

## Intellectual Property and Distance Learning

Apparently incongruent expectations exist about how UK's intellectual property (IP) policies apply to distance learning (DL) products that faculty develop. Such DL products may include recorded lectures, online quizzes, discussion board forums, completed Blackboard course "shells", and other faculty-generated course materials that might be posted online for the benefit of enrolled students (e.g., class notes, digital slide shows, databases of previous exam questions, etc.).

The question asked here is: Who controls this DL content? If you develop DL course materials, can they be used by another faculty member who replaces you? For how long? Can you use DL course materials that you develop at UK if you move to another institution? Can you share your DL course materials with a colleague at another institution who wants to use them? Can you be paid if someone wants to use your DL course materials?

The general policy on intellectual property at UK states that "[a]ll rights to intellectual properties... shall be owned and controlled by the University of Kentucky..." (AR 7.6.IV). However, certain intellectual property is apparently "excepted from the general policy" (AR 7.6.IV.A). The excepted property is the "traditional products of scholarly activity" that specifically includes "journal articles; textbooks; reviews; works of art including paintings, sculpture, and musical compositions; and course materials such as syllabi, workbooks, and laboratory manuals." Any such intellectual property, if excepted from the general policy, is considered the "unrestricted property of the author or originator."

Here is the specific wording of that UK Administrative Regulation:

All rights to intellectual properties as defined in Section III shall be owned and controlled by the University through its designated agent, the University of Kentucky Research Foundation (UKRF). When a University faculty member, staff member, or student develops or originates an item of intellectual property which, under the terms of this policy is to be owned and controlled by the University, the individual shall report the intellectual property to the Intellectual Property Committee (IPC). The originator shall: cooperate in the execution of legal documents and in the review of literature and prior art; be given opportunity to assist in the further commercial development of the intellectual property as defined in Section VI; and have an interest in and share in any income derived from the commercialization of such property.

A. Traditional products of scholarly activity which have customarily been considered to be the unrestricted property of the author or originator are excepted from the general policy. Such traditional products include journal articles; textbooks; reviews; works of art including paintings, sculpture, and musical compositions; and course materials such as syllabi, workbooks, and laboratory manuals. The University has not and will not claim any ownership rights to such traditional works and also specifically disclaims any potential rights to do so under the "work for hire" provisions of the U.S. Copyright Act.

You can read the full text for yourself at the following link:

<http://www.uky.edu/econdev/sites/www4.uky.edu/econdev/files/ar7-6.pdf>

In its *Statement on Copyright*, the American Association of University Professors (AAUP) encourages institutions to grant faculty ownership and control over the copyright of traditional academic works "regardless of the physical medium" in which they appear. The AAUP interprets this to mean that "the materials created by faculty members for distance education courses should be treated in exactly the same fashion as materials by faculty members for traditional courses." In cases where an institution helps to finance a faculty member's development of DL resources, the AAUP allows that "institutions may be reimbursed for the technical expenses of producing recordings of courses and presentations."

Full text of these statements can be found at [www.aaup.org/AAUP/issues/DE/sampleDE.htm](http://www.aaup.org/AAUP/issues/DE/sampleDE.htm).

Apparently, the UK IP office and others do not agree with the suggested AAUP interpretations. A document titled "University –Level Distance Learning Statements" is posted under "Forms" at the UK Senate website:

<http://www.uky.edu/Faculty/Senate/files/Forms/U-Level%20DL%20Statements.pdf>

Of special interest is statement #5 from that document. It reads:

5. DL policies are clear with respect to intellectual property and faculty compensation. For specific regulations, please refer to *Administrative Regulations II-1.1-3 ("Intellectual Property Disposition and Administrative Regulation")*. In cases where faculty members/departments wish to commercialize products developed with DL assistance, or they wish to transport products to external locations, they must submit the request to the UK Intellectual Property Committee (<http://www.econdev.uky.edu/ip-committee.html>) for determination of the University's material interest.

Rather than offer clarity, this document—it is unclear who authored it—seems to introduce only more confusion. Suppose you develop DL content for a DL course with "DL assistance" from a course designer at the UK DL Programs office. If so, does that mean you have surrendered your IP rights? What does it mean that faculty who develop DL products and "wish to transport products to external locations" must contact the UK IP office? If you post DL products on the internet for faculty at other institutions to use, does that mean that you have "transported products to external locations"? What if you put them on a disk and carry them to another institution?

The following is an email from Katherine Adams, Associate General Counsel, regarding how UK IP policies apply to distance learning products. Apparently, her view is that the DL products and content that faculty develop do not fall under the general exemption for "traditional products of scholarly activity". The email also indicates that faculty who develop DL products may be in

violation of the UK Code of Conduct (<http://www.uky.edu/Legal/ethicscode.htm>) if those DL course materials are used to recruit and train students by non-UK (i.e., competing) institutions.

Adams, Katherine

Sent: Tue 10/11/2011 5:11 PM

To: Brown, Roger M

Cc: Deaton, Marcy

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Dear Dr. Brown,

Sorry for any confusion. Marcy meant to talk with me and then call you back, the delay has been my schedule. I have been totally pre-empted by several deadlines and was just able to chat with her this afternoon.

Unfortunately, we do not have anything other than what you found on-line on the Senate's web site. If there has been a material use of University resources, then the University will assert an ownership interest. The Intellectual Property Committee has been designated to determine if there has been a material use of resources. Distance learning is not the typical scholarly work that has customarily been the unrestricted property of the originator.

I believe that the Intellectual Property Committee has debated adopting guidance on what it views as a material use of resources, but am not aware that there is any current guidance.

If you want to summarize what university resources have gone into the production (both direct monetary as well as staff who might have assisted), I will be happy to chat with the chair of the intellectual property committee and see if the committee would be willing to consider this in an expedited fashion.

There is a second issue that might be of concern, if this directly competes with UK, I believe that there has been a preliminary indication that this might be a conflict under the UK code of conduct.

Regards,

Katherine A. Adams  
Associate General Counsel

You might also find useful a 2002 report by Jonathan Alger, Assistant General Counsel at the University of Michigan, titled: "Legal Issues in On-Line Education". That report can be viewed at the following link: <http://net.educause.edu/ir/library/pdf/NTW0204.pdf>. The *Academe* article by Robert Gorman cited on page 4 is also very enlightening, as it articulates a number of potential negative consequences of a policy interpretation like the one above articulated by UK Associate General Counsel, Katherine Adams.

QUESTION: What interest, if any, do faculty have in owning and/or controlling the DL content, tools, and materials that they develop and should the faculty develop a position statement that articulates those interests?