Chapter VI

DISTANCE EDUCATION

OVERVIEW

Broadly construed, distance education is a process that occurs when instruction is delivered to students physically remote from the campus location. Educational institutions have traditionally employed a variety of technologies including mail, television, satellite broadcasts, videotapes, teleconferencing, and facsimile transmissions to reach students in remote locations. Today, however, the newest medium of distance education incorporates the Internet. Colleges and universities can provide courses and even offer entire degree programs on the Internet. These courses can take on different formats including:

1. Uploading assignments and taking examinations through a class website.
2. E-mail communications between faculty and students regarding class assignments and projects.
3. Real time multimedia streams of video and audio files of live or prerecorded instruction.
4. Real time discussions between faculty and students in course chat rooms, which can be accessed thought the campus web site.

Furthermore, students can engage in comprehensive research by accessing the campus library database from anywhere in the world with a computer and a modem.

The number of students enrolling in online distance education has increased dramatically over the last four years. With increasing world wide access to the Internet, the enrollment of online distance education students is expected to continue to increase.

There are mutual advantages to students and institutions that offer online distance education programs. Students have the flexibility to obtain a college degree in remote locations with minimal on-campus contact. Course work can be completed and instruction received at times convenient to the student. Students receive personal attention from their instructors in various forms of electronic communication, plus they have access to campus resources (i.e., library databases) from their computers. Institutions may benefit from online distance education because of additional tuition revenue, although providing quality distance education programs is expensive.

The rapid development of distance education has brought about changes affecting institutional intellectual properties. With the increase value of online courses, ownership disputes could potentially arise between the faculty member, who creates a distance education curriculum, and the institution, which provides the instrumentality for the creation. In addition, copyright issues arise when instructors transmit copyrighted works to students over the Internet. Such digital transfers may infringe upon a copyright owner's rights to reproduce, distribute, display, and/or perform.

Colleges and universities also need to be aware of accreditation issues. Because online students can live anywhere in the United States or across the globe, jurisdictional accreditation boundaries have become blurred.

This Chapter will discuss how to determine ownership rights of an online distance education curriculum based upon the statutory provisions of the Copyright Act. Practical steps will be analyzed to help prevent ownership disputes and to clarify existing intellectual property policies. This chapter will also discuss the extent to

which copyrighted “displays” or “performances” can be transmitted online to students, without copyright infringement. Furthermore, colleges and universities need to recognize the unique accreditation issues that arise when online courses are transmitted to different jurisdictions.

APPLICATION

COPYRIGHT OWNERSHIP

The increase of new technology is causing many higher education institutions to reexamine their existing intellectual property policies and procedures. Colleges have long claimed ownership (at least joint ownership with the faculty member) of the patentable inventions of faculty members, but they traditionally have not made claim to their copyrightable works. While universities began adopting written policies claiming professors’ patentable inventions early in the twentieth century, policies regarding ownership of copyrightable materials are a more recent development.

One reason for this new interest in copyright ownership is the increasing diversity and profitability of faculty works that are eligible for copyright. For example, while there tended to be a more limited market for scholarly works and academic journal writing, faculty web sites, computer programs, and distance education courses may appeal to a wider audience.

If a college does not have an institutional copyright ownership policy, ownership will be determined using principles of the federal Copyright Act. The question of ownership of faculty works under the federal act remains unsettled and the outcome is likely to depend upon the specific facts of each case. The lack of clarity regarding ownership emphasizes the importance of developing a comprehensive intellectual property policy in order to avoid litigation and other conflicts. The challenge for the institution is to facilitate an equitable solution to this potentially divisive issue.

Copyright Law

The framers of the U.S. Constitution granted Congress the power to "promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The basic goal of copyright is to stimulate the generation of new and useful information.

The Copyright Act recognizes copyright protection in original "works of authorship" that are fixed in any tangible means of expression from which these works can be perceived, reproduced, or otherwise communicated. Protected works of authorship include literary, musical, dramatic, pictorial, sculptural, and architectural works, as well as motion pictures and sound recordings. In the higher education context, covered works could include books and other scholarly works such as computer programs and information produced for distance education. Protection extends regardless of the tangible form of the product. Therefore, protection would encompass works in electronic media in cyberspace. For all protected works, copyrights attach as soon as it is fixed in a tangible form such as print or placement on the web.

Work-For-Hire Doctrine

Under the 1976 Act, copyright ownership "vests initially in the author or authors of the work." In general, the author is the person who actually creates the work. The person who translates an idea into a fixed, tangible expression is entitled to copyright protection. However, the 1976 Act created an exception for "works made for hire."

Section 101 defines a "work made for hire" as: (1) a work prepared by an employee, within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work,

as a compilation, as an instructional text, as a test, an answer material for a test, or as an atlas, if the parties enter into a written agreement that the work shall be considered a work made for hire. Three of the nine specified categories of ordered or commissioned works are explicitly academic in nature: instructional texts, tests, and answer material for tests. The statute defines instructional text as "a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities." This broad definition could encompass Internet web pages and other distance education materials.

As a result of the statutory definition, there are two distinct ways to create a work for hire. The first is for an employee to create a work within the scope of his or her employment. The second is for a hiring party to specially order or commission a work falling within one of the nine specified categories and for the parties to agree in writing that the work is for hire.

If a work is one made for hire, copyright law considers the employer to be the author who owns the copyright, unless the parties have signed a written agreement stating otherwise. Classifying a work as made for hire determines several features of the copyright, including its initial ownership, duration, and the owner's renewal rights.

The U.S. Supreme Court addressed the meaning of the term employee in the context of the work-made-for- hire doctrine in *Community for Creative Non-Violence v. Reid* (1989). The court relied on general principles of agency, including the Restatement (Second) of Agency (1992). According to the Restatement, an employee's conduct is within the scope of employment when it is of the kind that the employee was hired to perform, it occurs substantially within authorized time and space limits, and it is actuated, at least in part, by a purpose to serve the employer. The Court's reliance on the Restatement suggests that lower courts should look to the Restatement for guidance in determining when a copyrightable work prepared by an employee is created "within the scope of employment" and thus a work for hire.

Among the factors examined by the court that would be applicable in higher education context are: the hiring party's right to control the manner and means by which the product is accomplished, the skill required, the source of the instrumentality and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hiring party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, and the tax treatment of the hired party

According to the legislative history of the 1976 Act, "Congress did not intend to change the law prior to the 1976 Act regarding work for hire when a regular employment relationship exists." Under the previous 1909 Copyright Act, it was believed that "courts and commentators regarded the work-for-hire doctrine as largely inapplicable to teachers." A leading copyright scholar, Melville Nimmer, held the view that "professors own the copyright to scholarly work" because "courts fashioned a teacher exception to the work for hire rules." However, there was relatively scant judicial authority for this proposition; rather, it built on the English tradition that allowed professors to own copyrights in their work.

Without the "teacher exception," copyright ownership in academic works could belong to the institution. This is due to the application of traditional agency principles to academic employment. For example, faculty members create copyrightable works while being paid by the institution; they create such works using the instrumentality of the institution, such as paper, pens, computers, printers, books, and other resources; and they create many of the works to enhance their own work product. There are competing factors, however, including faculty control over the content of the works. The applicability of the work-for-hire doctrine is likely to rely on the factual circumstances of a case-by-case inquiry.

Faculty Position

The American Association of University Professors (AAUP) issued a policy statement in June 1999 reaffirming that the work-made-for–hire doctrine, with its focus on materials prepared by employees acting within the scope of their employment, is not appropriate for the preparation of scholarly teaching materials because of the nature of academic work and academic freedom. In the typical work-for-hire scenario, the content and purpose of the employee prepared works are under the control and direction of the employer; the employee is accountable to the employer for the content and design of the work. In the case of traditional academic works, however, the faculty member rather than the institution determines the subject matter, intellectual approach, direction, and the conclusions, which AAUP described as the "essence of academic freedom." The AAUP asserts that institutional ownership of faculty works could result in institutional control over publication decisions, derivative work rights (such as translations, abridgments, and variations), and decisions not to disseminate altogether.

The AAUP also reaffirmed its position that faculty "ordinarily" should retain ownership to the distance education courses they create. The AAUP cites several concerns for faculty members in a distance education policy, including ownership and the right to use works, compensation, and support they receive from the institution in designing and executing online courses.

University Position

Some colleges and universities contend that academic works are works made for hire because the faculty member, while creating the work, used institutional resources such as office space and supplies, library facilities, computers, and are salaried employees. While such concerns existed even when the faculty created materials were paper-based, the time and expense to develop a

program using modern information technology creates an even greater incentive for universities to claim ownership. Institutions can also assert that producing such work is part of the educators' employment obligations. These claims are based on concerns of losing the right to use materials, created with their resources, by a salaried employee.

While loss of ownership and control over the work is a concern for the institution, an even more troubling prospect to colleges and universities is that the educator could sell the creation to other institutions, which in turn could use the materials to compete with the original employer institution.

LEGAL FRAMEWORK OF COPYRIGHT OWNERSHIP

There are few reported cases addressing the issue of whether the educational institution or the faculty member owns the copyright to teaching materials and other works prepared by a faculty member. This is probably a reflection of the fact that, until recently, these works were not considered valuable. The following case analysis discusses several different instances when the work-for-hire doctrine was applied in academic settings.

Textbooks

In 1929, Clarence Sherrill taught military sketching, map reading, and surveying to military officers. He prepared a textbook for his courses based on his lecture notes and writings. Subsequently, military authorities printed a pamphlet incorporating the section from his book on military sketching.

When Sherrill sued for copyright infringement, the defendants argued that Sherrill did not own the copyright to his academic writing because it was developed under work for hire. (*Sherrill v. Grieves*, 1929) The court disagreed holding that Sherrill owned the copyright. The court reasoned that because a professor is not required to reduce lectures to writing, if the professor does, the

lectures do not become the property of the employing institution. This is the first reported case to recognize an exception to the work-for-hire doctrine for academic work product.

Lectures

B. J. Williams, an anthropology professor at UCLA, sued Edwin Weisser, to enjoin him from continuing to transcribe and publish Williams' oral lectures delivered in class, and to recover damages from unauthorized publication of the lecture notes. (*Williams v. Weisser*, 1969)

Weisser was engaged in a business of preparing class notes. He hired auditors who would attend classes at the university and take notes of the lectures. The notes were reproduced and sold to students. The university had made an agreement with Weisser that this could occur, but one of the conditions was that the professors would grant him authority for the note transcription.

Williams taught his course and learned that there was a note taker in the class even though he had not given permission. Weisser sold the notes and put a copyright notice on them. Williams tried to get Weisser to refrain from any further note taking or reproduction, but failed and accordingly brought this lawsuit.

The trial court framed the issue as "Whether a college professor has literary property rights in his lectures delivered by him at a university and whether he may recover damages for any misappropriation thereof." In defense, Weisser asserted that Williams did not have standing to sue because the university, not Williams, owned the copyright to his lectures under the work-for-hire doctrine. The court disagreed and determined that the professor and not the university owned the common law copyrights to the lectures.

The court based its decision on the academic exception precedent established in *Sherrill v. Grieves* (1929). The court's reasoning for not applying the work-for-hire doctrine was the university's lack of supervision and control, the absence of a

motive for the university to own the copyright, and the undesirable consequences that would flow from granting ownership to UCLA. The court enjoined Weisser from publishing Williams' notes and awarded Williams damages. Weisser appealed.

In affirming the trial court's decision, the appellate court also based its ruling on policy considerations. It stated:

> Indeed the undesirable consequences which would follow from a holding that a university owns the copyright to the lectures of its professors are such as to compel a holding that it does not. Professors are a peripatetic lot, moving from campus to campus. The courses they teach begin to take shape at one institution and are developed and embellished at others … Further, should plaintiff leave UCLA and give a substantially similar course at his next post, UCLA would be able to enjoin him from using the material, which according to defendant, it owns.

The court accordingly ruled that the lecture notes were owned by Williams.

Jointly-Authored Articles

Marvin Weinstein, a pharmacy professor at the University of Illinois, sued his co-authors, several university administrators, and the university because a co-author had published their article in an academic journal and listed Weinstein's name last instead of first. (*Weinstein v. University of Illinois*, 1987) He argued that listing his name last diminished his accomplishments in the views of other professors and thereby made him a less attractive candidate for another academic position. Weinstein alleged that publishing the article with his name last violated the Due Process clause of the Fourteenth Amendment by depriving him of property without due process.

The trial court found that the university owned the copyright because the work was for hire. Therefore, the university could do with the article whatever it wished. As a result, the court dismissed the suit for failure to state a claim.

On appeal, the federal court of appeals observed that the 1976 Act gave an employer full rights in an employee's work for hire unless a contract provided otherwise. "The statute is general enough to make every academic article a 'work for hire' and therefore vest exclusive control in universities rather than scholars."

The court noted that a university requires all of its scholars to write and such a demand may be the motivating factor in the preparation of many scholarly works. Although the dean told Weinstein to publish, he was not simultaneously dictating that the work had become a requirement or duty within the meaning of the contract.

The court determined that the university's written work-for-hire policy appeared to apply more naturally to administrative reports than to academic articles. If the university desired a broader application for the policy, it should provide evidence of the discussions underlying the policy and show how the university had previously applied the policy. In addition, the university had not asserted that professors regularly obtain consent or a copyright transfer before publishing articles. Furthermore, the court expressed doubt that any professors in the college of pharmacy treated their academic work as the university's property.

Therefore the court concluded that if this were a joint work under the copyright statute, then the co-authors were co-owners of copyright in the work. In such a case, the dispute between authors would be a contract dispute governed by state law. Accordingly, the court dismissed Weinstein's claim of copyright infringement against the university.