Faculty Intellectual Property Rights in Distance Learning Courses

Rui Kang
Georgia College & State University

Charles Hyatt
Mammoth Consulting

Jie Ke
Jackson State University

This article reviews U.S. copyright laws, focusing on two legal doctrines, the work for hire doctrine and the fair use doctrine, and their implications for distance learning. The article also explores ethical and pedagogical issues arising from distance learning and the involvement of higher education unions. The paper concludes with directions for future policies and research pertaining to faculty intellectual property rights in the context of online delivery.

Keywords: copyright law, distance learning, ethics, pedagogy, faculty, intellectual property

INTRODUCTION

Distance education has been on the rise in the United States and around the world. On many campuses, online and distance learning (DL) options have grown dramatically in the last 20 years, supplementing and even replacing many traditional face-to-face courses. The trend is by no means surprising considering the various advantages of distance learning, such as providing flexible schedules to students, having the potential to reach out to a wider population of students (especially those that are traditionally underserved), and generating lucrative incomes for colleges and universities. Despite controversies over quality, the growth of distance learning programs shows no sign of slowing down. Institutions of higher education that are reluctant to develop and expand distance learning programs have found themselves losing enrollment and income to those that are willing to actively utilize distance learning options (Thornton, 2001). Even high-prestige universities such as Harvard, Stanford, Yale, and Duke have forged online curricula. Unlike the findings from the early days of distance learning, recent surveys show that major potential employers are increasingly accepting graduates of online programs without discrimination (Thornton, 2001).

The argument that it is more difficult to hold distance learning accountable also falls short. On the contrary, it is easier for accreditation agencies to monitor online programs than traditional face-to-face programs because online course materials and the interchanges between the instructor and students typically are archived in easily trackable electronic forms and are stored for a significant period of time. Although the argument that distance learning lacks authentic social interactions, which are considered a

critical pedagogical component of traditional face-to-face education, still holds some validity, today's educational authorities tend to agree that eligibility for financial aid, or the quality of a program for that matter, cannot be solely determined by the fixed seat time in a classroom (Thornton, 2011).

However, the educational opportunities enabled by technological advances and distance learning have also triggered new challenges and developments to copyright laws, as faculty, unions, administrators, legislators, courts, and attorneys have become more vigilant of the changing trends in intellectual property disputes. This article addresses legal issues pertaining to the ownership and use of classroom materials developed by faculty in the context of distance learning courses at colleges and universities. Although intellectual property policy frontiers are usually developed, negotiated, and/or litigated at the post-secondary level, these principles can generally be extended to primary and secondary school faculty as well.

Copyrighted works such as books, articles, videos, photographs, and music belong to the broader category of intellectual properties, which can be defined as "products of the human intellect that are unique, new, and innovative, have some value in the market place and are the creation of a single person or a team" (van Dusen, 2013, p. 1). The scope of intellectual properties typically includes patentable inventions or discoveries, trademarks, trade secrets, and copyrighted items. Obviously, not all these properties will be deemed equally important by higher education institutions. Since patentable inventions and discoveries usually are considered the most valuable to higher education institutions due to their enormous potential economic returns, clearer guidelines and policies are established for these items. On the other hand, the policies and guidelines for obtaining and enforcing copyright protections can be ambiguous and more open to interpretation and debate (Le Moal-Gray, 2015). As distance learning has gained more acceptance and use, legislation and case law to address issues pertaining to the ownership and use of copyrightable and copyrighted items shared in the context of distance learning are likely also to attract more attention. For example, in a recent document about policies on intellectual property, California State University (CSU) has a lengthy treatment of ownership issues regarding classroom materials created in electronic formats, made available on the World Wide Web, or otherwise distributed electronically (The California State University, 2003).

Concerning these issues, this article provides a review of U.S. copyright laws, focusing on two legal doctrines, *the work for hire doctrine* and *the fair use doctrin*e, and their implications for distance learning. This is followed by a discussion of the ethical and pedagogical issues arising from distance learning and the involvement of higher education unions. The paper concludes with directions for future policies and research.

A REVIEW OF U.S. COPYRIGHT LAWS

Copyright has been part of the U.S. legal framework since the establishment of the U. S. Constitution in 1787. Congress is granted 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" (U.S. Const. art. 1, § 8, cl. 8). As a result of this clause, Congress has the power to enact legislation regulating copyrights and patents., The earliest federal Copyright Act was passed in 1909. The scope of copyright under the 1909 Act is often interpreted to include (a) reproducing the original work; (b) creating derivate works based on the original work; (c) selling, renting, leasing, or lending the work as any owner can do to any property s/he owns; and (d) publicly displaying or performing the work if the work is of an artistic nature (see Le Moal-Gray, 2015). The 1909 Act is also regarded as a dual system of property rights: from the moment a work was created until the work was published, the work was protected under the *state common law principles*; once the work was published, the author's common law copyright terminated. In order to continue to preserve one's property right, the author was required to obtain *a federal copyright*. If the statutorily required copyright notice appeared on publicly distributed copies of work, then the work enjoyed the federal copyright protection. Without such a notice, the work entered into the public domain with no protection (Le Moal-Gray, 2015).

The 1909 Act was repealed and superseded by the Copyright Act of 1976 (2012), which went into effect on January 1, 1978. The motivation behind the enactment of the 1976 Act was at least partly due to technological advances such as television, motion pictures, sound recordings, and radio. These advances called for the law to address questions raised by new forms of communication. The 1976 Act signified the abolition of the common law copyright tradition (Le Moal-Gray, 2015). In particular, the 1976 Copyright Act does not attach federal copyright protection from the moment of a work's publication, but from the moment that a work is "fixed in a tangible medium" (Le Moal-Gray, 2015, p. 987). The word "fixed" means the work is "embodied in a medium" that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration" (p. 988). This law has implications for distance learning since a wide variety of media can be potentially used to fix information in a tangible form. Thus, careful considerations should be given to the "manner and moment of fixation" in the context of distance learning (p. 988). In addition, two of the primary copyright doctrines: work (made) for hire and fair use, were explicitly codified in the Copyright Act of 1976 (2012), 17 U.S.C. § 201(b) and § 107 respectively. Although these doctrines may have existed for as long as the copyright law, as statutory terms they were not defined until 1976. These two doctrines will be further explored later in this article. Despite several amendments, the 1976 Act remains the primary legal basis for copyright in the United States.

Just as the drafters of the 1909 Act could not have predicted the impact of new forms of communications on copyright issues back in the early 1900s, the authors of the 1976 Copyright Act could not have predicted the popularity and complexity of today's distance learning. The Digital Millennium Copyright Act (1997) updates the law by securing the technological restrictions on access to copyrighted works. It pays specific attention to the protection of transmission of sound recordings by including meticulous regulations with a detailed fee schedule for many uses of music and other sound recordings. This last treatment is understandable since traditionally copyright-sensitive sound products, once uploaded onto the internet, can be easily reproduced, redistributed, and sent to people all over the world, causing a decline in the commercial prospects of these products.

Another significant landmark in U.S. copyright law is the Technology, Education, and Copyright Harmonization Act (2002), which specifically targets rights to lectures and other instructional materials, and extends the lawful (or fair) use of copyrighted works in distance education. According to a policy document issued by the California State University (2003), the major goal of this act is to "strike a balance between protecting copyrighted works, while permitting educators to use those materials in distance education" (p. 31). The law narrowly applies to the instructional use of copyrighted materials *as an integral part of a course*.

THE WORK FOR HIRE DOCTRINE

Simply put, the work for hire doctrine states "an employer owns the work of its employee if the work was prepared in the course of the employee's job" (Strom, 2002, p.3). Under this doctrine, a faculty member is considered an employee of a university and therefore, the ownership of the work created by the faculty member belongs to the university unless the university explicitly waives such right. Traditionally higher education institutions honor the "teacher exception" to the doctrine under which ownership rests with the creator of the work rather than the institution (Rooksby, 2016).

Williams v. Weisser (1969)

In *Williams v. Weisser* (1969), B. J. Williams, an anthropology professor at the University of California at Los Angeles (UCLA) sued J. Edwin Weisser, who was the owner of a publishing firm and had a business relationship with UCLA since 1948, for unauthorized use of his name in conjunction with the reproduction and sale of misappropriated lectures and materials. Professor Williams demanded (a) a permanent injunction, and (b) damage for infringement of his property rights. Weisser had hired a student to take notes in Williams's class and later published William's lectures and sold them for profit. The trial court ruled that Weisser infringed upon Williams's common law copyright and invaded Williams's

privacy by using his name without permission. The court permanently enjoined Weisser from copying, publishing, and selling notes of lectures delivered by Williams and rewarded Williams a total of $1,500 in statutory and punitive damages. The court rejected Weisser's argument under the employment for hire doctrine. The Court of Appeals specifically noted that university lectures are *sui generis*, or a unique kind of intellectual product that cannot be automatically treated like other intellectual products under the employee for hire doctrine without statutory compulsion and legal precedents.

Professor Williams's lecture notes were created before January 1, 1978 when the 1976 Copyright Act went into effect, and his case was tried based on the premises of common law copyright because Professor Williams himself never published his lecture notes. The following two cases shed additional new light on faculty copyright issues after the enactment of the 1976 Copyright Act. In both cases, the plaintiffs failed to achieve the desired results that Professor Williams was able to. But was the work for hire doctrine upheld by these new rulings?

Weinstein v. University of Illinois (1987)

In *Weinstein v. University of Illinois* (1987*)*, Marvin M. Weinstein was an Assistant Professor of Pharmacy Administration in the College of Pharmacy of the University of Illinois at Chicago. He sued his co-authors faculty members D. J. Belsheim and R. A. Hutchinson, along with his department chair, his dean, the Trustees of the University, and the University itself for mutilating his work, stealing his credit, and denying him due process of law. At the center of the dispute was the order in which the names of an article were listed. Weinstein believed that he should have been the lead author of the article, but he was listed as the third after Belsheim and Hutchinson on a published article about a clinical program that the three were involved in. The district court dismissed his complaint for failure to state a claim. The court's decision was based on the doctrine of work made for hire, 17 U.S.C. §201(b), which rendered the article as the University's property rather than Weinstein's. The United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court, but based its decision on a different premise.

According to the University's policy at the time, a professor retains the copyright unless the work falls into one of the three categories:

(1) The terms of a University agreement with an external party require the University to hold or transfer ownership in the copyrightable work, or
(2) Works expressly commissioned in writing by the University, or
(3) Works created as a specific requirement of employment or as an assigned University duty. Such requirements or duties may be contained in a job description or an employment agreement which designates the content of the employee's University work. If such requirements or duties are not so specified, such works will be those for which the topic or content is determined by the author's employment duties and/or which are prepared at the University's instance and expense, that is, when the University is the motivating factor in the preparation of the work (p. 1094).

The district court held that Weinstein's work belonged to the third category because the University funded the clerkship program upon which the article was based. But in Judge Easterbrook's delivery of the appeals court's majority opinion, he rejected the applicability of the work made for hire doctrine in this case and instead upheld the academic tradition such that the faculty should retain the copyright in his or her own academic writings. The appeals court determined that Weinstein, Belsheim, and Hutchinson co-owned the copyright of the article, which they together transferred to the journal that published their article. Under this assumption, the appeals court argued that Belsheim, as a co-owner of the article's copyright, had the right to revise the work and made a derivative work and publish the derivate work with or without Weinstein as a co-author. In addition, the appeals court found that none of the administrators of the University failed to give Weinstein a chance to voice his opinion. In fact, the Dean of the college even offered some advice to Weinstein to work with his co-authors to settle the controversy. Weinstein's motive to sue his university and colleagues was also attributed to his dismissal by the University due to his lack of production of scholarship. As an untenured professor, Weinstein lacked property interest in his

university position. Therefore, his complaint of lack of due process in his dismissal was also ungrounded. It should be emphasized that Weinstein's failed lawsuit, as Judge Easterbrook pointed out, was largely due to his own lack of legal knowledge and research. The Court of Appeals actually denied that faculty created academic writings fell under the work for hire doctrine.

Hays v. Sony Corporation of America (1988)

In *Hays v. Sony Corp* (1988), the plaintiffs, Stephanie Hays and Gail MacDonald were two instructors of business courses at a public high school in Illinois who were denied copyright to materials developed for and later used by the Sony Corporation of America. They co-wrote a computer manual for the Sony word processors purchased by the school district, which was then given by the district back to Sony, who modified and copied many parts of the original plaintiff's manual before distributing them to students. However, Sony did not charge the school district for their work on the manual, nor did Sony sell the modified manual for profit. The district court dismissed the case, and the Court of Appeals affirmed the decision since Sony had reaped no commercial profit from their work outside of increased goodwill and reputation.

It should be emphasized that in this case neither the lower court nor the appeals court considered the case as frivolous or without merit. The lawsuit was dismissed only because of the frivolous part of the case in which the plaintiffs' legal counsel made the claim for common law copyright, which had been abolished by the 1976 Copyright Act. Hays and MacDonald's manual was completed after the 1976 Act took effect on January 1, 1978, and the authors and their legal counsel failed to obtain federal copyright within the required time limit. If the case had been filed properly for claiming violation of federal statutory copyright, the decision might have been different or at least much more complicated. Therefore, the plaintiffs' failed suit, as Judge Posner pointed out in his delivery of the majority opinion, should have been attributed largely to the plaintiff's legal counsel's lack of expertise in copyright laws and his insufficient pre-complaint inquiry rather than the case's own lack of legal merit. More specifically, the plaintiffs forfeited their federal statutory copyright protection by failing to file for a federal copyright protection in a timely manner. Second, instead of filing suit against the school district who had taken the manual revisions, the plaintiffs sued Sony Corp., who had made a legitimate assumption that the work given to them by the school district was work made for hire. Third, Sony did not reap any additional commercial profit from the manual revisions they did for the school district, but the plaintiffs claimed they had, due to their legal counsel's lack of sufficient pre-complaint inquiry.

Judge Posner, in reflecting on the case, argued that although it might appear to some that the 1976 Act abolished the teacher exception together with common law copyright, such a conclusion was unwarranted and may have created a rift between faculty and academic institutions due to the incompatibility between the work for hire doctrine and the longstanding academic tradition regarding copyright of faculty's written works. Judge Posner pointed out that, for a piece of work to be considered work for hire, the work must have been prepared for the employer while under contract. But Hays and MacDonald were public school teachers whose primary duties were not academic writing. They prepared the manual based on their own initiatives rather than the order of their supervisors and completed their manual under very little supervision of their employer. A similar argument can be made about academic writings produced by university faculty. Although it is true that university faculty members often do use university facilities in preparing their manuscripts (e.g., offices, laboratories, computers, libraries, copiers, etc.), and it is true that publishing is often one of the requirements for tenure and promotion, yet faculty members almost never rely on colleges or universities to determine or supervise such academic endeavors. Therefore, it is difficult for universities to claim property rights in faculty's academic writings without pre-negotiated agreements.

In fact, Judge Posner noted that almost no one had contested the teacher exception in U.S. legal history, which made legal precedents in this area scanty and copyright laws appearing esoteric even to some legal counsel. In fact, the tradition of faculty ownership of intellectual property can be seen as the most significant exemption to the work for hire doctrine. Judge Posner, in his delivery of the majority opinion, actually stated that: "considering…the lack of fit between the policy of the work-for-hire

doctrine and the conditions of academic production, the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act" (p. 416). If this were reversed, recruiting and retention of university faculty would face serious challenges since few scholars would agree to sign over the rights to their intellectual work to their institutions without much larger compensation. Furthermore, due to the fluidity of time frames associated with the creation of intellectual work, it could be difficult or impossible to determine the exact times at which ideas were created. Some professors do their best writing "off the clock" during holidays and weekends.

Implications for Faculty Copyright

Based on Judge Posner's tentative conclusion above, it is safe to say that copyright ownership in the higher education context is not clearly established. This is partly because the financial returns on faculty member's written works were uncertain and typically minimal in the past. Due to the exorbitant costs of publishing, the royalties returned to faculty are usually minimal. Therefore, colleges and universities tend to honor the tradition that copyright ownership rights vested in the individual who created the copyrighted work (Le Moal-Gray, 2015). Such a tradition does not come from an altruistic motive. Perhaps academic publications are the least controversial copyrightable items because of their minimal financial prospects, so universities typically let faculty members retain their copyrights, which they in turn often transfer to the publishers of their works. For example, the University of Washington's intellectual property policy states "all intellectual property resulting from a faculty member's appointment, with the exception of academic publications, is owned by UW" (The University of Washington, 2005). With the rise of distance learning, colleges and universities have begun to more aggressively assert their copyright ownership to works produced by faculty members, including instructional text. A popular lecture, or an archived online course as a whole, can be distributed to thousands of students far beyond the boundaries of traditional campuses, and therefore, potentially generate impressive revenues for the universities just as patents and trademarks might do. Due to the potential commercial value of faculty created instructional materials, some colleges and universities start to use more explicit language in their policy to assert ownership over works produced by faculty under the work for hire doctrine. One example is the UW's intellectual property policy cited earlier, in which the university claimed all the academic products prepared by its faculty with the exception only applied to academic publications.

How can legislators protect institutional interests but also honor academic traditions of faculty? Some legal authorities believe that each individual institution should set up its own copyright ownership policy, based on their specific circumstances such as the relative wealth of the institution or the profitability of the work in question, and no unified model is necessary (Rooksby, 2016). This leads to the possibility that some colleges and universities have faculty members sign collectively bargained contracts. Other universities have simple contracts that do not include specific clauses to address copyright ownership (Le Moal-Gray, 2015). In the latter case, when no explicit language is in the contract, the faculty may give up the ownership of their written work under the work for hire doctrine in an implicit manner. Therefore, faculty members should be cognizant of the ownership and other related issues about their online instructional materials by carefully reviewing the policies, process, practices, and contractual terms of a university before they accept job offers (Le Moal-Gray, 2015).

In sum, faculty members historically have had little need to protect the copyright of their lecture notes, worksheets, and other classroom materials, since such materials before the digital age were rarely accessible to those not paying tuition to take the class and thus deemed economically insignificant outside of those classes. However, with the growth of distance learning, now entire courses themselves, consisting of abundant videos, audios, texts, and images of faculty, are being recorded, distributed to the public, paying or not, and licensed to other institutions. This will definitely generate revenues for the university who issues the license, but may not give the faculty member who created the course any share of profits. Another scenario is: when a faculty member has created and written a course and then is approached by an educational company who is interested in purchasing the faculty's work. However, if the university claims all the copyright of the faculty's work under the work for hire doctrine, then the

faculty member does not have the right to negotiate selling with the company. In fact, both individual faculty members and universities should think carefully before they decide to sell or license faculty created products to another university/institute because they may later suffer loss of tuition revenues if a competitor who acquires the faculty's course product uses it to lure students away from the university where the faculty member is employed.

In the digital age, the fairness of the work for hire doctrine is likely to be challenged. Meanwhile, the traditional laissez-faire approach to faculty's written work may also be considered inadequate for protecting faculty's (and the university's) rights and welfare.

THE FAIR USE DOCTRINE

Codified in the 1976 Copyright Act, §107, the term "fair use" refers to the limited, lawful use of copyrighted materials without the owner's consent. Four major factors are typically used to determine whether a particular case is considered fair use: (a) the purpose and character of use; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) the effect of the use upon the potential market for or value of the copyrighted work (Strom, 2003, p. 3).

In questions over fair use, nonprofit educational purposes are typically favored over for-profit commercial use, although the nature of use alone cannot determine whether the use is fair. Courts have also favored uses that are "transformative," that is, not simply reproductions of the original work. In fact, almost all educational uses are arguably transformative. For example, students often need to quote an original copyrighted work *in their own papers* or make a multimedia product for classroom presentation. Multiple copies for classroom use are also allowed even if they are not necessarily all transformative. Courts may also be willing to favor nonfiction over fiction for fair use; and, commercial, audiovisual works are generally subject to less fair use exploitation than printed work. However, the "amount" of material used can have both quantitative and qualitative components, and both can be difficult to define. Motion pictures are extremely sensitive to substantiality concerns because even short clips of movies may display their most creative and substantial elements (Strom, 2003).

Basic Books, Inc. v. Kinko's (1991)

In a landmark case, *Basic Books, Inc. v. Kinko's*, plaintiffs, all major publishing houses in the New York City brought suit against Kinko's for copyright infringement. Kinko's admitted copying excerpts from books owned by the plaintiffs without permission and without payment of required fees. Kinko's also admitted selling the copied materials as course packets to college students for profit. Kinko's defended its case using the fair use doctrine. However, the court ruled that Kinko's failed to convincingly show that the excerpts it appropriated without permission constituted a fair use and awarded the plaintiffs injunctive relief, as well as statutory damages in the amount of $510,000 plus attorney fees and costs. The court's decision regarding fair use was based on the following reasoning: (1) the purpose was for commercial profit; (2) the quantity of materials used (5% -25% of the original books) was considered excessive; and (3) it was determined that there was a direct effect on the market for the books. Although most of the works were nonfiction and intended for university student use only, and therefore was favored by fair use, three of the four factors played against Kinko's. However, Judge Motley's delivery of the court's opinion indicated that the court found library copying in general to be a fair use under the section of "multiple copies for classroom use" of the 1976 Copyright Act. A copyright note should be attached to each copy in this case. In addition, for classroom use to be considered a fair use, it must also adhere to the brevity and spontaneity principles. Brevity limits a complete article, story, or essay to be less than 2,500 words, and an excerpt to be no more than 1,000 words or 10% of the original work, whichever is less. The spontaneity principle permits use of copyrighted materials under the condition that the time scheduled for delivering instruction is so close that it would be unreasonable to expect a timely reply to a request for permission. In addition, users of copyrighted materials also have to consider the cumulative effect to

make sure to use no more than nine instances of multiple copying for one course during one class term and no more than one piece of work per author.

American Geophysical Union vs. Texaco, Inc. (1994)

Another important case is *American Geophysical Union v. Texaco, Inc.* (1994). The appeals court ruled that the photocopying of individual journal articles by a Texaco scientist, Dr. Donald H. Chickering, II, for his own research needs was not fair use. This may seem to be a surprising ruling, but the key issue was that this scientist worked for a for-profit organization and was not a university-based researcher. Thus, the ultimate nature of such use supported profit-seeking. In addition, Dr. Chickering was not treated as a university professor or independent researcher in this case. Instead, he was a randomly selected scientist chosen from 400-500 researchers hired by Texaco at the time, all seeking to develop new products and technology primarily to improve Texaco's commercial profits in the petroleum industry. Therefore, Dr. Chickering's photocopying of eight articles from the *Journal of Catalysis* appeared to be trivial, but represented the larger issue of systematic copying for commercial profits. The use was also deemed as not "transformative" because the scientist did not build on the existing works to write a paper of his own. The articles were factual, therefore, did favor fair use. However, an article is considered an independent or entire piece of work. Finally, although the court found no evidence that Texaco would have purchased more subscriptions to the journals in question, unpermitted copying did directly compete with the ability of publishers to collect license fees. The court argued that, although publishers had not established a conventional market for the direct sale and distribution of individual articles, the Copyright Clearance Center (CCC) presented a workable market from which users may obtain licenses for the right to reproduce their own copies of individual articles via photocopying.

Implications for Faculty Copyright

So far, no case has been brought against a university in which the university used the fair use doctrine in its own defense. The Kinko's and Texaco cases were both against corporations. But would a university pass the fair use test if it uses, sells, and/or licenses faculty created instructional materials, especially online instructional materials, without permission?

Of course, the fair use doctrine only applies to copyrighted items. University faculty hardly ever obtain copyright for their originally developed course materials outside of complete textbooks, regardless of whether some of these materials may have potential commercial value. Even if university faculty are conscious of copyright issues, they may not be able to obtain copyright protection for course materials under the work for hire doctrine if their universities assert aggressive copyright policies such as the one cited earlier from the University of Washington. However, nothing prevents the application of a fair use analysis to faculty-designed course materials. It is also possible that with the rise of online distance learning, the fair use doctrine will expand to include a wider range of intellectual properties that include instructional materials, both copyrighted and not copyrighted.

In terms of purpose or character of use, if a university sells or licenses instructional materials designed by faculty members without permission, such use cannot be considered as a fair use because the university in this case is gaining commercial profits. On the other hand, repeated use of instructional materials designed by a faculty member such as recorded lectures or an archived online course may be considered fair use because such use is strictly for educational purposes. In addition, such use is likely to be transformative since almost all educational uses are transformative. However, such repeated use is not entirely without concerns. In the case *Williams v. Weisser* (1969) discussed earlier, Professor Williams did not sue Professor Weisser only for infringement of his copyright, but also for "unauthorized use of name," or a type of invasion of privacy. Williams argued that the course material that Weisser sold to students contained "omissions and distortions" of his original lectures and therefore "reflected poorly on Williams's scholarship and reputation and caused him mental distress, anxiety, and wounded feelings" (Holmes & Levin, 2000, p. 173). Professor Williams was awarded not only statutory damages but also punitive damages. There is no guarantee that university's repeated use of a faculty member's course material would not incur omissions and distortions since the authenticity of the original material was not

only reflected in the archived version of the material but also in its execution. It should be emphasized that Professor Williams did not obtain copyright for his lecture notes. His property rights over the lecture notes were protected under common law copyright when the case was tried in 1969, before the enactment of the 1976 Copyright Act. It should also be emphasized that even if a university's repeated use of faculty-designed course material is solely for educational and non-commercial purposes, considerations should still be given to other criteria such as brevity, spontaneity, and cumulative effect.

In terms of the nature of the copyrighted work, most instructional materials are factual or non-fictional, and therefore, favored for fair use. However, some instructional materials can be highly innovative, such as performances, collages of images, computer codes (e.g., *Hays v. Sony Corp* (1988) discussed earlier), and other complex products that involve audiovisual media. For traditional face-to-face classrooms, these sensitive categories of works, under fair use, are allowed because of limited audience (Le Moal-Gray, 2015). But the meaning of fair use has to be far more strict when such creative materials are uploaded to websites (e.g., a recorded performance), which can potentially be transmitted anywhere in the world, easily downloaded, modified, and further redistributed.

In terms of the amount and substantiality of the portion used in relation to the copyrighted work as a whole, similar standards with reasonable modifications may be applied to instructional material as well. Finally, in terms of the effect of the use upon the potential market for or value of the copyrighted work, this effect may not be reliably estimated unless the instructional material in question or instructional material in general has already established a conventional commercial market.

COPYRIGHT CONTROVERSIES SURROUNDING DISTANCE LEARNING AND THE INVOLVEMENT OF HIGHER EDUCATION FACULTY UNIONS

With advances in technology, universities now can use course materials repeatedly for multiple semesters without additional compensation to the faculty who originally created the materials. Several problems arise from this situation. First, faculty members do not reap direct financial reward when universities release or rebroadcast their written or recorded work, although they may indirectly enjoy increased prestige or reputation. Second, full-time faculty members' own job security may be threatened when course materials are given to part-time faculty members, who may be paid less. In some cases, online universities do not even need to hire any permanent faculty members or develop any course materials internally. For example, Western Governors University (WGU) founded in 1996 by a group including governors of 17 states, solely relies on course content developed by outside experts (La Moal-Gray, 2015). Third, without further negotiations and involvement of the faculty member who created the course materials, the repeated use of the same materials that are not updated can become outdated or even misused and thus erode instructional quality and hurt the faculty member's reputation. These issues need to cause grave concerns among the faculty community.

Temporary hires usually do not have the same level of devotion, loyalty, or commitment to the institution. Will this tendency potentially reduce the quality of online education? Will this hurt the morale of permanent faculty members, as they do not have the incentive to produce high-quality instructional materials that may be lent to part-time instructors and therefore, cause concerns to their own job security? If a faculty member feels that his or her job is threatened, s/he may not be as altruistic as s/he usually is. Collaboration, which is considered important in higher education settings, may be significantly reduced, at least in teaching, as faculty members feel the need to be more protective and territorial toward their self-developed materials. The potential downward spiral of educational quality may not seem to be immediately obvious, but may become a backlash against distance learning.

All of these concerns pertaining to distance learning are intimately connected with intellectual property rights, and faculty today must be clear on their employers' policies while also proactively protecting ownership of original materials and ideas brought into that institution's setting. Since copyright owners are given the exclusive rights to create derivative works (e.g., revisions, new editions), sell, rent, release, and license copyrighted work, if the work for hire doctrine is strictly adhered to, not only could relationships between faculty and administration suffer further decline, but the number of lawsuits

pertaining to instruction and delivery may increase several-fold. At this time, many consider the faculty's best chance is to rely on higher education unions to exercise collective bargaining practices on their behalf (Strom, 2002).

Historically, The American Federation of Teachers (AFT), The National Education Association (NEA), and The American Association of University Professors (AAUP) have all gone on record to voice their concerns and positions regarding the use of distance learning delivery. For example, AFT's concerns focused on the reduction of the role of faculty and interactions between faculty members and students. Their position was particularly strong on undergraduate education. The lost opportunities to form intimate bonds and friendships in a shared human space and lack of opportunities to develop much needed 21st century communicative and teamwork skills are likely reasons that continue to prevent distance learning from ever taking a large share of undergraduate education. Another notable position of AFT is their advocacy for protecting the jobs of professors who choose not to teach online. In addition, AFT opposes courses taught on the internet, through videoconferencing, and with other technologies unless the quality is set by the faculty and taught by faculty who are appointed and evaluated against sound professional standards (see Le Moal-Grey, 2015). The positions of NEA and AAUP are similar to that of AFT, both emphasizing that faculty must maintain control of their own work and decide whether and how to disseminate their work (see Le Moal-Gray, 2015). AAUP's position is also linked to its longstanding principle (since 1940) of academic freedom (see AAUP, Statement on Online and Distance Education, 1999).

"By and large higher education unions are in the best position to protect the intellectual property rights of faculty through collective bargaining contracts or through extra-contractual negotiations over institutional policies," declared David Strom, an in-house counsel of AFT (Strom, 2002, p. 4). The union may clarify ownership right by entering into a legally enforceable agreement with university administration. Section 201(b) of the 1976 Copyright Act explicitly acknowledges the validity of such agreements, which are sufficient to overrule the work for hire doctrine. Higher education faculty unions often caution faculty members against entering into individual contracts with their university employer because such contracts may circumvent unions, and because faculty and staff who are not savvy in the area of intellectual property may be exploited.

Related to one of the concerns mentioned earlier, collective bargaining may demand an online course not be offered year after year without updating or quality control, and may not be used to substitute the corresponding same-time, same-place instruction at the institution. A license agreement can be an alternative solution, under the principle that the faculty member who created the course materials owns the materials. In this case, the faculty member has the right to determine the duration of which the materials may be used, the compensation terms, and the right to terminate the use after the agreed term of use (Strom, 2002). Residuals, a form of licensing used in the performing arts industry, may be borrowed for distance education. Residual payment is one way to protect the professor whose classroom lectures are taped and then rebroadcast after the professor stopped teaching the course. (Strom, 2002). But residuals may not be accepted by all faculty members without reservation, especially in the case of those faculty members who are already disenchanted with the trend of commercialization of education. Furthermore, a distance learning class theoretically does not have an enrolment cap because it is not limited by the size of a classroom, but a bargaining agreement can include a maximum class size to prevent involuntary overload without compensation (Strom, 2002). However, not all university faculty can rely on collective bargaining through the unions, as in many states, university faculty are not unionized. Under these circumstances, faculty's rights over their course materials must be protected by laws, legislatures, and sound policies.

FUTURE HIGHER EDUCATION COPYRIGHT POLICIES: PATENT REGULATION AS A MODEL?

Many universities now have a technology transfer department in charge of licensing of potentially patentable and commercially valuable research discoveries. This approach is considered more efficient, as

individual faculty members typically are not trained in manufacturing and marketing (van Dusen, 2013). But the establishment of formal policies to regulate patents and commercialization is a quite new phenomenon. Even in a survey conducted in 2002, the majority of the universities at that time had no intellectual property right policies. But just in about a decade, the situation had dramatically changed. Now policies regarding ownership of intellectual property rights are readily available on the websites of many, if not most, U.S. colleges and universities (van Dusen, 2013). Patent applications, material transfer agreements, confidentiality agreements, and distribution of royalties used to be foreign topics to universities. Now universities manage a full spectrum of such matters.

When clashes between traditional academic missions and commercialization arise, policies are in place to resolve these issues. Although the focus of higher education institutes in the past has been on patentable research discoveries, now university intellectual property policies cast a wide net in bringing a variety of works and inventions under the umbrella of the policy (van Dusen, 2013). If universities decide to model their copyright ownership policies of distance learning after the most common patent policies, the result will likely be a joint copyright ownership between the faculty and the university. Most universities today adopt the split-royalty provision, sharing the financial reward reaped from intellectual property among faculty member(s), the faculty member(s)' academic department, and the university (van Dusen, 2013).

CONCLUSIONS

As Professor Virgil van Dusen has pointed out "Once creativity and money start to mix, there can be tension between those who believed that they are entitled to a vested right of ownership" (p. 5). Therefore, we cannot rely on presumed rights or individual assumptions. In terms of policies regarding copyright concerns related to faculty-created instructional materials in the context of higher education distance learning, the following predictions and recommendations are offered. First, intellectual property policies pertaining to distance learning will vary from university to university depending on the mission, past practices, and future goals of the university (Le Moal-Grey, 2015). If universities choose to assert their copyright ownership, they may follow an approach similar to that used by many research universities in patent development for research faculty, for example, joint ownership or split royalty (Le Moal-Grey, 2015). Another possibility is to have clearly defined collective bargaining terms in faculty employment contracts, especially in clarifying the work for hire doctrine. When universities revise their copyright policies, they need to strike a balance among traditional academic culture, economic profit concerns, the university's mission, statutory requirements, and ethical standards (Le Moal-Gray, 2015). There is no doubt that such policies will have a wider range of influence, and strategically important to not only research universities but also regional teaching universities.

Faculty members, staff, administrators, higher education lawyers, and policy makers alike may feel that more research is needed before they are ready to commit to a unified policy. However, empirical studies on copyright in higher education settings are rare compared to those in other intellectual property domains such as patents, trademarks, and internet domain names. One obviously understudied area is the decision-making process by faculty, librarians, and administrators. This situation makes research- and data-driven policy impossible for copyright concerns related to faculty created instructional materials for online delivery. Professor Jacob H. Rooksby urges the legal personnel working at or with higher education institutes to conduct empirical research by making the statement: "Unfortunately despite a few early empirical studies, knowledge about the array of institutional policies regarding copyright is still embryonic, making careful and systematic investigation into the matter long overdue" (Rooksby, 2016, p. 216).

Most faculty members are still combatting the various challenges pertaining to the transfer from traditional classroom settings to online delivery. More empirical research involving copyright ownership and use issues in higher education settings, especially those pertaining to distance learning, should start with faculty members, relevant staff members, and their administrators. For example, faculty members, staff, and administrators may be asked questions such as: Who should own classroom materials? What

happens when a faculty member moves to another university? How should financial revenue be divided? How important do faculty members perceive their ownership of classroom materials? Which model of ownership should be adopted - work for hire, academic tradition, or patent regulation? And concerning faculty, how strongly do faculty members feel about their instructional materials to be re-used without permission? Are they concerned over traditional face-to-face programs being replaced by online programs? How do they feel about their job security? How do they feel about involvement of higher education faculty unions? How confident do they feel about their knowledge level about copyright ownership? And, do they believe that some sort of university policy is needed? Should this policy also include mandated training? Researchers may look for patterns in the responses by examining the similarities and differences in the opinions of faculty members versus administrators, faculty members at teaching universities versus those at research universities, etc.

Distance learning keeps expanding in relevance and scope, and with continued growth the controversies surrounding commercialization of faculty and university held intellectual properties will also undoubtedly receive increased attention. The enactment of more sound and comprehensive copyright policies are needed to protect the ownership of distance education materials for both institutions of higher learning and their faculties.

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