

# **Who Holds the Copyright in Your Classroom Handout? A Look at Higher Education Work-for-Hire Policies and Students Selling Class Notes**

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*Faculty and administrators in higher education face new challenges regarding copyright ownership as the internet expands the use and availability of course-specific intellectual property and information. This article explores four questions: Does the university or professor own the work? What can professors do with the work? What can students do with the work? And how do you control your course materials and protect your intellectual and financial investment? We will look at statutes, case law, and the copyright policies of eight universities to determine policy regarding the faculty right to hold copyright in all scholarly works and the university right to own copyright in special works and when they can license and publish faculty scholarly work.*

## **INTRODUCTION**

You have spent hours researching and honing the finer points in your instructional materials. Your syllabus and assignment schedule are the product of years of experience and refinement. Your workbook of case studies, your assessment tools, and your handouts are brilliant. You have created modules and digital presentations of the entire course for your distance learning class, and your website is the envy of the college. And then, your department chairperson gifts a copy of it all to the new part time instructor without your knowledge or permission and you discover your best student is selling your materials and his notes of your lectures to an online service...

College and university professors face challenging copyright issues every time they create something for use within the scope of their employment, including publication of materials written while “on the job.”

## **WHO OWNS THE WORK: UNIVERSITY OR PROFESSOR?**

The Copyright Act of 1976 “work for hire” places pressure upon universities and colleges to assert rights in scholarly works that have traditionally belonged solely to the individual creators of those works, the faculty. More important than the resulting indignation from the faculty is the challenge to the fundamental premise of academic freedom.

If an educational institution assumes the right to edit and control publication of faculty works, what are the rights that remain with the individual creator of the work?

Under the Copyright Act of 1976, a “work made for hire” is a work that the employee has prepared within the scope of his or her employment, or a work that the employer has commissioned from the employee as part of a collective or supplementary work, for which they expressly agree in a written instrument signed by both parties that the work shall be considered a work made for hire.

Most colleges and universities around the country have implemented copyright policies addressing some of these complicated ownership issues. For example, the University of California copyright policy states that “ownership to the rights to Course Materials, including copyright, shall reside with the designated instructional appointee who creates them,” generally meaning those university employees who teach the course (University of California Policy on Ownership of Course Materials, 2003, p.2). However, additional policy goes on to state that “ownership rights to Course Materials created, in whole or in part, by Designated Instructional Appointees with the use of Exceptional University Resources shall be governed by a written agreement entered into between the Originator(s) and the University. The agreement shall specify how rights will be owned and controlled and how any revenues will be divided if the materials are commercialized.” (University of California Policy on Ownership of Course Materials, 2003, p.3).

In comparison, the California State University Northridge (CSUN) policy states that “rights to all intellectual creations of its faculty including books, works of art, computer programs and musical compositions and all other scholarly works remain the property of the respective faculty member” (CSUN Policy on Ownership of Intellectual Creations, 1984, p.1). The policy is silent on works made for hire, works assigned or licensed by the faculty to the University, commissioned works, or works made using significant University resources (CSUN Policy, 1984). However, at least one college at CSUN has adopted a contractual approach for addressing copyright in course materials. In the Tseng College of Extended Learning at CSUN, faculty contributors must sign a Course Development Contract, which states that “specific work to be done in the design, development or customization of a course or program ...will be performed on a work-for-hire basis with all rights to the work product becoming property of the College of Extended Learning” (Roland Tseng College of Extended Learning, CSUN, Course Development Contract, 2005, p. 1). Although this appears to leave no rights with the author of the coursework, the college does recognize the “right of the producer to use the work product, with the written approval of the ...Dean or designee, in his/her own teaching assignments at CSUN ...so long as those assignments do not compete with course offerings by [the college]” (Table 2, Roland Tseng College of Extended Learning, CSUN, Course Development Contract, 2005, p. 4).

As is evident from these examples and other university policies regarding faculty rights (Table 1) and university rights (Table 2), the definition of a work-for-hire is key in determining whether coursework is owned by the faculty author or by the higher education institution.

**Table 1*****University Copyright Policies: Faculty holds copyright in all “scholarly works”***

<b>University</b>	<b>Year adopted/ amended</b>	<b>Faculty holds copyright in all scholarly works</b>
California Institute of Technology	2007	Copyrights to textbooks, reference works, submissions to scientific journals, and other copyrightable materials produced by faculty members as a part of their normal teaching and scholarly activities at the Institute that do not result from projects specifically funded in whole or in part by the Institute or by a sponsor of the Institute, shall belong to the author or authors and may be retained by them. <a href="http://ogc.caltech.edu/forms/copyrightpolicy">http://ogc.caltech.edu/forms/copyrightpolicy</a> Retrieved January 8, 2012
California State University, Northridge	1984	“It shall be the policy of CSUN that rights to all intellectual creations of its faculty including books, works of art, computer programs and musical compositions and all other scholarly works remain the property of the respective faculty member.” <a href="http://scholarworks.csun.edu/xmlui/handle/10211.2/354">http://scholarworks.csun.edu/xmlui/handle/10211.2/354</a> Retrieved January 8, 2012
Harvard University, Boston	2010	Subject to [exceptions], authors are entitled to own the copyright and retain any revenue derived therefrom in books, films, video cassettes, works of art, musical works, and other copyrightable materials of whatever nature or kind and in whatever format developed, except that computer software and databases shall be subject to [a separate section] of this policy. It is expected that when entering into agreements for the publication and distribution of copyrighted materials, authors will make arrangements that best serve the public interest. <a href="http://otd.harvard.edu/resources/policies/IP">http://otd.harvard.edu/resources/policies/IP</a> Retrieved January 8, 2012
Massachusetts Institute of Technology	2006	Authors own all intellectual property that is 1) not developed in the course of sponsored research, 2) not created as a work-for-hire, and 3) is not developed with the significant use of funds or facilities administered by MIT. <a href="http://web.mit.edu/policies/13.1.html">http://web.mit.edu/policies/13.1.html</a> Retrieved January 11, 2012
Stanford University, California	1998	All rights in copyright shall remain with the creator unless the work is a work-for-hire, is supported by a direct allocation of funds through the University for a specific project, is commissioned by the University, makes significant use of University resources or personnel, or is otherwise subject to contractual obligations. Retrieved January 11, 2012

		<a href="http://rph.stanford.edu/5.2html">http://rph.stanford.edu/5.2html</a>
University of California, Los Angeles	1992/2003	<p>“Ownership of copyrights to scholarly/aesthetic works shall reside with the designated academic appointee originator, unless they are also sponsored works or contracted facilities works, or unless the designated academic appointee agrees to participate in a project which has special provision on copyright ownership.” “Ownership of copyrights to personal works (prepared outside the course and scope of University employment without the use of University Resources) shall reside with the originator.” “Except as provided below, ownership to the rights to Course Materials, including copyright, shall reside with the Designated Instructional Appointee who creates them.”</p> <p><a href="http://www.ucop.edu/ucophome/coordrev/policy/8-19-92att.html">http://www.ucop.edu/ucophome/coordrev/policy/8-19-92att.html</a> Retrieved January 11, 2012</p> <p><a href="http://www.ucop.edu/ucophome/coordrev/policy/9-25-03copyright.html">http://www.ucop.edu/ucophome/coordrev/policy/9-25-03copyright.html</a> Retrieved January 11, 2012</p>
University of Michigan	2011	<p>“The University holds the copyright (as “works made for hire”) in copyrighted works authored by its Employees who are acting within the scope of their employment. Otherwise, the University does not hold copyright in a work, unless the copyright has been transferred legally to it by written assignment or other process of law.” “The University... transfers any copyright it holds in scholarly works to the faculty who authored those works – with [a number of] conditions and exceptions.”</p> <p><a href="http://www.lib.umich.edu/files/services/copyright/601.28(1).pdf">http://www.lib.umich.edu/files/services/copyright/601.28(1).pdf</a> Retrieved January 11, 2012</p>
University of Texas	2011	<p>“The Board of Regents will not assert an ownership interest in the copyright of scholarly or educational materials, artworks, musical compositions, and literary works related to the author’s academic or professional field, regardless of the medium of expression. This exemption applies to works authored by students, professionals, faculty, and non-faculty researchers. The Board of Regents encourages these creators to manage their copyrights in accordance with the guidelines concerning management and marketing of copyrighted works consistent with applicable institutional policies.”</p> <p><a href="http://www.utsystem.edu/bor/rules/90000series/90101.pdf">http://www.utsystem.edu/bor/rules/90000series/90101.pdf</a> Retrieved January 10, 2012</p>

**Table 2*****University Copyright Policies: University owns the copyright in “special works”***

<b>University</b>	<b>University owns the copyright in special works</b>	<b>University license to use/publish faculty scholarly work</b>
California Institute of Technology, California	If the Institute provides funds or a sponsor’s funds, to finance (in whole or in part) a specific research or educational project and copyrightable materials are produced by employees as a result of the project, the ownership of copyrights and royalty rights therein shall be held by the Institute.	
California State University, Northridge	School/College specific agreements may exist. For example: Tseng College of Extended Learning at CSUN provides: “...specific work to be done in the design, development or customization of a course or program ... will be performed on a work-for-hire basis with all rights to the work product becoming property of the College of Extended Learning.” <a href="http://tsengcollege.csun.edu/policies/V_I.pdf">http://tsengcollege.csun.edu/policies/V_I.pdf</a>	
Harvard University, Boston	<ol style="list-style-type: none"> <li>1. Whenever research or a related activity is subject to an agreement between the University and a third party, those materials shall be handled in accordance with the agreement.</li> <li>2. In circumstances where University involvement in the creation and development of copyrighted materials is more than incidental, including use of resources such as funds, facilities, equipment or other University resources, in consideration of making such resources available, ownership and rights to shares of royalties or income or both shall be fairly and equitably apportioned as between the University and the Author(s)</li> <li>3. A copyrightable work created within the scope of employment by non-teaching employees shall be a “work made for hire” and the University shall be deemed the Author and shall own the copyright.</li> <li>4. A commissioned work falling within the “work made for hire” definition shall be owned by the University.</li> <li>5. The University, at any time, may acquire ownership or rights in copyright and copyrighted materials by agreement with the Author(s) or other rights holder(s), on terms as are agreed.</li> </ol>	

Massachusetts Institute of Technology	Sponsored projects, works made for hire, works developed with significant use of funds, or facilities administered by MIT are the property of MIT.	Teaching materials can be co-owned by faculty and university if significant MIT resources are used.
Stanford University, California	"Copyright shall remain with the creator unless the work: a. is a Stanford work-for-hire (and copyright therefore vests in Stanford under copyright law) b. is supported by a direct allocation of funds through Stanford for the pursuit of a specific project, c. is commissioned by Stanford, d. makes significant use of University resources of personnel, or e. is otherwise subject to Stanford-related contractual obligations"	
University of California, Los Angeles	Ownership of copyrights to “sponsored work” (work produced by or through the University in the performance of a written agreement between the University and a sponsor); “commissioned work” (work produced for the University by employees outside their regular employment or by non-employees); “contracted faculties work” (work produced outside the course and scope of employment or by non-employees using designated University facilities); and “institutional work” (works made within the course and scope of employment using University resources) shall vest with the University unless the written agreement states otherwise	“The University retains a fully paid-up, royalty-free, perpetual, and non-exclusive worldwide license to any Course Approval Documents for the purpose of continuing to teach the course of instruction for which the documents were prepared, with the non-exclusive right to revise and update as required for this purpose.”
University of Michigan	The University does not transfer its copyright in scholarly works that are authored as required deliverables under a sponsored activity agreement, that would be in violation of the law, that are commissioned by the University, that are software under another bylaw, or that have been transferred to the University in a writing.	The University reserves the nonexclusive right to use scholarly works for educational or administrative purposes consistent with its educational mission, and to preserve, archive, and host scholarly works in its institutional repositories where faculty can control the timing and scope of access to their copyrighted works.

University of Texas	“the Board of Regents shall have sole ownership of all intellectual property created by (a) an employee, student or other individual or entity commissioned, required, or hired specifically to produce such intellectual property by the University of Texas System..., and (b) an employee, student or other individual as part of an institutional project.”	“Except as may be provided otherwise in a written agreement approved by the institution ... the provisions ...relating to division of royalties, shall not apply to intellectual property owned solely by the Board of Regents...”
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(Note: Most of these policies are edited and paraphrased to fit in the tables. Please see the individual university websites for the full policies.)

In the definition provided by the Copyright Act of 1976, we find that a work for hire is “a work prepared by an employee within the scope of his or her employment” (17 U.S.C. § 101). What works, then, are considered to be within the scope of employment? The Copyright Act of 1976 does not provide the definition of scope of employment. Many colleges and universities have interpreted the statute to mean that the copyright is retained by the university unless the university grants those rights back to the individual professor or employee. Generally, however, as a matter of university policy, scholarly work is not considered work-for-hire. The American Association of University Professors (AAUP) position is that “It has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member’s own initiative for traditional academic purposes” (Springer, 2006, p. 6).

The 1909 Copyright Act, through subsequent judicial interpretation (*Williams v. Weisser*, 1969), provided an “academic exception” that protected the purely academic works of faculty as works remaining within the ownership of the author. Unfortunately, this exception was never codified in the later 1976 Copyright Act and there has since been a question whether the “academic exception” remains (Nash, 2004). Assuming the exception does not remain, it appears that most academic work, which is necessary for tenure and promotion, is arguably created as a requirement for employment, and likely comes under the aforementioned “scope of employment” classification (*Hays v. Sony Corp. of America*, 1988). However, due to the long-time traditional belief that the professor or employee retains the copyright in his or her academic works, such as journal articles, classroom materials, presentation materials, etc., many universities have crafted their copyright policies in a manner that grants certain traditional rights to the professor, while retaining a number of others through a series of exceptions to the rule (Springer, 2006). Examples of these exceptions can be found in the copyright policies at Caltech, Harvard, the University of Michigan, and other universities listed in Table 2.

The case law regarding academic copyright, following the 1976 statutory revisions, did not settle these issues. In *Weinstein v. University of Illinois* (1987), the lower court found that Professor Weinstein’s article was the University’s property as a work-for-hire, but the Court of Appeals determined that under the University policy “a professor retains the copyright unless the work falls into one of three categories:

- (1) a third party agreement requires the University to hold the copyright, or
- (2) [a] work[s] commissioned in writing by the University, or
- (3) [a] work[s] created as a specific requirement of employment or as an assigned University duty.” (*Weinstein v. University of Illinois*, 1987, p. 1094).

Here, the lower court determined that Weinstein’s work fell within the third category because the University funded the program and Weinstein was required to write as part of his role as University scholar. The appellate court, however, questioned whether these three categories were “exceptions” to the rule when “a university requires all of its scholars to write” (*Weinstein v. University of Illinois*, 1987, p.1094). Thus, even though the University policy seemed to reserve copyright in the University for scholarly works, in practice, the Court stated it “would be surprised if any member of the faculty of the College of Pharmacy treats his academic work as the property of the University” (*Weinstein v. University of Illinois*, 1987, p. 1094). Ultimately, the court determined that the University of Illinois had “no more power over [Weinstein’s] manuscript than it did over the title to [his colleague’s] car or Weinstein’s family heirlooms” (*Weinstein v. University of Illinois*, 1987. p. 1095).

One year later, in *Hays v. Sony Corporation* (1988), Judge Posner wrote that “although college and university teachers do academic writing as a part of their employment responsibilities...the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher” (p.416). Judge Posner went on to state that “the work-for-hire doctrine, which assigns copyright to the employer in the absence of a contractual specification, does not come into play until it is determined that the work *was* one made for hire—a determination which cannot be based on the silence of the employment contract concerning who has the right to copyright the employee’s writings” (*Hays v. Sony Corporation*, 1988, p.417).

Most recently, and contrary to the *Williams* and *Hays* cases, the United States District Court in *Molinelli-Freytes v. University of Puerto Rico* (2010), held that the “teacher exception” did not survive the enactment of the 1976 Copyright Act and, “accordingly, [the college professor could] claim no such exception in relation to [the college’s] work for hire defense” (p. 172). The Court determined that, while the *Williams* court’s view was that universities had no reason to want to retain ownership in a teacher’s scholarly works, such rationale was no longer effective because “in an age of distance-learning and for-profit institutions of higher learning, universities stand to gain much by retaining ownership of certain works created by their employees” (*Molinelli-Freytes v. University of Puerto Rico*, 2010, p. 171). Interestingly, as noted in Table 1 above, most universities have continued to write policy that supports the academic exception even where the statutes may have remained ambiguous or where caselaw appears to say it no longer exists.

While these cases may be inconsistent in the outcomes for universities or faculty with regard to how the work-for-hire doctrine is applied, we learn that it is essential that both the university and its faculty understand what faculty work product is considered work for hire and what is not. These cases also seem to point to the need for the formulation of a contractual relationship in these matters.



It is important to note that, as mentioned in *Molinelli-Freytes*, these cases predate the explosion of online and distance learning university programs. In light of these cases and the significant investment of resources that go into the development of online and distance learning programs, the prudent institution will likely enter into a contract with the professor that specifies not only compensation for the course development but also ownership in copyright, and any rights pursuant, thereby avoiding ambiguity in this matter (Tseng College of Extended Learning, Course Development Contract, 2005).

Circumstances become less clear when the professor has been teaching the course for a number of years, developed the curriculum, created the accompanying materials, and is now asked to translate that course into an online version. If the professor signs over his or her ownership rights for the online version, does he or she retain rights in the prior materials and rights to use the newly developed materials in subsequent face-to-face coursework? Does he or she retain the right to publish any of that material at a later date?

## **WHAT CAN PROFESSORS DO WITH THEIR WORK?**

Policy guidelines published through organizations such as the American Association of University Professors (AAUP) urge faculty to address copyright issues and protect rights through detailed contractual agreements. Springer, in her 2006 article, "AAUP: Copyrights and Wrongs," addresses the current basic policies on academic journal articles, syllabi, support materials, etc. The AAUP position is that scholarly work is generally not considered work-for-hire and because professors are the owners of the copyright to their work, the creation of that work would not be within the scope of their employment (Springer, 2006). Regarding classroom work, universities might have a stronger case that professors may be acting within the scope of their employment if they use a department issued syllabus or course of study. However, Springer contends that "the extent that a course would be considered work-for-hire is tied directly to the amount of independence given the faculty member," and she illustrates why classrooms are generally considered an area under faculty control (p. 9). Citing the *Williams v. Weisser* decision from 1969, in which the court looked at whether a professor owned the copyright in his lectures and could, therefore, bring suit against a company to stop it from selling notes taken from his classroom, Springer discusses how the court determined that, in the absence of any evidence to the contrary, the professor (and not the university) owned the common law copyright to his lectures. The court also found that the published notes were incomplete, that the note seller had ignored the protests of the professor, and that publication of the inaccurate notes along with the professor's name constituted an invasion of his privacy (*Williams v. Weisser*, 1969).

Regarding course syllabi, the ownership is not as clear. Although faculty usually control the creation of the syllabus, there are provisions that must be in all course syllabi as directed by the department, the course outline, and the catalog description, etc. that could make control of the syllabus a shared venture and perhaps constitute a work-for-hire (Springer, 2006; *Vanderhurst v. Colorado Mountain College District*, 1998).

In two cases, *Manning v. Board of Trustees*, 109 F.Supp 2d 976 (C.D. Ill. 2000) and *Foraste v. Brown University*, 248 F.Supp 2d 71 (D.R.I. 2003), the courts held that a broad university or college copyright policy that granted copyrights to the authors or originators of new works was not sufficient to meet the statutory requirements of a

writing signed by both parties. In both cases, staff photographers claimed ownership in photographs they took while under contract and in both cases the courts ruled that the employer held the copyrights.

Thus, we see that while professors do have some control over their scholarly works, courts will look at whether the work is a work-for-hire, whether it was created within the scope of employment, whether the university or college had control over the content, and if the instructor and the institution had a clear written agreement.

## **WHAT CAN STUDENTS DO WITH THE WORK?**

As if the question of ownership regarding academic works was not complex enough as between the university and the professor, the digital age has confounded the question of how academic works, including class notes, may be used by students.

Traditionally, the student is the primary beneficiary of academic works, whether the student is a student researcher assimilating the knowledge from technical and trade publications, or a classroom participant utilizing course materials from textbooks and syllabi to outlines, presentations, and exams. While the publication industry battles to control the utilization of the technical and trade publications as well as textbooks, using existing copyright laws, the question over who controls student use of the professor-, university-, and student-generated course materials remains unresolved (Kolowich, 2009; Rivera, 2010; Kaya, 2010).

It is no secret that students at universities have traditionally shared course materials amongst themselves. It has been an accepted practice to store hard copies of course materials, including syllabi, presentations, homework sets, and exams in community files in student housing, for the benefit of students within the house. This has typically been a non-commercial endeavor, but now, the “community courseware file cabinet” has been transformed, in the digital age, into an international commercial file cabinet (<http://www.noteutopia.com/>; <http://www.coursehero.com/>; <http://www.notehall.com/>; <http://www.sharenotes.com/> ).

With the advent of websites such as CourseHero.com, Noteutopia.com, and the like, students post university course materials as well as their own notes for commercial benefit (See Use Policies of referenced commercial note distributors:

<http://www.noteutopia.com/terms>; [http://www.coursehero.com/Terms\\_of\\_Use.php](http://www.coursehero.com/Terms_of_Use.php);

<http://www.notehall.com/index/termsandconditions>;

<http://www.sharenotes.com/sharenotes-support/terms-and-conditions.php>).

As expected, universities and professors turn to the copyright laws. To the extent that the copyright laws support the position that professors have created the course materials as authors or as works-for-hire for the university as discussed above, the professors and universities can exercise their copyright over the students and these online distributors. The effectiveness of this approach is questionable, as noticing the distributors of copyright infringement pursuant to Section 512(c)(3) of the Digital Millennium Copyright Act (DMCA) requires collection and reporting of a great deal of information and the expenditure of significant effort on the part of the professor or university to compel the commercial distributor to remove offending material. The commercial distributors typically respond to valid DMCA notices in the following way: “The Company will remove or disable access to material claimed to be the subject of

infringing activity and/or terminating users in DMCA-complaint takedown requests. If the Company removes or disables access in response to such a notice, the Company will make a good-faith attempt to contact the provider of the allegedly infringing material so that they may make a counter notification. [Company] has adopted and implemented a repeat infringer policy whereby [Company] terminates that account of users who receive more than two counts of infringement” (CourseHero Copyright Infringement Notification, <http://www.coursehero.com/copyright.php>, 2012). Hence, after a great deal of effort, the material may be taken down and a student may have his account terminated, but this does not preclude another student from posting the very same material and the process from starting over again. Finally, it is possible that the copyright owner could send notice of infringement to the student; however, identification of students who have posted materials is technically challenging, so asserting copyright against the student, himself, does not appear to be very effective.

And what about the student’s notes? Looking at traditional copyright laws, a student’s notes will bear his own copyright, as there is no question that he has fixed the notes in tangible form. There is a question as to whether these notes are, in fact, original or derivative works of the professor’s lecture materials. It could be argued that the ideas and facts expressed in the lectures are not copyrightable material under the 1976 copyright laws: “*In no case does the copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work*” (17 U.S.C. § 102(b), emphasis added). If such is the case, the student notes would not be a derivative work as prescribed by the 1978 copyright law: “A derivative work is a work based upon one or more preexisting works,” and “[a] work consisting of editorial revisions, annotations, elaborations, and other modifications which, as a whole, represent an original work of authorship” (17 U.S.C. § 101).

However, if a lecture can be considered a fixed form of expression and qualifies as a preexisting work, as appears to be the case determined by the court in *Weisser*: “[u]niversity lectures are sui generis,” or expressions of a specific kind, and these expressions have been cast in a specific form for pedagogical purposes (*Williams v. Weisser*, 1969, p.735), then the lecture could be considered an original work and the student’s notes, the derivative.

Additionally, and perhaps more persuasively, in a society where professors create digital presentations and have lecture notes recorded, which are both clearly fixed in form and generically made available to the student, the student’s notes are likely to fall under the definition of derivative work.

If, in fact, the student’s notes are derivative works, professors (or universities) who hold the copyright give students an implied license to create and use their derivative for personal use. Those same copyright holders (professors or universities) could insist that that license does not extend to commercial use of the derivative. Utilization of such a method would require clearly articulated student policies and active enforcement of copyright to be most effective.

So, what are the best methods to try to control the intellectual property and protect the intellectual and financial investment made in course materials?

## **CONTROLLING COURSE MATERIALS: PROTECTING INTELLECTUAL AND FINANCIAL INVESTMENT**

### **The Copyright Approach: Works for Hire**

With regard to faculty members, an effective approach to controlling course materials is for the university to assert that such materials are works-for-hire. As mentioned before, in traditional academic circles, faculty retain copyright in their academic publications and coursework (See Table 1); however, in the digital age, there may be bona fide reasons for universities to retain some of these rights for the university, and, indeed, many institutions have set forth the parameters under which the institution would retain ownership (See Table 2). Justification for university retention of rights could include, for example, investment of significant university resources for the creation of the materials, as in the case for videotaped/digitally taped lectures, or an institutional interest that the quality of materials being released as material from that university meets a particular standard consistent with the university brand.

While faculty may be resistant to the university retaining copyright in course materials, faculty do benefit when the university retains copyright in course materials in that the burden of policing the improper use of such materials can be easily shifted to the university.

It is important to point out; however; that the parameters for what constitutes a work-for-hire be clearly stated in a university's copyright policy and it may be of further benefit for the university's copyright policy to explain what uses of this material are allowed, both by the faculty and the students. For example, such a policy should specify which course materials are considered works-for-hire, such as notes, digital presentations, syllabi, problem sets, exams, websites, video/audio recordings and the like. The policy should state whether faculty can freely release copies of these course materials or utilize course materials in forums outside the university such as lectures at other schools or publication in textbooks. The policy should also clearly distinguish the university's rights in course work from rights in textbook publications, editorial articles, reviews, and scholarly publications separate from course materials so that there is a clear understanding of the boundaries of material considered work-for-hire. Finally, it is prudent for the university to ensure that its agreement fulfills the requirements for a work for hire agreement (*Manning v. Board of Trustees*, 2000; *Foraste v. Brown*, 2003).

Assuming the institution can establish copyright in course materials as works for hire, it could then impose a student policy which should state what limitations on use, if any, exist in any student works derived from the university owned course materials. In this way, the institution could limit unauthorized student distribution.

### **The Copyright Approach: Faculty Copyright**

Should the university not assume the copyright in course materials as a work-for-hire, the faculty member should take care to protect his/her works that are fixed in a tangible medium such as digital presentations, syllabi, distributed notes, problem sets, exam problems, etc. by marking such materials as copyrighted and making sure the students are made aware of the limitations on distribution of such materials. Faculty

should also clearly articulate any policies the faculty member has on distribution of notes or recordings of his/her lectures or presentations, which have been taken by the students as well as any applicable university policies. Should the faculty member need to enforce his/her copyright, he/she will need to act in accordance with the DMCA, the common law copyright rules, and applicable institutional policies.

### **When Federal Copyright Isn't Enough: The California Approach**

Because lecture courses generally consist of a faculty lecturer giving an oral presentation from his/her own notes, the Federal copyright approach may prove inadequate to limit student usage on the student's own notes as discussed above (Nash, 2004).

In California, the legislature has adopted law which extends copyright beyond material that is fixed and clearly could encompass academic learners. California Civil Code section 980 states that, “[t]he author of any original work of authorship that is *not fixed* in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work” (CA Civ. Code Section 980, emphasis added). This section has been tested and a court in 1969 ruled in favor of a UCLA faculty member who sued a commercial entity that hired a student to take notes and sold the notes commercially (Nash, 2004; *Williams v. Weisser*, 1969). As such, faculty in California, or states with similar legislation, should take full advantage of this language and incorporate this common law copyright into applicable university and classroom policies.

The legislature in California also took an additional approach at addressing this problem in 2000 by enacting California Education Code §§ 66450-66452: “The Regents of the University of California and the governing boards of private postsecondary institutions are requested to, the Trustees of the California State University shall, and the governing board of each community college district *may*, in consultation with faculty, in accordance with applicable procedures, *develop policies to prohibit the unauthorized recording, dissemination, and publication of academic presentations for commercial purposes*. Nothing in this chapter is intended to change existing law as it pertains to the ownership of academic presentations” (California Education Code §§ 66450-66452, emphasis added). This legislation allows for universities within California to develop policies controlling the further use of course materials, regardless of the question of ownership. To effectively utilize this approach, the institution, along with its faculty, should work to develop policies which clearly articulate how lecture materials can be recorded and disseminated.

### **Best Practices**

It is clear that where there might be a question of copyright ownership, a well written agreement will better protect all parties from later misunderstanding. Questions regarding what will be considered scholarly work and what will be considered within the

scope of employment should be clearly stated. University and college personnel should craft explicit policies that cover work-for-hire issues regarding faculty and students. Copyright policies should be included or carefully referenced in faculty syllabi to inform students about appropriate use of course materials and to protect professors from copyright infringement. The bundle of copyrights implicated in a university, faculty, and student relationship can be complicated. A balance is needed to ensure the rights of everyone involved and to provide the broadest dissemination of information while providing appropriate compensation and credit to the originator of the copyrighted material.

So, who holds the copyright in your classroom handout? It depends. If faculty are not using materials developed during sponsored research, knowingly created as a work-for-hire, or not created using significant university funds, then they probably hold the copyright in their original work. However, creators of original works should not forget to protect their material by marking it as copyrighted and providing students with parameters for use, including limitations on sharing that work with others.

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