

Faculty Ownership of the Copyright to their Own Academic Work: Myths vs. Realities

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University faculty might be surprised to learn that in 1995 a Federal District Court in Colorado had ruled that the Regents of the University of Colorado were quite obviously the owner of the copyright on a journal article and not the professor who wrote the article. In a 1998 case this same court held that the Regents owned the copyright to a course outline despite that a professor employed by them had prepared the outline on his own time with his own materials. Then in 2007 an Iowa Federal District Court ruled that professors did not have standing to bring a copyright infringement claim against a consulting company that profitably commercialized their research because the professors did not own the copyright to their own research publication. This paper examines the scope of federal copyright law, case law and statutory history relevant to academic works. It then reviews institutional responses to copyright ownership uncertainties to determine by what legal means faculty can reassert lawful ownership of their own academic works.

Key Words: copyright, work made for hire, teacher exception, collective bargaining agreement

Introduction

In the course and scope of their employment, university faculty develop a portfolio of academic works: authoring scholarly papers; submitting those papers for publication in conference proceeding and journals; developing courses, syllabi, course materials and lectures; and creating handbooks, guidelines and other administrative materials. Faculty generally believe that when they move from one university to another their personal portfolio of academic works may accompany them. This concept of a transportable portfolio of academic works is unique to academia. In the private sector, the “work made for hire” doctrine asserts that for copyright purposes the author of original works developed in the course and scope of employment is the employer, not the employee who originated the work. Because the employer owns the copyright, it is unlawful for employees to take their original works with them upon termination of their employment. But in the academic sector a common law exception to the work made for hire doctrine known as the “teacher exception” had provided reason and justification for faculty to own the copyright in their original works of authorship and not the universities that employed them (Blanchard, 2010).

The Copyright Act of 1976 brought about the elimination of common law copyright claims – copyright laws had previously been different in every state - and substituted a uniform body of federal statutory law (Copyright Act of 1976 [Copyright Act], 1976). This Copyright Act is silent on the teacher exception. Absent reference to the teacher exception either in the words of this Copyright Act or its legislative history, a debate arose over whether or not Congress had intended to eliminate the teacher exception or had intended to enable the teacher exception to endure.

The viability of the teacher exception had until recently been a hollow debate. Original works by college professors had little commercial value. A professor could earn meager royalties on a textbook. But scholarly papers, course materials, lecture slides and administrative materials had little, if any, commercial value. A university that pursued an infringement suit could only succeed to alienate its faculty. Accordingly, such infringement suits had been a rarity. As far as original works of authorship by their faculty, universities either behaved as if they believed that the teacher exception granted copyrights to their faculty or they had no interest in enforcing their copyrights under the work made for hire doctrine. Faculty, on the other hand, largely believed that they owned the copyright to their own original works and checked out of the debate. The few copyright infringement claims involving university faculty since 1976 have done little to resolve the debate (Blanchard, 2010).

This debate is gaining currency because the commercial market for original works by university faculty is changing. Publishing-or-printing-to-order of a small number of textbooks can be accomplished by faculty without participation of traditional textbook publishers. More importantly, the multi-media, technology-enabled content created by faculty for both distance learning and the flipped classroom is changing the nature of today's universities. There is a decidedly more market-orientated thrust. We see this market-orientation manifest in technology transfer offices, trademarked merchandise, and distance education platforms (Townsend, 2003, at 210). Universities are expanding their ability to generate commercial income in a climate of severe budget constraints by engaging new, market-oriented business models. In the pursuit of these new business models, some universities are resolving the teacher exception debate by edict (Townsend, 2003, at 251). As we shall see, they sometimes extract by declaration what they want to own – works with intrinsic commercial value - and give back to the faculty the leftovers of scholarly but non-revenue generating works. Faculty may be justifiably anxious about this trend. Legal researcher Elizabeth Townsend explains, “The scenario most feared by faculty is that eventually the university might begin dictating or censoring work, all for the sake of profit from ownership (Townsend, 2003, at 245).”

Purpose and Methodology

The purpose of this research is to evaluate the opportunities for academics, their universities, and commercial entities to allocate property rights in the content that academics develop for learning. It elects not to take a dogmatic stance on individual property rights in original academic works but rather to propose practical legal strategies that can be used to fashion a satisfactory allocation of property rights between academics, their universities and commercial entities. Its methodology is analytical, adopting the classic legal research methodology of primary and secondary legal research sources in U.S. copyright law and designed to provide balanced findings in the form of a memorandum of law.

The scope of federal copyright law

Federal copyright law protects “original works of authorship fixed in any tangible medium” (Copyright Act, §102, 1976). “Original works” do not mean any idea put into writing. Original works means a novel and unique expression of an idea. Importantly, the idea itself is not protected by copyright. Ideas are in the public domain. It is the novel and unique expression of an idea that is protected by copyright.

An original work need only be fixed on something tangible for its author to enjoy a copyright. Upon such fixing a copyright lasts for the life of its author plus 70 additional years. If its original author is a commercial entity this copyright lasts for 95 years from its date of publication (Sonny Bono Copyright Term Extension Act of 1998 [CTEA], 1998). A copy or copies of an original work may be “deposited” for placement in the Library of Congress concurrent with registration with the U.S. Copyright Office. An author is not required to register its copyright although there are benefits to registration that arise in an infringement suit. Nor does the author need to place its name, a “©”, and the year of publication on a work to enjoy a copyright in that work; although this is a useful practice because it can prevent infringement by alerting people to the existence of a copyright.

A copyright asserts ownership of a bundle of exclusive rights and authorities: control of paper copies, electronic copies, and all other forms of reproduction; translation into other languages; abridgment or revision of the work; authority over derivative works (the exclusive right to future publications derived from the original publication); and control over public distribution, performance and display of the work. Ownership of these abstract rights and authorities pursuant to copyright is not the same as ownership of the tangible product, however. A student who buys a textbook, for example, owns that textbook. As its owner the student may read it, rent it to others, sell it back to the bookstore, or destroy it. The student may do anything he or she wishes with their textbook except to reproduce it, translate it, abridge it, revise it, or otherwise infringe on the author's exclusive rights and authorities.

The author, for copyright purposes, is not necessarily the originator of the work. When in the course and scope of employment an original work is authored, its author, for copyright purposes is the employer not the originator of the

work. This statutory allocation of ownership, known as the ‘work made for hire’ doctrine is stipulated, in pertinent part, as follows: “A ‘work made for hire’ is (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 a 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, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire... “ (Copyright Act, §102, 1998)

Case law and statutory history

Prior to the Copyright Act of 1976 the teacher exception to the work made for hire doctrine was firmly established by the California Court of Appeal’s decision in the *Williams v. Wiser* case (Nimmer & Nimmer, §5.30[B][1][b][i], 2011 (citing *Williams v. Wiser*, 1969)). The Williams court justified the teacher exception on the premise that to do otherwise would be to defeat the purpose of a university. The court explained that while a university is obligated to make subject matter available to its students it is not obligated to any particular means of expressing that subject matter (*Williams v. Wiser*, at 734, 1969). The Williams court found no case or custom to suggest that a university would ever prescribe a teacher’s means of expression (*Williams v. Wiser*, at 734, 1969). Finding no reason to want to retain any particular form of expression the court asserted, “Such retention would be useless except possibly for making a little profit from a publication and for making it difficult for the teacher to give the same lecture, should he change jobs” (*Williams v. Wiser*, at 734, 1969). During testimony Vice Chancellor Sherwood of UCLA, appearing as a witness, declared that if the teacher exception were not the law it would simplify his job immensely, since “a faculty member would not be able to leave the university for the university would have a right to his lectures and he could only go to another institution if he were in a position to turn his attention to a new subject. (*Williams v. Wiser*, at 732, 1969).” Chancellor Sherwood intimated that what was at stake was not the ownership of subject matter but the concrete form that that subject matter was cast for pedagogical purposes.

The work made for hire doctrine

Congress codified the work made for hire doctrine in §102 of the Copyright Act. Subsequently, in cases where §102 was at issue the courts differed in their interpretation of the phrase “an employee within the scope of his or her employment.” The Copyright Act failed to define employee. Four views emerged: works are prepared by an employee whenever the hiring party retains the right to control the work; works are prepared by an employee whenever the hiring party actually controls the work; the term employee carries its general common law of agency meaning; and the term employee only refers to formal, salaried employees. In *Community for Creative Non-Violence [CCNV] v. Reid* the U.S. Supreme Court settled this debate (at 751, 1989). Reasoning that Congress intended the word employee to mean “...the conventional master-servant relationship understood by the common-law agency doctrine” the court referenced a non-exhaustive list of factors from the Restatement (Second) of Agency § 220(2) [Restatement] for determining whether a hired party is an employee (1958; *CCNV v. Reed*, at 740, 1989).

Table 1 compares the circumstances of employment for university faculty against the factors test under the Restatement. No one of these factors is determinative. The factors must be taken as a whole. Taken as a whole, faculty in general and tenured and tenure-track professors in particular, are salaried, full-time employees of universities that provide employee benefits and pay all of the appropriate payroll taxes. Those facts alone constitute sufficient evidence that faculty are not independent contractors but rather employees of their university. It follows that authorship of their academic works belong to their university under the express words of §102 of the Act.

Some faculty contend that their academic works do not belong to the university as long as those works are produced on their own time: evenings, weekends, holidays, during academic recesses or while on sabbatical. That the university neither directs a faculty to perform a particular task nor controls when, where or how that task is performed is relevant to the employee/independent contractor distinction but insufficient to determine that the faculty is an independent contractor.

The teacher exception subsequent to the Copyright Act

Once the Supreme Court established the meaning of employee in §102 it became immediately evident that most academic works would be construed as works made for hire unless the teacher exception could be shown to have survived the Copyright Act. A handful of notable cases in various jurisdictions have provided mixed results.

Table 1

Circumstance of employment vs. factor test under general common law of agency

Circumstance of Employment	Factor Test	Employee	Uncertain	Independent Contractor
Faculty bring unique skill sets	Skill required			✓
University supplies desk, phone, computer, internet access, library resources, books	Source of instrumentalities and tools	✓		
University supplies office, classrooms and laboratories but faculty may partly work from home	Location of the work		✓	
Tenure-track and tenured faculty are long-term or permanently employed	Duration of the relationship	✓		
Classes are assigned by university but faculty choose service and research tasks with university consent	Hiring party's right to assign additional projects		✓	
Teaching schedule controlled by university but faculty free to choose most other working hours.	Discretion over when and how long to work		✓	
Faculty receive salaries	Method of payment	✓		
Assistants are hired and paid for by the university	Hired party's role in hiring and paying assistants	✓		
Administering academic work is regular business of university	Whether work is regular business of hiring party	✓		
University is in business as academic institution	Whether hiring party is in business	✓		
University pays benefits to faculty	Provision of employee benefits	✓		
University pays all payroll taxes	Tax treatment of the hired party	✓		

In *Bosch v. Ball-Kell* the U.S. District Court for the Central District of Illinois expressly recognized the teacher exception. The court noted a “long-standing common law ‘teacher exception’ to work made for hire that exempted academic writing (*Bosch v. Ball-Kell*, 2006).” The court reasoned that Congress did not provide any indication that they meant to abolish the teacher exception and that havoc to academic production would result were the teacher exemption abolished. In forming its opinion, however, the court cited decisions in other jurisdictions that supported the teacher exception for academic papers and publications. For course materials and notes – the instruments that were actually on point for copyright infringement in *Bosch* – the court relied on the record of deliberations of the faculty senate and the university’s intellectual property policy which assigned the copyright in course materials to

the professors who created those materials. It is questionable whether or not the university's intellectual property policy is relevant. This is because the policy was enacted after the alleged infringement and employment policy is insufficient to alter the statutory presumption under the Copyright Act. *Bosch* provides support for the teacher exception with respect to academic papers and publications but uncertainty with regard to course materials.

In *University of Colorado Foundation v. American Cyanamid*, a patent and copyright infringement suit, the Regents of the University of Colorado Foundation claimed ownership of a journal article published by research professors from the University (1995). American Cyanamid challenged the Regent's ownership claim. Without any mention of either the teacher exception or assignment of copyright, the Colorado District Court found that the Regent's owned the article, asserting that the Regents "are quite obviously the owner, because the [journal article] is a 'work made for hire' by the coauthors done within the scope of their employment (*University of Colorado Foundation v. American Cyanamid*, at 1400, 1995)."

In *Vanderhurst v. Colorado Mountain College District* a professor brought a copyright infringement claim against his former employer for an outline that he developed while teaching (1998). Noting that despite having "prepared the outline on his own time with his own materials," the Colorado District Court granted summary judgment in favor of the college on their claim of ownership of outline under the work made for hire doctrine (*Vanderhurst v. Colorado*, at 1307, 1998). Citing the Restatement (Second) of Agency as in the Supreme Court's decision in *CCNV*, the court asserted, "...there is no genuine dispute that Vanderhurst's creation of the Outline was connected directly with the work for which [he] was employed to do and was fairly and reasonably incidental to his employment. Further, creation of the Outline may be regarded fairly as one method of carrying out the objectives of his employment (*Vanderhurst v. Colorado*, at 1307, 1998)." Again, as in *University of Colorado Foundation*, there was no mention of the teacher exception or assignment of copyright (*Vanderhurst v. Colorado*, 1998).

In *Rouse v. Walter & Associates* the Iowa District Court granted summary judgment in favor of defendants including Walter & Associates, an agricultural consulting company, on a copyright infringement claim brought by professors pursuant to the commercialization of software by Walter & Associates that was developed by Gene Rouse and other professors at the University of Iowa as part of a research program (2007). Finding that the University of Iowa was the owner of the copyright pursuant to the work made for hire Doctrine, and yet again without mention of the teacher exception, the court found that the Rouse and the other plaintiffs did not have standing to bring a copyright infringement claim because they did not own the copyright (*Rouse v. Walter*, at 1070, 2007).

One particularly notable fact in *Rouse* was the existence of a faculty handbook that clearly assigned copyright in educational materials to the faculty who create the material. The court found that the university's written policy on copyright assignment, as expressed in the faculty manual, was insufficient to defeat §201(b) of the Copyright Act that makes an exception to the work made for hire doctrine when "...the parties have expressly agreed otherwise in a written instrument signed by them...(*Rouse v. Walter*, at 1064, 2007; Copyright Act, §201(b), 1976)." The court could not find otherwise because university policy, even when established through shared governance processes, is insufficient to alter the statutory presumption under the Copyright Act.

Institutional responses to copyright ownership uncertainties

Bosch v. Ball-Kell provides the only express support for the teacher exception. The scope of that ruling, however, is narrowly construed to academic papers and publications and the Illinois District Court's ruling is not controlling in other jurisdictions. Cases in other jurisdictions have militated toward application of the work made for hire doctrine but without directly confronting the teacher exception. Whether or not the teacher exemption has survived the Copyright Act remains entirely unclear to this day. Until the status of the teacher exemption is resolved the single viable avenue for faculty to assert copyright ownership is through assignment of copyright by their academic institution. The following paragraphs describe the legal implications of three different strategies that are currently being employed to make such assignments: disclaimers by memorandum, policy declarations, and collective bargaining or employment agreements.

Disclaimers by memorandum

At Cal Poly, San Luis Obispo, the Provost had circulated a memorandum to all faculty that expressed the university's position on ownership of academic works created by faculty. In that memo the Provost disclaimed ownership of those works, stating that the university recognized faculty rights to those works and that the university does not claim ownership of those works. At least one treatise on copyright supports the copyright disclaimer theory, asserting as follows, "In copyright [law], waiver or abandonment of copyright occurs only if there is an intent by the copyright proprietor to surrender rights in his work (*Rouse v. Walter*, 2007 (citing *A&M Records, Inc. v. Napster, Inc.*, 2001 (quoting Nimmer & Nimmer, p. 13.06, 2011)))."

This letter disclaimer may look appealing but it lacks legal authority for a variety of reasons. For a Provost to disclaim intellectual property the Provost must have authority to do so. In most large, public universities real property and intellectual property rights are owned by its Board of Regents. Agency authority to disclaim such property is usually delegated to a Chancellor or other high level official. For the lack of agency authority, a disclaimer by the Provost could not be construed as a disclaimer by the copyright proprietor.

Perhaps more importantly, the Provost's memo expresses the intent to vest copyright ownership in the creator faculty, not to just anybody whom might want to acquire what the Provost had abandoned. To vest copyright ownership in a particular party is to transfer the copyright not to disclaim it. The Copyright Act does allow for transfer of copyright when "...the parties have expressly agreed...in a written instrument signed by them..." (*Rouse v. Walter*, at 1064, 2007; Copyright Act, §201(b), 1976)." A memo signed by its author, however, is not an enforceable agreement under common law rules of contract. For a written contract to be enforceable it must be supported by consideration and executed by both parties. A donative promise, characterized by lack of consideration, is not enforceable. A memo from the Provost is not a writing signed by both parties either. And even if a disclaimer memorandum were enforceable, it could only be valid if express agency authority to disclaim ownership of intellectual property were to be found in the employment contract of the Provost

Policy declarations

The University of Arizona has issued a policy statement that preemptively declares ownership by its Board of Regents [the "Board"] of all intellectual property created within its system (Townsend, 2003, at 251). After claiming ownership of everything it then disclaims copyright ownership of a small set of scholarly works, including "traditional publications in academia" and "electronic publications (Townsend, 2003, at 254)." These disclaimers leave the ownership question unanswered for "non-traditional" works – software programs, apps, and social media sites are certainly non-traditional – and electronic publications such as blogs, websites and course management systems (Townsend, 2003, at 255).

A disclaimer by a Board is marginally better than a disclaimer by a Provost because the Board has authority to dispose of intellectual property. But there are legal flaws with such a disclaimer. A disclaimer still has the basic flaw of unenforceability as a common law contract. And "[an] employee policy is insufficient to alter the statutory presumption under the Copyright Act (*Rouse v. Walter*, 2007 (citing *Manning v. Board of Trustees*, 2000 (citing *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 1986)))."

This policy declaration also highlights a disturbing trend whereby universities extract by declaration what they want to own – works with intrinsic commercial value - and give back to the faculty the leftovers of scholarly but non-revenue generating works.

Collective bargaining and employment agreements

In the California State University System, a Collective Bargaining Agreement [CBA] is utilized to license property rights in materials created by faculty. Without making a declaration of ownership, this CBA allows the faculty to use materials created by them for university purposes or any other purpose. Materials created with extraordinary university support are excluded. Although this CBA effectively circumvents work made for hire, it also gives the university system the right to change their future position while asserting that neither party waives their right to assert ownership.

A CBA is not only an enforceable employment agreement; its signatories on behalf of the university would

ordinarily have the legal right to dispose of intellectual property. As such, a CBA is capable of transferring copyright ownership pursuant to §201(b) (Copyright Act, 1976). Ownership is neither declared nor transferred by this particular CBA, however. This CBA can be read as a license to use intellectual property that may be terminated by either party *instantly*. While a CBA can be written whereby faculties unequivocally own their academic works, this particular CBA avoids that outcome.

Some employment agreements will be construed as enforceable contracts too. As such, they may transfer copyright ownership to the employee pursuant to §201(b) (Copyright Act, 1976). To be enforceable an employment agreement must be written; it must express a definite salary; it must cover a specific period of time; and both parties must sign.

Findings

In *Urofsky v. Gilmore*, the U.S. Court of Appeals for the 4th Circuit asserted that academic freedom belongs to a university and not to any individual faculty member, finding as follows: “Our review of the law...leads us to conclude that to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors... (2000).”

At least one commentator has used the Supreme Court’s finding in *Urofsky* to argue that the teacher exception is contrary to the public welfare. Writing for Innovations in Higher Education, consultant Joy Blanchard argues “...sound public policy should not assist faculty in selling to the highest bidder the courses and knowledge they have generated from their employer’s resources. Such practice creates an unfair marketplace for distance education and abuses the original intent of the teacher exception (2010).”

Let us concede that university professors lack an express constitutional right to academic freedom. We can make that concession because academic freedom is not and never has been a legal doctrine. It is a professional norm. This professional norm was first asserted in a 1940 Statement of Principles on Academic Freedom and Tenure issued by the American Association of University Professors [AAUP] and the Association of American Colleges (*Urofsky v. Gilmore*, at 411, 2000 (citing Hiers, 1993)). That 1940 Statement of Principles has since “...been endorsed by every major higher education organization in the nation...through its adoption into bylaws, faculty contracts, and collective bargaining agreements. (*Urofsky v. Gilmore*, at 411, 2000 (citing Candido, 1996-97)).”

Academic freedom makes possible the educational purposes of universities. The novel, unique and personal expression of ideas is the value proposition that faculty bring to a university. This value proposition is supported by the tenure system, guaranteeing freedom of expression to university faculty. Such *sui generis* expression is also the quintessential purpose of copyright protection. As one legal researcher has put it, “Faculty independent thought, and control over their scholarly works, is at the core of the mission and success of the American higher education system. Without protection for the free and unfettered search for knowledge, our universities and their faculties will lose their value to society (Springer, 2006).”

Conclusion

The copyright in an original work is initially owned by its author but U.S. copyright law and case history are notoriously unsettled about identifying that author. That author may be the originator of the work or it may be the university that employed the originator. An academic cannot rely on owning a copyrightable work merely for having been its originator. However, the public welfare is best served when faculty realize the personal gain that follows from asserting copyright ownership over their commercially marketable academic works. The United States Constitution empowers grants of exclusive right in patents and copyrights to citizens in order to achieve a particular end, specifically “To promote the Progress of Science and useful Arts... (U.S. Const. art. I, §8, cl. 8).” The U.S. Supreme court interpreted the meaning and intent of this clause in *Mazer v. Stein*, as follows: “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such activities deserve rewards

commensurate with the services rendered. (1954).” The transfer of intellectual property rights either through a CBA or through individual employment contracts is the best available tool for assuring that outcome.

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