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AAUP Works

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Copyright in Academia: How Does It Work?

Notes from the October 21 presentation

On October 21st, we had the good fortune of hosting Nick Manicone, J.D. (AAUP General Counsel's Office, Washington, D.C.), Geoffrey Pinski, J.D. (Sr. Licensing Associate, U.C. Intellectual Property Office), and Howard Tolley, J.D., PhD (U.C. Professor of Political Science) as panel presenters on copyright in academia. The panel reviewed copyright law and how it affects faculty in today's university setting. This panel also discussed issues related to faculty owned intellectual property, the concept of "work for hire," and fair use of others' work in teaching and research. Over 50 faculty members attended and all had a very productive conversation.

Nick Manicone kindly provided us with this written overview of his presentation, and Geoff Pinski has uploaded or provided links to many of the documents reviewed in their presentation to the UC Intellectual Property Office website (http://www.ipo.uc.edu/index.cfm?fuseaction=news.headlines#cpres).

If you have ideas for topics or speakers you'd like to see us sponsor in the future, please let me know.

— John McNay, PhD
Chair, AAUP Organizing Committee

I. What Is Copyright?

Copyright law protects original works of authorship fixed in any tangible medium. *See* 17 U.S.C. §102. **This includes books, private letters, paintings, computer programs, motion pictures and other audiovisual work. It also includes anything else fixed, no matter how it is fixed.** Thus it includes documents "written" on a computer disk, web pages, notes on scraps of paper, even your grocery list.

Copyright owners don't have to record their copyright. Copyright can simply be asserted once the work is fixed in a tangible medium. While copyright can be registered (and, if a lawsuit is filed to enforce a copyright, must be registered at that time), such registration is not necessary to create the copyright protection.

The © symbol is not a requirement to make an item protected, nor is the lack of such a symbol any indication that the work is not copyrighted. Including the © symbol is a way to signal readers that the work is protected and that the author values that protection.

Copyright does not protect ideas, nor does it protect the labor that goes into creating a written work. No matter how much work goes into compiling data, for example, the data itself is not protected. If a work shows some originality or creativity in the way it is put together, that creative presentation might itself be copyrighted, but the data is not. In *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), the Supreme Court held that alphabetical listings in telephone directory white pages are not copyrightable.

Copyright only lasts for a limited time. **Copyright now lasts for the life of author plus 70 additional years.** For commercial products (commercial authors), it lasts 95 years from the date of publication.

II. The Bundle of Rights: What exactly does a copyright holder "own"?

Copyright law gives creators the exclusive right and authority to a "bundle of rights." Thus the author owns not only the specific work, but the right to control its use.

This bundle of rights includes the right of: reproduction (the right to control all forms of copying of the work); translation, abridgment, and revision (the right to control derivative works); public distribution; and public performance and display.

Ownership of copyright has to do with the right to control future use of the work, separate and apart from the treatment of the physical item on which that work is fixed. If an author writes a book, s/he owns the copyright and has rights over what happens to the content of the book. If you buy that book in the bookstore, the author does not own your copy and has no right over what you do with that particular copy of the book, but does retain control over how you use the content of the book, and thus can control your reproduction of the book, translation of it, marketing of it, etc.

III. Transfer of Copyright

Any transfer of ownership must be both in writing and signed.

A unilaterally imposed institutional policy cannot legally take away your copyright ownership of your work.

Handbooks - if you sign an employment contract ceding copyright to your work, or sign a faculty handbook indicating acceptance of the policies within, such a signed document might be construed as a contract and might constitute a valid transfer of rights.

Collective bargaining contracts defining specific areas of faculty work as belonging to the faculty, but leaving more grey areas open to resolution by future individual contracts, both protect the faculty but leave room to accommodate the need for an individual signed writing when necessary.

The **"work-for-hire" doctrine** is a statutory exception to the general ownership provisions of the copyright law. It is a way of allocating whether an employee or an employer is the author, and thus copyright holder, of work performed in the course of employment. **The work-for-hire provision entitles an employer to assert ownership over materials prepared by its employees acting within the "scope of their employment."**

IV. How Do These Laws Apply to Faculty?

The majority of traditional faculty work belongs to the faculty, and doesn't fit as work-for-hire. Traditional faculty work includes: course descriptions, syllabi, lecture notes and other materials generated for use by students, on-line courses, tests, computer programs, grant proposals, and university governance materials. Ownership of these various elements of faculty work depends upon a number of factors, and may vary not only between categories but within them.

Copyright ownership is an academic freedom issue in many cases. Scholarly work is not work-for-hire because "**the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions**." *Statement on Copyright*, AAUP Policy Documents & Reports 182-183 (9th ed. 2001). "Were the institution to own the copyright in such works, under a work-made-for-hire theory, it would have the power, [to control it] and indeed to censor and forbid dissemination of the work altogether. Such powers, so deeply inconsistent with fundamental principles of academic freedom, cannot rest with the institution." Id.

This standard protects both the institution as well as the faculty member: the institution has no control over the copyrighted works of a faculty member and therefore is not responsible for their ideas. See the Kent State University CBA: "A work made in the course of a Faculty member's normal duties and responsibilities is the property of the Faculty member, who has the right to determine the disposition of such work and revenue derived from such work. **The University is not held responsible for any opinions expressed in the work nor for any direct, indirect, special or consequential damages resulting from the creation or exploitation of the property**." Kent State University CBA, Article XVIII, Sec. 4 B 1.

Professors have the unusual responsibility, as part of their employment, to be creative and independent outside of class in their intellectual scholarly life. Thus the position of a professor requires an "employee" who researches and writes not to promote a particular viewpoint of the employer, but one who engages in an independent search for truth and knowledge. This model does not fit into the work-for-hire framework.

AAUP policy holds that for faculty work to be work-for-hire, it requires use of extraordinary resources; use of traditional resources "such as office space, supplies, library facilities, ordinary access to computer and networks, and money," are not sufficient to make faculty work into work-for-hire. *See, Statement on Copyright*, AAUP Policy Documents & Reports 182 (9th ed. 2001).

Accordingly, Work-for-hire is limited to works that are assigned as an institutional responsibility. Examples: a recruitment brochure written by an admissions director; an affirmative action report written by a department chair; a catalog for the university art museum's most recent exhibit written by an art professor (if it is outside the art professor's normal scope of employment).

Some faculty projects are highly integrated and dependent upon the administration or outside entities. These are likely to be subject to joint or some other form of shared ownership, or be considered work-for-hire. **All but the most blatant of such "commissioned" works, however, and everything else in between, fall into the gray middle area where individual decisions must be made on a case-by-case basis.**

V. Addressing Copyright Issues in a Collective Bargaining Environment

W. While traditional scholarly works should clearly belong to faculty, there is much in today's academic workplace that presents novel and/or non-standard situations; collaborative programs, works using great deals of technical or other support, works governed to some extent by funders, etc.. Many contracts have dealt with this conundrum by setting up procedures for individual contracting around individual works**. Copyright to scholarly works is retained by the faculty, and "agreements to later agree" are set up to deal with issues beyond that fundamental level. By creating a process to handle situations as they arise, contracts create protections for faculty while reserving the fluidity essential to the area.**

- First, many CBA's establish a broad scope of faculty-owned work. For example, the AAUP - *D'Youville College Contract* defines faculty-owned intellectual property as "including, but not limited to, books, tests, articles, monographs, glossaries, bibliographies, study guides, laboratory manuals, syllabi, tests and work papers, lectures, musical and/or dramatic compositions, unpublished scripts, films, filmstrips, charts, transparencies, other visual aids, video and audio tapes and cassettes, computer programs, live video and audio broadcasts, programmed instruction materials, drawings, paintings, sculptures, photographs, and other works of art."

- Other faculty work may be made the subject of future debate or contracting. For example, the *AAUP - Rider University Contract, Article XXXII. C. 3.*: "Where the substantial use of University Resources occurs, the University and the bargaining unit member shall be joint owners of the intellectual property, and the creator and the University shall negotiate the allocation specific ownership interest, amounts of remuneration, respective obligations, etc."

- Agreements are often made to make agreements at a future date. For example, *AAUP - Kent State University Contract, Article XVIII, Sec. 4, B, 1 and 2*: "A work made in the course of a Faculty member's normal duties and responsibilities is the property of the Faculty member, who has the right to determine the disposition of such work and revenue derived from such work. …. The University is the owner of intellectual property only when the Faculty member and University knowingly and voluntarily enter into a written agreement to specifically create or use such specified intellectual property in exchange for additional compensation."

Another option is to grant copyright to the faculty, but reserve certain uses to the institution. See the AAUP Cuyahoga Community College Contract, Article 24, Sec. 24.01: "Faculty members shall have sole rights to ownership and disposition of copyrightable material…generated by their own initiative, provided there is not substantial use of college ….resources. However, supplementary course material prepared by a faculty member, even if copyrighted, which has no reasonable market potential outside the college will be made available without charge."