

Protecting Faculty Rights in Copyright Ownership Policies

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The proliferation of college courses offered over the Internet—sometimes with the thought that they will generate significant revenue—has caused faculty members and their institutions to ask the same question: who owns the copyright to online courses? Does the course belong to the faculty member who develops it, or to the university that provides the resources to develop the course? This seminar provides some guidance to the answer, and some suggestions for protecting faculty rights in campus copyright policies.

Basics of Copyright Law

Under the Copyright Act of 1976, copyright ownership vests in the author of a work that is fixed in any tangible medium of expression from the time it is created. Copyright owners enjoy exclusive rights to their works under the Copyright Act. This bundle of rights includes reproducing the work, preparing derivative works, and distributing copies by sale or other transfer of ownership.

The law allows an exception to the general rule that the author is the creator of the work under the concept of “work made for hire,” according to which the author—and therefore the owner of the copyright—is often an employer or the person for whom the work was prepared. Copyright ownership lasts for the life of the author plus 70 years, or in the case of a work made for hire, 95 years from the first publication of the work or 120 years from its creation, whichever comes first (Copyright Act of 1976).

Work Made for Hire

The Copyright Act establishes two situations under which a work is a “work made for hire”: (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned. Commissioned work presents a clear-cut case when copyright resides with the employer. Work prepared by an employee within the scope of employment, however, is more problematic because the Copyright Act does not provide definitions for these terms.

To determine whether a hired party is an employee, the U.S. Supreme Court developed a 13-point test, which considers, among other factors, the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; and the extent of the hired party's discretion over when and how long to work (*Community for Creative Non-Violence v. Reid*, 1989). To determine whether a hired party is working within the scope of their employment, courts have developed a three-part test: (1) whether the work is of the type that the employee is employed to perform; (2) whether the work occurs substantially within authorized work hours and space; and (3) whether the work's purpose, at least in part, is to serve the employer (*Newark v. Beasley*, 1995; *Roeslin v. District of Columbia*, 1995).

The literature is divided over whether online courses, and some other faculty work, should be considered works made for hire. Some legal scholars (Gorman, 2000; Kwall, 2001) say that faculty are the rightful owners of their work, while other commentators (McSherry, 2001; Laughlin, 2000) conclude that universities have a legal claim to the copyright of the faculty member's work. The determining factor is often the financial investment made by the institution in developing the work. In the case of online courses, it is reasonable to conclude that, because of the institution's investment, the institution owns the copyright (Klein, 2004).

Campus Copyright Policies and Faculty Rights

Key to Ownership: Use of Resources

One survey (Lape, 1992) of copyright policies at 70 research universities showed that in 42 of the policies, universities claimed ownership of faculty work when there was use—specifically, “significant” or “substantial” use—of university resources. For example, at the University of North Carolina at Chapel Hill, the copyright policy (2001) provides that traditional works or non-directed works involving “exceptional use of university resources” are owned by the university. The policy defines “exceptional use of university resources” as occurring “where the University has provided support for the creation of the work with resources of a degree or nature not routinely made available to faculty” (2001). Columbia University’s policy (2000) provides the university with copyright ownership in any authored work that is “created with substantial use of University resources,” defined as the opposite of ordinary use: “Ordinary use of resources such as the libraries, one’s office, desktop computer and University computer infrastructure, secretarial staff and supplies, is not considered to be substantial use of such resources for purposes of vesting the University with copyright ownership in a work.”

Specific Faculty Rights

Faculty members can secure the maximum protection of their work if they obtain an agreement stating that their works are not considered works made for hire and are not produced in the course of employment (Simon, 1982-83). When the university owns the copyright to an online course, however, the faculty member who developed the course can still retain important rights and privileges under copyright law.

Creative credit. The American Association of University Professors (1999) believes that for most works, faculty should minimally “retain the right to take credit for creative contributions.” Under the University of Michigan’s policy (2002), faculty receive credit for participating in the creation of university-owned works.

Right to reproduce and revise the work. Faculty should have the right to reproduce their work for their instructional purposes. The University of Michigan policy (2002) gives faculty who created a work and who are still employed at the institution the right of first refusal to make new versions of their work. The University of Washington’s copyright policy (2000) provides two options to preserve a professor’s right to revise a course. The policy states that, “As long as the author . . . remains an employee of the University, the author may: (a) request reasonable revisions of the materials prior to any instance of internal use, or (b) ask that the materials be withdrawn from internal use if revisions are not feasible.” Faculty could also have the right to have their name removed as the creator of a work if they disagree with university-made revisions (Laughlin, 2000).

Future use. Campus policies can provide faculty members with the right to future use when they move to another institution and wish to use their old courses. Michigan’s policy (2002) provides departing faculty “the right to be consulted in good faith on reuse and revisions (*e.g.*, for online instructional materials or courseware).” Under the University of Washington’s policy (2000), the university retains the right to continue to use a faculty member’s work internally after the faculty member leaves the institution, “unless the author/producer and the University agree in writing on special conditions for subsequent internal use of the materials and the procedures for their revision.”

Using the policies of academic publishers as a model, departing faculty members could receive a nonexclusive, royalty-free license to use their work in their classes at the new institution (American Council on Education, 2000). Alternatively, if the original university insists on retaining authorship and

copyright, it can negotiate a license for use with the faculty member's new university (Le Moal-Gray, 2002).

Commercialization. Universities most often grant licenses, and sometimes pay royalties, when they commercialize an online course. Licenses are “a contract in which a copyright owner grants to another permission to exercise one or more of the rights under copyright,” and royalties are a “payment made to an owner of a copyright for the privilege of practicing a right under the copyright” (University of California at Berkeley, 1992).

The University of Texas System (2002) provides for exclusive and nonexclusive licenses. Under the University of Washington's policy (2000), licenses specify “the conditions of use,” including “provisions concerning the right of the author or producer to revise the materials periodically, or to withdraw them from use—subject to existing agreements—in the event revisions are not feasible.” When the University of Washington (2000) sells noncommissioned materials developed by professors, it shares royalties with the creating faculty member.

The University of California at Berkeley's policy (1992) contains a provision combining licenses and royalties. It states:

The University may assign or license its copyrights to others. Royalty or income received from such transactions may be shared with the originator(s) of such works, as determined by the appropriate Chancellor, Laboratory Director, or Vice President, taking into account the originator's contribution, the University's costs, any provisions imposed by sponsors or other funding sources, and any other applicable agreements concerning the copyright.

Faculty members at the University of North Texas receive royalties when their online courses are taught by other North Texas professors. The amount of the royalty depends on the amount of technical assistance provided by the university, but faculty members can receive up to 8% of the tuition paid by a student (about \$20) who takes the course when another professor teaches it (Young, 2001). The faculty member also receives 50% of the license fee paid by another institution to use the course.

Licenses are playing an important part in the creation of MIT's OpenCourseWare project, which is making the primary materials of all the institution's courses available free online. Faculty involvement is voluntary; those participating in the project sign a licensing agreement that allows MIT to distribute their course materials on the OpenCourseWare Web site, and the faculty member retains the copyright to the materials (Olsen, 2002).

Time limits. Some institutions enter an agreement with their faculty under which the institution owns the copyright of the work for a finite period of time, which is sometimes contingent on the faculty member's employment with the institution. After the end of the set time period, the faculty member assumes ownership of the copyright.

Dispute resolution. When disputes arise over copyright ownership, some campus policies first call for the parties to try to work things out themselves informally, and then move incrementally up the administrative ladder to the supervisor, department chair or unit head, and then to the dean or director (University of Michigan, 2002). The next step is to a committee, either ad hoc (University of Michigan, 2002), or a standing committee often composed of faculty, administrators, and students (Columbia University, 2000; University of North Carolina, 2001). An institution's chief academic officer sometimes has the final say in copyright-ownership conflicts (University of North Carolina, 2001), but colleges and universities more often designate their president as the final arbiter of copyright-ownership disputes (Columbia University, 2000; University of Michigan, 2002). Some institutions resolve campus

disagreements over copyright ownership through arbitration (Carnegie Mellon University, 1985; University of Washington, 2000).

Conflict of interest. Copyright policies should include provisions to address the situation when professors prepare online courses for another institution. While the professors may own the copyright to such courses, they may have a conflict of interest with their employer institution.

Assignment. Institutions or faculty members may transfer copyright ownership through a written assignment. In the case of works made for hire, both parties need to sign the agreement (Copyright Act of 1976).

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Biographical Sketch

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