

Symposium on Intellectual Property

***5 DEVELOPING A COMPREHENSIVE COPYRIGHT POLICY TO FACILITATE ONLINE LEARNING**

Georgia Harper [\[FNa1\]](#)

Copyright © 2000 by National Association of College & University Attorneys;

Georgia Harper

I. INTRODUCTION

Policy issues associated with online learning span the breadth of legal concerns in higher education: copyrights and trademarks, Internet law and the media, employment law, accreditation, financial aid, student discipline, accessibility, conflicts of interest and commitment, management of resources and use of the university's name. One could have a very comprehensive "Distance Learning Policy" that covered them all, explaining how each applies in the distance-learning context. At the minimalist end of the continuum one might have a policy that addressed only ownership of the intellectual property resulting from the creation of distance learning materials.

This paper addresses fewer than all the issues, but more than just ownership. I use the words "Comprehensive Copyright Policy" to describe the slice of the issues I will address, in particular to distinguish this set of policy issues from the more commonly understood "Intellectual Property Policy" issues with which most universities have significant experience. Intellectual property policies usually concern themselves with the ownership and exploitation of patented technologies, though some also address ownership of copyrighted works and educational materials.

Of course, any division of the issues is somewhat arbitrary, but once one addresses any one of the five areas I will discuss here, the necessity for addressing the others becomes apparent. I must note, however, that, although our Copyright Policy stops at the boundaries between copyright and patent law, these boundaries are blurring. The Patent and Trademark Office now issues patents for business methods implemented in software. Novel business methods and novel teaching methods probably are equally protected, so we will have to address the confluence of copyright and patent law in the near future.

Be prepared, however, for policy development in any area to reveal ties to other areas of law. Faculty and administrators will quickly recognize what is missing from the resolution a Comprehensive Copyright Policy provides. Still, we must start somewhere.

II. DEVELOPING A COMPREHENSIVE COPYRIGHT POLICY

Not so long ago, copyright policy meant essentially fair use policy, and fair use policy usually translated to, "It is the Policy of University to follow the law." Perhaps that was sufficient before we all got online. Today we need copyright policies that go beyond mere reference to or recitation of the fair *6 use statute or even reference to specific guidelines. Fair use must be more carefully explained if we really expect our faculty members, staff and students to respect its limits.

More importantly, fair use is just the tip of the iceberg. Even if we all understand fair use perfectly, we still need to know about other important exemptions and what to do if a proposed use does not fit into one of them. We really cannot tell our faculty members, or even permit them to infer from our silence, that they should not use a work unless it is a fair use. Sometimes they will need to get permission. Faced with that responsibility, they may well wonder why the university cannot license permissions more efficiently or why the library does not have the works they need in electronic form so they do not need permission.

These concerns, as wide-ranging as they are, cover only one aspect of copyright policy issues--the use of others' work. The complement to these concerns is the issues associated with the copyright works we create and own. To be comprehensive, a copyright policy should address the use of others' copyrights and the creation, ownership, and management of institutional copyrights.

III. USING OTHERS' WORKS

Not every educational use is a fair use. It is not that simple. For example, some photocopies for each of the following activities may be fair use or otherwise authorized by law, but rarely will all such uses be fair: reserves; coursepacks; copies for research, scholarship and private study; interlibrary loan and document delivery; and administrative copies.

If a use is not a fair use, faculty need help to get permission. Relying on individuals to obtain needed permissions is inefficient and perhaps even ineffective. Since the university is likely to share responsibility and liability for faculty infringement, it makes sense to provide faculty with an efficient centralized resource.

Universities may need permission at times to digitize, display, perform and distribute print or other analog works. Even if the library has licensed an electronic work, someone may need rights to use the work in a way that is not covered by the license. We certainly need to negotiate better access licenses that cover all anticipated educational uses. So, a comprehensive copyright policy should provide:

Fair use guidance. Universities need to ensure that normal activities comply with copyright law by providing faculty information about fair use and how to apply it in the various contexts we encounter on campus, when they need it, in a way that makes sense and is truly helpful. [\[FN1\]](#)

Help to get permission. In addition to providing effective guidance about fair use, universities should make it easier to get permission for those uses *7 that go beyond fair use. [\[FN2\]](#) The laws of agency suggest that in many cases universities will have liability for faculty infringements involving the creation of online course materials, so it is in the university's interests to facilitate this process. [\[FN3\]](#) A centralized facility is better able to capitalize on the growing expertise of a discreet number of individuals.

Comprehensive access licensing. Universities also must provide support for staff who negotiate license agreements for access to electronic works. If we acquire sufficient access upfront, we should not need additional permissions for the uses that we know we will need to make of electronic works. [\[FN4\]](#)

IV. MANAGING OUR COPYRIGHTS

University faculty, students and staff create educational materials, scholarly works, and administrative publications by the thousands every day. Our creations are getting more complex and more valuable. We simply must not fail to recognize their value or to preserve it for the university community's benefit. Copyright policy developed within the context of a reexamination of the university's mission in the electronic environment can help insure that the value of these works is not lost to

us. A comprehensive copyright policy also should address who owns these works [FN5] and who has the rights to use and to exploit them [FN6].

A. Ownership

This is the starting point for understanding ownership and for reviewing and revising university copyright policy: The copyright act places initial ownership of copyright works with their authors. [FN7] Other circumstances can affect an author's ownership, such as: whether more than one person or entity qualifies as an author; whether the work made for hire doctrine applies, making an employer the author of the creator's work; [FN8] whether a university policy affects ownership; or whether any signed contracts affect ownership.

Joint ownership is not automatic. Merely contributing copyrightable expression to a work to which others are also contributors is not enough to *8 cause the copyright in the work to be jointly owned. It takes a shared intention on the part of all of the contributors of copyrightable expression to be joint authors to effect joint authorship and joint ownership of copyright. [FN9] Relying on individuals' subjective states of mind at some point in the past is not the best way to figure out, after the fact, who owns a collaborative work. Our copyright policies can make university expectations explicit so that individuals are not surprised when university staff contributors claim to be joint authors and owners.

There is some question about whether the work made for hire doctrine applies to faculty-authored educational materials. Before passage of the 1976 Copyright Act, codifying decades of case law that had grown up around the 1909 Act, there was a "teacher" exception. Many feel that the exception did not survive the codification, because § 101's definition of a work made for hire makes no reference to it. Nonetheless, many universities seem still to honor the tradition of permitting faculty members to own works that might otherwise reasonably be characterized as within the scope of their employment. Whereas some courts have determined that the exception no longer exists and one has suggested that it probably does or should, at least one court gave deference to an institutional policy. [FN10] These mixed holdings of these cases indicate that policy probably is the best way to resolve the ambiguity. For example, an institution's policy can clarify what it considers work made for hire by specifying within reason that certain works are within or outside the scope of employment. Since the work made for hire statute requires a signed writing to show an agreement to permit an employee to own copyright in a work to which the statute would otherwise apply, it would be prudent for university employment contracts to be signed by both parties and to include a reference to the university's policies.

Finally, a copyright policy can recommend or even require the use of contracts to further clarify or vary ownership and control and to address many other issues that are important in the distance learning context, such as rights to revise, commercialize and create derivatives from a work.

*9 B. Management

University copyrighted works are far too numerous and, increasingly, too complex, for a simple policy that allocates all rights to faculty members or solely to the university. Rarely is an institution or a faculty members the sole stakeholder in educational materials created on campus today. These works need a more nuanced treatment. Even where one stakeholder may be the nominal owner, other stakeholders may need rights such as a non-exclusive license to use, to revise, and perhaps to commercialize the work and share in revenues from commercialization. Sometimes joint ownership is appropriate. In those cases, the owners thoughtfully should determine who is best able to manage the work. A policy that recognizes and focuses upon the parties' interests in a work, rather than just on who owns a work, will better serve everyone's needs.

C. An Example: U.T. System Policy

Five to ten years ago, university intellectual property policies likely were written without much thought about ownership and management of copyright works. Neither the inventions that were the chief concern of such policies nor the scholarly works that may or may not have been recognized as exceptions to the general rule of university ownership warranted any special understanding of copyright law. Who owned lectures, overheads and other course materials was not an issue. For all practical purposes, intellectual property policies were really patent policies.

About seven or eight years ago, we realized that the University of Texas System Intellectual Property Policy contained provisions that applied equally to copyrighted works and patented inventions, but were really only appropriate for the inventions. The first major adjustment came when we modified our policy to address special aspects of software, recognizing that if we treated it as though it would usually be patented, we caused the practice in our computer science departments of trading programs freely with research colleagues around the world to be a flagrant violation of our policy. [\[FN11\]](#)

The next major revision came when we realized that our policy did not adequately address the issues of ownership and control of distance learning course materials. The policy contained an exception that permitted faculty members to own their scholarly works, and we had not generally asserted ownership of course materials. It was not clear, however, whether the exception actually applied to educational materials, especially digital materials. It also was not clear that the university had any interest in these works other than a potential right to assert ownership, depending on how one interpreted the policy to apply to the works. We decided to clarify this and other aspects of the policy and made significant revisions over several years.

***10** Currently our policy describes who owns what in accordance with copyright law's ownership principles, clarifying that educational materials will not normally be considered works made for hire (not within the scope of employment). [\[FN12\]](#) Thus, at the outset, 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. [\[FN13\]](#) Such contracts often take the form of joint ownership agreements, depending on the facts surrounding the creation of the work. This combined policy and contractual framework allows us to accommodate the complex factual scenarios under which distance learning materials are created.

Most U.T. System component institutions already had a tradition of faculty ownership of educational materials in the analog context. It would have been very difficult to change the basic allocation of rights for digital works even though a university's interests in digital works are quite different from its interests in analog works such as textbooks. The policy is a compromise: it respects our tradition of faculty ownership, but it also acknowledges that today's educational courseware materials are rarely solo efforts. 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, to recover its contribution, and even to share in royalties from commercial exploitation are all clearly set forth now. The contractual framework also accommodates joint ownership where both the university, through its employees who are not faculty members, and one or more faculty members contribute copyrightable expression to and intend to be joint owners of the resulting courseware. [\[FN14\]](#)

Finally, the policy includes a provision that permits the U.T. System or a component institution to commission a work and own it as a work made for hire. We encourage at a minimum the use of a written acknowledgement when this arrangement involves faculty members who would otherwise own their works under our policy, to

avoid later confusion or dispute about which ownership paradigm applied. [\[FN15\]](#)

*11 D. On the Near Horizon: Patent Protection for Teaching Methods

The Patent and Trademark Office recently granted its first patent for a business method, ending a long history of seeming to deny such patent protection. [\[FN16\]](#) Business methods and teaching methods are nearly indistinguishable, especially in the online environment. It is quite likely that many of our institutions already have the kind of innovative teaching methods that could be covered by a patent and that we just do not know it yet.

How will U.T. System accommodate such a work in our policy framework? A courseware product might be both educational materials that the faculty member would own and an invention that the Board of Regents would own. How should we handle it? The answer involves our determining the results we want and the best means to get there. Whether we are considering patented and non-patented inventions or copyrighted works, we ask the same questions: what are each party's interests in the work and how can we equitably share responsibilities and benefits.

Perhaps the factors that keep most inventors happy with patent policies that allocate ownership to the institution and share royalties with the inventors will keep teaching method inventors just as happy. On the other hand, we may need to permit faculty inventors to own such inventions if they are so closely connected with the educational materials we already permit them to own that "dividing" ownership would be impractical. Alternatively we could consider joint ownership. In any case, the university would still be entitled to use the invention, and if it did not own the invention, it would be entitled to reimbursement of its expenses and a share in royalties if it contributed significant kinds or amounts of resources to the creation of the invention or the educational materials. These issues have not yet surfaced at most institutions, but it is important to recognize that they soon may surface and to be prepared to deal with them.

E. The Relationship of Mission to Policy

As important as it is to clarify ownership and carefully manage works created by faculty members, especially those works that require substantial investments of university resources, it may be even more important to clarify where an institution is headed, so that its policies help it get there.

Thus, copyright policy development ideally should include an examination of institutional mission in the electronic environment. If an institution sees its mission as protecting the quality of the courses it offers in the online environment and protecting the value of the institution's good name, its policy may differ from one based on a mission to seize new commercial markets for educational products worldwide, without concern for branding. In either event, a policy constructed to achieve a mission that has been carefully considered is preferable to one whose goal is merely to react to some of the serious (and *12 thankfully rare) missteps that some of us have made as we lurched forward, perhaps without a thoughtful plan.

The media may always be counted on to bring our most challenging controversies to everyone's attention. As painful as this might be for those involved, it gives the rest of us a wonderful opportunity to learn from others' mistakes. One may examine institutional mission in the electronic environment by considering some of the very difficult circumstances that already have challenged institutions to react.

F. Mission Informs Policy

What can we learn from an Ivy League institution's reaction to its highly regarded law school faculty member's decision to provide a set of videotaped lectures to a for-profit non-accredited online law school? What can we learn from the controversy created when a major research institution's distance learning division declared that

all its courses were considered works made for hire? If an institution fully explores its mission with widespread participation by faculty and administrators, could it then develop policy that would reduce the likelihood of an action by one that shocks the other and offends the other's ideas as to what was appropriate in the situation? An exploration of mission should, at the least, enable us to better anticipate where we are going and the kinds of questions we are likely to face along the way.

IV. SUMMARY

All aspects of a comprehensive copyright policy are related. Online distance learning brings the panoply of copyright concerns into sharp focus. As universities get serious about fair use, they also must get serious about getting permission. As universities get serious about getting permission, they also have to get serious about licensing comprehensive access. As they get serious about protecting everyone else's copyrights, they must get serious about their own copyrights and begin to manage them more effectively.

[FNa1]. Office of General Counsel, University of Texas System.

[FN1]. See, e.g., University of Texas System, Fair Use of Copyrighted Materials, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm> (last updated Jan. 5, 1998).

[FN2]. See, e.g., University of Texas System, Getting Permission, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/permisn.htm> (last updated May 8, 2000).

[FN3]. See, e.g., University of Texas System, University Liability for Faculty Infringements, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/unilia.htm> (last updated Oct. 30, 2000).

[FN4]. See, e.g., University of Texas System, Licensing Resources, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/licrsrscs.htm> (last updated Aug. 6, 1999).

[FN5]. See, e.g., University of Texas System, Who Owns What?, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/whoowns.htm> (last updated July 14, 1999).

[FN6]. See, e.g., University of Texas System, Copyright Management, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/copymgmt.htm> (last updated Aug. 28, 1998).

[FN7]. See 17 U.S.C. § 201(a) (1994).

[FN8]. See 17 U.S.C.A. § 101 (Supp. 2000); 17 U.S.C. § 201(b) (1994).

[FN9]. See 17 U.S.C.A. § 101 (Supp. 2000). See also Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061 (7th Cir. 1994); Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991).

[FN10]. See, e.g., Vanderhurst v. Colorado Mountain College Dist., 16 F. Supp. 2d 1297 (D. Colo.1998) (finding a Veterinary Technology Outline to be work made for hire), aff'd, 208 F.3d 908 (10th Cir. 2000), reh'g granted, No. 98-1408, 2000 U.S. App. LEXIS 9181 (10th Cir. May 9, 2000); University of Colo. Found., Inc. v. American Cyanamid Co., 880 F. Supp. 1387 (D. Colo. 1995) (finding a journal article to be work made for hire), aff'd in part & vacated in part, 196 F.3d 1366 (Fed. Cir. 1999), cert. denied, 120 S. Ct. 2005 (2000); Hays v. Sony Corp. of Am., 847 F.2d 412 (7th Cir. 1988) (in dicta, "we might, if forced to decide the issue, conclude that the exception had survived," 847 F.2d at 416); Weinstein v. University of Ill., 811 F.2d 1091 (7th Cir 1987) (interpreting university policy "which is part of each professor's contract" to provide for faculty ownership of scholarly articles).

[FN11]. See University of Texas System, Administrative Policy Regarding Disclosure, Distribution and Licensing of Software, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/SWADMPOL.HTM> (last updated July 26, 1995).

[FN12]. See University of Texas System, U.T. System Intellectual Property Policy in Plain English, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/ippol.htm> (last updated Oct. 28, 1998) [hereinafter U.T. IP Policy].

[FN13]. See University of Texas System, Copyright Management, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/copygmt.htm> (last updated Aug. 28, 1998); University of Texas System, Courseware Contracts, in COPYRIGHT CRASH COURSE, at <http://www.utsystem.edu/ogc/intellectualproperty/course.htm> (last updated Aug. 10, 2000).

[FN14]. See Courseware Contracts, supra note 13.

[FN15]. See U.T. IP Policy, supra note 12.

[FN16]. See State St. Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368 (Fed. Cir. 1998), cert. denied, 525 U.S. 1093 (1999); AT&T Corp. v. Excel Communications, Inc., 172 F.3d 1352 (Fed. Cir. 1999), cert. denied, 120 S. Ct. 368 (1999).

*13 APPENDIX A: EXAMPLES OF UNIVERSITY COPYRIGHT POLICIES

. University of Texas System, The U.T. System Comprehensive Copyright Policy, at <http://www.utsystem.edu/ogc/intellectualpro-perty/cprtpol.htm> (last updated May 14, 1997).

. Cornell University, Cornell University Copyright Policy (adopted June 28, 1990), at <http://www.research.cornell.edu/CRF/Policies/Copy-right.html> (last updated July 3, 1995).

. Dartmouth College, Copyright Policy & Guidelines, at <http://www.Dartmouth.edu/copyright> (last updated 10/18/2000).

. Indiana University-Purdue University Indianapolis, Indiana University Policy on Fair Use of copyrighted works for Education and Research, in COPYRIGHT MANAGEMENT CENTER (approved Dec. 5, 1997), at <http://www.iupui.edu/copyinfo/fupolicy.html> (last updated Apr. 25, 2000).

. UCLA, UCLA Library Copyright Policy, at <http://www.library.ucla.edu/copyright/toc.htm> (last updated Sept. 30, 1997).

. University of Chicago, New Information Technologies and Intellectual Property at the University (approved Apr. 27, 1999), at http://www.uchicago.edu/docs/policies/intell_prop.html.

. University of North Texas, Distributed Learning Creation, Use, Ownership, Royalties, Revision and Distribution of Electronically Developed Course Materials (approved Feb. 11, 2000), at http://www.unt.edu/legalaffairs/distributed_learning.html.

. University of Rochester, Copyright Clearance and Fair Use at the University of Rochester, at <http://www.lib.Rochester.edu/copy-right/urpolic.htm> (last updated Dec. 21, 1998).

. University of Virginia, University of Virginia Copyright Policies, in COPYRIGHT POLICY AND LAW AT THE UNIVERSITY OF VIRGINIA, at <http://www.lib.virginia.edu/copyright/uvapol.html> (last updated June 15, 1999).

. Washington and Lee University, Washington and Lee University Policy for the Use of Copyrighted Works, at <http://www.wlu.edu/lib-rary/copyrightpolicy.html> (n.d.).

. Washington State University, Copyright Policy, at <http://www.wsu.edu/Copyright.html> (last updated Sep. 27, 1999).

. Wellesley College, Wellesley College Copyright Policy, in http://www.wellesley.edu/Library/copyright_ToC.html (last updated Apr. 5, 2000).

. In addition, the University of Maryland maintains an online database of copyright policies. See University of Maryland, CopyOwn, at <http://www.inform.umd.edu/CompRes/-NEThics/copyown>.

***14 APPENDIX B: RESOURCES FOR POLICY DEVELOPMENT**

Additionally, there are many valuable resources that offer suggestions about the process of policy development, including various models for allocating rights, who should be involved in the process, what its goals should be, including broader issues in other areas of law, such as employment law, and issues of access and cost.

. CONSORTIUM FOR EDUCATIONAL TECHNOLOGY FOR UNIVERSITY SYSTEMS, OWNERSHIP OF NEW WORKS AT THE UNIVERSITY: UNBUNDLING OF RIGHTS AND THE PURSUIT OF HIGHER LEARNING (1997), available at <http://www.cetus.org/ownership.pdf>.

. DIVISION OF GOVERNMENT & PUBLIC AFFAIRS, AMERICAN COUNCIL ON EDUCATION, DEVELOPING A DISTANCE LEARNING POLICY FOR 21ST CENTURY LEARNING (2000), available at http://www.acenet.edu/washington/distance_ed/2000/03march/distance_ed.html.

. INTELLECTUAL PROPERTY TASK FORCE, ASSOCIATION OF AMERICAN UNIVERSITIES, INTELLECTUAL PROPERTY AND NEW MEDIA TECHNOLOGIES: A FRAMEWORK FOR POLICY DEVELOPMENT AT AAU INSTITUTIONS (1999), available at <http://www.tulane.edu/aau/IPNewMediaReport.pdf>.

. Dan L. Burk, Ownership of Electronic Course Materials in Higher Education, CAUSE/EFFECT, Fall 1997, at 13, available at <http://www.educause.edu/ir/library/html/cem9734.html>.

. COMMITTEE ON INSTITUTIONAL COOPERATION, WHO OWNS THE RIGHTS TO INSTRUCTIONAL MATERIALS? RETHINKING INTELLECTUAL PROPERTY AT THE UNIVERSITY (1999), available at <http://www.cic.uiuc.edu/resources/ip/copyrtconf99.html>.

END OF DOCUMENT