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Sheri V. T. Ross  
*St. Catherine University*, [svtross@stkate.edu](mailto:svtross@stkate.edu)

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# Intellectual Property Policies in Academe: Issues and Concerns with Digital Scholarship

*Sheri V. T. Ross, Assistant Professor, St. Catherine University*

## Abstract

The generation of digital scholarship, through both research and teaching/learning activities, has caused colleges and universities to either create or revise their institutions' intellectual property policies. Many factors should be considered when crafting a comprehensive and fair policy. This discussion focuses on the relatively new interest by higher education institutions in the copyright ownership of scholarly literary works, which has traditionally rested with the faculty creator. Digital technologies have led to the easy reproduction and commodification of these creations, prompting institutions to rethink their positions. The discussion considers the characteristics of copyrightable digital works, competing interests in the ownership of such works, and the federal legal provisions in place that offer an understanding of copyrights in these contexts. The discussion closes with remarks about intellectual property policies currently used in American higher education institutions.

Most colleges and universities have some manner of an intellectual property policy. There is a great deal of variation regarding the scope and formality of such policies, however. Regarding scope, policies range from only addressing the fair use of library materials to addressing both the use and creation of all types of intellectual property that might exist in an academic setting. Some academic organizations merely incorporate a few paragraphs regarding intellectual property in the employee handbook, whereas others have composed comprehensive policies that exist independently from other employment materials.

Research institutions began paying attention to the generation of intellectual property in the United States shortly after the transition from the industrial age to the information age. Patentable inventions were the first type of intellectual property to be noticed as commodifiable, and soon policies were springing up in universities to address the issue of ownership and revenue division among interested parties. The 1980 Bayh-Dole Act codified the notion that universities have property rights in the inventions of their faculty arising from federally funded research.

In the information age, intellectual property has come to the fore. The expression of original ideas is the currency that drives the economy, as well as political and social forces (Sun & Baez, 2009, p. 10). As institutions of higher education are

inherently concerned with intellectual property, they have necessarily had to pay attention to the changes in the landscape and adapt accordingly. Hence, almost all universities and colleges now have policies to address intellectual property. Due to the increasing use of digital technologies to develop scholarly works, institutions that have had policies in place for decades have been revising them to address copyright issues previously not considered worth including in policy.

This first question that might be asked is: what is copyrightable digital scholarship? Copyrightable digital scholarships might be separated into two broad categories: digital expressions of research and digital expressions of teaching and learning. While this is a useful division to help creators in a higher education environment think about intellectual property issues around their work, legally, there is no distinction regarding the purpose of the creation. Copyright law focuses on the product and presents eight potential categories of copyrightable expression (Title 17 U.S.C. §101). Each category has a different set of exclusive rights associated with it. For present purposes, the "literary works" will be the primary focus.

Literary works created in higher education include articles, monographs, reports, presentation slides, lecture notes, class assignments, reading lists, and

other research and teaching materials. All of these works may be expressed in a digital form, individually or in combination. This not only creates challenges in controlling unauthorized reproduction, but also determining who has rights to what in a creation that has multiple components, each of which may stand alone as an original work, but also contributes to the unique whole of a conglomerate product, for example, an online class or a multimedia presentation of research results. An argument has been made that these products might be treated as “musical works” and unbundled into constituent parts (Sun & Baez, 2009, p. 18). However, the law has not yet addressed the specific nuances associated with higher education products.

The next question that might be asked is: what are the primary stakeholder interests in the ownership of copyrights in digital scholarship? It has been a long standing tradition in higher education that faculty own their creations. Rarely has it been questioned whether the author of a journal article is legally entitled to assign copyrights to a publisher. Nor has it been questioned whether a professor has the right to bring her course outlines and lecture notes with her as her career takes her from one institution to another. This is just a long standing tradition and is proving not to be a legal entitlement. This has come to light because much scholarship today is created digitally, making it easily reproducible and commodifiable. Institutions of higher education have begun taking notice and are asserting copyrights in these works.

In reality, however, universities don't want all of the responsibilities that come with the ownership of a majority of copyrightable works; most don't have the inclination or capacity to manage all of the creations generated by their faculty. They primarily want an interest in those creations that have revenue-generating potential. They also have a concern for products that may be used by comparable institutions, potentially reducing their competitive advantage. In addition, universities also have interests in protecting their brand, and so want to be aware of works that are made public using references to the institution.

On the other hand, faculty members, who are the creators of the works, typically want them distributed as widely as possible. Ramsey and McCaughey interpret the AAUP's 1999 *Statement on Copyright* as supportive of “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” (Ramsey & McCaughey, 2012). Additionally, the work put into scholarly creations are substantial investments, intellectual and otherwise, in the scholars' careers, and these investments should not be divorced from the ongoing research and teaching agendas of the creators.

As the copyright holder retains a set of protections to the work's exclusive use in terms of controls over reproduction, adaptation, distribution, performance, and display rights, it is in the faculty member's best interest to maintain all of these exclusive rights. While reproduction and distribution through sale tend to be the rights that come to mind when revenue generation is the primary focus, the other rights should also be of concern to faculty. They should have a strong interest in controlling the intellectual content associated with their names and reputation. Their creations may be interpreted through performance or adapted in derivative works. If the creator does not hold these rights, he is not able to control the outcomes. According to the World Intellectual Property Organization (WIPO), copyright protection includes moral rights intended to preserve the creator's reputation (WIPO, 1999). In the United States, however, moral rights are typically only applied to visual works of art as outlined in the Visual Artists Rights Act of 1990.

Now, it might be a good idea to consider: what does the law say about the ownership of digital scholarship? According to Title 17, section 201, of the U.S.C., the creator or author of a work is the copyright holder. An exception to this is a circumstance in which an employee is creating works “within the scope of his or her employment.” In such a case, the employer is considered the author “unless the parties have expressly agreed otherwise in a written

instrument signed by them.” Scholarly work that produces a patent is generally considered a work for hire. But, as mentioned previously, faculty members have generally claimed copyrights of “literary works” whether created within the scope of employment or not.

This tradition of faculty owned scholarship has been carried forward from the 1909 Copyright Act. According to Blanchard (2009), the 1909 act was vague about the application of “work for hire” and “scope of employment,” and required all copyright claims to be published with a registered mark. While the 1909 Act did not explicitly grant faculty copyrights over their scholarship, it was acknowledged in case law (e.g., *Williams v. Weisser*, 1969) that there should be an exception to the work for hire provision for teachers. This “teacher exception” precedent, however, has not held sway since the 1976 revision of the Copyright Act (Blanchard, 2009, pp. 62–63).

The 1976 revision of the Copyright Act is silent on the concept of the “teacher exception,” but defines “work for hire.” It has been interpreted by the courts to apply to faculty work in institutions of higher education (Twigg, 2000, p. 22). One such case was *University of Colorado Foundation, Inc. v. American Cyanamid Co.* (1995) that concluded that an “article published from a funded research project belonged to the university regents because it was a work made for hire conducted within the scope of employment” (Blanchard, 2009). Some legal experts argue that a decision about whether the academic exception should apply depends upon the amount of assistance and resources that are provided by the institution and that more resources are provided to support the creation of digital works (Twigg, 2000, p. 13).

A primary reason for a university to claim a faculty member’s work is that the faculty member used a substantial amount of university resources when creating the work (Kromrey, et al., 2005, p. 5). On the other hand, it has been argued that institutional investments are an invalid criterion to determine “substantial assistance,” because nearly all works whether print or digital at a college or university are created by using substantial institutional resources. This argument is often made when debating the ownership of

online courses and the comprising digital course materials. While there are additional technology costs associated with the development and delivery of online courses, these courses do not require the same level of maintenance for physical facilities that face-to-face course development would require.

Finally, since the law does not provide a definitive answer to the ownership of copyrightable digital works in academia, we might ask: how are these issues best handled? Because the law does not provide a definite answer, institutions should have a policy, rather than leaving the matter unattended until a conflict arises. The policies should be well-defined and widely understood by all stakeholders at the institution.

Existing policies vary greatly. Twigg (2000) outlines three basic models. The university may assert copyrights in faculty works, pointing to the work for hire provision of Title 17. In a second model, faculty assert copyrights in their works, but institutions often insist on qualifying this by asserting the college or university’s right to perpetual, nonexclusive, royalty-free use of the materials in its internally administered programs. A third model is the allocation of ownership through contracts, where all parties agree on ownership designations, obviating the need to constantly monitor future clarifications or changes in the law (Twigg, 2000, pp. 22-23).

The purpose of an intellectual property policy in universities is multifold according to the WIPO. It should encourage discoveries and creations; expedite the dissemination of new knowledge; protect the rights of scholars to control the intellectual content of their works, ensure that any commercial results are distributed in a fair and equitable manner, comply with applicable laws to secure sponsored research funding, and several other provisions (WIPO, 1999). In short, these policies should bring harmony to the conflicting interest of all parties involved in the generation of intellectual property.

It was mentioned at the start of this discussion that most institutions of higher education have some form of intellectual property policy that endeavor to address potential conflicting

interests. Large research institutions tend to be the most likely to have extensive and comprehensive policies on intellectual property. In their 2005 study of 42 research universities, Kromrey, et al. (2005), discovered that most were writing intellectual property rights policies in order “to delineate the rights of faculty to their works,” with 93% of these policies indicating that professors should have control of their traditional

scholarly works. Most universities claimed some faculty works, especially if the works required substantial use of university resources, but, most also had provisions for sharing revenue. There is clearly a trend toward clarification of institutional intellectual property policies, which will inform the movement of talent as scholars progress in their careers.

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