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Student Author and the Law of Copyright: A Consideration of Some Peculiar Problems

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THE STUDENT AUTHOR AND THE LAW OF COPYRIGHT: A CONSIDERATION OF SOME PECULIAR PROBLEMS†

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I. Introduction

Although students, as a class, produce considerable copyrightable material, they generally are uninformed about the law of copyright and the way it can protect their intellectual efforts. Some students may be aware that a copyright is similar to a patent, in that it protects the person's financial interest in his creation by restricting others' use of that creation. Most students do not appreciate the manner of obtaining copyright or the specific nature of its protection, and, thereby frequently forfeit potentially valuable property interests in their literary and artistic productions. They prove easy prey for the plagiarist who reaps the benefits of someone else's intellectual labors while expending little or no effort of his own.

Informing students of the basis of copyright law, then, would allow them to protect material that otherwise would pass into the public domain; yet despite this, there is little writing on student copyright problems. It is an unfortunate fact that student works are frequently plagiarized, sometimes by other students and often by faculty. Tales of pilfered projects, theses, and other written work are too common to be mere concoctions or isolated incidents. This use of student material may be a symptom of the acute "publish or perish" syndrome that affects campuses today. For whatever reason, however, students are often and easily

† On February 19, 1976, after the manuscript for this article was prepared, the Senate unanimously approved a bill calling for a general revision of the Copyright Act, Title 17 of the United States Code. The Senate bill (S. 22) is presently under consideration by the House of Representatives, having recently been referred to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary. The Senate enactment is similar in content to earlier legislation that was approved by the Senate in September 1974 (S. 1361), and it also closely resembles a measure adopted in 1967 by the House of Representatives. Given these earlier efforts at revision, passage of S. 22 would certainly not appear to be a foregone conclusion.

S. 22 provides for an amalgamation of state and federal copyright laws under one unified system and, thus, represents a considerable departure from present law. Viewed from the perspective of this article, S. 22 proposes a radical change since it would include protection of *unpublished works* under the federal statutory scheme. A close reading indicates that the bill, if enacted, would not affect the fundamental premise of this article: student works would still be protectible by copyright laws. S. 22 does, however, affect certain other aspects of the analysis presented herein. For example, the doctrine of fair use is expressly recognized in § 107, although the statute does not provide much substance to the term. Section 204 requires that certain formalities (a written "instrument" signed by the owner) must be met before copyright can be effectively transferred, which should prove advantageous to students who claim that no copyright interest was intended to be passed by delivery of a copy. The strict notice requirements for published works are substantially modified in §§ 401-05. And, § 301 establishes a new term for the duration of copyright in both published and unpublished works, that being "the life of the author and fifty years after his death."

It must be stressed again, however, that the basic premise of this article would be unaffected by enactment of S. 22: copyright is presently and will continue to be available to protect student works, and students ought not to disregard the practical importance of copyright protection.

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deprived of potentially valuable property interests in their literary and artistic productions.

This article seeks to be both informative and analytic. After briefly introducing the law of copyright, it considers whether student works ought to be distinguished from other forms of literary property. The following issues are addressed: (1) whether a student can be treated as an author for hire with regard to works submitted for academic credit; (2) whether the student effects a transfer of ownership or copyright when he submits a work for credit; and (3) the extent of common law copyright, and whether the doctrine of fair use is applicable to works protected by common law copyright. It will be concluded that individual controversies are better solved nonjudicially, through an institutional/administrative framework. While legal process will ordinarily be available, students should attempt to apply the time-tested techniques of bargaining, arbitration and institutional settlement before resorting to the legal system.

II. The Applicability of Copyright to Student Works: An Introduction to the Law of Copyright

A copyright protects literary property by granting to the author a right to prevent others from copying his intellectual production.[1] Copyright thereby endows an author with the privilege of the exclusive use of and profits from his "literary property."[2] Literary property is a form of personal property that is not necessarily tangible or corporeal.[3] As the court explained in *Werckmeister v. American Lithographic Co.*,[4]

> The author of a painting, when it is finished, before publication, owns a material piece of personal property, consisting of the canvas and the paint upon it. He also owns an incorporeal right connected with it; that is, the right to make a copy of it. These two kinds of property, although growing out of the same intellectual production, are in their nature essentially and inherently distinct. . . . [T]he law has always recognized that a common-law

1 "Copyright in any form, whether statutory or at common-law, is a monopoly; it consists only in the power to prevent others from reproducing the copyrighted work." R.C.A. Manufacturing Co., Inc. v. Whiteman, 114 F.2d 86, 88 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940). *See* Walden, *Common Law Rights in Literary Property*, 37 J. PAT. OFF. SOC'Y 642 (1955) [hereinafter cited as Walden]; STRAUSS, PROTECTION OF UNPUBLISHED WORKS, STUDY No. 29, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86th Cong. 2d Sess. 1961 [hereinafter cited as Study No. 29]; Pickard, *Common-Law Rights Before Publication*, ASCAP THIRD COPYRIGHT SYMPOSIUM 229 (1940). *See generally* M. NIMMER, NIMMER ON COPYRIGHT (1963) [hereinafter cited as NIMMER].

2 *See* Walden, *supra* note 1, at 643. In E. DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 8 (1879), it is stated that:

> [A]n author has, in the fruits of his intellectual labor, a property as whole and inviolable as that which exists in material possessions. . . [H]e has supreme control over such productions, may exclude others from their enjoyment and may dispose of them as he pleases.

The copyrightable by-products of "intellectual labor" are by no means strictly confined to the written word. *See* 1 NIMMER, *supra* note 1, §§ 10-36 for a discussion of the subject matter of copyright generally. For the purposes of this article, however, the term "student works" will be intended to refer specifically to written materials, such as student papers, theses and dissertations.

3 In Palmer v. De Witt, 47 N.Y. 532, 538-39 (1872), the court stated that an author's property in his manuscript "is not distinguishable from any other personal property. . . . The right to literary property is as sacred as that to any other species of property."

4 142 F. 827, 830 (S.D.N.Y. 1905), *aff'd mem.*, 148 F. 1022 (2d Cir. 1906).

> copyright . . . is a distinct property from the thing to which the copyright applies. One man may be the owner of the thing, and another of the copyright in the thing.

Literary property may thus be seen as an incorporeal right, which exists separately from the physical object that has been created.[5]

Although literary property results from the author's having reduced his thoughts to tangible form, it is the *expression* of those thoughts that is the protectible subject matter of copyright.[6] Practically, this two-fold nature of literary property means that an individual's ownership rights in a copyrighted object will be subject to the author's rights in the literary property underlying that work. Authorship of a letter affords a good example of this distinct and separate nature of literary property. It is generally agreed that the recipient of a letter has an ownership interest in the paper upon which the letter has been written. However, the author of the letter retains common law copyright in the contents of the letter and can prevent its publication by the recipient. In *Baker v. Libbie,*[7] the court explained:

> [T]he right in the receiver of an ordinary letter is one of unqualified title in the material on which it is written. He can deal with it as absolute owner subject only to the author's proprietary right . . . to the publication or non-publication of idea in its particular verbal expression.

Copyright protection in the United States is available to authors of qualified literary and artistic works under a dual system of state and federal copyright law.[8] The scope of these two bodies of law is not coextensive, however, and an author who desires protection for his work must ordinarily determine whether state "common law copyright" or the federally derived "statutory" copyright will be available.[9] The dividing line between the operation of the common law and statutory systems is the element of "publication," a term of art having special meaning and significance in copyright law.[10] Publishing a work often determines

5 *See* Study No. 29, *supra* note 1, at 3.

6 *See* text accompanying note 113 *infra.*

7 210 Mass. 599, 607, 97 N.E. 109, —— (1912). *See generally* 1 NIMMER, *supra* note 1, § 64 at 247.

8 A "qualified" work is a literary production that meets the minimal requirements of copyrightability under common law or statutory copyright. *See* 1 NIMMER, *supra* note 1, §§ 10-36. "Statutory copyright" is copyright secured under the Copyright Act, 17 U.S.C. §§ 1 *et seq.* (1970).

9 The dual nature of American copyright law has consistently presented problems to courts and legislatures, particularly in terms of the treatment that is afforded unpublished works. Proposals for the amalgamation of the common law and federal schemes into a unified body of national copyright law have been embodied in revision legislation presented to Congress. To date, however, the Congress has not enacted these proposals into law. *See* Study No. 29, *supra* note 1; Cary, *The Quiet Revolution in Copyright: The End of the "Publication" Concept,* 35 G. WASH. L. REV. 652 (1967) [hereinafter cited as Cary]. The present bill before the Senate (S. 22) continues to reflect this suggestion. *See* † *supra. See also,* S. REP. No. 93-983, 93d Cong., 2d Sess. (1974).

Another, and perhaps more difficult issue posed by this dual nature is a basic question of federalism: to what extent does federal legislation "preempt" the field of copyright law so that the States may not act? For the most recent Supreme Court answer to this question *see* Goldstein v. California, 412 U.S. 546 (1973) (permit state regulation of tape/record piracy).

10 *See* Cary, *supra* note 9, at 652-59; Walden, *supra* note 1, at 648-56. *See also* notes 101-05 *infra* and accompanying text.

which type of copyright, if any, may be available for the work. Generally, property rights in unpublished works are secured under state common law, while federal legislation protects certain forms of published literary and artistic productions.[11]

A. *Statutory Copyright*

Statutory copyright is a right wholly dependent upon federal legislation.[12] The first federal copyright law was enacted by Congress in 1790,[13] pursuant to an express constitutional grant of authority, "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[14] In order to secure statutory copyright, the author or proprietor of a qualified work must "publish" the work with a notice of copyright appropriately affixed to each copy. Section 10 of the Copyright Act provides:[15]

> Any person entitled thereto by this title may secure copyright for his work by *publication thereof with the notice of copyright* required by this title; and such notice shall be affixed *to each copy* thereof published or offered for sale in the United States by authority of the copyright proprietor. . . .

The notice of copyright, "shall consist of the word 'Copyright,' the abbreviation 'Copr.', or the symbol ©, accompanied by the name of the copyright proprietor, and . . . the year in which the copyright was secured by publication."[16] Contrary to popular belief, all that the author must do to secure statutory copyright in his work is to publish with a proper notice affixed to each copy.

While publication with notice will cause the author's literary property to be protected by statutory copyright, certain other formalities must be met before a suit may be maintained for infringement of the copyright.[17] Section 13 of the Copyright Act provides that:[18]

> No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work has been complied with.

Additionally § 13 explicitly directs that two copies shall be deposited "promptly" after copyright has been secured by publication.[19] However, in

11 *See* Cary, *supra* note 9, at 652-59; Study No. 29, *supra* note 1, at 1-2.
12 *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 663 (1834). *See generally* 1 NIMMER, *supra* note 1, § 1.
13 Act of May 31, 1790, ch. 15, 1 Stat. 124.
14 U.S. CONST. art. I, § 8.
15 17 U.S.C. § 10 (1970) (emphasis added). It should be noted that the term "publication" does not have the same legal meaning in all copyright situations. *See* notes 101-05 *infra* and accompanying text.
16 17 U.S.C. § 19 (1970).
17 *See* notes 106-14 *infra* and accompanying text for a brief discussion of what constitutes a copyright infringement.
18 17 U.S.C. § 13 (1970).
19 *Id.*

Washingtonian Publishing Co. v. Pearson,[20] the Supreme Court held that the right to sue for infringement was not destroyed by "mere delay" in complying with the deposit requirement. The plaintiff in the *Washingtonian* case had not deposited copies of the work until some fourteen months after publication, and six months after the infringement.[21]

B. *Common Law Copyright*

Common law copyright antedates federal statutory copyright,[22] and affords more expansive protection to a broader class of literary and artistic works.[23] The existence of common law copyright was an issue considered and acknowledged by the Supreme Court in *Wheaton v. Peters*.[24]

> That an author, at common law, has a property in his manuscript, and may obtain redress against anyone who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted. . . .[25]

At the same time, however, the Court noted that while an author has exclusive perpetual rights in his unpublished manuscript, once the work was published, his rights were solely dependent upon the statutes.[26] As a lasting result of the *Wheaton* decision, the act of publication continues to be treated as *divesting* an author of his common law copyright.[27] Unless the author has published this work with the requisite notice, thus *investing* statutory copyright, the literary production will fall into the public domain for all to use.[28]

C. *Further Distinctions*

In addition to the importance of publication in determining whether and how copyright protection will be available to an author,[29] there are two practical

20 306 U.S. 30, 42 (1939).
21 *Id.* at 34-35.
22 *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 654-64 (1834). Consider that the very idea behind § 2 of the Copyright Act is that the federal statutory scheme was built upon the foundations established by common law.
23 *See* Study No. 29, *supra* note 1, at 3-4. Particularly important is the observation that "common law property rights may exist in forms of intellectual creations which are not copyrightable under the statute." *Id.* at 4. Also to be considered is the fact that common law copyright in a work may exist perpetually, whereas the statutory right extends for a limited time only. *Id.*
24 33 U.S. (8 Pet.) 591 (1834).
25 *Id.* at 657.
26 *Id.* at 591 n. 1.
27 *See* notes 101-05 *infra* and accompanying text.
28 Once a work enters the public domain, either by the voluntary acts of the author or by operation of law, it is available for the *unrestricted* use of all persons. An important limitation, however, is that matters in the public domain are not themselves copyrightable. *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 104 (2d Cir. 1951). *See also* 17 U.S.C. § 8 (1970), which relates specifically to the matter of copyright in works in the public domain; and, note 75 *infra*.
29 Note, however, that legislation recently proposed in the Senate and presently before the House embodies a proposal that would cause the common law copyright to be subsumed into the federal scheme. This would end the functional importance of the act of publication. *See* note 9 *supra* and, materials cited therein.

distinctions between the common law and statutory schemes. First, an author need not comply with any type of express precondition in order to secure common law copyright. The common law copyright arises automatically upon the author's completion of his production to protect the literary property in that work.[30] This feature of common law copyright contrasts with the statutory copyright system, under which a work will not be protected unless published with a proper notice affixed.[31] Second, common law copyright will protect a work perpetually, or more precisely, as long as it is not published,[32] while the monopoly resulting from statutory copyright is limited in time to an initial period of 28 years, with a possible renewal for another 28 years.[33]

Although common law copyright arises automatically—*i.e.*, without the necessity of compliance with specific formalities—it does not extend to every literary and artistic creation without exception. In addition to the basic requirement that the work be unpublished, common law copyright will protect only those works that are original and reduced to concrete form.[34] Originality, in this context, relates to a minimal requirement that the work must "owe its origin" to the author;[35] in other words, that it must be the result of the author's *independent intellectual effort*. This concept was postulated by Judge Learned Hand in *Sheldon v. Metro-Goldwyn Pictures Corp.*:[36]

> [I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.

Judge Hand thereby emphasized that it is the independence of the author's work rather than its uniqueness that is determinative in assessing originality.[37]

A third condition that must be met before a work will be copyrightable under common law is that the content of the production must have been developed beyond the abstract idea.[38] This requirement, which is the source of considerable confusion and controversy among commentators, is derived from a basic precept of copyright law that "only the expression of ideas, and not the ideas themselves are copyrightable."[39]

30 "Common law copyright protection is automatically accorded all unpublished works from the moment of their creation." Edgar H. Wood Associates, Inc. v. Skene, 347 Mass. 351, 357, 197 N.E.2d 886, 890 (1964). Consider also the quote excerpted from the *Werckmeister* case which appears in the text at note 4 *supra*.

31 *See* note 16 *supra* and accompanying text.

32 *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346-47 (1908) (quoting DRONE ON COPYRIGHT); Wheaton v. Peters, 33 U.S. (8 Pet.) at 591 n. 1. *See generally* Study No. 29, *supra* note 1, at 4.

33 17 U.S.C. § 24 (1970).

34 *See* 1 NIMMER, *supra* note 1, § 11.2 at 42.2.

35 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884).

36 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

37 *See* Alfred Bell v. Catalda Fine Arts, 191 F.2d 99, 102-03 (2d Cir. 1951). Professor Nimmer suggests that "there is a reciprocal relationship between creativity and independent effort. The smaller the effort . . . the greater must be the degree of creativity in order to claim copyright protection." 1 NIMMER, *supra* note 1, § 10.2 at 37. However, Nimmer's examples indicate that the suggestion was made in direct reference to the copying of short phrases of as little as two words. *Id.*

38 *See* 1 NIMMER, *supra* note 1, § 11.2 at 42.2, and more generally at § 11.1.

39 *Id.*, § 11.1 at 39.

Preliminarily, there does not appear to be any general impediment in the law of copyright that would prevent a student from securing copyright in a qualified work under either common law or federal statute.[40] Students, however, rarely publish their literary and artistic works. Moreover, where publication occurs so as to divest common law rights, the work probably will have been published without notice, and thereby dedicated to the public domain. Mindful of this situation, this article will focus primarily upon common law copyright, and proceed to consider the question of whether there is any reason—in fact, or in the law of copyright—for a student to be afforded special or disfavored treatment under the common law.

III. The Student Author and the Law of Copyright: Authorship, Transfer and Fair Use

Assuming that student work is protectible under common law, some specific questions face the student author. First, is there an established copyright policy that might preclude a student from being considered the author of a work that he has originated? Second, what is the effect, if any, upon the student author's copyright in a work when there is a physical transfer of possession, such as by submission of the work for academic credit? And, third, in what manner may the protected work be used irrespective of the author's wishes?

A. *The Student as Author and the "For Hire" Doctrine*

Copyright ordinarily inures to the author of a qualified literary or artistic work.[41] An important exception to this rule is presented in the doctrine of "works for hire," which is recognized under both common law and federal legislation.[42] Section 26 of the Copyright Act specifically provides that "the word 'author' shall include an employer in the case of works made for hire."[43] A person attempting to claim copyright privileges under the works for hire doctrine must first establish the existence of an employment relationship. Also, it must be proved by the employer that the particular copyrightable matter was created by his employee within the course and scope of the employment, since only these works

40 Certain technicalities arise in the area of statutory copyright when the author who is seeking copyright protection is not a United States citizen. *See* 17 U.S.C. § 9 (1970). However, common law copyright will apply irrespective of the author's nationality or domicile. *See* Palmer v. De Witt, 47 N.Y. 532, 539-40 (1872). *See also* Ferris v. Frohman, 223 U.S. 424, 432-37 (1912).

41 In that common law copyright arises in a work automatically upon its completion, it inures to the author in the first instance. The literary property in that work is then assignable. Statutory copyright, on the other hand, may be obtained by the "author or proprietor of any work made the subject of copyright . . . or his executors, administrators, or assigns. . . ." 17 U.S.C. § 9 (1970). Courts have interpreted the term proprietor to mean the same as assigns. Mifflin v. R. H. White Co., 190 U.S. 260, 262 (1903); Egner v. E. C. Schirmer Music Co., 139 F.2d 398, 399 (2d Cir. 1943), *cert. denied,* 322 U.S. 730 (1944). *See* notes 67-99 *infra* and accompanying text.

42 *See, e.g.,* Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, 248-49 (1903) (application of earlier version of present Act); Williams v. Weisser, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969) (common law).

43 17 U.S.C. § 26 (1970).

will be deemed to fall within the ambit of the rule.[44] Consequently, the determinative issue regarding the application of this doctrine is whether or not the particular work bears a sufficiently close relationship to the employee's duties to be treated as a product of the employment.[45]

In those situations where the works for hire doctrine applies, the employer has the right to obtain all those copyright privileges that would ordinarily be available to the actual originator of the work, *i.e.*, the author-employee.[46] Under the federal scheme, § 26 of the Copyright Act creates a rebuttable presumption that the legitimate work-products of an employment relationship are copyrightable by the employer as author. However, the employee may come forward with evidence to show the existence of an agreement giving him the right to secure copyright as the author of the work.[47] Recent judicial decisions tend to narrowly construe the scope of § 26 of the Act.[48] These cases appear to favor the claims of the author/originators, at least to the extent that the employer must clearly show the nexus between the specific employment purpose and the character and circumstances under which the work has been produced.[49]

Since the typical student is not an employee of his school and since even those students who are at least part-time employees are not ordinarily hired for the purpose of producing literary or otherwise copyrightable material, the author for hire doctrine would largely seem inapplicable to the student author, at least as to those materials specifically produced and submitted for academic credit. This general conclusion would have to be modified as it relates to research assistants. These individuals, often students, are customarily hired for the specific purpose of assisting in the production of copyrightable material. This employment relationship would seem to fall well within the works for hire doctrine. Nonetheless, copyrightable material not produced within the course and scope

44 *See, e.g.*, Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 567 (2d Cir. 1966); Sawyer v. Crowell Publishing Co., 46 F. Supp. 471, 473 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497, 498-99 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944). *See also* Scherr v. Universal Match Corp., 417 F.2d 497, 500-01 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

45 *See* Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 267-69 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962), *aff'd on remand*, 268 F. Supp. 444 (1967). *See also* Sawyer v. Crowell Publishing Co., 142 F.2d 497, 498-99 (2d Cir. 1944).

46 Note, however, that under 17 U.S.C. § 24, it is the copyright proprietor *at the time of renewal* who is entitled to renew the copyright for another 28-year term.

47 *Cf.* Williams v. Weisser, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969). *See also* Wells v. Columbia Broadcasting System, 308 F.2d 810 (9th Cir. 1962). In the event that an employee secures copyright in his own name for a work to which the employer is entitled under the works for hire doctrine, that copyright will be deemed held in trust for the employer. United States Ozone Co. v. United States Ozone Co., 62 F.2d 881, 887 (7th Cir. 1932).

Professor Nimmer has questioned the constitutionality of utilizing this presumption in favor of the employer. *See* 1 NIMMER, *supra* note 1, § 6.3 at 11-13.

48 *See* Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962). *But cf.* Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).

49 Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962); Sawyer v. Crowell Publishing Co., 46 F. Supp. 471, 473 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497, 498-99 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944); Williams v. Weisser, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969). *See also* Scherr v. Universal Match Corp., 417 F.2d 497, 502-03 (2d Cir. 1969) (Friendly, J., dissenting).

of the employment will not be treated as property of the employer.[50] A persistent question, even in light of this analysis, is whether a court might fashion an extension of the author for hire doctrine applicable to works created by students outside the true employment relationship.

Judicial inquiry into the existence of an employment relationship and the nature of the employment purpose, for copyright matters, has generally focused on three broad areas of analysis:[51] (1) whether the employer has a right to direct and supervise the employee's labors; (2) whether the work is performed at the insistence and expense of the employer, and with the use of his facilities; and, (3) whether there is any salary or other compensation paid to the purported employee. With respect to the first of these three factors, it is essential from a legal standpoint that an employer must have at least the *right to control* the employee's day-to-day performance of his work.[52] As provided in the Restatement (Second) of Agency,[53]

> A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled *or is subject to the right to control* by the master.

Thus, it is not mandatory that this supervision be exercised in fact, but merely that the employer is endowed with supervisory power.[54]

To the extent that a student's day-to-day efforts in producing a literary work are not closely supervised—in terms of precise format, subject matter and source material, length and quality of the completed document, and the amount of time spent in its preparation—the normal student author does not seem to fall within this employer-employee framework. Where, however, a general supervisory influence is exerted with respect to the nature of the student's final product, but not as to the daily activities in production, the student author might be termed more realistically as an independent contractor.[55] An independent contractor can be described as a person, such as a plumber or electrician, who is hired by an employer to perform a specific service, and is responsible to the employer only for the result of his labors and not for the means of its accomplishment.[56] The effect of this distinction is relatively minor in copyright law. The employer is entitled, as "author," to claim copyright in work produced by either an employee

50 *See* cases cited note 45 *supra*. Whether this research assistant could claim a partial interest in the copyrighted work would be a matter for contractual agreement between the parties. *Cf.* Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).

51 *See* Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. at 649-51. *See generally* 1 NIMMER, *supra* note 1, § 62.

52 Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. at 651, citing 1 NIMMER, *supra* note 1, § 62.2 at 238.2-239 (right of employer to direct and supervise). *See also* Scherr v. Universal Match Corp., 417 F.2d 497, 500-01 (2d Cir. 1969), *cert. denied*, 397 U.S. 396 (1970).

53 *Restatement (Second) of Agency* § 2(2) (1958) (emphasis added).

54 *Id.*

55 *Restatement (Second) of Agency* § 2(3) provides:

> (c) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. . . .

56 Trzaska v. Bigane, 325 Ill. App. 528, 534, 60 N.E.2d 264, 267 (1945) (automobile tort for personal injuries).

or an independent contractor. However, while the employer could assume ownership of and copyright in all materials produced by his employee, including such things as preliminary drafts and working papers, the employer is entitled to claim only the final work product of the independent contractor.[57] For example, accountants are often considered independent contractors and thus entitled to ownership in their working papers.[58] But again, with contractors, as with regular employees, the intent of the parties is the crucial factor.[59] And, it should be noted that courts will generally presume that copyright passes with the work unless the employee can show a contrary agreement.[60]

With regard to the remaining two aspects—production at the employer's insistence and expense, and the element of compensation—the typical student author situation again is only generally analogous to an employment relationship.[61] Student authorship cannot be considered voluntary insofar as a particular work *must* be produced, submitted for credit, and meet the approval of an institution before the student will receive academic credit. In that sense, the work may be said to have been done at the *insistence* of the institution. However, a persuasive argument pertaining to the elements of employer expense and employee compensation is not as easily developed. In a very broad sense, an academic degree is a type of compensation, a *quid pro quo* for the labors expended by the student. Moreover, students usually make use of library facilities and instructional personnel when preparing copyrightable material. But the fact that students commonly pay tuition for the privilege of attending educational institutions complicates matters. It is impossible to argue convincingly that there is an element of compensation involved where a student in fact pays out what may be a substantial sum of money as tuition to the university.[62]

A student author, then, should not be treated as an author for hire under the current statutory application of that doctrine. Neither would it be appropriate to treat a student as an author for hire under a broadly expanded application of the common law concept. The oft-stated purpose of copyright is to encourage authorship by securing to authors the just fruits of their labors. In *Mazer v. Stein*,[63] for example, the Supreme Court concluded its opinion with the following statement:

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57 *See, e.g.*, Ablah v. Eyman, 188 Kan. 665, 365 P.2d 181 (1961), and Ipswich Mills v. Dillon, 260 Mass. 453, 157 N.E. 604 (1927), (accountants entitled to working papers). *See also* Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).

58 *See* Ablah v. Eyman, 188 Kan. 665, 365 P.2d 181 (1961), and Ipswich Mills v. Dillon, 260 Mass. 453, 157 N.E. 604 (1927).

59 See 1 NIMMER, *supra* note 1, § 63 at 244-45.

60 *Id. See, e.g.*, Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir.), *cert. denied*, 309 U.S. 686 (1940); *see also* Eliscu v. T. B. Harms Co., 151 U.S.P.Q. 603 (N.Y. Sup. Ct. Oct. 27, 1966). *See* note 47 *supra* and accompanying text.

61 *See* note 51 *supra* and accompanying text.

62 A single case has been found to support the contention that an employment relationship could exist where there had been no compensation to the purported authors for hire. *See* Lawrence v. Dana, 15 F. Cas. 26, 51 (No. 8136) (C.C.D. Mass 1869), cited with approval in *Picture Music*, 314 F. Supp. at 651.

The payment of tuition by a student should ultimately preclude his being treated as an author for hire as to material submitted for course credit.

63 347 U.S. 201, 219 (1954). In the more recent case of Goldstein v. California, 412 U.S. 546, 555 (1973), the Court broadly stated that the purpose of federal copyright is to "encourage people to devote themselves to intellectual and artistic creation. . . ."

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Student authors, of course, could be distinguished from other authors in that they do not need to be enticed into writing by financial reward. Sufficient incentive exists in university academic requirements, to wit, satisfy the established standards or fail. But the mere provision of these incentives can hardly justify deprivation by a university of student's literary property. This is true even though educational uses of copyrighted material are often favored over the proprietary claims of authors.[64] Since the principal incentive to publish is something other than financial return for most scholar-authors (such as reputation in the academic community, and the institutional requirement of publication as a prerequisite to academic advancement), and it would be inconsistent to permit faculty to secure copyright while limiting copyright for students under similar conditions. And since one court has sustained a professor's claim to common law copyright in his lectures over an argument that the copyright properly resided in the university,[65] it is difficult to believe that the original common law copyright in a student work submitted for academic credit could be found to reside in anyone other than the student.

The typical argument proffered in support of the works for hire doctrine, that the employer is entitled to the products of the employment relationship,[66] simply does not fit the student author. Insofar as there exists no employment relationship for the production of literary property, it would seem that the nexus between the student and the institution—or the instructor himself—is too tenuous to allow expansion of the author for hire doctrine into the area of student works that are produced and submitted for academic credit.

B. *Transfer of the Student Work*

As has been discussed,[67] an author's copyright exists separately from either the physical object created or any copies subsequently made of that original. The importance of this dual nature of literary property can be better understood when one considers that an author rarely retains exclusive possession of the unpublished work, and quite often makes and distributes copies of that work. What is the effect of this transfer of possession? At the outset, it should be noted that an authorized distribution of a literary production to a special group or class of

64 "[A] scholar holds an especially favored position under the copyright law. He should feel completely free to copy whatever he legitimately needs to make his writings complete, accurate, and authenticated." Wilson, *The Scholar and the Copyright Law*, ASCAP TENTH COPYRIGHT SYMPOSIUM 104, 113 (1959) [hereinafter cited as *Wilson*]. *See also* 2 M. NIMMER, NIMMER ON COPYRIGHT § 145 at 648.1 (1963) [hereinafter cited as NIMMER].

65 In Williams v. Weisser, 273 Cal. App.2d 726, 733, 78 Cal. Rptr. 542, 545 (1969), it was held, "that in the absence of evidence the teacher, rather than the university, owns the common law copyright to his lectures."

66 *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248-49 (1903).

67 See notes 3-6 *supra* and accompanying text.

persons for a limited purpose will not ordinarily be treated as publication divesting common law copyright.[68] This distribution is termed a "limited publication," and common law copyright is not divested unless there has been a *general* publication.[69] The right of "limited publication" has been broadly described as follows:

> [U]nless the owner of the common law rights chooses to register the work, he may disseminate the work publically in every conceivable way except by publishing copies, and his rights continue perpetually in spite of the constitutional policy of copyright for a limited time.[70]

A physical transfer of a copyrighted work, however, under appropriate circumstances, could convey the author's copyright interest to the transferee. Thus, assuming that a student may be treated as the author of those works that have originated with him, and that the student author's literary property is protected under common law copyright, the discussion will now consider the potential effects upon a student's copyright when the protected work is submitted to an instructor for the purpose of fulfilling academic requirements.

Generally, the law of copyright places few limitations upon the transferability of rights in literary property. Although an author must abide by certain formalities in regard to statutory copyright,[71] there are no preconditions for an effective conveyance of common law copyright.[72] For example, literary property in an unpublished work may be transferred by oral agreement.[73] A valid transfer may be proved if it can be shown that the author had a present intention to convey title in his literary property to the transferee at the time of delivery of the work.[74] When there has been an authorized delivery of copyrighted material to another, therefore, the operative questions are: (1) whether the surrounding facts support a finding that there has been a transfer of ownership in the physical copy; and, (2) whether there may be found sufficient facts to show intent to convey copyright as well.

Students, as a class, are characteristically uninformed about copyright matters. It should come as no surprise, then, that students fail even to consider the legal effects of submitting a work to the university for academic credit, much less reduce their intentions to written form. Undoubtedly, a close analysis of the facts involved in each transfer situation will be necessary to ascertain the precise nature of the particular transaction. Has the student retained all of his rights in

68 *See generally* Cary, note 9 *supra.*

69 *See* notes 101-05 *infra* and accompanying text.

70 Strauss, note 1 *supra. See generally* Cary, *supra* note 9.

71 17 U.S.C. § 28 (1970), requires that an assignment, grant, or mortgage of copyright must be evidenced "by an instrument in writing signed by the proprietor of the copyright . . ."; under § 30, assignments must be recorded with the Copyright Office. Consider the case of DeSilva Construction Corp. v. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962), which involved the matter of the effect of a failure to record an assignment upon the various parties. *See also* 2 NIMMER, *supra* note 64, § 120.2.

72 *See* 2 NIMMER, *supra* note 64, § 120.1 at 523.

73 *See* Callagan v. Meyers, 128 U.S. 617, 658 (1888); Houghton-Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306, 311 (2d Cir.) (issuance of temporary injunction), *cert. denied,* 308 U.S. 597 (1939), *affirmed on merits,* 113 F.2d 627 (2d Cir. 1940); Fruenthal v. Hebrew Publishing Co., 44 F. Supp. 754, 755 (S.D.N.Y. 1942).

74 *See* 2 NIMMER, *supra* note 64, § 120.1 at 523 n.72, citing, *inter alia,* Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556, 558-59 (D. Mass. 1928).

the work, *i.e.*, ownership of the copy and the copyright? Has there been a valid conveyance of some or all of those rights? Or, has the student caused the work to pass into the public domain?[75]

It is by no means an easy task to divine the intentions of a student author at the time of delivery of his work, especially in the absence of written or oral communications between the parties. If presented with this type of situation, a court would be in the position of having to imply intent, not only from the actual conduct of the parties, but from the "reasonable expectations" that each should have formed regarding the particular transaction.[76] Enumeration and discussion of all the factual variations that could arise in every conceivable delivery situation would be too lengthy and impractical to include here. However, it is worthwhile to analyze the questions that should be asked and the factors that a court should consider when facing a student copyright problem.

1. Why was the work produced?
   a. General requirement in an introductory level or survey course.
   b. Independent study or seminar where paper has been assigned in lieu of exam.
   c. Primary research project—collection and analysis of empirical data.
   d. Senior paper or honors project produced to satisfy academic honors requirements rather than course credit.
   e. Master's or doctoral level thesis or dissertation.

The focus is on "expectations"; in other words, what did the parties anticipate would be done with the work once completed, graded and accepted for credit? Logically, it would seem that the more substantial the work—in terms of input and importance regarding academic credit—the greater the student's interest in maintaining and protecting his property in that work. This observation should pertain both to ownership of the copy and to the copyright. Admittedly, this type of analysis requires weighing probabilities. Furthermore, it assumes at least basic awareness of copyright law by students and, for that matter, by faculty as well. The oft-cited case of *T. J. Hooper v. H. N. Hartwell & Son, Inc.*,[77] provides a useful rationale for approaching this expectation factor. In *Hooper*, the court indicated that "common prudence" is not necessarily "reason-

75 It has been suggested that there must be "some unequivocal act indicating an intent to dedicate it [a manuscript] to the public. . . ." Pickard, *Common-Law Rights Before Publication*, ASCAP THIRD COPYRIGHT SYMPOSIUM 299, 309 (1940), citing Werckmeister v. Springer Lithographing Co., 63 F. 808 (S.D.N.Y. 1894). *But see* 1 NIMMER, *supra* note 64, § 58.3 at 229.

In any event, in order to divest common law rights, the act of publication must be performed by the author or at his direction. *See* Walden, *Common Law Rights in Literary Property*, 37 J. PAT OFF. SOC'Y 642, 650 (1955). This would preclude a third party from effecting a general publication for the purpose of dedicating the work to the public domain so that unlimited use could be made of it.

76 Ascertainment of the "reasonable expectations" or "reasonable understandings" between the parties is an accepted practice in the interpretation of ambiguous contracts. Courts often find it necessary to inquire into such matters as the meaning of contractual words at the time and place they were used, and the general course of dealings, performance and trade custom in the locale. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 47, 52 (1970). *But see* text accompanying notes 77-78 *infra*.

77 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

able prudence"; in certain situations there are "precautions so imperative that even their universal regard will not excuse their omission."[78] With regard to the issue of student expectations in copyright matters, a common expectation need not be treated as a reasonable expectation under the circumstances of each case. In other words, a court should not feel bound by the fact, for example, that students commonly believe that all rights in their literary property are lost upon transfer of possession for course credit. Rather, the court should inquire further to ascertain what would have been reasonable to expect had there been an awareness by students that rights would not necessarily be lost as a result of this sort of transfer. This guideline test seems appropriate in that the likelihood of a student relinquishing his proprietary rights by a transfer bears an inverse relationship to the substantiality of the work, *i.e.*, the more substantial the work, the less likely the intent to transfer.

2. What was the nature and extent of instructional input?
   a. Assignment of topic with no supervision or assistance.
   b. General advisory-type input.
   c. Substantial guidance and supervision.

A reasoned approach to this element would suggest the following analytic guideline: the more active and direct the supervisory role, the more improved the position of the supervisor in claiming a proprietary interest in the work. The dual questions of "whether any interest was passed" and "what is the extent of that (proprietary) interest" must be viewed in light of the aforementioned issue of the substantiality of the work. Assuming that the student's intent has not been expressed, the expectations of both parties must be implied. From an evidentiary standpoint, it should be the purported transferee who must prove the intent to transfer at the moment of delivery. It is here proposed that a court apply a rebuttable presumption of "no transfer"—that all rights will be reserved to the author unless the purported transferee produces evidence to warrant a contrary conclusion. This would provide the reverse of the approach taken in the author for hire situations.[79] From the standpoint of copyright policy, as well as the normal rules of evidence, it seems patently unfair to impose upon the student a transfer of ownership and copyright merely because of a failure to expressly reserve those rights at the time of the transfer of possession. The Court in *Stephens v. Cady*[80] took a similar view, even where there had been a valid conveyance of the original work, an engraved copperplate.

> [E]ven the transfer of the manuscript of a book will not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property of the manuscript, and the right to multiply the copies are two separate and distinct interests.[81]

78 *Id.* at 740.
79 *See* note 47 *supra* and accompanying text.
80 55 U.S. (14 How.) 528 (1852).
81 *Id.* at 529.

3. What was done with the work after submission?
   a. Retained by instructor or department.
   b. Copied and retained, original returned.
   c. Copied and distributed for instructional purposes.
   d. Copied and deposited in school library.

If a student has submitted more than one copy of a work, or when consent has been given to reproduce the original, it is not unreasonable to conclude that the student impliedly transferred ownership in the limited number of copies of that work. In all probability, the instructor could be viewed as a licensee, inasmuch as the author's express (or implied) consent had been given to make a certain number of copies for the instructor's own use. In copyright law, a licensee is a person who has been conveyed anything less than the "totality of rights commanded by copyright."[82]

The student author should be made aware of the fact that under certain circumstances, deposit of his work in a library may constitute a divestitive publication. Where the library is "public" as opposed to purely private, and where access to the work is not limited to a special class of persons, the student would be well advised to submit the work for deposit with notice of statutory copyright, rather than relying upon his common law rights.[83] (This does not answer the question regarding transfer of the underlying copyright, which should still have to be proved by the purported transferee.)

4. What rights are being claimed by the alleged transferee?
   a. Ownership of the copy.
   b. Grant of a license to copy the work in a particular manner.
   c. Assignment of copyright.

A recognition of the substantial disparity that exists between the relative bargaining powers of students, as opposed to instructors, has prompted the following guideline for analysis: the greater the interest claimed by the transferee, the more persuasive must be the implication that the student freely intended to convey that interest. This does not seem too harsh a standard to impose on persons attempting to prove a transfer of anything more than ownership rights in a copy, especially considering that the express consent of the student is so readily obtainable.

It cannot be overemphasized, however, that the element of voluntariness must be viewed as an indispensable consideration in the transfer situation. Careful analysis of the student-faculty relationship reveals that there are many unspoken but well known "rules" that govern academic life. With the ever-increasing importance of grades and one's standing in the university, many students are loath to confront the instructional staff lest some sort of retribution be exacted in the form of lower grades and the like. Whether such practices do in fact take place is not as important as the student's subjective belief that penalties

82 2 NIMMER, *supra* note 64, § 119.1 at 511.
83 *See* Walden, *supra* note 75, at 650-55.

could result from a contest over copyright.[84]

5. What manner of use is the author seeking to prevent?
   a. Reproduction or mere retention of a copy of the work.
   b. Use of a substantial portion of the work in modified form.
   c. Any use whatsoever.

Although this factor raises issues that will be discussed at length in the next section of this article,[85] note that it is unlikely that a court will prevent "insubstantial" uses of a work protected under common law copyright.[86]

It is clear that each case requires an in-depth factual analysis to determine the result of a transfer transaction. The reasonable expectations of the parties must be considered in this attempt to divine the author's intentions at the moment of delivery of the work. Reported cases provide little guidance for predicting how a court will weigh or determine intent where the transfer has not been performed pursuant to a sale of the work. For example, in cases where an absolute and unconditional sale of a protected work of art has been followed by a transfer of possession, courts have traditionally implied, by operation of law, an assignment of the underlying copyright to the purchaser as a part of the sale agreement.[87] In these sale situations, courts have presumed an implied assignment.[88] This presumption places upon an author the burden of coming forward with evidence to show that he expressly reserved those rights to himself.[89] However, Professor Nimmer has contended that "[t]his rule of construction is most unfortunate in that it creates a legal presumption of intent when more often than not such intent probably does not exist in fact."[90]

In cases involving the sale of a manuscript rather than a work of art, courts have been reluctant to allow the purported transferee to rely solely upon this presumption.[91] This is sound policy in those transfers where nothing more is shown than a gratuitous transfer of possession of the work. Where the facts support little else than the possible creation of some sort of bailment,[92] there is no conceivable reason for presuming an implied assignment. Logic compels placing upon the transferee the burden of proving that the author intended to convey to him title to either the physical copy, or the full copyright interest. This result is mandated by the dualistic nature of literary property, whereby the underlying copyrightable matter exists separately from the tangible copy.[93] Mere possession

84 *See* text accompanying notes 77-78 *supra*.
85 *See* notes 100-50 *infra* and accompanying text.
86 *See* note 150 *infra*.
87 *See* Yardley v. Houghton-Mifflin Co., 108 F.2d 28, 30-32 (2d Cir. 1940); Parton v. Prang, 18 F. Cas. 1273, 1278 (No. 10, 784) (C.C.D. Mass. 1872); Pushman v. New York Graphic Soc., 287 N.Y. 302, 306-07, 39 N.E.2d 249, 250-51 (1942).
88 *See* 2 NIMMER, *supra* note 64, § 125.12 at 540-41.
89 *See, e.g.*, Yardley v. Houghton-Mifflin Co., 108 F.2d at 30-32; Pushman v. New York Graphic Soc., 287 N.Y. at 306-08, 39 N.E.2d at 250-51.
90 *See* 2 NIMMER, *supra* note 64, § 125.12 at 541 (citations omitted).
91 *See, e.g.*, Stephens v. Cady, 55 U.S. (14 How.) 528, 530 (1852).
92 A bailment has been broadly defined as "the rightful possession of goods by one who is not the owner." 4 S. WILLISTON, THE LAW OF CONTRACTS 2888 (rev. ed. 1936). In a typical bailment situation, the owner delivers possession of an item to a second party for a specific purpose. *See* R. BROWN, THE LAW OF PERSONAL PROPERTY § 73 (rev. ed. 1955).
93 *See* notes 3-7 *supra* and accompanying text.

of a protected work, without more, should not affect the underlying literary property.[94] No decision has been found that supports a contrary conclusion.

Notwithstanding the likelihood that courts will view these transfer situations as involving essentially consensual interpersonal agreements with which they would not ordinarily interfere, there is an element of "public interest" that they may consider. It is basic copyright policy to encourage the production and dissemination of ideas through a grant of limited monopoly to authors.[95] The proprietary claims of authors, however, must often be balanced against the demands of public policy for greater access to these protected works.[96]

From both an institutional and legal point of view, the student author who claims a protectible property interest in work submitted for academic credit confronts certain problems, the foremost being the question of who is entitled to the copyright in that production. As will be discussed,[97] it is usually more difficult to determine what constitutes a permissible "fair use" of a protected work than it is to determine that the student has departed with his protectible interest, but any student wishing to protect his copyright interest should clarify his intent at the time of delivery of possession to the institution. When there is any question in the student's mind that his copyright may be violated, he should express his intentions in writing. Although the commentators do not discuss this technique, there is no reason why a student could not submit the work with notice of common law copyright. A court would probably consider this a sufficient reservation of rights in the event of a later contest. Furthermore, the student could double his protection, in a manner of speaking, by submitting the work with notice of statutory copyright. If the work is published, it will be protected by statutory copyright, assuming that the notice complies with formalities.[98] If the work remains unpublished for a time, the use of the statutory notice would not cause a divesting of the common law rights. This is supported by the court's statement in *Fader v. Twentieth Century Fox Film Corp.*:[99]

> Congress has not provided that one who seeks to obtain the benefits of statutory protection must surrender his common law copyright if statutory copyright is not afforded him.

Of course, many students may fear that in presenting a claim of copyright contrary to the expectations of their instructor, they would cause displeasure that could be manifested in a variety of forms (*e.g.*, lower grades, poor recommendations). Unless courts are willing to consider such fears when considering the transfer issue, students should engage in their own balancing test, *i.e.*, weighing

94 *See generally* notes 71-74 *supra* and accompanying text.
95 *See* note 63 *supra*, and notes 1-7 *supra* and accompanying text.
96 *Cf.* Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912).
97 For example:
NOTICE OF COMMON LAW COPYRIGHT
All rights reserved by the author. No part of this [paper] may be reproduced in any form, by any process, without the express written consent of the author.
Physical delivery of possession of this [paper] to any person is not to be deemed a transfer of any of the author's proprietary rights herein.
98 *See* note 16 *infra*.
99 169 F. Supp. 880, 882 (S.D.N.Y. 1959). *See also* Dieckhaus v. Twentieth Century Fox Film Corp., 54 F. Supp. 425 (E.D. Pa. 1944).

the potential benefits against the possible detriment in asserting a claim of copyright. Thus, the "legal" problems of student authors may well be more conducive to resolution in an institutional than a judicial setting.

C. *The Student Author's Protectible Copyright Interest*

Assuming that the student author has preserved intact the common law copyright in his unpublished work, remaining issues relate to the precise nature of the student's protectible copyright interest. Common law copyright will afford, at a minimum, the same scope of protection as statutory copyright.[100] However, the question of what, if any, additional rights are granted under the common law is not so easily answered. In light of the problems faced by the student author, the focus is on whether any use that is less than an infringing use will be actionable under common law copyright. Does the common law copyright prohibit "any unauthorized use" in the broadest sense of that term, or does it merely prevent unauthorized copying and publication of a protected work? Before addressing these specific questions, it is necessary to briefly consider three basic concepts in the law of copyright.

1. Publication

The concept of "publication" is fundamental to the law of copyright.[101] Publication provides the dividing line between common law and statutory copyright. It is the act by which an author divests himself of common law copyright; furthermore, publication with notice invests the statutory copyright.[102] However, as was stated in *American Visuals Corp. v. Holland,*[103] "[i]t is . . . perfectly clear that the word 'publication' does not have the same legal meaning in all contexts." As Judge Frank suggested in *American Visuals,* analysis of the cases reveals that the act of "publication" that will divest an author of the common law right on the one hand, is not the same act of "publication" that will invest the statutory right on the other; "[i]n each case the courts appear to treat the concept of 'publication' as to prevent piracy."[104] Courts seek either to maintain intact the common law rights, or to establish the statutory copyright, whichever will serve to protect the literary property of authors. This result-oriented approach has tended to produce inconsistent standards of publication: a minimal act of dissemination will invest the statutory right, whereas a general and open dissemination is required before the author will be divested of his common law copy-

100 This property in unpublished works raises rights then, which are at least co-extensive with the rights commanded under the Copyright Act except to the extent that statutory rights may be exercised after as well as prior to publication.
1 NIMMER, *supra* note 64, § 111 at 454, citing *inter alia,* Echevarria v. Warner Brothers Pictures, Inc., 12 F. Supp. 632 (S.D. Cal. 1935).

101 *See* notes 10-28 *supra* and accompanying text.

102 *See* American Visuals v. Holland, 239 F.2d 740 (2d Cir. 1956), for the seminal discussion of investive and divestive publication. *See also* Cary, *supra* note 68. *But see* 1 NIMMER, *supra* note 64, § 58.2.

103 239 F.2d 740, 743 (2d Cir. 1956).

104 *Id.* at 744. *Compare* Werckmeister v. Pierce & Bushnell Mfg. Co., 72 F. 54 (1st Cir. 1896) *with* Werckmeister v. American Lithographic Co., 134 F. 321 (2d Cir. 1904), where exhibition of a painting was treated as investive but not divestive publication.

right.[105]

2. Infringement

In strict copyright terms, a person is considered a "pirate" when he has infringed a protected work. The court in *Oneida, Ltd. v. National Silver Co.*[106] explained as follows:

> Where a person gifted with genius and imagination has by industry produced something attractive and interesting to the general public, which has a commercial or monetary value, there is always a temptation to persons of lesser qualities to imitate and exploit it to their own profit. In books or plays such imitative acts are called plagiarism; in commercial art or design it is called piracy; in general it is given the colloquial term "chiseling."

Infringement, which is also termed "plagiarism,"[107] is an unpermitted copying of a work protected under copyright.[108] Plagiarism, in copyright law, is not merely an exact, word for word copying of a protected work. The more expansive copyright view of what constitutes a "copy" is based upon practical realities.

> It is of course essential to any protection of literary property, whether at common law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.[109]

As was explained further in *Cantor v. Mandiewicz:*[110]

> It is of course true that copying, as construed in the law of plagiarism, is not confined to a literary repetition, but includes various ways in which the matter in any publication may be adopted, imitated or transferred, with more or less colorable alterations to disguise the piracy.

The threshold test of infringement is whether there is a substantial similarity between the protected work and the purported copy.[111] The inquiry and evaluation are both quantitative (as to substantiality) and qualitative (as to the issue of similarity). Where the challenged act consists of liberal paraphrasing or failure to attribute, as opposed to literal and exact copying of a work, the question of

105 *See* cases cited note 104 *supra*. *See generally* American Visuals v. Holland, 239 F.2d at 742-44; Cary, *supra* note 9; and, 1 NIMMER, *supra* note 64, §§ 46-50, 58-59.

106 25 N.Y.S.2d 271, 275 (1940).

107 *See* Herwitz v. National Broadcasting Co., Inc., 210 F. Supp. 231, 235 (S.D.N.Y. 1962), where it was stated, "[i]nfringement of a common law copyright is a tort, commonly called plagiarism."

108 *See generally* 2 NIMMER, *supra* note 64, §§ 141-43.

109 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). The *Nichols* court indicated that the decision as to substantiality is more troublesome when "the plagiarist does not take out a block in situ, but an abstract of the whole . . . ." *Id.*

110 203 N.Y.S.2d 626, 628 (Sup. Ct. 1960).

111 Perris v. Hexamer, 99 U.S. 674, 675-76 (1878), "to infringe [copyright] a substantial copy of the whole or of a material part must be produced." *See also* O'Rourke v. R.K.O. Radio Pictures, 44 F. Supp. 480, 482 (D. Mass. 1942), where it was said that "it is not necessary to exactly duplicate another's literary work to be liable for plagiarism, it being sufficient if an unfair use of such work is made by the lifting of a substantial portion of it." And *see* Kustoff v. Chaplin, 120 F.2d 551, 560 (9th Cir. 1941), and cases there cited.

infringement becomes a difficult one to answer.[112] The issue is further complicated in that ideas, themselves, are not protectible. This was explained in *Stowe v. Thomas:*[113]

> The claim of literary property . . . cannot be in the ideas, sentiments, or the creations of the imagination of the poet or novelist as dissevered from the language, idiom, style, or the outward semblance and exhibition of them. His exclusive property . . . cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them.

Thus, the issue of infringement can be stated as follows: Has the author's expression been appropriated, through concrete and identifiable paraphrasing (an infringement), or did the alleged pirate merely take the author's "ideas" and express them in his own words (no infringement)? Unless there is a significant and marked similarity between the protected work and the purported copy, courts will not treat the appropriation as an actionable *statutory* copyright infringement.[114]

3. Fair Use

The doctrine of "fair use" limits the monopoly granted an author under copyright; it has been characterized as "the most troublesome [issue] in the whole law of copyright."[115] "Fair use" is generally a defense to an action for copyright infringement, whereby the defendant attempts to justify his appropriation of the author's work as a permissible fair use.[116] It has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner of the copyright."[117] The importance of the doctrine cannot be overstated, inasmuch as the issue "what is a fair use" poses essentially the same question as "what is the extent of the monopoly afforded by copyright?"[118] Unfortunately, this term has been used in at least three distinct conceptual contexts.[119] First, courts have treated fair use as a technical infringement that is permitted,

112 *See* Twentieth Century-Fox Film Corp. v. Stoneifer, 140 F.2d 579, 582 (9th Cir. 1944), where it is stated that "literal or complete appropriation of the protected property rarely occurs."

113 23 F. Cas. 201, 206 (No. 13,514) (C.C.E.D. Pa. 1853).

114 See Yankwich, *Legal Protection of Ideas—A Judge's Approach,* 43 VA. L. REV. 375 (1957); 2 NIMMER, *supra* note 64, §§ 168 *et seq.* *See also* notes 115-50 and accompanying text for the complete discussion of the doctrine of fair use as it applies to common law copyright.

115 Dellar v. Samuel Goldwyn Inc., 104 F.2d 661, 662 (2d Cir. 1939).

116 *See* 2 NIMMER, *supra* note 64, § 145.

117 BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944), quoted in Study No. 14, *infra* note 118, at 5.

118 *See generally* LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86th Cong., 2d Sess. 1961 [hereinafter cited as Study No. 14]; 2 NIMMER, *supra* note 64, § 145.

119 *See generally,* Study No. 14, *supra* note 118, at 6-7; 2 NIMMER, *supra* note 64, § 145 at 643-45.

nevertheless, because of some overriding copyright policy.[120] Second, the term has been employed to refer to a use of unprotected matter in a copyrighted work, such as the theme or ideas.[121] And third, the term "fair use" has been employed in situations where the appropriation of protected matter did not amount to the threshold standard of substantial similarity.[122] One commentator has declared that this type of threefold distinction has no practical significance.[123] Nevertheless, this interchangeable use of the term creates not only conceptual problems, but difficulties in applying the doctrine of fair use in the area of common law copyright.

A compendium of the many cases applying the doctrine reveals more than mere imprecision.[124] In particular, it reveals that there is considerable confusion regarding the nature and outer limits of the fair use doctrine, and whether there is such a thing as a "fair use" of a common law copyright. Two somewhat contradictory positions have emerged regarding the full extent of the protections afforded by common law copyright. It has been suggested, on the one hand, that an author has the right to exclusive use of his work, which includes the power to prevent any unauthorized use of that production.[125] Conversely, it has been urged that the common law copyright gives the author a right to first publication, and that the only preventable uses are those which usurp that right.[126] In practice, the disparity between these two polar positions is remarkable. It is the difference between being able to prevent any use of the work for whatever purpose, and being obliged to allow an unauthorized user to appropriate and disseminate the work as if he were the true owner. As regards this second position, the user is allowed to utilize and disseminate the work as long as he does not cause a general publication of the work.[127] This limitation is untenable for two reasons. First, it is directly contrary to the copyright policy of courts which tends to define publication so as to prevent piracy.[128] Furthermore, its effect is to permit the author no greater control over his work than a stranger who is careful enough not to cause a divestive publication. The essential flaw here is that

120 *See* Study No. 14, *supra* note 118, at 10-11, for a discussion of the applicability of fair use in the area of scholarly works and compilations. *See also* Mathews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943); and cases cited 2 NIMMER, *supra* note 64, § 145 at 648.1 n.194.

121 *See* Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533, 537 (2d Cir. 1938), where it was stated that, "[f]air use is defined as copying the theme or ideas rather than their expression." *See also* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), *cert. denied,* 298 U.S. 669 (1936).

122 In copyright infringement cases . . . the problem before the Court is concrete and specific in each case to determine from all the facts in evidence whether there has been a *substantial taking* from an original and copyrighted property, and *therefore an unfair use* of the protected work.

Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1944) (emphasis added).

123 Cohen, *Fair Use in the Law of Copyright,* ASCAP SIXTH COPYRIGHT LAW SYMPOSIUM 43, 46 (1955).

124 *See, e.g.,* cases cited in notes 120-22 *supra.*

125 *See* Study No. 29 at 4; 1 NIMMER, *supra* note 64, § 111 at 455.

126 *See, e.g.,* Estate of Hemingway v. Random House, Inc., 53 Misc. 2d 462, 464-71, 279 N.Y.S.2d 51, 54-61 (Sup. Ct. 1967), *aff'd on other grounds,* 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968). Note that the Appellate Division did not incorporate into its affirmance the Supreme Court's treatment of this issue.

127 *Id.* at 464, 279 N.Y.S.2d at 55, citing in support of this position White v. Kimmel, 193 F.2d 744 (9th Cir. 1952).

128 *See* notes 102-03, *supra* and accompanying text; see also cases cited note 104 *supra.*

it is well settled that only the author or an authorized person can cause a publication divesting the common law copyright.[129]

In any event, commentators have for the most part agreed on the first position, that the doctrine of fair use has no application in the area of common law copyright.[130] This view is misleading, since it is unclear what is meant precisely by the term "fair use." Does this mean that insubstantial uses of works protected under common law copyright are not permitted? Does it mean that the ideas or theme underlying the work, which normally are not protected, are absolutely protected under common law copyright? Or, does it simply mean that those technical infringements usually permitted as a "fair use" because of their scientific, historical, or educational purpose, or because the infringing use would not diminish the potential market for the author's work, are not allowed under common law copyright? Unfortunately, the legal commentaries provide no answers, except insofar as it is concluded, without convincing citation, explanation or logical justification, that "any unauthorized use of the work is an infringement."[131] In fact, one prominent writer has asserted that there are "no cases squarely so holding, while some by implication deny this proposition."[132]

In the earlier American cases, common law copyright was often referred to as the "right of first publication."[133] This terminology appears to have sprung from the belief that the author's ownership of his literary property was absolute and exclusive until the work was published.[134] Accordingly, the author was regarded as having a wide degree of choice as to the use to which the work could be put: he could keep the work in his exclusive possession, he could cause a "limited publication" of the work, or he could prevent an unauthorized general publication of the work. This view is represented in *Frohman v. Ferris:*[135]

> At common law the author of a literary composition had an absolute property right in his production which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it.

An excellent example of a case in which the common law right was described as the right of first publication is *Palmer v. De Witt.*[136] Quoting from the English

129 *See* note 75 *supra.*

130 *See* 1 NIMMER, *supra* note 64, § 111 at 455-56; Study No. 29, *supra* note 1 at 4; Wilson, *supra* note 64, at 105, 113; Fisher, *Privilege of Using Public and Private Manuscripts in the Production of Art,* U. CHICAGO CONF. ON THE ARTS, PUBLISHING, AND THE LAW 113 (1952) [hereinafter cited as *Fisher*].

131 *See* Study No. 29, *supra* note 1, at 4; 1 NIMMER, *supra* note 64, § 111 at 455. *See also* note 130 *supra. But see* note 132 *infra.*

132 2 NIMMER, *supra* note 64, § 145 at 643 n.172 (and supplement).

133 "The right to make copies before publication and the right of first publication are common law rights." Werckmeister v. American Lithograph Co., 134 F. 321, 324 (2d Cir. 1904). *See also* Pushman v. New York Graphic Soc., 287 N.Y. 302, 307, 39 N.E.2d 249, 250-51 (1942); Palmer v. De Witt, 47 N.Y. 532, 537 (1872). The pertinent excerpt from *Palmer* appears in text at note 138 *infra.*

134 *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, n.1 (1834).

135 Frohman v. Ferris, 238 Ill. 430, 435, 87 N.E. 327, 328 (1909); *aff'd,* 223 U.S. 424 (1912). *See also* Taft v. Smith, Gray & Co., 76 Misc. 283, 286, 134 N.Y.S. 1011, 1013 (1912), where the court stated that "before publication the right of the producer is absolute." And *see,* Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912).

136 47 N.Y. 532 (1872), cited as authority in Wheaton v. Peters, 33 U.S. (8 Pet.) at 591 n.1.

case of *Millar v. Taylor*,[137] the *Palmer* court stated:

> [T]he manuscript is, in every sense, his [the author's] peculiar property, and no man may take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property; and as every author or proprietor has a right to determine whether he will publish it or not, *he has a right to first publication* and whoever deprives him of that priority is guilty of a manifest wrong, and the courts have a right to stop it.[138]

The court in *Palmer* was apparently moved to extend this veil of protection over the unpublished work because it viewed the author's property in his manuscript as indistinguishable from other personal property: "[T]he right to literary property is as sacred as other species of property."[139] In the more recent case of *Fender v. Morosco*,[140] the court engaged in rather interesting postulation regarding the author's common law rights:

> We are not now considering whether the defendant . . . made a fair use of plaintiff's play. Since plaintiff had not published or produced her play, *perhaps any use* that others made of it might be unfair. Perhaps a wrong was committed if the defendant . . . even read the play. This action is not brought to redress such wrong. We consider only whether the defendants have appropriated the plaintiff's literary property.

Perhaps most directly on point is the statement in *Stanley v. Columbia Broadcasting System, Inc.*:[141]

> The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, . . . while a statutory copyright permits a "fair use" of the copyrighted publication, without deeming it an infringement.

These cases are not definitive, however, regarding the extent of the author's protectible copyright interest under the common law. The confusion in the area largely results from two factors. First, it must be recognized that § 2 of the Copyright Act[142] is merely a "savings clause," reserving to the states the right to maintain the law of common law copyright in unpublished works.[143] That section reads as follows:[144]

> Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, *or use of such unpublished work* without his consent, and to obtain damages therefor.

137 98 Eng. Rep. 201 (K.B. 1769).
138 47 N.Y. 532, 536-37 (1872) (emphasis added).
139 *Id.* at 539.
140 253 N.Y. 281, 291, 171 N.E. 56, 59 (1930) (emphasis added) (opinion by Lehman, J.).
141 35 Cal. 2d 653, 661, 221 P.2d 73, 78 (1950). *See also* McCarter v. Barton Music Corp., 115 U.S.P.Q. 299 (N.Y. Sup. Ct. 1957); Cantor v. Mankiewicz, 203 N.Y.S.2d 626, 628 (Sup. Ct. 1960), where it was stated that "the common law prohibits any unauthorized use of . . . [the unpublished work, based upon] . . . plaintiff's exclusive right to possess, use, and dispose of her literary property."
142 17 U.S.C. § 2 (1970).
143 Study No. 29, *supra* note 1, at 3.
144 17 U.S.C. § 2 (1970) (emphasis added).

In some cases it appears that courts have misconstrued this section by reading into it more than was plainly intended. For example, in the case of *McCarter v. Barton Music Corp.*,[145] the court refers to the common law right as "the right to prevent copying, publication or use of any . . . unpublished composition without first having obtained the consent of the owner or author." As should be apparent, this phrase "copying, publication or use" is the precise language employed in § 2 of the Copyright Act. But note that § 2 does not create a substantive right; it merely leaves intact the state law that had provided common law copyright in the first instance. The question of whether an author could prevent "any unauthorized use" was and remains a matter of state law.

Second, there is the problem of ascertaining the precise meaning of the phrase "any unauthorized use." While early cases treated literary property as a form of personal property, there was, even then, a recognition of the peculiar aspects of literary property.[146] Use of literary property, such as manuscripts and books, is quite different from use of other personal property, such as a bicycle or a table. As applied to literary property, the term "use" includes many activities ranging from a mere reading of a manuscript,[147] to a minimal amount of appropriation,[148] to exact replication of the protected work.[149] The final question, therefore, is whether common law copyright will reach out to prevent a mere reading of a manuscript or an insubstantial taking, because the author does not see fit to authorize that use. Or do public interest/copyright policy considerations mandate at least a minimum of access to and dissemination of the contents of these "protected" works?

Again, neither commentators nor courts clearly define the extent of the author's protectible interest, and neither squarely answer the question whether the doctrine of fair use should apply to common law copyrighted works. Review of case law leads to the obvious conclusion that wholesale pirating of student work protected under common law copyright will be treated as an actionable infringement, much the same way as it is treated under federal statute: minimal types of use of these same student works will likely be permitted. This includes such uses as reading the work and "insubstantial takings" of the unpublished material.[150] This suggestion recognizes that courts are generally loath to prevent the use of protected material when it will be in the public interest to provide increased accessibility and dissemination, and when the proprietary interest of the author is not irrevocably impaired. In the last analysis, the fair use doctrine may indeed apply in the area of common law copyright, but with one special twist. In

145 115 U.S.P.Q. 299 (N.Y. Sup. Ct. 1957).

146 *See* notes 3-7 *supra* and accompanying text; consider especially the case of Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912), which is excerpted in text accompanying note 7 *supra*.

147 Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912); Fender v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930).

148 This would encompass copying that is either substantial, or a use that will not constitute copying because of a lack of similarity. *See* notes 111-114 and accompanying text.

149 Although wholesale appropriation of a protected work is most often considered an actionable infringement, the defense of fair use may transmute that act into a permissible taking. *See* notes 115-50 *supra*.

150 *See* Fisher, *supra* note 130, at 113:

> While it is sometimes said that the courts have developed no doctrine of fair use of common law literary property, it is hardly likely that any tribunal would hold the mere private reading of such property an infringement.

balancing the public interest against the author's monopoly, the court will have to consider the potential detriment to the value of the author's work that is posed by permitting even limited uses of the work.

IV. Conclusion: Toward an Institutional Settlement

Any consideration of the copyright problems of students must clearly acknowledge a very practical distinction between the student and the professional scholar. The student is not an independent author-entrepreneur, but is in a sense a "captive" of the academic institution. Once matriculated, he must pay tuition and abide by rigid rules of academic conduct, all with the ultimate hope of securing an academic degree. It is in some senses a by-product of the student's academic endeavors that he produces copyrightable material.

Although the copyright issues discussed herein are undeniably legal in scope, it is clear that an administrative or institutional forum is more appropriate for dispute settlement than the legal process. The establishment of a university policy regarding student copyright protection could prevent many disputes from arising in the first instance. Making available to students and staff comprehensible information on copyright law is a necessary concomitant of such a university copyright policy. Furthermore, formal procedures for dealing with violations of the university rules would also be required. This plan envisions the adoption of a code of conduct applicable to the entire academic community—students and faculty alike. These procedures would ameliorate the ironic situation present on many university campuses: strict disciplinary codes of academic conduct apply to acts of plagiarism by students (and are enforced), while faculty are somehow immune from application of the same or a similar standard.

Until such guidelines are established, the student author should consider the copyright questions of whether and how to protect literary property. Because the legal issues regarding student copyright cannot be answered with certainty, and because actual dispute resolution will most likely depend on the peculiar facts involved in each case, the following guide is offered to assist on deciding the questions of whether and how to secure copyright.

A. Ascertain whether the particular work has a present "value" or is worth protecting for the future. If it does, then

B. Make some determination whether the work will be published. Remember that unpublished works are protected by common law copyright, but published works must appear with statutory notice.

C. Ensure that copyright has been reserved, if and when necessary. This means notification of your reservation of common law right if the work is to remain unpublished; if the work will be disseminated to a large group of persons, it must appear with proper notice to invest statutory copyright.

Where the student wants to guarantee that copyright will apply to an especially valuable work, competent legal counsel should be obtained.

Ultimately, the fundamental question in the law of copyright is "[h]ow to balance the rights of the creative author and his incentive to continued production against those of users and the public interest."[151] As was said in the early English case of *Sayre v. Moore:*[152]

> We must take care to guard against two extremes, equally prejudicial: the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts retarded.

Student authors face a number of difficult problems with regard to obtaining and preserving copyright in their literary works. Whether the student will be able to protect his literary property in a given situation will, as with other authors, depend upon a balancing of personal property rights against the public's interest in the free dissemination of intellectual productions. In many situations, the best protection for which the student can hope is truthful attribution of the work—compelling the use of his name as the true author. But whatever the result in the specific case, students should continue to be reminded that copyright is a valuable property interest that ought not to be disregarded.[153]

151 *Id.* at 115.

152 102 Eng. Rep. 139 (K.B. 1785).

153 [I]n most cases the only thing of value resulting from an author's tangible creative work is the intangible copyright. Copyright is a valuable property right, and should not be treated lightly. . . . Only by securing to authors the exclusive rights to their respective writings can constitutional purpose be attained—the promotion of the progress of the arts.
Caterini, *Contribution to Periodicals,* ASCAP TENTH COPYRIGHT LAW SYMPOSIUM 321, 385-86 (1959).