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In Keeping with Academic Tradition: Copyright Ownership in Higher Education and Potential Implications for Open Education

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Abstract

Most postsecondary institutions in the United States have a copyright and/or intellectual property (IP) ownership policy, outlining under various circumstances the ownership of copyright and IP generated by faculty, staff, and students (Patel, 1996). As awareness of open educational resources (OER) increases and both faculty and student creation of openly licensed materials builds momentum, a closer examination of copyright ownership policies and what legal and ethical implications they may have for open education is crucial. This study analyzed 109 copyright ownership policies at both public and independent two-year and four-year postsecondary institutions of higher education in the U.S. and surveyed facilitators of open education initiatives (generally librarians and related educators) at these same institutions (N = 51) to gather the perceptions and preferences of their copyright policies with respect to locally-developed OER.

The content analysis revealed that while the ownership of scholarly works overwhelmingly belongs to the person who created the work, variables such as unusual support and potential uses affect copyright ownership. These factors can be problematic for faculty who receive support through campus programs to create and share openly licensed instructional materials beyond their institution and are also problematic for students participating in OER-enabled pedagogy coursework and projects. While our survey showed that many in the open community indicate that they have great confidence in their understanding of these policies, that certainty is often pinned to a sense of shared values and unspoken assumptions, rather than clear legal rules or reliable policy.

Keywords: Open Education, Open educational resources, OER, Copyright ownership, Copyright policy, Intellectual property, Higher education, Creative Commons, Scholarly works, Instructional materials, Student agency



Introduction

Institutions of higher education are increasingly supporting open education initiatives, which include both the creation and adoption of open educational resources (OER) and the use of open pedagogy. The word *open* in all of these areas refers to how the licensing structure of the resource being created allows for varying levels of reuse, redistribution, and revision in ways that traditional copyright does not. Open education not only serves to eliminate cost barriers to information access but also provides faculty more flexibility in tailoring and delivering course content and expands opportunities for students to participate in the scholarly process by contributing their own knowledge and research to the broader information commons (Gumb & Miceli, 2020). Perhaps most importantly, open education creates opportunities to center equity in resources, student outcomes, and creation processes (DeRosa, July 2020; Colvard, et al. 2018; Lambert, 2018).

In order to clarify the rights of authorship as discussed in U.S. copyright law and to allow for the mission-driven sharing and efficient administration, “university intellectual property policies have become standard form policies [that] provide guidelines that govern intellectual property ownership issues that may arise in the context of university research” (Patel, 1995, p. 482). Awareness and understanding of one’s institutional copyright ownership policy, particularly as it applies to the use of “significant” or “exceptional” university resources, (which we will refer to as “unusual support” throughout) is critical for the responsible creation of OER (free and openly-licensed teaching and learning resources) by faculty, students and staff, because in many policies, copyright is granted to the institution if a threshold of financial or personnel support is provided to the creator(s). However, these thresholds are often not clearly defined in the policies, which makes determining the true rightsholder difficult, even more so as stipend programs emerge to provide both financial and personnel support to faculty creating OER.

Vague copyright ownership policies also have serious implications for students who are invited to participate in open pedagogy projects. These projects, which deviate from the traditional banking model of education (Freire & Ramos, 1970) and instead place value on social learning (Cronin, 2017), center students as knowledge creators, who then are invited to openly license their contributions (Wiley & Hilton III, 2018). Open pedagogy or OER-enabled pedagogy often encourages the creation of new OER but also the adaptation of existing OER, resulting in derivative works. In open education, some derivative works are referred to as renewable assignments (Wiley, 2016), and often serve as a means of creating openly licensed instructional materials for future students in the same course. If instructional materials fall under an area of uncertainty in an institution’s copyright policy, or clearly belong to the institution as

explicitly stated in the case of institutions like Salt Lake Community College (2013), students may potentially find themselves in the middle of a confusing web of ownership. Wiley and Hilton III (2018) argue that educators do not instinctively associate copyright with pedagogy, but “...if students learn by doing, and copyright makes it illegal to engage in certain kinds of doing without a license, then copyright necessarily functions to limit the ways in which students can learn,” (p. 135) as faculty are limited in ways they can deliver the content and ask students to engage with it.

While the literature has explored faculty ownership of traditional scholarly and instructional output, little has been done to examine the implications of *openly* licensing such IP or inviting students into this process. The significant overlap between open education and copyright warrants a closer look into institutional copyright policies as they currently exist, as well as the awareness and perceptions of facilitators of open education programs such as librarians, instructional designers, and related educators, who are often left to navigate them on behalf of faculty and students creating OER. By focusing on a sample of institutions who have invested in open education, our research aims to start a conversation about the potential barriers that exist for the success and lawful scaling of open education programs in the U.S.

Review of the literature

There is a robust body of literature examining the copyright ownership of materials created in higher education. Under 17 U.S.C. 201(a) the general rule is that copyright vests in the author or authors of a work. Specifically, 17 U.S.C. §106 gives the creator exclusive rights to reproduce, perform, and distribute a copyrighted work. However, works made within the scope of employment are often considered a ‘work made for hire’ as defined in 17 U.S.C. §101, in which case copyright is owned by the employer. Because both scholarly works and instructional materials are arguably made “within the scope of employment” a flat reading of the statute is likely to conclude that copyright in those materials belongs to the university (Crews 2006, p. 18), some pre-1976 cases such as *Sherrill v. Grieves* (57 Wash. L. Rep. 286 [Dist. of Columbia Supreme Court 1929]) and *Williams v. Weisser*, (78 Cal. Rptr. 542, 545 [Ct. App. 1969]), however, suggest that there may be a so-called teachers’ or educators’ exception that exempts faculty works of scholarship such as journal articles, monographs, and book chapters based on academic tradition. This exception was established under the 1909 Copyright Act by case law, but because the 1976 Act did not incorporate it, the “teacher exception” seems to have been subsumed by a work-for-hire doctrine. Scholars such as Townsend (2003) have observed that “The 1976 Act did not codify this judge-made ‘teacher exception’ as part of the statute thus its survival today is uncertain” (p. 225). As discussed by scholars such Viswanathan

(2015), post-1976 cases such as *Hays v. Sony Corp. of America*, 847 F.2d 412 (7th Cir. 1988) (in dicta) suggests that there may be some life in the doctrine, but others such as *Molinelli-Freytes v. Univ. of P.R.*, (792 F. Supp. 2d 164 [D.P.R. 2010]) suggest otherwise.

The issue of faculty ownership in works they create was extensively discussed in the legal and library literature of the early 2000s with the rise of online instruction and again in the early 2010s when many institutions invested heavily in the development of massive open online courses. As of 2022, however, no clear consensus exists, with Nimmer (2015) calling the issue “highly contested” (§ 5.03[B][1][b][i]). As a result, the advice offered by lawyer-librarian Georgia Harper more than twenty years ago stands: “the mixed holdings of these cases indicate that [institutional] policy probably is the best way to resolve the ambiguity.” (2000, p. 8).

Today the question of faculty ownership in research and teaching materials remains primarily governed by individual institutional IP policies. There are, however, often substantial differences between the policies at individual institutions. Further, many scholars such as Packard (2002) and Hellyer (2016) have argued that these policies are often confusing, poorly drafted, and may even be ineffective in treatment of copyright ownership. Nevertheless, a general perception - often described in institutional policy documents - exists that faculty retain copyright in works such as scholarship and similar traditional academic works.

Other institutional stakeholders such as non-faculty administrators and staff may be given similar rights but may just as often face a general presumption that their work was made for hire. Fortunately, most institutional IP policies do explicitly address ownership in this context. For example, a review of 81 policies at Association of Research Libraries institutions by Hellyer in 2016 found that most of those policies do support ownership at least by librarians and similar stakeholders who may not be considered traditional academic faculty, “typically by referring more broadly to ‘university employees,’ ‘faculty and staff,’ ‘the univer-sity community’ or similar terms” (p. 49). This approach aligns with the values described by scholars such as Gasaway (2003), who argues that, as a matter of law and policy, librarians should be considered the owners of their academic work whether or not they are accorded faculty status. In short, under most policies faculty clearly own traditional scholarly works, but there is significant ambiguity as to which university creators are considered “faculty” and what types of work are considered “traditional scholarly works” for these purposes.

One type of work that is increasingly common on campuses are OER, which are frequently supported by financial incentive or stipend programs (Alpi, K., et al., 2017; Rigling & Cross, 2018; Lierman, 2020). A 2020 report from the New England Board of Higher Education found that several institutions both public and private in its region are granting faculty seed money to create and integrate OER into their courses (Gumb,

2020). A more geographically diverse study was conducted in 2020 and found that textbook incentive programs have been implemented across a variety of institutions in the U.S. and have a significant positive impact on student savings and pedagogical innovation (Lierman, 2020). While financial incentives alone are rarely the sole motivating factor for faculty to participate in these programs (Coleman-Prisco, 2016; Todorinova & Wilkinson, 2020; Hollister, C.V & Patton, J., 2021), the financial support can create uncertainty about copyright ownership given the provision of “unusual support”.

All stakeholders, including faculty, generally give up some rights when a work is specifically created within the employment responsibilities of the creator, as a specific work assignment (often called a “directed” work). Institutions also often claim ownership of works created with resources of a degree or nature not routinely made available to faculty. These cases, which we are calling “unusual support,” variously refer to “unusual,” “substantial,” or “exceptional” uses of institutional resources. This support often includes funding for a specific project, waiver of fees normally required to use specialized facilities such as equipment, production facilities, service laboratories, specialized computing resources, and studios, or reduction in teaching or service loads.

In the absence of policy language, ownership by staff such as academic librarians who are employees but sometimes hold faculty status, would likely be answered by agency law and include (1) whether it is the kind of work the employee is employed to perform; (2) whether the work is done substantially within authorized work hours and space; (3) whether the work is actuated, at least in part, by a purpose to serve the employer; and (4) whether the employee is acting while subject to the employer’s control or right to control (Hellyer, 2016).

The fact that copyright ownership may be unclear or depend on institution-specific IP policy language is especially significant in cases where various academic stakeholders, including students, work together to develop new OER through practices such as open pedagogy. The literature shows that open pedagogy has varying definitions and applications as described in the scholarship of teaching and learning, but many prominent scholars in the open education community agree that the term today widely centers around fostering a learner-driven, collaborative environment for knowledge creation, where students are invited to share their creative intellectual output beyond the classroom with an open license (DeRosa & Jhangiani, 2017; Cronin, 2017; Wiley & Hilton III, 2018). In their chapter on open pedagogy, DeRosa and Jhangiani (2017) share that several scholars have identified in the early literature foundational elements of open pedagogy under etymologies such as autonomy and interdependence; freedom and responsibility; democracy and participation and that “. .

. constructivist pedagogy, connected learning, and critical digital pedagogy are all recognizable pedagogical strands that overlap with Open Pedagogy (p. 7).” Wiley and Hilton III’s (2018) approach to open pedagogy, OER-enabled pedagogy, is arguably set apart from other definitions due to its focus on five distinct ‘R’ activities (reuse, revise, remix, redistribute, and retain) permitted by an open license that engage students in knowledge creation. As such, open educators must consider and explain to students not just the legal permissions offered by open licensing but also the associated ethical risks and rewards of working in the open in order to avoid exploitation of student IP and privacy (Jhangiani, 2019).

According to sociologist and scholar Lindsey Carfagna, students often inherently understand the ethos of sharing but may need more support to understand the legal rules for open creation (2018). Further, student understanding in this area requires support and can be intimidating for many and risky for more marginalized students (DeRosa, 2020; Jhangiani, 2019). Many students feel compelled to give back to the digital commons - “information and knowledge resources that are collectively created and owned or shared between or among a community and . . . oriented to favor use and reuse, rather than to exchange as a commodity” (Fuster, 2010, p. 5) - after taking something from it (Carfagna, 2018). But faculty should be aware that some who participate in creating openly licensed content as a part of their enrolled courses may actually feel pressured to do so even if they are told that it is optional (Hilton III et al., 2019). Others may simply be reticent based on their lack of familiarity with OER (Al Abri & Dabbagh, 2019).

Furthermore, while some students may understand their rights and the affordances granted to them through copyright (Baran & AlZoubi, 2020), most students are likely to need some level of assistance and guidance concerning what open licenses are available to them and which may align best with their intentions as contributors (Gumb, 2022, forthcoming). Tillinghast et al. (2020) found that students involved in courses using OER-enabled pedagogy may actually feel empowered to contribute to their respective fields of study, but Seraphin et al. (2019) note that instructors need to be transparent from the beginning of an assignment that uses OER-enabled pedagogy to best center and uphold student agency over their IP. This includes telling students the anticipated use of their work and providing them the freedom to license it as they wish.

Copyright ownership is central to the work of OER and open pedagogy. Students and faculty need to understand their rights under the law in order to assert their agency as creators and benefit from clear guidance on these issues. This is particularly true when an institutional policy adds an additional layer of complexity to the default rules established by positive law. If faculty and staff ownership of academic work is

complex, student ownership may be even more so, with further complications related to when and where student work is done, whether it is compensated, and how the work relates to institutional direction and support. In short, anyone—faculty, students, or staff members—creating or placing a license on educational resources will need to refer to local policy rather than simply relying on black letter copyright law.

Methodology

Research Questions

In order for open pedagogy to center the student agency at its heart, participants need a clear understanding about copyright ownership of course materials developed in open pedagogy-based courses. Ownership is also a threshold question for applying an open license to any educational materials, which is the signal characteristic of OER development. Unfortunately, questions about ownership are often poorly-understood by the faculty, students, and others being asked to share their work openly. Given the importance of clarifying these questions, we identified and focused our research on the following three questions:

- Who is the presumptive owner of educational materials at academic institutions that support open education and thus has the ability to lawfully apply an open license to those materials?
- How is ownership impacted by “unusual support” for the development of educational resources and by creators who serve in different roles at an institution? Do certain variables change or limit ownership?
- What are the perceptions of open educators and the facilitators of open education initiatives that support them about who should own those works and thus have the ability to select and apply an open license?

Data Collection

In order to answer these questions, we reviewed publicly-available copyright and IP policies for 109 institutions and systems that are members of the Open Education Network (OEN), a community that advances the use of OER and practices, because they represent a discrete set of institutions that are invested in open education. When relevant information was not available we supplemented our understanding with related sources such as student handbooks and faculty collective bargaining agreements. When copyright policy materials were difficult to find on the open web, we contacted the institution directly to request access. Because the OEN includes both individual institutions and larger consortia and systems that generally did not have copyright policies for the consortium/system, we focused on individual institutional policies.

With Institutional Review Board approval, we also developed and ran a fifteen-question survey (Appendix A), distributed to a sample of open educators and representatives from each OEN member institution, to describe how they understood their institution's copyright policy as well as their own policy preferences for locally-developed OER. By asking open educators to answer these questions, we hoped to gain insight into how the written documents aimed at a general institutional audience were actually understood and applied in the specific context of open education programs. Institutional roles as open educators include librarians, faculty, instructional designers, administrators and other staff positions, and they all have some hand in educating their campus community on the benefits of open education, often facilitating programs and projects that lead to the creation of new OER.

We left the survey open for 10 weeks from April 21, 2020 to June 30, 2020 and promoted it on the OEN's main email listserv as well as sent some personal invitations to participate. Overall, representatives from 51 institutions responded to the survey out of 109 of total institutions that we collected copyright policies for, a response rate of roughly 47%.

Data Analysis

In order to analyze the 109 copyright policies, we did a qualitative content analysis, "an integrated view of texts and their specific contexts" (Zhang & Wildemuth, 2009, p. 308), to identify how they described ownership of scholarly or educational materials. We specifically identified themes related to defining ownership of educational materials created by faculty, students, and staff, as well as situations when ownership might change based on financial support or external sponsorship. We also noted the various types of framing and language used to describe relevant issues such as defining "exceptional" or "unusual" institutional resources. Survey responses were analyzed using descriptive statistics (Wildemuth, 2009). We tallied responses to individual questions and reviewed free text responses.

Results

Content analysis

In keeping with academic tradition, our content analysis revealed that all of the 109 policies we reviewed grant the ownership of copyright to the creating faculty member with respect to traditional scholarly, non-directed works like journal articles, book chapters, and manuscripts. Eighty-six percent of institutions reviewed expressly recognize students' copyright ownership in their *coursework*, while the remaining 14% did not discuss the ownership of student copyright in their policies or handbooks. A majority (85%) of institutions analyzed treat non-faculty work products as a work made for hire and as such do not grant them copyright ownership in any works

created on the job, while the remaining 15% of policies do under varying and limited circumstances. While we did not specifically analyze copyright ownership rights of student employees, most policies make mention of these situations falling under work made for hire as employees of the institution.

Most of the policies we reviewed stipulated conditions of ownership when “unusual support” was utilized to develop copyrightable IP. While the specific verbiage varied across policies, they generally focused on provision of resources not generally available to all faculty and staff. For example, North Carolina State’s policy defines “Exceptional Use of University Resources” as a case where “the University has provided support for the creation of the work with resources of a degree or nature not routinely made available . . .” and lists specific examples including “waiver of fees normally required to use specialized facilities such as equipment, production facilities, service laboratories, specialized computing resources, and studios; University funding or gifts in support of the work’s creation; or reduction in levels of teaching, service or other typical University activities (e.g., course load, student advising, division/department meetings, office hours, administrative responsibilities) specifically to facilitate creation of the work.” (NC State Reg 01.25.03)

Our analysis found that exclusive copyright ownership typically only applies for faculty and staff when institutional support is not used to create such resources. If institutional support is provided in forms such as mini-grants, course releases, or excessive use of staff assistance or technological resources, 89% of institutions reviewed claim copyright ownership of any IP generated with such support. We were unable to determine any definitive ownership from policy language for 6% of institutions, and the remaining 5% of policies had varying degrees of shared/negotiated approaches to ownership. Similarly, most institutional policies took the position that faculty and staff utilizing external or sponsored resources (grant funding) rarely retain their copyright in materials created under the grant, often because the grant is technically awarded to the institution or because work done with sponsored or external funds administered by the university is considered a directed work. Many policies, however, made no mention of these circumstances and therefore offered no guidance.

While the majority of policies made only brief passing references to student ownership, a handful had more thorough and inclusive language that explicitly called out student agency over their IP. Virginia Commonwealth University’s IP policy states that when receiving external funding the “... responsible faculty must ensure that there are one or more comparable projects available for student selection that do not require such assignment and will satisfy the course requirement. Faculty are not permitted to assert ownership of student Copyrights as a condition of student

participation in a course, nor are they permitted to claim personal ownership over or control of student Copyrights created in courses they teach.” (Virginia Commonwealth Intellectual Property Policy, section 2C). At the University of Maryland (2018), student agency is front and center in their IP policy:

Under certain limited circumstances, Students may be asked as a condition of participating in a course research project to assign or license their rights in Intellectual Property they create in performing the project that they would otherwise own under this policy to the University or a third party that sponsors the course research project. In such circumstances, course instructors must give Students who object to making such an assignment or granting such a license the option to participate in an IV-3.20(A) page 7 alternative project, without penalty, that does not require the assignment or licensing of their Intellectual Property rights. (section V. E.1)

Policies like these that recognize students’ ownership of their work represented less than 2% of our sample.

Only one policy in our sample referred directly to OER. Central Oregon Community College’s policy, section 17.5 (b) Joint Ownership of Open Licensed Materials, speaks to the necessary collaboration between faculty and a College to agree upon a Creative Commons license together for any jointly created materials.

St. John’s University (2014) policy stipulates that creators may not commercialize course content that is currently taught at the institution without written consent of the Provost, which raises questions about the distinction between direct commercialization and OER that is shared under a license that permits third parties to commercialize the materials. Overall, our review reflected the general state of the field as discussed in the literature: faculty generally own copyright in their traditional scholarly works. Ownership is more complicated when faculty create works that are not clearly “scholarly” and when other campus stakeholders create works. And any type of “unusual support” is likely to further complicate ownership, with little clear guidance as to how an OER stipend program or a student-centered open pedagogy program fit within these general guidelines. Almost no written policies clearly answer these questions, leaving individual OER creators and the programs that support them the responsibility (if not always the authority) to clarify who owns OER and what role a stipend or open pedagogy assignment plays in that determination.

Survey: Ownership

Representatives from 51 institutions completed the survey, and as noted above, these participants were from OEN member institutions. We began by asking about copyright ownership, initially with a question about presumed ownership of textbooks and similar instructional materials created by faculty. As described in Figure 1, roughly

half (24) of the respondents indicated that faculty creators were the presumed owner. Only one institutional representative indicated that the institution was the presumed owner.

Significantly, almost a third of respondents selected “it depends.” Many of those answers confirmed presumed ownership by faculty but anticipated nuances which were covered in later survey questions such as the impact of “unusual support” or explicit direction from the institution to create the materials. Four also noted that at their institution the rules varied at the college or department level. They also indicated that commercialization of a work or classification of IP outside of copyright such as patentable inventions may impact ownership. Several also noted that, while faculty creators own discrete learning materials and “can share modules and videos from an online course individually” they may not be permitted to share an entire packaged course. Finally, more than ten percent of respondents indicated that they did not know who the presumed owner of educational material was.

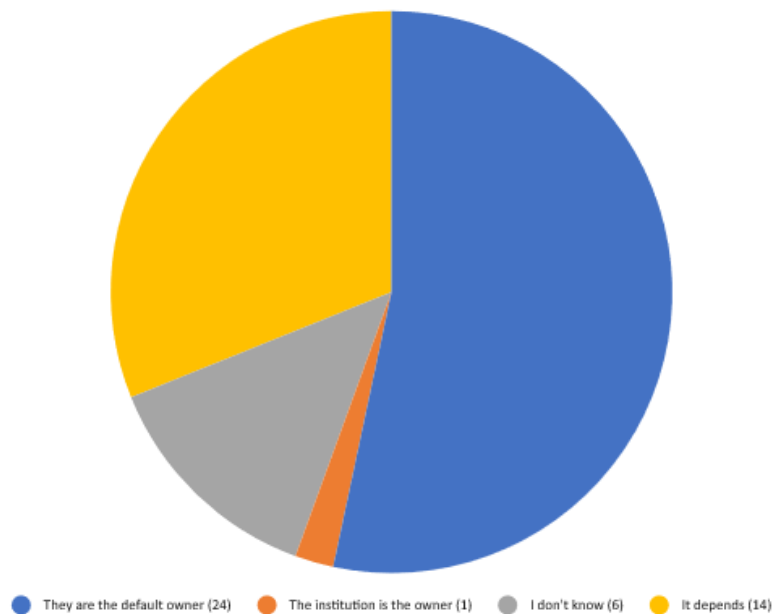


Figure 1: Presumed ownership of educational materials by faculty

Next, we asked about factors which may change presumed ownership of educational materials. As described in Figure 2, the most common factor identified which may impact ownership was employment status such as being hourly staff or the presence of a work made for hire agreement or institutional support, with between 40 and 50% of respondents indicating that these might change the presumed status of ownership. Significantly, both financial support and other support such as a course release were understood as significant enough to change ownership at comparable

levels. Only a few respondents indicated that status as a student or enrollment in a particular course were relevant to ownership. As above, more than 10% responded to this question with “I don’t know.”

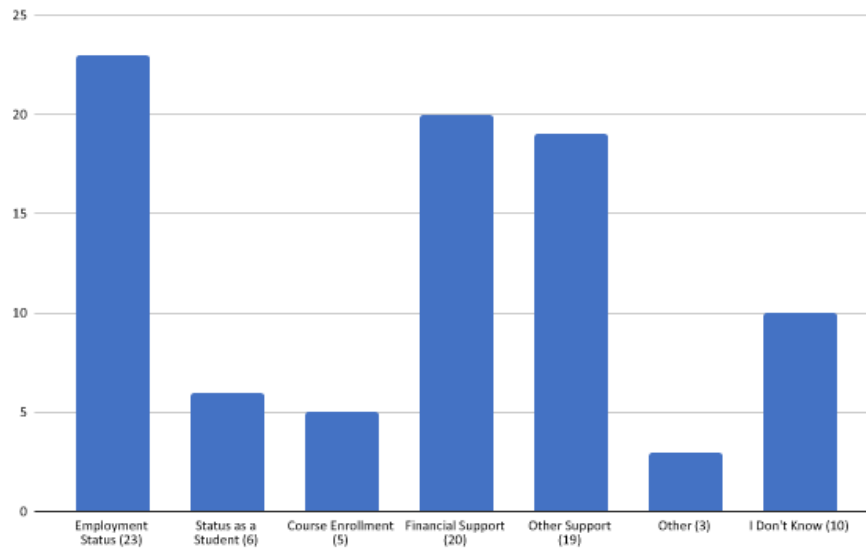


Figure 2: Factors that might change presumed ownership by faculty

Survey: Support

In the next section we asked about institutional support for open education initiatives. We began by asking whether the institution offered support for the creation of OER, and as described in Figure 3, more than three quarters of respondents (77%) indicated that their institution did offer some kind of support. Of those that did, the most common type of support was “time and expertise” (31 of 35 responses, or 89%), with “financial support” (23 of 35 or 66%) not far behind. Of those that offered financial support, award amounts varied significantly from a low of \$200 to a high of \$9,000. Several responded that different amounts were available based on the size, scope, and type of project being supported. A substantial minority (12 of 35 or 34%) also noted that they offered other kinds of support including hosting and publishing services and support for instructional design.

Next, we asked what type of OER creation was supported. The most common answer was the creation of textbooks (31 of 35 or 89%) with “other learning objects such as web pages, videos, and podcasts” a close second (25 of 31 or 60%). A majority of those institutions that support creation also reported supporting open pedagogy projects where students create materials. A small group also reported supporting other ancillary materials such as lab manuals and homework problems as well as supporting review of OER.

Finally, we asked whether the support offered was considered unusual enough to grant copyright to the institution, rather than the creator. As described in Figure 3, the overwhelming majority of responses (20 of 22 or 90%) indicated that creators continue to retain copyright even when receiving the type of support offered by their institution. A total of four respondents indicated that financial support was either understood or explicitly defined as sufficient to grant copyright to the institution and one response indicated that their institution requires copyright transfer as a condition of participation in their OER program. Again, roughly 10% of respondents answered “I don’t know” and several others shared nuances at their institution such as an institutional claim to a non-exclusive license or differences in ownership of OER based on medium. Despite the distinct types of OER supported, no respondents suggested that ownership depended on the medium or type of OER being developed.

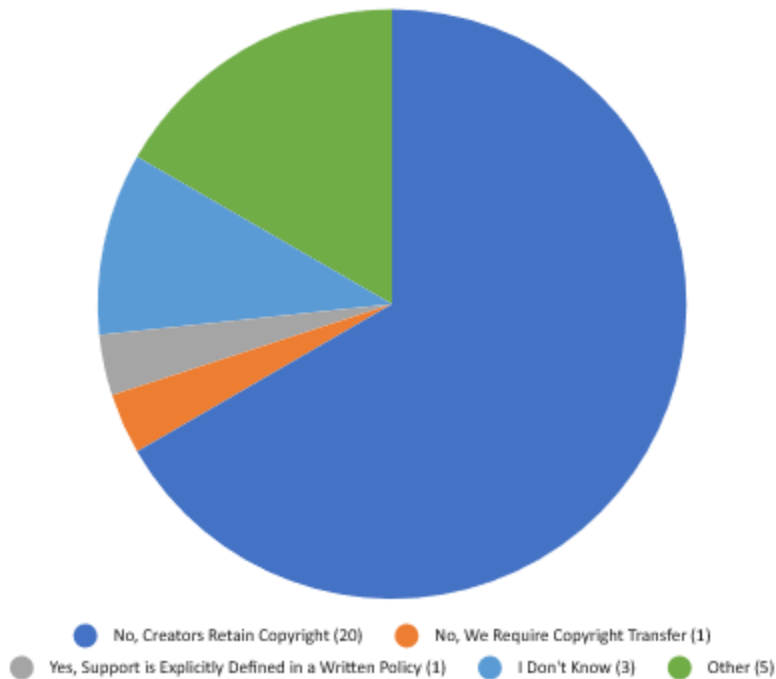


Figure 3: Impact of institutional support on copyright

Survey: Licensing of OER

Next, we asked explicitly about licensing of OER. As described in Figure 4, 17 of the 18 institutions that responded to this question indicated that the creator has the right to choose and assign the license since they are the copyright holder. No more than two of the 18 institutions selected any of the other options including that the institution would assign the license or would give the creator the right to decide. A large number of respondents nuanced this question by adding a comment that

participation in the grant program did create an expectation that the creator would assign some form of open license, with several noting that they would only support a subset of Creative Commons licenses such as CC BY (attribution) or CC BY-NC (non-commercial use) and others noting that a CC BY-ND (no derivative works) license would not be acceptable. It was not always clear whether respondents considered this expectation a condition of the grant, an ethical duty, or just a common practice.

Building upon this question, we asked how issues related to ownership and open licensing are communicated to campus stakeholders. The most common sources of information identified were OER training (29 of 30, or 96%) and OER outreach materials (23 of 30 or 77%). A smaller set of respondents indicated that their copyright policy was a source of information on these issues (11 of 30, or 37%) or that the issues were discussed with students when engaging in open pedagogical coursework (12 of 30 or 40%). A few also noted that the information was shared through either informal consultations or a formal memorandum of understanding.

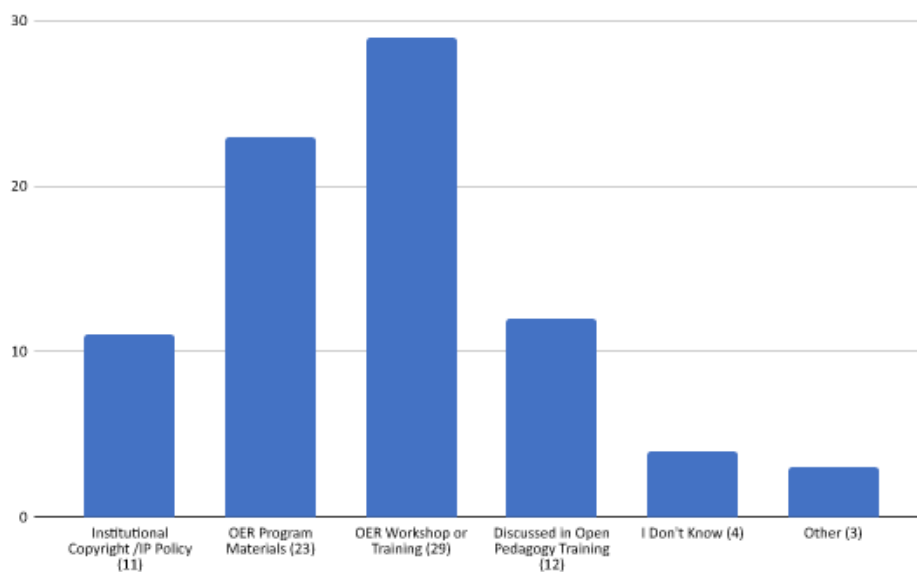


Figure 4: Sources of information on ownership and licensing of OER

We also asked whether the respondent was aware of any instances of disagreement about licensing between a creator and the institution that supports them. An overwhelming majority of the 42 who answered either indicated that there had not been any disagreements (29, or 69%) or that they were not sure (10, or 24%). Of those that were aware of a disagreement, respondents pointed to gaps in policy and understanding, such as OER developed by an administrator not covered by the standard policy, disagreement about applying an open license, and uncertainty about

whether support from a librarian or instructional designer should be considered “unusual” in a way that changes ownership.

Survey: Confidence in Addressing These Issues

Finally, we asked respondents to indicate how confident they felt in addressing these questions related to ownership, licensing, and support. Thirty of the 42 people surveyed (71%) indicated that they felt “very confident” answering the survey based on their knowledge of the issues. Six more indicated that they had chosen to refer to policy documents or experts on campus to help them answer these questions and only five indicated that they were not confident and could not find support on campus to help them understand the issues. Those that did reach out all learned something new. In some cases they discovered nuances that reassured them about their approach and in others those nuances led them to reassess their understanding.

Discussion

Content Analysis

Perhaps not the primary allure but still an attractive feature of OER for many faculty is that they get to both retain their copyright while also sharing their work more broadly under conditions which they choose. Our content analysis revealed that in keeping with academic tradition, all reviewed policies do grant copyright ownership to faculty for their scholarly contributions such as monographs, book chapters, journal articles, and other artistic works. However, the majority of institutions also claim copyright ownership over materials that are developed with “unusual” institutional resources, the definition and scope of which vary greatly from institution to institution. Different policies use a variety of terms, including “exceptional” or “unusual” support, but all agree that when faculty members receive special benefits from the institution, there may be ramifications for ownership of the materials made possible by those special benefits. Assuming the meaning of “faculty” is clear under the policy, there may or may not be implications for faculty creating new openly-licensed textbooks *without* any institutional support. For faculty who receive mini-grants, course releases, or utilize significant staff support and institutional resources to create new OER, however, our content analysis findings suggest that the issue may be more complicated. In these cases, a mini-grant or stipend may qualify as “unusual support” such that many institutional policies claim copyright for the institution.

If faculty are participating in university-sponsored open education programs to create OER, which is likely the case at the majority of the institutions who participated in this survey, these questions about ownership may have remained abstract so far, but will not remain so forever. Faculty could potentially be creating and broadly

sharing OER, which is then consumed and revised by others (including students), without the legal right to do so. Because Creative Commons licenses are irrevocable and may only be applied by the rightsholder, releasing a work with a license applied by a faculty member or institution who does not control copyright could cause confusion for the faculty member, the institution, and cause more significant trouble for downstream users who build derivative works based on materials that are not actually open.

An extreme example of harm caused by misunderstanding the terms and application of open licenses has been highlighted by scholars such as Stewart (2021) who have documented more than 30 cases of copyright trolls releasing openly licensed materials with the intention of bringing suit against users who provide improper attribution as required under the Creative Commons licenses. While most universities may be unlikely to engage in these sorts of predatory lawsuits, some institutions have been more than willing to flex their legal muscles when reputational or economic opportunities seem compelling (Boyle and Jenkins, 2021). Further, confusion about the open licenses that make up the core legal infrastructure of OER weakens the legal foundations of open education as a whole. Open creation and pedagogy rely on presumptions about the ability to reuse, revise, and remix. Continuing to release and build on materials that are not properly licensed ultimately destabilizes the movement.

While the majority of policies we reviewed expressly state that students own their copyright in their coursework, a significant minority did not make mention of student copyright at all. A lack of student inclusion in these policies can potentially be harmful for those students who are participating or considering participation in a course utilizing open pedagogy. Taking students' work without giving them credit or agency is inherently problematic, even if a program purports to work for the greater good. As Rajiv Jhangiani (2019) reminds us in his 5Rs for open pedagogy, "Open pedagogy without respect for agency is exploitation." Student agency over their IP is paramount in these courses, and asking students to navigate the risks and rewards of contributing their work under an open license without clear policies and knowledge of their own copyright ownership is irresponsible and unethical.

Survey

Responses to the survey made it clear that ownership of OER is a mixed and often confused issue. At the institutions surveyed, baseline ownership can vary based on a large variety of factors related to the academic status of the creator, the intended use, and in some cases the policies of individual departments.

Likewise, various levels and types of institutional support may or may not change that baseline. While the majority of institutions offered differing levels and types of support, many respondents were unsure how that support might or might not

change ownership. There was a strong consensus that an open license was “expected” but no clear sense of what the mechanism was for enforcing that expectation. So far, it appears that the good will of OER developers has often papered over these cracks, but, as one respondent noted, this approach may only be sufficient until “someone from the legal department notices and cares about it.”

While conflicts have apparently been rare, when they do arise they can present serious problems. In some cases, people *have* noticed and the results have done real harm to specific projects and to the culture of openness and OER advocacy. As one respondent wrote,

“there has been pushback from some faculty when we initially required a CC BY [license]. We have also had people who didn't know what they were doing try to put an open license on material that they did not have the rights to release under an open license. What an absolute headache . . . This completely destroyed the potential of the project as an open project. Very frustrating.”

Another respondent summed up the state of the issues today: “Our current practice is that creators retain ownership of copyrights but agree to license the work under an open license . . . in return for financial and other project support. This has not met with any disapproval, but having this practice explicitly defined in policies would be preferable to leaving it ambiguous and open to a change in interpretation in the future.”

Conclusion

As faculty at Youngstown State were preparing to teach courses during the fall of 2020, they were dismayed to learn that the institution had proposed changes to the IP policy that would claim copyright in most non-patentable works (Flaherty, 2020). The changes were introduced as part of union negotiations but left many faculty concerned about an “IP grab” at a moment when most instruction was moving online (Flaherty, 2020). As legal scholar Christopher Sprigman noted in a recent article (Flaherty 2020), these concerns are driven by the uncertainty of rules that have “little to do with the law and more to do with academic convention.” Where these conventions are codified in written policies, those policies must be clearly understood by academic stakeholders so everyone is able to understand what is expected and have an honest conversation about how the written rules meet the needs and support the values of the institution.

OER creators today face a related set of challenges. Ownership of educational materials created with some level of institutional support is often unclear at best. Fundamental ownership under the policies, as well as the impact of institutional support and of potential uses, are all controlled by an uncertain, variable, and often

contested understanding of “academic tradition” embodied in a hodgepodge of policy documents that may or may not have legal force. Individual policies often have significant ambiguity and policies vary from institution to institution. While many in the open community indicate that they have great confidence in their understanding of these policies, that certainty is often pinned to a sense of shared values and unspoken assumptions, rather than clear legal rules or reliable policy.

This uncertainty raises a host of questions for an open education program, particularly a program that intends to offer clear and accurate information about openly-licensing works. Uncertainty can be an impediment to understanding the fundamentals of open education (Gumb, 2019). It can also thwart policy decisions, for example choosing between applying a fully open CC BY license and an NC license that limits commercialization. Muddy rules about ownership can also reduce the agency of students engaging in open pedagogy, who are presumed to have some ability to assign an open license of their choice or not to open up their work at all.

In some cases, the ambiguity of the current system has left space for individual collaborators to write their own rules or make flexible assumptions based on the needs of a particular situation. As noted by several respondents here, however, this detente only lasts as long as everyone involved in a project agrees and institutional decision-makers are not especially interested in commercializing the materials. As the disagreement at Youngstown State illustrates, neither of these assumptions can be expected to last indefinitely. In cases where there is disagreement, a lack of clarity can harm the project and leave the most vulnerable members of the community to the tender mercies of university counsel. Respondents to this survey described situations where uncertainty “completely destroyed” an OER project, and there are likely many other practitioners facing similar issues today. There will be more in the years to come.

As we discovered in our analysis, many institutional copyright policies reference the phrase “in keeping with academic tradition,” and defer ownership to faculty for scholarly works such as journal articles, monographs and book chapters. Ownership of faculty-authored *instructional materials* such as textbooks and other ancillary materials is often less clear, with ownership of educational resources unspecified or considered work-for-hire and thus controlled by the institution. With respect to the emerging pedagogical innovations that rely on the existence and foundational structures of copyright and open licenses to invite students into the creation and revision processes of instructional materials, institutional copyright ownership policies have seemingly failed to keep up with the changing landscape of higher education. What happens when a “traditionally scholarly” work such as a faculty authored monograph is openly-licensed and then transitioned into an instructional tool, where students are invited to contribute via open pedagogy? What if the faculty

member also receives financial and staff support to facilitate this process -- does this count as “unusual support” and therefore copyright ownership now belongs to the institution? There are many similar questions and scenarios that would benefit from further investigation.

In the long term, it would be ideal for all institutions to update their policies in a way that is clear, consistent, and aligned with values of openness and the public good. As the recent events at Youngstown State suggest, however, where updates are made they may be contentious and reflect the competing priorities and pressures facing colleges and universities. In the absence of wholesale reform, open educators would do well to develop and offer broad training in these issues. Participants need to understand where they stand before *and* after they receive support. OER programs need to decide how they will balance the consistency of institutional control with the agency of creators who are empowered to assign their preferred license, even in ways the institution might not choose. In the interim, perhaps open educators who facilitate OER stipend programs might consider drafting a memorandum of understanding with their Office of General Counsel that clearly spells out copyright ownership of materials created through the facilitation of such programs.

Open Education initiatives should be starting a lot of campus copyright conversations. Librarians already offer some training in these issues (Ravas, 2016; Gumb and Miceli, 2020) and a clear policy statement or memorandum of understanding can help clarify the rules at a given institution. Establishing legal ownership is essential, but ethics also play a central role, particularly when students are invited into the knowledge creation process. The underlying decision about who owns OER and whose values will define the way this often-collaborative labor can be shared, speaks to core values of openness. As a field we need to decide how we balance these issues and write our values into these legal agreements, rather than leaving the issue to assumptions about academic tradition. A 2020 report by Spilovoy et al. shows that faculty awareness of OER is increasing. In turn, learner-centered pedagogies such as OER-enabled pedagogy, which encourage both faculty and student creation of openly licensed materials, are also building momentum— particularly in digital learning environments necessitated by the health and safety concerns brought on by corona virus disease of 2019. We need to take a closer look at copyright ownership policies and what legal implications they may have on open education as a whole, which relies upon the ethos of sharing.

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Appendix A

Who owns scholarly and instructional materials at your institution?

Start of Block: Default Question Block

Q1 Thank you for agreeing to participate in our survey. We are investigating copyright ownership of scholarly and instructional materials under campus policies and the impact such ownership may have on Open Education. **We ask that you try not to consult your institutional or system copyright policy before or while taking this survey if possible.**

Q2 Please select your institution from the drop down menu. If your institution is not listed, please select "other." (This identifying data will be removed in any published results)

▼ Aims Community College (1) ... Other (122)

Display This Question:

If Please select your institution from the drop down menu. If your institution is not listed, please... = Other

Q2 Please enter the name of your institution or system in the box below:

Q4 At your institution, when faculty author textbooks or create similar instructional materials, are they the default owner of copyright?

- They are the default owner (1)
- The institution is the owner (2)
- I do not know (3)
- It depends (please briefly elaborate) (4)

Q5 At your institution, what factors might change the default copyright ownership of textbooks and similar scholarly or instructional materials? (Select all that apply)

- Employment status such as being hourly staff or work-for-hire (1)
 - Status as a student at the institution (2)
 - Enrollment or participation in a particular course where the materials were created (3)
 - Financial support categorized as “significant” or “exceptional” use of institutional resources (4)
 - Other support categorized as “significant” or “exceptional” use of institutional resources such as course release, use of institutional name and branding, etc. (5)
 - Other (6) _____
 - I do not know (7)
-

Q7 Does your institution offer support for the creation of open educational resources (OER)?

- Yes (1)
- No (2)
- I do not know (3)

Skip To: Q11 If Does your institution offer support for the creation of open educational resources (OER)? = No

Skip To: Q11 If Does your institution offer support for the creation of open educational resources (OER)? = I do not know

Q8 What type of support is offered?

- We offer library or staff time and expertise (1)

We offer financial support (how much?) (2)

We offer other types of support (3)

Q9 What type(s) of OER creation is supported?

We support the creation of textbooks (1)

We support the creation of other learning objects like web pages, videos, podcasts, etc. (2)

We support open pedagogical practices where students create learning materials (3)

We support other kinds of OER creation (4)

Q10 Is the support considered significant or exceptional enough to grant copyright to the institution, rather than an individual creator?

No, creators still retain copyright even if they receive support to create OER (1)

No, but we require creators to transfer copyright or grant an exclusive license as a condition of accepting support (2)

Yes, financial support for OER creation is explicitly defined in our written policies as significant or exceptional enough to grant copyright to the institution (3)

Yes, financial support for OER creation is generally understood but not explicitly defined as significant or exceptional enough to grant copyright to the institution (4)

I do not know (5)

Other (6) _____

Q12 When OER are created with support from your institution, who decides what type of open license to apply?

- The creator because they own the materials (1)
 - The creator because the institution gives them that choice even though the work is institutionally-owned (2)
 - The institution because they own the materials (3)
 - The institution because they have the right to choose the license as a condition of the program, regardless of who owns the materials (4)
 - I do not know (5)
 - Other (6) _____
-

Q11 How are issues of ownership and open licensing communicated to campus creators (such as faculty) who may choose to create OER? (Select all that apply)

- Discussed in institutional copyright/IP policy (1)
 - Discussed in OER support program materials (2)
 - Discussed in OER workshops and training (3)
 - Discussed with students when engaging in open pedagogical coursework (4)
 - I do not know (5)
 - Other (6) _____
-

Q13 Has there ever been disagreement between the creator and the institution about what type of license to apply to an OER?

- Yes (please briefly explain) (1) _____
- No (2)

I do not know (3)

Q14 Generally speaking, how confident did you feel in completing this survey without asking others at your institution for guidance or referring to policy documents?

I was very confident answering all of these questions on my own based on my knowledge of these issues (1)

I had some sense of the issues but felt more comfortable referring to other experts at my institution (please list name/role) (2)

I had some sense of the issues but felt more comfortable referring to policy documents to refresh or clarify my understanding (please list documents) (3)

I am not very confident in my answers and was not able to find the experts or resources to make me feel more confident (4)

Other (5) _____

Skip To: Q16 If Generally speaking, how confident did you feel in completing this survey without asking others at... = I was very confident answering all of these questions on my own based on my knowledge of these issues

Skip To: Q16 If Generally speaking, how confident did you feel in completing this survey without asking others at... = I had some sense of the issues but felt more comfortable referring to policy documents to refresh or clarify my understanding (please list documents)

Q15 If you relied on campus experts or resources, did the answers they provided lead you to rethink any of your policies around OER support? (Select all that apply)

No, they confirmed my understanding (1)

Yes, I was unaware of some nuances of our policies and was reassured that they align with my expectations (2)

Yes, I was unaware of some nuances and they have made me rethink some aspects of our work (please list an example(s)) (3)

Other (4) _____

Q16 Do you have any other information you would like to share about ownership and licensing of OER on your campus such as a document or Memorandum of Understanding that addresses ownership or open licensing?

- Yes (1) _____
- No (2)
-

Q17 Would you be willing to be contacted for a short follow-up interview?

- Yes (1)
- No (2)

Skip To: Q18 If Would you be willing to be contacted for a short follow-up interview? = Yes

Skip To: End of Survey If Would you be willing to be contacted for a short follow-up interview? = No

Q18 Thank you! Please provide your name and email address so we may contact you for a short interview. This information will be kept confidential and will not be shared in any way outside of the research team.

End of Block: Default Question Block
