

**Intellectual Property and
Other “Kryptonite
Solutions”**

Presented by:
Mary Dowell

Agenda

- Copyright Laws
 - Copyright Act, including Fair Use
 - Digital Millennium Copyright Act
 - TEACH Act
- Intellectual Property Policies
 - Components
 - Negotiability
- Practical Problems
- Specific Questions

Copyright Law

- U.S. Copyright law gives copyright protection to original works fixed in any tangible medium
 - 17 U.S.C. § 102.

Copyright Law

- Copyright law gives authors the exclusive right and authority to control:
 - Reproduction
 - Translation, Abridgement and Revision
 - Public Distribution
 - Public Performance and Display
- These rights can be assigned to others

Fair Use

- Fair Use Doctrine allows users to use copyrighted materials for certain activities, notwithstanding the wishes of the copyright owner
 - 17 U.S.C. § 107

Fair Use

- Use must be for:
 - Criticism
 - Comment
 - News Reporting
 - Education
 - Scholarship
 - Research

Fair Use - Factors

- The purpose and character of use, including whether it is for commercial use or for nonprofit, educational purposes
- The nature of the copyrighted work
- The amount and substantiality of the portion used in relation to the copyright-protected work as a whole
- The effect of the use upon the potential market for or value of the work

- 17 U.S.C. § 107

THE DIGITAL MILLENIUM
COPYRIGHT ACT OF 1998

- Makes it a crime to circumvent anti-piracy measure
- Limits ISP liability for simply transmitting information
- Expects ISP's to remove material that appears to infringe copyrights
- Limits liability of nonprofit higher education entities
- Requires promotion of distance education while balancing interests of copyright owners

TEACH Act of 2002

- Technology, Education and Copyright Harmonization Act of 2002
 - Broadens instructional use of copyrighted materials in online instruction
 - Requires policies regarding copyright
 - Does *not* limit Fair Use doctrine

TEACH Act of 2002

- What does it allow?
 - Can digitalize materials for use during online instruction
 - Can display works for purpose of student review

TEACH Act of 2002

- What does it not allow?
 - Cannot use digitalized materials sold specifically for distance education purposes
 - Must limit use to amount and duration comparable to that of a traditional classroom setting

Intellectual Property Policies

- Know the essential components

www.copyrightoncampus.com

Intellectual Property Policy

- Must it be bargained?
 - Some states have said yes
 - Some states have said no, because it would interfere with federal copyright law

Intellectual Property Policy

- Must it be subject of consultation with academic senates?

**Practical Problems –
Faculty Course Packs**

- Photocopying materials, such as articles or portions of books, for academic course packs is not in and of itself considered fair use – and never has been
- Without permission, both the copy shop and the academic institution risk liability for copyright infringement
- Applies to E-course packs as well as paper course packs
- Permission is usually granted by academic period, so repeated use requires obtaining permission again

**Practical Problems – Materials
Developed While on Sabbatical**

- **Work For Hire: Employer Ownership**
 - Entitles an employer, such as an academic institution, to assert ownership over materials prepared by its employees acting within the scope of their employment
 - *17 U.S.C. §§ 101, 201.*

**Practical Problems – Materials
Developed While on Sabbatical**

- **Faculty Exceptions to Employer Ownership**
 - Traditionally, the work-for-hire doctrine did not apply to teachers
 - Work-for-hire still applies to non-academic reports, catalogs, or promotional material produced by employees of an educational institution
 - Institutional policy and individual agreements determine ownership of faculty works

**Practical Problems – Materials
Developed During Sabbaticals**

- **Faculty Ownership is the general rule**
 - Prevailing practice is to regard the faculty member as the copyright owner of scholarly works
 - Supported by principles of academic freedom

**Practical Problems – Materials
Developed During Sabbaticals**

- Institutional Ownership Can Be Negotiated
 - College’s copyright policy must spell out that academic works are deemed works for hire
 - Must also involve substantial use of institutional resources, i.e. more than just office space, etc.

**Practical Problems – Materials
Developed During Sabbaticals**

- Join Ownership
 - Usually arises in collaborative programs
 - Often involves external funding
 - Should be spelled out in an individualized agreement

**Practical Problems –
Recording Lectures**

- Lectures can be copyrighted
- Copyright is owned by the instructor
- Selling notes violates the copyright
- Education Code specifically prohibits commercial distribution of recording of a lecture

Practical Problems –
Web Based Instructional Content

- Who owns the content of an on-line course?

Practical Problems –
Web Based Instructional Content

- Some institutions attempt to allocate ownership via contract, with qualifications as to royalties if course materialized are commercialized

Practical Problems –
Web Based Instructional Content

- Some institutions have policies where faculty members are compensated for creating a course, while the institution owns the completed course package
- The faculty member continues to own all notes and materials used in creating the course
- May include granting the faculty member who authored the course the first right of refusal for teaching the course, and providing for compensation when that faculty member consults with somebody else who will be teaching the course

Practical Problems –
Web Based Instructional Content

- Other institutions use a “shop-right arrangement” where teachers or faculty members retain ownership of the materials they create, but the institution gets a license to use the materials as a part of its own program

Practical Problems –
Web Based Instructional Content

- **Institutions, developers and faculty members should come to agreement on content ownership prior to course development!**

Practical Problems –
P2P File Sharing

- What is Peer-to-Peer (P2P) File Sharing?
 - Users share digital information with each other over the Internet without having to log onto a central computer
 - The technology itself is legal, but it is a common conduit for illegal activity

Practical Problems –
P2P File Sharing

- There are legitimate academic applications for P2P file sharing
- The purpose of the network is to share academic material between users at many different academic institutions

Practical Problems –
P2P File Sharing

- Illegal P2P File Sharing
 - Students have used P2P software to distribute copyright works without owner permission
- Individuals may face serious liability
 - Damages range from nominal to huge, e.g. \$30,000

Practical Problems –
P2P File Sharing

- Institutional Liability
 - Colleges are under no legal obligation to defend students or staff
- May face contributory liability claims
 - Knew of conduct
 - Contributed to conduct
 - Failed to control conduct
 - Received financial benefit

**Practical Problems –
P2P File Sharing**

- How can colleges prevent illegal sharing?
 - Adopt and inform students and other users of a policy to terminate network privileges of those found to be infringing copyright
 - Post the policy on the website
 - Require users to prove knowledge of the policy before obtaining network access
 - Acknowledge and encourage legitimate P2P file sharing with academic benefits
 - Educate users about copyright law and infringement penalties
 - Monitor compliance and enforce policies through technologically limiting file sharing on the network
