

Background information for the 'Issues of copyright for faculty-created instructional materials' document:

Purpose:

- to promote informed discussion of intellectual property rights for copyrightable works (as opposed to inventions, which are covered by patents, technology transfer agreements, and other business arrangements)

Issues of concern:

- upcoming (March 2006) DE Steering Board meeting where policies and practices for managing IP will be discussed
- need for workable definitions and guidelines to operate effectively in a technological teaching and learning environment while preserving academic freedom and faculty control over curriculum development

Copyright law protects an “original work of authorship” from the time a work is created in fixed form. The work immediately becomes the property of the author or those deriving their rights through the author. Copyright confers a ‘bundle’ of rights in the work - to reproduce, distribute, perform, display, and adapt it.

The law has a “work made for hire” provision (Sec. 101) where an employer may be considered the author in some situations, rather the employee who conceives and puts the work in fixed form. Whether or not a faculty member’s works fall into the “work made for hire” category is open to interpretation of the provisions of Sec. 101. Historically, there has been recognition of the “academic exception” – a practice to preserve academic freedom rather than a firm legal principle – whereby faculty members’ creative, scholarly works do not fall into the “work made for hire” category. Faculty members have typically arranged for and handled the rights associated with the publication and dissemination of works such as articles, lab manuals, books, photographic collections, etc. This situation does not always pertain where grants are involved, because there is a written agreement negotiating these rights.

Under Sec. 101, an employer derives rights to a work “specially ordered and commissioned for use...as an instructional text, as a test, as answer material for a test...” as a “work made for hire” unless a written agreement states otherwise. Therefore, accepting a specified course release or overload payment for development of course materials moves a work more clearly into the realm of “specially ordered and commissioned for use” where the employer holds copyright (to reproduce, distribute, perform, display, adapt). In the absence of a specific course release, overload payment, or written agreement, the “work made for hire” provision regarding faculty members’ works is open to interpretation.

Universities have interpreted the “work made for hire” provision differently, with many having policies that expressly recognize faculty members’ rights to instructional and other types of works. At the University of Alaska, BOR Regulation 10.07.05 states:

“The university will not assert ownership of copyrightable materials produced by faculty members as a part of their normal teaching and scholarly activities at the university and which do not result from projects specifically funded in whole or in part by the university or by a sponsor of the university.”

A UA Copyright Committee with faculty, staff, and administration members was working on policy development that would have created guidelines for better understanding what constitutes “a project specifically funded in whole or in part by the university” (BOR 10.07.05). The Committee was disbanded on February 25, 2005 by the UAF Director of Intellectual Property & Licensing.

In a document that was recently distributed to UA governance bodies, “Tech Transfer Practices at UA – Internal Review Comments,” there is discussion (pages 5-6) of “works for hire provisions in policy and bargaining agreements, particularly concerning web-based materials and distance delivery...and that management consider a ‘bonus’ mechanism whereby ‘works’ benefit the originator in a manner similar to the way many private sector employees receive bonuses when revenue generating or productivity enhancements result from a work for hire.”

Should this recommendation be adopted, then ‘bonuses’ could easily be construed as equivalent to Sec. 101’s “specially ordered and commissioned for use,” and faculty works would more clearly fall into the ‘work made for hire’ category where the employer owns copyright.

The discussion paper, ‘Issues of copyright for faculty-created instructional materials,’ is intended to help clarify areas in handling of copyright at UA that merit further understanding and definition. Other institutions have achieved a win-win situation that preserves incentives for creativity as well as academic freedom by specifying certain rights for faculty members, while conferring other rights and benefits to the institution for supporting the creation of works. Governance bodies may want to discuss the issues and suggest workable definitions and guidelines.

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