

Public Policy Issues Surrounding Online University Courses

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Abstract

With the maturation of the internet more and more colleges and universities are offering online courses. As these courses enter the mainstream, public policy issues are beginning to emerge. Many of these involve the tension between the “work for hire” doctrine and academic freedom that occurs when educational institutions offer these courses with a profit motive and then claim ownership of course materials. When a university begins to offer courses with a for profit motive, issues involving copyright infringement may also arise due to the inapplicability of the “fair use exception”.

Other issues involve a developing disparity between the rights of public university faculty over those of private university faculty to the ownership of course materials as a result of the United States Supreme Court decision in *NLRB v. Yeshiva University* as well as the Due Process and the Takings Clauses in the Fifth Amendment and the Due Process Clause in the Fourteenth Amendment to the United States Constitution. The lack of clarity in U.S. copyright law over ownership of professorial created academic works has led some commentators to suggest the time has come to amend the law to return a “teacher exception” to the definition of a “work for hire” in the U.S. copyright statute. In the meantime, faculty must negotiate ownership issues with their schools on an individual basis, through collective bargaining or by both. In the case of private university faculty, there is no guarantee of any right to negotiate with their employer.

Introduction

Copyright law in the United States today is governed by the Copyright Act of 1976.¹ Under that law works put into a tangible form are automatically given a statutorily created copyright for the life of the author plus 70 years. If a copyright is owned by a publishing house, the copyright expires 70 years after the death of the last surviving author.² At the time Congress drafted this act, the internet was in its infancy and was inaccessible to all but the most sophisticated users. Congress could not have foreseen the issues that now exist in a university setting when courses are offered online. It probably did not foresee the development of what some have termed the corporatization of the university.³ Nor could it have foreseen the explosion in online learning. It certainly was not thinking about the increasing university reliance on adjunct faculty or the fact that many adjunct and part time professors teach at more than one institution or hold a full time job as an employee of another company or perhaps are self-employed. It certainly could not have foreseen the United States Supreme Court decision in the *N.L.R.B v. Yeshiva*⁴ case four years later, or that copyright and labor relations law could have a

¹ 17 U.S.C. Sections 101 *et seq.*

² 17 U.S. C. Section 302.

³ See Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom*, 12 B.U. Pub. Int. L.J. 73.

⁴ 444 U.S. 672 (1980).

relevance to each other and to the tradition of academic freedom that university faculty so cherish. Thus when it decided to statutorily define a “work for hire” to subsume the case law definition of the “work for hire” exception to the general premise of copyright law that a copyright belongs to the creator of the work, Congress may not have realized it would also be eliminating a judicially created exception to the exception (the “teacher exception”) that presumes ownership of academic works to be with the professor or teacher who creates them.⁵ Yet all of these events have converged to raise significant public policy issues of concern to academia.

Work for Hire and the Teacher Exception

Prior to the 1976 Amendments to U.S. copyright law, teachers owned their teaching materials and scholarly works pursuant to an exception to the “work for hire” doctrine under the older 1909 Copyright Act. Under copyright law, there are three basic types of ownership, which are (1) the author as the owner; (2) the employer as owner pursuant to the work-for-hire doctrine; and (3) the employer as owner of a work commissioned by the employer and created by an independent contractor for the employer.⁶ Over the years both case law and custom have dictated that scholars have owned the materials they create, despite the copyright doctrine of “work for hire.” Although faculty are clearly “employees” within the scope of employment, labor, tax, worker’s compensation and unemployment law, they have not traditionally been considered “employees” within the scope of copyright law. Anyone involved in higher education knows that the nature of the work performed by a professor at all but proprietary institutions is more akin to that of an independent contractor than it is to that of a servant under the master-servant analysis of agency law. Copyright law has historically recognized that fact. The teacher exception to the “work for hire” doctrine was created by case law under the 1909 act. However, because the 1976 copyright statute did not incorporate language recognizing it, the “teacher

⁵ See Georgia Holmes and Daniel Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 BYU Educ. & L.J. 165. See also Elizabeth Townsend, *Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University*, 4 Minn. Intell. Prop. Rev. 209.

⁶ Townsend *id.* at 224.

exception” was subsumed by a work-for-hire doctrine that Congress took from the U.S. Supreme Court’s definition in the case of *Community for Creative Non-Violence v. Reid*.⁷

Many scholars believe the “teacher exception” still exists despite its having been subsumed into revised statutory language. In her article “Legal and Policy Responses to the Disappearing ‘Teacher Exception’ or Copyright Ownership in the 21st Century University” Professor Elizabeth Townsend argues that the legislative history of the 1976 amendments do not indicate an intent to eliminate the “teacher exception.”⁸ Although there are few reported cases involving the teacher exception, the United States Court of Appeals for the Seventh Circuit has decided two cases since the 1976 statutory revisions. The two cases are *Weinstein v. University of Illinois*⁹ and *Hays v. Sony Corporation of America*.¹⁰ In the *Weinstein* case the Court of Appeals overturned the decision of the trial court and its conclusion of law that a scholarly work written by Weinstein was a work for hire for which the university owned the copyright. In so doing, the Court of Appeals opinion states that the trial court’s conclusion that the article was specifically required by Weinstein’s job “collides with the role” the three categories of exceptions to the work for hire rule play as exceptions to the general rule of copyright ownership by the creator. The opinion states the following in what can be assumed to be court dicta:

A university “requires” all of its scholars to write. Its demands – especially the demands of departments deciding whether to award tenure – will be “the motivating factor in the preparation of many a scholarly work. When [the Dean of his college] told Weinstein to publish or perish, he was not simultaneously claiming for the University a copyright

on the ground that the work had become a “requirement or duty” within the meaning of paragraph (3) [of the university’s “work for hire” policy]. The university concedes in this court that a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof. This has been the academic tradition since copyright law began, see M. Nimmer, Copyright § 5.03[B][1][b] (1978 ed.), a

⁷ In this case, Community for Creative Non-Violence (“CCNV”), a nonprofit organization dedicated to ending homelessness in America, hired James Reid to produce a sculpture dramatizing the plight of the homeless. After Reid produced the sculpture, CCNV and Reid disagreed as to which party owned the copyright to the work. CCNV sued Reid to determine copyright ownership. 490 U.S. 730 (1989).

⁸ Townsend *op. cit.* 227-238.

⁹ 811 F.2d 1091 (7th Cir. 1987).

¹⁰ 847 F.2d 412 (7th Cir. 1988).

tradition the University's policy purports to retain. The tradition covers scholarly articles and other intellectual property.¹¹

In the same case the appellate court asserts "When Saul Bellow, a professor at the University of Chicago writes a novel, he may keep the royalties."¹² In the corporate university of today not all university administrators and governing boards would agree.

The university in the *Weinstein* case was the University of Illinois, a state university subject to the due process clause of the Fourteenth Amendment to the United States Constitution. Following Congress's adoption of the 1976 amendments to the Copyright Act, the University of Illinois had adopted a "Work for Hire" policy. The policy defined the term "work for hire" for purposes of its employees, including its professors. According to the policy, a professor retained ownership unless the work fell under one of three categories. The university claimed ownership of the copyright and the trial court found such ownership in the university based upon the third category. That category applied to "Works created as a specific requirement of employment or as an assigned University duty."¹³ The university claimed that publishing academic articles was an assigned duty of an untenured professor. In deciding against the university on this point, the appellate court noted that "The university's copyright policy reads more naturally when applied to administrative duties."¹⁴ The court does not specifically rule on any Fourteenth Amendment due process "takings" issues saying the state courts in Illinois are open to address any such due process issues. In the court's words "We may assume that the due process clause applies to efforts by the state to eliminate entitlements established by private contracts."¹⁵ Presumably this would have been the issue raised by Saul Bellow if the University of Illinois had claimed royalties to any of his novels.

Additional Problems Raised by Copyright's Lack of Fit With University Culture

Issues surrounding whether a work is a "work for hire" are important under copyright law in part because of the "all or nothing" approach of copyright law. Under the statute courts must restrict their analysis to (1) characterizing the relationship between the party creating the work

¹¹ *Weinstein* at 1094.

¹² *Id.*.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1096.

and the party hiring the creator; and (2) categorizing the work being created.¹⁶ Under the analysis allowed by the statute, once a work is found to be a “work for hire” under the law, ownership of the work vests exclusively in the employer. Under this analysis there is a clear winner and a clear loser regardless of the parties’ intent.¹⁷ Professors who create works such as software programs or online courses are often unaware of copyright law or the “work for hire” doctrine. They believe they are the owner of these works, particularly if they have created them on their own time without direction from the university and without the use of university resources. This is not to say that a university will always want to be the owner of a faculty created works. If a work created by a professor is at all controversial, the university may in fact wish to distance itself from the work and the professor who created it. If the work is defamatory or obscene or itself violates copyright law, the university would most definitely not want to be the owner, but copyright law does not now give the university the option to pick and chose what it wants on an arbitrary basis, or the faculty member to claim ownership at will of works she/he creates.

Developing a course, whether online or in a traditional classroom setting involves synthesizing materials from a variety of sources. Some, but not all, will be created by the professor from her/his own knowledge base. Some will be derivative from a course textbook published by a publisher who allows a sort of implied license to the professor in return for having adopted the textbook for the course. Professors frequently develop problems for students to solve and discuss and test questions for course tests that are based upon the textbook, the copyright for which is owned by a publisher in the business of publishing textbooks. The publisher normally allows this as a form of “fair use” or an “implied license”, because it results in sales of the publisher’s copyrighted textbook. However, if the motive for use of the publisher’s materials becomes a profit making one for the university which offers online courses and posts materials taken from textbooks or other copyrighted materials, a “fair use exception would not apply and the university might well be subject to claims of copyright infringement, because “fair use” only applies when there is a nonprofit educational motive for the use.

The “fair use” exception to liability for copyright infringement is made under the “fair use” doctrine, which is found in Section 107 of the Copyright Act and reads as follows:

¹⁶ See Nancy S. Kim, *Martha Graham, Professor Miller and the “Work for Hire” Doctrine: Undoing the Judicial Bind Created by the Legislature*, 13 J. Intell Prop. L. 337 at 362.

¹⁷ *Id.*

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phone records or by any other means specified by [Section 106 of the Copyright Act], for purposes such as criticism, comment, news reporting,

Teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of

Copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be

Considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit

Educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁸

These guidelines can easily be violated when there is a for profit motive on the part of the university.

In 2002 Congress passed some amendments to the Digital Millennium Copyright Act of 1998. These amendments were intended to address issues involving distance education. They were known as the TEACH Act (for Technology Education and Copyright Harmonization Act). According to one university copyright attorney, “The TEACH Act, in essence, applies the teacher exemption and fair use defense to online education, but only to the extent that online delivery is a comparable replacement for the type of, and amount of, performance or display of materials that occurs in the classroom and that transmission be limited to students enrolled in the course.”¹⁹ This means that although there is some application of “fair use” to distance education, its application is more limited than one might anticipate. In the words of the same attorney “The vehicle of online education permits educators to place all forms of intellectual property on the

¹⁸ 17 U.S.C. §107.

¹⁹ Audrey W. Latourette, “*Copyright Implications for Online Distance Education*,” (2006), 32 J.C. & U.L. 613 at 624.

Internet and coupled with distance education's potentially vast audience, enormously enhances the possibility of significant market harm to the creator/owner of the copyright if the works are widely disseminated."²⁰

The Nexus of Copyright Law and Academic Freedom

With respect to the ownership of academic works created by a professor, the prevailing practice in higher education has been to treat the faculty member as the copyright owner of academic works when those works are created independently by the faculty member at the faculty member's own initiative and for traditional academic purposes.²¹ The AAUP endorses this approach, because in traditional academic works "the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusion."²² However, this approach is inherently inconsistent with copyright law's "work for hire" analysis.

Independence of thought is essential for academic freedom. There is a fundamental conflict with academic freedom when traditional academic works are considered "works for hire." For academia to be a haven of free inquiry, faculty members need to be able to produce works that reflect their own ideas and theories rather than those of the university's administration. If all academic work belongs to the institution, then its content also belongs to the institution and can be controlled by the administration. In the words of the AAUP "Institutions of higher education are conducted for the common good, and. . . [t]he common good depends upon the free search for truth and its free exposition."²³ Administration supervision of faculty academic work is not very practical without draconian restraints on faculty independence or a dramatic change in the role faculty have traditionally played in both society and the university. When one considers the hundreds of lectures, notes, books, papers and articles that faculty members create on a daily basis, such materials cannot practically be under administration control.²⁴

²⁰ *Id.* at 622.

²¹ AAUP, *Statement on Copyright*, AAUP Policy Documents and Reports, 182-83 (9th ed. 2001).

²² *Id.*

²³ AAUP, 1940 *Statement of Principles of Academic Freedom* at 3.

²⁴ AAUP, *Brief of Amicus Curiae in Pittsburg State University v. Kansas Board of Regents*, 2005 WL 2395658 at 6.

The Nexus of Copyright and Labor Relations Law

The foregoing analysis of copyright ownership between the university and the professor or staff person raises more questions than it answers and is not particularly useful in resolving any conflicts between a professor and her/his university. Perhaps that is why both the National Association of College and University Attorneys (NACUA) and faculty organizations such as the American Association of University Professors (AAUP) and the National Education Association (NEA) have concluded that negotiated agreements regarding ownership are in the best interests of the parties. However, they disagree as to ownership assumptions underlying such agreements and who should be a party to the negotiations. A 2004 article by Michael W. Klein (2004) stated “Despite having the law on their side, colleges and universities should neither boldly assert copyright ownership over online courses developed by their faculty, nor use these courses without permission. Monetarily, it is not worth the fight; the courses tend not be the money-makers they are often anticipated to be.”²⁵ On the other hand, the AAUP assumes that the faculty member (or members) who create the intellectual property, own the intellectual property.²⁶ It then describes and defines three limited and expressly defined sets of circumstances where the college or university can claim ownership. It also states that a work should not be treated as a “work for hire” simply because it is created using university resources. The AAUP and the NEA both represent unionized faculty in state colleges and universities across the United States. Although both organizations have many members at private colleges and universities, they do not represent them in formal union negotiations primarily because of the 1980 United States Supreme Court decision in *National Labor Relations Board v. Yeshiva University Faculty Association v. Yeshiva University*.²⁷

The Yeshiva Case

The question raised in the Yeshiva case was whether the faculty of a private university had the right to organize as a union under the National Labor Relations Act. The union sought certification as a bargaining agent for its full-time faculty members in a bargaining unit that included Assistant Deans, senior professors, and department chairmen, as well as associate

²⁵ Michael W. Klein, *The Equitable Rule: Copyright Ownership of Distance Education Courses*, 31 J.C. & U.L. 143.

²⁶ AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT ON COPYRIGHT, available at <http://www.aaup.org/AAUP/issues>.

²⁷ 444 U.S. 672 (1980).

professors, assistant professors, and instructors. It excluded Deans and Directors. The university opposed the petition on the ground that all of its faculty members were managerial or supervisory personnel and hence not employees within the meaning of the National Labor Relations Act. In a 5-4 decision written by Justice Powell the United States Supreme Court found the faculty fell within the managerial exception to the definition of an “employee” in the NLRA and were not entitled to unionize.

The case began in 1975 when the faculty at Yeshiva filed a petition to organize with the NLRB. Pursuant to the petition, an election was held and a union was certified to represent the faculty. However, the university refused to bargain. The NLRB ordered the university to bargain with the union, and when the university still refused to negotiate, the NLRB sought enforcement of its order in the Court of Appeals for the Second Circuit. The Second Circuit denied the petition on the grounds the university faculty were managerial employees. It was then appealed to the United States Supreme Court by *writ of certiorari*.

In the court case, the NLRB argued in favor of the faculty. It contended that the managerial exclusion could not be applied in a straightforward fashion to professional employees because those employees often appear to be exercising managerial authority when they are merely performing routine job duties. The Board argued that the Yeshiva faculty members were not aligned with management because they were expected to exercise independent professional judgment while participating in academic governance.

Yeshiva’s management structure was typical of most colleges and universities. University-wide policies were formulated by the central administration with the approval of the Board of Trustees. The budget for each school was drafted by its Dean or Director, subject to approval by the President after consultation with a committee of administrators. The only university-wide faculty body was the Faculty Review Committee composed of elected representatives who adjusted grievances by informal negotiation and also made formal recommendations to the Dean of the affected school or the President in a purely advisory capacity. Each school/college had faculty committees to deal with areas of educational policy. A faculty welfare committee negotiated with administrators concerning salary and conditions of employment. Other committees dealt with curriculum, the grading system, admission and matriculation standards, academic calendars and course schedules. The faculty would also make recommendations to the Dean or Director on faculty hiring, tenure, sabbaticals, termination and

promotion. Most of these recommendations were accepted by the administration, a fact which led the court majority to conclude that faculty members were managerial employees²⁸ In reaching its decision the majority of the court found that faculty members were “professional employees,” but then excluded them from coverage under the NLRA based upon the implied exclusion for managerial employees. In reaching this conclusion the court explained that “the controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial.”²⁹

The minority opinion in the case was written by Justice Brennan and joined by Justices White, Marshall and Blackmun. The minority believed the court should defer to the findings of the NLRB since the board had accumulated experience in dealing with labor-management relations in a variety of settings that has allowed it to develop the expertise in determining whether coverage of a particular category of employees would further the objectives of the labor relations act. The minority focused on whether the faculty was aligned with management and on whether the faculty would be performing their duties to implement the employer’s policies or whether the employee in performing his duties would represent his own interests as opposed to implementing the interests of his employer³⁰ They then point out that:

Unlike the purely hierarchical decision-making structure that prevails in the typical industrial organization, the bureaucratic foundation of most ‘major’ universities is characterized by dual authority systems. The primary decisional network is hierarchical in nature. Authority is lodged in the administration, and a formal chain of

command runs from a lay governing board down through university officers to individual faculty members and students. At the same time, there exists a parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decision-making process.³¹

In this analysis whatever influence the faculty wielded in university decision-making was attributable to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives. This model saw professors more as independent contractors within the

²⁸ Yeshiva, *op. cit.* at 860.

²⁹ *Id.* At 864.

³⁰ *Id.* at 696.

³¹ *Id.* at 696 quoting J. Baldrige, *Power and Conflict in the University*, 114 (1971), and Finken, *The NLRB in Higher Education*, 5 U. Toledo L. Rev. 608, 614-618 (1974).

university who act in their own self interests in order to create the most effective environment for learning, teaching and scholarship.

The Pittsburg State University Case

Unlike their counterparts in the private sector, public universities in many states have the right to unionize and bargain under their respective state employee labor laws. Included among the states where public university faculties are unionized are California, New York, Pennsylvania, Texas, Pennsylvania, Michigan, Minnesota and Kansas. The faculty at Pittsburg State University in Kansas was represented by the Kansas Education Association under the Kansas Public Employee Labor Relations Act (PEERA) When the NEA sought to negotiate with the Kansas Regents on issues of copyright ownership; the Regents refused citing pre-emption of the issue under the work-for-hire doctrine of the federal Copyright Act. The Board of Regents contended that because faculty members were employees, the university owned any intellectual property they created under the work-for-hire doctrine simply because they were employees of the university. When the Board of Regents refused to negotiate on the issue, the KNEA filed a complaint with the state Public Employee Relations Board (PERB). The PERB determined there was no obligation for the Board of Regents to meet and confer on the issue, because federal and state law preempted the subject. The district court reversed this finding, but the Court of Appeals reversed that decision and sided with the PERB. The Kansas Supreme Court then reversed the decision of the Court of appeals and affirmed the district court's holding on this issue³²

The dispute had begun several years earlier when the KBR proposed a policy which would have dictated that KBR owned and controlled any intellectual property created by faculty at the university. From the beginning of the dispute, the KBR had argued that ownership of intellectual property was not a condition of employment and could not be negotiated, because the subject was preempted by federal statute and fell within the rights of the public employer. Thus the KBR concluded it had no obligation to meet and confer with KNEA and therefore did not commit a prohibited unfair labor act. The first hearing of the case was before an administrative hearing officer who made the following findings of fact:

³² Pittsburg State University v. Kansas Board of Regents, 122 P.3d 336.

4. Professors at Pittsburg State University have three major responsibilities: teaching, scholarship, and creative endeavor and service.

5. Pittsburg State University provides its professors with office space, equipment, research facilities, supplies, and secretarial help.

6. Among other responsibilities, Pittsburg State University professors conduct research, write scholarly articles, publish scholarly articles, create songs or artwork and other forms of intellectual property.

7. Professors who publish scholarly works receive better performance evaluations and receive a higher level of compensation from the employer.

8. Professors' promotions are based on production of books and articles and on presentation of information at conferences³³

These findings of fact were accepted by all of the courts that subsequently heard the case.

Among the briefs filed in the Kansas Supreme Court case was an amicus brief by the AAUP.³⁴ In its brief the AAUP argued that faculty scholarly work is not, and never has been considered work-for-hire under federal copyright law. They suggest that to consider it as such would go against established federal appellate law. They further suggest that it would wreak havoc with settled academic practices and would fundamentally conflict with academic freedom. If university administration controlled copyrights to faculty scholarly work, it would mean that the administration would also have responsibility for the conclusions and statements made in such works and for managing the content and dissemination of faculty works.³⁵ AAUP argued that faculty scholarly work is independent. It lacks the necessary employer control found in the corporate world that is necessary for a work-for-hire scenario and it is unworkable as well as against academic practice and custom.³⁶

AAUP associates faculty ownership of its scholarly work with academic freedom. In making this argument, AAUP indicates that administrations are often relieved to distance themselves from some of the scholarly work produced by faculty. It argues if the administration owned all the work of faculty and controlled its release and dissemination, then it would also be

³³ *Id.* at 413.

³⁴ *AAUP Amicus Brief, op.cit* at 6.

³⁵ Pittsburg at 3.

³⁶ *Id.* at 8-9.

legally responsible for the content. Most administrations would prefer not to claim responsibility for every conclusion reached by a faculty member. These administrations rely on the ability to disclaim controversial statements made by faculty as the views of the faculty member alone, and not that of the university. In addition, an institution claiming ownership of the scholarly work of faculty would also be responsible for tasks such as negotiating book contracts and publishing agreements and handling revisions and updates. Most institutions have neither the desire nor the resources to take on these tasks.³⁷

In its decision the Kansas Supreme Court acknowledges that it is far from clear there is an absolute teacher exception to the work-for-hire doctrine, but concluded that the assumption of the administrative hearing officer, the PERB and the Court of Appeals that the work-for-hire doctrine would apply to any intellectual property created by PSU faculty is erroneous. Citing the Restatement (Second) of Agency the court notes that whether any particular creative work of a faculty member constitutes work for hire will depend on whether the work meets the Restatement test, *i.e.*, whether it is the type of work the faculty member was hired to create; whether it was created substantially within the time and space limits of the job; and whether it was motivated by a purpose to serve the university employer. This would involve not just a case-by-case evaluation, but also a task-by-task evaluation.³⁸

Neither the AAUP nor the KNEA seems to have raised any due process takings issues in the proceedings, and the Kansas Supreme Court never went beyond issues of federal copyright law and preemption in its decision. Nevertheless, had the court upheld the findings of the administrative hearing officer and the intermediate appellate court, issues along these lines could well have developed in the implementation of the policy adopted by the Kansas Board of Regents. A public university system that claims ownership of all works created by university professors during the time of their employment so that such property can be used to generate revenue for the university at some point runs the risk of taking private property for public use without just compensation. These same restrictions may not exist for private universities whose actions are not likely to be considered state action under the Fourteenth Amendment. At least from a legal standpoint it would seem to be easier for a private college or university to

³⁷ *Id* at 10.

³⁸ Pittsburg at 424.

implement a policy asserting ownership of faculty works than for a publicly run college or university to do so.

NEA and AAUP Recommended Policy Provisions

Until the advent of online learning, the ownership of faculty research, lecture notes, and classroom teaching materials was thought to have little value. Now, however, courseware suddenly has value and universities want to share in any revenue generated by it. Coincidentally, copyright law has become less clear on the issue of a teacher exception to the copyright law's work-for-hire doctrine. When collective bargaining is an option for faculty, the trend is to include intellectual property language in the bargaining agreement. However, collective bargaining is not an option for faculty at private colleges and universities. This could mean as time passes, these faculty will have fewer rights to their own creations than faculty at public colleges and universities. When collective bargaining is an option, the following are some provisions recommended by the NEA on its website.

1. If the research is funded by another agency, then the grant or contract for that research should determine ownership and the distribution of any income generated.
2. Faculty should own the copyright to their classroom lecture notes and materials as well as their publications.
3. The administration cannot make signing away rights a condition of employment.
4. If a faculty member writes, invents or produces a work without the use of campus resources, then that faculty member should own full rights to income from that product.
5. If university support consists only of an office, a department secretary and an office computer, which are used by the faculty member to create a work of value that generates income, the proceeds should be shared as negotiated by the individual faculty and the campus either in the labor agreement or on an individual basis.³⁹ AAUP has adopted a policy *Statement on Copyright*. This statement begins with the assumption that the faculty member (or members) who create the intellectual property, own the property. According to the AAUP "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

³⁹ Christine Maitland, *Intellectual Property Policies* (1998) as found at <http://www.nea.org/highered/resources>.

purposes.”⁴⁰ The AAUP statement recognizes only three circumstances where the university has ownership rights in faculty created works. These three are where:

1. The college or university expressly directs a faculty member to create a specified work, or the work is created as a specific requirement of employment or as an assigned institutional duty that may, for example, be included in a written job description or an employment agreement.
2. The faculty author has voluntarily transferred the copyright, in whole or in part to the institution. Such transfer must be in the form of a written document signed by the faculty author.
3. The college or university has contributed to a “joint work” under the Copyright Act. In this situation, the institution can exercise joint ownership when it has contributed specialized services and facilities to the production of the work that goes beyond what is traditionally provided to faculty members in the preparation of their course materials. Such an agreement should be in writing, in advance, and in full conformance with other provisions of any relevant agreements.⁴¹

Conclusion

AAUP and NEA Guidelines for university policy are helpful to faculty who have the ability to negotiate binding agreements with university administrations. They are well thought through and take into consideration the interests of both faculty and the university. However, in the final analysis these guidelines are merely guidelines. They are persuasive, but they need not be followed by a university administration or faculty association if it does not wish to follow them. Online education is here to stay. Distance education has entered the mainstream of higher education in the United States in part, because through it the university can reach underserved constituencies who are unable to travel to attend traditional classroom instruction. It also gives professors flexibility in course design. However, online courses raise significant public policy issues, particularly with regard to the application of copyright law, the intersection of copyright law and labor relations law, and the application of academic freedom to the online environment. The “all or nothing” allocation of ownership rights under the “work for hire” doctrine is problematic in an academic environment, but the application of labor relations law following the United States Supreme Court decision in *NLRB v. Yeshiva University* prevents faculty organizations at private universities from negotiating policies that are legally enforceable by

⁴⁰ *AAUP Statement on Copyright* as quoted at <http://www.aaup.org/AAUP/issues/DE/sampleIP.htm>.

⁴¹ *Id.*

faculty representatives or individual faculty persons. Without legally enforceable agreements, private universities can adopt their own policies without faculty input and can arbitrarily assert ownership over faculty created work.

When the university motive for offering online instruction is a commercial one rather than a nonprofit one, the university may be required to obtain licenses or to pay royalties to publishers for the use of copyrighted materials online. Both public and private universities that fail to obtain licenses or to pay royalties to the copyright owner could face significant damages for copyright infringement. Public universities who do so may also be subject to liability for taking private property for public use without due process and without just compensation in violation of the Fourteenth Amendment and Fifth Amendment due process and takings clauses. Fourteenth Amendment due process issues may also arise when the university arbitrarily asserts ownership of faculty works. Ownership of course materials and scholarly work is important, because with ownership goes editorial control. Without editorial control of their course materials and scholarly writing, faculty persons have no academic freedom. If faculty works are both owned and controlled exclusively by the university employer, assertions of the existence of and respect for academic freedom become disingenuous words.

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