developing patents and spinoff companies.[7] Copyrightable works and patented inventions hold great--if not always realistic[8]--promise of providing streams of income. Between 1998 and 2008, annual patent grants to universities and colleges ranged from 2,950 to 3,700.[9] Between 2003 and 2007, invention disclosures filed with university technology management offices--which describe prospective inventions and are submitted before filing for a patent application--increased from 13,700 to 17,700, and new U.S. patent applications increased from 7,200 to 10,900 over that same period.[10] In 2007, 161 institutions reported a total of $1.9 billion in net royalties from their patent holdings.[11]

Universities increasingly are attempting to exert control of these potential revenue sources through faculty contracts and intellectual property policies. In ***392** 1994, 33% of contracts in the Higher Education Contract Analysis System (HECAS), which is maintained by the National Education Association,[12] contained provisions outlining ownership of intellectual property.[13] By 2008, that number rose to 55%.[14] In 2008, specific provisions covering copyright ownership were included in 44% of faculty contracts, and specific provisions covering patents were included in 33% of contracts.[15]

As the struggle over ownership of academic work intensifies, faculties are becoming more like a "contingent labor force" and learning has been called a "commodity."[16] Baez and Slaughter warned that "faculty-generated products and processes increasingly are treated as alienable property removed from free circulation of ideas."[17] Some institutions put pressure on faculty to engage in commercial research or support themselves on "soft money," which in turn may sway them from their original intended research agendas.[18] The need for money "is a chronic condition of American universities, a condition inherent in the very nature of an institution forever competing for the best students and faculty."[19]

The cases in New Jersey and Kansas indicate that as colleges and universities increasingly enter the world of academic capitalism, their faculties--particularly through their unions--will fight for their piece of the pie. As of 2011, collective bargaining agents represented a total of 368,473 faculty members, organized into 639 separate bargaining units across 519 systems or institutions of higher education located on 1,174 campuses.[20] Organized faculties are located in 31 states and the District of Columbia, with a majority concentrated in three states: California, New York and New Jersey.[21] Despite recent legislative efforts to dilute public ***393** collective bargaining,[22] faculty unions continue to contribute a strong voice in shared governance and national higher education issues.[23]

Taken together, the New Jersey and Kansas cases can help unionized institutions consider whether to amend their campus intellectual property policies. The courts in both states use similar tests to determine if a topic is within the scope of bargaining.[24] These tests will help unionized institutions determine how best to draft--or redraft--campus policies concerning ownership of and use of patents and copyrighted works.

To help explain the New Jersey and Kansas cases, this case study analyzes the current state of labor law and intellectual property law, specifically copyright law and patent law. It then summarizes the intellectual property policies adopted by Rutgers University and the Kansas Board of Regents, and explores the court cases involving those policies. Finally, this paper suggests areas of future research on the topic of collective bargaining and intellectual property rights.

II. Labor Law

A. Federal Labor Law

The National Labor Relations Act of 1935 (NLRA, also called the Wagner Act) governs collective bargaining between employers and employees.[25] Enacted to address widespread strikes and the Great Depression in the 1930s,[26] the NLRA grants employees the right to form labor organizations and to deal collectively through these organizations with their employers. The Labor-Management Relations Act of 1947 (or the Taft-Hartley Act) amended the NLRA by, among other provisions, creating the NLRB general counsel position, which made unions as well as employers subject to the NLRB's unfair labor-practice powers and imposed on unions the same requirement to bargain in good faith that the Wagner Act placed on employers.[27]

***394** The National Labor Relations Act defines "employer" and "employee" in narrow terms. The definition of "employer" excludes "any state or political subdivision thereof,"[28] and thus does not apply to public colleges and universities. Not all private institutions are covered under the law, either. Under the current rules of the National Labor Relations Board, the NLRA applies only to institutions with gross annual unrestricted revenues of at least $1 million.[29]

With regard to employees, the NLRA specifically excludes certain types of workers, such as independent contractors and supervisors.[30] The U.S. Supreme Court further sharpened the definition of employee in two important cases. First, in National Labor Relations Board v. Bell Aerospace Co., the Court adopted language used by the National Labor Relations Board and excluded from the NLRA "managerial employees" who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."[31]

Building on the Bell Aerospace decision six years later, the Court held that faculty at private colleges and universities are "managerial" personnel--and therefore ineligible to form unions under the NLRA--in National Labor Relations Board v. Yeshiva University.[32] The Court based its ruling on faculty members' authority over course offerings, teaching methods, grading policies, admission standards, and graduation decisions.[33]

B. State Laws for Public Employees

State laws regulate bargaining at public institutions of higher education. Generally under state law, public employees have the right to organize and to select a representative to negotiate on their behalf with the employer over terms and conditions of employment. Once a representative is elected by a majority of the employees in a specific bargaining unit, the employer must bargain with the representative, and individual employees may not negotiate with the employer over issues that are mandatory subjects of collective bargaining.[34] Collective bargaining statutes in nearly half of the states give faculty the right to unionize.[35]

New Jersey originally adopted a labor-relations act in 1941 to help mediate impasses in the private sector,[36] and then extended the law to the public sector in ***395** 1968.[37] Kansas established its Public Employer-Employee Relations Act in 1971, providing public employees with "the right to form, join and participate in the activities of employee organizations of their own choosing."[38]

Kansas is considered one of twenty-two states that have "right-to-work" laws, which do not require employees to join a union or to pay dues or fees to a union.[39] New Jersey, on the other hand, is one of several states that authorize public employers and labor unions to negotiate agreements that require all employees either to join the union or pay the equivalent of union dues as a condition of employment.[40] "[U]nless legislation is enacted at the federal level (to amend the NLRA, for instance) or in the states (to repeal 'right to work' legislation), this issue [regarding the collective-bargaining rights of college faculty] will remain a major bone of contention between faculty and their institutions, both public and private."[41]

In chewing over this legal bone, the New Jersey and Kansas courts have used a similar approach in interpreting their respective labor laws. This approach is explained later.

1. Scope of Negotiation

State laws have language similar to the NLRA's regarding the subjects that must be covered by collective bargaining. The NLRA requires employers and employee representatives to bargain in good faith regarding "wages, hours, and other terms and conditions of employment."[42]

Beyond mandatory subjects of bargaining are "permissive" subjects of negotiations. These items are either not specifically excluded by the state's collective bargaining statute or not preempted by another law.[43] The last category of subjects are nonnegotiable, either because the subjects are preempted by laws (such as affirmative action) or because they are managerial prerogatives, like the right to determine the institution's mission.

It is difficult to draw the line between mandatory and permissive subjects of bargaining, particularly in a higher education setting, "where employees have ***396** traditionally participated in shaping their jobs to a much greater degree than have employees in industry."[44] For example,

Faculty play major roles in the decisions to hire other faculty, to award them tenure or to separate them, and to promote them. Faculty design the curriculum and often sit on the committees that select presidents, vice presidents, and deans. Faculty exercise great control over their professional lives and their work schedules, and they go about their day-to-day tasks unsupervised in traditional personnel terms.[45]

The laws in New Jersey and Kansas try to determine the boundaries between mandatory subjects of bargaining, permissive subjects, and managerial prerogatives. An explanation of those laws is following, followed by their application to campus-based intellectual property rights.

2. New Jersey

In New Jersey, the state constitution and the state statutes governing public labor relations provide broad rights to public employees without specifically defining subjects that must be negotiated between public employees and public employers. Under the state constitution, public employees "have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."[46] The New Jersey Employer-Employee Relations Act establishes that representatives selected by the majority of the employees in a unit shall be the exclusive representatives for collective negotiation of "terms and conditions of employment," "[p]roposed new rules or modifications of existing rules governing working conditions," and "grievances, disciplinary disputes, and other terms and conditions of employment."[47]

a. Terms and Conditions of Employment

The legislature did not enumerate negotiable "terms and conditions of employment" in the Employer-Employee Relations Act.[48] The New Jersey Supreme Court, noting this deficiency, designated the Public Employment Relations Commission (PERC), and not the courts, as the proper entity to determine whether, in a public-sector labor dispute, a specific subject is negotiable.[49] PERC is an administrative ***397** agency established under the Employer-Employee Relations Act to make policy and promulgate regulations designed to implement the provisions of the Act.[50] It exercises authority over charges of unfair labor practices, representation issues, and impasse procedures.[51]

The New Jersey Supreme Court eventually ruled that, while public employees in New Jersey have the same interest as private employees in negotiating terms and conditions of employment, the scope of negotiations in the public sector should be more limited compared to the private sector. The Court, in In re Local 195, based its reasoning on the premise that "the employer in the public sector is government, which has special responsibilities to the public not shared by private employers."[52] The unique responsibility of the State is "to make and implement public policy."[53] Therefore, to determine if a particular subject is negotiable between public employers and public employees, "the Court must balance the competing interests by considering the extent to which collective negotiations will impair the determination of governmental policy."[54]

b. Three-Part Test

The New Jersey Supreme Court used a three-part test to determine whether a subject is within the scope of negotiations.[55] Under the test,

a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.[56]

The contours of the first and third prongs took shape quickly. Under the first prong of the test, the Court has held that compensation is a fundamental term and condition.[57] For the third prong of the test, the Court in In re Local 195 provided a balancing test. To determine whether a negotiated agreement would significantly interfere with the determination of governmental policy, "it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, ***398** a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions."[58]

The New Jersey Supreme Court has also found that educational goals, like governmental policies, are managerial prerogatives. "When the dominant issue is an educational goal, there is no obligation to negotiate . . . even though [the matter] may affect or impact [sic] upon the employees' terms and conditions of employment."[59]

c. Preemption

The Court later refined In re Local 195's second prong--preemption. In Bethlehem Township Board of Education v. Bethlehem Township Education Association, the New Jersey Supreme Court held that for a statute or regulation to preempt negotiation, it must "expressly, specifically and comprehensively" regulate the issue over which negotiations are proposed.[60]

3. Kansas

As in New Jersey, the constitution and statutes of the state of Kansas protect the rights of workers to belong to labor unions. The Kansas Constitution states, "[n]o person shall be denied the opportunity to obtain or retain employment because of membership or non-membership in any labor organization."[61] The Kansas Public Employer-Employee Relations ("PEER") Act provides public employees with "the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment."[62]

a. "Conditions of Employment"

Compared to New Jersey, however, the Kansas statutes regarding the subjects of bargaining for public employees are more detailed. The Kansas PEER Act delineates a list of "conditions of employment." They are: "salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures."[63]

Despite this seemingly definitive list, the Kansas Supreme Court--in an earlier case between the Kansas Board of Regents and the faculty union at Pittsburg ***399** State--concluded that the legislature did not intend "the laundry list of conditions of employment" to be viewed narrowly.[64] "To the contrary, the legislature targets all subjects relating to conditions of employment."[65] The Court examined several subjects that arose during negotiations to see if they were "significantly related to an express condition of employment" of Pittsburg State faculty.[66] The Court found the following items to be significantly related to one or more of the statutorily listed conditions of employment and, therefore, mandatorily negotiable: budget inputs for salary generation and allocation; out-of-state travel funds; the criteria, procedures, or methods by which candidates for promotion are identified; the criteria, procedures, or methods for screening candidates for summer employment; tenure; retrenchment procedures; and personnel files.[67]

b. Preemption Exception

Although the Kansas Supreme Court has expanded the list of the conditions of employment, the PEER Act has four specific restrictions--or preemptions--on the subjects included in a collective bargaining agreement. They are: (1) any subject preempted by federal or state law; (2) statutorily defined public employee rights; (3) statutorily defined public employer rights; and (4) "the authority and power of any civil service commission [or] personnel board . . . to conduct and grade merit examinations" that determine appointments or promotions to "positions in the competitive division of the classified service of the public employer served by such civil service commission or personnel board."[68]

The term “preempted” is not defined in the PEER Act. The third exception, regarding the rights of public employers, has been called “a managerial prerogative” by the Kansas Supreme Court.[69] That term makes the Kansas exception similar to the exception in New Jersey under the third prong of the balancing test in In re Local 195.[70]

The courts in New Jersey and Kansas have had to apply their respective scope-of-negotiation tests to campus patent policies in recent years. Before analyzing those cases, a brief review of copyright and patent law will help frame the issues confronted by the courts.

*400 III. Intellectual Property Law

Intellectual property includes patents, copyrights, trademarks, and trade secrets. This section will focus on the two subjects most relevant to faculty activities: copyrights and patents. Ownership of intellectual property is a significant incentive. “[A]uthors and inventors would not create intellectual property without the possibility of being rewarded through royalties and licenses derived from copyright and licensing, nor would businesses invest in new products unless they were able to reduce risk somewhat through purchase of copyrights and patents.”[71] Institutions have a similar economic interest: they want to ensure they are compensated for the use of their resources in these works.[72]

In the United States, the concepts of protecting the property interests of authors and inventors, and providing useful information to the public, are embedded in the Constitution, which grants Congress the power “[t]o 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.”[73]

A. Copyright

1. What Can Be Copyrighted

The Copyright Act of 1976 defines eight categories of works of authorship: “literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.”[74]

The Copyright Act protects a work from the time it is created. It provides copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”[75] Stated more simply, “[A] work is protected at the very instant that, for example, a word is written on a page or encoded onto a computer disk.”[76] An author is not required to register a copyright, or even affix a copyright notice to the work to secure copyright protections.[77]

***401** 2. Ownership

Copyright ownership “vests initially in the author or authors of the work”[78] and lasts for the life of the author plus 70 years,[79] or, in the case of a work made for hire (described later), 95 years from the first publication of the work or 120 years from its creation, whichever comes first.[80]

Copyright owners enjoy exclusive rights to their works under the Copyright Act. This bundle of rights includes: (1) reproducing the work in copies or phonorecords;[81] (2) preparing derivative works; (3) distributing copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, performing the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, displaying the copyrighted work publicly; and (6) in the case of sound recordings, performing the copyrighted work publicly by means of a digital audio transmission.[82]

Another stick in the bundle of rights constituting copyright ownership is the right of transfer.[83] A “transfer of copyright ownership” is an assignment, exclusive license, and any other conveyance other than a nonexclusive license.[84] All transfers, other than those by operation of law, must be through “an instrument of conveyance, or a note or memorandum of the transfer" in writing and signed by the transferor.[85]

3. Works Made for Hire

The law allows an exception to the general rule that the creator of the work is considered the author. Under the concept of "works made for hire," the author--and therefore the owner of the copyright--is often an employer or the person for whom the work was prepared.[86] The Copyright Act establishes two situations under ***402** which a work is a "work made for hire": (1) a work prepared by employees within the scope of their employment; or (2) a work specially ordered or commissioned, provided "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[87]

A healthy debate exists among legal scholars as to whether the copyrightable work of faculty members that is not specially ordered or commissioned is work a made for hire.[88] These legal arguments all stem from Community for Creative Non-Violence v. Reid, a U.S. Supreme Court case that considered whether a sculptor working for no fee for a nonprofit organization to create a statue to depict the plight of the homeless was an employee creating a work within the scope of his employment.[89] The Court devised a 13-point test to define an employee under the Copyright Act's definition of work made for hire.[90] Analyzing this test, scholars who argue that faculty-authored works are not works made for hire include Dreyfuss,[91] Kilby,[92] Gorman,[93] and Kwall.[94] Scholars who find that faculty-authored works are works made for hire include Simon,[95] Wadley and Brown,[96] Laughlin,[97] and McSherry.[98]

4. Academic Exception

An even healthier debate focuses on the "academic exception" from the Copyright Act.[99] The academic exception--a time-honored tradition that allows teachers and college faculty to retain copyright ownership of their work--grew out ***403** of case law interpreting the Copyright Act of 1909, though it is unclear whether it survived the amendments to the Copyright Act in 1976.[100] The influential Seventh Circuit Court of Appeals is split on this issue. Supporting the exception, the judge in one case wrote that "reasons for a presumption against finding academic writings to be work make for hire are as forceful today as they ever were."[101] The year before this decision, a judge in the same circuit wrote that the Copyright Act's work-made-for-hire provisions were "general enough to make every academic article a 'work for hire' and therefore vest exclusive control in universities rather than scholars."[102]

Legal commentators who believe the academic exception still exists include VerSteeg,[103] Lape,[104] and Laughlin.[105] Legal scholars who conclude that the academic exception is no longer good law include Simon,[106] DuBoff,[107] Dreyfuss,[108] and Wadley and Brown.[109]

Given the current state of flux over the academic exception, including the split in the Seventh Circuit between Hays and Weinstein and the debate among legal scholars, "[w]hat is clear is that without an explicit statutory foundation[,] the exception can no longer simply be assumed."[110] University policies that do not clearly address intellectual property ownership of online courses create a dilemma: such courses are part textbook, over which universities rarely exert rights, and part invention, over which universities typically assert ownership and share in licensing income.[111] The best way to resolve this ambiguity is to enact clear university policies.[112]

***404** 5. Campus Policies

Between 1992 and 2002, an increasing number of leading research universities adopted copyright policies.[113] These policies meet the transfer requirements under the Copyright Act when institutions expressly incorporate by reference their written copyright policy into a written employment contract signed by the faculty member and the university.[114] Faculty contracts often consist of several documents, including "[a] university's faculty handbook, a departmental handbook, departmental policies, and various pamphlets on fringe benefits and personnel administration."[115]

Under their copyright policies, most institutions assert institutional ownership over expressly assigned works made for hire.[116] For works that are not expressly made for hire, "use of university resources" or "significant or substantial use of university resources" is the criterion for the institution to claim at least some ownership of the faculty member's authored work.[117] Such resources usually will not include libraries, offices, classrooms, laboratories, and support staff.[118]

With regard to traditional scholarly works, some institutions "expressly disclaim university ownership of copyrights."[119] Such works are defined to include "traditional literary works," such as books, articles, plays, and poetry; and "educational materials," such as syllabi, lecture notes, and tests.[120]

B. Patents

1. What Can Be Patented

Patents protect inventions and discoveries. The Patent Act states, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor."[121] It spells out four requirements for obtaining a patent. The invention must be novel; be nonobvious to someone skilled in the field related to the patent; have utility; and be within one of five classes of patentable subject matter: (1) processes, (2) machines, (3) manufactures, (4) compositions of matter, and (5) new and useful improvements of items within the first four categories.[122] A ***405** patent confers to its owner exclusive rights to use the invention for a period of twenty years from the date of application, which allows owners to prevent imitations and to develop and sell their product.[123]

The U.S. Supreme Court has ruled that by "choosing such expansive terms as 'manufacture' and 'composition of matter,' modified by the comprehensive [[term] 'any,' Congress plainly contemplated that the patent laws would be given wide scope."[124] While the courts have held that the laws of nature, physical phenomena, and abstract ideas cannot be patented,[125] inventions such as a genetically altered bacterium that breaks down components of crude oil have been held to be patentable because they are a non-naturally occurring manufacture, not a previously unknown natural phenomenon.[126]

2. Inventorship

Patent law, unlike the Copyright Act's "work-made-for-hire" doctrine, has no "invention for hire" doctrine. However, the inverse of this concept, "hired to invent," has appeared in case law, as explained later. The "inventor" must be a natural person, not a corporation.[127]

With a few exceptions, inventors must apply for the patent. The "inventor" is the person who devises the original inventive concept and reduces it to practice.[128] "Reduction to practice" means "the conception [is] embodied in readily utilizable form," which is necessary to receive a patent.[129]

Under the Patent Act, inventors have the authority to assign patent ownership rights. The act provides that patent applications, patents, and any interests therein have the attributes of personal property and may be transferred by a written instrument.[130]

***406** 3. Ownership

Because patents are considered private property, state laws regarding contracts, rather than federal laws, govern ownership of inventions and discoveries.[131] Court cases provide important interpretations of employment relationships based on the presence of a contract. In 1933, the U.S. Supreme Court ruled on a case in which an associate physicist and a lab assistant in the Bureau of Standards in the U.S. Department of Commerce invented three products related to broadcast reception and power amplification in loudspeakers.[132] The researchers worked on these inventions voluntarily, but pursued their research while on the job, using Bureau resources and facilities, and with the knowledge and encouragement of their supervisors.[133] The Court ruled that employees are generally considered the inventor of any patentable invention they develop in the course of their work, writing: "if the employment be general, albeit it covers a field of labor and effort in the performance of which the employee conceive the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent."[134]

If employees use the resources and time of their employer to create their invention, the employer retains a "shop right" in the invention, which provides the employer with a nonexclusive and nontransferable use of the invention, even after the inventor is no longer an employee.[135] The employees still retain ownership, which includes the rights to assign and sublicense interest in the invention.[136]

If, however, the employee is hired specifically to create an invention, the employee must assign the patent to the employer. The Dubilier Court wrote:

> One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained. The reason is that he has only produced that which he was employed to invent. His invention is the precise subject of the contract of employment.[137]

This provision within Dubilier has become known as the "hired-to-invent" doctrine. "If an employee is hired to invent, the employee must assign his entire right, title, and interest in any patents arising from inventions conceptualized during ***407** employment and stemming from the tasks delegated to him by his employer."[138] If this relationship is "not specifically expressed in the employment contract, it is implicit that what the employee is hired to invent will become the sole property of the employer."[139]

4. Patent Ownership at Universities

a. Assignment

As with copyrights, universities usually assert patent rights over faculty inventions through campus policies incorporated into faculty contracts. "[W] here there has been a knowing and voluntary waiver by the faculty inventor, such as signing an agreement to abide by institutional policies or an agreement to assign inventions," the law is "quite settled that universities may claim ownership of patents."[140] Even without a signed agreement, universities may require employees to assign inventions to the institution. "Generally, the policy must clearly require assignment of all inventions by all persons likely to be inventors, and the inventor must have known about the policy."[141]

Campus patent policies generally follow one of three models.[142] They are: (1) the "resource-provider approach," based on the faculty member's use of institutional resources; (2) the "maximalist approach," where the institution asserts ownership if the faculty member uses institutional resources, or develops inventions in the "course of employment"; and (3) the "supra-maximalist approach," where the institution claims any invention developed by the faculty member, regardless of the use of university resources or whether the invention was developed during the course of employment.[143]

Patent policies usually require faculty to assign creations and any accompanying rights to their institution in exchange for a specified percentage of any royalties the institution might receive. Many colleges and universities pay royalties to their faculty that are a fixed percentage of the total revenue received, "ranging from 15% to 50% at major research universities."[144] Other institutions pay royalties on a sliding scale based on the net income they receive.[145] In many cases, the faculty ***408** member's department receives a percentage of royalty revenue.[146] The institution's technology transfer office--rather than the faculty member--will handle the marketing and licensing of the creation.[147]

b. Federally Funded Projects: The Bayh-Dole Act

After World War II, most of the funding for large-scale scientific research came from the federal government.[148] Although universities conducted much of the research, they did not have ownership rights over their work. The federal government determined that research resulting from federal funding should belong in the public domain, available to the public at no cost.[149] "Universities were able to secure patents on federally funded research only when the government, through a long and cumbersome application process, granted special approval."[150]

The Bayh-Dole Act of 1980 changed that approach, in part to spur economic and scientific development. The law permits colleges and universities--and businesses as well--to obtain title to inventions made with the assistance of federal funding and to promote the commercial use of those inventions.[151] There are five steps toward obtaining title under Bayh-Dole: (1) the inventor, usually the faculty member, reports any patentable invention to the university;[152] (2) the university must then disclose the existence of the patentable invention to the federal sponsoring agency "within a reasonable time";[153] (3) the university has the opportunity to claim title to the invention provided it files a patent application in a timely fashion;[154] (4) if the university declines to claim title to the invention, then the federal government may claim title;[155] (5) if the government does not claim title (and it claims title infrequently), then the inventor can request rights in the invention.[156]

If the university obtains title, the government funding agency receives a nonexclusive royalty-free license on behalf of the United States.[157] The Bayh-Dole ***409** Act also reserves "march-in" rights to federal agencies to ensure adequate use of inventions, if the university does not fully exercise its right to use the invention.[158]

There is no equivalent to the Bayh-Dole Act for federally funded copyrightable works. The enabling acts of certain federal programs, however, have provisions regarding the ownership of copyrightable works produced in part through federal money. For example, the Regional Centers for the Transfer of Manufacturing Technology allow faculty members to claim copyright in works, such as computer software, created at the centers.[159] The faculty member must acknowledge government sponsorship in the work, and provide a permanent shop right in the work to the government.[160]

The Bayh-Dole Act applies only to government-sponsored research. When research is privately funded, the funding agreement usually determines ownership and licensing rights. Under most of these agreements, institutions must file patent applications before disclosing the results of the research, and they must permit research sponsors to review research results.[161]

Although the Bayh-Dole Act applies only to government-sponsored research, it has created a presumption that all faculty research is owned by the employer university. One legal scholar questions this assumption and argues that faculty have an inherent right of ownership that is abrogated only under a written agreement.[162] Building on this assertion, another commentator argues that faculty should own all the intellectual property rights--copyrights and patents--to their works, no matter the medium in which they appear.[163]

IV. Intellectual Property Policies at Rutgers and Pittsburg State: Within the Scope of Bargaining?

A. Rutgers University's Intellectual Property Policies

Rutgers University has separate policies for copyrights and patents. The AAUP challenged only the patent policy, perhaps because the copyright policy at the time did not assert many university rights over faculty-authored work, focusing mainly on works made for hire.[164]

***410** The Rutgers' copyright policy in effect at the time of the AAUP suit stated that the university did not intend to "infringe upon the traditional rights of faculty, staff, and students to write or otherwise generate, on their own initiative, copyrightable materials to which they have sole rights of ownership and disposition."[165] The university did not claim copyrightable materials on the basis that "it provides the libraries, offices and laboratories where the materials are generated or because it pays salaries to those who generate the materials."[166]

Rutgers did, however, assert an interest in copyrightable works "when it provide[d] facilities, salaries, or other support for the express purpose of creating such materials."[167] In those cases, the departmental chairman, dean, or university officer who directed the production of the work decided whether to copyright the work. Ordinarily, the university would not copyright faculty-produced materials.[168] "But if the cost of producing the materials must be recovered from sales, or if there is other good reason, the materials shall be copyrighted in the name of Rutgers University, or in the name of a publisher with whom the University will enter into a contract."[169] If materials were copyrighted, then the author and possibly the publisher entered a copyright agreement with the university, and property rights to the materials were "divided between the University, the author or authors, and the publisher in an equitable way, reflecting the contribution made by each party to the finished materials."[170]

The copyright policy adopted in 2007 expanded the ownership rights of the university. While reaffirming "the faculty's rights to retain copyright ownership to the scholarly and artistic works they create . . . without regard to the extent of university resources involved in the creation of these works,"[171] Rutgers asserted ownership over four specific works: (1) "[w]orks created at the university's direction"; (2)" [w]orks created by staff within the scope of their employment"; (3) "[w]orks created by students in their capacity as employees of the university"; and (4) works created with external funding where the terms of the funding require copyright in the name of the university.[172] Moreover, "[w]ith the exception of traditional scholarly and artistic works . . . the university also may elect to own the copyright to works created using substantial university resources," defined as "the use of university ***411** funds, facilities, equipment or other resources not ordinarily available to all or most faculty members."[173]

Under its patent policy, Rutgers requires those individuals covered under the policy--which include faculty, staff, and students--to "promptly" disclose inventions or discoveries to the director of the Office of Corporate Liaison and Technology Transfer before the inventor "discloses the same to the public and soon enough to permit timely filing of a patent application in the United States and in foreign countries."[174] Persons covered under the policy are also required "to assign their individual rights to inventions, discoveries, improvements, and reductions to practice to the University, including, without limitation, United States and foreign patent rights and the right to claim priority under the terms of any international patent agreement."[175]

Rutgers shares with inventors "revenue which it receives on patents according to a schedule of distribution designed to recognize the inventor's creativity, the academic unit as an innovative environment, and the administrative leadership necessary for inventions to be commercialized successfully."[176] The schedule for distributing licensing income has three steps:[177]
a. the first $5,000 in gross licensing income are paid to the inventor, "in recognition of individual creativity and inventorship"; then

b. expenses--including patent filing, prosecution and maintenance fees, and marketing and litigation costs--are deducted to determine net income; then

c. net income is distributed as follows:

Recipient	First $100,000	Above $100,000
Inventor	25%	28%
University/ Office of Corporate Liaison and Technology Transfer	25%	32%
Research Unit	40%	30%
Department	10%	5%
Dean/Director	--	5%

***412** Also under the policy, Rutgers asserts ownership over "[l]aboratory notebooks and all other documents pertaining to research activities."[178] The policy states: "These records are necessary for the University to document an invention or discovery and to support a related patent application."[179]

Rutgers' patent policy also contains a provision that returns rights to the inventor. Under Section C, if Rutgers elects not to patent or commercialize an invention that has been disclosed to it, it shall notify the inventor, who may request permission to file a patent or have the rights to the invention assigned back to him or her. The policy further states that Rutgers has sole discretion to grant such requests, after considering "the public interest[[,] the interests of sponsors . . . [and] the interests of the inventor and the University."[180]

Rutgers amended its patent policy in 1996, the fourth revision of the policy originally adopted in 1962. The amended policy addressed some issues for the first time, such as equity holdings, and it significantly revised the methodology for distributing income resulting from a patent on an invention subject to the policy.[181]

B. Adjudication of Rutgers' Patent Policy

1. PERC

In April 2003, the Rutgers Council of AAUP Chapters filed a petition with PERC to determine whether certain aspects of Rutgers' patent policy were subject to mandatory negotiation and could not be unilaterally adopted by the university.[182] The AAUP was principally concerned with assignment of patents, the restrictions on royalties they could receive for assignments, and the timing over disclosing inventions and discoveries to the university.[183]

PERC found that four subjects covered by the 1996 policy were mandatorily negotiable: (1) the distribution of royalty income to inventors; (2) the timing of ***413** disclosure of inventions and discoveries; (3) the ownership of laboratory notebooks; and (4) the terms under which inventions and discoveries are assigned to Rutgers.[184] The Appellate Division affirmed in part and reversed in part.[185]

PERC ruled that both the requirement to assign patents and the terms of these assignments are negotiable. Rutgers asserted that it owned faculty members' inventions as a matter of law, but PERC stated that the university "has not offered any particularized facts on this point and has not shown that all faculty members are 'hired to invent'."[186] With regard to non-federally funded research, PERC ruled that "[t]he terms of patent rights and other terms that may be arrived at through individual agreements may in theory be collectively negotiated."[187] This ruling was largely based on Dubilier's holding that employees' patent rights are established by their contract,[188] causing PERC to conclude that "the extent of an employer's rights to an employee's invention may be, and generally is, determined by agreement between the employer and employee."[189]

PERC limited this finding to non-federally funded research. It recognized that under the "comprehensive federal scheme" of Bayh-Dole, the scope of collective negotiations is more restricted for federally-funded inventions than for those that are not so financed.[190]

Moreover, PERC found that the percentage of royalties to be received by faculty member inventors is a mandatorily negotiable subject with respect to federally-funded and other research.[191] PERC agreed with the AAUP's argument "that royalty income constitutes compensation received by unit members in exchange for their assigning Rutgers patent rights to their inventions."[192]

PERC also declared that the policy provision regarding laboratory notebooks was subject to bargaining. PERC agreed that the university needed to have access to notebooks to support patent applications and prosecutions, but beyond that, "we find that the employees' interest in owning research materials unrelated to patent applications so that they can pursue publication outweighs any demonstrated managerial interest in owning that material."[193]

***414** 2. Appellate Division

Addressing the least controversial issue first, the Appellate Division reversed PERC's decision and sided with Rutgers regarding ownership of laboratory notebooks. In reversing PERC's ruling on this matter, the Appellate Division found that the university's "assertion of ownership of these tangible, physical items" will not "in any way impede the ability of [the AAUP's] members to publish the results of their research."[194]

The Appellate Division also reversed PERC's decision regarding the timing of an inventor's duty to disclose inventions and discoveries to the university. Rutgers' policy requires inventors to "promptly . . . disclose [an] invention, discovery, improvement, or reduction to practice to the Director of the Office of Corporate Liaison and Technology Transfer."[195] The Appellate Division found it was difficult to "specify more precisely when an individual is required to disclose to the University an invention or discovery," and that it was "persuaded by Rutgers' assertion that the subject does not permit a more precise formulation."[196]

The court did not get the chance to rule whether the requirement to assign patents is mandatorily negotiable, but did get to address the negotiability of the terms of such assignments. Rutgers had appealed PERC's ruling "that the issue whether individuals subject to the Patent Policy had to assign to the University their rights in inventions and discoveries was mandatorily negotiable."[197] Both the AAUP and PERC, in their responding briefs, agreed with Rutgers that individuals subject to Rutgers' patent policy were obligated to make such an assignment, so the Appellate Division found that issue "is no longer an issue on appeal."[198]

Regarding the terms of such assignments, however, the Appellate Division upheld PERC. Citing precedent going back to In re Local 195, the court wrote:
It is clear from the record that the terms of such an assignment have the potential for a significant impact upon the overall financial compensation an individual may receive as a result of his or her efforts at Rutgers. Such issues of compensation, which "intimately and directly affect[] the work and welfare" of the employee, are mandatorily negotiable.[199]

***415** Concluding its review of terms of assigning a patent, the Appellate Division stated emphatically, "[t]he University cannot act by its own fiat in such a sphere."[200]

Despite such strong language, the Appellate Division did not directly address the licensing-income distribution schedule in the Rutgers patent policy. Presumably, if the terms of a patent assignment are negotiable, the income received for such an assignment--termed a form of "compensation" by the AAUP, which Rutgers did not dispute[201]--is also negotiable as a term and condition of employment.

Neither Rutgers nor the AAUP appealed this case to the New Jersey Supreme Court. It is expected that the two sides will negotiate this matter,[202] but as of May 2012, the 1996 policy remained in place.[203]

C. Pittsburg State University's Intellectual Property Policy

In 1997, the Kansas Board of Regents proposed an intellectual property policy under which the board would retain ownership and control of any intellectual property created by faculty at Pittsburg State University.[204] The faculty union opposed the policy, proposed its own version, and demanded that the board and the union negotiate the issue.[205] The board refused to negotiate, claiming "the subject of intellectual property rights was not a condition of employment, was preempted by federal and state law, and was a management prerogative."[206]

In the meantime, the board adopted a different intellectual property policy, which provided some intellectual property rights to institutional employees. A detailed case study has been published that describes the process that the Board of Regents followed between 1995 to 1998 in restructuring its intellectual property policies, including the "initial development of ownership policies for technology-based course materials."[207] The purpose of the intellectual property policy was "to provide certainty in individual and institutional rights associated with ownership and with the distribution of benefits that may be derived from the creation of intellectual ***416** property."[208] The policy applied to "all full or part-time employees, including students, creating intellectual property related to the scope of their employment while under contract with a Regents institution,"[209] which encompasses six state universities.[210] The policy covered copyrights, patents, and trademarks.[211]

The copyright section of the policy provided the institutions with ownership of "all rights associated with works produced as 'work-for-hire' or other works that make 'substantial use' of institutional resources."[212] "Substantial use" meant that the author "receives more than normal support for the project or receives time and/or resources specifically dedicated to the project."[213] Faculty members retained ownership of "scholarly and artistic works," including textbooks, scholarly monographs, and artistic works.[214]

Under the patent section of the policy, patents obtained on inventions "with an actual or projected market value in excess of $10,000 annually resulting from institutionally sponsored research" were retained by the institution or assigned to an organization created to promote research and develop intellectual property at the institution.[215] If the institution received any revenue "from the development or assignment of any patent or from royalties, license fees or other charges based on any patent," the faculty-inventor received at least 25% of the revenues.[216]

D. Adjudication of Kansas' Intellectual Property Policy

1. PERB and Lower Courts

In light of that policy, the faculty union "amended its complaint to allege that [the board's] unilateral adoption of this policy was also a prohibited practice."[217] The Kansas Public Employee Relations Board (PERB) determined there was no obligation to meet and confer on intellectual property policies because federal and state law preempted the subject.[218] The district court reversed this conclusion, but the Court of Appeals agreed with PERB and reversed the district court.[219] ***417** The Court of Appeals wrote that "requiring mandatory negotiations concerning intellectual property is preempted by federal copyright law."[220] The case next went to the Supreme Court of Kansas.

2. Supreme Court of Kansas: No Preemption

The Supreme Court of Kansas framed the case as "a narrow question of first impression: whether ownership of intellectual property rights is a subject preempted by state or federal law and, therefore, not mandatorily negotiable."[221] In a lengthy review of federal copyright and patent law, the Court concluded that federal law does not preempt negotiations over intellectual property rights.[222] Focusing on whether "federal law prevents the parties from negotiating regarding ownership of intellectual property rights and entering into a memorandum of agreement which includes that subject," the Court analyzed both copyright and patent law.[223] The Court found that "parties could negotiate ownership of a copyright" under the Copyright Act's work-for-hire provision.[224] Similarly, the Court found that "the Patent Act specifically provides that the parties may assign patent ownership rights."[225] Therefore, "federal law does not preempt any kind of intellectual property rights from becoming the subject of a memorandum of agreement under PEERA."[226]

3. "Mandatorily Negotiable"

After its preemption analysis, the Kansas Supreme Court noted that the PERB "hearing officer did not reach the step of employing the balancing test"[227] to determine whether a particular item is mandatorily negotiable: "If an item is significantly related to an express condition of employment, and if negotiating the item will not unduly interfere with management rights reserved to the employer by law, then the item is mandatorily negotiable."[228] The Court ruled that "[t]he district court should have remanded the case to PERB for additional findings regarding whether ownership of intellectual property is a condition of employment and whether the exception of K.S.A. 75-4330(a)(3) (public employer rights as defined in K.S.A. 75-4326) applies."[229]

***418** 4. On Remand to PERB

Taking the cue from the Kansas Supreme Court, PERB implemented the scope-of-bargaining balancing test to determine whether the intellectual property policy could be classified as mandatorily negotiable.[230] With the Supreme Court having settled the matter of preemption,[231] PERB focused on the other two prongs.

In reference to whether publishing and inventorship were significantly related to employment, PERB found that "a professor's production of intellectual[] property has a direct and significant impact on the salary he or she earns."[232] For example, a faculty member could get paid twice for the same creation, first through a salary increase[233] and then by royalty or licensing revenue.

In deciding whether negotiations would interfere with the managerial rights of the Board of Regents, PERB found that state statute did not indicate "any 'inherent managerial prerogative' that would suffer significant interference by negotiating in regard to intellectual property rights."[234] Pittsburg State University and the Board of Regents argued that a requirement to negotiate intellectual property rights would interfere with their right to "direct the work of [their] employees."[235] PERB disagreed, stating that the issue was the rights of faculty members "regarding intellectual property after it has been created."[236]

Finally, PERB considered whether the unilateral implementation of the prior intellectual property policy at Pittsburg State constituted a "willful" refusal to meet and bargain in good faith with the faculty union.[237] After analyzing the legal meaning of "willful," PERB found that implementation of the policy without consulting the faculty union constituted a prohibited practice per Kansas statutory law,[238] and it ordered the university to cease implementation of the intellectual property so that the parties could meet and confer in good faith.[239] The results of ***419** these negotiations can be seen in the 2008-2011 collective bargaining agreement for the faculty at Pittsburg State.[240]

5. Current Kansas Board of Regents' Intellectual PropertyPolicy and Pittsburg State Contract

In its preamble, the Board of Regents' Intellectual Property Policy states that the policy "is intended to be a broad statement to provide uniformity among the institutions while allowing for institutional flexibility."[241] The policy is included in the 2008-2011 collective bargaining agreement between the Kansas NEA and Pittsburg State, with some institution-specific language.[242]

The current policy, like the one in question before the courts, exerts institutional ownership in some cases. With regard to copyrights, the policy states that "all rights associated with works produced as 'work-for-hire' or other works that make 'substantial use' of institutional resources belong to the institution."[243] In regard to general revenue sharing, the faculty and/or creator can obtain profits only after the university has recouped direct costs for equipment and materials and costs paid to third parties.[244]

The policy provides for only limited university ownership, however, for "mediated courseware", such as online courses. If the courseware is created at the faculty member's own initiative, he or she shall retain all rights but must reimburse the university for use of institutional resources should that course be offered elsewhere. If the course is created at the behest of the institution, ownership rests with the university, and the institution has the "right to revise it and decide who will utilize the mediated courseware in instruction."[245] The Pittsburg State collective bargaining agreement requires that an individual contract be created outlining the specifications ***420** of the project, time commitment, revenue sharing, and compensation, among other items.[246]

Regarding patents, the Board of Regents still exerts ownership of inventions with a market value greater than $10,000 annually. If the institution decides not to commercialize the invention, then the creator is free to patent it.[247]

The Pittsburg State collective bargaining agreement provides the university's faculty members with a greater share of patent-related revenue than the Board of Regent's policy requires to be paid to the faculty at the rest of the Regents' institutions. The Board of Regents' policy provides "not less than twenty-five (25) percent of revenues shall be paid to the inventor(s) or creator(s)" from the development or assignment of patents or from royalties, license fees, or other charges based on patents or copyrightable software.[248] The Pittsburg State contract provides one-third of such revenues.[249]

V. Conclusion

A. New Jersey and Kansas: Similar Outcomes

As the cases involving Pittsburg State and Rutgers indicate, the legal analysis required to determine if a university's intellectual property policy is subject to collective bargaining is complicated, and it can take several years to resolve. The Supreme Court of Kansas prominently noted that "the overarching question raised in this case [is] whether a public employer must meet and confer with a recognized public employee organization regarding ownership of intellectual property rights."[250] After wending their way through judicial and administrative proceedings, the cases in New Jersey and Kansas reached the same basic conclusion: because patents can increase the income of their inventor,[251] campus policies that determine the distribution of this income must be negotiated.

As academic commercialization becomes increasingly territorial between faculty and administration, the similar outcome in the cases in New Jersey and Kansas may prove to be a harbinger of decisions in other states. State cases-- because contract law falls under state jurisdiction--will increasingly become more important ***421** than federal cases in resolving intellectual property ownership and broader issues of academic freedom.[252]

Because each state determines the scope of bargaining under its own laws, faculty would need to bring suits in each state to determine whether intellectual property policies on their campuses are subject to collective bargaining. The cases in New Jersey and Kansas indicate that some unions are willing to undertake this effort. Administrators of unionized public institutions should be aware of this trend and determine whether it is more prudent to negotiate with their faculty over intellectual property policies rather than waiting for a lawsuit of their own.

B. Future Research: The Broader Context of Collective Bargaining

The lawsuits in New Jersey and Kansas should be seen in a larger context of organized labor's efforts to secure greater rights over the intellectual property created by faculty members. Of all organized faculty, 79% are represented, in whole or part, by one of the three national unions that have historically represented educators--the American Association of University Professors (AAUP), the American Federation of Teachers (AFT), and the National Education Association (NEA)--or by their joint affiliations, the AFT/NEA and AFT/NEA/AAUP.[253] Each of these unions has counseled its members on securing intellectual property rights, either at the bargaining table or in the courts.

1. AAUP, AFT, and NEA Strategies

The revised AAUP Statement of Collective Bargaining states that through labor negotiations, "the principles of academic freedom and tenure, fair procedures, faculty participation in governance, and the primary responsibility of the faculty for determining academic policy will thereby be secured."[254] With specific regard to intellectual property, the AAUP has adopted a Statement on Copyright (1999),[255] but "it has not formally addressed the questions of patents."[256] In its copyright statement, the AAUP argued that the ownership of online courses should be no different from traditional courses. It wrote, "[i]t has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes," such as class notes, syllabi, books, and articles.[257] This academic practice has not depended on "the physical medium in which these 'traditional academic ***422** works' appear; that is, whether on paper or in audiovisual or electronic form."[258] The AAUP concludes, "[T]his practice should therefore ordinarily apply to the development of courseware for use in programs of distance education."[259] The AAUP has recommended that--because of the nature of online courses--heavily enrolled courses be compensated as an overload in teaching assignments.[260] Florida International University and United Faculty of Florida negotiated such a policy in Fall 2010.[261]

The AFT has provided a primer on intellectual property for its members.[262] In it, the union argues: "Ownership of intellectual property should be the right of all academic employees and is key to controlling the quality and duplication of their work. Therefore, academic employees must be vigilant in protecting intellectual property rights."[263] "[T]he AFT is concerned about the unplanned utilization of pedagogical techniques that would serve to reduce the role of faculty and limit the interaction of faculty in the education of students."[264]

The NEA takes the strongest position on intellectual property ownership among the major faculty unions. It "believes that education employees should own the copyright to materials that they create in the course of their employment," and it advocates amending the work-made-for-hire doctrine in the Copyright Act "to expressly recognize an appropriate 'teacher's exception'."[265] Short of that goal, copyright ownership of faculty-created works should be determined by "negotiated agreements . . . [that] provide that copyright ownership vests in the education employee who creates the materials and that he or she has all of the legal rights that come with such ownership."[266] The NEA opposes making the assignment of intellectual property rights a condition of employment because it wants to ensure that digital course materials remain current and do not become outdated under institutional ownership.[267]

***423** 2. Comparison of Unionized vs. Nonunionized Faculty

Given these strategies on behalf of unionized faculty, future research might investigate whether unionized faculty have secured, through collective bargaining or other means, greater ownership rights over their intellectual property than have nonunionized faculty. A 10-year-old comparison of collective bargaining agreements at unionized colleges and universities with intellectual property policies at nonunionized research universities found "that institutions with collective bargaining tend to do a better job of protecting the interests of academics than do research universities without unions."[268]
Academics at unionized institutions tend to fare better than their nonunionized peers. Many collective bargaining contracts accord faculty members ownership of, and the profits from, any intellectual property they create. Moreover, when the institution owns the property, unionized faculty members often receive a larger share of the profits (for example, 60 to 80 percent) than their nonunionized counterparts. Some even get a share even when their work is produced "for hire."[269]

An updated comparison of unionized and nonunionized faculties could naturally lead to a comparison between public and private institutions and their approach to intellectual property ownership. "Ninety-four percent of organized faculty are employed in public institutions."[270] Although unionized faculty at a number of institutions have "bargained intellectual property clauses that provide for faculty ownership, most [institutions] have not. Increasingly, institutional policies, on which nonunionized faculty offer advice and consent, claim ownership of faculty's intellectual property, especially when substantial institutional resources, usually information technology, are used."[271]

3. Comparison by Type of Institution

Future researchers could also compare intellectual property rights among different types of institutions. Slaughter and Rhoades found a "limited pattern of more aggressive institutional claims" to faculty-authored work in more elite institutions than less prestigious ones.[272] This finding is consistent with studies that have found that two-year institutions are more likely to grant faculty ownership of copyrights and patents than four-year institutions.[273] "Two-year college contracts are overrepresented among those provisions that accord faculty ownership rights and ***424** claims to profits."[274] Therefore, "pursuing the differences in copyright policies by type [of institution, elite vs. less prestigious] may repay investigation."[275]

4. Keeping Pace with Changes in Technology and the Law

The rapid changes in technology and the law covering intellectual property present a scholarly challenge to keep pace. In the modern economy, "knowledge is the critical raw material to be mined and extracted from any unprotected site; patented, copyrighted, trademarked, or held as a trade secret; then sold in the marketplace for a profit."[276] Digital technology is driving this economy, as described by Tom Friedman in The World is Flat:

> Once the PC-Windows revolution demonstrated to everyone the value of being able to digitize information and manipulate it on computers and word processors, and once the browser brought the Internet alive and made Web pages sing and dance and display, everyone wanted everything digitized as much as possible so they could send it to someone else down the Internet pipes. Thus began the digitization revolution.[277]

The law is trying to keep up with the advances in technology. On September 16, 2011, President Obama signed the Leahy-Smith America Invents Act, which overhauled the U.S. patent system to one that rewards the first inventor to file a valid application instead of the first inventor who creates the new product but who may not be the first to file an application.[278] Large technology and pharmaceutical companies supported the legislation, saying that it makes the U.S. patent system consistent with patent policies in other countries and makes it easier to settle ownership disputes.[279] Small companies and inventors, on the other hand, argued that the legal reforms favor companies with the resources to retain lawyers who can quickly file applications for inventions.[280]

A June 2011 U.S. Supreme Court decision in a case between Stanford University and pharmaceutical giant Roche Molecular Systems, Inc. has significant implications for the assignment of ownership rights in inventions resulting from federally financed research at colleges and universities.[281] Stanford accused Roche ***425** of infringing its patents on a technology--funded in part through the National Institutes of Health and invented by a Stanford researcher who was also working with a small research company collaborating with Stanford that was eventually acquired by Roche--that measures the concentration of HIV in blood plasma.[282] Stanford initially succeeded in federal district court, which found that the professor had no rights to assign because the university's research was federally funded, giving it superior rights under the Bayh-Dole Act.[283]

On appeal, the focus of the case was the language in the agreements signed by the Stanford researcher, Mark Holodniy, that defined his obligations to assign his invention rights.[284] Under with the agreement with Stanford, Holodniy "agree[d] to assign" rights to inventions to the university, which the U.S. Court of Appeals for the Federal Circuit interpreted to mean "a mere promise to assign rights in the future, not an immediate transfer of expectant interests";[285] and one with a subsidiary of Roche, under which he "will assign and do[es] hereby assign" his patent rights, which the court held "effected a present assignment of . . . future inventions," meaning Roche's subsidiary "immediately gained equitable title to" the Stanford researcher's inventions.[286] The circuit court remanded the case to the district court with instructions to dismiss Stanford's claims.[287]

Universities argued that the circuit court's decision shakes the foundations of the Bayh-Dole Act. In an amicus brief to the Supreme Court, the American Association of Universities, several other organizations, and 42 universities argued that the circuit court was

casting in doubt the rights of universities and the federal government alike to inventions arising from hundreds of billions of dollars in research. The decision of the court of appeals turns the statutory structure [of Bayh-Dole] on its head, allowing rights in federally funded patents to be disposed of in obscure private contracts between researchers and third parties rather than according to Congress's dictates.[288]

The Supreme Court disagreed with Stanford and its amicus supporters, holding that the Bayh-Dole Act did not upend the historical premise that "rights in an ***426** invention belong to the inventor" and does not "automatically vests title to federally funded inventions in federal contractors.[289] The Court wrote:

> Under Stanford's construction of the [Bayh-Dole] Act, title to one of its employee's inventions could vest in the University even if the invention was conceived before the inventor became a University employee, so long as the invention's reduction to practice was supported by federal funding. What is more, Stanford's reading suggests that the school would obtain title to one of its employee's inventions even if only one dollar of federal funding was applied toward the invention's conception or reduction to practice.[290]

The Court indirectly noted the deficiency in Stanford's assignment agreement with Holodniy. The Court wrote:

> universities typically enter into agreements with their employees requiring the assignment to the university of rights in inventions. With an effective assignment, those inventions--if federally funded--become "subject inventions" under the Act, and the statute as a practical matter works pretty much the way Stanford says it should. The only significant difference is that it does so without violence to the basic principle of patent law that inventors own their inventions.[291]

Commenting on the Court's decision, one patent attorney said, "This whole case [emerged] because of how somebody at Stanford decided to draft their assignment provision."[292] The attorney said, "[A]t this point, what everybody has done, is go change their [contracts with researchers] to say 'I hereby assign' instead of 'I hereby promise to assign.' You gotta do the assignment right. If you screw that up, you can see what can happen."[293]

Like patent law, copyright law is also struggling to keep up with technology, especially the conflict between online infringement and fair use. The Online Copyright Infringement Liability Limitation Act established a safe harbor for online service providers, generally providing they would not be liable for storing or transmitting infringing material at their users' direction.[294] Copyright owners, in turn, have an efficient way to notify online companies about infringing works with takedown notices. Online companies must respond to such takedown notices by expeditiously removing the allegedly infringing material, risking its safe-harbor protection for failing to do so.[295] When Universal Music Corporation issued a notice to YouTube to take down a 29-second video of a baby dancing to Prince's ***427** "Let's Go Crazy" playing in the background, the mother of the baby asserted that her video constituted fair use of the song and did not infringe Universal's copyrights.[296] This case has obvious implications for copyrighted material used in online courses.

In addition to changes in federal law, practitioners will need to keep current on the rules at the state and institutional levels.[297] While patents and copyrights "are the province of the federal government," states "have authority for shaping institutional policy for public universities and colleges," and "that authority is sometimes delegated to state systems of higher education, sometimes to the institutions themselves."[298] Moreover, "[s]tate and institutional policy sometimes preceded and always interpret and implement federal policies and statutes."[299] With regard to labor laws, state legislatures have "[a] tremendous impact" on the "legality and scope of collective bargaining in higher education,"[300] as seen in several states in 2011.[301]

As this case study of New Jersey and Kansas reveals, administrative agencies and the state courts are the final arbiters of those laws.

Footnotes

a1 Michael W. Klein is the Executive Director of the New Jersey Association of State Colleges & Universities. Joy Blanchard is an Assistant Professor of Higher Education at Florida International University.

1 122 P.3d 336, 349 (Kan. 2005).

2 PSU v. Kan. Bd. of Regents, No. 75-CAE-23-1998, 2007 WL 5883184, at *4 (Kan. Pub. Emp. Relations Bd. 2007).

3 884 A.2d 821, 826 (N.J. Super. Ct. App. Div. 2005) (deciding that laboratory notebooks are the property of the university).

4 Id. at 828 (explaining that university must negotiate the terms under which individuals subject to the policy assign their rights to inventions and discoveries).

5 State Higher Educ. Exec. Officers, State Higher Educ. Fin. FY 2009, 43 (2010).

6 Id. at 11.

[7] Sheila Slaughter & Gary Rhoades, Academic Capitalism and the New Economy: Markets, States, and Higher Education 11 (2004).

[8] For example, of 2,751 discoveries disclosed by University of Wisconsin faculty as of 1990, only 73 had produced incomes greater than expenses. Pat K. Chew, Faculty-Generated Inventions: Who Owns the Golden Egg? 1992 Wis. L. Rev. 259, 272 n.54 (1992). With regard to copyrights, only about 2% of all works protected by copyright produce continuing revenue for their owners. Amy Harmon, Debate to Intensify on Copyright Extension Law, N.Y. Times, Oct. 7, 2002, at C1, C6.

[9] Nat'l Sci. Bd., Sci. & Eng'g Indicators 2010, 5-43 (2010).

[10] Id. at 5-44.

[11] Id. at 5-45.

[12] Higher Education Research Center, Nat'l Educ. Ass'n, http:// www.nea.org/home/34725.htm.

[13] Gary Rhoades, Managed Professionals: Unionized Faculty and Restructuring Academic Labor 237 (1998).

[14] Michael W. Klein, Ten Years After Managed Professionals: Who Owns Intellectual Property Now? 2 J. Collective Bargaining in the Acad. 1, 1 (2010), available at http://www.library.eiu.edu/ncscbhep/journal/docs/2_1_Klein.pdf.

[15] Id. at 2.

[16] Roger Green, Markets, Management, and 'Reengineering' Higher Education, 585 Annals Am. Acad. Pol. & Soc. Sci. 196, 196-97 (2003).

[17] Benjamin Baez & Sheila Slaughter, Academic Freedom and Federal Courts in the 1990s: The Legitimation of the Conservative Entrepreneurial State, in 16 Higher Education: Handbook of Theory and Research 73, 74 (John C. Smart ed., 2001).

[18] Risa L. Lieberwitz, Faculty in the Corporate University: Professional Identity, Law and Collec-tive Action, 16 Cornell J.L. & Pub. Pol'y 263, 302 (2007).

[19] Derek Bok, Universities in the Marketplace: The Commercialization of Higher Education 9 (2003).

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24 In re Local 195, 443 A.2d 187, 191-93 (N.J. 1982); Kan. Bd. of Regents v. Pittsburg State Univ. Chapter of Kan.-Nat'l Educ. Assoc., 667 P.2d 306, 317 (Kan. 1983).

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26 Nat'l Labor Relations Bd., Chapter One: In Search of a National Labor Policy, in The First Sixty Years: The Story of the National Labor Relations Board, 1935-1995 (1995).

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37 N.J. Stat. Ann. §§ 34:13A-1 to -39, P.L. 1968, c. 303 (West 2011).

38 Kan. Stat. Ann. § 75-4324 (2011).

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40 N.J. Const. art. I, P 19.

41 Michael A. Olivas, The Law and Higher Education: Cases and Materials on Colleges in Court 582 (3rd ed. 2005).

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[43] Kaplin & Lee, supra note 34, at 293.

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[45] Taylor Alderman, The Right Ball: A Primer for Management Negotiators in Higher Education 41 (1989).

[46] N.J. Const. art. I, P 19.

[47] N.J. Stat. Ann. § 34:13A-5.3 (West 2011).

[48] See Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 311 A.2d 737, 744 (N.J. 1973) ("Thus far our Legislature has not chosen to set forth the individual subjects which are to be negotiable and has left the matter to the judiciary for case by case determinations as to what are terms and conditions of employment within the meaning of N.J.S.A. 34:13A-5.3.").

[49] Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 393 A.2d 278, 282-83 (N.J. 1978). The year after this decision, the legislature amended the Public Employer-Employee Act to vest PERC with "the power and duty, upon the request of any public employer or majority representat-ive, to make a determination as to whether a matter in dispute is within the scope of collective negotiations." N.J. Stat. Ann. §34:13A-5.4(d) (West 2011).

[50] N.J. Stat. Ann. § 34:13A-5.2 (West 2011).

[51] Id. § 34:13A-5.4(c)-(e).

[52] 443 A.2d. 187, 191 (N.J. 1982).

[53] Id.

[54] Id.

[55] Id. at 191.

[56] Id. at 192.

[57] Id. See In re Hunterdon Cnty. Bd. of Chosen Freeholders, 561 A.2d 597, 602 (N.J. 1989); Eng-lewood Bd. of Educ. v. Englewood Teachers Ass'n, 311 A.2d 729, 731 (N.J. 1973).

[58] In re Local 195, 443 A.2d at 192-93.

[59] Bd. of Educ. v. Woodstown-Pilesgrove Reg'l Educ. Ass'n, 410 A.2d 1131, 1135 (N.J. 1980).

[60] 449 A.2d 1254, 1257 (N.J. 1982) (quoting Council of N.J. State College Locals v. State Bd. of Higher Educ., 449 A.2d 1244, 1250 (N.J. 1982)).

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[63] Id. § 75-4322(t).

[64] Kansas Bd. of Regents and Pittsburg State Univ., 667 P.2d 306, 318-19 (Kan. 1983).

[65] Id. at 319 (emphasis in original).

[66] Id. at 317 (emphasis in original).

[67] Id. at 321-26.

[68] Kan. Stat. Ann. § 75-4330 (2011).

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[70] 443 A.2d at 187, 192-93 (N.J. 1982).

[71] Sheila Slaughter & larry Leslie, Academic Capitalism: Politics, Policies and the Entrepreneurial University 39 n.6 (1997).

[72] Laura G. Lape, Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies, 37 Vill. L. Rev. 223, 257 (1992).

[73] U.S. Const. art. I, §8, cl. 8.

[74] 17 U.S.C. § 102(a) (2006).

[75] Id.

[76] Russ VerSteeg, Copyright and the Educational Process: The Right of Teacher Inception, 75 Iowa L. Rev. 381, 384 (1990).

[77] 17 U.S.C. § 408(a) (2006).

[78] Id. at § 201(a).

[79] Id. at § 302(a).

[80] Id. at § 302(c).

[81] Under the Copyright Act, phonorecords are defined as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." Id. at § 101.

[82] Id. at § 106.

[83] 17 U.S.C. § 201(d) (2006).

[84] Id. at § 101

[85] Id. at § 204(a).

[86] Id. at §§ 101, 201(b).

[87] Id. at § 101.

[88] See Michael W. Klein, The 'Equitable Rule': Copyright Ownership of Distance-Education Courses, 31 J.C. & U.L. 143, 159-66 (2004) (summarizing the debate).

[89] 490 U.S. 730 (1989).

[90] Id. at 751-52.

[91] Rochelle Cooper Dreyfuss, The Creative Employee and the Copyright Act of 1976, 54 U. Chi. L. Rev. 590 (1987).

[92] Pamela A. Kilby, The Discouragement of Learning: Scholarship Made for Hire, 21 J.C. & U.L. 455 (1995).

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[95] Todd F. Simon, Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?, 9 J.C. & U.L. 485 (1982-83).

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[97] Gregory Kent Laughlin, Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses, 41 B.C. L. Rev. 549 (2000).

[98] Corynne McSherry, Who Owns Academic Work? Battling for Control of Intellectual Property (2001).

[99] Klein, supra note 88, at 167-70.

[100] 35 Stat. 1075-88, 17 U.S.C. §§ 1-216 (repealed 1978); Sherrill v. Grieves, 57 Wash. L. Rep. 286 (1929); Williams v. Weisser, 78 Cal. Rptr. 542 (1969).

[101] Hays v. Sony Corp., 847 F.2d 412, 416 (7th Cir. 1988).

[102] Weinstein v. Univ. of Ill., 811 F.2d 1091, 1094 (7th Cir. 1987).

[103] VerSteeg, supra note 76.

[104] Lape, supra note 72.

[105] Laughlin, supra note 97.

[106] Simon, supra note 95.

[107] Leonard D. DuBoff, An Academic's Copyright: Publish and Perish, 32 J. Copyright Soc'y of the U.S.A 17 (1984-85).

[108] Dreyfuss, supra note 91.

[109] Wadley & Brown, supra note 96.

[110] McSherry, supra note 98.

[111] Michael W. Klein, ''Sovereignty of Reason:" An Approach to Sovereign Immunity and Copyright Ownership of Distance-Education Courses at Public Colleges and Universities, 34 J.L. & Educ. 199, 205 (2005).

[112] Georgia Harper, Developing a Comprehensive Copyright Policy to Facilitate Online Learning, 27 J.C. & U.L. 5, 8 (2000); Joy Blanchard, The Teacher Exception Under the Work for Hire Doc-trine: Safeguard of Academic Freedom or Vehicle for Academic Free Enterprise?, 35 Innovative Higher Educ. 61, 67 (2010).

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[134] Id. at 187.

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[136] Dublier, 289 U.S. at 189.

[137] Id. at 187.

[138] Marc B. Hershovitz, Unhitching the Trailer Clause: The Rights of Inventive Employees and Their Employers, 3 J. Intell. Prop. L. 187, 194 (1995).

[139] Id. at 194-95.

[140] Kaplin & Lee, supra note 34, at 1359. See Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1269 n.12 (8th Cir. 1978) ("Such provision are valid, if they are restricted to the line of actual em-ployment involved and not unreasonably extended in time.").

[141] Kaplin & Lee, supra note 34, at 1360.

[142] Chew, supra note 8, at 276.

[143] Id.

[144] Kulkarni, supra note 127, at 234.

[145] Id.

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[147] Id. at 235.

[148] David L. Kirp, Shakespeare, Einstein, and the Bottom Line: The Marketing of Higher Education 208 (2003).

[149] Sheila Slaughter & Larry Leslie, Professors Going Pro: The Commercialization of Teaching, Research, and Service, in Campus, Inc.: Corporate Power in the Ivory Tower 140, 142 (Geoffry D. White ed., 2000).

[150] Slaughter & Rhoades, supra note 7, at 50.

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[152] Id. at § 202(c)(1).

[153] Id.

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[156] Id. at § 202(d); Kaplin & Lee, supra note 34, at 1359.

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[160] Id.

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[163] See Kulkarni, supra note 127, at 223 ("[P]rofessors ... should own all IP rights in their crea-tions.").

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[165] Interim Copyright Policy, supra note 164.

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182 Id. at 823.

183 Rutgers v. Rutgers Council of AAUP Chapters, 30 N.J. Pub. Emp. Rep. 44, 68-71, 74, 77 (N.J. Pub. Emp. Relations Comm'n 2004).

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[192] Id. at 68-69.

[193] Id. at 81.

[194] Rutgers Council of AAUP Chapters v. Rutgers, 884 A.2d 821, 826-27 (N.J. Super. Ct. App. Div. 2005).

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[196] AAUP, 884 A.2d at 827.

[197] Id. at 828.

[198] Id.

[199] Id. (quoting City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 713 A.2d 472, 478 (N.J. 1998) (citing In re Local 195 v. State, 443 A.2d 187, 192 (N.J. 1982))).

[200] Id.

[201] Rutgers v. Rutgers Council of AAUP Chapters, 30 N.J. Pub. Emp. Rep. 44, 69 (N.J. Pub. Emp. Relations Comm'n 2004).

[202] Lisa Klein, After Long Battle, AAUP-AFT Wins on Negotiability of Patent Policy, Rutgers AAUP-AFT Newsletter (Rutgers AAUP-AFT, New Brunswick, N.J.), Dec. 2005, available at http://www.rutgersaaup.org/news/December2005newsletter.htm#patent.

[203] Rutgers University Office of Technology Commercialization, Patent Policy, http://otc.rutgers.edu/downloads/patentpolicy.pdf (last visited April 30, 2012).

[204] Pittsburg State Univ. v. Kan. Bd. Of Regents, 122 P.3d 336, 339 (Kan. 2005).

[205] Id.

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[207] John F. Welsh, Course Ownership in a New Technological Context: The Dynamics of Problem Definition, 71 J. Higher Educ. 668, 674 (2000).

[208] Kan. Bd. of Regents, Intellectual Property Policy, in Policies and Procedures Manual Ch. II, § D(8) (2011).

[209] Id.

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[211] Intellectual Property Policy, in Policies and Procedures Manual, supra note 208.

[212] Id. at Ch. II, § D(8)(a).

[213] Id.

[214] Id. at Ch. II, § D(8)(a)(2).

[215] Id. at Ch. II, § D(8)(b).

[216] Id. at Ch. II, § D(8)(b)(3).

[217] Pittsburg State Univ. v. Kan. Bd. Of Regents, 122 P.3d 336, 339 (Kan. 2005).

[218] Id. at 338.

[219] Id.

[220] Id. at 342 (quoting Pittsburg State Univ. v. Kan. Bd. Of Regents, 101 P.3d 740, 740 (Kan. Ct. App. 2004).

[221] Id. at 338.

[222] Id. at 343-45.

[223] Pittsburg State Univ. v. Kan. Bd. Of Regents, 122 P.3d 336, 343 (Kan. 2005).

[224] Id. at 344 (citing 17 U.S.C. § 201(b) (2006)).

[225] Id. at 347 (citing 35 U.S.C. § 261 (2006)).

[226] Id.

[227] Id. at 349.

[228] Id. (quoting Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kan. Nat'l Educ. Ass'n, 667 P.2d 306, 317 (Kan.

1983))(emphasis in original).

[229] Pittsburg State Univ. v. Kan. Bd. Of Regents, 122 P.3d 336, 349 (Kan. 2005).

[230] See PSU v. Kan. Bd. of Regents, No. 75-CAE-23-1998, 2007 WL 5883184, at *4 (Pub. Emp. Relations Bd. 2007) (explaining the balancing test used to determine mandatory negotiability).

[231] Id. at *6 ("[T]he ultimate determination by the Kansas Supreme Court that the subject is not pre-empted has rendered any further discussion of this issue moot."). See Pittsburg State Univ., 122 P.3d at 345, 347 (ruling that "federal law does not preempt any kind of intellectual property rights from becoming the subject of a memorandum of agreement under PEERA").

[232] PSU, 2007 WL 5883184, at *6

[233] Id.

[234] Id. at *7.

[235] Id. (quoting Kan. Stat. Ann. § 75-4326(a) (2011)).

[236] Id.

[237] Id. at *7-12.

[238] PSU v. Kan. Bd. of Regents, No. 75-CAE-23-1998, 2007 WL 5883184, at *12 (Pub. Emp. Rela-tions Bd. 2007).

[239] Id.

[240] Pittsburg State Univ., A Contract Between Pittsburg State University/Kansas National Education Association and Pittsburg State University/Kansas Board of Regents 2008-2011 app. C at 90-95 (2008) [[hereinafter Contract], available at http://www2.pittstate.edu/admin/vpaa/documents/2008to2011ContractwSignaturePage.pdf.

[241] Intellectual Property Policy, in Policies and Procedures Manual, supra note 208.

[242] Contract, supra note 240.

[243] Intellectual Property Policy, in Policies and Procedures Manual, supra note 208, at Ch. II § D(8)(a). The Pittsburg State collective bargaining agreement refers to the definition of work made for hire in the AAUP statement on copyright: "'Works created as a specific requirement of employment or as an assigned institutional duty that may, for example, be included in a written job description or an employment agreement, may be fairly deemed works made for hire. Even absent such prior written specification, ownership will vest in the college or university in those cases in which it provides the specific authorization or supervision for the preparation of the work.' Examples are reports prepared by members of a faculty committee or works of a faculty member in the normal execution of his/her duties." Contract, supra note 240, at app. C at 90 n.11.

[244] Intellectual Property Policy, in Policies and Procedures Manual, supra note 208.

[245] Id. at Ch. II, § D(8)(a)(1).

[246] Contract, supra note 240, app. C at 91.

[247] Id. at 93.

[248] Intellectual Property Policy, in Policies and Procedures Manual, supra note 208, at Ch. II, § D(8)(b)(3).

[249] Contract, supra note 240, app. C at 93.

[250] Pittsburg State Univ. v. Kan. Bd. of Regents, 122 P.3d 336, 339 (Kan. 2005).

[251] See Rutgers Council of AAUP Chapters v. Rutgers, 884 A.2d 821, 828 (N.J. Super. Ct. App. Div. 2005) ("[T]he terms of such an assignment [of a patent] have the potential for a significant impact upon the overall financial compensation an individual may receive as a result of his or her efforts at Rutgers."); PSU v. Kan. Bd. of Regents, No. 75-CAE-23-1998, 2007 WL 5883184, at *6 (Kan. Pub. Emp. Relations Bd. 2007) ("[A] professor's production of intellectual property has a direct and significant impact on the salary he or she earns.").

[252] Baez & Slaughter, supra note 17, at 114.

[253] Berry & Savarese, supra note 20, at xi.

[254] Am. Ass'n of Univ. Professors, Statement on Collective Bargaining, AAUP (2009), http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementcolbargaining.htm.

[255] Am. Ass'n of Univ. Professors, Statement on Copyright (1999).

[256] Am. Ass'n of Univ. Professors, Sample Intellectual Property Policy & Contract Language, AAUP, http://www.aaup.org/AAUP/issues/DE/sampleIP.htm (last visited May 1, 2011).

[257] Am. Ass'n of Univ. Professors, supra note 255, at 1.

[258] Id.

[259] Id. The AAUP recognizes, however, that the employer university may fairly claim ownership of faculty-created work that falls into three categories: "special works created in circumstances that may properly be regarded as 'made for hire,' negotiated contractual transfers, and 'joint works' as described in the Copyright Act." Id. at 2.

[260] Michele J. Le Moal-Gray, Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education, 16 Touro L. Rev. 981, 1033 (2000).

[261] The Fla. Int'l Univ. Bd. of Trs. & the United Faculty of Fla., Collective Bargaining Agreement 2008-2011 (as amended 2010), UFF-FIU, app. G, § 10(B)(iii)(b) (2010), http://www.uff-fiu.org/nindex.php/bargaining/uff.bargaining.html.

[262] David Strom, Intellectual Property Issues for Higher Education Unions: A Primer (2002), available at http:// www.aft.org/pdfs/highered/intelprop1202.pdf.

[263] Id. at 11.

[264] Le Moal-Gray, supra note 260, at 1026.

[265] Nat'l Educ. Ass'n, Distance Education, NEA (2002), http:// www.nea.org/home/34765.htm.

[266] Id.

[267] Le Moal-Gray, supra note 260, at 1027.

[268] Gary Rhoades, Whose Property Is It? Negotiating with the University, 87 Academe 38, 40 (2001), available at http:// www.aaup.org/AAUP/pubsres/academe/2001/SO/Feat/rhoa.htm.

[269] Id. at 42.

[270] Berry & Savarese, supra note 20.

[271] Slaughter & Rhoades, supra note 7, at 173.

[272] Id. at 145.

[273] Rhoades, supra note 13, at 252; Klein, supra note 14, at 3.

[274] Rhoades, supra note 13, at 252.

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[276] Id. at 4.

[277] Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century 64 (2005).

[278] Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified in scattered sections of 35 U.S.C.). See Jason Rantanen and Lee Petherbridge, Commentary, Toward a System of Invention Registration: The Leahy-Smith America Invents Act, 110 Mich. L. Rev. First Impressions 24 (2011), available at http://www.michiganlawreview.org/assets/fi/110/rantanenpetherbridge.pdf.

[279] Edward Wyatt, Senate Passes Bill to Change Patent System and Pricing, N.Y. Times, Mar. 9, 2011, at B9.

[280] Id.

281 Bd. of Trs. v. Roche Molecular Sys., 131 S. Ct. 2188 (2011).

282 Bd. of Trs. v. Roche Molecular Sys., 583 F.3d 832, 837, 838 (Fed. Cir. 2009), aff'd, 131 S. Ct. 2188 (2011).

283 Bd. of Trs. v. Roche Molecular Sys., 487 F. Supp. 2d 1099, 1119 (N.D. Cal., 2007). A subsequent district court opinion in the same case found Stanford's claims to three patents to be invalid for obviousness. Bd. of Trs. v. Roche Molecular Sys., 563 F. Supp. 2d 1016 (N.D. Cal. 2008), aff'd in part, vacated in part, 583 F.3d 832 (Fed. Cir. 2009), aff'd, 131 S. Ct. 2188 (2011).

284 Roche, 583 F.3d at 841.

285 Id.

286 Id. at 842.

287 Id. at 849.

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289 Bd. of Trs. v. Roche Molecular Sys., 131 S. Ct. 2188, 2192 (2011).

290 Id. at 2198.

291 Id. at 2199.

292 Doug Lederman, Supremes Rule Against Stanford, Inside Higher Education (June 7, 2011, 3:00 AM), http://www.insidehighered.com/news/2011/06/07/supreme_court_rules_against_stanford_in_ patent_case.

293 Id.

294 17 U.S.C. § 512 (2006).

295 Id.

296 Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151-52 (N.D. Cal. 2008).

297 See generally Richard Richardson, Jr. & Mario Martinez, Policy and Performance in American Higher Education: An examination of Cases Across State Systems (2009) (examining cases from multiple states).

298 Slaughter & Rhoades, supra note 7, at 81.

299 Id.

300 See Rhoades, supra note 13, at 18.

301 Greenhouse, supra note 22; Levenson, supra note 22.