

## Introduction

By tradition, university faculty have been regarded as the owners of the copyrightable works they create, and universities have as a matter of policy generally disclaimed copyright interests in faculty works. In the days when faculty produced primarily text-based scholarly lectures, articles, and books, this tradition accommodated both faculty and institutional interests. Today however, in addition to these traditional materials, faculty produce a wide variety of other works, such as computer programs, multimedia works, videotaped lectures, and distance learning courses. This variety, the circumstances in which it is produced, the resources used in producing it, and the financial demands on higher education, are putting increasing pressure on institutions to revise their policies regarding copyright interests in faculty works. This article discusses some of the issues relevant to such a revision of copyright policy.

## Faculty Works and Works for Hire

Under federal copyright law, initial ownership of the copyright in a work vests in the author or authors of the work, after which the ownership may be transferred to another.<sup>1</sup> In the case of "works for hire," the initial author, and therefore the initial owner of the copyright, is the employer or person who commissioned the work.<sup>2</sup> The Copyright Act defines a work for hire as either (1) "a work prepared by an employee within the scope of his or her employment," or (2) as a work specially commissioned and agreed in writing between the parties to be a work for hire, and which falls within certain categories listed in the statute.<sup>3</sup>

A fundamental legal question is whether faculty works fall into either of these two categories. Because faculty works are typically not specially commissioned, this question reduces to whether faculty works are prepared by faculty within the scope of employment. This is necessarily a fact-specific inquiry, focusing on the particular work and the circumstances of its production. Nonetheless, even in the case of scholarly articles prepared for publication in an academic journal, the matter is controversial.

Prior to the passage of the Copyright Act of 1976, case law supported the position that faculty writings are not works for hire.<sup>4</sup> According to some scholars, this constituted a "teacher exception" to the application of work for hire principles, and passage of the 1976 Act effectively abolished the exception.<sup>5</sup> Other commentators have argued that faculty works are not works for hire, and that this result was unchanged under the 1976 Act.<sup>6</sup>

The courts have not squarely addressed the question, and where they have addressed the issue indirectly have varied in their treatment of it. For example, in *Weinstein v. University of Illinois*,<sup>7</sup> the court stated in dicta that the 1976 Act "is general enough to make every academic article a 'work made for hire' and therefore vest exclusive control in universities rather than scholars."<sup>8</sup>

In contrast, in *Hays v. Sony Corp of America*,<sup>9</sup> the court, again in dicta, stated that if it were forced to decide the issue, it would hold the teacher exception had survived the enactment of the 1976 Act.<sup>10</sup>

The heart of the uncertainty lies in how to apply the legal principles of work for hire within the circumstances of academia. In the landmark case of *Community for Creative Non-Violence v. Reid*,<sup>11</sup> the United States Supreme Court made clear that the interpretation of the statutory definition of work for hire must be guided by the common law of agency. Under agency law, the fundamental question that

decides whether a work was prepared in the course of employment is whether the employer had the right to control the manner and means by which the work was produced.<sup>12</sup>

Other factors include whether the conduct was of the sort the employee was hired to perform, whether the conduct occurred substantially within the authorized time and space limits, and whether the employee's motivation was, at least in part, to serve the employer.<sup>13</sup>

Determining if a particular work is a work for hire is a fact-specific inquiry focusing on the circumstances in which that work was produced, and therefore, generalizations are hazardous. However, because the fundamental consideration under a work for hire analysis is the employer's right to control or supervise the preparation of the work, and because universities generally lack the right, for reasons of academic freedom, to supervise scholarly production, a wide range of faculty works are probably not works for hire.

Furthermore, it is frequently unclear whether a particular faculty work was prepared subject to the institution's supervision, and therefore the determination of which works qualify as works for hire is similarly unclear. A university copyright policy should be designed to accommodate the uncertainty inherent in a work for hire analysis, and at the same time to secure the institution's copyright claims where appropriate. The following discussion offers some suggestions as to how this might be done.

## **Faculty Ownership and University Policy**

A university policy concerning copyright interests in faculty works should address at least the following issues: (1) whether the university will assert an ownership interest in some faculty works, and, if so, which ones; (2) the means by which the university will obtain an ownership interest in those faculty works not considered works for hire; and (3) the process by which determinations of institutional interest will be made.

The first issue requires determining in which faculty works the university will assert an ownership interest. It is reasonably clear that most universities will assert ownership in works for hire. This decision however, is not an easy one, because the class of works for hire is not clearly defined, and because many faculty works are not works for hire.

One approach is to define broad classes of faculty works, such as software or multimedia, as those in which the university will assert an interest. This approach may help keep the burden of administration within manageable limits because it will limit the number of individual cases requiring review.

Another approach is to identify general factors of a particular work that could be evaluated to decide if the institution has an interest. Many universities currently rely on a variety of factors in this way, the most common being: (1) the extent to which institutional resources were used in preparing the work; (2) the commercial character of the work; (3) the utilitarian (as opposed to purely scholarly or aesthetic) character of the work; (4) the connection between the work and the faculty member's job responsibilities; (5) the concern to avoid disputes within the university community.

These considerations, or similar ones, facilitate an analysis similar to that used to decide whether a particular use of a copyrighted work is a fair use. Under section 107 of the Copyright Act, to decide whether a use is fair, one must evaluate it in light of its purpose, the nature of the work, the amount of the work that is used, and the impact of the use on the potential market value of the work.<sup>14</sup> No one factor is determinative, although the effect on market value is usually given the most weight.

Similarly, to decide whether the university has an interest in a particular faculty work, one could evaluate the use of institutional resources, the work's commercial and utilitarian qualities, and the relation between the work and the faculty creator's job responsibilities. As with the fair use analysis, probably no one of these factors should be determinative, although the use of institutional resources is probably the one that should be accorded the most weight.

If these factors are used to determine whether an institution has a copyright interest in faculty works, the range of works in which the institution might then claim some copyright interest would probably be broader than if it claimed only works for hire. The reason, generally, is that the above factors do not focus on the question of the institution's right to supervise and control the manner and means of the production of the work, whereas that is the most important consideration under a work for hire analysis.

To illustrate, imagine a multimedia instructional text that was prepared by several faculty members using university resources. In light of the factors described above, such a work might be one in which the university would wish to assert an interest, but it is not clear that the work would be a work for hire. In particular, although the university might have had some right to control indirectly the use of institutional resources, it is unclear whether that right in itself establishes the right to supervise the production of the work.<sup>15</sup>

The second fundamental issue is how the institution acquires its ownership interests. A university might try to secure its claim to a selected range of faculty works by re-defining what qualifies as a work for hire. This is possible, but only to a limited degree. On the one hand, an agreement declaring every copyrightable work prepared by the employee to be a work for hire would not have its intended effect. It would not make a particular work a work for hire if the facts about its creation established that the work was not prepared in the scope of employment.<sup>16</sup>

On the other hand, an employment agreement can determine what is a work for hire to the extent that it can define the scope of employment in such a way as to ensure that the works prepared by the employee were prepared within that scope. This approach would probably be of limited utility in the case of university faculty. To make traditional faculty works works for hire, a university in effect would have to declare that the preparation of such works is subject to the control and supervision of the university, contrary to strong tradition. Such a declaration would probably give the institution more control than it needs or wants, and would likely be vehemently opposed by the faculty.

Instead of redefining what counts as a work for hire, a more reliable way to determine copyright interests would be to have the university define the nature of the works in which it has an ownership interest, perhaps through reliance on factors like those described above, and then create a contractual obligation on the part of the faculty to assign their copyright interests to the university. Such a contractual obligation could be created by having faculty sign an agreement stating that they agree to abide by the university's copyright policy, and that faculty must assign copyright interests in their work where the determination has been made that the university has an interest in the work. The agreement can then be incorporated into the university's handbook, faculty code, or employment manual.

The third fundamental issue inherent in examination of faculty works focuses on the process by which the institution's interests are determined. Given the variety of faculty works and the variety of circumstances in which they are created, it is not possible to write a policy that anticipates all possible works and circumstances of creation. For this reason, the policy should define an administrative process by which determinations about the institution's interest are made. The process needs to designate an office--"the university copyright office"--to administer the policy and to make such determinations.

In addition, in light of the volume of copyrightable subject matter created by faculty, it is not practicable for the university copyright office to examine every piece of copyrightable work. The policy must therefore establish a threshold for determining whether it is necessary to decide if there is an institutional interest. One such threshold might be to require all faculty to report to the copyright office any copyrightable work having potential commercial value. The copyright office would then evaluate the work in light of factors such as those described above.

If the copyright office concludes that the work is one in which the university has an interest, then the university and the faculty member could enter into such agreements as may be necessary to secure that interest. If the work is clearly a work for hire, then strictly speaking, no further agreement is required. However, in light of the uncertainty inherent in the work for hire doctrine, this will probably be the exception rather than the rule. For this reason, it is advisable to have an agreement that memorializes the parties' understanding that the work is a work for hire, or to the extent the work is not a work for hire, which assigns the faculty member's interest to the university.<sup>17</sup> In cases where the parties agree the work is not a work for hire, a simple assignment of copyright interests will suffice.

To summarize, any university policy regarding copyright interests in faculty works will need to identify either types of works in which the institution will always assert an interest, or the criteria by which determinations of institutional interest will be made. Second, the policy must ensure there is a contractual obligation on the part of faculty to assign their copyrights in those cases in which the university determines it has an interest, where that interest is not already clearly secured under work for hire principles. Third, the policy needs to describe an administrative process by which determinations of institutional interest will be made, presumably through some sort of university copyright office, and ensure the existence of a contractual obligation for the faculty to enter into such further agreements or to make such assignments as are necessary to secure the institution's interests.

Finally, it should be emphasized that there is considerable flexibility under copyright law as to how the rights in faculty works can be allocated between faculty and the institution. The policy could, in effect, vest complete ownership of all copyrightable works in the university, or it could vest complete ownership of all works in the faculty, or it could vest complete ownership of some works in the university and complete ownership of other works in the faculty. Perhaps most importantly, the policy could divide the rights comprising a copyright and allocate some of those rights to the institution and some to the faculty, or could identify non-exclusive licenses precisely tailored to meet the needs of the parties.

In many cases, it is likely that the only right the university needs to secure is the non-exclusive right to use the work for its own purposes. The rights in faculty works, in other words, can be allocated however the university administration deems appropriate, and the determination as to what is an appropriate allocation can be determined largely by administrative considerations rather than legal concerns.

## References

<sup>1</sup> 17 U.S.C. [[section]] 201(a), (d).

<sup>2</sup> 17 U.S.C. [[section]] 201(b).

<sup>3</sup> 17 U.S.C. [[section]] 101.

<sup>4</sup> E.g., *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. App. 1969) (holding that professor owned the

common law copyright to his lectures); *Sherrill v. Grieves*, 57 *Wash. L. R.* 286 (S. Ct. D. C. 1929) (holding that instructor at U.S. Army school owned the copyright to a written version of his lectures).

<sup>5</sup> E.g., T. Simon, "Faculty Writings: Are They 'Works for Hire' under the 1976 Copyright Act?," 9 *J. Coll. & Univ. L.* 485 (1982-83) (arguing that the Act abolished the teacher exception and that faculty writings are works for hire).

<sup>6</sup> E.g., L. Lape, "Ownership of Copyrightable Works of University Professors: The Interplay between the Copyright Act and University Copyright Policies," 37 *Vill. L. Rev.* 223 (1992) (arguing that faculty writings are generally not works for hire); P. Kilby, "The Discouragement of Learning: Scholarship Made for Hire," 21 *Coll. & Univ. L.* 455 (1994) (arguing that agency principles establish that scholarly works are generally not works for hire). See generally 1 M. Nimmer, *Nimmer on Copyright*, 5.03[B][1][b][i], n. 94 (stating that it is unclear under the 1976 Act whether a professor's written lectures are works for hire).

<sup>7</sup> 811 F.2d 1091 (7th Cir. 1987).

<sup>8</sup> 811 F.2d at 1094.

<sup>9</sup> 847 F.2d 412 (7th Cir. 1988).

<sup>10</sup> 847 F.2d at 416-17.

<sup>11</sup> 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989).

<sup>12</sup> E.g., *Scherr v. Universal Match Co.*, 417 F.2d 497 (2d Cir. 1969) (applying this principle to reach result that artists employed by the U.S. Army had no copyright interest in sculpture they created).

<sup>13</sup> Restatement (Second) of Agency [[section]] 228; see generally Kilby, *supra*, 21 *J. Coll. & Univ. L.* at 465 (identifying and discussing agency law factors in relation to scholarly works).

<sup>14</sup> 17 U.S.C. [[section]] 107.

<sup>15</sup> Cf. *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326, 1331 (N. D. Ind. 1986) (work was made for hire because company policy required each employee to submit a manuscript for review prior to publication).

<sup>16</sup> See generally 1 *Nimmer* [[section]] 5.03[B][1][b][ii].

<sup>17</sup> As noted previously, *supra*, fn. 14, a private agreement that a work is not a work for hire will not in itself determine whether the work is, or is not, or a work for hire, although such an agreement may present a significant barrier for the hired party to prove ownership. See generally 1 *Nimmer* [[section]] 5.03[B][1][b][ii].

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