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Copyright for Academics in the Digital Age

by

Colin Ramsey and Martha McCaughey

ABSTRACT: The article presents the authors' insights on the copyright issue in the digital age, which concerns the academic field. The authors say that instead of promoting knowledge, the act of putting materials for teaching on the web can undermine such goal. The authors suggest that when considering the blanket policies for posting such materials online, it is important to also recognize the cost to faculty administrators and members if ever external partisan groups decide to make charges. The authors add that the issue concerning course content's recording and distribution includes academic dishonesty cases.

Putting teaching materials on the web doesn't necessarily promote public knowledge. Sometimes, it undermines it--along with academic freedom

When faculty members consider copyright in the digital age, it is often in relation to things we can't (or shouldn't) do. For example, we can't have too much material placed in online reserve, we can't scan journal articles to create digital versions of what used to be called "course packs,"

and we can't post an excerpt from a work of scholarship on our blogs without appropriate permissions.

Yet copyright also empowers faculty authors, and that flip side of copyright, especially as it relates to challenges posed by the posting of our teaching materials on the public web, is our subject here. The web offers great advantages for the dissemination of scholarly information, but that same technology, in its uniqueness, can also endanger our ability to ensure that our teaching materials and the products of our research are not exploited for ends we might not have imagined.

A number of examples will illustrate how the web can complicate intellectual work. First, consider this case: a department staff member recently asked one of us for an electronic copy of an old syllabus without explanation. Having deposited paper copies of syllabi in the department office for years, we were surprised by the request. It turned out that copies of all syllabi were now going beyond the file cabinet; they were being scanned and posted to the department's public website to allow former students easy access to them. (however, the department chair, anticipating potential problems with posting faculty syllabi online, ended the practice and no syllabi were posted.)

One might wonder, "What's the big deal about posting a syllabus to a website?" Placing paper copies in a file cabinet is very different from putting a syllabus on a public website: the latter engages an enormously complex set of sometimes conflicting rights and claims over faculty ownership of intellectual property, the need for various interested parties to access materials created by faculty, and public demands for general access to materials produced at a public university.

A PROBLEM OF MILLISECONDS

Some faculty members assume that recent upheavals in copyright law result from a "new" ease in copying texts posted on the web. But for most of the history of writing, copying a work has not been especially difficult, and thus questions about who should be allowed to copy texts and who should own such copies predate the Internet. Consider the Irish legend of saint Columba, often said to mark the beginning of the concept of copyright: Columba surreptitiously made a copy of the psalter belonging to his friend and abbot, saint Finnian. When Finnian learned about Columba's copy, he claimed the copy also belonged to him, and a conflict between the two erupted that threatened the peace of the Irish church. Attempting to settle the dispute, King Diarmaid sided with Finnian and made his now legendary pronouncement, "To every cow its calf, and to every book its son-book." This story dates to the sixth century, roughly fifteen hundred years before the creation of the Internet.

But the legend also shows that before the digital age, in order to copy a text, one had to possess it and, thus, be aware that the text existed in the first place. The web's "searchability"--the enormous power of search engines like Google's to instantly search billions of websites--allows one to discover texts with a rapidity never before imagined. Saint Columba knew about

the psalter he copied because saint Finian told him about it and lent it to him. In the digital age, such physical proximity is unnecessary, even superfluous: anyone with Internet access can find any text on the public web in milliseconds.

This difference can lead to a number of problems when faculty work is casually posted to public websites. Materials posted on the web can become low-hanging fruit for sensationalistic critiques by individuals who do not have the disciplinary expertise to make good judgments about their appropriateness. For example, a month after the 2007 mass murders at Virginia Tech, ultraconservative activist Phyllis Schlafly wrote on her eagle Forum blog that a feminist professor in Cho Seung-Hui's major department might have been to blame. Schlafly had found Bernice Hausman's course syllabus on the web and thought one assignment, designed to challenge gender norms, was "just the thing to confuse an already mixed-up kid." Hausman never even taught Cho, but someone blaming her course for a tragedy of such magnitude prompted us to rethink our own choices to post our syllabi on the web.

When we consider blanket policies that require posting teaching materials on the web, we should also consider the cost to faculty members and administrators who may end up having to defend certain courses and even whole programs from trumped-up charges made by external partisan groups. Posting syllabi on the public web is likely only to increase such critiques from nonacademic ideologues.

Nevertheless, demands for accountability and transparency may eventually require that faculty members, particularly at public universities, post their intellectual works online for public consumption. This has already occurred in Texas, with legislation enacted in 2009 requiring the state's universities to post all course syllabi online and no more than "three clicks away" from the universities' main home pages. As Debra Ellen Clark pointed out in her 2010 **Academe** article, "Three Clicks and Academic Freedom Is out," the Texas law enables potential censorship that is antithetical to academic freedom. The Texas AAUP conference has been pushing for the law's repeal.

The opposition to the Texas law may seem surprising to some, since faculty members are accustomed to providing copies of their works. We regularly send our scholarship and course materials to colleagues on promotion and tenure committees, and we send our CVs to college deans, external agencies to which we are applying for grants, and prospective employers. But whether the copies are on paper or digital, they cannot be discovered by Google's search engine unless someone posts them to the public web, and we quite reasonably don't expect them to show up on the web without our approval.

Of course, posting work to the web can be an advantage when we want to get feedback on scholarship or to extend the influence of our teaching, but we must also be careful to retain the copyrights to our work, and we should be aware of what those rights allow us to control. When an institution posts syllabi without the express permission of faculty authors, it might well be infringing on the authors' copyrights no less than if it posted copies of songs by the rock band Metallica to a peer-to-peer music-trading website. Similar material damages potentially occur in both cases: the songs and the syllabi can now be found (and then copied) by an unlimited number of people who have not been authorized to make copies. The violation is even more

obvious when such posting has been done without the knowledge of the faculty authors, who can't give permission for an act they don't know about, or when done against their express wishes. An assertion of copyright may at least help slow down this kind of "publication without approval" in which institutions are increasingly engaged.

Other conflicts over faculty copyright in the digital age abound. Consider the effect of the web on the circulation of classroom content. When we went to college in the 1980s, students who wanted to record a lecture had to put a tape recorder next to the podium; asking permission to record lectures was expected. Today, cell phones and laptops are omnipresent, and students can record or videotape without faculty knowledge. While many faculty members are comfortable allowing students to record lectures, they might feel differently should those lectures suddenly turn up on YouTube, Facebook, or other social media sites. Recently a portion of a professor's lecture, a discussion of the F-word treated with an amusing combination of explicitness and gentility, "went viral" as a comical "F cluster bomb" (to use the vernacular of our students). The recording was uploaded first to YouTube and then was posted and reposted across Facebook.

And yet if a professor's original lectures exist in a tangible medium (written, electronic, audiovisual) they are generally protected by copyright and, often, university intellectual property policies as well. When a professor did not give permission for a student to record or distribute her teaching material, such a student's action might well be a copyright infringement. Imagine that the F-word professor was a linguist writing a book on the history of the word's use; the online distribution of his lecture on the subject could even hurt his ability to publish his work. Asserting copyright to lecture materials in advance of class (on the syllabus), then, would help prevent a professor's work from premature digital publication through social media and simplify taking action against infringers.

The problem of recording and distributing course content includes darker examples of academic dishonesty. For example, faculty members at the University of Arizona recently requested a clarification about their ownership of lectures when students were discovered selling notes they had taken in class to other students who hadn't attended and to third parties for resale to other students. The technologies available today easily enable an enterprising undergraduate to record an entire semester's worth of lectures and sell them to other students or to third-party websites such as Notehall.com. Both the technological developments and the fact that students can't be counted on either to understand or to respect faculty copyright make it all the more important for faculty members to understand and assert their rights.

The conflict between copyright and casual online posting of faculty work is not limited to course materials. Imagine a situation such as this: A creative writing professor reads from an original poem, and an audience member records the reading. That person then posts the recording to YouTube. The professor owns the copyright to the poem, but the rights to the video have been transferred to YouTube by virtue of YouTube's terms of service. This act of posting could also be infringement: even if the professor gave permission to someone to record the reading, that permission would not automatically include a right to "publish" the recording by posting it on YouTube. Just as faculty members cannot post to the public web student papers or other forms

of students' intellectual property, such as photographs and videos, without their permission (doing so is a violation of their copyright), students, the public at large, or universities cannot post the intellectual property of faculty members.

Again, sharing one's work on the web can also be desirable. Tech-savvy faculty members often create websites or blogs to advertise their latest books, for example; others use web-based social networking like Twitter to microblog in "real time" about academic conferences or use Facebook to stay in touch with alumni. Some even use social media because the technology enables them to form, as one professor we know put it, "a virtual department of self-selected colleagues I actually like."

WHAT IS MINE IS NOT AUTOMATICALLY YOURS

We emphasize here, however, that none of the above uses of the web entail automatic transfers of faculty copyright for their academic work. In fact, some common uses of the web are predicated on faculty ownership of those rights. For example, we often send teaching materials to syllabi exchanges hosted online by scholarly societies. To do this legally, we must possess the copyright to such materials to begin with; that is, faculty members must be owners of the copyright to the syllabi they create in order to have the right to disseminate them through syllabi exchanges.

The same is true for the publication of research. In order for faculty members to enter into contracts with publishers of academic journals and books, in either print or digital form, they must be the original owners of the copyright for that work.

While faculty members tend to understand intuitively their ownership of the copyright to their research and scholarly products, they are often less clear about syllabi and teaching materials. Moreover, institutional policies, legally defensible or otherwise, differ significantly from place to place. The AAUP's 1999 Statement on Copyright bears emphasizing in this regard. The statement supports faculty ownership of "traditional academic works," as both a historical practice and as a practice compatible with the general mission of higher education as a public good. It notes that "it has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes. Examples include class notes and syllabi; books and articles; works of fiction and nonfiction; poems and dramatic works; musical and choreographic works; pictorial, graphic, and sculptural works; and educational software, commonly known as 'courseware.'" The courseware includes work that is published on the web and in other digital forms: "this practice has been followed for the most part, regardless of the physical medium in which these 'traditional academic works' appear; that is, whether on paper or in audiovisual or electronic form."

However, despite historical practices, the Statement on Copyright also makes clear that faculty ownership has sometimes been challenged: "some colleges and universities have promulgated policies, typically unenforced, that proclaim traditional academic works to be the property of the institution." As the AAUP's statement notes, federal law makes such broad claims suspect: "The Copyright Act, however, explicitly requires that a transfer of copyright, or of any exclusive right

(such as the exclusive right to publish), must be evidenced in writing signed by the author-transferee. If the faculty member is indeed the initial owner of copyright, then a unilateral institutional declaration cannot effect a transfer, nor is it likely that a valid transfer can be effected by the issuance of appointment letters to new faculty members requiring as a condition of employment that [faculty] abide by a faculty handbook which purports to vest in the institution ownership of all works created by the faculty member."

We note especially that the copyright for course materials and syllabi is among the first intellectual products that the Statement on Copyright refers to as typically belonging to their faculty creators. Yet this tradition of faculty ownership is increasingly problematic in the digital age. For example, when course materials are developed in the context of distance education, they are often explicitly considered "works for hire," and faculty members who develop such courses are offered contracts that spell out the terms of the transfer of copyright to their institutions. Nevertheless, course materials not covered under such specific "work-for-hire" agreements should and often do remain the property of the faculty member.

Since faculty work is produced in the context of educational institutions, the broad protections of "fair use" might seem to prevent any claim of infringement when our colleges or universities copy our work. However, consider our first example of publishing syllabi on public websites: even if institutions claim that web posting of faculty-owned syllabi falls under the "fair use" protections of the copyright act--that it is for "educational purposes" only--it remains unclear whether such posting would be protected. "Fair use" requires consideration of three additional factors beyond the nature of the use of the copy: the amount of material copied, the nature of the copyrighted work itself, and the effect of the use on the potential market for the copyrighted work. These three factors are not so easily dismissed in such cases, and thus faculty members who object to the public posting of their academic materials on websites or to their potential sale on course-note websites might still reasonably argue an infringement. (see former AAUP legal counsel Ann Springer's essay "Copyrights and Wrongs," available at <http://0-www.aaup.org.wncln.wncln.org/AAUP/issues/DE/copy.htm>, for an extensive legal discussion of fair use.)

We believe it is in the best interest of both faculty members and their institutions not to post either teaching or research materials to publicly accessible websites unless the faculty copyright holders provide explicit permission. The web is a unique medium, and any institutional claim to a "shop right" to use faculty-created materials for internal purposes should at least exclude requirements to post them to the public web, just as materials more commonly understood to be protected, such as research data or publications, should not be posted without permission. If access through the web seems to be an academic imperative, we suggest limiting access to specific groups, such as students currently enrolled in a course. Doing so meets the avowed educational goals of faculty and their institutions without unnecessarily exposing either party to conflict over intellectual property.

Yet another reason faculty members should be concerned about controlling their copyrighted material in the digital age is that a loss of that control could threaten their personal privacy. Consider the problems that would emerge if old syllabi, written before posting to the web was

commonplace, were to be suddenly posted en masse. A professor who in 1993 felt comfortable supplying a home phone number on a syllabus for a seminar of twelve students would reasonably expect that information not to circulate much beyond that group. But if the old syllabus has been removed from its file cabinet and posted on the web, online data-mining companies could log and repost the phone number, exposing the faculty member to violations of privacy and scams. Such corporate "web-bot" collection of personal information from academic institutions' websites occurs without the permission of the institutions and thus increases the tensions between web-based information sharing and the need to protect individual privacy.

THE PRESSURE TO POST

Despite all the concerns cited above, the pressure to post digital copies of faculty material seems to increase almost daily. Many of the major accrediting bodies want information to be easily accessible through the web; our own group, the southern Association of Colleges and schools, has requested that all faculty CVs be placed online and made available for accreditation purposes. For many faculty members, these pressures suggest that external forces are pushing us toward loss of control over the dissemination of our intellectual work. But it is important to remember that electronic availability does not require that materials be posted on public websites. Documents can easily be placed under password protection or on a server that only accreditation agents can access. Suggesting to administrators that institutions implement such simple policies can help faculty members retain appropriate control of their work while still meeting the needs of their institutions.

We understand that such conversations with administrators can be difficult, at least initially. When faculty members assert their intellectual property rights, particularly over commonplace materials such as syllabi or CVs, administrators often reply that, since these materials are sometimes subject to Freedom of Information Act requests or state public-records acts, they are a priori "public information." Things are never so simple, however. These record requests are potentially ripe for litigation, given the overlapping patchwork of privacy laws concerning personnel and educational records. Making faculty materials available, however, does not constitute an inevitable and compulsory transfer of the copyright of the faculty authors to the recipients of their materials.

Another difficulty faculty members can encounter when asserting their copyright over teaching and research materials originates with campus IT professionals. As a group, such professionals are often trained in the intellectual property regimes that are common to software and other computer-technology companies. In those corporate environments, the work of software writers, engineers, designers, and so on are normally "works for hire," with the corporate employers as the initial authors and owners. Works by employees are undertaken under the direct control and specific guidance of the employer, to whom the employee, in the language of the AAUP's Statement on Copyright, "is accountable for the content and design of the work."

When faculty members create traditional academic works, by contrast, they are generally self-directed and working on their own initiative; as the Statement puts it, faculty "determine the

subject matter, the intellectual approach and direction, and the conclusions" of the work. Were academic institutions to own such works by faculty, they would have the power to determine where, how, and even if such works would be disseminated, either in the classroom or as publications, and they could also change those works in any way and at any time. For colleges and universities to exercise such control over the intellectual work of the faculty is anathema to academic freedom and the search for truth. Moreover, academic institutions may well prefer not to be responsible for all the academic works of their faculties. As Ann Springer wrote in "Copyrights and Wrongs," "If all work belonged to the administration, then its content would also have to be controlled or at least accepted by the administration.... For instance, does the University of Colorado want the copyright ownership, and responsibility, for Ward Churchill's 'little Eichmanns' essay? It appears not. As the Chancellor himself stated, 'Professor Churchill's views are his own and do not represent the views of University of Colorado faculty, staff, students, the administration or the regents.'" That case can help explain differences between working as a faculty member in a college or university and working as a software engineer at a technology company to initially skeptical IT professionals, as well as to university administrators.

KEEPING COPYRIGHT AND ENSURING ACCESS

Despite our support for faculty exercise of copyright, we share the broad concerns over the increasing difficulties involving access to and use of scholarly information. Legal barriers to the free exchange of knowledge are driven in part by the profit motives of commercial publishers and are enabled by current US copyright law. Restrictions imposed by nonoriginal copyright holders, especially for-profit publishers of academic journals, pose serious dangers to faculty research and to the general public good that is the basis for the law as set out in the US Constitution--that is, "to promote the progress of science and the useful arts."

However, faculty exercise of their copyright need not come at the expense of discovery and creation of new knowledge, much less the transmission of such knowledge in the classroom. One of the advantages of copyright is that it allows for limited transfers of rights, and, as the original owners of a copyright, faculty members have the power to insist that the transfer of those rights be accompanied by protections for the free exchange of knowledge that is so critical to the profession. One useful movement to this end is the Creative Commons, an initiative based in existing legal regimes of intellectual property that harnesses the power of the Internet. Creative Commons allows authors and other creators to choose one of six different "licenses" that enable them, as the Creative Commons website puts it, "to keep your copyright but allow people to copy and distribute your work provided they give you credit--and only on the conditions you specify"; the limits apply even when one publishes on the web.

Another useful resource for faculty members seeking to understand their intellectual property rights and how to use them to protect the exchange of ideas and academic freedom is the scholarly Publishing and Academic resources Coalition, or SPARC. The organization's website includes a downloadable "Author rights" brochure that, as the group says, "identifies the rights

faculty have as copyright holders and encourages [them] to retain the rights needed to ensure the broadest practical access to your articles." Colleges and universities are getting involved, crafting open-access policies that encourage faculty members to insist on various sorts of rights retentions and non-exclusivity clauses when they negotiate with scholarly publishers, so that the products of their scholarship can be freely accessible. Harvard University provides one good example of such a policy. Harvard asks its faculty members to deposit copies of their publications in its digital repository, Digital Access to scholarship at Harvard (DASH), and provides them with boilerplate addenda to add to their copyright contracts with publishers. These contract addenda ensure that any transfer of copyright to publishers does not prevent Harvard faculty members from sharing their work through DASH. Again, all of these efforts to reform the "ecosystem" of scholarly publishing are based on the fundamental concept of faculty members as initial owners of the copyright to their intellectual works.

For this reason, we believe that AAUP chapters can and should play a crucial role in support of faculty ownership of copyright by directly engaging chief information officers, IT professionals, and academic administrators on their campuses. Individual faculty members might also consider adding copyright statements on their syllabi and other materials, especially on their websites, if it is consistent with the intellectual property policies of their respective institutions (and if it is not, they should work to change that policy, first by referring administrators to the AAUP's Statement on Copyright). While copyright marks and formal registration are not required for a work to be copyrighted, they can help to remind recipients that making additional copies is not automatically permitted, and they can support an infringement claim, should it come to that. Faculty members can state on their syllabi that they do not permit students to record, photograph, videotape, or otherwise copy and reproduce their lectures; they can also register their syllabi with Creative Commons to allow transfers of limited rights for all to make copies, but only for specific purposes and in limited circumstances (not including posting to YouTube, for example). In the case of distance education courses created explicitly as "works for hire," we suggest that faculty members review their contracts carefully and insist, at a minimum, that they retain the right to use the material they create in their own future teaching and research.

Ultimately, it is only when faculty members fully recognize the rights and powers they possess as the original owners of the copyrights to their academic works that they will be able to use the web and other digital communication technologies in a way that avoids the unintended consequences: an erosion of their academic freedom and an unnecessary limitation on the flow and advancement of academic and scholarly knowledge.