

Online Highway Robbery: Is Your Intellectual Property Up for Grabs in the Online Classroom?

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Abstract

Do you own the rights to materials in your online course? Many in higher education face the task of creating online materials before considering the issue. This paper examines evolving intellectual property policies for online materials, informing educators that copyright law alone is not the final word on this issue. The author demonstrates that intellectual property policies vary greatly, even among institutions in the same university system and the same geographic area. Knowledge of policies is stressed as an important element in the job market and solutions are offered for faculty faced with outdated ownership policies.

Keywords: copyright, ownership, course materials, distance learning, e-learning, job market

Introduction

"It must be a mistake," was Dr. Z's (personal interview, 2009, name changed at her request) first thought, as a student remarked about hearing her audio lecture emanating from another instructor's online course. "At first it didn't click that was what she [the student] actually meant." Dr. Z was actively trying out her new online course for the first time that semester and had yet to make changes necessary to perfect the course content before it was "assigned" to another instructor.

"It was too soon," Dr. Z said of the course sharing. "There was no verification that the course was ready to go or that the quality of the content had been ensured. What if I hadn't finished?"

Dr. Z's situation is unique because she did sign a contract with her university to develop the course knowing it had the potential to be copied and shared, however, the material itself was still green and untested.

But what if Dr. Z had never known it could be shared? Or that it could be sold? Or that under some interpretations of copyright law, she had no right to any content in her other courses, including those that weren't under the contract?

Understanding Copyright and Intellectual Property Policies

Copyright, and/or intellectual property policies, are something many instructors, new and experienced, know little or nothing about as it concerns their own work. But as the online offerings at colleges and universities increase, it is an area where instructors must educate themselves. It helps to start with a general understanding of the terms "copyright" and "intellectual property." Put simply, copyright is, "the exclusive legal right to reproduce, publish, sell, or distribute the matter and form of something (as a literary, musical, or artistic work)" (Merriam-Webster, 2009). Applying this more specifically to copyright codes, Kromrey et al. (2005) cite Title 17 of the U.S. Code which "defines copyright as an author's independent and original expression recorded in a fixed and tangible form." Kromrey et al. go on to state that "In the context of copyrightable works in an academic setting...examples consist of books, scholarly publications, syllabi, PowerPoint files containing course content, web-based course content, and lecture notes." But in the world of distance learning, copyright quickly becomes much more complicated.

Until recently, many generally believed that universities owned anything and everything an instructor generated as part of a traditional or online course because the work was done as part of the duties of the job, a “work for hire” situation. Cynthia M. Chmielewski (n.d.) of the National Education Association Office of General Counsel says, “under federal copyright law, [the owner is] ...whomever the employer and employee designated as the owner. But if there isn’t any written agreement, the general rule is that the employer owns the copyright to materials that teachers produce as part of their jobs.” This is where the term “work for hire” becomes important as it relates to copyright law. “Materials created by teachers in the scope of their employment are deemed ‘works for hire’ under the federal Copyright Act of 1976, - and unless the parties agree otherwise in writing - the school employer owns them,” Chmielewski asserts.

That being said, institutions “... have rarely, if ever, laid claim to the original materials prepared by faculty for course use,” according to Carol Twigg, executive director of the Center for Academic Transformation (n.d). Others even argue against such clear cut assertions as Chmielewski’s. Michael Klein, director of government relations, New Jersey Association of State Colleges and Universities, is one of them. “There’s no question that the copyright belongs to the professor,” he says of the trappings of academia such as the syllabus and class notes. “There’s the philosophical academic-freedom issue, but also the practical issue of: What can you really do with materials like someone else’s class notes? With an online course that’s complete and packaged, it’s easier for someone else to use it” (Dahl, 2005). Other argue that a signed agreement is necessary, “...specifying the intellectual property and copyright interests; otherwise, the developer will retain the rights” (Peterson, 2003).

Normally this argument about copyright would have been resolved in the courts, but Douglas Kranch (2008) found that “little case law was developed regarding the relationship between faculty and the products of their teaching.” This is explained by the limited monetary value of course materials in the face-to-face setting. One case that was tried, however, involves a professor, Williams, who left UCLA, taking his course materials with him. “A publisher published Williams’ notes without his permission and Williams sued” (Kranch, 2008). The court found in Williams’ favor as the copyright owner, despite the publisher claiming that UCLA should hold the rights because the professor created his course materials as “works for hire.”

For a better understanding of the issue, it helps to consider United States Copyright Act, Section 101, which defines a “work for hire” as “a work prepared by an employee within the scope of his or her employment...” (“Definition,” 2009). Works for hire are generally considered the property of the employer. Many instructors would agree that course materials are prepared as part of their duties as employees, even online course materials. However, the law isn’t clear. “Part of the reason there is so much unease in higher education about this issue is because there is no default position, no definite ‘answer’ to the question of course ownership. As a result, existing policies at colleges and universities vary greatly,” says Twigg. And while that controversy sparked some concerns when online courses were in their infancy, the online education revolution awakened a deeper controversy. Suddenly, what was disputed was worth something. Colleges and universities saw the commercial value of educational materials delivered online and many decided to assert their ownership rights, as will be shown by the creation of new policies. Twigg (n.d.) suggests that course materials’ value as a commodity thrust the ownership controversy in new directions:

The process of committing to writing the course content (e.g., lectures, exercises) and digitizing course materials makes it possible, if not potentially lucrative, to package courses in such a way that they can become mobile and can be delivered by people other than the original author. Courses have become “commoditized” and sought as commercial products by online distance learning companies, for-profit universities, and publishers. Thus, both institutions and faculty authors are encountering new, different opportunities.

These “opportunities” mean that suddenly the bread and butter of the instructor; the syllabus, lecture notes, handouts; are no longer only a concern in the realm of the classroom; they, and their ownership, are of growing concern to a larger audience. That concern has led to a new emphasis on universities defining policies regarding ownership of course materials in online environments rather than falling back on old copyright laws. This is where the term intellectual property enters the picture.

"Intellectual property encompasses copyrights, patents, trademarks, and trade secrets..." says Mark F. Smith (2002), American Association of University Professors director of government relations. Universities and other organizations needed a term that was more concrete and comprehensive than copyright to deal with the issues raised by online ownership. Patents and trademarks alone weren't quite right. Smith says, "...trademarks and trade secrets have much less applicability than copyrights to faculty pursuing academic endeavors. Similarly, patents are important in the scientific and engineering disciplines and, increasingly, in the field of computer software" (Smith, 2002). So, intellectual property policies, sometimes called online course policies, began to spring up, starting, as the following study suggests, with major research institutions.

Policies at Major Universities

Jeffrey Kromrey of the University of South Florida and 9 other researchers presented a study entitled "Intellectual Property and Online Courses: Policy at Major Research Universities" at the National Educational Computing Conference in 2005. Their study investigated policies at "42 public and private Carnegie Doctoral Research-Extensive Universities." It also referenced and built on similar studies conducted in 1992 by L. G. Lape and in 2001 by A. Packard. Lape's 1992 findings show that of the 70 research institutions' policies he studied, "11 had no written policy and 5 had only draft policies" (Kromrey et al., 2005). Packard's 2001 study surveyed policies at the same institutions and found, "all but one had adopted a policy." Kromrey et al. report that "In both studies, all of the policies that were analyzed asserted the university's claim to ownership of at least some faculty works. The typical justification for such ownership is that faculty works are created with university resources."

As online courses grew in popularity, however, the pendulum began to swing back in favor of the instructor. Kromrey et al. found that by 2005, 100 percent of public and private institutions they studied had on-line course ownership policies. While 100 percent of the private institutions' policies and 93 percent of the public institutions' policies claimed some faculty works as their property, 50 percent of both types of institutions "ceded control" of syllabi, tests, notes, etc. to instructors. This is up from only 17 percent in 2002. Also interesting is that 21 percent of private institutions and 29 percent of public institutions claimed joint ownership of online works. Provisions for allowing professors to control use of a work with the university were present at 21 percent of private institutions and 25 percent of public institutions. In 1998, only 7 percent of institutions had provisions for allowing professors to control use of a work within the institution, and by 2002, the number had risen only slightly to 10 percent (Kromrey et al., 2005).

Differences within a System and a Region

Those numbers sound promising, but the institutions Lape, Packard, and Kromrey et al. chose to study were research institutions, which were expected to be at the forefront of change. How do these changes filter down to institutions more focused on teaching than cutting edge research? The author's home state of Louisiana offers an example.

With the exception of Louisiana State University, which was not included in the Kromrey et al. study, the remaining institutions in Louisiana would be considered primarily teaching or teaching and research institutions on a smaller scale than those in the Kromrey et al. research. Most are governed by the University of Louisiana System ("Intellectual Property," 2007). The ULS has its own intellectual property policy that falls back on copyright law. It gives institutions, "ownership of intellectual property created... by an employee within the scope of his or her employment" ("Intellectual Property," 2007). However, the policy also states that institutions do not, "have ownership of traditional academic copyrightable works," but "do have the right to recover costs and/or right to use the work." The policy goes on to say that institutions, "may assert ownership to intellectual property of all types regardless of whether the property is subject to protection under patent, trademark, copyright, or other laws..." This takes us back to Twigg's idea that there is no "definite answer to the question of course ownership."

Left to decipher the ULS' unclear policy, various ULS universities have incorporated intellectual property policies into their faculty handbooks in differing ways. Intellectual property policies from faculty handbooks or in standalone sections of university websites were used as the basis for this comparison because Kromrey et al. used similar policy documents in their study. The University of Louisiana at Monroe makes

no mention whatsoever of an intellectual property policy in any section of the faculty handbook (University of Louisiana at Monroe Faculty Handbook, 2007). The author's own institution, Northwestern State University, which leads the state in the number of electronically delivered degree programs, states a brief form of the ULS policy (NSU Faculty Handbook, n.d.).

The University of Louisiana at Lafayette also adheres to the ULS system policy, but clearly states its full or partial rights to any property, "conceived, developed, or constructively reduced to practice..." (University of Louisiana at Lafayette Intellectual Property Policy, n.d.).

Louisiana's flagship research institution, Louisiana State University, has a more clear policy for what it terms "Course Materials." It states in part, "LSU releases to the respective author(s) all of LSU's interest in any copyright to a book, article, lecture, thesis, dissertation, other literary work, work of art, Course Material, or musical composition that would otherwise be an LSU Work." ("Bylaws and Regulations," n.d.). But all is not as rosy as it first appears. LSU then lists exceptions to the policy including, "a nonexclusive, paid-up, royalty-free right to distribute copies of Course Materials, theses, and dissertations, both internally and to third parties, whether by electronic means, microfilm, or otherwise." The university giveth, then taketh away, but at least faculty members know where they stand.

The most innovative institution in the ULS system is Southeastern Louisiana University. Its intellectual property policy specifically addresses electronic courses and recognizes the new issues faced in this arena. It clearly spells out how intellectual property is created, who retains ownership, and how the property may be used, and even includes a "Plain English Scenarios" section with examples. While covering the issue in great detail, of particular interest to most online instructors is Southeastern's assertion that "Faculty members are free to use their supplementary Web-based course materials at other institutions without the University's prior approval," and that "When the university licenses Entirely Online Web-based courses to third parties...Developer and the University may share the proceeds." Southeastern also concedes that "copyright of an electronic course shall be jointly owned by the employee and the university" in instances where the course is developed and taught by a faculty member as a work for hire or when resources are used to create that course which exceed what is "commonly made available to faculty members" (Southeastern Louisiana University Intellectual Property Policy, n.d.). The policy also addresses issues such as the right of first refusal to teach online (given to the developer of the course) and the developer's scholarly right to the material.

As this illustrates, institutions even within the same state and university system differ greatly. This also applies to geographic regions. Louisiana shares a border with Texas, yet the university systems vary greatly in their approach to intellectual property. The University of Texas System Policy favors the instructor. Georgia Harper of the Office of General Counsel for the U.T. System (2001) states,

"we allocate ownership of most educational course materials to their authors, the faculty members. On the other hand, the policy establishes a University interest in works it does not own, but to which it contributes significant kinds or amounts of resources, and creates a contractual framework for memorializing agreements to create, use, and exploit such works."

She says the contracts are often types of joint owner's arrangements between the parties, allowing the system's universities more flexibility to deal with the complex situations encountered with distance learning materials.

Harper says the University of Texas System had a history of "faculty ownership" of materials used in the traditional classroom and felt it would be hard to change this for the online environment, though the situations faced may differ:

The policy is a compromise: it respects our tradition of faculty ownership, but it also acknowledges that today's educational courseware materials are rarely a solo effort. The resources that must go into the preparation of digital learning materials for online courses far exceed the resources that earlier went into a journal article or even a textbook. Thus, the University's interest in continuing to use such a work, recover its contribution and even share in royalties from commercial exploitation are all clearly set forth now.

In light of Kromrey et al.'s research, this appears to be a very forward thinking approach to protecting both the rights of instructors and the university, with both knowing what to expect.

However, even bigger and better things are on the horizon for instructors, as evidenced by Klein's comments to Judy Dahl about his favorite policy, interestingly enough, at the University of North Texas. The policy, "...allows faculty members to receive royalties when their courses are taught by other North Texas professors. Faculty members also receive 50 percent of the license fee paid by another institution to use the course" (Dahl, 2005).

Expectations and Solutions

Knowing that intellectual property policies and copyright exist is only half of the picture. What should you look for when considering your university's policy and what can you reasonably expect if you enter the job market? Kromrey et al. address this best by explaining the characteristics of the intellectual property policy at a "'typical' research university." At this typical university, instructors can expect to find an online policy for intellectual property that claims some faculty work as university property, but that also cedes control of syllabi, tests, notes, etc., to professors. Kromrey et al. do not define "cedes control," but it appears to mean that instructors own these works. Instructors can expect the university to retain the rights to courseware or distance learning materials other than the above named professional notes, etc. Most other rights will also remain with the university. However, the typical university also says it is, "committed to academic freedom or free dissemination of ideas" (Kromrey et al., 2005).

What if you can't find a job at a university that meets at least the "typical" policy for intellectual property rights, or you work at a university that has a limited policy that does not support faculty ownership? Don't give up. Things are still changing, for the better. For instance, The American Association of University Professor's (AAUP) takes the stance that instructors own their works, regardless of which mode of teaching is used, except in certain unique circumstances where co-ownership might be appropriate (Kromrey et al., 2005). Universities are also realizing that liberal policies are a wonderful recruiting tool. Instructors who have a choice between institutions, or who are in a highly desirable specialty area, might find online course material ownership the deal maker or breaker. William Rayburn and Roscoe Shain (2009) of Austin Peay State University assert that "By providing terms favorable to the instructor, schools might attract superior faculty who still wished to pursue a profitable 'second life' for their course materials." In even stronger terms, they suggest that an institution that might not appear attractive otherwise would benefit from an instructor-based policy. "In a job package, ownership slanted toward faculty could overcome weaknesses elsewhere, especially in salary." Or, that a reasonable policy could, "get faculty to innovate" by "giving them an incentive to go online—such as rights favorable to the professor."

Institutions that don't offer favorable policies will suffer. "At my previous institution, even faculty who had been hired with technology experience hesitated to become too involved with technology in the classroom because our university offered no formal reward (credit toward tenure or promotion) for pedagogical forays into the wired classroom," said Julie K. Chisholm (2006). This author has found that same attitude among colleagues at a variety of institutions. Most have a strong feeling of ownership toward the courses because of the additional work required to design and maintain an online course and the ease with which administration can make this work available to others if developers are not considered owners. Dr. Kim Kelley, Associate Provost and Executive Director of the Center for Intellectual Property at the University of Maryland University College, also addresses this feeling:

The faculty says that if I develop a course, I have ownership of that course. Then I have a greater incentive to create the course, deliver the course, plus it's a part of my teaching portfolio. That's how I determine my ability to be good at this so that institution Y wants to hire me. (Pederson, n.d.)

Solutions are available to instructors who are already invested in an institution or who are not willing to relocate, or able to find an institution offering a favorable online policy. While slower, teachers' unions are making an impact in this area. The Mott Community College Education Association, a National Education Association local affiliate, brokered an intellectual property rights policy for faculty-created distance learning that benefited both instructors and institutions. "The agreement divides ownership rights between

the creating faculty member and the college. The college owns the rights to the actual courseware product, but the faculty member owns the rights to all notes and materials used in its production” (“Protecting,” n.d.). This is the best possible outcome for an instructor in that everything used in teaching the course can go with the instructor. “The faculty member is free to use all the notes and materials at a new job.” The agreement also gave faculty the right to share in certain revenues and the “right of first refusal to teach the course” (“Protecting,” n.d.).

Other solutions include voicing concerns and actively working with faculty senate members to get new policies passed and educating administrators about advances in intellectual property rights and policies passed at similar institutions. While the commercial value of courses is of advantage to some institutions, others believe that value will be small, except in the case of super instructors with high popularity. The value of recruitment, retention, and innovation in the virtual classroom should and can count for more. “An institution should treat these technology innovations as original contributions to the betterment of education and should be generous and forward-thinking by offering attractive incentives for such activities. More liberal policies will incent faculty to more actively pursue the creation of original online course materials” (Twigg, n.d.).

One other note of warning must be sounded. When entering into any agreement with an institution to teach online, develop courses, administer, or manage courses, look at the fine print and take the time to read faculty policies. “If you’re going online, watch what you sign! Any statement equating your course material to ‘works for hire’ is a red flag,” says Chisholm (2006). On the other hand, not having an agreement is also risky. It leaves both faculty and the institution in a murky area; especially if the institution’s intellectual property policy isn’t clear or follows basic copyright laws. Smith references the American Association of University Professor’s Statement of Copyright in dealing with this area:

“...the Statement [AAUP’s Statement on Copyright] emphasizes the need for individual faculty members to negotiate ‘ownership, control, use, and compensation’ in advance and to demand a written agreement from the institution. Doing so is especially critical ‘when the institution seeks to depart from the norm of faculty copyright ownership.’”

Such joint agreements are growing in popularity, but little research has been done in this area.

Conclusion

Returning to Dr. Z and her online course shell, we face the issues that should concern us the most, knowledge of what to expect versus the reality. “I knew about the course shell issues, but I assumed I would be able to teach it [online course] for one semester before anyone else used it,” Dr. Z said. No one ever asked her, or even told her, that it had been copied and shared. “I have now made changes because of my experience,” she stated. These changes came about after the course had already been copied and assigned to another instructor. This instructor was kind enough to give Dr. Z credit for delivering the recorded lecture, but Dr. Z would never have known if not for her observant student’s comment.

Dr. Z maintains a good attitude toward the incident. “My concern was for the quality of education, not really the ownership.” It could be argued, however, that the two often go hand in hand.

In this rapidly changing online environment, instructors who understand what to expect are ahead of the game. Knowing copyright law, its limitations, and the policy at your institution, or those you consider applying at, can mean all the difference in a positive or negative distance learning experience. Take hope that policies continue to change in favor of the instructor. As Carol Twigg and a group of 13 other higher education leaders asserted at a 2000 symposium, “We recommend that the default policy position for all institutions should be that the faculty member owns the course materials he or she has created” (Twigg).

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