

# COURSE RIGHTS IN CYBERSPACE

OCTOBER, 2012

OWNERSHIP ISSUES IN ONLINE EDUCATION

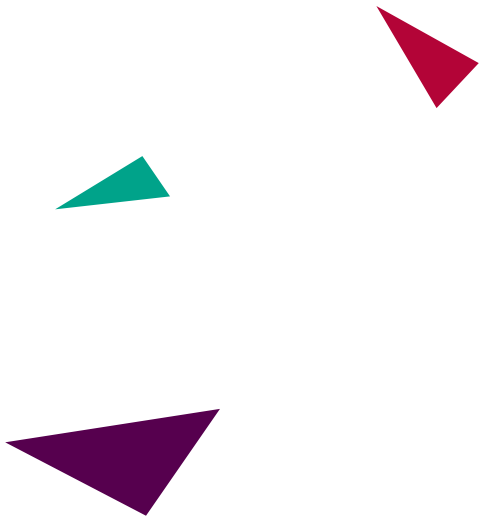
MEDIA X  
STANFORD UNIVERSITY



# **COURSE RIGHTS IN CYBERSPACE**

Ownership Issues in Online Education

October, 2012



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# 1. INTRODUCTION

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The “legal and economic management of university intellectual property is rapidly becoming one of the most critical and complex issues facing higher education.”

New online learning technologies have “shaken the very foundations of copyright and patent law and...promise to affect notions of intellectual-property ownership altogether.”<sup>1</sup>

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Higher education is in the midst of change, much of it driven by communication technologies that are changing access and delivery of content and the respective roles of faculty members, students and administrators.

The Internet has made knowledge more widely available by opening access to content, peers and experts far beyond the traditional boundaries of the physical campus. This access to information has influenced the roles of faculty members and students, and it has raised new questions about the respective rights of faculty members and administration.

Prior to the ubiquitous communication of the Internet, distance learning was limited to correspondence courses, and these were the exception to physical learning environments in which the teacher and learner were both physically present. The availability of computers enabled computer-based training (CBT), in which the teacher could be virtualized in a software application that interacted with the student through pre-defined patterns of technology-mediated communications.

With more powerful computers and Internet connectivity, CBT moved from the computer to the Internet. Distribution of educational content no longer required purchase of digital media and was thereby liberated from location.

Online distance ‘e-learning’—in which web-based technology is the medium of instruction and teaching occurs through the use of telecommunications to transmit and receive voice, video, and data—entered the educational ecosystem and began to revolutionize the delivery of education. Web-based technologies offered convenience for students and faculty members convened through traditional physical class environments. Augmented and immersive learning environments joined the mix. And recently, the free and open distribution of educational content to people who are not matriculated as students has also begun to grow.

The benefits of online learning are many. The World Wide Web has increased the accessibility and flexibility of education for learners in locations and circumstances that would otherwise have precluded physical attendance at conventional institutions of high education (Phipps & Merisotis, 1999; Garrison & Anderson, 2003). With new markets for students, opportunities for new curricula have also been created. Faculty members have access to different learners, larger audiences, and wider visibility for their expertise. Online educational offerings have democratized higher education by making coursework and degrees possible for many nontraditional students, who comprise a rapidly growing contingent (Phipps & Merisotis, 1999).

The implications of these technological advances, however, reach beyond teaching and learning. They have the potential to influence the format, the content, and the business models of higher education. As such, important issues are raised.

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<sup>1</sup> The Policy and Global Affairs National Research Council 2002 Report.

One such issue involves the question of who will own and control copyrighted educational materials used in online education. This question is certain to command considerable attention by the faculty and administration of institutions of higher learning as the demand for web-based courses generates increased faculty and institutional investment in the design, development and delivery of distance education (Eisler, 2001).

Online distance learning is offered by many higher education institutions, including a number of elite universities. Higher education institutions based on co-location of professors and students have embraced online services to support traditional educational environments in which professors and students are co-located but use online communication for dissemination of information, dialogue and discussion, immersive experiences, and extended presence.

The online flow of information for higher education now includes registration processes, learning management systems, testing and evaluation, and record keeping. New experiments in using online communications for everything but the classroom discussion – the “flipped” class – are underway around the world, and online information exchange has become well-integrated into the practice of traditional higher education.

In 1999, Phipps and Merisotis of the Institute for Higher Education Policy reported that “Distance learning, which was once a poor and often unwelcome stepchild within the academic community, is becoming increasingly visible as part of the higher education offering. The technology is having, and will continue to have, a profound impact on colleges and universities in America and around the globe.” Of rising concern to faculty and administration involved in implementing distance learning are changes that relate to student

admissions and academic performance, as well as questions about control over course content. A burgeoning focus of innovation, investment, and attention, today’s online education programs have also raised numerous issues related to copyright and intellectual property policy (Manz, 2004).

The fast-approaching wave of new delivery modes of curricular content brings with it potential shifts in the business models of education, with ramifications for the commercialization of learning and its concomitant impact on the ownership of course content and on academic freedom. Publishers, educational administrators, faculty and students have different motivations, and optimal solutions have yet to be formulated (Bok, 2003; Chambers, 1999; Gorman, 1998; Kirp, 2004; Rhoades & Slaughter, 2004; Rowe, et al., 1998; Schreker, 1998).

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*Who will own and control copyrighted educational materials used in online education?*

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## 2. COPYRIGHT IN EDUCATION

### **COPYRIGHT IS INTENDED TO SUPPORT THE MARKETPLACE FOR CREATIVE WORK**

Copyright law is likely to play a key role in solutions to ownership of course content. Of considerable importance to institutions of higher education, copyright law allows the owners of copyrights “to reproduce the copyrighted work in any format; to prepare derivative works; to distribute copies of copyrighted work to the public by sale, rent, lease, or gift; to perform the copyrighted work publicly; and to display the copyrighted work publicly” while retaining enforceable rights of ownership (Levy, 2003).

To be copyrighted, products must be original works of authorship (the author must have engaged in some endeavor to create the work with some level of creativity) and fixed in a tangible medium (the work must be committed to a sufficiently permanent form), as stipulated in the Copyright Act of 1976 (Campani, 2006).

The purpose of copyright law is to stimulate the creation and wide dissemination of creative work in order to further art, science, and social good while balancing economic incentives by establishing a marketable right to the use of one's free expression, recognizing that works of original expression belong to the person who created them (Givler, 2003). Many outputs of faculty creativity in the educational process are copywritable. Traditional literary publications, course materials and presentations, software applications, multimedia, video, photos, music, plays, art and other creative activities are copyrightable products (Rowe et al., 1998).

On the other hand, a lecture or classroom presentation that is not simultaneously recorded is not protected under copyright (Eisler, 2001).

The ability of an instructor to copyright a course requires that it be recorded; a syllabus, a video, or an audio recording is necessary for that protection to be relevant.

In many cases the person who conceives of a work and fixes it in a tangible medium is considered the owner. This interpretation is consistent with the older 1909 Copyright Act under which educators maintained ownership of their scholarly materials. However, the 1976 Copyright Act includes exceptions for work of employees within an institution. Under this statute course materials are deemed ‘works-for-hire’ which the university or employer is considered to own because such works are created within the scope of employment duties. (Campani, 2006). When a faculty member is recognized as a full-time employee of an institution, the employing institution can be interpreted to own his authored work (Levy, 2003).

Under the 1976 Copyright Act, faculty may, however, retain legal ownership of ‘commissioned’ works they have developed through additional or outside compensation and time spent beyond the normal contract, when such activities are considered by the institution to constitute an ‘independently contracted’ endeavor (Eisler, 2001). Generally, part-time instructors are considered contract employees, not subject to work for hire, and thereby own their creative work (Levy, 2003).

While educational institutions have had the ability to claim ownership of instructional materials, enforcement has not been the practice. Academe has generally not adopted the business model that products of university faculty members, made in the course and scope

of employment, are considered property of the employer as works-for-hire. Rather, many universities exempt faculty from copyright constraints, enabling academic authors to retain ownership of original ideas and creative works, as intellectual property (Palloff, 2001; McIsaac & Rowe, 1997).

Little legal attention has been paid to copyright of faculty-created materials in traditional instruction, and since the first Copyright Act of 1909 until very recently less than a handful of court decisions have been reported in this area of law (Gorman, 1998). The academic tradition of sharing information and the culture of academic freedom in universities have overshadowed the legal strictures associated with copyright and ownership of intellectual property (Rowe et al. 1998). As a result, in higher education institutions, authored works tend to be considered the intellectual property of the faculty member (McIsaac & Rowe, 1997; Rhoades & Slaughter, 2004).

Still, there are complexities. Ownership and copyright issues become increasingly complicated when products are jointly created—a frequent practice in higher education. Under copyright law, ownership of products of joint authorship is shared. Co-authors who own the same interest are entitled to proceeds and possess the same capacity to transfer, lease, or change work without the consent of other authors (Campani, 2006). In some online courses, student-created works are shared with the class, or shared more broadly. Additionally, a number of conditions affect the duration of a copyright, including the type of work, when and where it was published or disseminated, and whether it falls under the

works-for-hire doctrine (Campani, 2006).

In higher education, this current interpretation of copyright law is influenced by employment agreements, and some university policies have made allocation of ownership unclear (Rowe et al., 1998). Faculty and university expectations of ownership can vary significantly (Chambers, 1999) and can become contentious absent explicit agreements between faculty members and the institution (Palloff, 2001). There is a wide divergence in the determination of ownership across institutions (Peters, 1999). Employment contracts can allocate ownership in several ways along a continuum from licensing whole or part ownership to the institution, to assigning partial or complete ownership to the faculty member (McIsaac & Rowe, 1997).

#### **COPYRIGHT RECONSIDERED AND RENEGOTIATED IN ONLINE EDUCATION**

With the advent of online education, as more courses are offered online and more students are enrolled in them, issues of copyright, ownership, and work for hire are being revisited as a reaction to increasing concern about protection and piracy of written and multimedia materials disseminated via the internet. In 2008, Cambridge University Press, Oxford University Press, and SAGE Publications sued four individuals at Georgia State University for the “systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works...through a variety of online systems and outlets utilized and hosted by the University for the digital distribution of course reading material” (Cambridge University Press, et al. v. Patton et al., 2008).

Though most of the alleged violations maintained by the publishers were rejected, infringement of the plaintiffs' copyrights was found in five of the specific readings that had been challenged in the case. While some of the readings cited in the complaint were dismissed because analysis of download counts suggested that no students actually read the materials (Cambridge University Press, et al. vs. Patton et al., 2012), the growth of open online courses aimed at large-scale participation has been accompanied with growing interest and confusion about what is permissible under fair use. Both universities and publishers are looking to this case to resolve broader conflicts about copyright infringement in the education community.

A feudal-like system has historically prevailed in educational institutions built for distance education. The infrastructure is typically owned and managed by the educational institution. Under work-for-hire agreements, instructors use the institutional infrastructure to teach students that are recruited and certified by the institution. The institution controls course content; new content created for courses becomes the property of the institution. In campus-based educational institutions, on the other hand, faculty members have often played key roles in pioneering development of infrastructure for online education programs – either as instructor-developed applications for the class or as open source platforms for wide use among the academic community, such as SAKAI, and open education provider Udacity, both which had their early developments at Stanford University.

Attempts to address whether professors own

the intellectual property rights to their online courses and whether universities or private institutions can dictate the content of these courses have been complicated by the absence of legal standards and institutional policies do not address faculty-produced multimedia materials (McIsaac & Rowe, 1997).

Copyright laws and institutional policies have been difficult to apply in traditional university classrooms and in the traditional “world of paper.” They have not adequately addressed the ownership of courses transmitted over online networks (McIsaac & Rowe, 1997; Gorman, 1998). Faculty members involved in developing new course materials and platforms are navigating uncharted waters, often claiming ownership of the intellectual property they have created. The courts have not provided much guidance in the matter; “the law is utterly unclear on the answer of who owns traditional and scholarly materials at the university” (Guernsey & Young, 1998).

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Because online learning courses often employ different educational conventions than traditional classroom courses, it has not been firmly established whether copyright protection for online educational works will hold up in cyberspace.



For example, the common practice in online courses of converting media by capturing video and images with a camera or scanner constitutes derivative work authorship and falls under stipulations of copyright law which have not been adapted for traditional classroom teaching.

Universities and their faculty are rushing to partner with ventures like Coursera, Udacity, and edX to offer their course content for free to legions of learners around the globe (Daniel, 2012). Faculty-created products for these Massive Open Online Courses, or MOOCs, can differ significantly from materials used in face-to-face teaching exchanges in a contained physical classroom. Collaboration and team-production of work by faculty members, research assistants, graphic designers, video editors, and web designers are typically required to develop and launch MOOCs, and this complicates assignment of ownership. In its agreement with the University of Michigan, Coursera treats the instructor or university as the owner of the independently-created academic content, but reserves the right to make “Content Enhancements” to course material “in the form of translations, adaptations, captioning, encoding, transcripts, or video annotations” (Online Course Hosting and Services Agreement Between Coursera Inc. and University of Michigan, 2012).

New computer applications make it possible for faculty members and students to create, capture, and change materials including text, graphics, and video. Content can be unbundled and rebundled; content from one

source can be embedded in another. Online infrastructures and web-based resources allow content creation opportunities and widespread distribution that were not in use and could not have been conceived at the drafting of the 1976 Copyright Act.

Nevertheless, copyright is implicated in many of the new possibilities brought about by the changing digital landscape and emergence of a distributed media model for higher education. The evolution of new policies outlining the terms, assumptions, and conditions affecting the ownership of digital materials is lagging behind the technological advances and the needs of distance education (McIsaac & Rowe, 1997; Rowe et al., 1998).

# 3. THE NEW ONLINE DISTANCE EDUCATION MARKET

## A PARADIGM SHIFT IN EDUCATION

At the same time that universal access to learning spaces and free online courses are being enabled by MOOC ventures and distance learning platforms, a shift away from the early academic tradition of sharing can be seen in policies addressing ownership of digital course materials. The advent of electronic media and online instruction has changed many universities' once casual attitudes toward course and content ownership. Educational computer programs, unlike academic literary works, are being likened to patentable inventions more than intellectual property (Gorman, 1998).

Insofar as the comparison relates to the potential size of their audience and the use of the World Wide Web for their dissemination, educational multimedia also promise to be potentially quite lucrative, and the significant business opportunities offered by online distance education have renewed administrative attention to licensing (Bok, 2003; Gorman, 1998). Typically requiring collaboration and more resources to design but little additional cost to deliver to wide audiences, online distance education programs have the potential to change the financial dynamics of traditional instruction in that they thrive on quantity and volume (Chambers, 1998).

A rise in e-business efforts is one result of this shift in thinking toward the commercial end of the continuum. Educators developing web-based instruction and institutions who have seen profits on successful multimedia courses and course materials have both begun to view ownership issues differently than in the past. In a online education model in which web-based versions of traditional media and expanded audiences represent a lucrative market, all parties have an

interest in increasing their share of the revenue and a stake in policy decisions (McIsaac & Rowe, 1997; Rowe, 1998). The increased appreciation of the actual or potential value of copyrightable digital education products is driving discussion and reexamination of university agreements which may well bring new commercial players into distance education and facilitate the entry of academic institutions into the private sector online learning marketplace (Rhoades & Slaughter, 2004; Gorman, 1998; Rowe et al., 1998).

Recent years have witnessed legal trends favoring institutional interests in the assignment of intellectual property ownership and a strong movement to empower the copyright holder (McIsaac & Rowe, 1997). Legislation such as the Digital Performance in Sound Recording Act of 1995, the Telecommunications Act of 1996, and the Technology, Education and Copyright Harmonization (TEACH) Act of 2002, promote the commercialization of copyrightable educational materials and the expansion of e-commerce (Rhoades & Slaughter, 2004).

In the online arena, universities increasingly are seeking to claim the ownership of educational products, and work-for-hire language and stipulations were found to have been incorporated in 75% of faculty contracts having intellectual property provisions (Rhoades & Slaughter, 2004). Institutional decisions “increasingly bypass collective faculty control and are made with an eye toward efficiency and profit” (Bok, 2003). Such patterns of change in federal law and institutional policies facilitate commercialization and academic capitalism in the realm of online distance education (Rhoades & Slaughter, 2004).



## 4. THE DEBATE ABOUT COURSE RIGHTS

This question of ownership is becoming a source of contention between faculty and university administration: faculty members want to retain ownership of courses while institutional administrative representatives consider the development of courses to reside within the scope of faculty employment. Higher education stands at the crossroads of this debate. Higher education faculty members are producers of content which many claim is based on their intellectual capital, drawn from scholarly work and research. Often however, institutional resources are used for the creation of course content.

Evidencing the extent to which opinions differ on faculty ownership of digital courses, in the 1999 statement the American Association of University Professors advocated for universities to uphold the traditional “academic practice [of] treat[ing] faculty members as the copyright owner of works that are created independently and at the faculty member’s own initiative for traditional academic purposes” (AAUP, 1999).

On the other hand, in a report from the same year, the position of the Association of American Universities was that “the university should own the intellectual property that is created at the university by faculty, research staff, and scientists and with substantial aid of its facilities or its financial support” (AAU, 1999). The National Education Association is among many organizations that have expressed the need for revisiting copyright doctrine and the formulation of telecommunication and copyright policy at the national level (Guernsey & Young, 1998).

### **INSTITUTIONAL OWNERSHIP AND ACADEMIC FREEDOM CONCERNS**

The potential of revenue and prestige from online distance education is important to academic institutions that are constantly

seeking new avenues to support the academic enterprise. Institutions view the costs of developing an online course (\$10,000 to more than \$50,000 depending on the discipline and multimedia used) as an investment, and they allocate significant resources to create the courses, establishing an interest in ownership of the product (Kelley, 2000).

However, exclusive ownership of online courses by learning institutions would place universities in the uncommon role of director, coordinator, and publisher of academic work. This could potentially reshape higher education by treating students as customers and learning as a commodity in an enterprise in which profit is the ultimate goal (Maddux et al., 2002). Moreover, policies controlling ownership of academic work may inhibit faculty participation in creating new programs (Policy and Global Affairs National Research Council, 2002), and threaten academic institutions by contradicting fundamental assumptions of the free exchange of information on which the academic community is based (Kirp, 2004).

Some faculty members fear that policy interpretations placing ownership of digital materials in the hands of the university would result in their exploitation by the administration. These professors are concerned with being regarded not as professors but as university employees bound by contract to design “Hollywood-style courses” aimed at attracting a market (Guernsey & Young, 1998; Chambers, 1999).

Protecting course quality is an important issue among faculty members who worry that if course ownership is transferred to the university, they will not have the ability to update the content,



ensure the accuracy of the material, or respond to developments in the field over time. If the university owns a course, a faculty member might not have the right to amend and revise it to ensure their work continues to have academic integrity (Kelley, 2000).

Another faculty concern is that by yielding ownership of materials, faculty members will lose their jurisdiction over the course content—a serious threat to the principle of academic freedom. This principle is based on the assumption that public and non-profit universities provide education in service of the common good and do not exist to further interests of individual faculty members or the institution as a whole (Guernsey & Young, 1998; Bok, 2003).

One concern is that under the restraints of work-for-hire copyright stipulations, professors might not be able to promote the public interest in the advancement of human knowledge and understanding, which some see as their teaching mission. University ownership of faculty-generated works could also potentiate administrative revision, scrutiny, regimentation, and censorship.

Rather than allowing faculty members to pursue their own lines of inquiry, some are concerned that universities might steer or limit faculty members' efforts toward profit-oriented areas of research (Gorman, 1998; Schrecker, 1998). Exercise of these constraints and restrictions could jeopardize core values of the academic community and infringe upon the tenets of academic freedom.

#### **FACULTY OWNERSHIP AND UNIVERSITY VULNERABILITY**

Many universities wisely have been reticent to

press their rights of ownership because of the anticipated angry response of faculty members—the life-blood of these institutions—who play important roles in attracting students, obtaining grants, and building university reputations (Bok, 2003; Gorman, 1998). “A vote of no-confidence by the faculty is generally fatal” at universities; senior faculty at leading institutions are generally able to re-locate without difficulty and are thus likely to “hold the whip-hand” (Bok, 2003). Copyright and ownership policies significantly influence faculty members' relationships with administration (Rowe, et al. 1998). Rather than being exploited, faculty members must be regarded with care.

Still, faculty ownership of distance education courses could make universities vulnerable to the risk that their professors might act as freelance consultants, developing software for competing educational institutions or other providers and even selling their instructional services to the highest bidder in an extremely competitive marketplace (Policy and Global Affairs, National Research Council, 2002). Under the rubric of academic freedom, a “freelance professor” could research and teach any subject or point of view.

University reputations, resting on their association with the work of their academic ‘superstar’ professors would suffer if those faculty members' names became associated with other institutions and organizations (Kirp, 2004). Marketplace demand would shape the curricula, potentially making less popular or less commercial areas of online instruction susceptible to shortages of funding and support (Chambers, 1999).

Some have suggested that online course ownership be shared between faculty and administration (Chambers, 1999). This creates a potential conflict, however. Joint holders of a copyright are afforded all of the rights of the creator to reproduce, publish, and change property without permission of the co-owner (Campani, 2006). Under joint ownership, express agreements between faculty members and their university would be necessary to ensure that academic freedom and course quality are maintained under joint ownership.

#### **COURSE OWNERSHIP POLICIES AT FOR-PROFIT AND TOP INSTITUTIONS**

Either ownership model risks changing faculty's roles, threatens the sanctity of academic freedom, and makes higher education more commercialized than before. In light of this, universities are approaching course ownership differently. For example, there are many models that vest ownership in the institution - such as The University of Phoenix, a for-profit university heavily involved in distance education. The AAUP, representing traditional educational enterprises, has expressed criticisms and fundamental concerns surrounding the lack of academic freedom at University of Phoenix (AAUP, 1998).

At Princeton, a new category of policy covering online courses was created after a faculty backlash to its suggestion that web-based courses fall under its existing patent policy enabling the university to claim ownership (Guernsey & Young, 1998). The University of Chicago's policy stipulates that all faculty-produced work except traditional literary materials is the property of the university. At the opposite end of the spectrum, Stanford University assigns complete ownership rights to individual professors, and MIT elected to launch all course materials as free open courseware in 2003 (Kirp, 2004).

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*Express agreements between faculty members and their university would be necessary to ensure that academic freedom and course quality are maintained under joint ownership.*

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## 5. CONSIDERATIONS

The growing enthusiasm and application of online digital media for delivering higher education have raised serious questions of ownership and conflicts over control. These questions have brought copyright law to the fore and cannot be ignored. Technology has provided the means through distance courses to expand access to learning.

The commercialization of online courses also has the potential to change faculty roles and possibly inhibit scholarly inquiry and academic freedom. It is difficult to prognosticate how these problems will be solved, but it does seem apparent that to avoid legal entanglements, institutions of higher education must be aggressive in devising comprehensive policy that coordinates expectations, serves the interests of education, and protects those involved in the development, design, and distribution of online courses.

Technology has and will continue to transform access and delivery of higher education. Its advancement brings added responsibilities, the most paramount of which is that, however transformed higher education may become, its seminal mission to advance enlightenment and the common good must be retained.



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