
Do you own your course? What you should know, and what you can do to protect your coursework during and after COVID-19

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During the current pandemic it has been necessary to use remote and online learning for everyone's safety. Faculty members who had never taught online have been suddenly forced into using an instruction method that that they were previously happy to avoid. As of this writing there are limited vaccines available and indications that the health concerns will be end as soon as this summer. During this situation universities across the nation have encouraged faculty to commit to teaching completely remotely. Consequently, faculty have devoted countless hours revising their courses, creating electronic resources, video lectures and assignments that will facilitate online teaching. At the same time, many universities are under increased financial stress from the prospect of smaller enrollment and ever shrinking state subsidies. It is likely that universities are considering saving some of their limited financial resources by having adjunct faculty teach courses online that have already been created by full-time faculty. Beyond the worry of job security, if these materials are taken and assigned to other faculty members, without the consent of the originator, then going forward instructors will be less willing to put forth the efforts needed to develop courses. A faculty member's ownership of a course that they have developed is an important issue to most instructors. Faculty members new to teaching online or remotely are likely unaware of this potential problem. This paper investigates who owns faculty scholarly work and what instructors can do to protect their work.

Faculty Intellectual Property Background

Intellectual property is closely tied to many of the principles that universities view as fundamental to their existence, namely: academic freedom, shared governance, scholarship, and research. Intellectual property includes trademarks, copyrights and patents. Trademarks, like

logos, phrases, images or jingles, are often used to identify a school or to indicate certification or membership to an organization. Copyrights were established in Section 201 of the Copyright Act of 1976. This Act provides protection from unauthorized copying of fixed tangible expressions. This includes faculty-authored traditional course materials like syllabi and lecture notes (Ahmadi, 2017). Patents, are used to protect inventions. They go beyond the protections provided by copyrights by protecting the ideas that form the basis for the invention, not just the “expression” as in copyrights. So where patents protect the owner’s right exclusively to make, use, and sell the invention, copyrights just protect the tangible expression. For example, an inventor of a multifunctional desk, offers for sale his twenty-page manual that fully explains how to take full advantage of all the ways to use the desk effectively. The inventor would copyright this manual to prevent others from making copies and selling his manual. This copyright would therefore protect his fixed tangible expression. The inventor would instead patent his multifunctional desk to prevent another person from making and selling his desk. The patent would protect his idea that forms the basis of his invention. Another key difference between copyrights and patents is that patents can be expensive - easily running in the thousands of dollars. Copyright protection is automatic, although registering a copyright is recommended to make it easier to take legal action against someone stealing your work. Copyright protection is, therefore, provided whether or not the copyright symbol is included on the work.

Unless you were hired for the purpose of creating inventions, patent law clearly protects inventors as the owners of patents, regardless of who supports the research that lead to the invention. This ownership can be transferred or sold. Over the years, university administrators have increasingly gone to great lengths to control revenue streams from licensing faculty inventions. This results in a conflict of interests for the university. The universities’ goals of protecting academic freedom, promoting research, and disseminating knowledge to the best interest of the public needs, should all be balanced with the universities’ goals of maximizing profits, and ensuring the ability to fund future research. The *Stanford v. Roche* 2011 case, a landmark U.S. Supreme Court decision, favored the rights of individual faculty inventors to retain ownership of their inventions. The Court acknowledged that the intellectual property rights of faculty differs from the rights of corporate employees (who owe their employers the ownership rights of inventions unless the inventions were made at home

and unrelated to their employment). Since these ownership rights can be transferred, faculty should still be cautious about signing any agreements that provide automatic institutional ownership from research agreements. These are often inserted into standard sponsored research agreements with private foundations or firms. The *Stanford v. Roche* case supports not only faculty patent ownership, but this support also carries over to copyright protection. Faculty members who choose, can negotiate separate agreements with their institution that provide payment for work “beyond the normal faculty responsibilities”. These agreements will, however, then permit the university to own, use, and sell this work. Generally, as a result of the *Stanford v. Roche* case, written course materials are protected with current copyright law, but the ownership of online course material is less clear.

Online Course Ownership

The faculty’s ownership of original authored fixed expressions is well established under U.S. copyright law. The exception of work “beyond the normal faculty responsibilities” does lead to some ambiguity as to the ownership of online course materials. The question to be answered here is if the faculty member is a typical employee or not, and if their work is beyond “normal”. If faculty are not considered “employees” of the university, then the university has no rights to the online course material. Even when a faculty member is considered an “employee”, if the online course development work is performed solely by the faculty and is part of their normal responsibilities, the faculty online course materials are still protected by copyright laws. The administration would have to set up a separate agreement for developing online materials that go beyond the normal responsibilities to gain the rights to these materials.

The Copyright Act of 1976 does not provide guidance as to who is considered an employee, or the scope of employment that qualifies as going beyond normal (Ahmadi, 2017). The term “employee” is viewed as being a master-servant relationship and not as an independent contractor type of relationship. Faculty are, on one hand, *typical employees* who are provided tools and materials (offices, computers...) from their university. They are also paid a salary, and provided with other benefits from the university. However, unlike a private firm, the university does not control the manner or means the work is completed, suggesting that faculty are *not typical* employees, but more like independent contractors. For example, faculty

are generally not told what specifically to teach in their course or how to best teach their courses. Furthermore, the university often does not want the faculty to be considered an employee since they could then face liability for the faculty's actions.

If faculty members are considered independent contractors (not employees) then their online course materials are protected. But, even if faculty members are considered employees, if the course development is solely theirs and part of their normal faculty responsibilities then they retain the rights of ownership. This right became known as the “teacher exception”. The “teacher exception” recognizes that faculty ownership of course materials is needed to maintain academic freedom and allow faculty member to use their materials if they moved to a different university (Townsend 2003). For practical reasons it is difficult to see how universities can claim ownership of course materials. If, for example, universities did own course materials, then before hiring any faculty they would first need to determine what course materials were developed or used at any university that the new faculty had previously worked. Failing to do so, and allowing the faculty member to use his previously developed materials, would be a violation of the ownership rights of previous universities and subject them to liability (Holmes et al. 2000).

In terms of online course development, if the faculty member uses his own resources to create the website and instruct online then the faculty member retains the rights to this course material. The problem arises when a faculty member uses the university owned internet server and courseware to develop the online course. Universities contend that using this provides a substantial contribution of the university to the faculty member, so the university has ownership of the course and all the materials. Substantial contribution might include assistance in learning the courseware, help in creating videos, technical support for troubleshooting, and staff produced materials (Kranich 2009). This issue of ownership is not clear and there are few reported cases that have been tried to provide precedence. If a faculty member has not been paid a stipend or course release then the case for faculty ownership is stronger. Likewise, if the faculty did receive a stipend then it is likely that in doing so they will have given up ownership. The vast majority of institutions provide incentives to faculty to develop online courses. Hoyt et al. (2013) reports that 82% of universities provide extra pay for online course development while Loggie et al. (2007) finds that 83% of universities claim intellectual property rights to any work that required

substantial use of university resources. It is likely that many of these faculty were unaware that they were potentially giving up ownership when they accepted this payment. During the lockdowns associated with COVID-19 many universities provided supplemental pay to faculty who moved their courses online or were teaching remotely. They may also be at risk. The AAUP recommends in their AFT and AAUP Principles for Higher Education Response to COVID-19 that faculty should receive reasonable hourly compensation for transitioning courses to online instruction. Although the AAUP warns that institutions should not use this situation to appropriate intellectual property, faculty accepting compensation for online course development are making it easier for universities to claim ownership of their online course materials.

The 1998 Digital Millennium Copyright Act (DMAC) specifically addresses the issue of copyrights on the internet. In general, this act protects online materials of professors in exchange for providing immunity to universities from copyright infringement claims from professors who claim ownership. Faculty are granted ownership, and the university is not liable if the material on their servers are copied and used by others. The DMAC is very complicated, but if faculty limit access to users (students) who meet some access precondition then they will likely maintain ownership of their course materials (Holmes et al. 2000).

Recommendations for faculty to protect their materials:

- Review your employment contract or intellectual property policy.
- Carefully consider accepting stipends for online course development or working closely with a team of non-faculty educators when developing your online course.
- Limit access to course material to students enrolled in the course instead of allowing anyone to access the material.
- Specify course ownership in a written agreement prior to teaching online or developing course materials.
- Consider how other publishers and other courseware providers will treat course materials.
- Keep backups of all course materials up to date and on non-university computers.
- To prevent others from using your materials without your permission, know how to eliminate your online course materials

from university computers, servers, and learning management systems and how to restore them from backups.

- Negotiate contractual faculty protections to online materials. This is in both the faculty and the universities interest. It will not only protect faculty rights, and clarify ownership, but it is also beneficial to the university, since protected ownership will provide incentives for course development that might not otherwise happen. This agreement can also stipulate what stipends or extra resources will be provided to aid in course development, and how this will impact course ownership.

Conclusion

The amount of time and effort faculty devote to preparing and creating course materials, assignments and assessment methods are usually non-trivial. Although these course materials are protected in the typical classroom environment they may not be in for online courses. Once a faculty member independently adds their self-authored course materials like syllabus, PowerPoints, lecture notes... to an online platform the ownership should be the faculty's, regardless of if the course is being offered in an online or a traditional course format. It is, however, likely that many universities feel otherwise and see the already developed online course as a potential source of additional revenue. For example, Purdue University in October of 2020 adopted an Intellectual Property Standard that gave the university default ownership of online course materials. The policy recommended that faculty enter into a formal agreement, however, without an agreement the university claimed ownership. The Purdue University faculty were particularly concerned since the decision was made without input from their Faculty Senate and, as written, would apply to previous online course and those that were forced to being moved temporarily online during the pandemic (Flaherty 2020). To date, there is no case law testing this online course ownership conflict. Since it has not yet been litigated there is little legal precedent to refer to. For many institutions this is an important issue that is not being addressed. In a survey conducted of universities having at least 2000 distance education courses, Kelley et al. 2002 finds that only about half reported having an intellectual property policy and the majority of these did not specifically address distance education or faculty ownership. Even more troubling Loggie 2007 finds in a survey of 42 large research extensive universities that only 31% of the

institutions provide rights to faculty course material posted on the internet and 36% claimed university ownership of courseware and distance learning materials. It is therefore important that faculty understand their rights, make written agreements with their institutions to protect their work, and pay close attention to any changes in related policies.

References

- Ahmadi, S. 2017. "Faculty Rights to Courses and Digital Courseware." *New Directions for Higher Education*, 2017(177):25-37.
- Dahl, J. 2005. "Who owns the rights to online courses." *Distance Education Report*, 9(22):4-7.
- Flaherty, C. 2020 "IP Problems" Inside Higher Education Retrieved from: <https://www.insidehighered.com/news/2020/05/19/who-owns-all-course-content-youre-putting-online>
- Holmes, G. and D. Levin. 2000 "Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age." *Brigham Young University Education and Law Journal*, 2000(1):165-189. Retrieved from: <https://digitalcommons.law.byu.edu/elj/vol2000/iss1/8>
- Hoyt, J. and D. Oviatt. 2013 "Governance, Faculty Incentives, and Course Ownership in Online Education at Doctorate-Granting Universities." *American Journal of Distance Education*, 27(3)165-178.
- Kelley, K. B., K. Bonner, J. S., McMichael, and N. Pomea. 2002. "Intellectual Property, Ownership and Digital Course Materials: A Study of Intellectual Property Policies at Two and Four Year Colleges and Universities." *Libraries and the Academy*, 2(2), 255-266.
- Kranch, D. A. 2009. "Who owns Online Course Intellectual Property?" *Quarterly Review of Distance Education*, 9(4):349-356.
- Loggie, K., A. Barron, E. Gultitz, T. Hohlfeld, J. Kromrey and P. Sweeney. 2007. "Intellectual Property and Online Courses." *Quarterly Review of Distance Education*, 8(2):109-125.
- Townsend, E. 2003. "Legal and Policy Responses to the Disappearing 'Teacher Exception,' or Copyright Ownership in the 21st Century University*," *Minnesota Journal of Law, Science & Technology*, 4(2):209-283 Retrieved from: <https://scholarship.law.umn.edu/mjlst/vol4/iss2/1>