

## Intellectual Property Issues for Faculty and Faculty Unions

### I. Introduction

This document is intended to serve as an informational guide to faculty-related copyright issues. It focuses on two important issues: faculty ownership of faculty work and faculty use of other's copyrighted work. The AAUP hopes to inform professors of the law behind copyright so they can better understand their rights and better advocate for more favorable policies.

The AAUP firmly believes that work made by a faculty member belongs to and is copyrightable by solely that faculty member, not the institution he or she works for. This belief stems from academic tradition—which has historically recognized professors' rights to their own work—as well as from notions of academic freedom. It is the best and fairest way for copyright law to function in relation to faculty work.

However, the AAUP also acknowledges that universities and colleges may take advantage of certain legal concepts to cut back upon these rights and we want professors to be aware of these strategies, such as the work-made-for-hire doctrine, contractual transfers of professor ownership rights, etc. We aim to explain these principles and provide information and guidance, enabling professors and union members to fight to keep traditional copyright ownership in practice.

To achieve these purposes, this guide first gives a **general overview of copyright law**, introducing the background information about what a copyright protects, what types of work qualify for copyright, and how copyright ownership can be transferred.

Next, we examine the **history and law behind faculty copyright ownership**, providing information particular to the crossover between copyright law and employment as a professor, including (a) the work made for hire doctrine, (b) the teacher exception, (c) scope of employment, and (d) other specific issues such as transfer of copyright and substantial use of university resources.

Then we provide information on **what unions can advocate for** regarding copyright ownership, which explains policy rationales behind faculty ownership of copyright and details specific issues that unions can advocate for in university policies.

Finally, we also explain when and how **faculty can use others' work in the classroom**, including students' work.

We hope you find this guide informative, and for more information please see our other copyright guides (<https://www.aaup.org/issues/copyright-distance-ed-intellectual->

[property/resources-copyright-distance-education-and\)](https://www.aaup.org/report/statement-copyright) and the AAUP Statement on Copyright (<https://www.aaup.org/report/statement-copyright>).

## II. Copyright law overview

A. Copyright law is designed, most basically, to protect works from being copied by people who don't own the rights to them. The purpose of the law is to provide the protections necessary to direct investment toward production of abundant information.

B. The basic law on copyright is fairly straightforward: See 17 U.S.C. §102 (Subject Matter of Copyright: In General)

C. Specific Elements of Copyright Protection:

1. Copyright law protects original works of authorship fixed in any tangible medium.

a) This standard is a fairly easy one to meet; it is much less stringent than that for getting a patent. As logically follows, copyright offers much less protection than patent.

b) Copyright owners don't have to record their copyright. Copyright can simply be asserted once the work is fixed in a tangible medium. While copyright can be registered (and, if a lawsuit is filed to enforce a copyright, must be registered at that time), such registration is not necessary to create the copyright protection.

Note: Thus the © symbol is not a requirement to make an item protected, nor is the lack of such a symbol any indication that the work is not copyrighted. However, including the © symbol is an easy way to send a clear reminder to readers that the work is protected and that the author values that protection.

2. Covered works are anything fixed in a tangible medium.

a) This includes books, private letters, paintings, computer programs, motion pictures and other audiovisual work. It also includes anything else fixed, no matter how it is fixed. Thus, it includes documents "written" on a computer disk, web pages, notes on scraps of paper, even your grocery list. Anything fixed qualifies for protection.

b) This of course makes any policy requiring "reporting" of the creation of copyright material, or intellectual property, an absurdity.

3. Copyright does not protect ideas, nor does it protect the labor that goes into creating a written work.

a) No matter how much work goes into compiling data, for example, the data itself is not protected. If a work shows some originality or creativity in the way it is put together, that creative presentation might itself be copyrighted, but the data is not.

*Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). In this case the Supreme Court held that alphabetical listings in telephone directory white pages are not copyrightable. The Court allowed copyright protection for compilations or directories only for any original and creative elements of the arrangement or selection, and excluded protection of the underlying data. In doing so the Court rejected several decisions supporting a "sweat of the brow" doctrine. The Court concluded that the sweat-of-the-brow doctrine went too far in that it "extended copyright protection in a compilation beyond selection and arrangement. . . to the facts themselves."

#### 4. Copyright only lasts for a limited time.

a) Copyright now lasts for the life of author plus 70 additional years. For commercial products (commercial authors), it lasts 95 years from the date of publication.

b) Note, however, that the legal authority for any time limit on copyright comes from Article I, Section 8, Clause 8 of the U.S. Constitution, which promotes "the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This leaves the specific time to be set by Congress, which keeps expanding the time. It was expanded by the Sony Bono Copyright Term Extension Act (CTEA) of 1998. Legal challenges to the most recent expansion were unsuccessful. *See Eldred v. Ashcroft*, 537 U.S. 186 (2003).

#### D. The Bundle of Rights: What exactly does a copyright holder "own"?

1. Copyright law gives creators the exclusive right and authority to a "bundle of rights." Thus, the author owns not only the specific work, but the right to control its use. *See*, 17 U.S.C. §106 (Exclusive rights in copyrighted works).

2. This bundle of rights includes the right of:

a) Reproduction (the right to control all forms of copying of the work);

b) Translation, abridgment, revision (the right to control derivative works);

c) Public distribution; and

d) Public performance and display.

E. Copyright Ownership Defined:

1. Ownership of a copyright is different from ownership of a tangible object. *See* 17 U.S.C. §202 (Ownership of copyright as distinct from ownership of material object).
2. Ownership of copyright has to do with the right to control future use of the work, separate and apart from the treatment of the physical item on which that work is fixed.
  - a) For example, if an author writes a book, s/he owns the copyright. S/he has rights over what happens to the content of the book. But if you buy that book in the bookstore, the author does not own your copy. S/he has no right over what you do with that particular copy of the book. You can resell it at a used bookstore, give it to a friend, etc. But the author does have control over how you use the content of the book, and thus can control your reproduction of the book, translation of it, marketing of it, etc.
3. Transferring a copy of a book does not affect copyright and transferring copyright does not give a copyright holder property rights to any particular material object.

F. Transfer of Ownership of Copyright *See* 17 U.S.C. §204, (Execution of transfers of copyright ownership).

1. Copyright must be deliberately transferred.
2. Any transfer of ownership must be both in writing and signed.
  - a) A unilaterally imposed policy cannot legally take away your copyright ownership of your work.
  - b) However, if you sign an employment contract ceding copyright to your work or sign a faculty handbook indicating acceptance of the policies within, such a signed document could be construed as a contract and might constitute a valid transfer of rights.
  - c) Courts generally interpret the signed writing requirement liberally, allowing, for example, a signed check to suffice. *See, e.g., Franklin Mint Corp., v. National Wildlife Art Exch., Inc.*, 195 USPQ 31 (E.D. Pa. 1977), *aff'd*, 575 F.2d 62, cert. denied, 439 U.S. 880 (1978). But an agreement that is signed just by the recipient of the copyright, but not by the assignor (the copyright holder) has been held not to be a valid transfer of ownership, even though the copyright holder had accepted payments under the agreement. *See Berger v. Computer Info. Publishing, Inc.*, 1984 U.S. Dist.

LEXIS 15291 (S.D.N.Y. 1984). *See generally*, Paul Goldstein, *Copyright*, 2 ed. §4.5 (2005).

### **III. Faculty copyright ownership: history and law**

Historically, institutions have recognized that faculty own the intellectual property rights (*i.e.* copyright) to work they create, reflecting the principles of academic freedom. Thus, the AAUP policy states that traditional academic work (*e.g.* class notes, syllabi, books, articles, etc.) is owned by the faculty member who created it, not the university.

However, AAUP policy must interact with the relevant copyright statutes and case law, so this section provides information regarding this crossover. Specifically, it explains the work-made-for-hire doctrine, discusses the teacher exception to that doctrine, defines when a work is made in the scope of employment, and discusses other issues like distance education, transfers and disclaimers of copyright, and substantial use of university resources.

#### **A. Work Made for Hire doctrine**

The “work made for hire” doctrine is an exception to the general rule that copyright ownership belongs to the creator. Roberta Rosenthal Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, Santa Clara Computer and High Technology Law Journal 13 (Dec. 2001).. The doctrine was introduced in *Sherrill v. Grieves*, 20 C.O. Bull. 675 (D.C. 1929) and later codified in the Copyright Act of 1976. “Work made for hire” is by default the starting point for copyright policies within universities, because most faculty works likely fall within the scope of their employment. *See* Glenda A. Gertz, *Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-for-Hire Dilemma*, 88 Wash. L. Rev. 1475-76 (2013); *Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education*, 16 Touro L. Rev. 996 (2000).

The Copyright Act of 1976 defines a work made for hire as a work that (1) can be made for hire if it is created by an “employee within the scope of his or her employment”, or (2) is specially ordered or commissioned for certain types of uses where the parties agree in writing that the work shall be considered a work made for hire. 17 U.S.C. § 201 (2015); *see generally* Kwall, *supra*, at 13. Thus, the work made for hire doctrine will apply, in the absence of a written agreement, if a professor is an “employee,” and the copyrighted works are “created within the scope of his or her employment” with the university.

The Copyright Act of 1976 does not explicitly define “employee” or “scope of employment.” To determine whether an individual is an employee under the Act, courts have adopted a thirteen (13) factor test under the common law of agency set forth in *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–72 (1989). *See* Michael W. Klein, “*The Equitable Rule: Copyright Ownership of Distance-Education Courses*,” 31 J.C. & U.L. 143 (2004). The *Reid* factors are:

The skill required; source of instrumentalities and tools; location of work; duration of relationship between parties; whether the hiring party had the right to assign additional projects to the hired party; the extent of the hired party's discretion of when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is a part of the hiring party's regular business; whether the hiring party is in business; employee benefits; and tax treatment of the hired party.

*Reid*, 490 U.S. at 751–52. These factors are considered together in a balancing test, and no single factor is dispositive.

To determine whether employees act within the scope of their employment when creating a work, courts consider three factors derived from the common law of agency: (1) whether the employee created a work he or she was employed to perform; (2) the extent to which the work occurred during work hours and space; and (3) whether the purpose of the work is to serve the employer. *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52.

#### B. Teacher exception

The judicially created “teacher exception” to the work made for hire doctrine allows university professors to retain ownership of their copyrighted course materials. There is current debate as to whether the “teacher exception” was abolished by Congress when it omitted reference to the exception in the 1976 Copyright Act. Nathaniel S. Strauss, *Anything but Academic: How Copyright's Work-for-hire Doctrine Affects Professors, Graduate Students and K-12 Teachers in the Information Age*, 18 Rich. J.L. & Tech. 4 1, 2 (2011).

There are three principles in support of the “teacher exception” that is set forth in the case law. *Id.* (citing *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988); *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987)). First, based on academic tradition, there is a widespread assumption that professors own the scholarly works they create. *Id.* at 27. Second, disturbance of that academic tradition would disrupt settled practices of allowing professors to retain copyright to traditional scholarly works. Third, without a “teacher exception,” scholarship in the university context would suffer due to a lack of academic freedom because universities and colleges could use copyright to suppress scholarship, they find objectionable. *Id.*; see also Klein, *supra*, at 160 (noting that universities do not typically assign scholarly works to professors and doing so may violate the professor's academic freedom).

For example, without a “teacher exception,” faculty could lose control over distribution, revisions, and derivative rights of their works. In such a case, universities could withhold distribution of that work from the academic community if the work expressed ideas not supported by the university. Michael W. Klein, Esq., *"Sovereignty of Reason:" an Approach to Sovereign Immunity and Copyright Ownership of Distance-Education Courses at Public Colleges and Universities*, 34 J.L. & Educ. 199, 205 (2005) (faculty losing control over distribution,

revisions, and derivative works would “would threaten academic freedom.”). As a result, activist faculty is limited in opposing corporatization trends in education. Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?* 12 B.U. Pub. Int. L.J. 73, 86-90 (2002). Lastly, a lack of academic freedom could frustrate the exchange of ideas among students. Chanani Sandler, *Copyright Ownership: A Fundamental of Academic Freedom Comment*, 12 Alb. L.J. Sci. & Tech. 232, 246 (2001).

### C. Scope of employment

1. Employees: While the tradition in the academy is to view faculty as scholars affiliated with an academic institution, under the law there is little debate that professors employed on a salaried basis, with benefits, tax withholding and other symbols of employment, are employees. Those faculty working on a contingent basis, however, or on an adjunct or per course basis, might present a different picture.

2. The Scope of Employment:

a) The distinction between work and personal development is a harder line to draw for faculty than other employees.

(1) Professors have the unusual responsibility, as part of their employment, to be creative and independent outside of class in their intellectual scholarly life. Thus, the position of a professor requires an "employee" who researches and writes not to promote a particular viewpoint of the employer, but one who engages in an independent search for truth and knowledge. This model does not fit into the work-for-hire framework.

b) As one commentator has noted, "insofar as custom plays a role in determining the intent of the parties to an employment contract, it defines, at least in part, what professors are hired to do. Thus, the longstanding assumption that professors own the copyrights to their works is evidence that the parties do not consider the creation of copyrightable works of authorship to be within the scope of employment." Laura Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. Rev. 223 (1992).

c) Another legal scholar has opined: "Because of the tradition of independence and judgment that are commonly associated with professional activities, the fact that the individual who prepared the work is a professional, such as an architect or university professor, will weigh heavily toward a finding that he, rather than his employer, is the author of any works that he creates while in the

other's employ." Paul Goldstein, Esq. *Copyright*, 2nd ed. §4.3.2 (Aspen Publishers 2005).

#### D. Other specific issues for faculty

##### 1. Distance education

a) Ownership of faculty-created distance education and massive open online courses (MOOCs) is generally covered in university copyright policies.

b) See AAUP's, "Faculty Rights and Responsibilities in Distance Learning" for more information: <https://www.aaup.org/faculty-rights-and-responsibilities-distance-learning-2000>.

##### 2. Disclaiming and transferring copyright ownership in university policies

a) Per academic tradition, some university copyright policies either expressly "disclaim," or do not claim at all, ownership of traditional scholarly works, like pedagogical, scholarly, or artistic works.

b) Other policies provide for additional procedures in which the professor transfers the ownership of the work to the university, or vice versa.

c) The legal effect of disclaiming copyright to traditional scholarly works is often not clear.

(1) While many policies appear to recognize a teacher exception implicitly by disclaiming traditional scholarly works, the problem is that simply disclaiming copyright ownership may not properly effectuate a valid transfer of copyright ownership from the university to the professor in cases where ownership vests initially with the university (such as when the work is a WMFH and the teacher exception is held not to apply).

(a) Disclaiming copyright ownership is meaningless if the university does not own the copyright in the first place, except that it could possibly prevent it from claiming ownership in court after the fact, under the doctrine of promissory estoppel.

(b) A valid transfer of copyright must comply with section 204(a) of the copyright statute. 17 U.S.C. § 204(a) ("[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is

in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent").

(i) This means that the transferor (university or professor) must transfer ownership to the other party through either: (1) a second contract signed by the transferor; (2) the policy itself, if it is signed by the transferor; or *maybe* (3) an employment contract signed by the transferor which incorporates the copyright policy by reference.

The answer to whether #3 might effectuate a valid transfer is not clear. While the plaintiffs raised this question in *Rahn v. Board of Trustees of Northern Illinois University*, 803 F.3d 285 (7<sup>th</sup> Cir. 2015), the court did not address it. The case law on transfers varies from circuit to circuit, but generally it may require more specificity than incorporation by reference.

(ii) This also means that in many cases, professors must seek a valid transfer in order to claim the university policy's disclaimed works. Some universities provide notice and procedures to effectuate a valid transfer explicitly in their policy, while others are silent, and the requirements are often unfulfilled.

d) *See infra*, "Faculty copyright ownership: what unions can advocate for" for information on how to advocate for policies on transfer/disclaimer of copyright.

### 3. Substantial use of resources

a) In creating works or course materials, professors may use more university resources than are customarily provided. Many university copyright policies provide that in such circumstances the copyright belongs to the university rather than the professor.

(1) Under the general University of California (UC) policy, *e.g.*, significant resources are those "in excess of the usual support generally available to similarly situated faculty members. Customary secretarial support, library facilities, office space, personal computers, access to computers and networks, and academic year salary" are not considered significant resources. *See* <http://policy.ucop.edu/doc/2100004/CourseMaterials>.

(2) Custom is often department-specific, so a comparison of resources provided to professors within the same department can be a useful indicator of when substantial university resources have been used.

b) It is important for professors to understand how a university's policy defines a "substantial," "exceptional," or "significant" use of university resources as this may affect copyright ownership of the work.

(1) Note: Each university policy varies in whether and how it defines substantial use of university resources. Therefore, it is important to pay close attention to these definitions.

c) Typically, where a professor has used limited secretarial support, library facilities, and desktop or personal computers in creating a work, a university will consider this to be a customary, and not substantial, use of its resources.

d) Most policies claim ownership of such works via one of the following mechanisms:

(1) The policy itself purports to transfer copyright ownership from the professor to the university;

(2) The policy creates a contractual obligation of the professor to transfer in full, or in part, the copyright of works to the university using a second agreement; or

(3) "Substantial use of resources" clauses attempt to obviate any obligation for the university to disclaim, or transfer ownership of such work, even though the university would otherwise do so under the terms of the policy; essentially, such policies presume that the university initially owns the copyright to such works.

#### **IV. Faculty copyright ownership: what unions can advocate for**

Faculty and unions have successfully advocated for favorable university policies through collective bargaining and university governance. Typically, universities follow their own policies and these types of issues do not usually go to court. However, unions should advocate for university policies that are beneficial to professors whether or not they are required by law. This section will first explore the policy rationales for why professors should own copyrights in their own work, which can support bargaining efforts. Next, this section offers suggestions on specific issues unions should consider advocating for in union policies, such as an explicit definition of traditional scholarship and specifying that professors retain ownership of their works.

A. Policy rationales for professor ownership of copyright

1. Generally, faculty scholarly work is not considered work-for-hire. "[I]t 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 purposes." *Statement on Copyright*, AAUP Policy Documents & Reports 264 (11th ed. 2015).

2. Despite this general practice and legal understanding, some colleges and universities still proclaim that even traditional academic works are "works made for hire," and that the institution is the initial owner of copyright. "The most common standard employed by universities for claiming ownership of faculty works is the 'use of university resources' or 'significant or substantial use of university resources.' ... However, since there is no tradition of applying this standard, the process of defining it will be one of uncertainty for both parties..." Laura Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. Rev. 223 (1992).

3. Administration ownership of faculty scholarly works, lecture notes and teaching materials would profoundly contradict the practices of the academic community. Faculty scholarship as work-for-hire doesn't fit, legally or policy-wise, into academic scholarship.

a) Academic freedom requires that faculty be free to produce work reflecting their own views and theories--not those of administration or trustees. If all work belonged to the administration, then its content would also have to be controlled or at least accepted by the administration, which would vitiate any freedom of thought or inquiry.

(1) "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." *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents & Reports 14 (11th ed. 2015).

(2) Courts have generally looked to employer control over the work as a deciding factor in determining work-for-hire ownership. While debate exists as to whether that control must be actual or simply be the right to exercise control, the focus on the employer's ability to direct the outcome remains.

b) In traditional academic works "the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions." Thus, it follows that the faculty member rather than the institution

would have ownership. *Statement on Copyright*, AAUP Policy Documents & Reports 264-65 (11th ed. 2015).

(1) "Were the institution to own the copyright in such works, under a work-made-for-hire theory, it would have the power, [to control it] and indeed to censor and forbid dissemination of the work altogether. Such powers, so deeply inconsistent with fundamental principles of academic freedom, cannot rest with the institution." *Id.*

c) Not only is faculty control of its scholarly work required for academic freedom reasons, but in fact, administrations are usually happy to distance themselves from some of the scholarly work of faculty.

(1) If the administration owned all the work of faculty, then it would be responsible for the content. Few administrations want to claim responsibility for every conclusion reached by faculty.

(a) For example, does the University of Colorado want the copyright ownership, and responsibility, for Ward Churchill's "little Eichmanns" essay? It appears not. As the Chancellor himself has stated, "Professor Churchill's views are his own and do not represent the views of University of Colorado faculty, staff, students, the administration or the regents."

(b) In another example, a professor at Brandeis wrote a book about the composer, Rebecca Clarke, and it was published by the University of Indiana Press. After publication, the owner of unpublished papers by Clarke contacted the press, claiming the book made unauthorized use of the papers. The press withdrew the book, but the owner of the papers also wrote to the professor's home institution, Brandeis University, asking questions about the "relationship" of the faculty member to the institution. The administration responded that the work was done by the faculty member as an "independent scholar," and that work of such scholars belongs to the scholar, and not to institution.

(2) If the institution owned the scholarly work of faculty, it would also be responsible for items like negotiating book contracts, publishing agreements, handling revisions and updates, etc. Few institutions have the desire or resources to assume these tasks.

#### B. Specific issues to advocate for

1. An important first step is language defining with specificity the "traditional scholarship" that belongs to faculty so that it includes include things like syllabus, tests, lectures, computer programs, teaching aids, etc., in addition to articles and books.

a) The AAUP - *D'Youville College Contract*: Faculty owned intellectual property is defined as "including, but not limited to, books, tests, articles, monographs, glossaries, bibliographies, study guides, laboratory manuals, syllabi, tests and work papers, lectures, musical and/or dramatic compositions, unpublished scripts, films, filmstrips, charts, transparencies, other visual aids, video and audio tapes and cassettes, computer programs, live video and audio broadcasts, programmed instruction materials, drawings, paintings, sculptures, photographs, and other works of art."

2. Other faculty work, such as that requiring substantial resources, may be singled out as the property of the university, jointly owned and/or as the subject of future debate or contracting.

a) AAUP - *Cuyahoga Community College Contract Article 24, Sec. 24.02*: "Faculty members and the College shall share the ownership and disposition of copyrightable material, and patentable discoveries or inventions and intellectual property generated where there is a substantial use of College personnel or facilities not uniformly provided to other similarly-situated faculty members."

b) AAUP - *Rider University Contract, Article XXXII. C. 3.*: "Where the substantial use of University Resources occurs, the University and the bargaining unit member shall be joint owners of the intellectual property, and the creator and the University shall negotiate the allocation specific ownership interest, amounts of remuneration, respective obligations, etc." "

3. Agreements are often then made to make agreements at a future date.

a) AAUP - *D'Youville College Contract, Article XX, Sec. C*: "The College and the employee are joint owners of intellectual property when they enter into a specific agreement to create such intellectual property and such agreement shall define the development obligations and ownership share of each party."

4. Another oft-pursued option is to grant copyright to the faculty but reserve certain uses to the institution. For example, some say the college has right to purchase intellectual property owned by faculty (AAUP - *D'Youville College Contract, Article XX.C.2.*) or has license (*e.g.* non- exclusive right) to use it (*Id.*, at C.1), as way of preserving copyright ownership with faculty but at the same time preserving the materials for use for university purposes.

a) AAUP - *D'Youville College Contract, XX.C.1*: "Intellectual property created by the employee in the fulfillment of the employee's normal duties and responsibilities under this collective bargaining agreement is presumed to belong to the employee for proprietary or marketing purposes outside of the College but is available to the College for internal review and for review by external agencies regulating the College"

b) AAUP Cuyahoga Community College Contract, Article 24, Sec. 24.01: "Faculty members shall have sole rights to ownership and disposition of copyrightable material. . . generated by their own initiative, provided there is not substantial use of college. . . resources. However, supplementary course material prepared by a faculty member, even if copyrighted, which has no reasonable market potential outside the college will be made available without charge."

Note: Often conflicts can be resolved by retaining copyright with the faculty member but giving the university employer a license to use the material for campus or educational purposes.

6. For clarity, it is beneficial to professors that university policies allow for the express transfer of copyright ownership back to the professor for scholarly works. This makes professor-ownership clear.

7. AAUP Suggested Language:

AAUP has suggested language available covering possible ways of addressing the issues of intellectual property and distance education. The suggested language on intellectual property provides guidance on five main areas:

a) Definitions of intellectual property: this language provides specific guidance on how to distinguish between patents and copyright, and what to include in the definitions of each.

b) Ownership of intellectual property: this language sets out both the fundamental tenet of faculty ownership of scholarly work, and then the different, limited areas of joint ownership and work-for-hire, including specially commissioned or specially contracted work.

c) Use of intellectual property: preserving ownership for the faculty but allowing the institution free use of such material for particular purposes.

d) Treatment of funds generated from intellectual property: giving control over funds primarily to the owners of the copyright

e) Resolving emerging disputes: this language sets up an Intellectual Property and Policy Rights Committee made up of faculty, or faculty and administrators, to deal with novel, uncovered, and emerging issues.

## V. Faculty use of others' work

### A. Use of copyrighted material in class: fair use

1. Fair use is a statutory exception to the general rule of copyright ownership. It affects or limits not who is considered the author and copyright holder, but rather the *rights* of that copyright holder. The doctrine provides that no matter who owns the copyright, certain uses are *not* considered a violation of that copyright.

a) The fair use exemption was initially judge created law; it evolved from case law. It was eventually codified in 17 U.S.C. §107, during the 1976 revision of the Copyright Act, and is now a statutory exception.

2. Notwithstanding its now-codified status, the fair use exemption is still vague and unclear, depending on the specific facts and circumstances.

3. Because of this lack of precision, fair use analysis can be extremely frustrating. As one court put it, the doctrine is "so flexible as virtually to defy definition." *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

4. Statutory Codification: *See* 17 U.S.C. §107 (Limitations on Exclusive Rights: Fair Use).

5. The fair use analysis is based on two basic concepts: the purpose of the use and the fairness of how that the work is used.

a) *Purposes*: The fair use doctrine says that copying for certain purposes will not be considered a violation of copyright because there are certain purposes where copying betters society.

(1) The statute sets out a non-exclusive list of purposes that are assumed to be of benefit to society and thus eligible for fair use protection. While this list does not include all possible fair use purposes, it can be viewed as setting out a premier set of uses that deserve preferred status in the application of fair use. *See* Robert A. Gorman, *Copyright Law* (Federal Judicial Center 1991).

(2) This "preferred" list includes uses crucial to faculty, such as criticism, comment, teaching, scholarship, and research, which form the basis for most of the classroom and research copying faculty do.

(a) This list, however, is clearly illustrative, not exhaustive. Note, for example, that the two Supreme Court cases addressing this issue, *Harper & Row Publishers v. Nation Enterprises* and *Sony Corp. of America v. Universal Studios, Inc.*, do not seem to follow this list. *Harper* dealt with news reporting, one of the enumerated factors, but was found not to be fair use, and *Sony* dealt with private videotaping of television programs, a use clearly beyond the "preferred" list, yet was found to be fair use. (see further discussion of cases in IV.B.6 below.) It is this particular provision that makes fair use the legal basis for much of classroom use of copyrighted materials.

(3) The list of purposes includes use not only by citation or reference, but also by reproduction in copies, including multiple copies for classroom use. It is this particular provision that makes fair use the legal basis for much of classroom use of copyrighted materials.

b) *Fairness Factors*: The fair use analysis does not stop at the list of enumerated purposes, however. Courts also look at the way the materials are used for that purpose. The use must be fair. The statute sets out four factors for courts to consider in determining whether a use is fair use.

(1) The Purpose and Character: (includes whether the use is a commercial use or an educational and/or non-profit use.

(a) The general rule is that commercial use is presumed not to be fair use. See, e.g. *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) ("[I]f the intended use is for commercial gain, [the] likelihood [of future harm] may be presumed.")

(i) The idea is that if someone is profiting from use of a copyrighted material, the copyright holder should be benefiting from that use.

(2) The Nature of the Work:

(a) This second factor is designed around the idea that there should be greater access to works of fact or information. The point of the copyright law is to increase public knowledge by encouraging creation of information, and thus factual, informative materials are more likely to be subject to fair use than purely entertainment-based materials.

(b) This factor also can implicate the availability of the work. If the work is somehow unavailable (out of print, never reproduced, etc.) then this aspect of its nature would make it more likely to fall under fair use.

(c) Unpublished works would also receive special consideration under this factor. The rights of the author to control the distribution of the work and its presentation would weigh more heavily against a claim of fair use if the work had never been published, than if it had already been made available. *See Harper & Row*, 471 U.S. 539 (1985).

(i) Note however, that the drafters of the copyright law added the last sentence of the statute, "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." The sentence makes clear that while the unpublished nature of a work is a consideration, it is not the only consideration nor a complete bar to a finding of fair use.

(3) How Much is Too Much? ("The amount and substantiality of the portion used in relation to the copyrighted work as a whole").

(a) The third factor is directed at whether the amount of work used is more than necessary to achieve the protected purpose. There is no magic number of pages or number of words that makes copying fair use.

(b) Courts will look to whether the user took only what was necessary to effectuate the purpose of his or her use, or whether the copying exceeded that which was necessary to make the point.

(i) Example: In a case involving parody, a certain amount of use is necessary to evoke the work being parodied. But replaying a whole movie as part of creating a parody of that movie would be excessive copying. *See, e.g., Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979)(court found that "Scarlet Fever," a musical based on *Gone with the Wind*, had so many similarities of character theme, dialogue, etc. that it was neither a parody nor a satire, but instead an unauthorized adaptation of the novel).

(c) Note, too, that work that was initially fair use under this factor may move outside of fair use protection with repeated use. Material distributed to one class with a limited number of students might be analyzed differently if that same material continues to be used class

after class or is distributed more widely through distance education or other means.

(d) This third factor also has a qualitative element, as well as quantitative. For example, in *Harper & Row*, the copied amount was a small portion of the total book, but because it was the heart of the work (and the most commercially important part (see 4 below)), the court considered its copying not to be fair use.

(4) The Market Effect ("the effect of the use upon the potential market for or value of the copyrighted work"):

(a) Courts use this fourth factor to look at who is profiting from the work, both now and in the future.

(b) Courts consider not just actual harm, but potential harm. *See, e.g., Harper & Row*, 471 U.S. at 568 (To negate a fair use claim, a copyright holder must only show "that if the challenged use 'should become widespread' it would adversely affect the potential markets for the copyrighted work.").

(c) This factor has been key in some of the coursepack cases, where the courts have found copy shop production of coursepacks not to be fair use. *See, e.g., Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996) (court concluded that the market effect was "the most important factor," and ruled that the publishers established a "diminution in potential market value.")

## 6. Some Other Fair Use Cases

a) *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff'd*, 804 F.3d 202 (2d Cir. 2015): Google scanned books and created a full-text searchable database which displayed "snippets" of text around the search phrase, which was accessible by anyone. The Court ruled that since the "snippets" gave information about the book rather than enabling someone to copy it, the fair use exception applied and there was no copyright infringement.

b) Coursepack Cases:

(1) *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996): An academic publisher sued a copy shop that bound segments of scholarship into "course packs" for copyright infringement. The court found that the fair use doctrine did not obviate the need to obtain permission to reproduce

the works. The court explained that the fair use doctrine "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." At the same time however, the court decided that the fair use doctrine allowance of multiple copies of classroom use does not provide "blanket immunity." The court reasoned that the factor regarding "the effect of the use upon the potential market for or value of the copyrighted work" was "the most important factor" in the fair use exemption and ruled that the publishers established a "diminution in potential market value." The court also noted that the professors assigned as much as 30 percent of one copyrighted work and found that amount not "insubstantial."

(a) Publishers continue to file cases against copyshops selling coursepacks. *See Elsevier Science v. Custom Copies and Elsevier Science v. Westwood Copies, Inc.*: These cases were brought by various presses against copyshops selling coursepacks to students at the University of Florida at Gainesville and at UCLA. In both cases the copyshops settled with the publishers for an undisclosed amount in 2003.

(2) *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014): Georgia State University allegedly encouraged faculty to offer unlicensed digital copies of scholarly work as a no-cost alternative to traditionally licensed coursepacks. Judge Evans of the 11th Circuit evaluated each of the 49 alleged infringements and found only four of the coursepacks constituted copyright infringement. In her analysis, the judge emphasized that the "purpose and character of the use" factor for evaluating fair use always favored the university since it is for educational purposes. Also important in her analysis, the judge found that if the copyright owner did not offer licenses for excerpts (i.e. there was no available alternative), the evaluation of the infringement claim favored the university.

## 7. DMCA exemption

a) The AAUP collaborated with others to advocate for several exemptions to the Digital Millennium Copyright Act (DMCA) which were granted by the Librarian of Congress. Specifically, the exemption allows for the educational use of motion pictures (a legal category that includes television shows, commercials, and almost any other work involving moving pictures, as well as feature films). It allows faculty to copy short portions of protected works for use in criticism/commentary in these formats: DVD, streaming video delivery, and, in some cases, Blu-ray. In addition, authors can access these video formats to make criticism and commentary in the burgeoning new media of multimedia e-books. The Library of Congress later modified this exemption to allow authors nationwide to access content from encrypted media for use in multimedia e-books. The previous exemption was limited to authors "offering film analysis." Now, any non-fiction author will be able to use the exemption, greatly improving their ability to

make fair use. Without these exemptions, copying from protected media would be unlawful, even for educational purposes. 8. Practical Considerations for Fair Use by Faculty:

a) Consider whether, if others used your work as you are contemplating using theirs, would you lose money? Would you consider it a sufficiently limited and justifiable reference? Would you have wanted them to ask permission? Pay a fee? Would you have been willing to give permission if you had been asked?

b) Would you be upset? The Supreme Court has referred to this approach as the "equitable rule of reason;" "[Perhaps] no more precise guide can be stated than Joseph McDonald's clever paraphrase of the Golden Rule: 'Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.'" *Harper & Row*, 471 U.S. 539, 550 n. 3 (citing 3 Nimmer § 13.05[A], at 13-66, quoting McDonald, *Non-infringing Uses*, 9 Bull. Copyright Soc. 466, 467 (1962)).

c) Remember that acknowledging the source is important in research but does not substitute for permission in using the work.

d) Keep in mind that the users' inconvenience is not a factor in the fair use analysis. Therefore, the fact that the piece is really needed for class tomorrow, or that the faculty member doesn't have the phone number of the author or the money to pay for use are not valid excuses.

e) In making coursepacks:

(1) Consider whether you can use a university in-house copy shop, rather than a commercial one. (The closer tie to the university and the removal of the profit receiving middleman, provide better support for a fair use, "multiple copies for classroom use" argument.)

(2) Consider whether the copyshop gets permissions for you, or whether you need to follow up yourself.

(3) Be brief and sparing in excerpts.

(4) Attribute excerpts.

(5) Get permission.

(a) If use of a work is truly spontaneous, you might be able to argue fair use, but if you have time to get permission, do so. Note too that even if the first use is spontaneous, you will still need to get permission for

future uses, as the spontaneity argument will not be available with repeated use.

9. Pointers to Consideration of Fair Use in the Electronic World:

a) Many of the same considerations for fair use exist in the electronic classroom as exist in the traditional classroom. However, the electronic classroom amplifies all the risks of the traditional classroom.

(1) Every time you download a web page, you are copying someone's work. The web is essentially one big photocopier; every time you view a webpage, or forward an email, you are making copies of it. That consideration becomes increasingly important when you start moving beyond downloading for your own research and begin to distribute that webpage to students around the country or globally.

(2) Similarly, posting something on your own webpage can be a violation of the author's copyright, even if you got it from another webpage, and even if you attribute it.

(a) Example: A lawsuit was filed by an author against colleges and universities for allegedly allowing people to use their web servers to post copies of his self-published book on income tax laws. While the institutions may be protected because they are only involved as owners of the servers, not controllers of the individual websites, (and the courts dismissed the case against the webserver operators), the faculty or other members of the university community who may have posted the book could be liable for copyright infringement. "Colleges Are Unconcerned by Online Author's \$2.6 Billion Copyright Lawsuit," *Chronicle of Higher Education* (March 7, 2002); *Mitchell v. AOL Time Warner Inc., et al.*, 2002 U.S. App. LEXIS 26313 (December 2, 2002).

b) The greatest risk of technology is that it means more people see what you are doing. You are "on the radar screen" much more when you post something on the web than when you discuss it in a traditional classroom.

c) Greater publication also means greater harm to the copyright holder. The more you cover the market by your use of the copyrighted work the more potential financial harm to the person whose copyright is violated.

d) Materials presented on the web have a much longer lifespan than hard copies in traditional classrooms. They tend to have a life of their own, staying up and accessible for years, increasing the risk of infringement and liability.

#### 10. TEACH Act: certain uses of teaching material will not constitute copyright infringement

a) Section 110 is another statutory exemption to the bundle of rights belonging to the copyright holder. It sets out certain uses that will not be considered violations of copyright.

(1) Originally passed in 1976, it was designed to deal with the then looming onset of televised education. Thus, it covered face-to-face classroom performances of copyrighted works, including dramatic works, for teaching purposes in nonprofit educational institutions.

(2) The statutory provision was made obsolete by the advent of web-based distance education, however, and the statute needed amendment for many years.

b) Congress finally passed the Technology, Education, and Copyright Harmonization (TEACH) Act in 2002. It amends Section 110 so that while the section continues to deal with the performance of nondramatic literary and musical works, it also addresses issues of asynchronous, web-based distance education.

c) Section 110 is different from Section 107 (fair use) because Section 110 doesn't require the use to be fair. There is no balancing of factors or analysis of motive. Rather, it sets out specific limited uses that are automatically protected. The flip side is that the teacher exemption is also more limited than fair use; it sets out very specific uses and very specific criteria and is thus much narrower than fair use.

d) Statutory Language (See 17 U.S.C. §110(Limitations on Exclusive Rights: Exemption of Certain Performances and Displays)).

e) Section 110(1) is the old law, and still protects the type of in-person displays that it has always protected. Section 110(2) is the new part of the law. The law now provides that the following activities are not infringements of copyright:

(1) § 110(1): Exempts from copyright violation the performance or display of any work done in:

(a) the course of face-to-face teaching activities of a nonprofit educational institution, (including performances or displays by students and/or professors),

(b) which are presented in a classroom or similar place devoted to instruction.

(2) §110(2): Extends this coverage to performance *via digital* transmission of:

(a) an entire non-dramatic literary or musical work,

(b) a limited and reasonable portion of all other works, including videos, films, and dramatic musical work,

(c) a display of still images in amounts typical of face-to-face displays in classroom.

(3) The new part of Section 110 contains significant restrictions, however, that at the current time may swallow its benefits. To be covered:

(a) all displays or performances must be made to students officially enrolled, wherever they are located (dorm, work, home, class, library, etc.),

(i) thus, there must be protections to ensure, "to the extent technologically feasible," that web postings, for example, are not accessible to those other than the enrolled students.

(b) all displays or performances must be part of "mediated instructional activities" of an accredited institution,

(c) institutions must have technological measures in place that reasonably prevent students from retaining or redistributing material,

(d) the institution can't interfere with technical protection measures of the copyright holder, i.e. it can't circumvent or otherwise go around copying protections the copyright holder has put in place, and

(e) The institution must adopt and maintain institutional policies on copyright and give notice that materials might be copyrighted, which means that the institution must not only have a copyright policy, but must provide copyright notices, and inform faculty, students and relevant staff about copyright law.

(f) The Section 110 exemption doesn't cover:

(i) any copy that is "not lawfully made and acquired,"

(ii) any materials that are "produced or marketed primarily as part of mediated instruction activities transmitted via digital networks". (In other words, it doesn't cover anything designed and marketed to the distance education market, on the theory that such materials are designed to be purchased, and copyright holders should benefit from that purchase.)

(iii) products typically purchased by students, like textbooks or coursepacks, again on the theory that copyright holders should benefit from that purchase.

a) General Points for Faculty Members on The Teacher Exemption

(1) The statutory exemption, although broadly titled, is limited to very specific situations.

(2) It is not a replacement for fair use.

(3) It provides some more options than fair use, but faculty must be careful of all the caveats.

(4) As more institutions adapt to this law, look for institutional guidance to be forthcoming regarding institutional policies, notices and protections. Faculty should be involved in such discussions and should pay close attention to both the policy development process and the resulting official policies of the institution.

(5) This provision may eventually be very helpful to faculty. It presents an unusual scenario however, because while the protections it provides benefit faculty use of material in the classroom, the caveats it includes are primarily controlled by the administration. Thus, a faculty member who relies on this provision may run into trouble of technological and policy protections are not in place as required, even though the faculty member may have little control over the implementation of such protections. Thus, faculty should be careful about relying too heavily on its provisions before investigating what policies and protections are already in place.

Note, however, that this unusual circumstance provides a good opportunity for faculty to work with the administration toward a common goal of providing greater copyright protection for classroom use of materials while at the same time preventing institutional and faculty legal liability.

#### B. Use of student work

1. Works by *students* as students are entitled to copyright protection and belong to the students.

a) Faculty need to get permission from students to copy and distribute their works just as they would any other copyrighted work. Some faculty address this issue by having students sign a waiver at the beginning of the class.

b) Works by students as employees are works-for-hire.

(1) To the extent students are being paid for work they do, their work is work-for-hire. This payment could take forms other than strict salary, like tuition reimbursement, etc. Again, however, the only work covered would be that directed by the employer and related to the employment. If a paid graduate assistant also does scholarly work during the time as a graduate student, that scholarly work would still belong to the student.

#### **VI. Conclusion**

University copyright policies vary widely. Largely due to the commercialization of higher education, copyright policies have become more restrictive, with universities claiming more copyright ownership today, than in the past thereby threatening academic freedom. Without protection for the free and unfettered search for knowledge, our universities and their faculties will lose their value to society. It is all the more important that faculty (and faculty unions) address and resolve these issues in a way that allows faculty to have confidence in their ability to create and control their scholarship.