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Ownership of Online Course Material

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Overview

The transition from a print-on-paper world to a digital one has led to the reexamination of issues such as intellectual property, copyright, and ownership of online course materials. In the print world, giving “ownership” of courses and textbooks to the faculty member was an accepted practice. However, during the “gold rush” of distance education—a time when many individuals and institutions thought they might strike it rich through online courses—clarification of rights, ownership, and revenues became significant issues. Despite the demise of many dot-com dreams, the financial potential of online course materials remains an impetus for examining the ownership of online course materials. Whether because of declining state support or the desire to invest in online learning, institutions are looking for entrepreneurial activities that generate revenue. Commercialization of online courses holds the promise of augmenting existing revenues.

The ownership of faculty-generated material emerged as an issue in the mid-1990s, but from a different perspective. Libraries were wrestling with the rising costs of publications as well as the proliferation of books and journals. Institutions found themselves paying permission fees to use the work of their own faculty. As library budgets struggled to keep pace with rising costs and expanding collections, many institutions began to question the practice of assigning copyright to a publisher and then paying to use the material. Faculty found they were restricted in the use of their own material for classes, either in print or online.

Determining the author of online course material has significant legal and contractual consequences. From a legal perspective, it is important to determine who owns material, particularly if the intent is to commercialize it or subsequently use or license it. If there is no clear owner, later claims or controversies may be difficult to sort out. The inherent portability of online material makes it easily transferable from one institution to another. If a faculty member used the resources of institution A to develop a course, there is a natural resistance to seeing the course used by institution B without some form of compensation. Beyond ownership, conflict of interest, conflict of commitment, and use of the institution’s name can become issues in online courses.

As the controversy and confusion have increased concerning intellectual property and the copyright of course material, professional organizations have become more involved. Groups such as the American Association of University Professors (AAUP) and the National Education Association have focused on copyright and intellectual property as collective bargaining issues for their members.

While much of the recent focus has been on ownership and rights of online course material, institutional policies may provide little guidance on the use of existing copyrighted material. The recent passage of the Technology, Education, and Copyright Harmonization Act may provide the necessary incentive for the development of institutional policies and informational materials “that accurately describe, and promote compliance with, the U.S. copyright laws.”¹

The purpose of this Research Bulletin is to describe the factors involved in determining the ownership of online course materials. Institutions should review existing policies or develop new ones to ensure that ownership of online course materials is clear.

Highlights of Ownership of Online Course Materials

Ownership of online course material is rarely an all-or-nothing proposition. Rather than the course being owned solely by the faculty member or by the institution, there can be a large number of complicating factors, ranging from what constitutes a course to unbundling ownership. Determining ownership of online course material involves institutional philosophy, consideration of the possibilities created by digital media, legal issues, and a weighing of practical considerations.

Defining “the Course”

Before determining ownership, it may be necessary to define what constitutes a course. There is little debate that a course is more than “canned content”; it includes interaction with the instructor and other students. Course components may include a syllabus, course description, readings, assignments, tools, simulations, student contributions, discussions, exams, and so on. In fact, the ultimate value of the online course may result not merely from creating content but also from the instructor’s ability to select and organize materials, motivate and guide students, facilitate discussion, and assess learning outcomes.

Much of the course material may be developed by a faculty member. Other material may be copyrighted by others but can be used based on principles of fair use or other exceptions under copyright law. Minimal controversy arises when materials are used in a traditional, on-site class. If the course is developed with the intent of being distributed over the Web or used for profit, however, the situation changes.

The definition of a course—and clarification of who owns the course’s materials—is particularly complicated for seminars or colloquia. In these types of learning environments, much of the material is generated by students. Students may be considered authors, just as faculty are. If student-generated material is used in a course, who owns it? Who can license the material? Some institutional policies attempt to treat students as employees, using a work-for-hire philosophy. However, it is unclear whether institutions have the right to use student work unless prior approval is granted. Even when permission is obtained, institutions should be aware that privacy issues may be involved. Having students sign a consent and release form is a common remedy.

Principles for Intellectual Property

The principles an institution follows for creation of its intellectual property policy should foster specific types of activities and reflect the institution’s philosophy. The Consortium for Educational Technology for University Systems (CETUS) published an example of principles used for intellectual property. CETUS suggests that intellectual property guidelines should

- foster the creation of intellectual properties of the best possible quality in order to further the academic mission of higher education;
- foster the dissemination of new knowledge and the maintenance of high academic standards;
- provide incentive for faculty, staff, and students to fully participate in the use and creation of intellectual properties; and
- support the concept that the ownership of intellectual property rights is not necessarily an all-or-nothing proposition.²

Ownership and Copyright Law

Copyright law has its basis in the Constitution. There have been four major revisions to copyright law, the most recent in 1976. Following the 1909 Copyright Act, a practice known as the “teacher exception” evolved for academic works. In the context of education, the academic exception stipulates that the author, not the employer, owns academic work. The 1976 revision to copyright law did not explicitly endorse or denounce the teacher exception, confounding ownership of academic material and leaving open for speculation both the legislative intent and how a court might act in the event of a dispute. For this reason, many institutional policies reaffirm the concept of faculty ownership of course material.

Copyright law protects original works that are “fixed in any tangible medium of expression.”³ Books, articles, artwork, music, software, traditional or electronic correspondence, and materials placed or found on the Internet may be protected by copyright. Eligible material is automatically protected upon its creation; it is no longer necessary to place a copyright notice on work or register it with the U.S. Copyright Office.⁴

Owners can be individuals, teams, or organizations. Increasingly, online courses are developed by teams of individuals—faculty, technologists, instructional designers, graphic artists, and perhaps students. All those who contribute to the final product may have a claim to some legal rights in the work.

One exception to an author retaining ownership of material is “work for hire.” In the case of work that is done “by employees in the scope of their employment,”⁵ the work is owned by the employer (for example, the institution or the regents). While the practice is accepted in the corporate sector, faculty rarely consider it appropriate that their scholarly works fall under a work-for-hire stipulation. In general, institutions support this position.

Of course, faculty are not the only developers of online courses. There has been a rise in the use of adjunct faculty and contractors for course development and delivery. As a result, there are two different employment situations to consider in a work for hire. First, there are faculty who are considered employees (they receive salaries and benefits), developing material within their scope of employment. Second, there are adjuncts, consultants, and contractors who are paid to develop work but who are not employees. Simply because the institution compensated someone to develop course material does

not mean that the institution owns it. In the case of contract employees or commissioned works, copyright generally stays with the author; the work only belongs to the institution if it is specifically agreed to in writing. Therefore, if the intent is for the institution to own course material developed by others, a signed agreement is needed specifying the intellectual property and copyright interests; otherwise, the developer will retain the rights.

Unbundling Ownership

Copyright establishes a set of exclusive rights, which include the rights to

- make reproductions of the work,
- distribute copies of the work,
- make derivative works,
- make public performances or displays of the work, and
- perform sound recordings publicly by means of a digital transmission.⁶

These rights and privileges are divisible. For example, copyright and ownership can be transferred. In the case of scholarly publishing, commonly authors will transfer or assign their ownership to a publisher or journal. Assignment of copyright to another party must be done in writing.

Copyright is a set of rights and privileges that can be retained, shared, or transferred. The rights may be assigned exclusively (to only one party) or transferred nonexclusively through a license (the owner grants the same right to multiple parties). For example, an author may grant a nonexclusive license to others to reprint the work or post it on the Web. A license can also carry a price.

CETUS views copyright as a divisible set of rights that may be shared among different parties to create the environment that most scholars intend—one in which their works are broadly shared and studied. “A careful allocation of rights among parties can best allow faculty to build on their previous works, enable colleagues and students to benefit from one another’s research and creativity, and allow universities to foster the greatest growth of knowledge from increasingly scarce support funds.... New policies and agreements must not diminish the power of the partnership between American academic authors and their universities.”⁷

Unbundling copyright compels individuals and institutions to determine (a) which party owns the copyright, (b) who has full or partial license to the material, and (c) what the distribution of revenue, if any, will be. CETUS suggests that three factors play important roles in determining faculty and institutional rights to a particular work:

- **Creative Initiative.** Was the work conceived and created by the same person? Although work may have been suggested by a department chair or colleague, the individual who creates the work is usually the one who owns it. In most cases, the author is favored as the copyright owner.

- **Control.** As the work was being created, who had control over the content, scope, and final expression? In some cases, an institution provides detailed specifications about content, format, and so on. In other cases, the faculty member retains this control. The party that exercises the most control in creating the work is favored as the owner.
- **Investment.** The degree to which the institution invests in the creation of a work influences ownership. In some cases, institutions provide extraordinary investment, such as instructional and technical design teams, artists, special equipment, and so on. If the institutional investment is considered substantial, and the individual is an institutional employee, the institution is favored as the owner.

These three factors may be considered in the unbundling of copyright. Regardless of whether the institution or the creator is determined to be the owner of the material, the other party may be interested in certain rights, as identified below.⁸

In the case of institutional ownership, the following rights might be licensed to the creator:

- The right to make reproductions for use in teaching, scholarship, and research
- The right to borrow portions of the work for use in other works
- The right to make derivative works, even if the author assigns copyright to a third party
- The right to alter the work, add to the work, or update the content of the work
- The right to be identified as the author of the work
- The right of portability (the right to take the work to, and use the work with, a new employer)
- The right to be informed in advance of any uses, reproductions, or distributions of the work
- The right to retain for his/her institution the right to duplication of the work

In the case of creator ownership, the following rights might be licensed to the institution:

- The right to retain for the institution duplication of the work for teaching, scholarship, and research
- The right, on a limited basis, to make derivative works if the author(s) assign copyright ownership to a third party
- The right to control whether the institution's name or logo is displayed in association with the work
- The right to require an appropriate acknowledgment of college/university support of the creation of the work

- The right to borrow portions of the work for use in compilations or other composite works
- The right to reproduce the work for uses directly related to advancing the mission or maintaining the culture of the college/university
- The right to be informed in advance of any uses, reproductions, or distributions

Ideally, institutions should come to an agreement about ownership and administrative issues prior to the development of online courses. When there is no discussion or prior agreement, the faculty member is typically considered to own the course. Many institutions are using contracts for online courses to stipulate both the author's and the institution's rights.

Process for Creating an Ownership Policy

Development of a copyright-ownership policy should involve individuals representing all interested groups, and the policy development process must be perceived as fair to all parties, including the institution. Because faculty are most affected by the policy, establishing faculty representation as the dominant force may be wise.

Prior to drafting a policy, the involved parties should discuss underlying issues and assumptions. The culture and philosophy of the institution may have a significant influence on the policy. Draft policies should be circulated to interested parties, including governance groups, allowing sufficient time for review, discussion, and revision. Having faculty as spokespersons for the policy who "sell" it to the academic community is also advisable. After the policy is approved, institutions might want to allow time for education of the campus community before implementing the policy, particularly if the policy represents a significant change from the status quo.⁹

Components of a Copyright-Ownership Policy

Copyright is one of several related policies. Depending on the institution, these policies may be covered in the same policy document or handled separately:

- Intellectual property policies: patents, copyrights, and trademarks
- Copyright policies
- Policies for ownership of software
- Policies for ownership of course materials

Handling these policies separately might be advisable. Institutions should ensure that a copyright-ownership policy is not construed as being sufficient to cover other situations such as the creation of software, filing for patents, or the use of trademarks.

Policy Elements

There are a number of common elements to most copyright-ownership policies.

Statement of Principles. Many policies begin with a reaffirmation of principles and mission. The Association of American Universities (AAU) suggests the following:

- The central mission of the university is to create, preserve, and disseminate knowledge through teaching and research.
- Reaffirm of the norms and values of scholarly work, such as the open exchange of ideas, publication of work in scholarly journals, and ownership, “which holds that research and scholarship are the products of social collaborations and are assigned ultimately to the community.”
- Policies should not interfere with faculty ability to freely pursue their research and expression of ideas.¹⁰

Purpose Statement or Rationale. The purpose of the copyright-ownership policy should be defined. In general, the purpose of a copyright-ownership policy is to protect the interests of the institution and its faculty, staff, and students. This may include a restatement of the Constitutional objective of copyright (“to promote the progress of science and useful arts”) and the higher education interpretation of copyright, which according to the AAUP *Statement on Copyright* is “to encourage the discovery of new knowledge and its dissemination to students, to the profession, and to the public.”¹¹

Policy Statement. The policy statement should set forth the institution’s position. At one extreme is the statement that academic works, including those online, are the property of the institution. At the other extreme, works are considered the author’s property. Such statements may be overly simplistic, because an increasing number of institutions are establishing processes for unbundling rights. The policy statement should include clear direction on unique circumstances, such as when a work is created as a work for hire, is a joint effort, or involves a negotiated contract.

Definitions and Explanations. Also included may be a definition of the works considered copyrightable and the degree to which work is portable to other institutions. There may be a number of terms that require further definition or explanation. For example, some policies rely on the degree to which institutional resources were used to determine ownership. A phrase such as “significant contribution” or “substantial contribution” might be used to describe when resources, above and beyond those normally available to faculty, are used. If use of institutional resources is a criterion for determining ownership, the institution may need to determine what types of support are “normal” or “reasonable” as opposed to “extraordinary.” For example, is the use of technical support or instructional design assistance normal, or does it represent a significant institutional contribution? Another option is to assume that the ownership of a work resides with the creator unless it results from a directed assignment or there is a direct allocation of funds from the institution for the specific project. While it is useful to include definitions as part of the policy document, explanations may be better addressed through corresponding guidelines or a set of frequently asked questions that follow or supplement the policy document.

Procedures. A procedures section should detail the process by which exceptions to the copyright-ownership policy are determined. It should describe the dispute resolution process. Institutions may choose to have a standing committee that reviews policy on a regular basis and adjudicates disputes. The policy should also provide guidance on where faculty and others can seek clarification if they are unclear about the policy or its implications.

Royalties and Revenue Sharing. To avoid conflicts, policies should stipulate the distribution of royalties and specify any revenue-sharing arrangements. Because online courses may be created by more than one person, policies need to include statements about the distribution of revenues for all involved in developing the product (Web designer, graphic artist, and so on). Distribution of revenue to the creator(s), department, division, and institution should also be described. In some cases the institution retains the majority of the revenue; in others it is distributed to the creator's academic unit. Although policies should apply to all who create online courses, AAU cautions that "if the general pattern of academic productivity prevails here as elsewhere, this will be a 'game of home runs': 10 to 15 percent of the faculty or units of the university will generate about 65 to 80 percent of the total revenues from these new media activities."¹²

Additional Issues

Beyond the components of copyright policy, other issues should be addressed, such as conflict of commitment, use of the institution's name, and questions regarding consulting.

Conflict of Commitment Policy. Conflict of commitment policies often address the appropriateness of teaching courses at other institutions or the amount of time faculty may devote to outside activities. The presumption is that faculty owe their primary time commitment to their own institution. Policies rarely place restrictions on the type of work allowed but may require prior institutional approval. However, the ability of faculty to develop Web-based courses for other institutions creates the need to clarify conflict of commitment policies.

AAU contends that full-time faculty should not be allowed to create commercial works for another institution or private company without prior institutional permission. However, if no institutional resources are used, the college or university may not have a claim on the product.

Use of College or University Name. An institution's name is a valuable resource. Many colleges and universities trademark their names and seek to protect use of their logos. As a result, if an institution's name is used in association with personal activities or the development of intellectual property, it triggers the institution's interest. Improper use of an institution's name or use of the name in relationship to poor-quality work could negatively affect the institution. Institutions are encouraged to have a policy defining the use of the institution's name, whether for individual works or for works created with an external organization.¹³

Consulting and Use of University Resources. Faculty and professional staff are often experts in their fields, and some institutions encourage outreach or service to the community. Additionally, some employees might serve as paid consultants. The development and dissemination of copyrighted works for clients is another delicate issue, especially when the work is related to an employee's duties. Policies that permit outside consulting typically forbid the use of institutional resources for personal financial gain. Similarly, such policies might also clarify copyright ownership and address situations in which work developed for clients is also used for institutional purposes, such as course materials, training modules, or documentation manuals.

What It Means to Higher Education

Intellectual property issues are at the heart of academic enterprises. Faculty and students generate a tremendous amount of new scholarship and have a vested interest in the protection of their inventions and creations through the application of patent and copyright laws. Colleges and universities are also vast consumers of copyrighted materials and need to be cognizant of alternatives to licensing, including educational exemptions and defenses such as fair use. Clarifying ownership may also be critical to determining what rights institutions have with respect to using copyrighted materials created by their faculty and students. The mission of colleges and universities should naturally result in the promotion of ethical behavior; educational approaches are necessary to inform faculty and students about copyright law and institutional policy.

Key Questions to Ask

- Does the institution have an intellectual-property and copyright policy in place? Is it well communicated?
- Is there an operational definition of “the course” as well as the ownership of the components that compose a course?
- If adjuncts, consultants, or contractors are used to develop course material, are they bound by a contract that specifies ownership and licensing considerations?
- Does the institution have a process for separating institutional interests from faculty interests, allowing for the creation of win–win situations?
- Is there a well-defined process that allows stakeholders to participate in discussions of intellectual property and copyright?
- Does the institution have policies covering the use of the institution's name, conflict of commitment, and consulting and outside activities?

Where to Learn More

- Center for Intellectual Property and Copyright in the Digital Environment, <<http://www.umuc.edu/distance/odell/cip/>>.

- CopyOwn: A Resource on Copyright Ownership for the Higher Education Community, <<http://www.umd.edu/copyown/>>.
- Copyright Management for Scholarship, <<http://www.surf.nl/copyright>>.
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Endnotes

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