White Paper: Three Online Intellectual Property Hacks

October 7, 2021

Thomas J. Tobin
University of Wisconsin-Madison
thomas.tobin@wisc.edu

Disclaimer: The information contained herein, along with any questions and answers, is provided for educational purposes only. Neither is a substitute for legal advice, and neither is to be construed as the rendering of a legal opinion. The author is not a lawyer. The ideas and materials herein are based on more than 20 years of practice as an educator, faculty developer, and all-around intellectual property nerd. Rest assured that actual lawyers who specialize in intellectual property have given this content their general blessing.

Colleges and universities are experiencing a new surge of questions about who actually owns all of the content that instructors created in response to the urgent need to move from face-to-face to remote instruction starting in March of 2020. As far back as the late 1990s, instructors who developed materials for online courses have been unsure about their intellectual property rights when they put those materials into their college and university web sites, learning management systems, and other systems.

Even with students coming back to campus soon, instructors who were forced to create new content for their remote-instructions courses—like documents, videos, live-session recordings, and discussion posts on various platforms—are asking whether they retain ownership over those materials.

Although I’m not a lawyer and this white paper is not intended to be legal advice, I’ve spoken with a number of higher-education lawyers, all of whom provide roughly the same advice for instructors, designers, and others involved in creating online learning materials:
It depends.

This is puzzling, because the law in clear about who owns materials that are put into a fixed format (such as documents, files, recordings, and the like): if you are an employee doing your job, then your employer owns what you create, under the legal doctrine called “work for hire.” In the definition of work for hire, the U.S. law say that

“17 USC Section 201(a) vests ownership of copyright in a work with the author of the work. Section 201(b) provides that the employer or other person for whom a work-for-hire is prepared will be considered the author for copyright purposes. Works-for-hire are works created by employees within the scope of their employment, or by others pursuant to written contract, if the work created falls into one of the nine categories set out in the definition of work-for-hire.” [1]

However, in higher education, there is a long tradition of altering that statutory scheme, either through tradition or through policies that permit faculty members ownership of their scholarly writings and educational materials.

It is unclear whether the law would compel the conclusion that faculty writings are works within the scope of employment, but resolving the issue seemed of little consequence until recently. . . . For example, such practices have contributed to the escalating prices universities must now pay to “buy back” the published scholarly works their own—and often federal taxpayer funds—helped to create.

The allocation of ownership interests in the end products of college and university research is just one policy consideration. Today there are more subtly nuanced variations on the once-straightforward theme of ownership of works created on our campuses:

- Scholarly works implemented in software
- Multimedia courseware
- Technology-mediated face-to-face teaching and distance learning
- The changing nature of authorship in joint and collaborative electronic works

By explicitly allowing faculty members to retain ownership of the content that they create as employees of institutions of higher education, colleges and universities have inadvertently created a situation where competing claims of ownership for intellectual property can be made, especially where faculty members have created course-related materials (e.g., lecture notes, videos, audio podcasts) with assistance from other institutional staff whose work outputs often do fall under the work-for-hire criteria in copyright law.

Regardless of ownership categories or agreements, for all content created by faculty members for use in courses or an LMS, faculty creators retain the rights

- to take credit for creative contributions,
- to reproduce the work for their own instructional purposes,
- to incorporate the work in future scholarly works authored by the instructor,
- of first refusal in making new versions, and
- to be consulted in good faith on reuse and revisions to the content.

Colleges and universities traditionally disclaim ownership rights in scholarly works like conference papers, publications, and content created in the pursuit of faculty members’ research agendas.

This has some staff members asking why the focus is wholly on the rights of institutions and the rights of faculty members. Administrative staff and other institutional employees who may be employed in order to
support faculty members in the creation of course materials almost always fall under the “work for hire” provisions of copyright law, where the institution owns the work that they produce.

For administrators in higher education, a leading concern regarding distance-education and technology-mediated courses is assignability. In order to meet the demand for new programs, courses, and sections, deans and department chairs need as much flexibility in creating, scheduling, and assigning courses as possible. For face-to-face offerings, intellectual property is seldom a concern in these processes.

The institution provides a minimum structure: usually a common syllabus (or set of requirements for elements that must appear in the syllabus), a common set of learning outcomes or objectives, and perhaps a textbook in common across all sections of a course. All instructors who teach a given course are expected to create the remaining course experience for students. Indeed, course delivery is traditionally what tenure-line and adjunct faculty members are paid for, the former in terms of a course load and the latter on a course-by-course basis.

Instructors create materials like tests, lecture notes, handouts, and multimedia as part of the course delivery, and administrators feel confident assigning instructors to newly-created sections of courses, even on short notice, because face-to-face instruction can often be constructed “on the fly,” based largely on the expertise, notes, and memory of the assigned instructors.

For course-delivery modes that include distance-education components, such as hybrid and online courses, much of what instructors might create or say “on the fly” in a face-to-face course must be written out and fixed in the structure of an LMS in advance of the course-offering time frame.

Because online course components require instructors a) to fix their ideas in a permanent format such as lecture notes or multimedia presentations and b) to create such course materials ahead of the time when learners will consume them, relying on the tradition of “you created it, so you own it” presents significant assignability challenges for administrators. If individual instructors own everything but the syllabus and the textbook, then only those instructors who have already created their entire complement of online course materials can be assigned to teach sections of a given course.

Worse, institutions are hamstrung in cases where instructors become ill or where demand for a course surges soon before the beginning of a semester: finding replacement instructors is dependent on getting permission from the creator who has become ill, in the first instance, and having an instructor who already has the online course content “in the can” and ready to deploy, in the second instance.

It is imperative for higher-education institutions to move away from reliance on tradition and make explicit policies and agreements regarding faculty-member, staff, and institutional ownership of intellectual property. Here, we will narrow our focus to consider especially the ownership of online (that is, fixed-format) content, especially content that is housed in institutions’ learning management systems (LMSes), for which institutions have oversight and control. Institutions typically distinguish among three categories of ownership of intellectual property developed by instructors for use in LMS course shells or other institution-owned repositories:

- created without substantial technical or financial support,
- created with substantial technical or financial support, and
- created as work-for-hire.

Some institutions prefer not to distinguish between these first two categories because “substantial technical or financial support” is simple to define yet difficult to measure. “Substantial technical or financial support” is support provided expressly for the creation of materials that are to be used in the LMS or other institution-owned repositories. Such support includes staff time devoted to assisting instructors, training requested by/for the instructor, release time, reassignment of duties, and payment directly for development
of content. Such support specifically excludes staff time already scheduled for campus-wide workshops or other general assistance, training provided for general audiences, and institution-owned equipment and time used for the fulfillment of primary job duties.

Content Created without Substantial Technical or Financial Support

The intellectual property rights for content created by faculty members without substantial technical or financial support from the institution, for use in the LMS or other institutional repository, are owned wholly by the faculty member who created the content. The content creator may use such content in LMS course shells without implying shared ownership of the content, and the faculty member retains copyright protections for the content. This is closest to the long-standing tradition of “you created it, so you own it.”

Content Created with Substantial Technical or Financial Support

The intellectual property rights for content created by faculty members with substantial technical or financial support from the institution, for use in the LMS or other repository, are owned jointly by the institution and the faculty member who created the content. This type of agreement must spell out carefully who are considered rights-holding creators and who are considered employees whose work is owned by the institution.

The institution and the faculty creator typically grant each other a royalty-free license for future use of the content. Both the institution and the instructor retain the right independently to make derivative works based on the content. Administrators may copy the content when assigning new course sections to other instructors, and many agreements stipulate that the original content creators be paid a nominal per-use stipend for each re-assignment, such as 1/10th of the payment for teaching the full course.

Content Created as Work for Hire

The intellectual property rights for content created by faculty members under work-for-hire agreements, for use in the LMS or other repository, are owned wholly by the institution. The faculty creator releases all rights to the content in return for compensation by the institution. Work-for-hire content is produced as a result of direct written agreement, and is produced by individuals contracted specifically to produce such content. Work-for-hire also includes content specifically commissioned by the institution.

Work-for-hire is considered to be outside the normal contractual duties of faculty members—as “extra work” or “overload” assigned to the faculty member. Work-for-hire is challenging to define when the core job duties of faculty members already include the creation of course materials, so defining it as “extra work” or creating a separate contract or Memorandum of Understanding (MOU) for work-for-hire assignments helps to eliminate such potential confusions.

The terms of all work-for-hire agreements are determined in writing prior to beginning the work-for-hire tasks, which are laid out in a mutually agreed-upon timeline for specific deliverables. The work-for-hire agreement must be signed by the institution and the faculty creator before work begins. A work-for-hire agreement is considered a separate and legally-binding contract.

There you have it: unless there is a specific and detailed policy in place, the law of work-for-hire applies. Without such detailed ownership policies, confusion about who owns what can lead to misunderstandings, bad feelings, and an inability to grow technology-mediated programs.

If you want to go beyond this white paper and OLC conference session, check out thomasjtobin.com for resources like the Copyright Ninja, as well as the article that started it all, “Training Your Faculty about Copyright When the Lawyer Isn’t Looking.”