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Commentary
Intellectual Property / Copyright application in Higher Education

Since the first copyright laws were enacted in England in 1556, (Alexander & Alexander, 2011) authors have been attempting to protect their work and the results, i.e. profits, associated with the same. In higher education, this work takes place on three main stages: the universities who seek to protect their interests in the work created under their watch and expense; the faculty who create works of various kinds and who must navigate the policies regarding ownership of those works; and publishers who seek to protect their interests in the works which they choose to produce and which are a sign of the ever-shrinking world and the access to information in it.

Universities find themselves in the position of establishing policy to guard the works created by their employees, using equipment purchased by the institution, from not only infringement by others, but also in order to protect the interests of the university. At what point does a faculty member's work go beyond "work-made-for-hire" (as defined in § 201(b) of U.S.C. - Title 17 - Copyrights) and enter into the rhelm of copyright? In a case described in Alexander & Alexander (2011), *Weinstein v. University of Illnois at Chicago*, (811 F.2d 1091, (7th Cir.) (1987)) an issue between two faculty members, one of whose contracts was also not renewed during the timeframe, developed into a legal battle over an idea that resulted in an article. While the court saw fit to determine that the article in question was not a work-for-hire and the former faculty member did hold the rights, the judicial also determined that the institution was not at fault for the disagreement or the result.

In another case, which is ongoing, Georgia State University has found itself in a suit brought by several publishers regarding the usage of copyrighted materials through an eReserve program in the library – intended to provide ready access to materials - *Cambridge University Press et al v. Patton et al,* 1:2008cv01425 (Northern District of Georgia). While the case was brought in 2008 and a State court verdict was rendered in 2011, the case is still being appealed. (Georgia State copyright case: Resources) The intital state ruling was in favor of the university, further strengthening the "Fair Use" portion of copyright law that includes teaching as one of the protected areas. The case did also bring to light that institutions should not only have, but make a concerted effort to ensure that their employees are aware of copyright policy, and also that

institutions could be held liable if those employees then violate those rules and the institutions do not act to stop the violations. Additional regulations regarding the investigation of available digital options before taking the step of producing a digital copy were also discussed in the case.

The reach of published works extends further than ever before, due to the digital age. The definition of copyrightable works has been extended to include not only those materials that are published in some medium, but also those that are produced, and exist, solely online. Some of the most discussed are materials which have been specifically developed for use in online instruction. In the case of two instructors at Arizona State, Jeff MacSwan and Kellie Rolstad, it was a rumor that led to MacSwan to register for an online section and led to a finding that the materials that the two had developed were being used by others, without permission and without credit being given to the authors. The husband and wife team, who have now moved to a different institution, are threatening suit, claiming damages and violation of both copyright law and university rules. (Basu, 2012) Many universities have Intellectual Property Policies that outline what works are to be considered the property of the institution (works-for-hire), what are the property of the faculty member who produces them and, in some cases, how the ownership/profits from works is to be shared between the two. As the era of online courses further develops and more for-profit online institutions are established, the line between work-for-hire and copyright infringement could just get more vague. There are resources available online that are specifically targeted at faculty who are developing course materials for online delivery, to assist in navigating the maze of rules and legal issues. (Enghagen, 2005)

The American Association of University Professors first published advice regarding the legal issues surrounding Intellectual Property in 2005. The topic of online materials makes up a large portion of the discussion in their presentation. (Springer, 2005) The idea of ownership of produced works is also presented as a key issue for those states where faculty are unionized, although mention is made of a Kansas court decision stating that raising the question of ownership during contract bargaining would interfere with federal law – namely U.S.C. 17 – since the federal law allows an author to negotiate the transfer of his/her rights, but does not require the author to do so against his/her will. Also raised in the article is the question – which is still ongoing – of how to determine at which point course materials stop being at the direction of the institution and start being developed works of the faculty member. The University System

of Georgia, in its Intellectual Property Policy (6.3 Intellectual Properties (USG)) has a full section (6.3.3) directed to the "Determination of Rights and Equities" for various projects that produce copyrightable works to assist its member institutions in the development of their own policies, as well as defining the Board's position and stake in the matter.

As the case brought against Georgia State shows, publishers are involved in the process of protecting their interests as well. In that case, three publishers (Oxford University Press, Cambridge University Press and Sage Publications, Inc.) all joined forces in one suit. As of the initial ruling, the use by the college was found to be within guidelines for appropriate and "fair" use. I do wonder if the publishing industry's push to put materials online themselves, made available for "purchase" or "rental" to students, is not an attempt to ensure that the materials are available in some method online in order to protect against "Fair Use" claims in the future. Perhaps a challenge to future creation of online options by faculty is being developed in the push to make the materials readily available – and with access completely controlled by the publisher – in what will be considered their original format?

In another case, *Kirtsaeng dba BlueChristine99 v. John Wiley & Sons, Inc.* the U.S. Supreme Court issued a decision on March 19, 2013 on the case, which was originally brought in 2008, that determined that the "first sale" doctrine (17 USC § 109) did apply to lawfully produced copies of works that originated in foreign lands. The publisher argued that Kirtsaeng, who had family and friends purchase cheap foreign produced English language textbooks in his home Thailand, which he then sold in the US and kept the profits, was violating copyright law by bringing foreign produced works into the US illegally – when the books stated they were not for distribution in the United States. The court's decision was that since the first purchase had been legal, the further distribution of the materials did not infringe on the copyright holder. (Kirtsaeng v. John Wiley & Sons, Inc., 11-697, 2013) (In a dissenting opinion offered by three justices, the argument was offered that USC 17 should not be applied in this case since the materials were produced outside the United States and are therefore not subject to US law. An interesting difference of opinion that, having now been entered into the legal record, may come to bear on a future case – should the argument be worded differently.) Having purchased a foreign-printed textbook once, this author is glad to not be in possession of "stolen" goods – although the

experience with the company who sold the book was such that I have stuck with materials available on native soil since that time.

While legal cases on all levels involved have not reached the level of the Supreme Court, there are steps taken and decisions being made that determine and outline the necessary actions to be taken by institutions, faculty and even publishers to secure the rights to their materials. Institutions have developed policies that both protect their interests and determine the application of the tenets of USC 17 to the actions of their employees. Recent cases have supported the "Fair Use" guidelines but have brought additional considerations that institutions are placing in their policies in order to provide greater protection in the future. Faculty are paying attention to these policies as they develop materials for courses just as closely as those involved in research have – to protect their interests for the future usage and value to be found in the materials under development. Cases are beginning to show where faculty are fighting for their rights to own those works which fall outside the boundaries of "works-for-hire" and protecting their authorship interests. Attention is being paid to these cases as the growth of online instruction continues to expand. Publishers are also seeking to protect their interests – interests which the courts have so far contained – as they too move into the new territory of online delivery. Online instruction has always made use of online materials, so the publishers seem to be moving their business model into that territory – perhaps if they are the ones to take the material online, then their interests will be more protected? At the same time, the consideration of print materials is not out of the picture just yet… while, in my opinion, online materials will never truly replace bound printed materials in all cases, the online copies are being established in an easier to control access manner, one which may allow publishers to retain control of their profit margins since every online copy will be an original copy – removing the resale market from the picture. At least for current material. A basis has been laid, but there is much ground to yet be discovered in the legal arena concerning Intellectual Property rights.

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