STATE OF NORTH CAROLINA ORANGE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 463
US RIGHT TO KNOW, Plaintiff, v. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Defendant.	**SECOND MEMORANDUM OF LAW FOR REFEREE**

INTRODUCTION

This Second Memorandum of Law for Referee responds to questions the Referee posed to the Parties related to the intersection of N.C. Gen. Stat. § 116-43.17 and copyright law. N.C. Gen. Stat. § 116-43.17 provides as follows:

> Research data, records, or information of a proprietary nature, produced or collected by or for state institutions of higher learning in the conduct of commercial, scientific, or technical research where the data, records, or information has not been patented, published, or copyrighted are not public records as defined by G.S. 132-1.

Id.

The University of North Carolina at Chapel Hill ("University") understood the correspondence from the Referee to present three questions:

1) Does copyright protection attach to some or all of the withheld documents?

2) If so, what person or entity owns the copyright?

3) Is copyright "of a proprietary nature," and if so, how does N.C. Gen. Stat. § 116-43.17 treat copyrighted works?

In light of previous briefing and in the interest of efficiency, this Memorandum does not recite the facts and procedural history, and instead takes each question in turn.

For purposes of this Memorandum, the University analyzes each issue under U.S. Right to Know's ("USRTK") narrow reading of § 116-43.17, assuming that "of a proprietary nature" modifies all of "research records" and "research data," in addition to "research information."[1] Because copyright protection attaches to the research records at issue, copyright is "of a proprietary nature," and only registered copyrights are excluded from § 116-43.17's protection, the University properly withheld its research records.

ARGUMENT

I. Copyright protection does attach to likely all of the withheld research records.

Title 17 of the United States Code governs the provision of copyrights, and expressly preempts any state law or common law on the same subject matter. 17 U.S.C. § 301(a). Title 17 confers copyright protection to a broad range of records or other reduction to a tangible medium, whether located in an email, written on a piece of paper, drawn through a computer program, or any other number of ways:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;

[1] The University does not abandon and continues to assert the arguments in its earlier briefing, including that "of a proprietary nature" only modifies "information." However, if the Referee, and the Court, were to find the research records to be properly withheld under USRTK's narrower reading, it should find the same under the University's interpretation. The University also preserves its earlier jurisdictional arguments.

(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

Id. § 102(a). "Literary works" are then defined as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." *Id.* § 101.

All, or almost all, of the research records at issue fall within the definition of "literary works" such that copyright protection attaches.

II. Ownership will vary, but that has no impact on the N.C. Gen. Stat. 116-43.17 analysis.

The question of who would own the copyright is more complicated and fact intensive. Title 17 defines a "work made for hire" as, in relevant part, "a work prepared by an employee within the scope of his or her employment." *Id.* § 101. Works made for hire are owned by the employer, "unless the parties have expressly agreed otherwise in a written instrument signed by them[.]" *Id.* § 201(b).

Public records, almost by definition, are created within the scope of employment, putting the research records at issue within the definition of a work made for hire. The University, however, has a Copyright Policy that governs when

works made for hire are owned by the University or the employee. *See Copyright Policy of The University of North Carolina at Chapel Hill*, The University of North Carolina at Chapel Hill, https://policies.unc.edu/TDClient/2833/Portal/KB/ArticleDet?ID=132138 (last modified Apr. 18, 2023, 11:11 AM). That policy covers many scenarios and affords discretion to the University, making the question of who owns the copyright to any given research record a fact intensive inquiry. *See id.*

The University would retain ownership over most of the research records at issue per its Policy because they either involve exceptional use of University resources or are directed works or work for hire as defined by the Policy. However, the relevant question is not who owns the copyright, but instead whether the record at issue is indeed a research record protected by § 116-43.17.[2] As described below, even under USRTK's restrictive reading, because a copyright interest is "of a proprietary nature," the research records at issue are protected from public disclosure so long as the copyright is not registered.[3]

III. N.C. Gen. Stat. § 116-43.17 affords protection to most copyrighted works.

[2] Research data, or research information, are also protected if, under USRTK's reading, those data or information are of a proprietary nature. Because this is a public records case, the University is not aware of any dispute that the documents at issue qualify as "records." Likewise, the University is not aware of a dispute as to whether the records constitute "the conduct of commercial, scientific, or technical research" under § 116-43.17

[3] A large portion of the research records may also be protected as other records "of a proprietary nature," such as trade secrets. The University's earlier Memorandum describes, in detail, why protecting each category of records helps to preserve the University's ability to compete in the grant funded research marketplace.

A. Copyright ownership is "of a proprietary nature."

N.C. Gen. Stat. § 116-43.17 does not define "proprietary" or "of a proprietary nature." "In the construction of any statute . . . words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974) (citations omitted). Relevant definitions from Black's Law Dictionary and Merriam-Webster.com Dictionary are as follows:

Proprietary: "1. Of, relating to, or involving a proprietor . . . . 2. Of, relating to, or holding as property . . . ." *Proprietary*, *Black's Law Dictionary* (11th ed. 2019).

Proprietary Information: "Information in which the owner has a protectable interest. See Trade Secret." *Proprietary Information, Black's Law Dictionary* (11th ed. 2019).

Proprietary (adjective): "1: Of, relating to, or characteristic of an owner or title holder . . . 2: used, made, or marketed by one having the exclusive legal right . . . ." *Proprietary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/proprietary (last visited Feb. 27, 2024).

All these definitions refer to an ownership interest, whether characterized as property, protectable, or an exclusive legal right. The federal copyright laws echo this language, affording copyright holders "ownership" and "exclusive rights." *See, e.g.*, U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"); 17 U.S.C. § 101 (defining "Copyright owner" as "with respect to any one of the exclusive

rights comprised in a copyright, refers to the owner of that particular right."); 17 U.S.C. § 106 (granting certain exclusive rights to the "owner of copyright under this title[.]"); 17 U.S.C. § 501-513 (providing a framework to protect copyright owners from infringement of their rights).

Likewise, Title 17's regulation of copyright ownership transfer is analogous to regulation of the transfer of other real or personal property interests. *See, e.g.,* 17 U.S.C. § 201(d)(1) (referring to copyright ownership passing as personal property); *Id.* § 203(a)(2) (dictating rules for intestate succession of copyright ownership); *Id.* § 204(a) (requiring a written instrument to transfer a copyright interest unless by operation of law); *Id.* § 205 (regulating the recording of copyright ownership to govern conflicting ownership claims); *see also Wheaton v. Peters*, 33 U.S. 591 (1834) (discussing, in an early seminal case addressing copyright ownership, the interest as property of the author).

This enduring treatment of a copyright interest as one sounding in property and affording exclusive rights to its holder is entirely consistent with longstanding definitions of "proprietary."[4] Records to which copyright ownership attaches under

[4] The Referee also analogized § 116-43.17's reference to "proprietary" to the sovereign immunity analysis of governmental versus proprietary functions. While such an immunity analysis is not at issue where the General Assembly has explicitly waived immunity from suit, as in N.C. Gen. Stat. 132-9, viewing the University's research activity as a proprietary function is consistent with that framework. *See Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Rec. Dep't.*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012) ("A proprietary function, on the other hand, is one that is commercial or chiefly for the private advantage of the compact community.") (internal quotation marks and citations omitted). One primary factor in such an analysis "is whether, and to what degree, the legislature has addressed the issue." *Id.* at 200, 732 S.E.2d at 141-42. N.C. Gen. Stat. § 116-43.17 explicitly does so by using "proprietary" as a qualifier and protecting records related to "the conduct of *commercial*, scientific, or technical research[.]" N.C. Gen. Stat. § 116-43.17 (emphasis added).

Title 17 are, therefore, squarely within the "of a proprietary nature"[5] scope. What, then, to make of § 116-43.17's potentially inconsistent carve out of "patented, published, or copyrighted" records as subject to the Public Records Act? As discussed below, only one conclusion allows for an internally consistent interpretation.

B. "Copyrighted" in N.C. Gen. Stat. § 116-43.17 refers only to registered copyrights.

Section I, *supra*, explains that copyright protection attaches to likely all of the research records at issue, and that would be the case under almost any scenario involving § 116-43.17. If the General Assembly intended to remove all such documents from the statute's purview, the statute would protect virtually nothing and there would have been no reason to pass it at all. Instead, the only logical conclusion is that the exclusion of copyrighted records refers to those copyrighted works that are registered.

"Copyrighted" in the statute is part of a list that also includes "patented" and "published." N.C. Gen. Stat. § 116-43.17. All three words are in past tense verb form, implying that affirmative actions must be taken to achieve such a result. Indeed, that is true with respect to "patented," which involves submission to and approval of an application by a federal agency, and "published," which likewise involves submission to and approval of a manuscript by a journal. While copyright *protection*

[5] Arguably, "proprietary nature" expands the universe of protected research records, data or information beyond that which is simply "proprietary." Regardless, copyright would fall within its ambit.

attaches upon creation, copyright *registration* is only achieved through a very similar submission to and approval by a federal agency.

CONCLUSION

Even under USRTK's narrower reading of N.C. Gen. Stat. § 116-43.17, the research records at issue are protected. Copyright protection attaches to the records, a copyright interest is "of a proprietary nature," and only registered copyrights are excluded from the statute's shield. For all these reasons and those in the University's earlier Memorandums, the Referee and the Court should affirm that the University properly withheld all of its research records.

This 29th day of February, 2024.

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CERTIFICATE OF SERVICE

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This 29th day of February, 2024.

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