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LEGAL ISSUES & LLT



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WHERE TECHNOLOGY MEETS THE LAW: OWNERSHIP AND ACCESS

At first glance ownership of curricular materials, or any creative work for that matter, seems quite easy to understand with regard to United States copyright law. However in today's educational environment of group collaboration, online education and technology-mediated instruction, the concepts of ownership and access quickly become intertwined among the law, institutional policy and technological limitations. Unpacking the various issues at play, and more importantly understanding these issues before creating your work, is vital to the sustainability of instructional resources. Consider the following scenarios:

Scenario 1: Professor K creates and validates a language placement exam, which is then used for several years by the department to place students into the proper language class. Professor K then accepts an appointment at another university, but is denied permission to use this exam at the new institution by the Chair of the department where the instrument was developed.

Scenario 2: Professor H spends hundreds of hours developing an online “textbook” delivered via a proprietary database created by the university. After several years of successfully using this textbook in his classes, Professor H is offered a position as a program director at a rival institution, in part based on his work with materials development. When Professor H attempts to use his “text” for his new classes he finds that he is locked out of the system, which still resides at the previous institution.

Scenario 3: Professor Q develops comprehensive curriculum that is delivered via the LMS, including audio and video files that are streamed to students. Professor Q then agrees to teach the same course on a study abroad program. Just before classes begin, Professor Q realizes (too late) that the streaming media does not work, and furthermore, that the library will not upload current versions of the media since it is being accessed in another country.

In each of these scenarios, there are interconnected issues at play, let’s look at the various issues independently, to review basic concepts. Please keep in mind that these concepts have been simplified for the purpose of this article, there are more details and exceptions that can come into play given different circumstances.

According to U.S. copyright law, a work is protected by copyright the moment it is created and put into a tangible form. The author of the work is considered the copyright holder, holding the following rights for their work: the right to reproduce the work, the right to prepare derivative works, the right to distribute copies of the work, the right to perform and display the work.¹ A mistake that many authors make, though, is assuming that these rights continue in perpetuity regardless of publishers,

¹ Copyright Law of the United States. (n.d.). Retrieved May 17, 2017, from <https://www.copyright.gov/title17/>

collaborators, or the author's employer, each of whom can impact how the work is able to be used, and what rights are maintained by the original author. In the case where an author signs with a publisher, the contract that the author signs determines the rights that they will maintain (or lose). It is not uncommon for authors to sign away their basic rights without understanding the implications to their own teaching or general use. It is also not well known that you can approach a publisher with alternative text to include in the contract where those rights will be retained.² In the case of collaborative authorship, all contributing authors may hold full and equal rights to the work, and be able to negotiate additional non-exclusive licenses and uses independently of each other.³ Finally, there is an important yet lesser known concept of “work for hire.” In the case of a “work made for hire,” the author under copyright law is the person who employed or commissioned the creator of the work, rather than the creator of the work herself. In the case of a faculty member in the employ of a college or university, creating materials for an institutional course, the copyright of those materials may very well belong to the institution.

This brings us to the second set of considerations that come into play; the institutional policies of intellectual property for faculty, staff and students. Bear in mind that these policies may be quite different depending on your position within the institution. Most if not all universities and colleges should have official statements of copyright ownership available. In the case of the University of Michigan, all works created by employees (including faculty) of the university revert copyright ownership to the Regents of the University of Michigan. The policy then states that in the case of scholarly works created by faculty, the UM grants copyright ownership back to the author, retaining certain rights for the institution.⁴ Work created by university staff in the performance of their professional responsibilities, remains with the institution. Work created by students in their role as student, is not claimed by the institution. However, work created by students in a role as paid employee of the university, is claimed by the institution. As you can see, this can quickly become very

² For sample language you can add to a contract, see Author's Addenda. (n.d.). Retrieved May 17, 2017, from <https://www.lib.umich.edu/copyright/authors-addendum>

³ Research Guides: Copyright Basics: Who Holds Copyright. (n.d.). Retrieved May 17, 2017, from <http://guides.lib.umich.edu/copyrightbasics/who-holds-copyright>

⁴ Standard Practice Guide Policies. (n.d.). Retrieved May 17, 2017, from <http://spg.umich.edu/policy/601.28>

complicated. It is also wise to be aware of intellectual property policies that may vary from the standard ones in light of works that change the traditional paradigm of operation. The most recent case of this is an example involving Massive Open Online Courses (MOOC's).

Then he did something instructors of conventional courses historically have almost never done: Under rules established by his college, he abandoned all control of it, surrendering any say in how or when the class will be revised, or who will teach it....“This is something of the wave of the future,” he added: Professors create and package the course, but then their university employers simply say: “Thank you very much.” (Butrymowicz, 2014)

Although more recently policies are trending towards traditional IP ownership for MOOC's, it is a good example to keep in mind as the next new technology or teaching method comes our way.

The third complicating factor to take into consideration is that of technology itself. This aspect has less to do with legal implications (although you should be aware of licensing restrictions and contractual language of any tool), and more to do with the pace of change in the technology industry. It is important to have an estimate as to how long you intend to use the work you are creating, and understand the lifecycle of any tool that you will be using to store and deliver that work. You do not need to have an in-depth understanding of any particular technology, rather know the questions to ask. Issues to keep in mind are the age of the technology/tool, who owns it, what is the commitment to maintain it and who has that charge? In the case of content that is directly tied to the delivery, you should evaluate how to store the data apart from the tool, and what value that content has with no delivery mechanism.

Let's now review the scenarios presented at the beginning of this article in the context of the issues outlined above:

Scenario 1: Who owns the placement exam?

Looking at this example from the context of the University of Michigan environment, and assuming that a placement exam is considered a “scholarly” work under the IP policy, it would appear that this professor has a strong case to take the exam with him to the new institution. It may very well be that the Chair is unaware of the faculty member's rights,

which is why it is sound advice to seek out resources across campus to step in and advocate for you.

Scenario 2: Ownership and access to the online textbook

In this case, the professor may very well have IP rights over the content of the textbook (depending on the IP policy of the originating institution), but most likely not the technology that delivers it, especially since it was built in-house. Much of the value of this content though is in the delivery mechanism of the lessons.

The professor might be able to work with technology staff of the new institution to recreate the technical structure on the new campus.

Scenario 3: Access to streaming media from abroad

This scenario is the most problematic with regard to the law. The streaming media was uploaded to the LMS either using existing licenses through the campus library, or through fair use. When approached with this scenario, the licensing agents could not give permission to stream abroad as they only held the rights to stream in the United States. Regarding fair use cases, U.S. copyright law does not apply outside the U.S. When abroad, you are obligated to the law of the country in which you are using the materials. The recommendation was for the professor to try and obtain these movies on dvd in the country in which she was teaching (assuming that this was legal in that country).

As mentioned previously, this discussion does not get into all of the details, nor the many different types of exceptions that can come into play. It is still important however to be aware that there is an interdependency that is complicated with each additional factor added into any given situation. All of these examples deal with the consequences of uninformed assumptions and expectations. Understanding the potential impact these various issues and their interdependencies can have on teaching might be able to save you from frustrating and problematic situations in the future. This does not make the current landscape any easier to navigate for a teacher whose primary goal and expertise is teaching. So what can you do to protect yourself? Before you embark on your next creative work:

- 1) Seek out the resources available to you: institutional legal counsel (try to find someone who specialized in IP issues), the office that

deals with technology transfer, librarians as well as academic technology professionals. All can be valuable resources for you.

- a) Is your work considered a “work for hire”?
 - b) Is your work grant funded, if so what are those IP conditions?
- 2) Get it in writing! This is important for official contracts, but it is good practice to have a file of any agreements and understandings in writing. They should adhere as much as possible to current law and policy. Institutional leadership and strategic directions change often enough that verbal agreements will not hold up for very long.
 - a) Read any publisher/software contracts or licenses prior to signing.
 - b) Acquire sample text that you can add to a contract to amend the terms if they are too restrictive.
 - 3) Use international standards/media formats for greatest assurance of sustainability.
 - 4) Plan to mirror your dataset and/or create a backup that is clearly organized in case you lose access to your primary tool. Make sure that you reference related text and audio/video files.
 - 5) Ask about life expectancy and support of the tools you will be using.
 - a) Understand how you can migrate your data in case of upgrades or tool changes.
 - b) Know rights/limitations of using a particular tool if you are no longer affiliated with the institution.

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