

## Intellectual Property Ownership in Distributed Learning

By pushing the temporal and spatial boundaries of the classroom, distributed online courses provide colleges and universities with ways to enrich and better support the learning of traditional students. In addition, distributed learning courses appeal to many institutions that want to expand their course offerings beyond the traditional student audience and attract a wider range of student populations, including corporate and professional-development students as well as nontraditional and recreational learners. Moreover, in an era of state budget cuts and a tight economy, distributed learning may address the needs of colleges and universities that are looking for additional revenue sources. Budding virtual universities, consortia, and corporate partnerships are now providing new ways for institutions to market courses beyond their campuses. Yet in spite of the great promise of distributed education, a critical question remains: Who is entitled to control, and potentially profit from, faculty-created courses and course materials?

Recent copyright legislation, such as the DMCA and the TEACH Act, has amended the 1976 U.S. Copyright Law to include stipulations for intellectual property usage in a digital age. These acts, however, are relatively silent on the ownership of works created with new technologies. Creators of electronic intellectual works must therefore utilize the 1976 U.S. Copyright Law in order to understand the ownership rights afforded to them. Under this law, copyright owners are granted bundles of rights, including the right to control the reproduction, display, and distribution of their work as

well as the right to create adaptations and derivative works.

When determining the owner of a work, U.S. copyright law distinguishes between independently created work and “work for hire.” In the former case, the default assumption is that ownership vests with the author. In the later case, works are owned by the hiring party. In academia, the case is not clear as to whether faculty members are working independently or as part of their employment at the college or university. Though faculty members create course materials as part of their employment, academic activities are generally conducted at the faculty’s discretion. Because of this ambiguity, tension has arisen between two academic models of intellectual property ownership: the textbook model and the software model.

With the exception of specifically commissioned works, academic tradition and case law have favored the position that faculty members are generally granted full rights over the printed course content and academic materials they create. This “textbook model” arose from the realization that institutional ownership of faculty members’ printed works (including textbooks, articles, lecture materials, and other publications) could ultimately lead to censorship by restricting the distribution and dissemination of new or controversial ideas. Moreover, because of the relatively low cost of development and the often small financial incentive for such works, colleges and universities do not typically claim ownership over faculty-created academic work products. Conversely, works produced in the “software model” present a much lower threat to academic freedom, require greater re-

sources to develop, and result in a more lucrative product than academic publications. Consequently, colleges and universities are more prone to claim ownership rights over these products.

Distributed learning, a unique hybrid encompassing aspects from both traditional text-based academic materials and digital software, thus poses an interesting dilemma for both institutions and faculty members.

### Significance for the Higher Education Community

With the growing marketability of Web-based courses, higher education institutions need to clarify issues of ownership and control over the course content created for distributed learning courses. Distributed learning technologies often require resources over and above those generally available to faculty. Colleges and universities may therefore wish to assert ownership over materials created with these unusual or extraordinary resources, either to recoup costs or to profit from their investment in the technology.

Faculty members often bring certain presumptions about academic tradition to the digital classroom and may believe that digital course materials should be granted the same treatment as more traditional course artifacts. Portability of course materials is a growing issue as many faculty members express concern about maintaining the right to migrate their course materials to other formats (e.g., textbooks or CD-ROMs) or to other institutions in the future. This poses a threat to colleges and universities, since digital courses and course materials can be marketed to outside institutions to di-



rectly compete with the college or university course offerings.

Moreover, U.S. copyright law dictates that copyright is secured at the point of fixation in a tangible medium. Thus, as video and audio recordings of instruction become increasingly easy to produce, even more of the classroom experience is subject to copyright ownership and restrictions. Although institutions may benefit from maintaining recordings of each course, this fact is particularly worrisome to faculty, since transient teaching can now (at least conceptually) be owned and controlled by the institution.

### Addressing the Ownership Issue

Since the law is unclear about how ownership of digital course materials should be distributed, issues of intellectual property ownership need to be addressed at the campus level through policy and through written contractual agreements.

- Institutions should work with faculty members and local legal counsel to develop policies that balance the needs of faculty with those of the institution. This may involve unbundling copy-

rights and creating policies of joint or shared ownership.

- Institutions should articulate the resource usage level at which ownership vests with faculty members and the level at which ownership vests with the institution. This “tipping point” in ownership will likely differ between institutions and will likely be a reflection of the campus culture. For larger institutions with diverse departments or a wide array of technology uses, the tipping point may need to be determined at the departmental level. While clarifying some of the boundaries of institutional copyright ownership, the process of articulating resource “tipping points” also affords both faculty and the institution a better glimpse of the resources required to develop distributed learning materials.

- Institutions should create written agreements to articulate rights afforded to both faculty and college/university parties.

- Institutions should ensure that campus intellectual property policies comply with existing “non-compete” policies and agreements.

- Institutions should develop policies to retain college/university and faculty use of intellectual property materials when sold or licensed to outside companies or organizations (“shop rights”).
- Once ownership of materials has been established, institutions should register works (particularly modularized, Web-based training materials or other materials designed for long-term or repeated use) with the U.S. Copyright Office (<http://www.copyright.gov/register/>). Although registration is not necessary to secure copyright under U.S. law, works must be registered before infringement suits can be issued. In addition to written agreements asserting ownership, registration is often beneficial when ownership is complicated or when multiple derivative uses are anticipated.

For better or worse, no single policy can be written to address the varied needs and concerns of all institutions. Some institutions desire strong institutional control over the intellectual property used in distributed learning, whereas others prefer to allow faculty a greater degree of ownership over such materials. Moreover, the available technological resources and the ways in which technology is used in distributed learning likewise vary between institutions. Policy development must therefore be approached with the specific culture and unique capabilities of the institution in mind.

The process of crafting effective copyright ownership policies is not necessarily simple or easy. Such a process, however, may be required in order to avoid potential disputes that may arise from the growing prevalence and profitability of distributed learning materials.

### Note

For further information, see the EDUCAUSE Current Issues page, “Faculty Intellectual Property Rights: A Debate for the Electronic Age,” on the EDUCAUSE Web site: <http://www.educause.edu/issues/faculty.html>.

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