

Copyright and the Notre Dame IDR: An Environmental Scan and Recommendation for Further Action.

Pat Loghry and I recently investigated the state of copyright as it affects universities, faculty, and students in general as well as at the University of Notre Dame. In the course of our investigation we examined the copyright policies at numerous State and Private institutions of higher education, met with a copyright specialist at Indiana University, and attended a conference on copyright at Ball State University.

A quick scan of the legal literature as well as conversations with copyright experts quickly led us to conclude that, counterintuitively; copyright is not a well-settled area of the law. University policies are sometimes vague, and vary from institution to institution. We also discovered that copyright as applies to faculty creative work is a particularly ill-defined area of law. There is no real consensus on whether the Copyright Act's work-for-hire provision applies to faculty or graduate students for that matter. Packard and Dreyfuss note that many scholars assert that faculty output is work-for-hire and thus universities may assert ownership of the rights assigned in copyright. Conversely, Reichman seems to indicate that in practice, little has changed in the 1976 act from prior practice. There was some concern among the speakers at the Ball State conference that this was an ill-defined area and the work-for-hire provision may apply to graduate students in some circumstances.

We also investigated policies at other institutions. We did this primarily by reviewing college and university web sites for public information. We discovered that most institutions of higher education spelled out their policies on intellectual property most clearly when addressing patents. Some had exceptionally good clear policies and guidelines on copyright, but this was not always the case. MIT is a particularly good example. <http://web.mit.edu/ist/topics/security/copyright/> In addition to providing clear and easy access to MIT's copyright policies, this website also contains links to other useful sites addressing copyright.

The University of Notre Dame has posted its intellectual property policy on the web. <http://www.nd.edu/copyright/> This policy is reasonably clear:

The University owns all rights to all copyrightable materials (including computer programs, software, or multi-media productions) that are works made for hire under copyright law or that are required to be assigned to the University by the contract terms of a grant or sponsored program. However, consistent with long-standing academic tradition, the University does not normally claim ownership of works such as textbooks, articles, papers, scholarly monographs, or artistic works. Creators, therefore, retain rights in copyright in their works, unless they are created under a grant or sponsored program that specifies ownership rights in some entity other than the creator, they are the subject of a contract modifying ownership rights, or they are otherwise addressed in this Policy.

The University will ordinarily waive its rights to intellectual property created by student creators where the use of University facilities, equipment, or other resources has been properly authorized, except when:

- faculty or staff involvement is substantial,*
- the work is part of a larger University work or specifically commissioned by the University,*
- the use of facilities, equipment, or other resources is substantially in excess of the norm for educational purposes, or*
- the intellectual property resulted from the student's employment with the University.*

Informal discussions with Notre Dame faculty, staff, and students quickly led us to believe that these members of the university community have little understanding, on the whole, of how copyright affects their work. Often times there was the perception among the creators of the work, particularly exceptional undergraduate research, that they retained copyright to their work when in fact it was unlikely that this was truly the case. The most frequent scenario for losing full rights seemed to occur when a student (or even faculty member) submitted a paper for publication and signed away rights to the article. Excellent undergraduate research is often submitted for publication, and business plans (a variation of undergraduate research for Business students) are often submitted to contests.

Our recommendations are as follows:

1. There should be links to copyright information on the IDR web page, but these links should be limited to the US Copyright Office <http://www.copyright.gov/> and the University of Notre Dame policy <http://www.nd.edu/copyright/>
2. A Creative Commons like license, with a checkbox, should be developed for those wishing to deposit items in the IDR. There may be someone on the IDR team who can do this in conjunction with the University Counsel's office.
3. Some method should be developed to maintain an archival copy of these agreements when a users submits materials to the IDR
4. The University Libraries should facilitate or support, rather than offer, informational or instructional sessions for the Notre Dame community on copyright issues
5. Team IDR should develop list of useful copyright sites

Referenced Works

Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work. Ashley Packard. 7 Comm. L. & Pol'y 275

The notion of scholarly authorship is complicated, however, by the Copyright Act's work-for-hire provision. The Copyright Act defines a work made for hire as "a work prepared by an employee within the scope of his or her employment." It further states that "In the case of a work for hire, the

employer or other persons 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."

Many scholars have interpreted this to mean that faculty, as university employees, are creating works made for hire when they produce academic materials and scholarly articles, and that the university, as employer, is actually the owner of those works.

Computer Programs As Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research. J. H. Reichman 42 Vand. L. Rev. 639

Yet this result seems rather surprising under a Copyright Act that aimed to strengthen authors' rights, especially when the legislative history conveys no intention to disturb the "teachers' exception" to the works-for-hire doctrine that was firmly established under the 1909 Act. To equate a general duty to write with a duty to produce specific works for a university distorts the nature of academic employment and downgrades the professorial rank to that of an ordinary staff member. Professors are expected to advance their universities' reputations for high-quality scholarship by publishing suitable research of their own, largely because scientific publications enhance the ability of these same universities to attract the kinds of funds and personnel that ensure fulfillment of their educational missions. That professors are attracted to teaching because research support is provided or that they write to obtain tenure and retain its full benefits hardly entitles a university to regard itself as the author of a scholarly product over which it has exercised no direct supervisory control whatsoever. In ascertaining the scope of university employment for purposes of copyright ownership, moreover, one finds no evidence to suggest that trade usage had altered the well-established teacher exception at the time the 1976 Act was adopted.

The Creative Employee and the Copyright Act of 1976. Rochelle Cooper Dreyfuss 54 U. Chi. L. Rev. 590

The copyright statute enacted in 1976 has modified prior law. Under the Copyright Act of 1909, courts and commentators regarded the work for hire doctrine, which deems an employer the owner of work prepared within the scope of employment, as largely inapplicable to teachers. Commentators have, however, argued that Congress eliminated this exception to the work for hire doctrine when it passed the Copyright Act of 1976. According to these commentators, the 1976 Act permits universities to claim copyright to, and even "authorship" of, their faculty's output.