FIDUCIARY DUTIES IN ACADEMIA: AN UPHILL BATTLE

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I. INTRODUCTION

Generally speaking, there is an absence of accountability concerning the handling of intellectual property rights to works created by students in academic

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settings. As a result, a problem exists with professors misappropriating and misusing student inventions or works of authorship. This lack of accountability is a result of unwillingness or reluctance on the part of government and educational institutions to acknowledge the existence of fiduciary duties arising from the student-professor relationship.

In academia, students may fall prey to opportunistic and unscrupulous professors using their positions of power and influence to usurp and convert their students' work. Similarly, faculty may mishandle their students' work-product due to mere ignorance of intellectual property rights or a lack of academic conduct standards that impose fiduciary duties in student-professor relationships.

Perhaps most instances of faculty mishandling and misappropriation of student intellectual property are never addressed by students. However, when victimized students are unable to find recourse within an educational institution, some address their predicament by resorting to legal action. An increasing number of lawsuits by students claiming intellectual property misappropriation have resulted in high-profile court battles against educational institutions and professors.

According to a 2005 posting on an Internet advice column, a California student accused a professor, who was not his faculty advisor, of using portions of his thesis in a patent application.[1] According to the student, he became aware of the misappropriation when he read the professor's published patent, which contained large sections of text from the student's thesis work and subsequent papers.[2] The student claimed he never gave permission for the professor to use his work.[3]

According to the student, after almost two years of investigation, the university finally admitted that both the patent application and the actual patent contained plagiarized work.[4] The student claimed that the university blamed their Research Office and the attorney who wrote the patent application and classified the incident merely as a technical error.[5] Even though the university took responsibility, the student claimed he still felt violated but was unsure of his actual legal remedies.[6]

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1 Posting of Recent-phd to FreeAdvice, http://forum.freeadvice.com/showthread.php?t=241913 (Apr. 30, 2005, 20:57 EST).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

This story reflects a reality faced by students at institutions of higher education in the United States. What mechanisms and measures need to be implemented to deter faculty misappropriation and misuse of students' work-product? Furthermore, what is the root of the problem?

II. PLAGIARISM AND THEFT OF INTELLECTUAL PROPERTY

The term *plagiarism* has Latin roots: *plagiarius* means kidnapper and abductor, and to *plagiare* is to steal, kidnap, or abduct.[7] As described by the American Historical Association, plagiarism is "the expropriation of another author's work, and the presentation of it as one's own . . . ."[8] In academia, plagiarism is generally defined as an act of "stealing and passing off (the ideas or words of another) as one's own," "us[ing] (another's created production) without crediting the source," or "present[ing] as new and original an idea or product derived from an existing source."[9] Plagiarism is generally viewed as an ethical issue, though there are some civil legal remedies.[10] There are also criminal penalties for certain intellectual property violations, yet acts of plagiarism seem forgotten in our penal codes.[11] Intellectual property is without a doubt an essential asset to the United States and the world, and significant creation and conception initially takes place in higher education. As one court pointed out, "[t]he future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property."[12]

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7 Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 516–17 (1992).

8 Am. Historical Ass'n, Statement on Standards of Professional Conduct § 4 (adopted by Council on Jan. 6, 2005), *available at* http://www.historians.org/pubs/free/professionalstandards.cfm.

9 Webster's Third New International Dictionary 1728 (2002).

10 Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 200–205 (2002) (discussing the overlap between plagiarism and both copyright infringement and unfair competition laws).

11 *See* 17 U.S.C. § 506(a) (2006) (federal criminal copyright infringement); 18 U.S.C. § 1831 (2006) (federal criminal penalties for economic espionage committed for the benefit of a foreign entity); 18 U.S.C. § 1832 (2006) (federal criminal penalties for conversion of a trade secret related to products produced or placed in interstate commerce); 18 U.S.C. § 2319 (2006) (defining punishment and penalties for violations of 17 U.S.C. § 506(a)); 18 U.S.C. § 2320 (2006) (federal criminal penalties for use of counterfeit marks in connection with goods or services).

12 Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 180 (7th Cir. 1991).

Nevertheless, specifically as it relates to students, legal protection against misappropriation of work in academia is deficient. Even though there are criminal penalties against copyright infringement, theft of trade secrets, and counterfeiting,[13] criminal protections against plagiarism and patent infringement are lacking.[14]

Steps need to be taken to establish fiduciary duties in student-professor relationships and criminalize the misappropriation of intellectual property.

III. INTELLECTUAL PROPERTY RIGHTS IN ACADEMIA

The administration and management of intellectual property at the university level is governed by institutional polices, guidelines, and common practices. Thus, it is essential to understand the differential treatment of students as it relates to the ownership of intellectual property in academia and to review a sampling of university intellectual property polices.

A. Student Ownership of Intellectual Property

Due to employment and co-authorship arrangements, graduate students may be more aware of their rights than undergraduate students. However, as will be discussed further, even when these contractual measures are in place, disputes between students and faculty and/or students and the university still arise. These disputes may spawn from conflicts of interest, lack of acknowledgment of fiduciary duties arising from student-faculty relationships, and faculty ignorance of intellectual property ownership principles.

A discussion of the flawed implementation and administration of intellectual property policies relating to undergraduate students at universities is available in an article published by the Kansas Journal of Law and Public Policy.[15] According to the authors, regardless of the increasing use of undergraduate students as research assistants, "many universities do not ask undergraduate researchers to sign agreements allocating intellectual property rights."[16] The

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13 *See* 17 U.S.C. § 506(a); 18 U.S.C. §§ 1831–32, 2319–20.

14 "[M]isuse of intellectual property has not been criminalized. For example, infringement of a patent is not generally a criminal violation." Int'l Trade Ass'n, Intellectual Property, What is It?, http://www.stopfakes.gov/sf_what.asp (last visited Apr. 28, 2008).

15 K. J. Nordheden & M. H. Hoeflich, *Undergraduate Research & Intellectual Property Rights*, 6 KAN. J.L. & PUB. POL'Y 34, 35–39 (1997).

16 *Id.* at 36.

authors based their statement on their knowledge of practices at the University of Kansas and the University of Illinois.[17]

B. Sampling of University Intellectual Property Policies

There are several factors stated in university policies that determine the ownership of intellectual property in an academia. Tufts University, in an effort to encourage and promote creativity and invention among its faculty, students, and staff, has a policy intended to "provide for incentives that foster creative activity, and to help assure that any intellectual property produced will be exploited for the benefit of the creators, the University research enterprise, and the public."[18] The Tufts University policy on intellectual property applies to all university personnel.[19] Interestingly, university personnel, among other people, "refers to . . . students . . . whether compensated by the University or not."[20] Furthermore, students "are covered to the extent that their creative work involves the use of University resources such as space, facilities, equipment, staff, or funds . . . for both patentable and copyrightable material."[21] Tufts University also imposes a requirement that everyone in the University community abide by its intellectual property policy, stating that "[a]s a condition of affiliation with the University, members of the University community are bound by all University policies, including this one."[22]

According to the Tufts University policy, the scope of "copyrightable intellectual property" includes all creative works, including electronic or paper documents, as long as University resources were used for their creation.[23] Under the Tufts University policy guidelines, only faculty are specifically compelled to disclose to the University any copyrightable work, assuming the work was developed under certain qualifying conditions.[24] However, faculty members are

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17 *Id.* at n.26.

18 Tufts Univ., Policy on Rights and Responsibilities with Respect to Intellectual Property, http://techtransfer.tufts.edu/?pid=13&c=40 (last visited Feb. 8, 2008) [hereinafter Tufts Univ. Policy].

19 *Id.*

20 *Id.*

21 *Id.* University personnel also includes all faculty, administrators, office and technical staff, visitors, contractors, consultants and all others whose primary work affiliation is with the University. *Id.*

22 *Id.*

23 *Id.*

24 *Id.* Qualifying conditions include any of the following circumstances:

encouraged to disclose any copyrightable work that may have *commercial value* if the faculty member wishes assistance in registration and marketing in exchange for sharing of profits with the University.[25] Finally, the Tufts University Office of the Vice Provost is in charge of handling any and all disputes and regulations when it comes to the administration of intellectual property at the University.[26]

This internal practice not only introduces a serious conflict of interest between a student and the university, it also hinders arm's length transactions between them. That is, a conflict of interest arises when a dispute between a student and the university is mediated by the same university having an interest in the dispute. Educational institutions are not solely to blame for this practice. The reality is that some courts require students to exhaust all university administrative remedies before taking legal recourse outside of the university.[27]

Institutional remuneration is another key factor that impacts the ownership rights to intellectual property created by students. The University of Colorado policy states that the University has an ownership claim on discoveries created by a student, if the student received remuneration from the University (i.e. salaries, scholarships, fellowships, etc.) and the discovery was related to his/her remunerated research.[28]

> [1.] Development was funded as part of an externally sponsored research program under an agreement which allocates rights to the University. [2.] A faculty member was assigned, directed, or specifically funded by the University to develop the material, or the University has negotiated an understanding or formal contract with the creator. [3.] Material was developed by administrators or other non-faculty employees in the course of employment duties and constitutes work for hire under US law. [4.] The material was developed with extraordinary or substantially more use of University resources than would normally be provided for the creator's employment duties. This might occur as disproportionate use of staff time, networks, equipment, or direct funding.

Id.

25 *Id.*

26 *Id.*

27 Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 169 (2002) (commenting on Montalvo v. Univ. of Miami, 705 So. 2d 1042 (Fla. Dist. Ct. App. 1988)).

28 *See* Univ. of Colo., Office of the Vice President for Academic Affairs & Research, Intellectual Property Policy on Disclosures and Patents for Their Protection and Commercialization 2 (Jan. 16, 2003), *available at* https://www.cu.edu/techtransfer/downloads/Administrative%20Policy%20Statement%20-%20Discoveries%20and%20Patents.pdf.

The University of Massachusetts (UMass) has similar policies regarding intellectual property.[29] The UMass policy clarifies that the "[u]se of library facilities, facilities available to the general public, and occasional use of office equipment and office staff will not ordinarily be considered 'significant use' of University facilities and equipment."[30] Additionally, the UMass policy informs its "covered individuals" of what constitutes an exempted scholarly work.[31]

Kansas State University and the University of Kansas have intellectual property policies that apply specifically to student academic creations.[32] According to the Kansas State University policy, "[t]he ownership of student works submitted in fulfillment of academic requirements will be with the student, except when the student collaborates with faculty or staff to create works as part of research or development activities."[33] Interestingly, the Kansas State University policy further establishes that "[b]y enrolling in the University, the student gives the institution a nonexclusive royalty free license to mark on, modify, and retain the work as may be required by the process of instruction."[34] Furthermore, when students receive only university support, the Kansas State University policy establishes that "the data and other scholarly information collected as a result of the student academic creation will remain the property of Kansas State University and will reside physically at the University."[35]

In contrast to these restrictive policies, Clemson University may offer the most comprehensive and student-friendly patent and research ethics policies in higher education.[36] The University's patent policy, which covers students, faculty, and staff, balances converging interests fairly among all parties involved.[37] The University accomplishes this by providing clear notice of its

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29 Univ. of Mass., Intellectual Property Policy, http://www.umass.edu/research/intelfac.html (Apr. 2, 1997) [hereinafter UMass IP Policy].

30 *Id.* § III(B)(1).

31 *Id.* § I.

32 Kan. State Univ., University Handbook, Appendix R: Intellectual Property Policy and Institutional Procedures (May 15, 2002), http://www.k-state.edu/academicpersonnel/fhbook/fhxr.html [hereinafter Kan. State IP Policy]; Univ. of Kan., Intellectual Property Policy (May 15, 2001), https://documents.ku.edu/policies/provost/IntellectualPropertyPolicy.htm [hereinafter Univ. of Kan. IP Policy].

33 Kan. State IP Policy, *supra* note 32, § I(E).

34 *Id.*

35 *Id.*

36 *See* Clemson Univ., Clemson University Patent Policy (July 12, 1991), http://www.clemson.edu/research/ottSite/ottPolicies_patent.htm [hereinafter Clemson Patent Policy]; Clemson Univ., Policy on Research Ethics (May 10, 2000) [hereinafter Clemson Ethics Policy].

37 *See* Clemson Patent Policy, *supra* note 36.

rights in "inventions . . . that are conceived or first actually reduced to practice as a part of or as a direct result of: (a) University research; (b) activities within the scope of the inventor's employment by, or in official association with, the University; and (c) activities involving the use of University information not available to the public, or funds administered by the University."[38]

The main objectives of Clemson University's patent policy are, "encouraging research and scholarship . . . while recognizing that commercially viable inventions may result from such endeavors."[39] In addition, Clemson University "encourage[s] inventors to report discoveries with patent potential and to assist them, while at the same time safeguarding the interests of all concerned parties."[40] Notwithstanding its altruistic aims, Clemson University still wants "to make inventions developed in the course of University research available to the public under conditions that promote their effective utilization and development."[41]

The Clemson University Research Ethics Policy preamble clearly establishes that "[r]esearch institutions have a critical responsibility to provide an environment that promotes integrity, while at the same time encouraging openness and creativity among scholars."[42] Clemson University reproaches misconduct, such as "plagiarism," "misappropriation of others' ideas," "conflicts of interest," "misuse of position as researcher for personal gain", and "[e]xploitation . . . of students, or other persons, for research purposes."[43] Further, Clemson requires that "[c]harges must be filed within seven years of the date on which the event in question occurred."[44] This provision provides a fair statute of limitations for filing a research misconduct grievance.

Even though Clemson's patent and research ethics policies are some of the best in addressing patent rights in academia, neither of its policies mentions fiduciary duties between the students and the faculty and/or the University. Thus, an aggrieved student's only potential remedy is through a breach of contract claim filed under South Carolina law.[45]

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38 *Id.* § III.

39 *Id.* § II.

40 *Id.*

41 *Id.*

42 Clemson Ethics Policy, *supra* note 36, at 1.

43 *Id.* ar 2.

44 *Id.* at 3.

45 *See generally*, Hendricks v. Clemson Univ., 578 S.E.2d 711 (S.C. 2003) (student sued Clemson University for breach of contract in state court).

Even though intellectual property policies are prominent in academia, some universities fail to notify students of their policies. Therefore, students may engage in research activities at universities without knowing the extent of their intellectual property rights.

IV. THE EXISTENCE OF FIDUCIARY DUTIES IN ACADEMIA AND THE RELUCTANCE TO ACKNOWLEDGE THEM

Chief Judge Cardozo, while sitting on the Court of Appeals of New York, espoused perhaps the most famous description of fiduciary duties:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[46]

A fiduciary duty arises when a person assumes "a duty to act for someone else's benefit, while subordinating one's own personal interests to that of the other person."[47] Furthermore:

> Mere respect for the judgment of another or trust in his character is not enough to constitute such a relation. There must be such circumstances as indicate a just foundation for a belief that in giving advice or presenting arguments one is acting not in his own behalf, but in the interests of the other party.[48]

Moreover, there are certain basic elements and requirements of fiduciary relationships. As stated by the court in *Emerik v. Mutual Benefit Life Insurance Co.*,[49] the elements of a fiduciary duty are:

> (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party

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46 Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

47 Elmore v. State Farm Mut. Auto. Ins. Co., 504 S.E.2d 893, 898 (W. Va. 1998) (quoting BLACK'S LAW DICTIONARY 625 (6th ed. 1990)).

48 Comstock v. Livingston, 97 N.E. 106, 108 (Mass. 1912).

49 756 S.W.2d 513 (Mo. 1988).

> by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.[50]

These fiduciary duty elements are present in academia. For example, when it comes to traditional student-professor relationships the following is generally true: (1) the student is subservient to the will and power of the dominant mind of the professor; (2) the professor possesses the final say when it comes to the student's grade and education; (3) for education to flourish, the student must surrender intellectual independence in order to gain the knowledge imparted by the professor; (4) the teaching process requires a manipulation of the thoughts and actions of the student by the professor; and (5) in order for the student to truly acquire knowledge and understanding, the student must place trust in the professor. Accordingly, a possible conclusion is that the student-professor relationship is that of a fiduciary. This is especially true when the professor acts as an advisor and is influential in the student's choice of academic studies.

Consider Oregon law, which defines a fiduciary duty as one that "exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence."[51] Oregon's definition of general fiduciary duties appears to be a good model for the definition of fiduciary duties in academia. The elements of a general fiduciary relationship in Oregon are inherent in every student-professor relationship. Professors, intentionally or not, are in a position of power, control, and influence over their pupils. There is an implicit, if not explicit, psychological reliance on professors to guide students in pursing their educational goals, help them grow as human beings, and shape their lives through the attainment of knowledge. Professors cannot escape this reality simply because their university fails to address explicit student-professor fiduciary duties in standard polices.

A fiduciary duty is based on a special relationship of trust between the parties.[52] In such a relationship, the party with superior knowledge and expertise owes a fiduciary duty to the other party. By this reasoning, the university and/or faculty, as the superior party, owes fiduciary duties to the students, as the inferior party, due to the trust and confidence students place in them.

There are certain relationships, such as attorney-client, doctor-patient, broker-client, and trustee-beneficiary, that are automatically considered fiduciary relationships. Other relationships may create fiduciary duties depending on

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50 *Id.* at 526–27.

51 Bird v. Lewis & Clark College, 104 F. Supp. 2d 1271, 1277 (D. Or. 2000); Starkweather v. Shaffer, 497 P.2d 358, 361 (Or. 1972).

52 *See Bird*, 104 F. Supp. 2d at 1277.

certain circumstances, but only where the beneficiary has placed a special trust in another. The determination of this "special" trust depends on state and federal law. Generally, a fiduciary relationship is determined on a case-by-case basis by comparing the facts to the elements discussed earlier.[53]

In the United States, educational institutions seem reluctant to mention "fiduciary duties" in their intellectual property polices. When fiduciary duties are mentioned in university intellectual property policies, the university usually delineates its responsibility for the appropriate use of government funds.[54] Further, the university may simply clarify that it is not a fiduciary of the creators of intellectual property.[55] For example, the Indiana University Intellectual Property Policy clearly establishes that "[t]he University does not act as a fiduciary for any Creator concerning equity interests or other nonmonetary consideration received under the terms of this Policy and no Creator shall have any interest in, or legal right to, such equity interests or nonmonetary consideration."[56] This is the only instance where "fiduciary" is mentioned in Indiana University's intellectual property policy. Likewise, the UMass policy mentions "fiduciary" only as it relates to the fiduciary obligation of confidentiality owed to the university, with respect to intellectual property.[57]

The general rule in the law is that "courts will not interfere with the purely academic decisions of a university,"[58] and that "[t]he relationship of students and universities is generally contractual rather than confidential or fiduciary."[59] Courts also share the general view that "[p]rofessors in the position of making academic decisions will not be second-guessed by the courts. Where a university acts in an arbitrary and capricious fashion or in bad faith, then courts generally have accepted review of these decisions."[60]

In Massachusetts, courts have refused to recognize fiduciary duties between students and universities. These courts have found that the relationship

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53 *See* United Teachers Assocs. Ins. Co. v. MacKeen & Bailey Inc., 99 F.3d 645, 649 (5th Cir. 1996).

54 *See e.g.*, Kan. State IP Policy, *supra* note 32; Wichita State Univ., Policies and Procedures § 9.10 (Dec. 1, 2007), *available at* http://webs.wichita.edu/inaudit/ch9_10.htm.

55 Ind. Univ., Intellectual Property Policy (May 9, 1997), *available at* http://www.research.indiana.edu/respol/intprop.html [hereinafter Indiana IP Policy].

56 *Id.*

57 UMass IP Policy, *supra* note 29.

58 Maas v. Corp. of Gonzaga Univ., 618 P.2d 106, 109 (Wash. Ct. App. 1980).

59 *Id.* at 108.

60 *Id.* at 109.

between students and universities is generally contractual rather than fiduciary.[61] Further, in 2003, the Supreme Court of South Carolina, in *Hendricks v. Clemson University*,[62] refused to recognize the existence of a fiduciary relationship between an academic advisor and a student.[63] The court stated that "[a]lthough whether a fiduciary relationship has been breached can be a question for the jury, the question of whether one should be imposed between two classes of people is a question for the court."[64] The court's position was that the "Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters."[65] Thus, the court declined "to recognize the relationship between advisor and student as a fiduciary one."[66]

Hendricks did not deal with a student's misappropriation of intellectual property. However, an argument exists to support a finding of fiduciary duties in student-professor relationships as the relationship relates to the handling of the student's intellectual property. Students routinely entrust their intellectual property to professors. And such intellectual property may have inherent financial value. The United States Supreme Court once said that "an essential distinguishing feature of any trust, at common law, was that it entailed a '*fiduciary relationship* with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.'"[67]

For some scholars, the solution for an aggrieved student is to claim a breach of the duties of good faith and fair dealing because "in the university-student relationship, good faith and fair dealing are duties courts are more likely to recognize than fiduciary duties."[68] These scholars have argued that because the professors in the "educational contract" are in a position of superiority, the students "are not completely in arm's length from the university."[69] Accordingly, one obstacle for students to prove more than a duty of good faith and fair

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61 *See, e.g.*, Morris v. Brandeis Univ., No. 01-P-1573, 2004 WL 369106, at *4 (Mass. App. Ct. Feb. 27, 2004) (unpublished).

62 578 S.E.2d 711 (S.C. 2003).

63 *Id.* at 715–16.

64 *Id.* at 715.

65 *Id.* at 716.

66 *Id.*

67 United States v. Mitchell, 445 U.S. 535, 548 (1980) (White, J dissenting) (quoting RESTATEMENT (SECOND) OF TRUSTS § 2 (1959)).

68 Weeks & Haglund, *supra* note 27 at 178.

69 *Id.*

dealing is the ability to prove a special trust relationship needed to create fiduciary duties.[70]

This "good faith and fair dealing" argument seems plausible, but it is not the proper solution to deter faculty misconduct. The argument should be that fiduciary duties are inherent in student-professor relationships. Professors will likely be more careful when dealing with students' intellectual property if they know they have a heightened duty of care in these student-professor relationships.

According to a recent law journal article, there are "two hurdles standing[ing] in the way of establishing fiduciary duties between universities and their students": the lack of *in loco parentis* status of the university in relation to the student; and the courts' reluctance to extend duties between the university and its students beyond contractual obligations.[71]

Even if the courts do not directly bind universities to students under fiduciary duties principles, universities are still vicariously liable through their professors. This approach avoids the two hurdles discussed above. The principal (university) will be vicariously responsible for the actions of its agents (professors) under agency law, as long as the agents' actions are related to their employment (teaching and advising). Fearful of vicarious liability inherent with fiduciary duties, universities should have an incentive to create stricter standards of ethical conduct for their faculty.

V. INTELLECTUAL PROPERTY DISPUTES IN HIGHER EDUCATION

Academia's struggles with technology transfer infrastructures are discussed in an article titled *Fairplay or Greed: Mandating University Responsibility Toward Student Inventors*.[72] The article specifically addresses students' struggles:

> Lost in that struggle are those who could be considered the backbone of university research: the students. Graduate and undergraduate students remain baffled by the patent assignment and technology transfer processes within their various institu-

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70 *Id.*

71 *Id.* at 155.

72 Carmen J. McCutcheon, *Fairplay or Greed: Mandating University Responsibility Toward Student Inventors*, 2003 DUKE L. & TECH. REV. 26 (2003).

> tions. Efforts should be undertaken by universities to clarify the student's position in the creative process.[73]

The above-mentioned clash of interests is common in higher education and usually results in legal disputes related to ownership, authorship, and inventorship of intellectual property.[74] For everyone involved, ownership of intellectual property equates with financial gain, while authorship and/or inventorship equates with prestige.[75] Controversies over intellectual property interests commonly arise between the faculty and students, between the university and the students, and between the faculty and the university. The disputes are usually caused by conflicts of interest, opportunism, and lack of good faith and fair dealing in arm's length transactions due to failure to impose fiduciary duties in student-teacher relationships.[76]

In a 2001 *Chronicle of Higher Education* article,[77] the author reported that a professor and a graduate student conducted a joint experiment but arrived at different interpretations of the same data.[78] The graduate student wrote an article based on the data and submitted it for publication to a journal.[79] When the professor found out about the student's submission, he successfully blocked publication of the paper on the grounds that he owned the data.[80]

In another case, a Wayne State University student sought recourse in the courts by suing her former professor for breach of fiduciary duties.[81] In her pleadings, she claimed that her professor breached fiduciary duties when he published her entrusted artwork without her permission.[82] She claimed to have given the artwork to the professor only for the purpose of selecting some color scheme.[83] Instead, he converted the entrusted artwork for his own purposes.[84]

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73 *Id.*

74 *Id.* at ¶¶ 5–6.

75 *Id.* at ¶¶ 11–13.

76 *Id.* at ¶¶ 8–9.

77 Dan Curry & D.W. Miller, *Chemistry Journal Delays Publishing Postdoc's Article at Behest of His Adviser; a Biography, Finally, for Author of 'Confederacy of Dunces'*, CHRON. OF HIGHER EDUC., June 15, 2001, *available at* http://chronicle.com/weekly/v47/i40/40a01501.htm.

78 *Id.*

79 *Id.*

80 *Id.*

81 Rainey v. Wayne State Univ., 26 F. Supp. 2d. 963, 968–69 (E.D. Mich. 1998).

82 *Id.* at 968.

83 *Id.*

84 *Id.*

In an article titled *Mentor vs. Protégé*,[85] the authors questioned professors' ethics when publishing students' works as their own.[86] The article relates the separate sagas of graduate students Dwayne D. Kirk, Caroline Phinney, Sheng-Ming Ma, and Antonia Demas when they realized that their respective mentors had stolen their work and fraudulently taken credit for their creations.[87]

After months of arduous work and extensive research, Dwayne D. Kirk published his first scholarly article. However, a year later he realized that his mentor, also Kirk's professor, had copied his paper verbatim and passed it as his own in another publication.[88] Kirk confronted the issue on authorship and plagiarism grounds and filed a grievance with Arizona State University.[89] However, as of this date, there is no evidence that the University has redressed his complaint.[90] According to Kirk, graduate students fear retribution and therefore remain silent about their grievances.[91] As the article points out, most students decide not to confront their mentors because of "the power a senior scholar can wield over a younger colleague."[92]

Even though some students decide to remain silent, others successfully fight for their interests. Carolyn R. Phinney, a psychology researcher at the University of Michigan at Ann Arbor, was able to reach a settlement with the University after years of court proceedings.[93] In her initial complaint, she successfully contended that her professor had fraudulently used her ideas to obtain a federal grant.[94]

On the other hand, Sheng Ming-Ma, a graduate student studying mathematics at Columbia University, lost his career after he alleged that his professor inappropriately tried to publish a proof that he devised.[95] His allegation got him expelled from the University and, according to one source, he is now working for a Subway sandwich establishment.[96]

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85 Thomas Bartlett & Scott Smallwood, *Mentor vs. Protégé*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at A14.

86 *Id.*

87 *Id.* at A14–A15.

88 *Id.* at A14.

89 *Id.* at A15.

90 *Id.* at A14–15.

91 *Id.* at A15.

92 *Id.* at A14.

93 *Id.* at A15.

94 *Id.*

95 *Id.*

96 *Id.*

Dr. Antonia Demas was another victim of faculty misappropriation of ideas. In an article titled, *Bitter Aftertaste*,[97] the author described the struggle she faced when confronting a popular professor in a dispute over her student's thesis authorship.[98] Demas claimed that her nutrition professor, David A. Levitsky at Cornell University, fraudulently took full credit for her ideas, work, and research surrounding an elementary-school nutrition curriculum.[99] Demas stated in the article that it was "intolerable to have [her] life destroyed by a thief."[100]

Demas' legal fight commenced in 1995 and is still being litigated.[101] Her complaint initially alleged negligence, breach of fiduciary duties, fraud, misappropriation of ideas, breach of contract, and defamation.[102] The court rejected several complaints against Cornell University on grounds that the university was not vicariously liable for the actions of a professor, because those actions were "unrelated to the furtherance of Cornell's business."[103] However, the complaints against Levitsky, as well as one defamation claim against Cornell University, survived summary judgment.[104]

In another instance, a controversial legal battle arose between an electrical engineering professor at the University of Wisconsin and one of his graduate students. [105] The student and professor allegedly co-authored an article published in the *Journal of Applied Physics*.[106] Both names were included when the article was initially sent for publication.[107] However, due to a serious disagreement between the professor and the student, the professor decided to withdraw the manuscript from the journal prior to acceptance.[108] The student, under his own name, resubmitted the article and executed an assignment of copyright to the publisher upon the article's acceptance.[109] The professor claimed his copyrights were infringed by the student's action because the professor felt he was

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97 Scott Smallwood, *Bitter Aftertaste*, CHRON. OF HIGHER EDUC., April 12, 2002. *available at* http://chronicle.com/free/v48/i31/31a01001.htm.

98 *Id.*

99 *Id.*

100 *Id.*

101 Demas v. Levitsky, 291 A.D.2d 653, 653, 662 (N.Y. App. Div. 2002).

102 *Id.* at 658.

103 *Id.* at 661.

104 *Id.* at 653, 661.

105 Seshadri v. Kasraian, 130 F.3d 798, 799 (7th Cir. 1997).

106 *Id.* at 802.

107 *Id.*

108 *Id.*

109 *Id.*

the sole author of the work.[110] The student defended against the infringement accusation by arguing that the article was a joint work, and as such, he had the right to license the copyright to a third party, subject only to an accounting.[111] The court agreed with the student and declared the article a joint work.[112]

Further, in *Johnson v. Schmitz*,[113] a federal court dealt with allegations from a graduate student that his dissertation advisory committee wrongfully misappropriated his "Reaction Norm Theory."[114] Graduate student Kris Johnson sued Yale University and members of his advisory committee in a multi-million dollar lawsuit for fraud, civil theft, and misappropriation of ideas.[115] The court refused to dismiss his case and held that the student successfully stated claims of breach of contract, breach of fiduciary duty, and negligence.[116]

According to the facts alleged, Johnson was a student in the Yale University doctoral program of the School of Forestry and Environmental Studies.[117] He alleged that both of his dissertation advisors misappropriated his theories and ideas.[118] In addition, he alleged that when he tried to explain his "Reaction Norm Theory" during his dissertation oral examination, he was told by the same faculty, whom he later accused of stealing his ideas, that his views on the matter were "ridiculous and unoriginal."[119] He was later informed that he had failed the qualifying oral examination and could not be awarded a Ph.D. degree.[120]

This case not only involves allegations of misconduct by student dissertation advisors, but also misconduct by several university faculty committees from which the student allegedly sought recourse when he was not able to find recourse with his advisors.[121] When these other committees were of little help, he sought the help of the Dean of the Yale School of Forestry and Environmental Studies.[122] The Dean began an investigation but eventually chose not to

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110 *Id.*
111 *Id.* at 801.
112 *Id.* at 805.
113 119 F. Supp. 2d 90 (D. Conn. 2000).
114 *Id.* at 91.
115 *Id.*
116 *Id.* at 105.
117 *Id.* at 91.
118 *Id.* at 100.
119 *Id.* at 92.
120 *Id.*
121 *Id.*
122 *Id.*

pursue the matter further.[123] Johnson ended up having to take his case to the courts. According to the court in *Johnson*, "[g]iven the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student."[124] In addition, the court found that a fiduciary duty extends to the university so long as the student can prove the existence of such a duty with respect to the advisor.[125] If the student is able to prove that the university represented "its mission towards graduate students, and whether or not it represented that it would take care of graduate students to the exclusion of all others," a relevant determination may be made that the university owed a fiduciary duty to the student.[126]

In July 2001, the Court of Appeals for the Federal Circuit finally addressed these concerns.[127] In, *Chou v. University of Chicago*, the court decided that Ph.D. supervisors may have fiduciary duties towards student researchers and the university, and unlike *Demas*, can be held vicariously liable for faculty wrongdoings.[128] The court found that faculty job descriptions included a duty to abide by the institution's intellectual property policies.[129]

Dr. Joany Chou was a researcher in molecular genetics at the University of Chicago.[130] In 1983, Chou began working with Dr. Bernard Roizman in the study of a potential vaccine for the herpes virus.[131] In 1991, Chou successfully completed the vaccine and informed Roizman that she believed her discovery was patentable and specifically inquired as to the proper procedures for obtaining patent protection.[132] The professor's response was that the discovery was not patentable.[133] The two continued working together and conducting research

123 *Id.*
124 *Id.* at 97–98.
125 *Id.* at 98.
126 *Id.*
127 Chou v. Univ. of Chi., 254 F.3d 1347, 1361–63 (Fed. Cir. 2001).
128 *Id.*
129 *Id.* at 1361.
130 *Id.* at 1353.
131 *Id.*
132 *Id.*
133 *Id.*

until 1996.[134] They published various papers and even jointly applied for a patent on a different aspect of their herpes research.[135]

In June of 1996, Roizman notified Chou that if she did not resign she would be fired.[136] Chou eventually discovered that in 1991, around the same time that she approached Roizman about securing a patent on the vaccine, he had filed a patent application on that same vaccine that he had claimed was unpatentable.[137]

Chou further discovered that the patent was issued and that Roizman was listed as the sole inventor.[138] Not finding assistance at the University level, Chou sued Roizman, the University of Chicago, and the company licensing her invention.[139] Chou alleged that she was the rightful inventor and should be named as an inventor on the patent, and added state law claims of conversion, breach of fiduciary duty, breach of contract, and unjust enrichment.[140]

The Federal District Court in Illinois refused to grant Chou any relief.[141] The court argued that, due to the University's patent assignment policies, Chou did not own the patent.[142] Therefore, without ownership interest in the patent, she did not have standing to bring a suit challenging the patent's inventorship.[143] In addition, the court refused to impose on Roizman a duty to inform Chou about the patentability of her research, and as such, found his actions did not breach any duties that would allow Chou recovery under Illinois law.[144]

Chou appealed, and the Federal Circuit Court of Appeals reversed the District Court ruling.[145] This allowed her to sue and challenge the inventorship of the patent.[146] The Federal Circuit found that the trial court was correct in finding that Chou had no ownership interest in the patent because of her employment patent assignment agreement with the University.[147] However, the

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134 *Id.*
135 *Id.* at 1354.
136 *Id.*
137 *Id.* at 1353.
138 *Id.*
139 *Id.* at 1353.
140 *Id.* at 1354.
141 *Id.* at 1353.
142 *Id.* at 1358.
143 *Id.*
144 *Id.* at 1353.
145 *Id.*
146 *Id.*
147 *Id.* at 1358.

Federal Circuit also found the employment agreement was inapposite to a suit challenging the inventorship of the patent.[148] The court established that "parties with an economic stake in a patent's validity may be subject to a § 256 inventorship correction suit."[149]

However, the court was not prepared to grant every person standing to bring a suit challenging a patent's inventorship.[150] Rather, the suit challenging inventorship must be brought by a party that has some interest in the patent, such as a financial stake in the success of the invention.[151] In this case, Chou had such a financial interest.[152] Although under patent assignment agreements, inventors do not have an ownership interest in the patents, this particular employment contract provided that inventors received a portion of the royalty payments associated with licensing of the technology.[153]

In addition, the Federal Circuit reversed the trial court's finding that Roizman did not have a duty to inform Chou of the status of their invention.[154] Furthermore, since Roizman was Chou's mentor, counselor, and guide, he had a fiduciary duty to care for his pupil, requiring him to treat Chou with the highest degree of loyalty.[155] Therefore, by failing to name Chou as an inventor on the patent, Roizman committed a breach of his fiduciary duty.

The court also found that Chou had valid causes of action against the University of Chicago under tort and agency law principles.[156] Since Roizman's conduct towards Chou concerned the employment handbook's guidelines for patenting inventions, the professor's conduct was within the scope of his employment with the University.[157] Specifically, the court stated that although faculty members are not considered agents of a university with respect to selection and conduct of their research projects, they still may be considered agents

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148 *Id.* at 1360. According to 35 U.S.C. § 256 (2006), if a rightful inventor was not listed as an inventor on the patent, that inventor can sue in federal court to have his or her name added to the patent.

149 *Chou*, 254 F.3d at 1359.

150 *Id.*

151 *Id.* at 1359–60.

152 *Id.*

153 *Id.* at 1359.

154 *Id.* at 1362–63.

155 *Id.*

156 *Id.* at 1361–62.

157 *Id.* at 1361.

with respect to implementing university policies, including ownership and compensation regarding inventions.[158]

However, after *Chou*, a South Carolina appeals court ruled that fiduciary duties are reserved for the legal or business setting and declined to recognize the existence of fiduciary relationships between advisor and students.[159] Further, in what seems to make *Chou* a legal anomaly, the court in *University of West Virginia v. VanVoorhies*[160] refused to follow the *Chou* ruling, which was decided just one year earlier.[161] Kurt VanVoorhies "was a Senior Design Engineer for General Motors Corporation."[162] In 1990, VanVoorhies enrolled as a graduate student at the University of West Virginia (WVU) to pursue a Ph.D. in engineering and, specifically, to work with Professor James E. Smith.[163] Once he entered the Ph.D. program, VanVoorhies commenced work with Smith investigating antennae for wireless power transmissions.[164]

According to VanVoorhies' laboratory notebook, he completed his first invention by June 3, 1991.[165] Prior to submission of VanVoorhies' invention disclosure to the University, Smith, in his capacity as graduate advisor, counseled VanVoorhies regarding the University's patent policies.[166] According to VanVoorhies, Smith fraudulently influenced him in listing Smith as a co-inventor of VanVoorhies' first invention.[167] They executed a patent application directed only to the first invention and assigned all rights to the University.[168] VanVoorhies received his doctoral degree in 1993 and commenced work for the

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158 *Id.*

159 Hendricks v. Clemson Univ., 578 S.E.2d 711 (S.C. Ct. App. 2003) (dealing with whether an advisor breached his fiduciary duties to a student by failing to properly advise in course selection and thus inhibiting ability to play sports).

160 278 F.3d 1288 (Fed. Cir. 2002).

161 *Id.* at 1300.

162 *Id.* at 1292.

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.* at 1299.

168 *Id.* at 1292–93. The assignment agreement between the co-inventors and the University provided that the inventors assigned to the University all rights to the first invention "in any form or embodiment thereof" and all rights in any patents or reissues or extensions thereof and any "divisional, continuation, *continuation-in-part* or substitute applications which may be filed upon said invention . . . ." *Id.*

University as a post-graduate-research Assistant Professor in the spring of 1994.[169]

The legal battle between VanVoorhies, Smith, and West Virginia University originated in VanVoorhies' conception of his second invention. VanVoorhies argued that he conceived of his second invention after receiving his doctorate degree, but before beginning work as a professor at WVU in the spring of 1994.[170]

After conception of his second invention, VanVoorhies wrote a letter to the University suggesting that the WVU file a continuation-in-part (CIP) of the application directed to his first invention.[171] In addition, VanVoorhies forwarded a preliminary invention disclosure to the University's patent counsel, urging the University to seek patent protection for his second invention.[172] However, the University responded by sending a patent application with a declaration and corresponding assignment.[173] VanVoorhies did not take any action regarding this correspondence.[174]

> WVU nonetheless filed what became U.S. Patent Application 08/486,340 [the second invention] as a CIP of the '970 application [the first invention] on June 7, 1995, listing VanVoorhies as the sole inventor. The application was filed under 37 C.F.R. § 1.47(b), which permits a party with a sufficient interest in an invention to file a patent application when an inventor refuses to execute the application. The United States Patent and Trademark Office ("PTO") subsequently accepted the '340 application after evaluating WVU's entitlement to ownership of the application under the '970 assignment covering CIPs. The '340 application issued as U.S. Patent 6,028,558 on February 22, 2000. A continuation of that application issued as U.S. Patent 6,204,821 on March 20, 2001.[175]

Notwithstanding the University's actions:

> On August 14, 1995, VanVoorhies filed U.S. Patent Application Number 08/514,609, also directed to the second invention, and listed himself as the sole inventor. The '609 application, unlike the '340 application, was not designated as a CIP of the original '970 application. [VanVoorhies] assigned all interest in that application to VorteKx, P.C., of which he is the president and majority shareholder. The '609 application was issued as U.S. Patent

169 *Id.* at 1293.

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.* (citations omitted).

> 5,734,353 on March 31, 1998. U.S. Patent 5,952,978 also issued from a continuation of the '609 application on September 14, 1999.[176]

Due to VanVoorhies' actions, the University filed suit against him, alleging breach of his duty to assign his second invention to the University.[177] VanVoorhies answered, filing counterclaims and a third-party complaint (including, but not limited to, breach of fiduciary duty, fraud, RICO violations and breach of contract) against the University, Smith and others.[178] In addition, he aimed to disqualify the University's counsel on grounds that it had represented him with the initial patent application for his first invention.[179]

The lower court denied VanVoorhies' motion to disqualify, dismissed his quasi-contract and RICO claims, and granted judgment in favor of the University on VanVoorhies' remaining claims.[180] The lower Court also ruled in favor of the University on its claim for breach of the assignment agreement.[181] VanVoorhies unsuccessfully appealed.[182] The court stated:

> We therefore conclude that his breach of fiduciary claim against Smith was properly resolved by summary judgment, because VanVoorhies has not introduced sufficient evidence to establish an essential element of his claim, *viz*., a breach of the purported fiduciary duty, on which he would bear the burden of proof at trial.[183]

However, this decision was flawed. Contrary to the court's opinion, a careful examination of VanVoorhies' pleadings shows that VanVoorhies sufficiently stated genuine issues of material fact that should have enabled him to survive summary judgment in light of *Chou*. According to the court, "[d]ismissal is proper only if, after drawing all reasonable inferences in the appellant's favor, it is clear that the appellant can prove no set of facts consistent with his claim that would entitle him to relief."[184] After review of the pleadings, it is difficult to believe that VanVoorhies did not establish facts enabling him to prove, for example, fraud and breach of fiduciary duties.

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176 *Id.* (citations omitted).

177 *Id.* at 1294.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.* at 1292.

183 *Id.* at 1300.

184 *Id.* at 1295.

According to VanVoorhies' appellate brief, Smith was his advisor and the chairman of his advisory and examining committee.[185] Smith was in a position of power and authority and highly influential in deciding to grant VanVoorhies' Ph.D. degree.[186] VanVoorhies further alleged that he never signed any assignment or employment agreements as a graduate student, that he conceived of his first invention independently, and that he had witnesses confirm these facts.[187] In addition, according to VanVoorhies, Smith told him that if VanVoorhies developed his invention through the University, Smith could influence licensing decisions on VanVoorhies' behalf.[188]

VanVoorhies, due to Smith's influence, decided to develop the invention through the University, initially listing himself as the sole inventor in the disclosure.[189] Further, VanVoorhies alleges that Smith told him that he should be listed as a co-inventor.[190] VanVoorhies complied with his Professor's request. Neither Smith nor the University informed VanVoorhies that Smith owned and controlled the company that would receive the license to commercialize VanVoorhies' first invention.[191] The University argued that it did not have any legal duty to inform VanVoorhies of its licensing decisions.[192]

In 1994, the West Virginia University Research Corporation granted an exclusive license of the first patent to Smith's wholly owned company, Integral Concepts Inc. (ICI).[193] VanVoorhies was not permitted to participate in the licensing decision and was unaware of the granting of the license to ICI until 1996.[194] Unbeknownst to VanVoorhies, Smith received royalties, corporate shares, and the exclusive license of the first invention.[195]

The court did not find VanVoorhies believable and dismissed his case without allowing a jury to decide on the merits.[196] The court found that Van-

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185 Brief for Defendant/Third Party Plaintiff-Appellant at 8, Univ. of W. Va. v. VanVoorhies, 278 F.3d 1288 (Fed. Cir. 2002) (Nos. 00-1440, 00-1478), 2000 WL 35596293.

186 *Id.*

187 *Id.* at 8–9.

188 *Id.*

189 *Id.* at 10.

190 *Id.*

191 *Id.* at 11.

192 Brief of Appellees at 54–55, Univ. of W. Va. v. VanVoorhies, 278 F.3d 1288 (Fed. Cir. 2002) (Nos. 00-1440, 00-1478), 2001 WL 36088681.

193 Brief for Appellant, *supra* note 185, at 12.

194 *Id.*

195 *Id.*

196 *Univ. of W. Va.* at 1292.

Voorhies had not "shown a genuine issue of material fact to support his fiduciary duty claim under West Virginia law."[197] However, the court did not view the alleged facts in a light most favorable to the plaintiff, and thus did not properly evaluate VanVoorhies' claims properly.

Courts in the United States should look to Canada for guidance in resolving intellectual property disputes within academia. In Canada, students appear to be afforded more protections from preying professors than in the United States. In a copyright-infringement case dealing with the appropriation of a university student's term paper, an Ontario Court of Justice found in favor of the student.[198] The Canadian court held that the University of Ottawa and a professor were jointly liable for infringing the copyright interests and moral rights of the student.[199] The court found that the professor illegally appropriated the student's term paper and posed it as his own work.[200] The student, as part of the school's Masters of Business Administration (MBA) program, had written his paper for a class taught by the professor.[201] The student's paper was included in a casebook sold to MBA students by the University.[202] The professor presented the paper as his own at a symposium, and did not acknowledge the student's authorship or rights and without seeking his consent.[203] In the opinion of the Canadian court, Judge Metivier commented:

> Plagiarism is a form of academic dishonesty which strikes at the heart of our educational system. It is not to be tolerated from the students and the University has made this quite clear. It follows that it most certainly should not be tolerated from the professors, who should be steering examples of intellectual rigor and honesty.[204]

While the above cases are examples of disputes between students, faculty, and universities regarding the management and administration of intellectual property, there are other instances when disputes arise because students do not realize their intellectual property has been stolen.

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197 *Id.* at 1300.

198 Boudreau v. Lin, [1997] 150 D.L.R. (4th) 324 ¶ 52 (Ont. Ct. of Justice).

199 *Id.* ¶¶ 49, 53.

200 *Id.* ¶ 49.

201 *Id.* ¶¶ 1, 4.

202 *Id.* ¶¶ 8–9.

203 *Id.* ¶ 8.

204 *Id.* ¶ 54. For a more detailed description of this case, see Diane Leduc Campbell, *Professor, University Held Liable For Plagiarism of Student's Work*, 11 W.I.P.R. 401, 401–02 (1997).

In a *Business Week* article,[205] more examples of breaches of fiduciary duties and fraudulent faculty behavior were disclosed.[206] The author of the article contends that some professors have had students work on company research contracts, appropriated their ideas for businesses, denied them academic credit, and refused "to let them write up the work because it's proprietary."[207]

Faculty preying on students' creative and arduous efforts—while taking advantage of the respect and appreciation students place in them—also occurs in law schools. Law professor Bill L. Williamson argued in a 1994 essay that students in American law schools are at the mercy of dishonest faculty members.[208] He advanced the view that some law school faculty selfishly misuse research performed by students on their behalf. In his opinion, "[s]tandards are needed to impose honesty in faculty-student work relationships, to provide appropriate recognition of student efforts, and to defuse some of the institutional stridency that is one of the factors causing faculty misconduct."[209]

According to Williamson, faculty members' publishing requirements of "quantity, rather than quality," make them engage in unethical relationships with students.[210] Williamson argues that in order to obtain useful materials for books or articles, professors tend to give assignments with "marginal academic value" (in order to obtain the student work-product), or simply assign students to work on their publications without giving due credit for student work.[211] This failure to acknowledge student contributions and plagiarism of student research papers are common examples of unethical faculty behavior.[212]

VI. FIDUCIARY DUTIES ACCORDING TO A UNIVERSITY PROFESSOR

A questionnaire[213] was sent to a handful of professors regarding fiduciary duties in academia. Only one professor responded and was only willing to

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205 Julia Flynn Siler et al., *Million-Dollar Professors: Should the Ivory Tower Be a Gold Mine?*, BUS. WK., Aug. 21, 1989, at 90.

206 *Id.*

207 *Id.*

208 Bill L. Williamson, *Using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 ARIZ. ST. L.J. 1029, 1029–31 (1994).

209 *Id.* at 1029.

210 *Id.* at 1037.

211 *Id.*

212 *Id.*

213 *See* app. A.

come forward anonymously.[214] This professor demonstrated his unfamiliarity with issues surrounding fiduciary duties.[215]

According to the above-mentioned professor, universities should govern intellectual property disputes, as courts are unable to deal with these matters "because the courts don't deal very well with uncertainty, which is inherent in any scientific study."[216] This professor feels that university committees could be of more help in dealing with intellectual property disputes.[217] His overall misunderstanding about the subject matter is evinced in the fact that he equates implementing fiduciary duties at the university with legalizing intellectual property disputes.[218] However, the professor's most chilling statement was, "[w]hen it comes to patents, lawyers are always involved here and since so much money is at stake, I imagine institutions are very quickly making policies."[219] Yet who are these lawyers representing? Are the lawyers representing the university, the faculty, or the student? And more importantly, do all parties know and waive the obvious conflicts of interest before accepting legal advice?

VII. CONCLUSION

Students' growing distrust of professors coupled with professors' fear of losing their work to students is hindering the free flow of ideas in academia. David Hume provided one of the best illustrations of the real, and negative, effects of distrust.[220] Hume wrote of two farmers:

> Your corn is ripe to-day; mine will be so to-morrow. 'Tis profitable for us both, that I shou'd labour with you to-day, and that you shou'd aid me to-morrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and should I labour with you upon my own account, in expectation of a return, I know I shou'd be disappointed, and that I shou'd in vain depend upon your gratitude. Here then I leave you to labour alone: You treat me in the same manner. The seasons change; and both of us lose our harvests for want of mutual confidence and security.[221]

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214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.*

220 DAVID HUME, A TREATISE OF HUMAN NATURE at 520–21 (L. A. Selby-Bigge ed., Oxford, Clarendon Press 1888).

221 *Id.*

Additionally, James Hilton stated in an article:

> Anecdotally, MBA students around the country are beginning to ask their professors to sign nondisclosure forms before they turn in their class projects. They are worried that their professors will steal and patent their ideas.
>
> Conversely, some professors are hesitant to work with students because they fear that the collaboration means they will lose control of their intellectual property.[222]

Hilton also related an interesting anecdote regarding ownership of university assets:

> When I first started working on these issues for the provost, we received a phone call from a student who said: "I'm doing a multimedia video thesis, and I have a question. Who owns the copyright to a student thesis?" The student had worked on the project in partnership with a faculty member. The student was the author, but from a copyright perspective, the student, the university (which paid the videographers), and the faculty member were all owners. So we organized a meeting—consisting of three attorneys, the faculty member, two administrators, the student's advisor, the student, and me—in order to negotiate terms to give everyone what they wanted. And at the end of this very expensive meeting, that is exactly what everyone got. My reaction to the meeting was "Happy day!" But on the way out, the faculty member who had worked with the student said: "I will tell you what I've learned from this. I will never work with another student again. I'll just hire it out and save myself grief."[223]

When educational institutions and faculty engage in these actions despite conflicts of interest, fiduciary duties owed to the students are breached and the educational environment fails to meet its purpose. Students will not feel confident in exploring their intellectual potential if they fear losing their intellectual property to those they trust. Joint faculty-student work is necessary and valuable but depends upon honest conduct by all parties. The student, faculty, and university should all benefit from these relationships when all parties receive their due credit. According to Professor Williamson, "[t]he student can profit from the wisdom and experienced insight of the professor; the professor can benefit from the energy and fresh insight of the student."[224] He states that "[t]he enterprise can be an enriching experience for both student and professor and for their intended audience as well."[225]

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222 James Hilton, *The Future for Higher Education: Sunrise or Perfect Storm?*, EDUCAUSE REV., Mar.–Apr. 2006, at 58, 68.

223 *Id.*

224 Williamson, *supra* note 208 at 1039.

225 *Id.*

It is imperative that students trust their educational institutions and do not feel like competitors over ownership of their intellectual property. University intellectual property policies tend to reward faculty for their creations but sometimes fail to afford students the same privilege. As students lack the negotiating power afforded to faculty through tenure and unions, institutions need safeguards and policies to redress the inequities that students face when defending their intellectual property rights against faculty and universities.

It is a shame that the United States courts predominately classify the relationship between student and teacher as contractual rather than fiduciary. However, the real shame falls on the educational institutions that, blinded by faculty reputations and commercial and financial interests, ignore the legitimate rights of students in intellectual property rights.

Institutions of higher education should not only have intellectual property assignment policies in effect, but should also have specific policies aimed to establish fiduciary duties towards students. For example, universities should require faculty members to sign acknowledgement forms outlining their fiduciary duties towards students and advisees *before* working with students. In addition, a neutral party should handle disputes over ownership of intellectual property in order to avoid potential conflicts of interest.

Traditionally, the law recognizes the duties of loyalty, care, and disclosure as the three major fiduciary duties. However, fiduciary duties cannot coexist with conflicts of interest. For that reason, in order to fulfill fiduciary duties, conflicts of interest should be avoided at all costs. When it comes to a university's administration of intellectual property, imposing fiduciary duties in faculty-student relationships is one way to avoid conflicts of interest. Further, universities can begin educating faculty and students regarding such duties. Moreover, it is important to disclose the potential conflicts of interests inherent in intellectual property management and administration in academia and to truly engage in arm's length transactions with students.

Confidence in universities and colleges is essential to the achievement of these institutions' educational missions. This confidence is sometimes shattered by the failure of the educational institutions to acknowledge fiduciary duties in academia. When universities allow and/or encourage faculty members in misappropriating, mishandling, plagiarizing, and/or stealing students' intellectual property, their educational mission and purposes vanish.

Unless the courts and the educational institutions take action by acknowledging fiduciary duties in student-professor relationships, the disturbing result will be that relationships between students and their professors will eventually deteriorate. Inaction may cause future generations to develop student-

professor relationships resembling that which exists between Hume's two farmers.[226]

[226] *See* HUME, *supra* note 220, at 520–21.

APPENDIX

A Professor's Response to a Questionnaire on Fiduciary Duties

The following are the verbatim responses of a university professor who wished to remain anonymous when asked his opinion of the role of fiduciary duties in academia:

> 1) Do you believe that the university shall implement fiduciary duties policies? Why?
>
> > You mean, do I believe the university (U) *should* have a legal duty between students? Here's the problem. You can't put a time limit on how long it takes to discover something. However, in Engineering, often a part of the qualifier exam for the PhD consists of a PhD Proposal, which is a document written by the student and agreed upon by his advisor and PhD committee, where the student outlines what he is to accomplish during his PhD program. In Engineering and Math and Science, this can be quite detailed and precise, e.g.- prove this formula- or, apply that method to this problem in the hopes of deriving a relationship between A and B, - or, design this structure to this specification with this method.
> >
> > And if the student completes an agreed upon amount of this, with allowances for failure (e.g. if the formula you want to prove turns out to be false), then the student shall get a PhD.
> >
> > What sometimes happens is that failure is not accounted for, and then the PhD can drag on if the advisor gets the student to do other things. Or, if the student finds a quick way to prove the formula, maybe the advisor adds more things for the student to do - this is not a bad thing, i.e. if the result turns out to be easy then the thesis is not that big of a deal, and it is in the student's and school's best interest to have a thesis with stronger results, although I suspect this doesn't happen very often.
> >
> > Should this be legalized? No, because the courts don't deal very well with uncertainty, which is inherent in any scientific study. I think there should be an academic committee at the school (and even an un-biased academic committee through some of the scholarly associations) able to resolve issues of run-on PhD's (i.e. PhD's that go on forever, either because the problem is intractable or because the advisor keeps adding things for the student to do). Perhaps legal action could be taken to impose the committee's recommendations, or something.
> >
> > As for the committees, I'm not sure if there are standards for setting up these committees across all the universities. Maybe different U's have different types of committees.

2) Do you think that the students are at the mercy of faculty when it comes to discovery and research? Why?

> I'm not sure what you mean here. The advisor and student work together to develop the thesis; it is in their best interest (faculty gets results, student get results). As for credit for the results, that is a different department. Again, there are academic committees to deal with this, although I'm not sure if there are standards for setting up these committees across all the universities.

3) As a former student, what policies should be implemented to ensure students get credit for their work? Why?

> I had no problems and great supervisors, who always gave me credit. There are academic committees and policies in place to deal with this. Again, these may vary across schools. Maybe there should be standards – there are standard committees that rank and accredit the schools – you can check if they have standards for these policies. When it comes to patents, there are rules and policies in place at each institution. These may vary. What *should* these policies be? Well, different policies at different schools is ok – pick the policies you like and go to that school.

4) As a current professor, what policies should be implemented to ensure students get credit for their work? Why?

> It's always hard to prove who came up with what idea, since ideas evolve and are born out of other ideas. An advisor always looks back on a piece of work and asks what original contribution was made by each party (student, colleagues, etc), and then assesses authorship. Academic committees are involved here if there is a problem. I've never had one, and it is always clear what is manual labor and what is an original contribution. For example, manual labor could include running a computer model many times, if it was written and setup by the advisor and the student literally ran the code. However, if the student found some inputs to the model which yielded interesting simulation output, which clarified behavior of the system under study, that would be an original contribution. When it comes to patents, lawyers are always involved here and since so much money is at stake, I imagine institutions are very quickly making policies. MIT has all the faculty sign one. I don't remember if I signed one as a graduate student. With the current court battles out there, this may happen in the near future.