

# AAUP Webinar--University Copyright Policies: What Professors Need to Know

## Supplementary Materials: Overview of Relevant Law and Current Trends

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### Background Law

#### Work Made For Hire

- Under the “work made for hire” (“WMFH”) doctrine, an employer is considered the author of copyrightable works prepared by employees. 17 U.S.C. §101 (2010). This is an exception to the general rule that copyright ownership belongs to the creator.
- The Copyright Act of 1976 (hereinafter “the Copyright Act”) codified the WMFH doctrine, specifying that a WMFH includes:
  - (1) works “prepared by an employee within the scope of his or her employment,” or
  - (2) specially ordered or commissioned for certain types of uses where the parties agree in writing that the work shall be considered a WMFH, but only with respect to the following types of work:
    - a contribution to a collective work,
    - a part of a motion picture or other audiovisual work,
    - a translation,
    - a supplementary work,
    - a compilation
    - **an instructional text,**
    - **a test,**
    - **answer material for a test, or**
    - an atlas.

#### Teacher Exception

- The “teacher exception” to the WMFH doctrine provides that university professors retain ownership of their course materials and scholarly works.
- The teacher exception has been recognized since 1929.
- Courts have cited the following reasons for the exception:
  - Without the exception, scholarship in the university context would suffer due to a lack of academic freedom because universities could use copyright ownership to suppress scholarship they find objectionable.
  - Per academic tradition, there is a widespread assumption that professors own the scholarly works they create.
  - Disturbance of that academic tradition would disrupt long settled practices, that are at the heart of the relationship between universities and professors.
- *Hays v. Sony Corporation of America*, Opinion by Judge Posner
  - “Although college and university teachers do academic writing as a part of their employment responsibilities and use their employer's paper, copier, secretarial staff, and (often) computer facilities in that writing, *the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right*

to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university. . . . The reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were. . . . *there is no discussion of the issue in the legislative history, and no political or other reasons come to mind as to why Congress might have wanted to abolish the exception. . . .* But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act.” *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416–17 (7th Cir. 1988) (emphasis added).

### Transfers of copyright

- Under section 204(a) of the Copyright Act, transfers are only valid where an “instrument of conveyance, or 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” (emphasis added). However, the Copyright Act does not clearly define what constitutes a sufficient writing to effectuate a transfer.
- Section 201(b) of the Copyright Act also provides that the parties can modify the default WMFH position via a written instrument *signed by both of them*.  
“(b) Works Made for Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. §201 (2010).

## University Copyright Policies

### What Are They?

- Universities provide policies governing copyright ownership of works created by professors, and the licensing of those rights.

### How Are They Structured?

- Most university policies include a definition section, defining relevant terms, such as “copyright,” “resources,” and “originator.”
- University copyright policies discuss who has copyright ownership of various kinds of works, such as scholarly works, commissioned works, and student works.
- University copyright policies may also outline procedures professors must take to execute transfers of copyright ownership.

### Current Trends

- Nearly all university policies disclaim or transfer copyright ownership to scholarly works, personal works, and artistic creations, among other things, in accordance with academic tradition.
- Many university policies include “substantial use” provisions.
- Many policies generally allow professors to keep the copyright to the online course materials they create (including Massive Open Online Courses, or MOOCs) when the university considers the work a traditional work or course material.
- Nearly all policies grant the university broad licenses to use the professor-owned work.

## Interplay Between the Law and University Copyright Policies

### Issue: Substantial Use of University Resources

- In creating works or course materials, professors may use more university resources than are customarily provided. Typically, if a professor, in creating a work, uses resources beyond what is customarily used by or provided to professors in the same department, it will be considered a “substantial use” of university resources under the policy. Many university copyright policies provide that in such circumstances the copyright of the work belongs to the university rather than the professor.
- Sample terminology defining “substantial use:”
  - “resources beyond those usually customarily provided” (University of Maryland)
  - “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” (University of California)
- 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.
- 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.
- Some university policies require prior written approval from the university for professors to receive “substantial use” of university resources to create a work.
  - Under these circumstances, the professor might transfer copyright ownership in full, or in part, of such a work to the university in exchange for receiving the necessary “substantial” resources. In such cases, where a professor does not obtain prior written approval for “substantial use” of university resources, the university may: (1) claim ownership of the work under the policy; or (2) declare that the professor and university are joint owners.
- Universities treat works created with “substantial use of university resources” in one of three ways:
  - Some policies merely claim ownership of works made with substantial use of university resources.
  - Some policies themselves purport to transfer all copyright ownership in works to the university when a substantial use of university resources is used in creating the work.
  - Some policies create a contractual obligation for the professor to transfer in full, or in part, the copyright of works to the university using a second agreement.

### Issue: Disclaiming versus Transferring

- 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.
- Other policies provide for additional procedures in which the professor transfers the ownership of the work to the university, or vice versa.
  - The legal effect of disclaiming copyright to traditional scholarly works is often not clear.

### Issue: Licensing

- Most policies grant the university a broad license to use the professor-owned work.
- Some policies specify the duration of the license, while others do not address the time span of the license at all.
  - Example: “The University retains a fully paid-up, royalty-free, perpetual, and non-exclusive worldwide license to any Course Approval Documents for the purpose of continuing to teach the course of instruction

for which the documents were prepared, with the non-exclusive right to revise and update them as required for this purpose.” (University of California)

- Some policies grant a license from the university to the professor. These types of license are important in the distance education context where universities claim copyright ownership of online courses created by professors. In these cases, the license permits professors to continue to teach online course they create even after they leave the university

#### Issue: Massive Open Online Courses (MOOCs) and Distance Education

- University copyright policies on ownership of online courseware and distance education materials vary widely, where the policies specifically address them.
  - Policies generally allow professors to keep the copyright to the online course materials they create (including MOOCs) when the university considers the work a traditional work or course material. However, this is subject to “substantial use” provisions.
    - Example: “In brief, UC policy is that faculty . . . retain copyright over course materials. . . . Course materials include, but are not limited to lectures, lecture notes, and materials, syllabi, study guides, bibliographies, visual aids, images, diagrams, multimedia presentations, web-ready content, and educational software.” (University of California)